

The Incredible Shrinking Fourth Amendment

—The Ongoing Erosion of the Fourth Amendment of the Constitution of the United States of America

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Abstract

During the Prohibition era, the US Supreme Court, “the court” radically deviated from the plain meaning of the Fourth Amendment and precedential authority. The object of this essay is to show that the “trespass” doctrine adopted in this period, was in fact a Prohibition law enforcement doctrine, which took only those parts of the common law that accorded with the court’s recasting of the balance set in the Fourth Amendment. This unprincipled approach construed the Amendment to allow wiretaps, when there was increasing public concern over this expansion of police power. This eventually led to the replacement of the “trespass” doctrine with the privacy doctrine, in *Katz v. United States* (1967). However, the focus on personal privacy counter-poses a weak value, to the strong value of effective law enforcement, as it pits a personal interest against a public interest. What is lost is the public interest in preventing the expansion of state power, under the veil of law enforcement. It is the central thesis of this work that both the “trespass” doctrine and the privacy doctrine have weakened Fourth Amendment protections and in part, have resulted in a law enforcement culture which is to an extent now out of control. The methodology employed to substantiate this thesis is a close analysis of the central cases, placed within a chronological context.

Keywords

Fourth Amendment, *Hester v US*, *Olmstead v US*, The Right to Privacy, *Katz v US*

1. Introduction

In the preceding essay, *Katz Amongst the Pigeons*, there was an analysis of the

Fourth Amendment case of *Boyd v. United States* (1886). In this essay, there is an analysis of the cases that derogated from *Boyd*, which fall into three chronological categories:

- 1) The Prohibition cases which purportedly were decided on a common law trespass basis, rather than a constitutional basis;
- 2) Transition cases which were decided either on a purportedly common law trespass basis, or a privacy basis, depending on the extent of national interest at stake;
- 3) Wiretap cases, which came to be decided on a privacy rather than a constitutional basis.

The one thing which unites all these cases is that they all ignore the ratio in *Boyd* that “constitutional provision for the **security** of person and property should be liberally construed”, (emphasis added) and the plain text of the Fourth Amendment, which provides for a right “to be **secure** ... from unreasonable searches and seizures” (emphasis added).

With the Prohibition cases, there was a wild swing away from the constitutional balance set in *Boyd*, in favour of law enforcement. In 1924 the court unanimously decided *Hester v. United States* (1924) “*Hester*”. Contrary to the ratio in *Boyd*, in *Hester* the court adopted a narrow definition of the term “house” in the Fourth Amendment, finding that the Amendment did not apply, as the evidence was obtained outside the house, in the “open fields”. In *Hester* the facts were that revenue officers were trespassing on Hester’s property and spying on him. The court did not even consider how these acts impacted on the right to be secure in one’s house. Rather than consider the extent of the penumbra, which the right to be secure conferred on the house, the court invented the doctrine of the “open fields”, purportedly relying on Blackstone’s exposition of common law burglary. However, the specific passages in Blackstone cited by Holmes J, refer to curtilage and homestead, contrary to any black and white distinction between the house and “open fields”.

While the court in *Hester* purportedly relied on the common law, the penumbra that the “right to be secure” creates around the “house”, maps directly onto common law curtilage or homestead, as the terms “secure” and “house” are properly interpreted pursuant to the Fourth Amendment. The individual’s sense of primacy in their own place, is a fundamental human instinct. Blackstone explicitly refers to this fact of nature and placed burglary within a set of offences, the gravity of which was measured by the fundamental principle that a man’s home is his castle. This principle is the foundation of the common law balance of power within society, which accords the individual’s primacy in their own place, against all comers, including the State. In respect of the latter, the principle is constitutional.

In *Olmstead v. United States* (1928), where an illegal wiretap was in issue, the evisceration of the Fourth Amendment reach a point that even Holmes J, the author of *Hester*, dissented. In *Olmstead* the court relied on its decision in *Hes-*

ter, in support of the position that a search by sight, did not violate the Fourth Amendment, when such a search was not in issue in *Hester*. It then analogised from sight to hearing and found that the Fourth Amendment did not forbid a search by hearing and only applied to physical searches. The court also held that it unreasonable to expect confidentiality when talking over a phone and that the illegality of the wiretap was of no moment to the Fourth Amendment, as the evidence was admissible at common law. As with *Hester*, the court in *Olmstead* took parts of the common law which suited law enforcement, while ignoring aspects which didn't, to override constitutional principle.

