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MAUREEN E. BRADY

The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection

ABSTRACT. In addition to "persons, houses, [and] papers," the Constitution protects individuals against unreasonable searches and seizures of "effects." However, "effects" have received considerably less attention than the rest of the categories in the Fourth Amendment. Recent Supreme Court opinions on Fourth Amendment searches reintroduced the word "effects," and yet they did so without a definition of the word, an understanding of its history, or a clear doctrinal theory.

In the absence of a coherent approach to "effects," many lower courts apply the standard Fourth Amendment test: they ask whether the government has violated the claimant's "reasonable expectation of privacy." However, many lower courts protect or decline to protect personal property by examining the individual's expectation of privacy in the property's physical location. These courts hold that individuals have no expectations of privacy in personal property that is unattended in public space.

This Article argues that personal property in public space should receive greater constitutional protection than is provided by these cases, because of the privacy and security interests inherent in ownership and possession. The history surrounding the Fourth Amendment provides evidence that the protection against unreasonable searches and seizures was connected to the law prohibiting interferences with another's possession of personal property, including dispossession, damage, or unwanted handling. To restore this connection, this Article uses guidance from personal-property law to propose a framework for identifying Fourth Amendment interests in effects based on their qualities and environment. This intervention would grant effects the constitutional protection they deserve.

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INTRODUCTION

Personal property has long been overlooked in Fourth Amendment jurisprudence. The Constitution expressly protects "the right of the people to be secure in their . . . *effects*" from unreasonable searches, but—unlike its companion categories "persons, houses, [and] papers"[1]—the Fourth Amendment rules for searches of effects are comparatively underdeveloped. To be fair, personal property is often treated as a residual category even in property law: *Black's Law Dictionary* defines real property to include land and anything constructed on it, while personal property is defined as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property."[2] The Fourth Amendment canon, which also ascribes an inferior status to effects, is equally ambiguous in its treatment of them. When an individual's personal property is not located inside her home or pocket,[3] current search law provides few metrics for establishing whether the property is entitled to Fourth Amendment protection.[4] Yet individuals bring and keep

1. U.S. CONST. amend. IV (emphasis added). This Article need not confront one of the most debated issues in criminal-procedure law: the question of whether the Fourth Amendment requires warrants, operates only to require that searches be reasonable, or functions as some combination of both. *See generally* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791, at 773-82 (2009) (analyzing these two paradigms in light of historical research); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 763-67 (1994) (using history to advocate that the Fourth Amendment requires only that searches and seizures be reasonable, not warrants); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 573-90, 723-24 (1999) (dismissing Amar's historical account and arguing that the Framers were primarily concerned with warrantless searches and seizures). This Article posits that whichever paradigm one adopts, interferences with effects require greater constitutional protection than courts have required to date. Depending on which paradigm one subscribes to, either warrants should be required or a more limited set of warrantless searches and seizures should be deemed reasonable.

2. *Property*, BLACK'S LAW DICTIONARY (10th ed. 2014). I use "personal property," "objects," and "items" interchangeably throughout this Article.

3. There is at least some limited guidance regarding searches and seizures of effects inside the home, such as *Horton v. California*, 496 U.S. 128, 136-37 (1990), and searches and seizures of effects in the custody of the person, such as *United States v. Place*, 462 U.S. 696, 716 (1983).

4. For space reasons, this Article is primarily concerned with searches of otherwise "innocent" effects that may result in seizures—in other words, it assumes that probable cause to seize has been created by the search, rather than the nature of the item itself (for example, obvious drug paraphernalia or clothing with blood on it in plain view). Accordingly, I use "search law" to discuss the modern law that applies to these sorts of objects, but I use "search and seizure" when describing the historical circumstances that gave rise to the Fourth Amendment and the holdings of cases that apply to both search and seizure. I also use "search and [subsequent/resulting] seizure" to remind the reader of this Article's limitation to "innocent" effects where appropriate.

all sorts of personal property outside their homes: a dog tied to a parking meter while its owner visits a store, a carefully stacked sleeping bag in a homeless encampment, or towels and chairs placed on the sand during a beach walk. The factors that determine an individual's rights to keep these objects free from interference are at best unclear and at worst incoherent.

Property analyses were once quite relevant to search law. Prior to the 1960s, the Supreme Court required individuals either to demonstrate a superior property interest in the papers or items searched and seized or to prove that the government had trespassed on real property, before Fourth Amendment relief could be considered.[5] Then, in *Katz v. United States*, as Justice Harlan noted in his concurrence, the Court replaced these property standards with a new test: a person could claim protection from government actions that violated his or her "reasonable expectations of privacy" in the object of the search or the area from which the item was seized.[6] Redefining

5. *See* Katz v. United States, 389 U.S. 347, 352-53 (1967) (rejecting the notion that physical penetration into a protected area is required to show a Fourth Amendment search); Warden v. Hayden, 387 U.S. 294, 303-07 (1967) (rejecting indications from earlier cases "that property interests control the right of the Government to search and seize"). Recent scholarship has called the validity of the trespass story into doubt, at least on the real property side. *See generally* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 69 (suggesting that *Hayden* and contemporary cases overemphasized the role of trespass in prior case law). The "superior interest" approach to personal property has more historical credibility. *See* Gouled v. United States, 255 U.S. 298, 308-09 (1921); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 133-34 (1937). As observed in *Hayden*, property analyses were especially important because aggrieved individuals requested remedial writs for wrongs to personal property, rather than exclusion of the evidence, as Fourth Amendment relief. *Hayden*, 387 U.S. at 307-08; *see also* Adams v. New York, 192 U.S. 585, 595-98 (1904) (noting that evidence obtained in violation of the Fourth Amendment need not be excluded if the evidence is otherwise competent).

6. 389 U.S. at 360-62 (Harlan, J., concurring); *see also Hayden*, 387 U.S. at 294, 301 (providing that privacy protection is the main goal of the Amendment). "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." Kyllo v. United States, 533 U.S. 27, 33 (2001). A Fourth Amendment seizure occurs when there is "some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984). Despite appearances from this latter test, privacy may also play a role in the law of seizure: the owner of a seized good may nevertheless lack standing to challenge the search and resulting seizure if he or she lacks "a legitimate expectation of privacy in the area searched." Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (citation omitted); *see id.* at 116-19 (Marshall, J., dissenting); Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978); Lavan v. City of Los Angeles, 693 F.3d 1022, 1037-39 (9th Cir. 2012) (Callahan, J., dissenting); United States v. Bushay, 859 F. Supp. 2d 1335, 1352-53, 1365-67 (N.D. Ga. 2012); State v. Alston, 440 A.2d 1311, 1319 (N.J. 1981). *See generally* Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 16-17 (1983) (overviewing and criticizing the Supreme Court's narrowing of Fourth Amendment standing to challenge searches and seizures to

the Fourth Amendment to protect privacy instead of property allowed individuals to challenge, among other things, the government's recording of conversations in a public phone booth[7] and intrusions into office file cabinets.[8] In short, it expanded Fourth Amendment protections to places in which individuals had privacy interests, but no property interests.

Yet the expansion in privacy protections was accompanied by a contraction in the protection afforded to personal property. While the home remains the pinnacle of Fourth Amendment protection under both the property and privacy paradigms,[9] personal property is often subject to narrow protections that treat the location of the personal property as dispositive of an individual's reasonable expectation of privacy with respect to it. In many courts, if the owner has physical custody of the property or an expectation of privacy in the area where it is located, then the property is protected by the Fourth Amendment. Conversely, if the owner has neither physical custody of the property nor an expectation of privacy in the area in which it is located, then the personal property is without protection from examination and seizure.

This Article proposes a superior framework for defining "effects" and for ascertaining an individual's Fourth Amendment rights with respect to them. This intervention would give individuals greater protection against government interference with items in spaces law-enforcement officers and

areas in which individuals have expectations of privacy); Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing To Object to Unreasonable Searches*, 41 ARK. L. REV. 487 (1988) (same). The viability of this line of cases is in some doubt. The Court mentioned in *Soldal v. Cook County*, 506 U.S. 56, 65-66 (1992), that, notwithstanding the lack of a privacy interest in the area searched, plain-view seizures can be challenged in the absence of probable cause. Multiple courts of appeals have thus held that the absence of a reasonable expectation of privacy in some area will not foreclose challenges to seizures from that area. *See, e.g.*, Miranda v. City of Cornelius, 429 F.3d 858, 862 n.2 (9th Cir. 2005); United States v. Paige, 136 F.3d 1012, 1021 (5th Cir. 1998); Lenz v. Winburn, 51 F.3d 1540, 1550 n.10 (11th Cir. 1995); Bonds v. Cox, 20 F.3d 697, 702 (6th Cir. 1994). This Article does not delve into this standing debate in seizure law, instead assuming that the owner (or perhaps, possessor) of property has standing to challenge a search and resulting seizure and examining how courts have and should assess whether Fourth Amendment interests have been violated.

7. *See Katz*, 389 U.S. at 351.

8. *See* Mancusi v. DeForte, 392 U.S. 364, 369-70 (1968).

9. This Article should not be read to question protection for the house. It is beyond dispute that, as many scholars and courts have noted, the home enjoys a special status under the Fourth Amendment. Put simply, this Article suggests that protection for items found outside of the home should be strengthened—not that existing paradigms for the home should be weakened. *See* United States v. U.S. District Court (*Keith*), 407 U.S. 297, 313 (1972). *See generally* Davies, *supra* note 1, at 590-91, 601-09, 603 n.142 (describing intrusions into the home as the primary problem to which the Amendment was directed).

other parties may lawfully access – what I term "public space."[10] Courts should interpret the Fourth Amendment's application to personal property in public space by examining contextual factors to determine both whether an item is an "effect" – whether it is personal property like a tube of lipstick or a sweater – and whether an individual remains in possession of the item and therefore renders it presumptively entitled to Fourth Amendment protection. Many courts currently apply the Amendment to personal property in an ahistorical and doctrinally unsound manner. This Article traces the doctrinal history of the Fourth Amendment to explain how many courts erroneously came to treat privacy in an item's location as a substitute for privacy and security interests in the item itself. Moreover, this Article provides a new historical account of Founding-era debates focused specifically on personal property,[11] thus reanchoring the "effects" provision in the concerns that motivated its inclusion.[12] As this account demonstrates, the protection for effects was connected to the law prohibiting interferences with another's possession of personal property, including dispossession, damage, and unwanted manipulation. This reflects the recognition that when agents of the

10. Although I use the term "public space" for convenience, whenever used in this Article, this term includes spaces to which officers have lawful access (but others may not): open fields outside the curtilage of the home, spaces owned or controlled by third parties, and so on.

11. There has been little work on effects separate from the rest of the Constitution. Thomas Davies gives the most comprehensive account of some of the constitutional history of the word in two of his articles, though his work focuses broadly on the meaning of the search and seizure provisions of the U.S. Constitution and state constitutions. *See* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 87-172 (2007); Davies, *supra* note 1, at 706-15.

12. This Article should not be read to argue that the historical evidence mandates a particular change to Fourth Amendment doctrine or as an endorsement of originalism more broadly. Although the use of history in Fourth Amendment law is not without its critics, it remains that the Court views history as a persuasive source of authority. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 949 (2012); Wyoming v. Houghton, 526 U.S. 295, 300-01 (1999). Whether one prefers to decide Fourth Amendment rules by examining common law search and seizure doctrine in the eighteenth century, by a softer purposive originalism, or by ahistorical reasoning from precedent, this Article marshals evidence for the conclusion that effects merit both more consideration and greater protection. For considerations of the use of history in answering Fourth Amendment questions, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 660 (2013); Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 895-97 (2002); and David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1741-43 (2000). *See generally* Steven Douglas Smith et al., *The New and Old Originalism: A Discussion* (Univ. of San Diego Legal Studies Research Paper Series, Working Paper No. 15-178, 2015), http://ssrn.com/abstract=2562531 [http://perma.cc/CF5D-YWVJ] (discussing different approaches to using Founding-era history in originalist methodology).

government examine and handle personal items, they threaten the privacy, security, and dignitary interests inherent in ownership.[13]

Giving credence to the history of effects and the foundations of search law means adopting a view of Fourth Amendment rights that considers factors beyond an effect's location—factors like the nature of an item, its relationship to other items, and other ways the owner has communicated her intent with respect to it, like securing it or shielding it from view. Personal-property law already makes use of these sorts of signals in mediating between competing ownership claims, although personal-property law receives scant attention from property scholars,[14] let alone criminal-law theorists.[15] Still, if guidance from personal-property law is incorporated into Fourth Amendment analyses,[16] the law will better protect the expectations and interests that

13. Others have advanced similar arguments that Founding-era grievances were deeply connected to tort law. *See, e.g.*, Amar, *supra* note 1, at 785-86; John C.P. Goldberg, *Tort Law at the Founding*, 39 FLA. ST. U. L. REV. 85, 90-92, 104-05 (2011).

14. Apart from a recent account of personal property, *see* BARLOW BURKE, PERSONAL PROPERTY IN A NUTSHELL (3d ed. 2003), most American personal property work dates from the early twentieth century, *see, e.g.*, HARRY A. BIGELOW, CASES AND OTHER MATERIALS ON THE LAW OF PERSONAL PROPERTY (1917); RAY ANDREWS BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY (2d ed. 1955); THOMAS ARMITAGE LARREMORE, A SELECTION OF CASES ON PERSONAL PROPERTY (1928); READINGS ON PERSONAL PROPERTY (William T. Fryer ed., 3d ed. 1938). Many modern casebooks devote only a few pages to it. *See, e.g.*, JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 103-40 (9th ed. 2008); JESSE DUKEMINIER ET AL., PROPERTY 15, 104, 113-18, 125-44 (8th ed. 2014); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 224-26, 234-42, 434-49, 518-31 (2d ed. 2012); JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 18, 136-41, 150-58 (6th ed. 2014). By way of contrast, William Blackstone devoted well over a hundred pages to defining interests in chattels—let alone interferences with them. 2 WILLIAM BLACKSTONE, COMMENTARIES *384-520.

15. It has been difficult to find borrowing between criminal law and personal-property theory. A few articles on the Fourth Amendment have invoked property theorist Margaret Jane Radin's concept of personhood in *Property and Personhood*, 34 STAN. L. REV. 957 (1982), though for purposes other than discussing personal property. *See generally* Christian M. Halliburton, *How Privacy Killed* Katz*: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803 (2009) (invoking concepts of personhood to argue for greater protections for cognitive information); Arianna Kennedy Kelly, *The Costs of the Fourth Amendment: Home Searches and Takings Law*, 28 MISS. C. L. REV. 1 (2009) (discussing personhood to suggest that compensation should be awarded for the harms inherent in a residential search).

16. Despite the Court's attempt to reduce the relevance of property to Fourth Amendment analyses since *Katz*, most courts continue to use real-property concepts—most notably, the right to exclude—to define the "reasonable expectations of privacy" protected by the Fourth Amendment. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 88 (1998); *see also* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 316-20 (1998) (noting the importance of physical intrusions in determining whether Fourth Amendment rights were violated); Orin S. Kerr, *The Fourth*

individuals have with respect to their personal property and that society recognizes as reasonable under the circumstances.

At the outset, it may be helpful to explain the relationship of this intervention to the "reasonable expectation of privacy" test. This Article does not advocate abandoning privacy where effects are concerned, nor does it suggest that demonstrating a property interest is sufficient to invoke Fourth Amendment protection. Instead, it argues that many courts have taken a narrow view of privacy when it comes to personal property.[17] As a result, they have failed to protect the other ownership-based interests embodied in the Fourth Amendment's protection for effects—for example, the ability to prevent damage, theft, or unauthorized inspection and use. Privacy is a broad value, capable of covering these other interests of property ownership—if given meaningful content.[18] But by defining privacy by reference to location or in other artificially limited ways, many courts have offered minimal protection to personal items. Controlling access to the location of an object is only one piece of the puzzle. Indeed, property gives individuals a right to exclude others from the thing itself, not just to prevent inspection, but to forbid tampering and theft so that individuals can confidently "develop resources and plan for the future."[19] Property law can thus help redefine Fourth Amendment protections

Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 MICH. L. REV. 801, 809-10 (2004) (describing the persistence of "real property concepts" in Fourth Amendment doctrine). Accordingly, using personal-property concepts to give content to "privacy" is not as controversial a suggestion as it might seem.

17. *See, e.g.*, United States v. Ramapuram, 632 F.2d 1149, 1155 (4th Cir. 1980) ("[W]hatever expectation of privacy attends a closed but unsecured 'effect' generally is diminished where the 'effect' itself is placed in an area totally without the protection of the Fourth Amendment such as in an open field."); State v. Flynn, 360 N.W.2d 762, 765 (Iowa 1985) ("[T]he place where seized property is located may be so exposed as to negate any reasonable expectation of privacy."); State v. Scheetz, 950 P.2d 722, 726 (Mont. 1997) ("[W]hen a person leaves the privacy of his home and exposes himself and his effects to the public and its independent powers of perception, it is clear that he cannot expect to preserve the same degree of privacy for himself or his affairs as he could expect at home.").

18. *See* Alschuler, *supra* note 6, at 17 n.40 (observing that "the word privacy is extraordinarily flexible"); Jack Wade Nowlin, *The Warren Court's House Built on Sand: From Security in Persons, Houses, Papers, and Effects to Mere Reasonableness in Fourth Amendment Doctrine*, 81 MISS. L.J. 1017, 1051 (2012) ("[T]he Court could slowly reorient the Warren Court's broad 'reasonable expectation of privacy' frame back towards a traditional concern for the protection of Fourth Amendment interests specifically enumerated in the text—as 'liberally' construed in light of their common-law origins."); David Alan Sklansky, *Too Much Information: How Not To Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1106 (2014) (suggesting that privacy should carry connotations of dignity, sovereignty, and security).

19. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001); *see also* 1 JEREMY BENTHAM, THE THEORY OF LEGISLATION 109-

for personal items by indicating when a person can reasonably expect items to be left alone. Whether property considerations are encompassed in the "reasonable expectation of privacy" test or constitute a parallel path to Fourth Amendment protection is immaterial—the two will involve identical inquiries and achieve the same results.[20] This Article takes the position that, whether framed as a property test or a component of privacy analysis, Fourth Amendment interests in effects should be defined by reference to personal-property rules.

In critiquing the development of the Fourth Amendment rules for personal property, this Article joins existing calls to abandon interpretations of Fourth Amendment coverage that privilege territorial concepts of privacy. While other scholars have discussed how the continued use of spatial boundaries to define Fourth Amendment protection overprotects residential property and underprotects other areas where people have significant privacy interests,[21] this Article identifies personal property as an additional and overlooked casualty of spatial approaches to Fourth Amendment protection.[22] Moreover, this Article uses traditional tools—history and arguments from precedent—rather than appeals to psychology, sociology, or philosophy. For that reason, this account of the problems territorial privacy creates for personal property may advance

13 (Richard Hildreth trans., Thoemmes Press 2004) (1890) (suggesting a linkage between property and security because both protect future expectations).

20. *Cf.* United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012) (arguing that an eighteenth-century constable who hid in a stage coach would be conducting a search regardless of whether he sought to overhear conversations or to learn the coaches' destinations).

21. *See generally* Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311 (2013) (suggesting both bodily intimacy and spatial intimacy should be used to construct Fourth Amendment protection); Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1290 (suggesting the idea of "personal curtilage" because traditional physical boundaries "no longer guarantee privacy protection"); Simien, *supra* note 6, at 492-97 (criticizing the proposition that defendants lack standing to challenge a search unless their "legitimate expectations of privacy" in an area have been violated); Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905 (2010) (suggesting that residential property is overprotected and other interests are underprotected as a result of "spatial" notions of privacy).

22. Some existing work has previously suggested that territorial privacy unfairly impacts the effects of the homeless, but this work has not considered its impact for other individuals' property. *See, e.g.*, Gregory Townsend, *Cardboard Castles: The Fourth Amendment's Protection of the Homeless's Makeshift Shelters in Public Areas*, 35 CAL. W. L. REV. 223, 242 (1999); Kevin Bundy, Note, *"Officer, Where's My Stuff?" The Constitutional Implications of a De Facto Property Disability for Homeless People*, 1 HASTINGS RACE & POVERTY L.J. 57, 59-60 (2003).

the cause of those scholars who criticize territorial approaches, as this critique relies on sources of authority that courts are likely to find persuasive.[23]

Attention to personal property has recently increased because the word "effects" is creeping back into Supreme Court opinions. In one recent case, *United States v. Jones*, officers acting without a warrant installed a GPS device on a suspect's vehicle and tracked it for four weeks.[24] The Supreme Court declared it "beyond dispute that a vehicle is an 'effect' as that term is used in the [Fourth] Amendment"[25] and held that a "trespass on 'houses' or 'effects' . . . to obtain information" is a search.[26] However, because *Jones* did not define "effects," the role of personal property interests remains unclear. Will "trespasses" to any item in which a person asserts a property interest trigger Fourth Amendment protection, and if not, what are the parameters for determining whether an effect is protected? In a second recent case, *Riley v. California*, the Court determined that law enforcement officers' search of an arrestee's cell phone was illegal, in part because cloud storage raises "the possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee."[27] But instead of looking at the cell phone as personal property, the Court compared the phone to a house to define its owner's expectations.[28] These cases indicate a desperate need for some guidance as to the interaction of privacy and personal property in the Fourth Amendment calculus.

Additionally, recent events indicate that the Supreme Court has not yet given the final word on effects. At a lecture at Brooklyn Law School, Justice Scalia hummed excitedly when a student asked whether computer data would be considered an "effect" under the Fourth Amendment.[29] "I better not answer

23. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516 (2007) (describing "positive law" as one commonly accepted approach to Fourth Amendment questions of reasonableness); *see also* sources cited *supra* note 12 (discussing the Court's acceptance of history as persuasive authority in Fourth Amendment jurisprudence).

24. 132 S. Ct. at 948.

25. *Id.* at 949.

26. *Id.* at 951 n.5.

27. 134 S. Ct. 2473, 2491 (2014).

28. *Id.* (noting that "a cell phone search would typically expose to the government far more than the most exhaustive search of a house" because a "phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is" (emphasis omitted)).

29. Debra Cassens Weiss, *Does Fourth Amendment Protect Computer Data? Scalia Says It's a Really Good Question*, A.B.A. J., (Mar. 24, 2014, 1:06 PM), http://www.abajournal.com/news/article/asked_about_nsa_stuff_scalia_says_conversations_arent_protected_by_fourth_a [http://perma.cc/B7TV-B4EL].

that," he said. "That's something that may well come up. It's a really good question."[30] Put simply, it is not a matter of *if* there will come a Supreme Court case about the meaning of and protection for effects; it is a matter of *when*.