It may be thought that the extensive analysis of these earlier cases is redundant, given that *Olmstead* was overruled by a privacy based interpretation of the Fourth Amendment. However, this analysis has been incorporated for the following reasons:

1) The earlier cases begin the process, followed in the later cases, of the court substituting the constitutional articulation of the balance between law enforcement and limitation of state power, as set out in the Fourth Amendment, with the court's own articulation;

2) Analysis of these errors shows that it was the court's deviation from the principles enunciated in *Boyd* and the misapplication of a property rights/trespass interpretation which vitiated the Fourth Amendment. Accordingly, there was no need to adopt a privacy based approach, as had the court followed *Boyd*, it could not have ruled as it did in *Hester* and *Olmstead*. In addition, that the court could purport to adjudicate in this way, is demonstrative of a central thesis in this work, that the erosion of the Fourth Amendment has been occasioned by the failure of the court, as a constitutional mechanism;

3) The earlier cases purport to found the Amendment on property and the law of trespass, but analysis shows that the Republican majority was picking only those aspects of trespass which could support latitude being given to law enforcement. Conversely, the Democrat judges reacted against what they saw as a property qualification to the Fourth Amendment and advanced privacy as an egalitarian means of limiting state power. It is maintained below that a major reason for the transition to a privacy based interpretation of the Fourth Amendment, was because the pro-law enforcement faction in the court subsequently realised that privacy was a better vehicle by which to advance law enforcement. All the liberal judges achieved was to throw the baby out with the bathwater.

Unlike *Hester*, which was a unanimous decision, in *Olmstead* the court went five to four. The dissent of Butler J, with which Stone J agreed, shines like a light of reason on what is otherwise a jurisprudential abyss. Sadly, it is Brandeis J's dissent, in which privacy is first advanced as the fundamental value that the Fourth Amendment protects, which was eventually followed. Brandeis was a Democrat appointee and the continuing schism in the court very closely reflected the political divide, in the first instance. The power of Brandeis' dissent lay in

his counter-posing an egalitarian privacy value, to what appeared to be a property qualification, as underpinning the Fourth Amendment. However, this property qualification is not part of the Fourth Amendment and was a result of the law enforcement faction couching the issues in terms of property rights/trespass but then reading these down, to advantage law enforcement. In addition, Brandeis' privacy approach appeared to accord with the need for the Fourth Amendment to encompass technological change. However, in *Olmstead* the reason the court found that the Fourth Amendment did not apply to wire-taps, was because pro-law enforcement judges never addressed the purpose of the Fourth Amendment when interpreting it.

Post *Olmstead*, there followed what is termed here the transition cases, in which the schism in the court was at first maintained, but the tendency was towards a privacy based Fourth Amendment. These cases fall into three broad groups:

- 1) cases involving national security, in which the law enforcement faction dominate;
- 2) those cases which don't involve national security, in which the privacy interpretation plays an increasing role. Notably these cases are post Prohibition, although they are often drug cases;
- 3) Cases involving wiretaps and the like, in which the privacy interpretation comes to dominate.

It is in the latter two broad categories that Brandeis J's, conceptualisation of privacy, as the core value underlying the Fourth Amendment, is developed and adopted. This process finalises in *Katz v. United States* (1967), which explicitly overruled *Olmstead*. What can be seen here is a political, Republican/Democratic divide which appears to be a haves vs have nots alignment, where the value underlying the Fourth Amendment was common law property rights versus an egalitarian right to privacy. However, the common law property rights, as postulated by the conservative judges, were flawed, partial and simply a rationale for law enforcement priority, so there was also a divide between law enforcement priority and law enforcement limitation.

In *Hester*, decided in the earlier days of Prohibition, the unanimous political accord in its favour, was reflected in unanimity of the court. By 1928, when *Olmstead* was decided, Prohibition was increasingly seen as disastrous and the Democrat party had begun to position itself as the anti-Prohibition party. In *Olmstead* there are four dissents. In the cases of *Goldstein* and *Able* the law enforcement priority faction have a clear majority. But in the wire-tap cases, as *Olmstead* was indefensible and privacy as a value was directly applicable to private conversations, privacy as the core value was adopted across the political divide.

It is a central thesis in this work, that this divide was healed by the law enforcement priority faction's realisation that a privacy based interpretation of the Fourth Amendment better suited the priority of law enforcement, than a flawed

common law basis. This is evident in *Warden v. Hayden* (1967) in which Brennan J, a Republican appointee, wrote the decision. In this case the court adverted to privacy, as the underlying value in the Fourth Amendment. At the same time, it also overruled *Boyd*, on an issue of admissibility, allowing police to seize “mere evidence”, a significant expansion of State power. Similarly, in *Jones v US* (1960) the entire bench adopted a privacy based approach to a challenge to a search. However the bench, with the sole exception of Douglas J, also found there was probable cause, in the circumstances that the warrant was issued not by a member of the judiciary, as the use of the word “Warrant” in the Fourth Amendment imports, but by a Commissioner. The “probable cause” for the warrant was an affidavit by a narcotics officer, stating that he had a tipoff from an anonymous informer, who the narcotics officer said once before had given reliable information.