This Article proceeds in three parts. Part I sets forth a modern history of effects. It begins by summarizing the current state of effects doctrine. The Supreme Court has provided some guidance in this area, but because of its partial treatment of the issue, lower courts have had the freedom to develop their own approaches. Lower courts have generally splintered into two factions: many use the location of an item to determine Fourth Amendment interests, while some define Fourth Amendment interests using multiple factors including, though not limited to, an effect's location. Part II describes the history of effects at the Founding. It briefly recounts the constitutional history of the word and describes the concerns relating to personal property that motivated the Framers to include this particular protection in the Fourth Amendment. It concludes that the Amendment was intended to protect possession as well as the privacy and security interests inherent in ownership and control over one's personal items. Part III proposes a new approach designed to protect the values and interests associated with personal-property ownership, values that should be encompassed by the Fourth Amendment. Courts should recognize "effects" by reference to existing rules and understandings from property law, and they should define "reasonable expectations of privacy" by examining various qualitative and contextual signals. Though further work is needed to examine what government conduct is a search and when exigencies make intrusions reasonable, this Article provides the necessary first steps toward a new and coherent approach to personal property under the Fourth Amendment.

I. EXISTING APPROACHES TO EFFECTS

This Part reviews and critiques the three existing approaches to effects. Section I.A seeks to untangle the Supreme Court's limited case law on effects in public spaces.[31] The Court's conflicting pronouncements have freed lower

30. *Id.*

31. It should be noted that this attempt to make the Court's Fourth Amendment doctrine coherent is almost necessarily incomplete. *Cf.* Kerr, *supra* note 16, at 809 ("[T]rying to understand the Fourth Amendment is a bit like trying to put together a jigsaw puzzle with several incorrect pieces: no matter which way you try to assemble it, a few pieces won't fit."). In this Part, I do not discuss three categories of effects. Two categories are (1) effects inside the home; and (2) effects on the person. These effects receive derivative protection on account of their location, and the Court has occasionally made special rules for these sorts of items based on prudential considerations, like officer safety or when items are in plain view.

courts to expound on the appropriate rules for personal property. Section I.B and Section I.C identify the two approaches lower courts use in the absence of clear guidance: the locational-privacy approach, in which courts rely primarily on the object's location to define Fourth Amendment interests, and the contextual-privacy approach, in which courts use a variety of factors to define Fourth Amendment interests in an effect.

A. The Limited Life of Effects in the Supreme Court

Until the last few years, effects had received little sustained attention from the Supreme Court. That all changed in 2012, when *United States v. Jones* reintroduced effects into the Supreme Court canon.[32] This Section uses *Jones*, the Court's first opinion to engage with "effects" as constitutional text, as a jumping-off point. It then identifies three lingering infirmities in *Jones*: the case fails to explain (1) what sorts of actions count as "trespasses" to effects; (2) what counts as an "effect"; and (3) how the trespass test squares with two earlier Fourth Amendment doctrines—the container doctrine and abandonment doctrine—that provided some limited rules for effects before *Jones*. In particular, both the container and abandonment doctrines indicate that a trespass to an effect to obtain information has not always been sufficient to trigger Fourth Amendment protection.

The facts of *Jones* are as follows. The FBI and D.C. police suspected Antoine Jones of drug trafficking.[33] They obtained a warrant authorizing them to install an electronic tracking device on a Jeep Grand Cherokee belonging to

See, e.g., Horton v. California, 496 U.S. 128, 136-37 (1990); United States v. Place, 462 U.S. 696, 716 (1983). The third category left out is automobiles. Although this Part references some of the holdings from the automobile cases insofar as they might be read to apply to all effects in public spaces, the rules for automobiles under the Fourth Amendment have inspired a full literature and case law of their own. *See* Chambers v. Maroney, 399 U.S. 42, 48-49 (1970); Lewis R. Katz, *The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375 (1985); David S. Rudstein, Belton *Redux: Reevaluating* Belton*'s Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 WAKE FOREST L. REV. 1287 (2005); Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974). Moreover, like effects in the home or on the person, automobiles are subject to different exigency exceptions than most other effects because they are mobile. *See* Carroll v. United States, 267 U.S. 132, 153-54 (1925). At least right now, cell phones and beach chairs cannot be used to flee from an officer.

32. 132 S. Ct. 945 (2012). Although *Jones* did concern a vehicle, it is discussed here insofar as it applies to all effects in public spaces. In other words, the fact that it was a vehicle did not seem to be of particular significance in the framework for effects outlined in the *Jones* decision.

33. *Id.* at 948.

Jones's wife, provided that it was installed within ten days and in the District of Columbia. Acting outside the terms of the warrant (in Maryland and on the eleventh day), the agents placed a GPS tracking device on the vehicle's undercarriage while it was in a public parking lot. For the next four weeks, the agents tracked Jones's location as he drove and parked, and the government subsequently sought to use that information to prosecute Jones for drug crimes.[34]

The government defended its placement of the GPS device on the exterior of the car on the basis that it had attached the device when the car was in a public parking lot and monitored Jones's travel on public roads, and that thus there was no privacy violation.[35] But the Court did not discuss the significance of the fact that these acts occurred in public spaces. Instead it held that the placement of the device to obtain information caused the Fourth Amendment violation.[36] The Court observed that the vehicle was undoubtedly an "effect" within the scope of the Fourth Amendment and held that a search occurred when the government "physically occupied private property for the purpose of obtaining information"—when it "trespass[ed]" on an "effect."[37]

The Court explained two key parts of this holding. First, the Court held that the Fourth Amendment "must provide *at a minimum* the degree of protection it afforded when it was adopted."[38] In the Court's view, a physical occupation of personal property to obtain information—a trespass on an effect—qualified under this test.[39] Second, the Court stated that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[40] Thus, *Jones* simultaneously stands for the propositions that *Katz*'s invocations of privacy did not replace protections against trespasses to property and that "[a] trespass on 'houses' or 'effects'" is a Fourth Amendment search if the goal of the trespass is to obtain information.[41]

The *Jones* holding is cryptic. From all appearances, the *Jones* per se rule—that a trespass on an effect to obtain information is a search—attempts to clarify the muddle of rules that previously governed effects. But the *Jones* per se rule offers little hope for a clearer doctrine of effects in the future. Despite the apparent simplicity of the trespass test, *Jones* provides more questions than

34. *Id.*

35. *Id.*

36. *See id.* at 948, 950.

37. *Id.* at 949, 950 n.3, 953.

38. *Id.* at 953.

39. *Id.* at 949, 951 & n.5.

40. *Id.* at 952.

41. *Id.* at 951 n.5, 952.

answers about the application of the Fourth Amendment to personal property. And, it interacts in curious and contradictory ways with the precedent it endeavors to supplement.

First, *Jones* failed to define what constitutes a "trespass" to an effect, besides acknowledging that a physical invasion qualified. This shortcoming was pointed out by the four Justices concurring in the judgment,[42] but not in the majority's reasoning.[43] Should lower courts apply a Founding-era conception of trespass? The common-law doctrine of trespass to chattels? Or some state's positive law of chattel ownership and trespass?[44] What level of interference rises to the level of a trespass?[45] The majority opinion is unclear.

Furthermore, even in the pre-*Katz* era there was no "common-law trespassory test" for personal property. Rather, the rules for personal property required courts to balance the competing property interests of the individual with the government's interest in the item. This interest-balancing rule developed in a series of cases on searches of papers and objects in the mail.[46] The Court found that an individual's Fourth Amendment interests are weak when his property interests are weak, thus distinguishing searches of affirmatively forbidden property—stolen goods, contraband, and illegal imports—from searches of other property.[47] The government's ability to search or seize items depended on the government's successful assertion of an interest that was superior to the individual's interest in possession. Of course, in the same Term that the Court held that proving a Fourth Amendment search did not require a physical trespass onto real property,[48] the Court expressly abandoned this interest-balancing approach to effects.[49] But because the

42. *Id.* at 961-62 (Alito, J., concurring).

43. *Id.* at 949-50 (majority opinion) (noting that the Fourth Amendment was "tied to common-law trespass" and that "a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted," but not discussing incorporation or selective incorporation of the law of trespass beyond that).

44. *Id.* at 961-62 (Alito, J., concurring).

45. *Cf.* Arizona v. Hicks, 480 U.S. 321, 324-25 (1987) (holding that moving a turntable inside a home even a few inches was a Fourth Amendment search).

46. *See* Gouled v. United States, 255 U.S. 298, 309 (1921); Boyd v. United States, 116 U.S. 616, 624 (1886); *Ex parte* Jackson, 96 U.S. 727, 732 (1877); *see also* LASSON, *supra* note 5, at 133-34 (describing the interest-balancing approach as of 1937).

47. *See Boyd*, 116 U.S. at 624 ("In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon . . . .").

48. Katz v. United States, 389 U.S. 347, 353 (1967).

49. Warden v. Hayden, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be 'unreasonable' within the Fourth Amendment even though the Government asserts

trespass test has never existed, at least for personal property, it is even more unclear what principles provide content for the "trespass" portion of the Court's test in *Jones*.

Second, *Jones* did not provide a definition of "effects." This is especially concerning because the Court has been cagey about this definition before. Though the Supreme Court has devoted significant effort to refining the rest of its search and seizure rules, no Supreme Court decision has ever clarified what makes something an "effect." A few cases noted that some things—a parcel,[50] a vehicle,[51] luggage[52]—are undisputedly effects, and two cases declared that "open fields" are not.[53] In a footnote in one of these cases, the Court held that "[t]he Framers would have understood the term 'effects' to be limited to personal, rather than real, property."[54] But apart from that curt equation of effects and personal property, the cases—including *Jones*—shed little light on how to identify whether the subject of a search is an effect so that an analysis particular to that classification can begin.

The final, and most serious, problem with the per se rule is that *Jones* did not clarify whether all effects are protected if trespassed upon to obtain information, or if only some subset of effects is. In other words, assuming there has been a "trespass" to obtain information, it is unclear whether the status of something as personal property is sufficient to invoke the Fourth Amendment, or whether personal property gains and loses protection by reference to some other factors. This problem comes into sharp focus when two strands of the Court's past case law are considered: the container doctrine and the abandonment doctrine.

The cases on the container doctrine indicate that, in the past, the Court has relied upon facts other than the existence of a physical invasion and a property interest to define Fourth Amendment protections—though it has never explained this analysis systematically. In *United States v. Chadwick*, for example, the Supreme Court took up the government's contention that, after *Katz*, "only homes, offices, and private communications"—high privacy zones—"implicate interests which lie at the core of the Fourth Amendment" and therefore require

a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.").

50. United States v. Jacobsen, 466 U.S. 109, 114 (1984).

51. United States v. Jones, 132 S. Ct. 945, 949 (2012).

52. United States v. Place, 462 U.S. 696, 705-06 (1983).

53. Oliver v. United States, 466 U.S. 170, 176 (1984); Hester v. United States, 265 U.S. 57, 59 (1924).

54. *Oliver*, 466 U.S. at 177 n.7.

warrants.[55] The Supreme Court firmly rejected that idea, holding that "there is no evidence at all that [the Framers] intended to exclude from protection of the [Warrant] Clause all searches occurring outside the home."[56] The Supreme Court found that a footlocker was protected, remarking that the Fourth Amendment "draws no distinctions among 'persons, houses, papers, and effects' in safeguarding against unreasonable searches and seizures."[57]

However, despite this broad language describing the importance of protecting effects outside the home, the *Chadwick* Court took an odd turn: it treated the presence of a container as especially significant.[58] The Court observed: "No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause."[59] This comparison is perplexing. It does not matter whether an individual locks his doors—the home is protected whether or not they are locked. Yet the Court holds that once inside something, "a diary and a dishpan" get the same level of constitutional protection.[60] Of course, police cannot be expected to ignore evidence of contraband in plain sight, so in that regard, containers obscure what might otherwise be visible contraband from view.[61] But, putting aside contraband, why should other, innocent objects receive lesser protection than objects that are, or are in, containers?[62] If putting an item in a container "manifest[s] an expectation that the contents would remain free from public

55. 433 U.S. 1, 7 (1977), *overruled on other grounds by* California v. Acevedo, 500 U.S. 565 (1991).

56. *Id.* at 8.

57. *Id.*; *see also* United States v. Robinson, 414 U.S. 218, 255-56 (1973) (Marshall, J., dissenting) (suggesting that the Fourth Amendment protects a cigarette package found on a person as a container).

58. *Chadwick*, 433 U.S. at 10-11. For a fuller treatment of the container doctrine than this Article can provide, see Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1414-26 (2010).

59. *Chadwick*, 433 U.S. at 11.

60. Robbins v. California, 453 U.S. 420, 426 (1981), *overruled on other grounds by* United States v. Ross, 456 U.S. 798 (1982).

61. Contraband in plain sight probably includes a container (like a gun case) that by its appearance can only hold evidence of the crime. Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979), *overruled on other grounds by* California v. Acevedo, 500 U.S. 565 (1991).

62. Granted, the Supreme Court has broadened its definition of "container" to mean "any object capable of holding another." New York v. Belton, 453 U.S. 454, 460 n.4 (1981). Amending the definition of container in this way is a blunt method by which to expand protection for effects—it encompasses more of them, certainly, but it still does not take into account indicia of ownership.

examination,"[63] why are other actions insufficient to manifest privacy expectations? Why should officers be free to search something that, because of its nature or circumstances, is likely owned but left in the open—say, a pair of muddy shoes left outside the apartment door—while placing the same item in a paper bag entitles it to Fourth Amendment protections? And if, as *Jones* suggests, all trespasses to property to obtain information are Fourth Amendment searches, why does the presence of a container matter at all?

The Court's rulings on abandonment doctrine also indicate that not all trespasses on personal property to obtain information are Fourth Amendment violations. In keeping with that principle, the Seventh Circuit has held that effects in public spaces (including those in containers) can lose their constitutional protection if deemed "abandoned."[64] The contours of abandonment, however, are imprecise. The earliest abandonment case concerned the recovery of incriminating evidence from the trash can in a vacated hotel room.[65] The Court held that the items were "*bona vacantia*"—a property term meaning "unowned"[66]—and denied the defendant's Fourth Amendment claim on that ground.[67] Since that first case, the most extensive treatment came in *California v. Greenwood*, in which the Court held that a person could not claim Fourth Amendment rights in curbside trash—though the majority never used the word "abandon."[68]

Apart from these two decisions, the Court has only held that effects were not abandoned in two other cases.[69] In both cases, the Court ruled without extensive analysis. In one, the Court held that an individual did not abandon a package dropped on the floor of a taxicab in which he was a passenger.[70] In the other, the Court issued a per curiam opinion affirming the Ohio Supreme Court's conclusion in a footnote that an individual did not abandon a grocery

63. *Robbins*, 453 U.S. at 426 (quoting *Chadwick*, 433 U.S. at 11).

64. *See, e.g.*, United States v. Rem, 984 F.2d 806, 810 (7th Cir. 1993) ("A person may possess a privacy interest in the contents of personal luggage. However, that privacy interest can be forfeited where the person abandons the luggage." (citations omitted)).

65. Abel v. United States, 362 U.S. 217, 225 (1960).

66. *Bona Vacantia*, BLACK'S LAW DICTIONARY (10th ed. 2014).

67. *Abel*, 362 U.S. at 241 ("There can be nothing unlawful in the Government's appropriation of such abandoned property.").

68. 486 U.S. 35, 40-42 (1988).

69. *See* Smith v. Ohio, 494 U.S. 541, 543-44 (1990) (per curiam); Rios v. United States, 364 U.S. 253, 262 n.6 (1960).

70. *Rios*, 364 U.S. at 262 n.6 ("A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have 'abandoned' it.").

bag tossed onto a car hood at an officer's request.[71] In other words, apart from two cases on garbage, the Court has not indicated what should factor into a determination that an item is abandoned or not. And *Jones* offers little additional help. Abandonment doctrine makes clear that something besides a trespass to obtain information and a property interest is required to prove a Fourth Amendment violation when an effect is the object of the search, but *Jones* does not explain what additional analysis is required.

The focus of the *Jones* Court on a trespass-based analysis does not follow from the cases decided under the container doctrine and the abandonment doctrine: if a trespass to an effect to obtain information typically or even automatically constitutes a Fourth Amendment search, why did past cases from the Court rely so strongly on signals of privacy inherent in containers or signals of nonuse indicated by abandonment? Perhaps the answer lies in the concurring opinion of Justice Sotomayor in *Jones*: "privacy expectations [are] inherent in items of property that people possess or control"—in other words, if the property is possessed, then the possessor has an expectation of privacy.[72] But both the majority opinion and Justice Sotomayor's concurrence fail to address how courts should determine possession for Fourth Amendment purposes.[73]

71. *Smith*, 494 U.S. at 543-44 (affirming the conclusion reached in *State v. Smith*, 544 N.E.2d 239, 246 n.6 (Ohio 1989), *aff'd*, *Smith*, 494 U.S. 541, that "a citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer's inquiry, clearly has not abandoned that property"); *see also id.* at 544 (Marshall, J., dissenting) (noting the belief that "summary dispositions deprive litigants of a fair opportunity to be heard on the merits and significantly increase the risk of an erroneous decision").

72. United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring).

73. To illustrate, both the majority opinion and Justice Sotomayor's concurrence accept that the placement of the tracking device offended the Fourth Amendment because it was placed on Jones's wife's car while in Jones's possession and parked in a public parking lot, rather than placed before he took possession. *Id.* at 951-52 (majority opinion); *id.* at 955 (Sotomayor, J., concurring). But this leaves several ambiguities. The device was apparently placed on the vehicle while it was in a public parking lot, but neither the Supreme Court nor the three lower-court opinions in Jones's case discuss the circumstances of the placement. *See id.* at 948 (majority opinion); United States v. Maynard, 615 F.3d 544, 555-60 (D.C. Cir. 2010), *aff'd*, *Jones*, 132 S. Ct. 945; United States v. Jones, 511 F. Supp. 2d 74, 79 (D.D.C. 2007); United States v. Jones, 451 F. Supp. 2d 71, 87-88 (D.D.C. 2006); *aff'd in part*, *rev'd in part*, *Maynard*, 615 F.3d 544. It is unclear what sort of lot the car was parked in, how long it had been there, whether it was locked—in other words, what about the car indicated its possession by Jones? Moreover, if it is important that the trespass occurred during Jones's possession, what indicated that he was the possessor? Had the GPS device been placed when the car was in Jones's wife's possession, or after being parked by a friend, would the placement be permissible if meant to track Jones? What conferred possession on Jones—his status as most recent driver, exclusive driver, or something else? This Article does not

The Supreme Court's doctrine of effects thus provides few clear guidelines: effects are without protection if abandoned (whatever that means), effects in containers might be protected, and the location might or might not factor into the Fourth Amendment analysis of constitutional protection for personal items. It remains unclear what "effects" means and whether trespasses to all or only some subset of personal property are searches. The uncertainty both before and after *Jones* has given lower courts considerable latitude to shape their own views on how effects in public space are treated. The following Sections explain the approaches that have developed in that void.

B. The Locational-Privacy Approach in Lower Courts

In the absence of clear guidance from the Supreme Court, many lower courts have decided that an owner's Fourth Amendment rights in an object turn on the item's location. If the owner cannot exclude others from the space where the item is located, norms or signals indicating that the item should remain untouched are likely ineffective.[74] This Section overviews this "locational privacy" approach to effects. It demonstrates that, under this approach, an individual generally has a protectable interest only when the effects are on the person or in the home, or, somewhat more broadly, if they have been lawfully entrusted to a third party.[75] Conversely, an individual lacks

explore this standing-related question, but instead raises it to show just how confusing the Court's invocation of possession is, absent further explication.

74. I use the term "courts" rather than "jurisdictions" because some jurisdictions have taken conflicting approaches in different cases. *Compare* United States v. Gault, 92 F.3d 990, 991-92 (10th Cir. 1996) (finding that an officer did not search a bag when he kicked and lifted it, in part because it was "unattended" while the owner temporarily de-boarded an Amtrak train), *with* United States v. Salinas-Cano, 959 F.2d 861, 864 (10th Cir. 1992) (suggesting that courts should give heightened Fourth Amendment protection to containers, especially when "precautions [have been] taken by the owner to manifest his subjective expectation of privacy, for example locking the container or explicitly forbidding the host to open it," an approach that is not just locational); *compare* State v. Elison, 2000 MT 288, ¶ 51, 302 Mont. 228, 247, 14 P.3d 456, 470 ("[W]hen a person takes precautions to place items behind or underneath seats, in trunks or glove boxes, or uses other methods of ensuring that those items may not be accessed and viewed without permission, there is no obvious reason to believe that any privacy interest with regard to those items has been surrendered simply because those items happen to be in an automobile."), *with* State v. Scheetz, 950 P.2d 722, 726 (Mont. 1997) ("[W]hen a person leaves the privacy of his home and exposes himself and his effects to the public and its independent powers of perception, it is clear that he cannot expect to preserve the same degree of privacy for himself or his affairs as he could expect at home.").

75. *See* United States v. Most, 876 F.2d 191, 198 (D.C. Cir. 1989) (finding that an individual retained privacy rights in a bag entrusted to a grocery-store clerk). This Article does not delve deeply into how the third-party doctrine impacts effects. The doctrine suggests that

Fourth Amendment rights when an item is outside the home or curtilage, in a place he has no right to access, or in an area to which the public has unfettered access. Lower courts have typically arrived at this interpretation in one of two ways: (1) by holding that bringing and leaving something in public *exposes* it to view and manipulation by others; or (2) by narrowly interpreting abandonment, providing very limited protection to objects still in the constructive possession of the owner but not within the owner's immediate control. I refer to these two versions of the locational-privacy approach respectively as the "exposure" test and the "abandonment of privacy" test.

Courts following an exposure-based locational-privacy approach have read Supreme Court opinions to distinguish between "public space" and "private space."[76] *Katz* held that "[w]hat a person knowingly exposes to the

voluntary disclosure of information to a third party removes any reasonable expectations of privacy with respect to that information. The wisdom of the third-party doctrine is a hotly debated topic in criminal-procedure law. *Compare Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring) (suggesting that the third-party doctrine should be abandoned), *and* Stephen E. Henderson, *Beyond the (Current) Fourth Amendment: Protecting Third-Party Information, Third Parties, and the Rest of Us Too*, 34 PEPP. L. REV. 975 (2007) (same), *with* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009) (touting the benefits of the third-party doctrine). Further work is needed to explore the issues specific to entrusting one's property, rather than information, to a third party. However, the analyses proposed in the latter portion of this Article may prove helpful: the context and nature of the property entrusted to another should likely be determinative. Lending one's coat to a friend, for example, may involve consent to a different level of intrusion than giving one's coat to a coat-check agent. *See infra* Part III.

76. *See, e.g.*, United States v. Cortez-Dutrieville, 743 F.3d 881, 885 (3d Cir. 2014) (finding no protection for an overnight bag stored in a location the defendant had been barred by a protective order from entering); State v. Sinsel, 543 N.W.2d 457, 461 (Neb. 1996) (finding no Fourth Amendment right in a stove left in a landfill site accessible to anyone with a key when no effort was made to mark the stove as the defendant's); People v. Weaver, 909 N.E.2d 1195, 1198 (N.Y. 2009) ("[W]hile *Katz* purported to deemphasize location as a determinant in judging the reach of the Fourth Amendment, the analysis it seemed to require naturally reintroduced considerations of place back into the calculus since the social reasonableness of an individual's expectation of privacy will quite often turn upon the quality of the space inhabited or traversed, i.e., whether it is public or private space."); State v. Cleator, 857 P.2d 306, 308 (Wash. Ct. App. 1993) ("[I]f an individual places his effects upon premises where he has no legitimate expectation of privacy . . . then he has no legitimate reasonable expectation that they will remain undisturbed upon [those] premises." (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3(c) (2d ed. 1987))). Several cases contain broad language that could support a locational-privacy approach, although the cases were arguably decided on other grounds. *See, e.g.*, State v. Barrett, 401 N.W.2d 184, 189-90 (Iowa 1987) (holding that there is no reasonable expectation of privacy in personal journals inadvertently left in a restaurant, "[g]iven the public nature of the place where the journal was discovered and examined," though search could probably have been justified by the fact that fast-food employees picked up and read the journal and reported its "evidentiary nature" to the police); Hicks v. State, 753 S.W.2d 419, 421 (Tex. Crim. App. 1988) (permitting a seizure because, among other

public . . . is not a subject of Fourth Amendment protection."[77] These courts have suggested that bringing and leaving personal property in public space sufficiently "exposes" it to others to destroy Fourth Amendment protections.[78] A person simply cannot expect the same level of privacy with respect to his or her personal goods when they are outside protected spaces like the home.

Courts adopting an exposure test have distinguished between public and private space even in circumstances where the owner of an item has taken considerable steps to shield it from view or manipulation. The Iowa case of *State v. Flynn* is instructive. James Flynn was suspected of violating gambling laws, and his home was under police surveillance.[79] Aware of this surveillance, the defendant decided to relocate two paper sacks containing "thirty-three cassette tapes, two notebooks, two sheets of paper with names and numbers, and a ledger book" to a locker at his private golf club.[80] When Flynn arrived and tried to get into the club, his key did not work, so he "temporarily placed the two sacks containing the records beneath a tarpaulin which was covering a pile of peat moss used for golf course maintenance" while he left to find the right key.[81] In ruling that officers did not violate Flynn's reasonable expectation of privacy by subsequently obtaining the bags and listening to the cassette

factors, the defendant brought effects into public so "many of the items seized were open to public view from the street," although the defendant also disclaimed ownership when asked).

77. Katz v. United States, 389 U.S. 347, 351 (1967); *see also* Cardwell v. Lewis, 417 U.S. 583, 593 (1974) (noting that because a vehicle was in "a public place where access was not meaningfully restricted," as opposed to being examined on and seized from private property, there was no Fourth Amendment problem).

78. *See* United States v. Ramapuram, 632 F.2d 1149, 1155, 1159 (4th Cir. 1980) ("[W]hatever expectation of privacy attends a closed but unsecured 'effect' generally is diminished where the 'effect' itself is placed in an area totally without the protection of the Fourth Amendment such as in an open field."); State v. Flynn, 360 N.W.2d 762, 765 (Iowa 1985) ("[T]he place where seized property is located may be so exposed as to negate any reasonable expectation of privacy."); *Scheetz*, 950 P.2d at 726 ("[W]hen a person leaves the privacy of his home and exposes himself and his effects to the public and its independent powers of perception, it is clear that he cannot expect to preserve the same degree of privacy for himself or his affairs as he could expect at home."). Several of these cases concern officers touching, kicking, or punching luggage a person has brought onto public transportation. *E.g.*, *Gault*, 92 F.3d at 991-92; United States v. Guzman, 75 F.3d 1090, 1095 (6th Cir. 1996); State v. Quintanilla, Nos. A-99-201, A-99-202, 1999 WL 1063085, at *1-2 (Neb. Ct. App. Aug. 11, 1999). *But see* United States v. Nicholson, 144 F.3d 632, 639 (10th Cir. 1998) (finding that officers may not manipulate a bag any more than fellow passengers might in making space for their bags).

79. 360 N.W.2d, at 763-64.

80. *Id.* at 763.

81. *Id.* at 764.

tapes,[82] the court stated that "the location of property seized by authorities may be of critical importance in determining whether the search and seizure were lawful."[83] The *Flynn* court held that Fourth Amendment protection is different depending on whether an item is found in something more like an "open field" or more like a "private residence."[84] Of course, the contraband at issue in the Supreme Court's past "open fields" cases was apparent to officers without them having to disturb the item. The *Flynn* court did not explain why that was irrelevant, instead interpreting those cases to mean that "it matters where a person places the items which later are the subject of a search and seizure."[85]

Courts have also distinguished between private and public space in other cases where there is no apparent intent to hide but also no anticipation of inspection. In *People v. Juan*, for example, an anonymous informant reported that two diners at a restaurant were discussing a robbery and using the victim's credit cards.[86] Officers arrived at the restaurant and spotted a brown jacket draped over a chair at one of the tables; the victim's passport was on the floor under the chair.[87] They searched the jacket pockets and found the victim's credit cards. The police officers then replaced the jacket and waited in another area for the table's occupants to return.[88] The court rejected the defendant's

82. When Flynn returned to the club two-and-a-half hours later, the bags were gone. *Id.* An unidentified "private person" had found the bags and called a police officer with whom that individual was acquainted, and the officer advised the person to bring the sacks to the police station. *Id.* Police then listened to the cassette tapes. *Id.* The search in the case was actually the playing of the cassette tapes, rather than the disturbance of the bags, because of the intervention of the private individual.

83. *Id.* at 765. The removal of the sacks by a "private person" rendered that seizure outside the scope of constitutional protection, so the majority of the *Flynn* opinion focused on the "search" that occurred when officers listened to the cassette tapes. *Id.* at 768 ("The private citizen did not infringe defendant's fourth amendment rights in seizing the materials. This is because the amendment protects only against governmental action. The police officers, however, went beyond the citizen's seizure when they listened to the tapes.").

84. *E.g.*, Oliver v. United States, 466 U.S. 170, 174 (1984) (discussing the "two marihuana patches fenced with chicken wire" visible to officers in an open field); Hester v. United States, 265 U.S. 57, 58 (1924) (noting that a bottle and broken jug discarded in an open field contained "easily recognizable" moonshine whiskey).

85. *Flynn*, 360 N.W.2d at 765. A dissenting opinion disagreed with this analysis, holding that under the circumstances, any person would expect that his objects would remain private, regardless of their accessibility to a subset of the public. *Id.* at 767-68 (McCormick, J., dissenting) ("The fact that the place he chose for temporary storage of the two sacks turned out not to be secure does not diminish his right to expect that his interest in his property would be respected by anyone reasonably likely to be on the premises.").

86. People v. Juan, 221 Cal. Rptr. 338, 339 (Ct. App. 1985).

87. *Id.* at 340.

88. *Id.*

challenge to the search, finding that "an article of clothing in a public place" was not entitled to protection.[89] "By leaving his jacket unattended in the restaurant, [the defendant] exposed it to the public[,] and he cannot assert that he possessed a reasonable expectation of privacy in the pockets of his jacket."[90] The court surmised that a person who leaves a jacket over a chair probably wants a "Good Samaritan" to examine its pockets and try to return the jacket to its owner.[91] For these reasons, the defendant was not entitled to exclusion of the fruits of the search. While the court treated this as obvious, there is cause for skepticism. Leaving one's jacket over a chair in a restaurant is common social practice, and there is little reason to believe the circumstances would lead anyone else to look through it.[92] Yet several other courts have reached similar conclusions to deny Fourth Amendment protection for clothing left outside apartment doors,[93] folded on tables at a bar,[94] and on office coat racks.[95]

Courts following the other form of the locational-privacy approach—the abandonment of privacy test—have relied on expansive notions of abandonment to leave objects in public space with limited protection.[96] Despite

89. *Id.* at 341.

90. *Id.* at 341-42.

91. *Id.* at 341.

92. It is difficult to tell how long exactly the jacket was left unattended. The men had been seen in the restaurant approximately two hours before the search, but the opinion in the case does not make clear how long the men had been absent from the table—in other words, whether it was a smoke break, or whether the jacket had been inadvertently left behind. The opinion also does not make clear how long the officers observed the jacket unattended. *See id.* at 340-41.

93. United States v. Haughn, 414 F. Supp. 37, 38, 40 (D.N.J. 1976) (finding the defendant had no expectation of privacy in a black police raincoat on top of an attaché case outside his apartment door).

94. People v. Loveless, 400 N.E.2d 540, 541-43 (Ill. App. Ct. 1980) (finding that an individual's Fourth Amendment rights were not violated when an officer grabbed a jacket folded in half on a tavern table, though these rights were violated once the owner proclaimed it was his coat and the officer continued the search).

95. United States v. Alewelt, 532 F.2d 1165, 1168 (7th Cir. 1976) (finding no expectation of privacy in a jacket left "on a coat rack in the general working area of an outer office where he had no possessory interest," although this case might be distinguished on the basis that fruits of a crime were visible in the pockets).

96. Clearly, the exposure approach and abandonment of privacy approach are closely related, which is why I group them both under locational privacy. I separate them analytically here because they derive from different lines of Court opinions—the exposure test from the language about exposure in *Katz*, *see* Katz v. United States, 389 U.S. 347, 351 (1967), and the abandonment of privacy test from the Court's abandonment cases, *see supra* notes 62-71 and accompanying text. Still, they produce the same result: minimal protection for effects located in public places.

invocations of property law, specifically *bona vacantia*, in the Supreme Court's earliest case on abandonment,[97] many courts have since decided that property-law abandonment and Fourth Amendment abandonment are unrelated.[98] Under these rulings, a person may retain a property interest, even one that is or should be apparent to others, but might nevertheless "abandon" expectations of privacy if the location is accessible to officers and other third parties. Though achieved in a different way, these courts have reached the same results as courts that treat "public" and "private" space differently: the location of the effect is the sole or dominant factor in determining whether an individual has "abandoned" his or her privacy expectations and thus relinquished any claim to Fourth Amendment protection.

Some courts have thus found items to be abandoned for Fourth Amendment purposes even when most would likely agree that they remained in the constructive possession of their owners. For example, in *Anderson v. State*, a couple was fishing, and park rangers observed the man walk about seventy-five feet away, stash something under a rock on a beach, and then return to the fishing spot.[99] When the man failed to produce a fishing license on request, one officer walked to the rock, found a margarine container underneath, and opened it to find marijuana.[100] The Georgia Court of Appeals found the container was not entitled to Fourth Amendment protection. By placing it under a rock and walking away, the court reasoned, the defendant had "reliev[ed] himself of its possession" or, in other words, abandoned it.[101] This characterization of abandonment provoked a rebuke from the dissenting judge, who observed: "If I put my shirt, shoes, or wallet on a public beach and walk into the water, or walk 75 feet down the beach, I do not give the world leave to search my pockets or my purse."[102] Nevertheless, the majority agreed that the defendant's leaving the item unattended left it "out of his possession" and thus negated his Fourth Amendment rights.[103]

Although locational privacy can function like a bright-line rule dividing protected and unprotected property, some courts following locational-privacy

97. *See supra* notes 65-67 and accompanying text.

98. *See, e.g.*, United States v. Fulani, 368 F.3d 351, 354 (3d Cir. 2004); United States v. Lewis, 921 F.2d 1294, 1302 (D.C. Cir. 1990); United States v. Brown, 663 F.2d 229, 232 (D.C. Cir. 1981); City of St. Paul v. Vaughn, 237 N.W.2d 365, 370 (Minn. 1975); State v. Dupree, 462 S.E.2d 279, 281 (S.C. 1995).

99. 209 S.E.2d 665, 665-66 (Ga. Ct. App. 1974).

100. *Id.* at 666.

101. *Id.* at 667 (emphasis omitted).

102. *Id.* at 669 (Deen, J., dissenting).

103. *Id.* at 667 (majority opinion).

approaches have nevertheless recognized protections in public space for objects that are not closed containers under two circumstances. First, if an individual is only out of contact with the property for an extremely short time—a few seconds—then the person may retain his Fourth Amendment rights.[104] Second, at least two courts applying a locational-privacy analysis have struggled to evaluate constitutional search and seizure protections when the owner did not intend to leave the property unattended—when it has been lost and given to officers for safekeeping.[105] In one case, for example, the Washington Court of Appeals held that a criminal defendant retained an expectation of privacy in her zipped purse inadvertently lost at a shoe store.[106] The court held that the defendant remained "in constructive possession" of the item while mislaid and thus retained her Fourth Amendment rights in the purse, although her protected expectation of privacy was "diminished to the extent that the finder would probably search the purse for identification."[107] The reasoning behind these rulings seems to be that when personal property has been inadvertently misplaced, there has been no willful "exposure" to the public or intentional abandonment of privacy.[108] Accordingly, the personal property itself remains a protected area in those limited circumstances.

Whatever form they take, these locational-privacy approaches should be eliminated. At a minimum, it is possible that the holding in *Jones* already undermines many of them. The government's main justification for its placement of the GPS device on Jones's wife's car was the fact that it was done

104. *See* People v. Anderson, 246 N.E.2d 508, 509 (N.Y. 1969) (holding that a Fourth Amendment search of a tin box was illegal where the officer "picked up the box so soon after it had been dropped that it is impossible to determine whether or not the defendant, if given the opportunity, would have picked up the box himself").

105. State v. Kealey, 907 P.2d 319, 321-24 (Wash. Ct. App. 1995); *cf.* State v. Hamilton, 2003 MT 71, ¶¶ 6-10, 34, 314 Mont. 507, 510-11, 516, 67 P.3d 871, 873, 876 (using a similar analysis to find that the search of a zipper pouch of a lost wallet violated the protection against unreasonable searches in the Montana State Constitution).

106. *Kealey*, 907 P.2d at 326. Adding to the complexity of this fact pattern, one of the clerks had actually hidden the purse and lied about having seen it when the owner was looking for it. *Id.* at 321-22.

107. *Id.* at 326. The court ultimately found that because the contraband would have been discovered during a search for identification, there was no Fourth Amendment violation. *Id.* at 326-27. *But see Hamilton*, 2003 MT ¶¶ 30, 41-48, 314 Mont. at 515, 518-20, 67 P.3d at 876, 878-79 (noting in a case decided under the Montana State Constitution that an individual "did not intentionally or knowingly expose her wallet to the public," so "her right to exclude others from the contents of her wallet remained intact" where the search went beyond the scope necessary to identify the owner of lost property).

108. *See Hamilton*, 2003 MT ¶¶ 41-48, 314 Mont. at 518-20, 67 P.3d at 878-79; *Kealey*, 907 P.2d at 323-24.

in a public parking lot and his travel was monitored on public roads.[109] Yet the "trespass to effects" approach makes clear that Fourth Amendment protection does not rise or fall solely based on the publicness of the location. Instead, invasion of a personal-property interest to obtain information may be enough, regardless of where that property is located.

Even if *Jones* does not directly undermine locational-privacy approaches, these approaches should be eliminated because they are inconsistent with the cases that gave rise to privacy-based notions of the Fourth Amendment in the first place. Locational-privacy approaches rely on an incomplete reading of *Katz*. First, *Katz* itself held that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."[110] Second, *Katz* has often been read to proscribe protection for information exposed to others: "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[111] But *Katz* also provided that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[112] Though the "invited exposure" holding of *Katz* has endured, this second sentence—the "discouraged intrusion" holding—has received much less attention. As of November 14, 2015, the first sentence has been quoted in isolation in 481 federal and state cases.[113] The second has been quoted in isolation in just eighty.[114] The locational-privacy approach reflects this ignorance. It fails to recognize individuals' attempts to discourage intrusion into personal property through signals and actions, and it gives little credence to the reasonable expectations individuals have about the likelihood of intrusion.

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

110. Katz v. United States, 389 U.S. 347, 350 (1967).

111. *Id.* at 351.

112. *Id.* at 351-52.

113. WESTLAW NEXT, http://www.next.westlaw.com [http://perma.cc/4ZYM-8FDK]. On the jurisdiction dropdown, select "All States" and "All Federal" and click "Save"; then search for "advanced: 'knowingly exposes #to the public, even #in his own home #or office, is not a subject #of Fourth Amendment protection' % 'what he seeks #to preserve #as private.'"

114. *Id.* On the jurisdiction dropdown, select "All States" and "All Federal" and click "Save"; then search for "advanced: 'seeks #to preserve #as private, even #in #an area accessible #to the public, may #be constitutionally protected.' % 'What a person knowingly exposes #to the public.'"

C. *The Contextual-Privacy Approach in Lower Courts*

Instead of using locational privacy to assess effects in public space, other courts have looked at the overall environment of the item to determine the scope of Fourth Amendment protection. These courts ask whether the circumstances of the item should indicate a person's intention and expectation that the item would remain private. In these courts, signals of possession and other norms may overcome the lack of privacy in the object's location. The location of an item is one factor to be considered, but it is not dispositive. As this Section explains, these approaches tend to provide greater protection to property in public space, but courts have been remarkably vague about what set of factors actually determine protection.

A contextual-privacy approach to effects was first suggested by early cases taking up state constitutional search provisions.[115] In *Ash v. Commonwealth*, a

115. In the early twentieth century, state courts mostly made criminal-procedure law by examining searches and seizures under state constitutions. For most of their histories, many state constitutions protected "effects" like the Federal Constitution. CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 7; GA. CONST. art. I, § 1, para. 13; IDAHO CONST. art. I, § 17; IND. CONST. art. 1, § 11; IOWA CONST. art. I, § 8; LA. CONST. art. I, § 5; MINN. CONST. art. I, § 10; MO. CONST. art. I, § 15; MONT. CONST. art. II, § 11; NEB. CONST. art. I, § 7; NEV. CONST. art. I, § 18; N.J. CONST. art. I, § 7; N.D. CONST. art. I, § 8; OR. CONST. art. I, § 9; S.D. CONST. art. VI, § 11; UTAH CONST. art. I, § 14; W. VA. CONST. art. III, § 6; WIS. CONST. art. I, § 11; WYO. CONST. art. I, § 4. Three states originally used "possessions" but subsequently adopted "effects." *Compare* ARK. CONST. of 1836, art. II, § 9, *and* FLA. CONST. of 1838, art I, § 7, *and* S.C. CONST. of 1868, art. I, § 22, *with* ARK. CONST. art. II, § 15, *and* FLA. CONST. art. I, § 12, *and* S.C. CONST. art. I, § 10. Arizona and Washington have used "private affairs" since adopting their constitutions. ARIZ. CONST. art. II, § 8; WASH. CONST. art. I, § 7. Hawaii, New Mexico, and Oklahoma all used "effects" later on into the twentieth century, when their respective constitutions were adopted; Alaska used both "other property" and "effects." ALASKA CONST. art. 1, § 1.14; HAW. CONST. art. I, § 7; N.M. CONST. art. II, § 10; OKLA. CONST. art. II, § 30. New York lacked a constitutional search and seizure provision until 1938 but used "effects" at that point. N.Y. CONST. art. I, § 12 (amended 1938); *see* People v. Richter's Jewelers, Inc., 51 N.E.2d 690, 693 (N.Y. 1943). Most of the remaining state constitutions protected "possessions" instead of "effects." ALA. CONST. art. I, § 5; CONN. CONST. art. I, § 7; DEL. CONST. art. I, § 6; KY. CONST. § 10; ME. CONST. art. I, § 5; MASS. CONST. pt. 1, art. XIV; MICH. CONST. art. I, § 11; MISS. CONST. art. III, § 23; N.H. CONST. pt. I, art. XIX; OHIO CONST. art. I, § 14; PA. CONST. art. I, § 8; R.I. CONST. art. I, § 6; TENN. CONST. art. I, § 7; TEX. CONST. art. I, § 9; VT. CONST. ch. 1, art. XI. Illinois briefly changed from "possessions" to "effects" but reverted to "possessions." *Compare* ILL. CONST. of 1818, art. VIII, § 7, *with* ILL. CONST. of 1870, art. II, § 6, *and* ILL. CONST. art. I, § 6. One commentator has argued that "possessions" is broader than "effects." *See* Neil C. McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179, 195-96 (1988). Several courts have rejected that position. *See, e.g.*, State v. Davis, 929 A.2d 278, 295-97 (Conn. 2007); Brent v. Commonwealth, 240 S.W. 45, 47 (Ky. 1922); People v. Smith, 360 N.W.2d 841, 848-50 (Mich. 1984). *But see* Falkner v. State, 98 So. 691, 692-93

Kentucky case, the defendant's suitcase was searched and seized while he was in a train station and had left it unaccompanied in the waiting room. Liquor was found inside.[116] The court determined that items "cannot be [unreasonably] seized or searched in defendant's absence any more than his premises may be so searched."[117] The Kentucky court summed up rights in possessions outside the home succinctly: "The interpretation given to our constitutional provision extends the same sacred protection to one's 'papers and possessions' as it does to his person or his houses, and it will indeed be a sad day when misguided innovators may succeed in destroying it."[118] Given that the suitcase had been unattended for only fifteen minutes and had been left under a bench, the court held that the defendant "constructive[ly] possess[ed]" the suitcase at the time it was taken.[119] Other early cases also suggested that the location of a "possession" or effect was relevant to, but not determinative of, the officer's ability to search and then seize it.[120]

More recent decisions have similarly examined factors other than an object's location to construct a person's Fourth Amendment rights and expectations with respect to some personal property. Two cases have taken up the issue in examining the legality of ordinances requiring officers to search, seize, or destroy the property of homeless individuals.[121] Unsurprisingly, under

(Miss. 1924); State v. Kirchoff, 587 A.2d 988, 991-92 (Vt. 1991); *Search and Seizure—Open Fields—Expectation of Privacy*, 34 Crim. L. Rep. (BNA) 4088-89 (Nov. 16, 1983) (recounting the oral argument in an open-fields case, *Maine v. Thornton*, 466 U.S. 170 (1984), where Justice Marshall stated that he "[didn't] agree [that 'effects' meant personal effects]; the Constitution doesn't say that. I think the term includes real property").

116. Ash v. Commonwealth, 236 S.W. 1032, 1033 (Ky. 1922).

117. *Id.* at 1034.

118. *Id.* at 1035.

119. *Id.* at 1034.

120. *See, e.g.*, Youman v. Commonwealth, 224 S.W. 860, 863 (Ky. 1920); State v. George, 231 P. 683, 689 (Wyo. 1924) (discussing sheep seized from public land). Two factors make examples from early case law somewhat difficult to find. First, as now, many early cases on effects in public spaces concerned the legality of seizing plainly visible contraband. *See, e.g.*, United States v. Lee, 274 U.S. 559, 563 (1927); *Brent*, 240 S.W. at 47; Ratzell v. State, 228 P. 166, 167 (Okla. Crim. App. 1924); McClannan v. Chaplain, 116 S.E. 495, 499 (Va. 1923). Second, because there was no exclusionary rule, the courts did not need to determine whether many searches or seizures were illegal because it would make no difference: the court would not exclude the fruits of the illegal act. *See, e.g.*, Williams v. State, 28 S.E. 624, 625 (Ga. 1897) (noting that, even assuming the search of a woman's apron was illegal, evidence found therein would not be inadmissible); Gindrat v. People, 27 N.E. 1085, 1087-88 (Ill. 1891) (finding that a warrantless search of an apartment and valise and seizure of imitation jewelry did not render the evidence inadmissible).

121. Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir. 2012); Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

locational-privacy approaches, the homeless fare extremely poorly; officers have broad authority to search, seize, and destroy any personal property of the homeless left in public space.[122] In contrast, under contextual-privacy approaches, courts have found that the property of the homeless may not be searched or destroyed because the nature and circumstances of that personal property should indicate to observers that the property has not been abandoned. For example, in a class-action lawsuit brought by homeless individuals in Miami, the District Court for the Southern District of Florida considered the characteristics and context of the property that officers were examining and seizing during "clean ups":

> As this court previously found, property belonging to homeless individuals is reasonably identifiable by its appearance and its organization in a particular area. Typical possessions of homeless individuals include bedrolls, blankets, clothing, toiletry items, food and identification, and are usually contained in a plastic bag, cardboard box, suitcase or some other type of container. In addition, homeless individuals often arrange their property in a manner that suggests ownership, for example, by placing their belongings against a tree or other object or by covering them with a pillow or blanket. Such characteristics make the property of homeless persons reasonably distinguishable from truly abandoned property, such as paper refuse or other items scattered throughout areas where plaintiffs reside.[123]

The court accordingly enjoined police from "destroying property which it knows or reasonably should know belongs to homeless individuals," requiring

122. *See* United States v. Ruckman, 806 F.2d 1471, 1472 (10th Cir. 1986) (finding no Fourth Amendment violation where officers "clean[ed] out" a cave and found harmful devices); United States v. Jackson, 585 F.2d 653, 658 (4th Cir. 1978) ("It is also analogous to the situation in which an 'individual places his effects upon premises where he has no legitimate expectation of privacy (for example, in an abandoned shack or as a trespasser upon another's property)'; in such a case, 'he has no legitimate reasonable expectation that they will remain undisturbed upon these premises' and consequently has no standing or right to contest a search." (quoting Melvin Gutterman, *"A Person Aggrieved": Standing To Suppress Illegally Seized Evidence in Transition*, 23 EMORY L.J. 111, 119 (1974))); Amezquita v. Hernandez-Colon, 518 F.2d 8, 13 (1st Cir. 1975) (finding no Fourth Amendment violation where officers sought to bulldoze a squatter community living on public land); State v. Cleator, 857 P.2d 306, 307 (Wash. Ct. App. 1993) (finding no Fourth Amendment violation in the search of a tent on city property). *But see* United States v. Sandoval, 200 F.3d 659, 660 (9th Cir. 2000) (finding that an individual had a reasonable expectation of privacy in a closed tent among vegetation on public land); State v. Mooney, 588 A.2d 145, 151 (Conn. 1991) (finding that an individual had a reasonable expectation in closed containers left under a highway abutment).

123. *Pottinger*, 810 F. Supp. at 1571.

the police to "consider factors such as the nature and appearance of the items" and whether the property is "arranged in a manner suggesting ownership."[124]

Even when the owner of property is not homeless, the character of the property and space as well as the duration of separation of owner from property are key to contextual-privacy analyses, not merely whether the space is public or not. In other cases, courts have looked to the overall context in which officers have encountered items to define the scope of Fourth Amendment protection.[125] In *State v. Dunn*, for example, officers breaking up a loud party came across a jacket lying on the side of the driveway.[126] One officer picked up the jacket, searched the pockets, and found marijuana.[127] The officers

124. *Id.* at 1584.

125. *See* Allinder v. Ohio, 808 F.2d 1180, 1186 (6th Cir. 1987) (finding that commercial beehives located in an open field were clearly owned and unabandoned); United States v. Boswell, 347 A.2d 270, 274-75 (D.C. 1975) (finding that a defendant retained an expectation of privacy in a blanket-covered television left outside while he stepped into a laundromat to make a phone call); Jones v. State, 648 So. 2d 669, 675 (Fla. 1994) (examining the search and seizure of effects in a hospital room); People v. Payton, 741 N.E.2d 302, 306 (Ill. App. Ct. 2000) (holding that officers violated the Fourth Amendment by searching a grill outside a curtilage); State v. Philbrick, 436 A.2d 844, 855 (Me. 1981) (noting that "the knapsack's location is the only fact which, if considered in isolation, might suggest that the defendant abandoned it," and the fact that an injured individual buckled up the bag and left it on the side of a road to hitch a ride and retrieve it later outweighed that fact); State v. Desimone, 2005 WI Ct. App. 233U (finding that a defendant did not relinquish her expectation of privacy in her property when she "placed her cigarettes, wallet and keys inside a mailbox so that the items would not get wet and because she was afraid of lightning"); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3(d) (4th ed. 2004) ("Assessment of a defendant's privacy expectation vis-a-vis the item may also be aided by considering if he dealt with that item in a fashion which reflects an effort on his part to maintain privacy."); *cf.* United States v. Mancini, 8 F.3d 104, 110 (1st Cir. 1993) (protecting the interests of a mayor in documents in city hall where the mayor "took steps to assure that no one would have access to his files without his prior authorization," and "belongings were clearly labeled and were segregated from other items in the secured archive attic," though the items might be considered papers rather than effects); United States v. Delgado, 903 F.2d 1495, 1502 (11th Cir. 1990) (suggesting that the search of a shirt found in a warehouse, had it been challenged in trial court, might have raised a Fourth Amendment issue). In addition to these decisions interpreting the Fourth Amendment of the U.S. Constitution, several state courts have used a contextual-privacy approach in interpreting analogous state-constitutional provisions. *See* State v. Joyce, 639 A.2d 1007, 1013-15, 1014 n.13 (Conn. 1994) (finding under a state constitutional search and seizure provision that the clothing of a burn victim stripped by paramedics could not be searched while in police safekeeping); State v. Westover, 666 A.2d 1344, 1349 (N.H. 1995) (finding that the circumstances weighed in favor of an individual retaining his expectation of privacy in a sweatshirt he tossed on the ground outside a convenience store).

126. 2002 ND 189, ¶ 2, 653 N.W.2d 688, 690.

127. *Id.* ¶ 2, 653 N.W.2d at 690.

did not check to see if anyone inside owned it.[128] The North Dakota Supreme Court concluded that, though the jacket was located next to a driveway and was lawfully accessible to the officers, the object's proximity to a house full of people, its relationship to cars in the driveway, and the officers' failure to inquire as to the jacket's ownership rendered the search of the pockets a violation of the owner's legitimate expectation of privacy.[129]

Likewise, in the Maryland case of *Morton v. State*, the defendant was suspected of robbery and under surveillance by officers as he played basketball in a public recreational facility.[130] During an unlawful arrest, an officer took the jacket and plastic bag that the defendant had been carrying from the side of the court, searched them, and found a handgun and marijuana.[131] The government argued, and the trial court accepted, that the defendant had "abandoned" his expectation of privacy in these items because they were not in the defendant's "control."[132] The Maryland Court of Appeals rejected this reasoning, observing that "[p]ersons who avail themselves of the facilities at a public recreation center and place their belongings on the sidelines of a basketball court do not, without more, forfeit the legitimate expectation that those belongings will remain undisturbed."[133] This makes sense in light of the space (a recreational facility) and the property (a jacket and a bag, the sorts of objects people generally leave along the sideline during recreational activity). People leave their belongings unattended while they are playing ball and do not expect that others will rifle through them. The court took notice of that expectation.[134]

Intriguingly, at least two jurisdictions have characterized their contextual-privacy approaches as "trespass to effects" tests, albeit in interpreting state constitutional search provisions. The Oregon courts were the first to hold that a "physical trespass to a personal effect" that has not been abandoned could suffice to prove a violation of state constitutional search protections.[135] In the

128. *Id.* ¶ 9, 653 N.W.2d at 692.

129. *Id.* ¶¶ 7-15, 653 N.W.2d at 691-93.

130. A.2d 1385, 1387 (Md. 1979).

131. *Id.*

132. *Id.* at 1387-88.

133. *Id.* at 1390.

134. *Id.*

135. State v. Rounds, 698 P.2d 71, 73 (Or. Ct. App. 1985) (en banc). At first, the Oregon courts viewed this inquiry as separate from any inquiry into privacy. *See id.* Subsequent cases have suggested that the "trespass to unabandoned effects" inquiry and the inquiry into privacy are the same. *See, e.g.*, State v. Belcher, 749 P.2d 591, 593 (Or. Ct. App.) (en banc) ("Stated differently, in the constitutional context we are concerned with whether the owner has 'abandoned' his right of privacy in the property so that its inspection presents no question of a search with constitutional implications." (citations omitted)), *aff'd*, 759 P.2d 1096 (Or.

seminal case, the "[d]efendant went to his grandfather's home, tried the doors and, finding no one home, left his backpack leaning against a woodpile in the carport" for fifteen minutes.[136] In the interim, a neighbor reported seeing a suspicious person, and officers searched the backpack and found drugs inside a cigarette box. Because the duration was short, the property was a cigarette box inside luggage, and the location was a private driveway, the court found that the property was not abandoned, and that this "trespass" violated the defendant's constitutional rights.[137] New Hampshire followed suit in a case about a sweatshirt left outside a convenience store, and held that when circumstances indicate that the property is not abandoned, a trespass to an effect alone triggers a constitutional violation.[138]

Despite appearances from the cases cited in this Section, the contextual approach does not always recognize protections for property in public spaces. In *Powell v. State*, another Maryland case, the defendant placed a small paper bag "gingerly and gently" on a curb, then backed away a few steps and stood still.[139] Shortly thereafter, he was apprehended and the bag was searched, revealing glass jugs of cocaine.[140] The court looked at a number of the same factors as the court of appeals had in *Morton v. State*.[141] The property here was a brown paper bag. "In contrast to items such as a purse, clothing, jewelry, a suitcase, a backpack, a briefcase, a wallet, or other obviously personal or valuable items, the only reasonable inference is that the brown, softball-sized bag, from its appearance and location, resembled discarded trash."[142] It was left in a fairly vulnerable space: on a curb in an urban area.[143] On the other hand, the defendant was nearby, he claimed at trial that he had not intended to

1988). For Oregon cases achieving different results applying the same contextual approach, compare *State v. Kendall*, 24 P.3d 914, 917 (Or. Ct. App. 2001), which found a Fourth Amendment violation when officers searched a bicycle, property "common for a person to leave . . . outdoors[] unattended" on private property, with *Belcher*, 749 P.2d at 593, which found that a defendant had abandoned his privacy interest in a bag after fleeing police and leaving his pack "in a public place." It should be noted that although some language in these cases indicates that the court examines whether an individual has abandoned privacy interests, Oregon has interpreted that more contextually and expansively than the abandonment of privacy approaches limned *supra* Section I.B.

136. *Rounds*, 698 P.2d at 72 (footnote omitted).

137. *Id.* at 73.

138. State v. Westover, 666 A.2d 1344, 1348-49 (N.H. 1995).

139. 776 A.2d 700, 705 (Md. Ct. Spec. App. 2001).

140. *Id.* at 703.

141. *Id.* at 710-11.

142. *Id.* at 713.

143. *Id.* at 703.

abandon the bag, it was not left for long, and he placed it carefully on the ground.[144] However, for the *Powell* court, this was not enough to overcome the factors weighing in favor of a determination that he had abandoned his expectation of privacy with respect to that property.[145]

These contextual-privacy approaches taken by some lower courts are thus more inclusive of personal property and take into account both efforts to preserve privacy and prevailing norms, but they suffer from other flaws. Importantly, most courts have not systematically laid out the factors that should be considered in constructing an individual's reasonable expectations of privacy with respect to items.[146] Accordingly, the contextual-privacy approach is vulnerable to the criticism that it is indeterminate and risks overbreadth. An example from the case law may illustrate. In *Lavan v. City of Los Angeles*, the court evaluated whether an ordinance permitting cleanups of Skid Row violated the residents' Fourth and Fourteenth Amendment rights, but without any metrics for discerning protected property from unprotected property.[147] The majority held that unattended personal property was protected from search and seizure when left on public sidewalks,[148] so that the owners could "get food, shower, use the bathroom, obtain medical care and other private and government services, and go to work."[149] Though the majority admirably

144. *Id.* at 704.

145. *Id.* at 714.

146. A few jurisdictions have adopted a sort of "totality-of-the-circumstances approach to determine whether a defendant has an actual or subjective expectation of privacy in the object of a search." State v. Ross, 49 S.W.3d 833, 841 (Tenn. 2001); *see also* United States v. Haydel, 649 F.2d 1152, 1154-55 (5th Cir. Unit A July 1981) (enumerating a variety of factors to be considered when evaluating a defendant's possessory interest). The seven factors in this test focus primarily on the location: "(1) [whether the defendant owns the property seized]; (2) whether the defendant has a possessory interest in the thing seized; (3) whether the defendant has a possessory interest in the place searched; (4) whether he has the right to exclude others from that place; (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion; (6) whether he took normal precautions to maintain his privacy; and (7) whether he was legitimately on the premises." *Ross*, 49 S.W.3d at 841 (alterations in original) (quoting *Haydel*, 649 F.2d at 1154-55). Apart from these, only Maryland has laid out the contextual factors it considers: "[W]e have evaluated the location of the property and assessed whether the area is secured. We have also assessed how long the property remained in the location prior to the search and the condition of the property at the time of the search. In addition, we have considered whether the owner requested a third party to watch or protect the property. Finally, we have considered whether the owner disclaimed or failed to claim the property when questioned by police." Stanberry v. State, 684 A.2d 823, 829-30 (Md. 1996) (citations omitted).

147. 693 F.3d 1022, 1024 (9th Cir. 2012).

148. *Id.* at 1023-24.

149. *Id.* at 1034 (Callahan, J., dissenting).

protected a vulnerable population from government destruction of their goods,[150] experience suggests that there may be significant differences between an individual's privacy and property interests in items left alone momentarily and items left unattended for hours or days on a sidewalk during a workday. Moreover, different kinds of interests are at stake depending on whether the property is a hypodermic needle, sweaters in a shopping cart, or a personal lockbox.[151] The Ninth Circuit opinion contains no standards for officers and city legislators to use in drafting or enforcing a constitutionally permissible cleanup ordinance.

Relatedly, courts following contextual-privacy approaches still lack any way of identifying an "effect." A few lower courts have tried a variety of unsatisfying approaches.[152] The Texas Court of Appeals has analyzed whether dirt in a truck bed was an effect by examining the truck owner's privacy interest in it, describing "constitutionally protected effects as those 'in which the public at large has a legitimate expectation of privacy.'"[153] The Fourth Circuit adopted a different approach in analyzing whether a pet dog was an "effect": it asked whether a pet constituted an effect in 1791.[154] It is unclear

150. *Id.* at 1033.

151. *Cf. id.* at 1034 n.1 ("The majority opinion focuses on the interests of the homeless in Skid Row who leave their property unattended and does not acknowledge the interests of the other people in Skid Row – homeless or otherwise – who must navigate a veritable maze of biohazards and trash as they go about their daily business. Certainly, the City is charged with protecting the health and safety of individuals who comply with the law but are forced to live in the unsanitary and unsafe conditions created by other residents.").

152. Early cases often declared that contraband items could not be constitutional effects, given that the legislature had outlawed their possession, but offered little guidance otherwise. *See* Glennon v. Britton, 40 N.E. 594, 597 (Ill. 1895) ("Certain articles or things customarily regarded as property, when lawfully acquired and used for a lawful purpose, may, by proper statutory enactment, cease to be so treated, and become liable to seizure, forfeiture, and destruction, if they or their use is deemed pernicious, or dangerous to the public welfare."); Hastings v. Haug, 48 N.W. 294, 295-96 (Mich. 1891) (suggesting that most possessions must be particularly described in the warrant authorizing search and seizure, but not when objects of search and seizure are "tools and machines used in counterfeiting, or for counterfeit coin, or for obscene books"). *But see* Herman v. State, 8 Ind. 545, 557-60 (1855) (using the constitutional provision against unreasonable searches and seizures of effects to hold that "the legislature cannot prohibit the manufacture and sale, for use as a beverage, of ale, porter, [and] beer").

153. Cullen v. State, 832 S.W.2d 788, 794 (Tex. App. 1992) (quoting United States v. Jacobsen, 466 U.S. 109, 114 (1984)).

154. Though it found that animals were not considered property in 1791, the Fourth Circuit found that they were sufficiently property-like to merit protection. *See* Altman v. City of High Point, 330 F.3d 194, 201, 203 (4th Cir. 2003). Including the Fourth Circuit, seven federal courts of appeals have held that pets are "effects" within the meaning of the Amendment. *See* Carroll v. Cty. of Monroe, 712 F.3d 649, 649 (2d Cir. 2013) (per curiam);

which court, if either, is on the right track. The contextual-privacy approach, in short, suffers from lack of clarity in nearly every jurisdiction that has followed it. There are few clear definitions, tests, or steps for courts to follow in deciding how to approach an effect search.

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We are thus left with three unsatisfactory ways of determining what effects are and how to separate protected ones from unprotected ones. The *Jones* per se rule and other Supreme Court cases offer little guidance on either question. The locational-privacy approach is based on flawed doctrine and may have been abrogated by *Jones*. And contextual privacy provides more protection for effects, but fails to provide principled standards for distinguishing protected effects from unprotected ones, let alone guidance for police officers and legislators to structure their behavior.

To address this legal void, this Article turns to history to examine why effects were specifically included in the constitutional text and what values this protection for personal property historically served. Until *Jones*, effects received little treatment in the case law. Unlike houses, persons, and papers, the circumstances of their inclusion in the Constitution have been forgotten. But as the next Part reveals, harms to effects were a critical part of the arguments that individuals needed greater protection from unrestrained searches and seizures – and not just because they might have been located in protected space.

II. THE FOUNDING-ERA HISTORY OF EFFECTS

Historians and legal scholars have generally paid little attention to the role of personal items in the controversies over British searches and subsequent seizures that led to the passage of the Fourth Amendment. Instead, they have focused on more famous episodes involving egregious searches of papers and houses.[155] While these episodes were surely the primary impetus for the

Maldonado v. Fontanes, 568 F.3d 263, 270 (1st Cir. 2009); Villo v. Eyre, 547 F.3d 707, 710 (7th Cir. 2008); Brown v. Muhlenberg Twp., 269 F.3d 205, 209-10 (3d Cir. 2001); Fuller v. Vines, 36 F.3d 65, 68 (9th Cir. 1994); Lesher v. Reed, 12 F.3d 148, 150 (8th Cir. 1994).

155. These more famous episodes generally cluster into three groups. First, in England, courts first began criticizing invasive searches targeted to editors of critical publications in decisions like *Wilkes v. Wood* (1763) 98 Eng. Rep. 489; 489 C.P. 1763, and *Entick v. Carrington* (1765) 95 Eng. Rep. 807; 807 KB 1765. At the same time, Americans were enduring and protesting the widespread use of general writs to search homes and warehouses for smuggled goods. 2 LEGAL PAPERS OF JOHN ADAMS 123-34 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965); *Paxton's Case*, *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED

constitutional guarantees regulating searches and seizures, a history focusing on the objects of these searches illuminates a different set of currents. The inclusion of effects in the Constitution was not an afterthought. Instead, both constitutional history and contemporary sources indicate that transgressions to personal property were important motivations for constitutional protection from search and seizure. These invasions caused harms to the privacy and security of individuals distinct from, but on par with, the harms caused by incursions on persons, papers, and houses. Personal property was important because of the property values at stake, which existed separately from privacy or property interests in the effect's location, and the constitutional protection against search and seizure was connected to the law of wrongs against personal property more generally. The failure of the Supreme Court to ground its protection for effects in constitutional history accordingly gives us a body of precedent from courts at all levels that privileges locational information, not the rights in rem that the Amendment was intended to protect.

A. The Constitutional History of Effects

Effects wound their way into the constitutional text through the Bill of Rights, but the textual history surrounding the inclusion of the word "effects" has rarely been discussed.[156] This Section accordingly reviews the textual history of effects, beginning with the state constitutional protections that predated the federal Constitution, proceeding through the proposals from state ratifying conventions, and concluding with the revisions at the federal level that led to the protection for effects as it now stands. Though this Article does not take the position that this history is determinative of the scope of protection, the Court has found the history behind Fourth Amendment protections persuasive in fashioning rules for persons and houses.[157] Thus, this

AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 51 (Boston, Little, Brown & Co. 1865); *see* LASSON, *supra* note 5, at 55-63. Finally, in 1767, Parliament further catalyzed these concerns by reauthorizing the use of general warrants in the colonies, generating conflicts that continued all the way to the Declaration of Independence. Davies, *supra* note 1, at 566.

156. *But see* Davies, *supra* note 11, at 87-172; Davies, *supra* note 1, at 706-15.

157. *See, e.g.*, Silverman v. United States, 365 U.S. 505, 511 (1961) ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); Boyd v. United States, 116 U.S. 616, 624-31 (1886) (discussing important Founding-era history of searches and seizures of papers); *see also* Chimel v. California, 395 U.S. 752, 760-61 (1969) ("[T]he Amendment's proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words'—a history of

Article tells the story behind "effects" to marshal historical support for broader protections of personal property, in addition to the functional and doctrinal support for such an intervention.

The Framers used the word "effects" in the Fourth Amendment with guidance from state-level sources. Four state constitutional provisions preceding the Bill of Rights included specific protections for personal property. The first state constitution to reference possessions came from Pennsylvania.[158] It provided "[t]hat the people have a right to hold themselves, their houses, papers, and *possessions* free from search or seizure."[159] Vermont adopted this section—embodying the houses-papers-possessions construct—verbatim,[160] and both Massachusetts and New Hampshire used very similar formulas.[161] In

'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution.'" (quoting United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting))).

158. When the colonies declared independence, twelve of the fourteen earliest states adopted new constitutions; this included Vermont, which was not formally recognized by other colonies, but considered itself an independent republic. Rhode Island and Connecticut continued to operate under their colonial charters, though Connecticut did adopt a "constitutional ordinance" in 1776. Eight of these new constitutions included declarations of rights. *See* Davies, *supra* note 11, at 89. Georgia, New Jersey, and South Carolina did not have declarations of rights, and the constitutions made no mention of searches or seizures. *See* GA. CONST. of 1777; N.J. CONST. of 1776; S.C. CONST. of 1776. New York adopted a constitution, but no declaration of rights until 1787. The New York constitution also did not contain a search and seizure provision. *See* N.Y. CONST. of 1777; NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS para. 10.1.3.6.c, at 353 (1997). Some of these constitutions did include a broad paraphrase of the Magna Carta prohibition on deprivations of property except according to the "law of the land." *See* Davies, *supra* note 11, at 108-12. The four earliest state constitutions provided no enumerated protection for personal property. Maryland, North Carolina, Delaware, and Virginia had constitutional provisions broadly proscribing deprivation or destruction of property during unlawful searches and seizures, but the constitutions did not specifically refer to "effects," "possessions," or personal property. DEL. CONST. of 1776, § 17; MD. CONST. of 1776, art. XXI-XXII; N.C. CONST. of 1776, art. XII; VA. CONST. of 1776, § 10. The due process coverage in these clauses may have protected possessions, of course.

159. PA. CONST. of 1776, art. X (emphasis added).

160. VT. CONST. of 1777, ch. I, art. XI.

161. MASS. CONST. of 1780, pt. 1, art. XIV, *reprinted in* 1 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 21 (Boston, I. Thomas & E.T. Andrews 1801) ("Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions."); N.H. CONST. of 1784, art XIX ("Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions."). These state provisions actually had an analogue in an unexpected place: the very earliest legal codes in the American colonies, coming from Massachusetts, New Haven (a distinct colony at the time), and Connecticut. Each of these colonies provided that "no mans goods or estaite shall be taken away from him, nor any way indammaged under colour of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country waranting the same. . . ." *The*

addition to these four state constitutional provisions, members of state ratifying conventions from six states recommended that the Federal Constitution include specific protection for personal property. The minority share of members from Maryland,[162] Massachusetts,[163] and Pennsylvania[164] and the majority share of members from New York,[165] North Carolina,[166] and Virginia[167] each suggested that the Constitution include provisions guaranteeing freemen the right to be secure in their "property" or "possessions" from unreasonable searches and seizures.

From the state proposals, these propositions for protection of items made their way into the federal Constitution through the Bill of Rights. The history of the passage of the Bill of Rights is well-trodden territory.[168] It suffices to say here that the Constitution as ratified by several states did not originally include the Bill of Rights, though "Anti-Federalists" in other states—fearful of a powerful centralized federal government—were able to hold up ratification until conciliatory amendments were on the table, including one covering search and seizure. James Madison's proposal on June 8, 1789, for what eventually became the Fourth Amendment, tracked the proposals made by the six aforementioned state ratifying conventions, as well as the extant provisions of

Liberties Of the Massachusets Collonie in New England (1641), *reprinted in* 7 OLD SOUTH LEAFLETS 261, 261 (Boston, Dirs. of the Old S. Work n.d.); *see also* J. HAMMOND TRUMBULL, THE TRUE-BLUE LAWS OF CONNECTICUT AND NEW HAVEN AND THE FALSE BLUE LAWS FORGED BY PETERS 61-62, 190 (Hartford, Am. Publ'g Co. 1876) (containing the provisions used by Connecticut and New Haven). While these Massachusetts, New Haven, and Connecticut provisions are generally linked to the history of the Due Process Clause and Takings Clause of the Fifth Amendment, the Fourth and Fifth Amendments are demonstrably related. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 80 (1998) ("There is . . . a conspicuous connection between the Fourth Amendment's limitations on 'seizures' of 'houses' and 'effects' and the Fifth's restrictions on 'takings' of 'private property.'").

162. *Proposal of Maryland Minority*, Apr. 26, 1788, *reprinted in* COGAN, *supra* note 158, para. 6.1.2.1, at 232.

163. *Proposal of Massachusetts Minority*, Feb. 6, 1788, *reprinted in* COGAN, *supra* note 158, para. 6.1.2.2, at 232-33.

164. *Proposal of Pennsylvania Minority*, Dec. 12, 1787, *reprinted in* COGAN, *supra* note 158, para. 6.1.2.5, at 233.

165. *Proposal of New York*, July 26, 1788, *reprinted in* COGAN, *supra* note 158, para. 6.1.2.3, at 233.

166. *Proposal of North Carolina*, Aug. 1, 1788, *reprinted in* COGAN, *supra* note 158, para. 6.1.2.4, at 233.

167. *Proposal of Virginia*, June 27, 1788, *reprinted in* COGAN, *supra* note 158, para. 6.1.2.6, at 233.

168. *See generally* THE COMM'N ON THE BICENTENNIAL OF THE U.S. CONSTITUTION, THE BILL OF RIGHTS AND BEYOND 6-16 (1991) (discussing the history of and the debate over the Bill of Rights); DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 221-45 (1990) (same).

the four state constitutions. Madison proposed that "[t]he rights of the people to be secured in their persons; their houses, their papers, and *their other property*, from all unreasonable searches and seizures, shall not be violated . . . ."[169]

The Committee of Eleven—a committee made up of a delegate from each state that had already ratified the Constitution—reviewed this proposal, struck "their other property," and replaced it with the word "effects."[170] This left the Fourth Amendment in substantially its present form: "The right of the people to be secure in their person, houses, papers and effects, shall not be violated . . . ."[171] From the Committee of Eleven on, no further proposals were made to change the personal-property phrasing of the Amendment before the Bill of Rights was ultimately adopted.[172]

The selection of the term "effects" is curious. No state constitution included the word, nor did any of the proposals from state-convention members. Indeed, the first and only source to use the word before its inclusion

169. 1 JOSEPH GALES, ANNALS OF CONGRESS 452 (Washington, Gales & Seaton 1834) (emphasis added).

170. *House Committee of Eleven Report*, July 28, 1789, *reprinted in* COGAN, *supra* note 158, para. 6.1.1.2, at 223-24.

171. *Id.* The Fourth Amendment might be read to forbid only seizures of effects, and not searches of effects, because the latter part of the Amendment provides that warrants must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Nevertheless, the Supreme Court has long held that "[t]he Fourth Amendment protects 'effects' as well as people from unreasonable searches and seizures," United States v. Place, 462 U.S. 696, 716 (1983), and there are a few historical reasons to support that interpretation. At a minimum, houses are not the outer limit of "places" that can be searched. And searches of persons were well known at the time the Amendment was drafted, even though the latter part of the Amendment references only "seizures" of persons (and things). Second, state constitutions provided many other constructions that more clearly proscribed "searches" of physical spaces and "seizures" of objects, but those were not chosen. For example, the Maryland Constitution provided "[t]hat all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive . . . ." MD. CONST. of 1776, art. XXIII. On the other hand, it should be noted that a few contemporary sources placed a comma in their report of the proposed federal amendments, indicating something closer to the Maryland formulation. A Pennsylvania newspaper, for example, reported the Amendment as follows: "[T]hat every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers, and property . . . ." *American Intelligence*, INDEP. GAZETTEER, July 10, 1788, at 1. This suggests a different understanding, but it may have been a misinterpretation or misprint on the part of the reporter.

172. *See* 1 GALES, *supra* note 169, at 783. Further congressional consideration did change "person" to "persons" and reinserted the phrase "against unreasonable searches and seizures" after "effects." *See* COGAN, *supra* note 158, at 224-25 (citing the debates and correspondence that led to these changes).

in the Federal Constitution was the anti-Federalist publication *Federal Farmer*, which included the phrase in a letter printed in 1787:

> The following, I think, will be allowed to be unalienable or fundamental rights in the United States: . . . No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects . . . .[173]

Apart from the Constitution itself, no other source before or after this letter used the word "effects" in this context. Indeed, a far greater number of anti-Federalist commentators used either "possessions" or "property" as parallels to "persons" and "papers" around the same time.[174]

Though no record of the reason for the change from "property" to "effects" in the Committee of Eleven exists, later readers generally agree that the consequence was to narrow the Amendment's coverage.[175] While "other property" could have encompassed other real property, dictionaries from the period indicate that "effects" was synonymous with personal property: possessions other than buildings and land. Each of the ordinary dictionaries cited by the modern Court as authority for the original meaning of the Constitution defines "effects" to mean chattels or possessions. Noah Webster's

173. *No. 6*, FED. FARMER, Dec. 25, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 256, 262 (Herbert J. Storing & Murray Dry eds., 1981).

174. *E.g.*, *Letter IV*, FED. FARMER, Oct. 12, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 173, at 245, 249 (describing the desired "freedom from hasty and unreasonable search warrants . . . for searching and seizing men's papers, property, and persons"); *see also* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 532 (Washington, Elliot 2d ed. 1836) (recording an argument by Patrick Henry, during Virginia's ratification debates, that "any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power"); Brutus, *No. 2*, N.Y.J., Nov. 1, 1787, *reprinted in* 13 MERRILL JENSEN ET AL., THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 527 (1976); Centinel, *No. 1*, INDEP. GAZETTEER (Philadelphia), Oct. 5, 1787, *reprinted in* JENSEN, *supra*, at 329 ("Your present frame of government [in Pennsylvania], secures you to a right to hold yourselves, houses, papers and possessions free from search and seizure . . . . [W]hether your *papers*, your *persons* and your *property* are to be held sacred and free from *general warrants*, you are now to determine."); Centinel, *No. 2*, FREEMAN'S J. (Philadelphia), Oct. 24, 1787, *reprinted in* JENSEN, *supra*, at 466-67 ("[T]he people have a right to hold themselves, their houses, papers and possessions free from search or seizure . . . .").

175. Davies, *supra* note 1, at 708-09; *see* Altman v. City of High Point, 330 F.3d 194, 201 (4th Cir. 2003) ("The effect of that change is clear however; it narrowed the scope of the amendment.").

1828 dictionary defines "effects" as "goods; movables; personal estate"[176] and provides the following example sentence: "The people escaped from the town with their *effects*."[177] Apart from ordinary dictionaries, early legal dictionaries also shed light on the meaning and types of effects.[178] In some dictionaries, effects include money and other forms of commercial paper.[179] Though the term was most commonly associated with bankruptcy or inheritance, it was not exclusively a term of art for those contexts. Eighteenth-century sources discuss the duty of innkeepers to keep guests' "goods and effects" safe and the rights of

176. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828); *accord* 1 JOHN ASH, *Effect*, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward & Charles Dilly 1775) (defining "effect" in the plural as "goods; chattels"); N. BAILEY, *Effects*, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edward Harwood ed., London, J.F. & C. Rivington et al. 25th ed. 1790) (defining "effects" as the "Goods of a Merchant, Tradesman, &c."); JAMES BARCLAY, *Effect*, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (London, J.F. & C. Rivington et al. 1792) (defining "effect" in the plural as "goods, furniture, or moveables"); THOMAS DYCHE & WILLIAM PARDON, *Effects*, A NEW GENERAL ENGLISH DICTIONARY (London, Catherine & Richard Ware 11th ed. 1760) (defining "effects" as the "goods or moveables of a merchant, tradesman, gentleman, &c."); 1 SAMUEL JOHNSON, *Effect*, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 10th ed. 1792) (defining "effect" as "goods, moveables"); WILLIAM PERRY, *Effects*, THE ROYAL STANDARD ENGLISH DICTIONARY (Isaiah Thomas ed., Worcester 1788) (defining "effects" as "goods, moveables, possessions"); 1 THOMAS SHERIDAN, *Effect*, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Charles Dilly 3d ed. 1790) (defining "effect" in the plural as "goods, moveables"); JOHN WALKER, *Effect*, A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE (London, G.G.J. Robinson, J. Robinson & T. Cadell 1791) (defining "effects" in the plural as "goods, moveables"). For further information on Founding-era dictionaries, see Gregory E. Maggs, *A Concise Guide To Using Dictionaries from the Founding Era To Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358 (2014).

177. WEBSTER, *supra* note 176, at 641 (emphasis added).

178. *See, e.g.*, 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 17, 19, 88, 435 (London, A. Strahan & W. Woodfall 1792) (declaring, for example, that administration of a wife's "goods and chattels" should be granted after her death to her husband, and "the husband's effects, to the widow"); 1 T. CUNNINGHAM, *Attachment*, *Bankruptcy*, A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW (London, S. Crowder & J. Coote 1764) (noting that attachment shall be granted for court officers guilty of corrupt practices, including giving a defendant "notice to remove his person or effects, in order to prevent the service of any writ" and declaring that the effects of the bankrupt person shall be delivered to the assignees); GILES JACOB, *Bankrupt*, A NEW LAW-DICTIONARY (The Savoy [London], Henry Lintot 6th ed. 1750) (noting that the Commissioners should assign "the *Bankrupt*'s Effects" to those chosen by creditors); THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY 52, 192, 219, 39 (London, T. Ostell 1803) (advising, for example, that a bankrupt person must "disclose and discover all his estate and effects, real and personal").

179. 1 CUNNINGHAM, *supra* note 178 (quoting in the definition for champarry the earlier directive of the Lord Commissioners providing rules for transfers and custody of "sum[s] of money, tallies, orders, bonds, deposites, securities, and other effects").

robbed persons to prove which "money, goods or effects" had been taken.[180] These and other early sources indicate that the term "effects" meant "personal property" in common and colloquial usage.[181]

B. Threats to Personal Property in Founding-Era Sources

Although the Supreme Court has held that "the Amendment's proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words,'"[182] that history has remained obscure for effects. As it turns out, personal property featured quite prominently in Founding-era grievances against the British and, later, in calls to support constitutional restrictions on federal power. This history demonstrates that effects were specifically included in the constitutional text because of the harms to privacy and dignity that could be incurred by their inspection, but also because of the risk of mishandling or damage generally associated with interferences with personal property.

Threats of government wrongs to certain categories of personal property were repeatedly invoked in the Anti-Federalist and Revolution-era sources that Madison consulted while drafting the Bill of Rights.[183] Clothing was one of these categories: authors wrote about suffering searches of the clothing they carried on journeys,[184] and orators gave impassioned speeches about officers

180. 2 *id.* (quoting the definitions for inn and rob).

181. *E.g.*, *Declaration of the Cause and Necessity of Taking Up Arms*, July 6, 1775, *reprinted in* U.S. CONG., DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 69-398, at 10 (1st Sess. 1927); *Boston*, BOS. GAZETTE, Oct. 18, 1748, at 1; *Copy of a Letter from General Gage to the Earl of Hillsborough*, BOS. GAZETTE, Jan. 23, 1769, at 6; *see also* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only A Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 104 n.261 (2010) (providing additional citations to Founding-era uses of effects).

182. Chimel v. California, 395 U.S. 752, 760-61 (1969) (quoting United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)).

183. Madison consulted contemporary newspapers, pamphlets, and court cases, as well as constitutional convention debates. Fisher Ames, *Letter to Thomas Dwight*, *reprinted in* CREATING THE BILL OF RIGHTS 247 (Helen E. Veit et al. eds., 1991) ("Mr. Madison has introduced his long expected Amendments. They are the fruit of much labour and research. He has hunted up all the grievances and complaints of newspapers—all the articles of Conventions—and the small talk of their debates.").

184. *See To the Farmers and Planters of Maryland*, MD. J., Apr. 1, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 173, at 74, 75 ("Nay, they often search the clothes, petticoats and pockets of ladies or gentlemen (particularly when they are coming from on board an East India ship), and if they find any the least article that you cannot prove the duty to be

"measur[ing]" "every thing you eat, drink, and wear."[185] Clothing—a necessity for civilized life—was associated with self-expression, of course, but the search of clothing could also affect one's dignity and livelihood. For that reason, clothing had special status elsewhere in the law of personal property: several early colonial statutes exempted clothing and bedding from confiscation for the satisfaction of debts.[186] Contemporary sources also decried invasions of an individual's repositories for letters, heirlooms, and valuables, namely cabinets, closets, desks, and bureaus.[187] If a man's house was his castle, his desks and cabinets were the crown jewels.

Clothing and repositories would generally be found in the home or on the person, but a few Founding-era sources discussed the search and seizure of personal property outside the house, indicating that the colonists were likely aware that personal items were susceptible to government intrusion regardless of location.[188] For example, some searches and seizures of effects located on

paid on, seize it and carry it away with them; who are the very scum and refuse of mankind, who value not their oaths, and will break them for a shilling.").

185. *See* 3 ELLIOT, *supra* note 174, at 448-49 (recording an argument by Patrick Henry, during Virginia's ratification debates, that without a bill of rights, tax collectors "may . . . search, ransack, and measure, every thing you eat, drink, and wear.").

186. CUDDIHY, *supra* note 1, at 422.

187. *See The Rights of the Colonists, a List of Violations of Rights and a Letter of Correspondence, 28 October 1772*, *reprinted in* 2 THE WRITINGS OF SAMUEL ADAMS 350, 361 (Harry Alonzo Cushing ed., 1906) [hereinafter *Boston Town Meeting of 1772*]; *To the Farmers and Planters of Maryland*, *supra* note 184, at 75. The famous case of *Entick v. Carrington* also referred to officers breaking "open the boxes, chests, drawers, &c." (1765) 95 Eng. Rep. 807, 807; 807 KB 1765. Repositories could also be found on the person—like satchels, cases, and other items for carrying valuables—though I have not found specific reference to searches of those items in this period.

188. Notably, slaves were a peculiar class of effects subject to search and seizure outside the home with nearly no criticism. There is little doubt that slaves were considered "effects" in the eighteenth century. *See Advertisements*, WKLY. NEWSL. (Boston), May 2, 1728, at 2 (referring to an individual absconding with "Four Negro's [sic], and sundry other effects"); *Congress*, FED. REPUBLICAN & COM. GAZETTE (Philadelphia), June 22, 1809, at 1 (referring to "slaves and other effects"); *On Wednesday*, CITY GAZETTE S.C. (Charleston), Apr. 10, 1788, at 1 (referring to "[b]etween forty and fifty Negroes, and sundry other effects"); *Portsmouth, May 25*, PA. GAZETTE, Aug. 10, 1758, at 3 (referring to "Gold, Slaves, and other Effects"). Slave patrols had a long history in British law in the colonies, though these patrols had different degrees of authorization to enter different places and to undertake different scopes of search. *See* CUDDIHY, *supra* note 1, at 218-27, 559-61, 625-26. The patrol did, however, exercise a judicial function in deciding where and what to search, and regulations requiring multiple officers acted as somewhat of a limitation on this unchecked power. *See* State v. Hailey, 28 N.C. (6 Ired.) 11, 12-13 (1845); Richardson v. Salter, 4 N.C. (68 Taylor) 505, 506-07 (1817); ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868, at 108 (2006). Nevertheless, I have found no instances where a master claimed that a slave had been wrongfully searched or seized while the slave

ships provoked the ire of colonial commentators when those actions interfered with particular types of personal property.[189] Admittedly, legislation authorized wide-ranging warrantless searches on ships both before and after the Founding,[190] but this might be explained by the fact that most areas of ships would not contain the sorts of personal items that concerned individuals in the Founding era. Indeed, some evidence suggests that contemporaries did object to searches or seizures of items on ships that resulted in the uncovering or seizure of personal goods owned by crewmembers or intended for the crew's use (rather than examination and seizure of items that were being imported for sale).[191] Virginia newspapers covered an incident in Jamaica where Spanish customs officers accused a British ship of smuggling, tied up a sailor, "and took from him his Buttons, Buckles, and every Thing of Value, as well as his Chest of Cloaths, Moveables in the Cabin, private Papers, and others belonging to his Vessel."[192] In the 1760s, newspapers from Connecticut and Massachusetts criticized customs officers who searched ship cabins to find personal food or liquor stores meant for the ships' crews.[193] One of these papers, *The Essex*

was out in public. Later state cases held that in the absence of patrol legislation, entries into slave houses could be protested by masters. *See, e.g.*, Thompson v. State, 25 Ala. 41, 45 (1854).

189. Akhil Amar has suggested that "effects" included ships, although there is not much clear evidence either way. *See* Amar, *supra* note 1, at 766-67. I have found only one source that indicates that usage. 2 CUNNINGHAM, *supra* note 178 (quoting the definition of outlawry: "*A.* who was a foreign merchant and never in *England* was outlawed at the suit of *B.* in an action on several promises for goods sold and delivered; and upon a special *capias utlagatum* a ship and other effects belonging to *A.* were seized, as forfeited upon this outlawry . . . .").

190. Many commentators have used ship searches to advance their broader theories about the propriety of warrantless search. *See* Amar, *supra* note 1, at 766-67 (arguing that the common warrantless search of ships provides proof that the Fourth Amendment requires only generalized reasonableness); Davies, *supra* note 1, at 605-06 ("In late eighteenth-century thought, ships were neither 'houses, papers, and effects [or possessions]' nor 'places.' They were ships."); *see also* Carroll v. United States, 267 U.S. 132, 150-53 (1925) (analogizing automobiles to ships in giving them lesser Fourth Amendment protection than the house). *But see* CUDDIHY, *supra* note 1, at 757-58 (suggesting that "ship seizures" were not uniquely unprotected, but instead that probable cause had already been created for warrantless searches in the law of admiralty courts); *contra* Davies, *supra* note 181, at 93 n.207 (refuting William Cuddihy's attempt to connect jurisdictional assignments regarding ship seizures to the scope of Fourth Amendment protections). Cuddihy has also suggested that ships may have been special either because of their mobility or because the concentration of crewmen rendered privacy impossible. CUDDIHY, *supra* note 1, at 767-68.

191. *But see* Davies, *supra* note 1, at 604 (suggesting that it is difficult to determine whether contemporary objections to ship seizures were really commentaries on seizure or merely objections to corrupt customs officers).

192. *Spanish Injustice and Barbarity*, VA. GAZETTE (Williamsburg), Nov. 5, 1751, at 1.

193. *Journal of the Times, Boston, March 9*, 288 NEW LONDON GAZETTE, May 19, 1769; *Journal of the Times, Boston, May 20*, 1 ESSEX GAZETTE 52, July 25, 1769, at 207.

Gazette, wrote a critical story about customs officers seizing "several Bundles of Cloths and other Necessaries" from the crew of a whaling ship.[194] In other words, though many items on ships lacked the protections associated with the home and were often subject to search without judicial scrutiny, some searches and seizures of personal goods on ships seem to have angered colonists because of the type of property searched and removed.

Inspection of personal property no doubt threatened individuals with indignities and invasions of privacy. Several agitators for a Bill of Rights invoked the traumatic search of an effect suffered in *Ward's Case*,[195] decided in York, England, in 1636.[196] The defendant in *Ward's Case* was a constable who had entered the plaintiff's home on a general warrant to search for stolen goods and "did pull the clothes from off a woman's Bed" and "search under her Smock."[197] This invasion of the bed and body would have been undignified and embarrassing, and Anti-Federalists used it as a potent example of the dangers of unrestrained searches of effects. A person's effects might literally hide secrets; chests, desks, and trunks—one's "most secret recesses"[198]—were likely to contain private papers, books, and other items one might not wish to share with the world. William Henry Drayton's 1774 *Letter from Freeman*, a key piece of Revolutionary propaganda, lamented the fact that "a petty officer has power to cause . . . locks of any Man to be broke open, to enter his most private cabinet . . . ."[199] Later, Patrick Henry argued that a Bill of Rights was necessary in part because the first Constitution failed to protect personal property from prying eyes; under it, "[e]very thing the most sacred [might] be searched and ransacked by the strong hand of power."[200]

194. *Journal of the Times, Boston, May 20*, *supra* note 193, at 207.

195. *See* Samuel Chase, *Objections to the New Government: General*, *reprinted in* 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 173, at 85, 85; *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 173, at 58, 61 ("[S]uppose the excise or revenue officers (as we find in Ward's case)—that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift—suppose, I say, that they commit similar, or greater indignities . . . .").

196. Ward's Case (Aug. 1636), *in* JOHN CLAYTON, REPORTS AND PLEAS OF ASSIZES AT YORK 44 (Dublin, S. Powell 1741).

197. *Id.*

198. ELLIOT, *supra* note 174, at 58.

199. WILLIAM HENRY DRAYTON, A LETTER FROM FREEMAN OF SOUTH-CAROLINA TO THE DEPUTIES OF NORTH-AMERICA ASSEMBLED IN THE HIGH COURT OF CONGRESS AT PHILADELPHIA 10 (Charleston, Peter Timothy 1774) (emphasis omitted).

200. ELLIOT, *supra* note 174, at 588.

But much of the rhetoric surrounding searches and subsequent seizures of personal property described more pedestrian harms. For example, wrongful searches and seizures could result in the damaging or mishandling of goods. The Boston Town Meeting of 1772 – convened to identify the rights violated by British soldiers in advance of the Revolution – criticized the authority of officers "to enter and go on board any Ship, Boat, or other Vessel . . . any house, shop, cellar, or any other place where any goods wares or merchandizes lie concealed," only to leave "boxes chests & trunks broke open ravaged and plundered by wretches . . . . By this we are cut off from that domestick security which renders the lives of the most unhappy in some measure agreable."[201] After the Revolution was won, Anti-Federalists raised the specter that without protection from unreasonable searches and seizures, the government would be free to damage chattels in pursuit of evidence.[202] And both before and after the war, the violence associated with officers smashing furniture and locks to search for chattels – trespassing on personal property – was often analogized to violence to real property, like the breaking of a door to a home.[203]

If unlawful searches could cause damage to property, then unlawful seizures were outright conversion and theft. Again, Patrick Henry warned that, without constitutional restraints, agents of the government might cart off property without just reason to do so.[204] Anti-Federalists portrayed officers as thieves, which mirrored earlier portrayals of British customs officers, predating the Revolution.[205] John Hancock, in a 1775 letter to British inhabitants published in a Philadelphia paper, described how broad customs authority had "robbed thousands of the food" naturally provided by the land and that British

201. *Boston Town Meeting of* 1772, *supra* note 187, at 361-63; *see also id.* at 350-74. The famous case *Entick v. Carrington* also referred to officers "break[ing] open doors, locks, boxes, and to seize a man and all his books, &c." (1765) 95 Eng. Rep. 807, 807; 807 KB 1765.

202. ELLIOT, *supra* note 174, at 448-49; *see also To the Farmers and Planters of Maryland*, *supra* note 184, at 75 ("The excise officers have power to break open your doors, chests, trunks, desks, boxes, and rummage your houses from bottom to top.").

203. *See* DRAYTON, *supra* note 199, at 10; *see also To the Farmers and Planters of Maryland*, *supra* note 184.

204. ELLIOT, *supra* note 174, at 588 ("[A]ny man may be seized, any property may be taken, in the most arbitrary manner . . . .").

205. *Compare* DRAYTON, *supra* note 199, at 10 (describing the power of an officer to "take and carry away, whatever he shall in his pleasure deem uncustomed goods"), *and* FATHER OF CANDOR, A LETTER CONCERNING LIBELS, WARRANTS, THE SEIZURE OF PAPERS, AND SURETIES FOR THE PEACE OF BEHAVIOR (London, J. Almon 5th ed. 1765) (noting that officers could "forcibly carry away [one's] scrutores," or desks), *and Boston Town Meeting of 1772*, *supra* note 187, at 361 (describing officers who "ransack men's houses, destroy their securities, [and] carry off their property"), *with* Britano Americus, *To the Commons of Great Britain, &c.*, BOS. EVENING POST, Sept. 28, 1767, at 1 (comparing officers of the British Government to "thieves who care only for the bag and what is put therein").

armies stood ready to "wrest from [citizens] their property."[206] These and other acts had rendered "property precarious."[207]

Conversion and trespass to chattels are claims that sound in personal property and tort law. Both forms of action originated in the Middle Ages and continue to be in use today,[208] and they were doubtless well-known at the time of the Founding.[209] Blackstone wrote of multiple writs available for interferences that deprived owners of possession, unlawfully detained goods, or devalued property to its owner. For Blackstone, damages to chattels were "injuries too obvious to need explication."[210] And even small harms were actionable, as Lord Camden observed in the famous search and seizure case of *Entick v. Carrington*: "By the laws of England, every invasion of private property, be it ever so minute, is a trespass."[211] Damage did not even necessarily require direct physical interference with or destruction of the item; in his discussion of damages to chattels, Blackstone noted that a person would be liable for trespass to chattels if his dog worried another man's sheep.[212]

206. John Hancock, *The Twelve United Colonies, by Their Delegates in Congress, to the Inhabitants of Great Britain*, STORY & HUMPHREYS'S PA. MERCURY, July 14, 1775, at 2, 4.

207. *Id.* at 2.

208. *See* RESTATEMENT (SECOND) OF TORTS §§ 217, 222A (AM. LAW INST. 1965); SIMON DOUGLAS, LIABILITY FOR WRONGFUL INTERFERENCES WITH CHATTELS 52-55 (2011); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 85-86 (5th ed. 1984) (discussing the history of trespass to chattels); William L. Prosser, *The Nature of Conversion*, 42 CORNELL L.Q. 168, 169 (1957) (discussing the origins of conversion).

209. *See* 3 BLACKSTONE, *supra* note 14, at *144-45. Though the most helpful discussion of the writs for wrongs against chattels are in the private-law section, similar actions existed against the king's agents. *See id.* at *256.

210. *Id.* at *152.

211. (1765) 95 Eng. Rep. 807, 818; 807 KB 1765. Although Lord Camden gave an example of trespass on real property after this sentence, other aspects of this paragraph concerned the sacredness of personal property: it was only subject to abridgment in limited circumstances, like distresses, executions, and forfeitures. *Id.* ("The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good."). Distresses, in particular, were the "taking of a personal chattel out of possession of the wrongdoer into the custody of the party injured . . . ." 3 BLACKSTONE, *supra* note 14, at *6.

212. 3 BLACKSTONE, *supra* note 14, at *153. Notably, modern law is now somewhat more strict regarding the level of interference required to rise to the level of a trespass to a chattel. *See* RESTATEMENT (SECOND) OF TORTS § 218 cmt. e, h (AM. LAW INST. 1965). This Article does not answer the question of whether courts should use an originalist definition of trespass or the modern law of trespass to chattels, *see infra* Section III.C, but this is yet another area where the law of effects needs attention and refinement.

Even in the eighteenth century, signals around the property—like fences, or the fact it was hidden from view—were relevant to determining whether an unlawful interference had occurred. Finders of goods could be liable if they used or possessed property that they knew or should have known was not up for grabs.[213] The nature of the property might suggest it should be let alone or kept in custody. For example, valuable animals found outside fenced areas were presumed escaped, and that escape did not extinguish the property right and permit subsequent finders to take them for labor. Instead, the animals were to be returned to the lord or king for safekeeping for a full year and a day, in case the owner sought to reclaim them.[214] Liability might also attach for wrongful possession if the circumstances in which the finder encountered the property suggested that the owner had not given up his interest. The law of finders was fairly complex,[215] but property hidden by the owners was generally presumed owned against subsequent discovery.[216] The same was true for property lost and dropped; in all these cases, there was no intent for the owner to abandon the effect, and "rather the contrary."[217]

Blackstone observed that security of personal property against such unwanted intrusions was critical to the functioning of society. Actions for interference with chattels especially protected society's weakest members:

> For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simple-minded part of mankind, which is, by far, the most numerous division, could never be secure of their possessions.[218]

Blackstone's words directly parallel the constitutional protection of "secur[ity]," and they nicely capture the harms associated with intrusions on

213. *See* 3 BLACKSTONE, *supra* note 14, at *151-53.

214. 1 *id.* at *297-98.

215. *See* 1 *id.* at *290-98 (providing special rules for "royal fish," "shipwrecks," "treasure-trove," "waifs," and "estrays").

216. 2 *id.* at *9 ("So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth, or other secret place, and it is discovered, the finder acquires no property therein . . . ."). *But see* 1 *id.* at *295-96 (providing special rules for treasure, which reverted to the crown).

217. 2 *id.* at *9.

218. 3 *id.* at *145.

personal property in the eighteenth century. Personal property gives its owner a right to exclude others from possessing, using, and interfering with the effect. It accordingly protects privacy interests with respect to the property. But personal property also permits individuals to engage in commerce, function in social life, and plan for the future. Because of this function, Blackstone wrote that, by the end of the eighteenth century, "[o]ur courts now regard a man's personalty in a light nearly, if not quite, equal to his realty."[219] Interferences with myriad interests flowing from possession—privacy, security, and exclusivity of use and control—could be just as harmful to the individual as other unlawful searches and seizures of the body, papers, or home. This connection between property law and the foundations of search and seizure law has been obscured by the absence of a history focusing on the role of personal property in the development of the Fourth Amendment.

C. Constitutional Values in the History of Effects

To summarize the lessons from the historical record, colonial sources indicate concern for some personal property because it was property, not simply because exposure of the property threatened to reveal people's secrets. At the time of the Founding, contemporaries of the Framers decried the exposure of items associated with self-expression, items necessary for survival, and items that contained their most valued possessions. But they also decried the risk of mishandling and damage. And unlike houses or real property, effects could be carted away by government agents. Interferences with personal property threatened privacy interests with respect to that property but also a person's interests in continued possession and control of the unadulterated object. When the government rifled, rummaged, examined, and seized personal property, it threatened individuals' livelihood, safety, privacy, and dignity. And if the law of interferences with chattels is any clue, the harms might be especially pronounced when the item itself, or inferences from its environment, created strong sensibilities about third parties tampering with the object.[220] This is the history behind specific protections for effects in the Constitution.

In developing its case law for houses and papers, the Supreme Court has often invoked the constitutional history of the Fourth Amendment in

219. 2 *id.* at *385.

220. *See supra* notes 213-217 and accompanying text.

designing modern rules for decision.[221] It has not done the same for personal property, and, as a result, approaches to personal property have grown apart from the moorings that led to the inclusion of effects in the Fourth Amendment in the first place.[222] Though members of the Supreme Court have occasionally observed that the Amendment is about both property and privacy,[223] that message has not been uniformly received. Erasure of the property-centric vision of protections for effects has helped to produce a body of case law that rests on a thin conception of privacy with respect to personal property.[224] As Part I revealed, many courts have interpreted "reasonable expectation of privacy" narrowly, finding that a person has privacy with respect to personal property only when its location is private or when the object is a container.

But all is not lost. If *United States v. Jones* is any indication, then the Court is adopting a version of the Fourth Amendment that takes personal property seriously. Still, *Jones* has left troubling questions open, and its per se rule is deceptively unhelpful and inconsistent with past rules. The key is identifying a set of factors that demarcates personal property entitled to Fourth Amendment

221. *See supra* note 157 and accompanying text. The history of protections for personal property has quite recently made it into the Court's Fifth Amendment Takings jurisprudence. *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2426-28 (2015).

222. There is a potential counterargument to a similar use of history for effects. Effects, unlike persons or houses themselves, often constitute the bulk of the evidence against criminal defendants. Before the rise of the exclusionary rule, it may have been relatively costless at the system level to recognize officers' interferences with personal property as constitutional violations, since the remedy would be a civil action against the officer. *See* Amar, *supra* note 1, at 785-86. In contrast, with the entrenchment of the exclusionary rule, it may seem costly and disproportionate at a system level to throw out evidence that establishes guilt on the basis of an officer searching the pocket of an unattended coat. Judges often distort doctrine to avoid letting the guilty go free on this sort of technicality. *See generally id.* at 793-800 (pointing out the costliness and backward reasoning behind the exclusionary rule more broadly). This difference in remedy between the Founding and today may suggest that history is a less persuasive guide as to how we should treat effects. I disagree. Without weighing in on the wisdom of the exclusionary rule, I take the position that denying constitutional rights on the basis of an undesirable remedy throws the baby out with the bathwater. If the remedy is wrong for effects, it should be changed for effects, rather than denying the existence of a protected right.

223. *See, e.g.*, Katz v. United States, 389 U.S. 347, 350 (1967) (noting that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all"); Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting) ("The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth.").

224. *See supra* Section I.B (describing how privacy in personal property is often determined by reference to the property's location alone).

protection from that which is unprotected. Eighteenth-century sources invoked the law of property, in discussing search and seizure, to connect privacy and security harms to wrongs to property more generally.[225] The next Part accordingly turns to property law to identify factors that will provide more robust Fourth Amendment protections for these historically important interests.

III. TOWARD A PROPERTY-BASED APPROACH TO EFFECTS

With its cryptic instruction that trespasses to effects conducted for the purpose of obtaining information constitute Fourth Amendment violations,[226] *Jones* left three questions unanswered: (1) what is an effect; (2) what, if anything, distinguishes protected effects from unprotected ones; and (3) what constitutes a trespass? Other Supreme Court cases and lower-court approaches provide inadequate answers to these questions for the reasons identified in Part I. In Part II, this Article turned to history to examine why effects are worthy of constitutional protection in their own right. Threats to personal property harm privacy interests as well as security and dignitary interests associated with ownership.

In the final Part, this Article proposes restructuring the current law of effects to better capture the broad Fourth Amendment interests an individual has in possession. It organizes this analysis into four parts.[227] When confronted with the search and resulting seizure of an item of personal property, courts should ask: (1) is this "effect" the sort of item that someone owns; and (2) would an outside observer recognize that the item is not abandoned, or in other words, does its owner have a reasonable expectation of privacy?[228] If both

225. *See supra* notes 201-219 and accompanying text.

226. United States v. Jones, 132 S. Ct. 945, 951 n.5 (2012).

227. This analysis is particularly designed for effects in public space. As explained already, *see supra* note 31 and accompanying text, effects located in the home and on the person have derivative protection and some limited case law. Additionally, the reader should be reminded here that the concept of "privacy" may be flexible enough to cover all the interests associated with chattel ownership that a search and resulting seizure might disrupt—but so might a "trespass to effects" test. Accordingly, this Part discusses a property-based approach that would be consistent with either existing line of precedent and that protects the constitutional values with which the Framers were concerned.

228. I use the term "owner" here even though a person might be able to claim Fourth Amendment rights in something he or she possesses only temporarily. *See Jones*, 132 S. Ct. at 949 n.2 (suggesting that although the defendant was not the "owner [of the searched vehicle] he had at least the property rights of a bailee" and declining to "consider the Fourth Amendment significance of Jones's status" because the government had not raised the issue of standing); *see also Ex parte* Jackson, 96 U.S. 727, 728, 732 (1877) (finding that the sender

inquiries are answered in the affirmative, courts can proceed to examine (3) whether the challenged government behavior was a trespass in that it violated the owner's expectations that the item would remain undisturbed in that manner; and (4) whether any exigency exceptions apply. This Part focuses on what property law can contribute to the first two questions, and it concludes by suggesting some further avenues for research on the third and fourth.

A. How Courts Should Recognize Effects

1. The Relationship Between Effects and Other Protected Categories

As an initial matter, it is important to define the relationship between effects and the other protected Fourth Amendment categories. Under current doctrine, courts employ different decisional trees depending on whether the objective of the search and subsequent seizure is a person, house, paper, or something unenumerated like a conversation. The other categories set forth in the Fourth Amendment—persons and houses in particular—each proceed from that classification down a different set of inquiries.[229] None of these decision trees involve appeals to expectations of privacy to define whether the object of the search is a house or person in the first instance or whether it would have counted as a house or person at the Founding. Instead, classification of these items is performed on a common-sense basis, and the categorization directs the subsequent inquiry.[230] The Supreme Court does not have a similar decision

retained Fourth Amendment rights against the search of a mailing sent to a third party while the mailing was in custody of the postal service, without inquiring into the ownership of the mailing and its contents). Requiring someone to be the owner of a chattel rather than a possessor seems unnecessarily formal, particularly in light of longstanding rules on real property finding formal ownership unnecessary to confer standing to challenge a search. *Cf.* Minnesota v. Olson, 495 U.S. 91, 100 (1990) (observing that an overnight guest in an apartment had a reasonable expectation of privacy in the apartment even though it was not his "home").

229. *See* 3 LAFAVE, *supra* note 125, §§ 5-6 (covering, respectively, "Seizure and Search of Persons and Personal Effects" and "Entry and Search of Premises"). Papers, like effects, have a relatively undeveloped line of case law, but much scholarship exists to clarify and expound on the law that does exist. *See, e.g.*, Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461 (1981); Donald A. Dripps, *"Dearest Property": Digital Evidence and the History of Private "Papers" as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49 (2013); Nowlin, *supra* note 18, at 1046-51; Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869 (1985).

230. House searches without warrants are presumptively unreasonable, outside a narrow set of circumstances. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) ("That line [at the entrance of the home], we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant."); Payton v. United

path for effects, perhaps in large part due to its failure to define "effects." As a result, this class of objects is subject to nebulous and inconsistent rules. Clearly defining a category provides the benefit of a starting point for the subsequent analysis.

While effects will sometimes be afforded protection because they are located on a person or in a house, treating effects as a separate category will be especially useful when the item does not have these secondary protections.[231] In other words, it provides a residual category that protects a broad swath of items that do not fit into the readily identifiable categories of person, house, or paper.[232] Treating effects as a separate category also gives them protections above and beyond the protection afforded to things that are not personal property, protections intended by the Framers but not yet recognized in Fourth Amendment doctrine.[233] Take, for example, an item of clothing: the classification of clothing as an effect should lead courts to use different factors

States, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971))). If the objective of the search or seizure is determined to be a person, the inquiry proceeds from that categorization to questions about whether the police conduct really constituted a seizure or search. *See* United States v. Mendenhall, 446 U.S. 544, 552 (1980) (considering "[t]he distinction between an intrusion amounting to a 'seizure' of [a] person and an encounter that intrudes upon no constitutionally protected interest"). Finally, if no warrant was issued, courts determine whether the search or seizure was reasonable. *See* Sibron v. New York, 392 U.S. 40, 64 (1968) ("[A] police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so.").

231. When an effect has secondary protection, courts have generally provided specialized rules for analyzing the possible intrusion on two Fourth Amendment categories. *See*, *e.g.*, Horton v. California, 496 U.S. 128, 136-37 (1990) (discussing effects located inside the home); United States v. Place, 462 U.S. 696, 716 (1983) (discussing effects located on the person).

232. Papers are arguably not as easily identifiable as persons and houses, and papers also have a less clear line of Fourth Amendment inquiry compared to those two categories. *See supra* note 229 and accompanying text. Scholars have argued that papers are the most important category of effects in the Fourth Amendment and that they should be subject to heightened protection beyond other effects. *See* Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1772 n.89 (2011); Dripps, *supra* note 229, at 102-05. Many or all papers might be effects, but not vice versa. Any litigant whose papers were searched would probably be best served claiming protection under both words because of this overlap. There is some evidence to suggest that papers in public spaces have fared as poorly as other effects—a subject for another article. *See* State v. Russ, 767 N.W.2d 629, 632 (Wis. Ct. App. 2009) (finding no expectation of privacy in affidavits sitting on a bench outside a small-claims courtroom). In that regard, treating papers as effects may at least help some papers achieve greater protection in the short term.

233. *See supra* Part II (discussing the Founding-era history of effects).

to understand reasonable expectations of privacy, to consider tampering with it differently, and to consider different operational exigencies. If the item is not an effect (or any of the other enumerated categories), then courts should approach it like the conversations in the telephone booth at issue in *Katz v. United States*: a common-sense privacy and exposure analysis is the correct approach.[234]

An effects category may also offer protection in circumstances when the analyses for searches of persons, houses, and papers do not provide clear guidance. For example, consider a variation on the fact pattern in *Riley v. California*, which concerned the proper scope of a search incident to a lawful arrest—specifically, whether police could search the contents of a cell phone found on defendant's person at the time of his arrest.[235] Assume for the sake of argument that the officers searching the cell phone in *Riley* used it to remotely access information stored on David Riley's own hard drive. In this scenario, the officers took lawful custody of the phone during his arrest by relying on a Fourth Amendment exception to the prohibition on searches of "persons." However, Riley could argue that the search of the cell phone went beyond a physical search of the phone (say, of the battery case) and instead became a search of another "effect"—his hard drive[236]—not on his person. This argument seems to reflect the reasoning behind the majority's statement that the search in *Riley* was constitutionally impermissible because of "[t]he possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee."[237] In short, providing effects with their own set of protections would put them on par with the established analyses courts

234. This is not to say that the categories encompass the exclusive realm of protection; the Fourth Amendment may well protect noneffects—like telephone booth conversations—but noneffects should not proceed under the same analysis. Amar has suggested that the conversations in *Katz* are "effects." Amar, *supra* note 1, at 803. I do not think this suggestion fits with the history or plain meaning of that term, but as explained here, that should not necessarily mean that the conversations are without protection.

235. 134 S. Ct. 2473, 2480-81 (2014).

236. The idea that data is an effect is a highly contested position, and one that this Article cannot hope to resolve in its final Part. The factors laid out at the end of this Section might help formulate future arguments about whether data is an effect. *See also* Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CALIF. L. REV. (forthcoming 2016) (manuscript at 36-37, 41-42, 69-71) (on file with author) (discussing some of the conceptual difficulties associated with deciding whether digital data is an "effect," and suggesting a "virtual curtilage theory" to protect data associated with personal property).

237. *Riley*, 134 S. Ct. at 2491. It is difficult to tell from the *Riley* opinion whether the Court considered the data a "paper" or an "effect." *See id.* at 2489, 2493 (comparing a cell phone to a "purse," "wallet," "camera[]," and "video player[]," and comparing data to "slip[s] of paper," "video tapes," "photo albums," and an "address book").

apply to other categories enumerated in the Fourth Amendment, and it would add protections for effects in circumstances where they may be unprotected by these other analyses.

2. How To Identify Effects

If one accepts that effects should be treated as a distinct category, the challenge lies in determining what constitutes an effect. One approach would be to examine whether the object was the sort of thing that would have been considered an effect in 1791, and this analysis has been followed by at least one court.[238] But this methodology is unnecessarily formal and will lead to bizarre historical and definitional line drawing, a task for which courts are ill-suited. It may be easy to accept that modern automobiles are evolutions of the Founding-era coach.[239] But what about a toaster oven? Would the Framers consider that to be more like an oven (often affixed to the home and thus considered real property in the eighteenth century),[240] the wood used to heat it, or something else? This sort of analogical reasoning will rarely lead to determinate results in close cases.[241] Additionally, such a formalistic approach is inconsistent with the Court's preferred way of interpreting constitutional terms.[242] Instead, the Court generally looks to the Founding-era meaning and fills it with modern content, rather than using Founding-era facts to set the

238. Altman v. City of High Point, 330 F.3d 194, 202 (4th Cir. 2003).

239. *Cf.* United States v. Jones, 132 S. Ct. 945, 950 n.3 (2012) (discussing the analogy between a constable concealing himself in a coach in the eighteenth century and twenty-first-century GPS tracking); *id.* at 958 (Alito, J., concurring in the judgment) (same).

240. *See* 2 BLACKSTONE, *supra* note 14, at *428 (noting how chattels affixed to property pass with the land).

241. An additional strike against this approach is the weak historical ability of untrained judges. *See* Jack N. Rakove, *Fidelity Through History (or to It)*, 65 FORDHAM L. REV. 1587, 1588 (1997) ("[T]here is good historical evidence that jurists rarely make good historians, and that a theory of interpretation which requires judges to master the ambiguities of history demands a measure of faith that we, as citizens and scholars alike, should be reluctant to profess.").

242. *See* Michael Clemente, Note, *A Reassessment of Common Law Protections for "Idiots,"* 124 YALE L.J. 2746, 2748 (2015) (noting how the Eighth Amendment prohibition on "cruel and unusual punishment" covers both punishments considered cruel and unusual in the eighteenth century and those now considered cruel and unusual according to "evolving standards of decency" (citation omitted)); *cf.* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (citations omitted)).

outer limits of constitutional protection. Effects meant, and means, "personal property." There is no reason to think that the Fourth Amendment protects only the clear descendants of effects that were in existence in the late eighteenth century.

A second approach would be to look at the positive law of some individual state to see whether it actually qualifies as personal property under a specific state's law.[243] But this approach is also unnecessarily formal. Property entitlements are defined by the law of each state; each state's law accordingly gives content to the term "property" in the Fifth and Fourteenth Amendments.[244] The Fourth Amendment, on the other hand, uses "houses" and "effects," words with their own plain meanings independent of technical law.[245] Requiring courts to first determine whether something is an effect according to some extant state law also leads to vexing secondary choice of law questions: should the personal-property interest be determined by the law of the state where the property is located, where the government action takes place,[246] where the owner is domiciled, or something else? These problems can be avoided by a more flexible inquiry into whether reasonable minds would consider the item personal property, using personal-property concepts rather than strictly applying a given state's rules. Instead of artificially looking to the law of the state where the individual is domiciled or the personal property is located, courts should use a holistic approach.

The most cogent holistic approach would be to determine whether the object is reasonably recognizable as personal property. Such a test would fit the

243. Justice Alito suggested that the Court's holding in *Jones* about "effects" would cause the Fourth Amendment protection to vary from state to state. *Jones*, 132 S. Ct. at 961-62 (Alito, J., concurring in the judgment).

244. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Envtl. Prot., 560 U.S. 702, 715 (2010); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029-30 (1992); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."). *But see* AMAR, *supra* note 161, at 80 ("There is . . . a conspicuous connection between the Fourth Amendment's limitations on 'seizures' of 'houses' and 'effects' and the Fifth's restrictions on 'takings' of 'private property.' In both cases, state law typically defines the property rights given constitutional protection against federal officials.").

245. *Cf.* Tom W. Bell, *"Property" in the Constitution: The View from the Third Amendment*, 20 WM. & MARY BILL RTS. J. 1243, 1265-66 (2012) (discussing the general preference to interpret the Constitution according to plain meanings rather than technical legal meanings of words in the context of the multiple technical legal meanings given to "property" in various amendments).

246. Here, I am imagining the government remotely searching property from a state other than the one where the property is located.

Supreme Court's directive that Fourth Amendment law is constructed by the "concepts" and "understandings" that derive from social life and myriad state laws,[247] and it would reanchor Fourth Amendment protection to its roots in personal-property law. Since at least the late eighteenth century, chattel property has generally been marked by three features: (1) the ability to exclude others, (2) the ability to transfer the object, and (3) control over its use.[248] We routinely recognize these rights, and our corresponding duties to keep out, when we come into contact with something that is personal property. An amalgam of law and lived social experience informs our understanding of whether the items we encounter are property—that is, whether we should avoid taking or interfering with something that another has rights to use, transfer, and control.[249] True, such an approach may be somewhat vague. If judges are not required to rely on existing positive law or a stricter set of factors to declare that something is property, then they might manipulate the doctrine to arrive at results about an object's status as an effect in ways that do not comport with generally shared attitudes and beliefs.[250] But judges are members of the public and share the same duties toward another's property as the rest of us. Unlike standards that require courts to assess changing public opinion or consensus—a task to which they may be rather poorly suited[251]—judges routinely encounter things that may or may not be property and must adapt their behavior accordingly. There is no reason to suspect they are any less capable of assessing what counts as property than the average legislator or person on the street.

247. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

248. 2 BLACKSTONE, *supra* note 14, at *389 (defining possessed chattel property as carrying the "right, and also the occupation, of any movable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default"); *see* MERRILL & SMITH, *supra* note 14, at 365; JEDEDIAH PURDY, THE MEANING OF PROPERTY 16-17 (2010); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 49-50 (1988); Edward Gluck, *Possession of "Lost" Goods*, *in* READINGS ON PERSONAL PROPERTY, *supra* note 14, at 351, 353; A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 108-10 (A.G. Guest ed., 1961); *cf.* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1362-63 (1993) (defining a "Blackstonian bundle" of property rights in land by the rights to exclude, use, and transfer).

249. *See* THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 8-11 (2010).

250. *Cf.* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1816 (2008) (criticizing the prohibition in Eighth Amendment jurisprudence of punishments that are "cruel and unusual" according to "evolving standards of decency" because the evolving standards test is vague and does not clarify whether or how the court should divine what those standards are).

251. *See id.* at 1751-52 (discussing the problems associated with courts attempting to assess what "standards of decency" apply to punishments).

Courts and officers should approach the question of whether something is an effect by examining the legal and social identifiers surrounding the sort of object encountered. Does it belong to a category of items that people generally can use, transfer, and control, and if not, do other circumstances indicate that someone intends to use, transfer, or control it?[252] Do positive state laws affirmatively forbid its ownership? Or is it generally unowned by private individuals, like water in the ocean or plants in a public park? Each of these questions is a way of asking whether the item is in a class of items generally understood as personal property.[253] This approach descriptively matches the limited assessments the Court has already made about what is or is not an effect: most states and people would recognize that open fields are not chattel property, while automobiles and suitcases are.[254]

Luggage, clothing, notebooks, and cell phones are the sorts of objects that a holistic approach would ordinarily consider property.[255] From that categorization, courts should distinguish protected property from unprotected property with guidance from personal-property law (the approach this Article advocates in the next Section). On the other hand, states and individuals generally do not recognize personal property rights in dirt[256] and urine.[257] Those things should ordinarily not be considered Fourth Amendment effects, so personal-property rules need not determine how courts analyze searches and resulting seizures of them. The fact that something is *not* an effect does not mean that it should have no Fourth Amendment protection; instead, those expectations must come from a source other than property law and normative

252. Notably, even some things that are not ordinarily property—say, animal excrement—can become personal property through circumstances indicating intent to use, transfer, or exclude others from it. *See* Haslem v. Lockwood, 37 Conn. 500, 506-07 (1871) (organizing manure into piles along the side of the highway made it into plaintiff's personal property, making defendant's subsequent removal of it unlawful).

253. *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 83-84 (1997) (noting that "[c]onventions about what types of things are generally owned will determine which things are objects of the duty *in rem* and those which are not. For example, we take all cars and houses we come across to be owned, though not most pigeons").

254. United States v. Jones, 132 S. Ct. 945, 951 (2012); Oliver v. United States, 466 U.S. 170, 176-77 (1984).

255. *See* Tracey v. State, 152 So. 3d 504, 524 & n.15 (Fla. 2014).

256. *See, e.g.*, State v. Reldan, 495 A.2d 76, 82 (N.J. 1985).

257. Ferguson v. City of Charleston, 532 U.S. 67, 92 (2001) (Scalia, J., dissenting). *But see* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 617 n.4 (1989) ("Taking a blood or urine sample might also be characterized as a Fourth Amendment seizure, since it may be viewed as a meaningful interference with the employee's possessory interest in his bodily fluids.").

property understandings.[258] Declaring something an "effect" simply sets it down a different path to determining constitutional protection. The next step on that path is assessing whether the effect remains within the coverage of the Fourth Amendment, or whether the owner's actions and the property's circumstances place it outside the Amendment's scope.

B. Distinguishing Protected and Unprotected Effects

Imagine a jacket—something that is undoubtedly an effect under the analysis in Section III.A. First, imagine that jacket is on a coat hook at a restaurant, while its wearer is dining inside, or perhaps, has stepped outside to take a phone call. Next, imagine that same jacket covering belongings in a shopping cart parked outside a church in Los Angeles's Skid Row. Finally, imagine that the jacket is folded on a curb in an urban area. In all circumstances, the jacket has remained untouched for thirty minutes.

The existing pathways to protection—the *Jones* rule that trespasses to effects constitute searches, the locational-privacy approach that treats an effect's location as paramount, and the contextual-privacy approach that takes into account a nebulous array of facts about the property's context—would each arrive at different results in examining the three jackets. Under a locational-privacy approach, all three items have been "exposed to the public"—anyone might tamper with them—so officers would probably be justified in searching them.[259] Under a contextual-privacy approach, the first would probably be protected, but the other two might or might not—depending on whatever collection of factors those courts decided to use that day.[260] The *Jones* per se rule might find that any search or removal of all three of these jackets would constitute a "trespass to an effect" to obtain information—unless, of course, the placement of the folded jacket on the curb somehow rendered it "trash."[261]

Opinions that have not been widely followed suggest there is another way. Maryland, which follows a contextual approach, is the only state that has adopted a coherent set of factors to evaluate what makes an effect

258. In the urine case, for example, the Court held that a woman submitting urine for diagnostic testing might reasonably expect that "tests will not be shared with nonmedical personnel without her consent." *Ferguson*, 532 U.S. at 78.

259. *See supra* Section I.B. Paradoxically, courts might determine the third jacket was lost if a bystander picked it up and brought it to the police station, which might limit the permissible scope of search (but would permit some search for identification, presumably). *See supra* text accompanying notes 107-108.

260. *See supra* Section I.C.

261. *See supra* Section I.A.

constitutionally protected: the location of the property, whether the area is secured or not, how long it has remained in its place, and the condition of the property all factor into this analysis.[262] The provenance of this test appears to be a series of the Maryland Court of Appeals' earlier Fourth Amendment opinions.[263] Applying that analysis to the jackets yields a more nuanced examination of the privacy and security interests at stake: those factors weigh in favor of protecting the jacket in the first scenario above (the one on the coat hook), arguably weigh in favor of protecting the jacket in the second scenario (the location is public but in Skid Row, where public storage is common), and probably weigh against protecting the third (though the condition of the jacket is perhaps good: it is unsecured and on an urban curb). The Maryland factors are helpful, but unmoored from positive law: Fourth Amendment rules are supposed to "ha[ve] a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[264] Perhaps Justice Sotomayor was contemplating something like the Maryland factors when, in her concurrence in *Jones*, she suggested that the Court has provided "longstanding protection for privacy expectations inherent in items of property that people possess or control."[265] But, regrettably, her statement does not explain what factors indicate "possession" or "control."

Here, personal-property law can offer guidance. Possession, unlike effects, has a legal meaning that supplements its ordinary one.[266] It is defined as "the exercise of dominion over property" or a "right under which one may exercise control over something to the exclusion of all others."[267] Personal-property law teaches that when a person expects continued exclusive control over an item, that expectation is likely to be clear to others, whether because others would expect the same with respect to their property under similar circumstances or because the owner has taken steps to make that expectation apparent. Personal property-theorists have known for a long time that an individual may have

262. Stanberry v. State, 684 A.2d 823, 829-30 (Md. 1996) (describing the multifactor test and citing as support Owens v. State, 589 A.2d 59, 66 (Md. 1991), Faulkner v. State, 564 A.2d 785, 789-90 (Md. 1989), Morton v. State, 397 A.2d 1385, 1390 (Md. 1979), and Duncan v. State, 378 A.2d 1108, 1118-19 (Md. 1977)).

263. *See id.*

264. Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143-44 (1978)).

265. United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring).

266. *Compare Possession*, BLACK'S LAW DICTIONARY (10th ed. 2014) (disambiguating multiple different kinds of possession and referring to possession as a form of right), *with Effects*, *id.* (defining "effects" as "[m]ovable property; goods").

267. *Possession*, *id.*

strong interests with respect to personal property because of *what* it is and *how* it is arranged, not simply *where* it is located. Nowhere is this principle clearer than in the law of abandonment.

The law of abandonment is well equipped to provide standards for the application of the Fourth Amendment to effects that are consistent with the historical commitments underlying it.[268] This historical account has illuminated the interests harmed by unlawful search and subsequent seizure: privacy interests, security interests, and property interests, interests that individuals retain in the items they continue to possess and control.[269] In contrast, an individual who abandons property no longer has any right to possess or control it. True, some courts have made much of the difference between property-law abandonment and Fourth Amendment abandonment. The sticking point appears to be the requirement in property law of actual intent to abandon, in addition to an act manifesting that intent.[270] Apparently

268. Instead of using this long-developed body of existing positive law, lower courts have used an ahistorical and otherwise nonexistent abandonment of privacy approach in developing the contours of abandonment for Fourth Amendment purposes. *See supra* Section I.B (discussing the "abandonment of privacy" test). To be fair, the law of property abandonment can have some arcane distinctions. Historically, the law distinguished between items in possession and items that had been (1) lost; (2) mislaid (intentionally placed by the owner, but forgotten); or (3) abandoned. The distinction between lost and mislaid property is not particularly helpful for Fourth Amendment analyses; it was used to determine whether the finder of a good could lawfully take it, or whether it should be in the custody of the owner of the premises on which the good was found. In other words, the distinction between lost and mislaid property acts to mitigate claims between two subsequent possible possessors—not the original owner and a subsequent interferer, which is the relevant analysis for Fourth Amendment purposes. *See* John V. Orth, *What's Wrong with the Law of Finders & How To Fix It*, 4 GREEN BAG 2D 391, 397 (2001) (criticizing the lost/mislaid distinction). Another caveat must be made here. I discuss general principles of the common law of abandonment. At least one state has done away with the common law of abandonment by statute. *Compare* N.Y. PERS. PROP. LAW § 251(3) (McKinney 2015) (presuming abandoned property to be lost for six months after finding) *with* MONT. CODE ANN. §§ 70-5-101 to -107 (2013) (retaining a category of "abandoned property" but treating lost and mislaid property the same). For the same reasons that I think the approach to recognizing an effect need not be state specific, I do not think the approach to abandonment need be; the common-law principles are commonsense. *See supra* Section III.A.

269. *Cf. Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) (noting the Fourth Amendment's "longstanding protection for privacy expectations inherent in items of property that people possess or control").

270. *See, e.g.*, United States v. Brown, 663 F.2d 229, 232 (D.C. Cir. 1981) (distinguishing between property abandonment and Fourth Amendment abandonment because property abandonment allegedly requires voluntary, intentional, and unconditional relinquishment of the interest in the property, while the Fourth Amendment requires only abandonment of the privacy interest); City of St. Paul v. Vaughn, 237 N.W.2d 365, 370-71 (Minn. 1975) (same); State v. Dupree, 462 S.E.2d 279, 281 (S.C. 1995) (same).

fearful of what this actual-intent prong would do—presumably, any individual claiming a violation of his Fourth Amendment rights would claim he actually intended to continue possessing the property—courts have considered abandonment of privacy rather than abandonment of property to be the suitable approach.[271] Both property and Fourth Amendment law, however, are equipped to surmount this difficulty.

Both areas of law recognize the importance of objective, not subjective, assessments by those who encounter the property. In the law of abandonment, for example, despite the "actual intent" requirement, judges and juries remain free to determine that the circumstances indicate no intent to continue possessing the property, notwithstanding the former owner's protestations to the contrary.[272] Similarly, Fourth Amendment law asks whether an individual's subjective expectation of privacy is objectively reasonable under the circumstances.[273] Both inquiries examine the situation as it appears to the outside observer—the right to interfere varies depending on whether the circumstances evince to third parties an intent to continue possessing and controlling the property or, conversely, indicate no such intent.

What factors in property law indicate abandonment (or, alternatively, continued possession)? The key determinants of abandonment are the nature of the item, its circumstances, and subsidiary factors that inform those analyses.[274] A person communicates expectations about and interests in

271. *See*, *e.g.*, United States v. Fulani, 368 F.3d 351, 354 (3d Cir. 2004); *Vaughn*, 237 N.W.2d at 370.

272. *See* 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* §§ 55, 58 (2005); Worsham v. State, 120 S.W. 439, 443-44 (Tex. Crim. App. 1909) (reviewing a jury instruction to find from the circumstances that the owner of a check abandoned it). Note that this was not a Fourth Amendment (or state constitutional) case; the defendant claimed the affirmative defense that the property had been abandoned, so his picking it up was not conversion. *See also* CRIBBET ET AL., *supra* note 14, at 112 (observing that "it is likely that intent to abandon was inferred from the facts" in front of the court in Eads v. Brazelton, 22 Ark. 499 (1861)).

273. Generally, courts ask whether "the individual manifested a subjective expectation of privacy in the object" of the search and resulting seizure and "society [is] willing to recognize that expectation as reasonable." Kyllo v. United States, 533 U.S. 27, 33 (2001) (alteration in original) (quoting California v. Ciraolo, 476 U.S. 207, 211 (1986)). Although often cast as a two-part inquiry—a subjective and objective test—in reality, the Fourth Amendment inquiry often boils down to the analysis of whether the expectation of privacy is objectively reasonable based on the individual's behavior and actions. *See generally* Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 (2015) (arguing that the subjective expectation of privacy test has been reframed, such that there is only one prong of the test).

274. Authorities are in universal agreement on the importance of the nature and circumstances of the property to the abandonment calculus. *See* 1 AM. JUR. 2D, *supra* note 272, § 58 ("Intention to abandon may be inferred from the acts and conduct of the owner and from the nature and

property to the world through acts that others understand and respect.[275] Contextual signals of possession manifest an individual's expectations with respect to an object, no matter where the object is located. Even when personal property is unattended, a person may retain an enforceable right or ability to exclude others.[276] The circumstances and nature of the property help third parties ascertain the existence of that right.

In abandonment law, the circumstances of the property are important—but in a more nuanced way than merely declaring the location as "private" or "public." A collection of subsidiary inquiries has historically come into play in this analysis; this is true across multiple jurisdictions and in academic scholarship.[277] First, there is a broad spectrum of locations with varied levels of access. While the home is the pinnacle of privacy, and a highway is a quintessential public space, situated between them are a wide range of locations, including restaurants, subway cars, and apartment lobbies. The same property may lead observers to assume different intentions on the part of its owner depending on the location where the property is left. Even the property's position in some space within a location might be probative of the owner's continued possession of an item, or lack thereof. Take, for example, an object located on a store counter versus the floor.[278] If the space is one where

situation of the property."); Ralph W. Aigler, *Rights of Finders*, 21 MICH. L. REV. 664, 665 (1923) ("In determining [the question of abandonment], the kind of property, the place where left, and the circumstances of the leaving are vitally important."); Gluck, *supra* note 248, at 351 (explaining that the rights of finders of goods depend on both the nature of the premises and the nature of the article).

275. Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015, 1025-26, 1031-32 (2011); Carol M. Rose, *Response*, 19 WM. & MARY BILL RTS. J. 1057, 1058-59 (2011). *See* Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. (SUPPLEMENT) 1, 2-3 (2006); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 76-79 (1985) [hereinafter Rose, *Possession as the Origin of Property*].

276. *See* Rose, *Possession as the Origin of Property*, *supra* note 275, at 76-77.

277. There is no authority that comprehensively lays out these factors, despite universal agreement that the nature and circumstances of the property determine whether it is abandoned. Accordingly, I have examined personal-property cases for consistency across jurisdictions and consensus in scholarship, and the factors listed here appear both to be comprehensive and to occur with some frequency.

278. *See* Ray v. Flower Hosp., 439 N.E.2d 942, 944-45 (Ohio Ct. App. 1981) (finding an eyeglass case containing jewels found on top of a desk, not on the floor or strewn across the floor, to be lost-mislaid property); *cf.* Aigler, *supra* note 274, at 668 & n.21 (noting that, in discerning lost from mislaid property, various different elements of location suggest different intentions of the owner); Gluck, *supra* note 248, at 358 (asking whether a subway car is more like "a private parlor or a public highway" in determining whether an item is lost or mislaid). These factors would seem to obtain equally in distinguishing abandoned property from lost or mislaid property.

property is ordinarily left unattended, then it is difficult to assume an individual has abandoned either property or privacy in following that custom. The duration of time the object is left alone is also a factor to be considered. The longer something has been left unattended, the more likely its owner has relinquished claims to property or privacy interests.[279] Even here, however, the character of the space is important. Leaving a plastic bag with one's other belongings on the side of a basketball court for an hour-long game is commonplace while leaving a gym bag in front of your neighborhood electronics store is not. Finally, the proximity of the property to other items or markers may be relevant. For example, in an abandonment case about oysters, the fact that the oysters were surrounded by stakes should have signaled their nonabandonment to the fisherman who took them.[280] Again, the key question here is how and whether the circumstances of the property manifest to third parties the owner's intentions with respect to the property.

The nature of the item is a second factor to be considered. Its condition is relevant: the better the condition, the more likely a person has invested time and care in maintaining the property and thus does not intend to relinquish its use.[281] But more important is a second aspect of the item, namely whether anyone has made efforts to hide it, protect it, or shield parts of it from view.[282] Efforts to conceal something do not just indicate an expectation of privacy; they also indicate the expectation of the owner to return to the property. Of

279. *See* Erickson v. Sinykin, 26 N.W.2d 172, 176-77 (Minn. 1947); *Ray*, 439 N.E.2d at 944; 1 AM. JUR. 2D, *supra* note 269, § 59. A number of unclaimed property statutes tie the constructive abandonment of certain types of property to the duration of time it remains unused or unclaimed. *See* UNIF. UNCLAIMED PROP. ACT §§ 2(a), 3 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1995).

280. State v. Taylor, 27 N.J.L. 117, 122-23 (1858).

281. *See* Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400, 406 (Iowa 1995) (finding that the fact that "bills were carefully tied and wrapped" mitigated against finding that the property was mislaid); Elk Horn Coal Corp. v. Allen, 324 S.W.2d 829, 831 (Ky. 1959) (finding that coal waste in an "orderly pile," even though located in a slate dump, indicated nonabandonment); *see also* Lior Jacob Strahilevitz, *The Right To Abandon*, 158 U. PA. L. REV. 355, 362 (2010) (noting that negative market value and negative subjective value items—like "damaged chattels"—have a high abandonment frequency).

282. Terry v. Lock, 37 S.W.3d 202, 208 (Ark. 2001) (finding that a box of "old, dusty currency" hidden in a motel ceiling was not abandoned); *Benjamin*, 534 N.W.2d at 406 ("[W]e considered the manner [in *Ritz*] in which the money had been secreted in deciding that it had not been abandoned."); Ritz v. Selma United Methodist Church, 467 N.W.2d 266, 269 (Iowa 1991) (finding that "[t]he fact that [money] was buried in jars and tin cans indicates that the owner was attempting to preserve it"); Jackson v. Steinberg, 200 P.2d 376, 378 (Or. 1948) ("From the manner in which the bills in the instant case were carefully concealed beneath the paper lining of the drawer, it must be presumed that the concealment was effected intentionally and deliberately. The bills, therefore, cannot be regarded as abandoned property.").

course, this intent must be reasonable—no matter how many "keep out" signs are on my lockbox, if I insist on leaving it right outside a Transportation Security Administration checkpoint and walking away, I should probably expect that it will be removed or searched.[283] But condition and plain efforts to keep the item safe are further objective indicators of the owner's intents and expectations.

These same clusters of factors that authorities typically invoke as evidence of abandonment in personal-property law can contribute to the analysis of privacy expectations in Fourth Amendment law. Instead of developing an approach to privacy in personal items from scratch, personal property rules can help provide a rubric for assessing the status of an individual's interests and expectations based on an item's intrinsic qualities, an item's relationship with its surroundings, and manifestations of the owner's intent to keep the item private.[284]

Let us return to the jackets from the outset of this Section. Assuming that the nature of each jacket is the same—in each instance, let us assume that the jacket has minor wear and no locked pockets—the circumstances of the encounter are of critical importance. The first jacket is almost certainly protected: the location is semipublic (open to fellow diners), but the owner is nearby, the place is one where property is commonly left unattended, and the jacket has been placed carefully on a hook. It is reasonably apparent that the owner is in constructive possession of the property and has not abandoned it. Similarly, the third jacket (the one in the street) is probably not protected. The

283. The same reasonableness requirement should apply to "destroyed" property. Efforts to destroy something indicate that the owner does not intend for another to assume possession of it, *see* Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 794-95 (2005), but a defendant may nonetheless abandon incompletely destroyed property, *cf.* State v. Davis, 577 N.W.2d 763, 766 (Neb. Ct. App. 1998) (discussing how officers discovered during a lawful search of a home sunglasses that defendant had tried to destroy in a stove), and should thus lose Fourth Amendment rights with respect to it, just as one would lose protection for any abandoned property. The Supreme Court has *lessened* Fourth Amendment protection for persons during arrests because of the threat that individuals will destroy evidence, *see* Preston v. United States, 376 U.S. 364, 367 (1964), so it would be nonsensical to create a loophole where destroying property would actually increase one's Fourth Amendment rights with respect to it. *But see* Matt Corriel, Comment, *Up for Grabs: A Workable System for the Unilateral Acquisition of Chattels*, 161 U. PA. L. REV. 807, 811-12, 824 n.61, 837-38 (2013) ("[T]he acquisition of destroyed property and of certain kinds of abandoned property is wrongful because such chattels give notice to the acquirer that they ought not to be repossessed.").

284. The Court has often recommended this sort of practical, holistic analysis over a strict bright-line test. In the context of residential searches, the Court has rejected a formal, numerical-factor test to decide whether a person has a reasonable expectation of privacy in his or her overnight accommodations, instead looking at "everyday expectations" and "social custom" to define Fourth Amendment protections. Minnesota v. Olson, 495 U.S. 91, 96-98 (1990).

duration of time it has been left alone (thirty minutes) is fairly long for an urban corner, and although it is folded and in fine condition, that does not seem to overcome the high probability that, based on its circumstances, it appears abandoned and unowned. The second jacket, located atop the shopping cart of other belongings and in front of a Skid Row church, presents a more complicated analysis; but here, even though most might not choose to leave their property in this manner, the fact that the area is one where individuals commonly leave property unsecured and that the jacket is associated with a cart and other belongings seem to weigh in favor of protection. But changes in circumstances may totally change the outcome. For example, imagine that instead of covering other belongings, the jacket covers piles of wadded up paper and is located outside a police station in Hollywood. Abandonment factors can take into account these changes to the fact pattern and give courts a reasoned way to proceed through the analysis.

Personal property thus provides relevant guidance for Fourth Amendment questions: would a third party understand and respect the owner's investment in and continued possession of that property, based on its nature and context? Or would individuals reasonably think the property was unpossessed and up for grabs? In this sense, the Maryland court has correctly identified most of the factors relevant to Fourth Amendment rights in effects, even if the test was not explicitly derived from property law.[285] The circumstances, particularly the sort of location, surrounding objects, and how long it remained in its place, as well as the nature of the property, as evidenced by its condition and security measures, all factor into a historically and doctrinally grounded analysis of Fourth Amendment interests in effects.

Of course, this collection of factors hardly amounts to an exact science. Even in the context of a dispute over personal-property ownership, there may still be confusion over whether an item is an effect in the first place, as well as whether a good is possessed or free for the taking. Such confusion may engender "controversy, moral qualms, and unnecessary investments in determining the status of property."[286] This is no small worry in Fourth Amendment law as the Court has a "general preference to provide clear guidance to law enforcement through categorical rules. '[I]f police are to have workable rules, the balancing of the competing interests . . . must in large part

285. *See supra* note 146 and accompanying text (discussing Stanberry v. State, 684 A.2d 823, 829-30 (Md. 1996)).

286. Strahilevitz, *supra* note 281, at 373.

be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'"[287]

But given the number of times individuals encounter objects in the world and make assessments about them, the gray areas seem comparatively few. In reality, the factors I have just described are a complicated way of asking the sort of question we confront multiple times a day when we encounter personal effects: "Would I have left this here? What would I expect to happen?" A dollar bill in the street; a woman's purse on the bus seat next to her; a glove in the mall; a wallet found on the floor of a restaurant. We all have moral intuitions about what we can take and what we should leave alone. And these determinations are dynamic, not static: a glove on the floor of the mall may become detritus after a period of time if its owner is presumed to have forgotten it or opted not to look for it. "In a world of indirect communication, familiarity with the social signals of what is permitted or forbidden becomes fairly clear."[288] While there is no question that disputes will exist at the margins and in hard cases, officers—as members of society—are generally capable of interpreting the same signals around personal property in their professional lives that they routinely interpret in their personal lives. With proper training, they may become even more attuned to the signals around property than the average citizen. Moreover, with proliferating digital and telecommunications technology and modern rules permitting officers to seek warrants via these technologies, officers have quick access to magistrates and can seek warrants in close cases.[289]

Further, vagaries notwithstanding, a property-based approach is more faithful to longstanding Fourth Amendment case law than any of the other approaches. The *Jones* "trespass to effects" rule lacks substantive guidelines;[290] the locational-privacy approach is disconnected from both precedent and history;[291] and while the contextual-privacy approach has potential, courts have failed to explain systematically how officers (or for that matter, other

287. Riley v. California, 134 S. Ct. 2473, 2491-92 (2014) (alterations in original) (quoting Michigan v. Summers, 452 U.S. 692, 705 n.19 (1981)). *See generally* Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141 (arguing for "readily applicable" bright-line rules in the Fourth Amendment context). *But see* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment,* 45 U. PITT. L. REV. 227, 230-34 (1984) (pointing out that Fourth Amendment rulings are so fact bound that it is difficult to create bright-line rules).

288. Orin S. Kerr, *Norms of Computer Trespass*, 116 COLUM. L. REV. (forthcoming 2016) (manuscript at 11), http://ssrn.com/abstract=2601707 [http://perma.cc/PM44-NQP8].

289. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1561-62 (2013).

290. *See supra* notes 41-73 and accompanying text.

291. *See supra* notes 109-114 and accompanying text.

tribunals) should determine Fourth Amendment protections for the personal property they encounter.[292] The approach advocated in this Article builds on the contextual-privacy approach, providing a more principled, doctrinally grounded, and rigorous way of analyzing searches of effects. And a property-based approach gives content to the "discouraged intrusion" portion of *Katz*, because, as members of the Court have acknowledged, an individual's actions with respect to property can create privacy even in public space.[293] Moreover, a property-based approach adheres to the command that reasonable expectations of privacy have content from an independent source: in this case, personal-property law.[294]

Personal property makes use of a set of factors relating to the nature and environment of an item in mediating ownership claims, and these factors are also helpful in determining the strength of an owner's Fourth Amendment interests with respect to an object. These contextual factors provide indicia of ownership and the continued relationship between person and effect. As a result, they are also helpful in evaluating the objectivity of the owner's expectations that property will remain undisturbed and that his or her privacy and security interests will remain unharmed. Personal-property factors help to construct a continuum, from circumstances strongly indicating possession (a dog tied to a parking meter for five minutes) to circumstances strongly indicating public exposure (a broken vase on a sidewalk). Not all personal-property interests deserve protection. But the more "possessed" an object appears, the more likely that the owner retains the privacy, security, and property interests that the Amendment was designed to protect.

C. Unanswered Questions: Searches and Exigencies

Much research and analysis remains to be done on the last two parts of the property-based effects analysis. This Article has focused on highlighting how the word "effects" dropped out of the constitutional canon and how the law should recognize an effect and decide whether it is presumptively protected. As I have argued, property law can help define what constitutes an effect and when it warrants Fourth Amendment protection. However, complicated questions remain about when it will be unreasonable for the government to search or seize these effects. Further work will have to provide more insight into this third step of a new approach to effects: what sorts of behavior with

292. *See supra* notes 146-154 and accompanying text.

293. Smith v. Maryland, 442 U.S. 735, 740-41 (1979); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

294. *See* Minnesota v. Carter, 525 U.S. 83, 88 (1998).

respect to effects constitute a search? This Section offers a few preliminary thoughts.

Doubtless, as there remain uncertainties about what police conduct constitutes a home search,[295] there will still be arguments about whether officers' actions violate reasonable expectations of privacy in items or constitute "trespasses to effects" after *Jones*. If courts revisit their definition of and approach to effects, further refinements of the contours of permissible searches and resulting seizures are the logical next step. Indeed, even in the absence of a coherent approach to effects, debates about the meaning of search and seizure with respect to effects have been underway for some time.[296] Several cases have examined whether aberrant behavior of police dogs that damage or infiltrate personal property counts as a search.[297] Recent work has examined whether the activity of drones capable of "see[ing] . . . through" personal property would be engaging in unreasonable searches.[298] If the Court continues to follow the "trespass to effects" approach outlined in *Jones*,[299] does a "trespass to an effect" require the chattel to be damaged in some way, as modern tort law requires when there is no dispossession,[300] or is some de minimis interference enough?[301] These are complicated questions and ones that further study by legal scholars should begin to answer.

295. *See*, *e.g.*, Kyllo v. United States, 533 U.S. 27, 37, 40 (2001).

296. *See, e.g.*, United States v. Place, 462 U.S. 696, 708 (1983).

297. *See* United States v. Reed, 141 F.3d 644, 647 (6th Cir. 1998); United States v. Lyons, 957 F.2d 615, 616 (8th Cir. 1992); State v. Miller, 766 S.E.2d 289, 296 (N.C. 2014).

298. Mason C. Clutter, *Dogs, Drones, and Defendants: The Fourth Amendment in the Digital Age*, 21 GEO. MASON L. REV. 557, 557 (2014); *see also* Matthew R. Koerner, Note, *Drones and the Fourth Amendment: Redefining Expectations of Privacy*, 64 DUKE L.J. 1129, 1132-33 (2015) (explaining how expectations of privacy operate in the context of drone surveillance); Andrew B. Talai, Comment, *Drones and* Jones*: The Fourth Amendment and Police Discretion in the Digital Age*, 102 CALIF. L. REV. 729, 732 (2014) (examining how drone surveillance might or might not constitute a Fourth Amendment search).

299. Given the vehement disagreement of four Justices on the current Court with the "trespass to effects" test, it may not be as long-lived as the privacy test from *Katz* has been. *See* United States v. Jones, 132 S. Ct. 945, 957-62 (2012) (Alito, J., concurring in the judgment). Nevertheless, the Court has cited the property rationale from *Jones* in subsequent cases, *see* Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013), and lower courts have also begun applying the trespass rule, *see*, *e.g.*, United States v. Dennis, No. 3:13-CR-10-TCB, 2014 WL 1908734, at *9 (N.D. Ga. May 12, 2014); People v. Gingrich, 862 N.W.2d 432, 436-37 (Mich. Ct. App. 2014); *Miller*, 766 S.E.2d at 296.

300. *See* RESTATEMENT (SECOND) OF TORTS § 218 (AM. LAW INST. 1965); *see also Jones*, 132 S. Ct. at 961-62 (Alito, J., concurring in the judgment).

301. *See, e.g.*, Laurent Sacharoff, *Constitutional Trespass* 16 (Univ. of Ark., Research Paper No. 13-18, 2014), http://ssrn.com/abstract=2311405 [http://perma.cc/W8UQ-BUP4]

A new and more banal problem is raised by the account in this Article: when, if ever, are officers justified in searching standalone or obviously lost property for identification, and what are the limits of that search? A number of cases have reached different results.[302] Though this Article does not answer this question, it suggests the necessary first steps: defining "effects" and separating presumptively protected ones from unprotected ones through the law of abandonment. This definitional work can provide a foundation for new debates about the scope of permissible officer conduct.

Similarly, further work remains on the fourth step in a new effects analysis: what sorts of "exceptions" legitimate otherwise suspect officer behavior. In the home-search context, for example, it is presumptively reasonable for officers to enter a home in hot pursuit of a criminal.[303] If the doctrine of effects is overhauled as this Article proposes, future cases must clarify when otherwise impermissible officer behavior with respect to items will be acceptable. Already, officers are justified in examining and seizing property when contraband is in plain view or when officers have probable cause to believe some object is evidence of a crime. Recognizing effects as a constitutionally protected category may well have the consequence of helping courts create further exceptions that better distinguish between different officer behaviors and otherwise promote socially desirable ends. For example, courts might find that an individual's privacy rights are comparatively weak when the property is of a sort or in a context that potentially poses a danger to others. Since September 11, 2001, nearly any unattended item in Times Square or an airport

(arguing that the Supreme Court in *Jones* "barred unconsented to physical intrusions upon property, of whatever kind").

302. Some courts have used language that might permit fairly broad ID searches. *See* United States v. Sumlin, 909 F.2d 1218, 1219-20 (8th Cir. 1990) (finding that an officer did not violate an individual's Fourth Amendment rights when, in searching for identification in her purse, he encountered a gun and cocaine); State v. Belcher, 759 P.2d 1096, 1097 (Or. 1988) (holding that the "police may search abandoned or lost property for identification of the owner"). Others have permitted ID searches, but require officers to stop searching immediately once identification is found or to adopt the least intrusive means of ascertaining ownership (even to avoid a search altogether if the object is not valuable). *See* State v. Ching, 678 P.2d 1088, 1093 (Haw. 1984); State v. Hamilton, 2003 MT 71, ¶¶ 41-48, 314 Mont. 507, 518-20, 67 P.3d 871, 878-79. This question is beginning to come up with "digital property," too. *See* United States v. Wilson, 984 F. Supp. 2d 676, 684-86 (E.D. Ky. 2013) (finding that it was reasonable for officers to search a laptop for identification of its owner).

303. *See* United States v. Santana, 427 U.S. 38, 43 (1976) ("[T]here was a true 'hot pursuit,' . . . and thus a warrantless entry to make the arrest was justified." (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967))).

seems to fit that bill.[304] Additionally, without saying as much, the Court has found some exceptions to general search and seizure rules for effects in prisons, schools, and automobiles, noting that these are contexts where traditional expectations of privacy are diminished or prudential concerns necessitate greater officer flexibility.[305] Courts may very well find that by clearly categorizing "effects," other contexts emerge in which effects must receive diminished protection on account of countervailing government concerns.

This Article offers a starting point. At a minimum, it has shown that effects deserve more consideration than they have traditionally been given. Recognizing effects alongside other protected categories in the Fourth Amendment confers upon them the stature the Constitution historically provided and should provide them, which is superior to the status quo in many jurisdictions. By using personal-property law to examine the context of items, instead of looking to their location, courts would honor the constitutional commitment to protecting individuals from government interferences with the objects he or she holds dear.

304. *See* United States v. Va Lerie, 385 F.3d 1141, 1157 n.10 (8th Cir. 2004) (Riley, J., dissenting), *vacated*, 424 F.3d 694 (8th Cir. 2005) (en banc).

305. *See* California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that the "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained"); New Jersey v. T.L.O., 469 U.S. 325, 339-41 (1985) (evaluating the search of a purse in a school and holding that "[a]gainst the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds"); Hudson v. Palmer, 468 U.S. 517, 528-30 (1984) (holding that "random searches are essential to the effective security of penal institutions" and permitting warrantless searches of prisoners' property). The Court has framed all three analyses as modifications to what is understood as "reasonable" for Fourth Amendment purposes, instead of as special rules for certain categories of effects. *See Acevedo*, 500 U.S. at 580 (holding that searches of containers within vehicles or of vehicles themselves are unreasonable if unsupported by probable cause); *T.L.O.*, 469 U.S. at 339-40 (noting that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject" to support an exception to the warrant requirement in schools and a relaxation of the probable cause standard); *Hudson*, 468 U.S. at 527-28 (noting that prisoners lack a reasonable expectation of privacy in property in their cells because "[d]etermining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests"). *But cf.* Carroll v. United States, 267 U.S. 132, 153 (1925) (comparing movable vehicles to structures and noting that special warrant rules should apply when the object of a search is a "ship, motor boat, wagon or automobile . . . because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought").

CONCLUSION

For a long time, privacy and property have coexisted uneasily in Fourth Amendment law. Despite the holding in *Katz* that the Amendment protects "people, not places,"[306] courts extensively rely on property concepts to construct the Amendment's bounds.[307] While scores of scholars have argued that real-property concepts unfairly continue to control Fourth Amendment law,[308] no one has yet explored the surprising ways that real-property concepts erode personal-property protections. This oversight is paradoxical given the specific inclusion of personal property in the constitutional text and the history underlying the Amendment.

This account argues that courts can and should reclaim Fourth Amendment protection for personal property outside the home. Courts can give greater protection to effects in spaces accessible to others by abandoning the hegemonic rule of locational privacy. Instead, they should look to multiple contextual factors indicative of an individual's possessory and privacy interests when deciding whether a Fourth Amendment search resulting in a seizure has occurred. A property-based approach can offer significant help in constructing both the meaning of "effects" and expectations of privacy with respect to them. A property-based approach to effects is also more faithful to the text and history of the Amendment and to longstanding principles of Fourth Amendment law.

More fundamentally, as the Supreme Court has begun to give more attention to this word, it is important to begin a scholarly discussion about how effects fit into the Fourth Amendment canon. All the other constitutionally enumerated categories—houses, persons, and even papers—have benefitted from years of doctrinal refinement and academic debate. As courts return effects to significance in the case law, it is critical that scholars join them in interpreting this neglected piece of the Fourth Amendment.

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

307. *See*, *e.g.*, Kerr, *supra* note 16, at 809-15.

308. *See* sources cited *supra* note 21.