In the Prohibition era the court radically deviated from the plain meaning of the Fourth Amendment and precedential authority. The object of this essay is to show that the “trespass” doctrine adopted in this period, was in fact a Prohibition law enforcement doctrine, which took only those parts of the common law that accorded with the court’s recasting of the balance set in the Fourth Amendment.

This unprincipled approach construed the Amendment to allow wiretaps, when there was increasing public concern over this expansion of police power. This eventually led to the replacement of the “trespass” doctrine with the privacy doctrine, in *Katz v. United States* (1967).

2. Cases Which Followed *Boyd*

Boyd remained authoritative up to the Prohibition cases, both *Silverthorne* and *Gouled* being decided in the prohibition era but not being Prohibition cases. In Alito J’s dissent in *Carpenter v US* he stated¹:

Although *Boyd* was replete with stirring rhetoric, its reasoning was confused from start to finish in a way that ultimately made the decision unworkable.

As set out below, the major cases which followed *Boyd*, up to the prohibition cases, *Weeks*, *Silverthorne* and *Gouled*, all applied *Boyd*. *Weeks* and *Gouled*, were unanimous decisions. In *Silverthorne* the Chief Justice and Pitney J dissented but as there was no written dissent, it is unknown what issue they took. As discussed below, it was the Prohibition era court’s elevation of law enforcement values over the balance set by the Fourth Amendment which was the reason for *Boyd* was not followed.

3. *Weeks v. United States* (1914)

In this 1914 case Federal officers suspected Weeks of sending lottery tickets by mail. They searched his home without a warrant, when Weeks was not there.

¹Ibid 13.

Over Weeks' objection the evidence found was used in court and he was convicted. The court unanimously held that the search was in breach of the Fourth Amendment and founded the exclusionary rule, that evidence obtained in breach of the Fourth Amendment is inadmissible.

Silverthorne Lumber Co. v. United States (1920)

This case was decided just after the Volstead Act passed on 17 January 1920, but did not involve a breach of the Act. The court's opinion was given Holmes J, who 4 years later gave the opinion in *Hester*. The court stated the facts as follows:

An indictment upon a single specific charge having been brought against the two Silverthornes mentioned, they both were arrested at their homes early in the morning of February 25, 1919, and were detained in custody a number of hours. While they were thus detained representatives of the Department of Justice and the United States marshal without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there. All the employees were taken or directed to go to the office of the District Attorney of the United States to which also the books, &c., were taken at once.

The District Court ordered the return of seized material but allowed the prosecution to keep copies and photographs, which formed the basis of a new indictment. A grand jury subpoena was issued for the originals. The court held:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

Gouled v. United States (1921)²

In this 1921 case, Gouled was suspected of conspiring to defraud the Government, through contracts with it for clothing and equipment. Private Cohen, of Army Intelligence and a business acquaintance of Gouled's, pretended to make a friendly call on Gouled, gained access to his office and seized documents. One of these, "of evidential value only" was put into evidence against Gouled. The court unanimously held that obtaining evidence by stealth breached both the Fourth and Fifth Amendments.

4. *Hester v. United States (1924)*

The facts

As stated by the court, the facts were:

In consequence of information they [revenue officers] went toward the house of Hester's father, where the plaintiff in error lived, and as they approached saw one Henderson drive near to the house. They concealed themselves from fifty to one hundred yards away and saw Hester come out and hand Henderson a quart bottle. An alarm was given. Hester went

²255 U.S. 298.

to a car standing near, took a gallon jug from it and he and Henderson ran. One of the officers pursued, and fired a pistol. Hester dropped his jug, which broke but kept about a quart of its contents. Henderson threw away his bottle also. The jug and bottle both contained what the officers, being experts, recognized as moonshine whiskey, that is whiskey illicitly distilled; said to be easily recognizable. The other officer entered the house, but being told there was no whiskey there left it, but found outside a jar that had been thrown out and broken and that also contained whiskey.

Legal and factual issues in Hester

The Fourth Amendment of the US Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Hester was convicted of concealing distilled spirits. The appeal to the court was made on the basis that the Fourth and Fifth Amendments of the Constitution of the United States required the evidence of Hester's possession of distilled spirits to be excluded.

The Court held:

The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above "testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug; the jar and the bottle-and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned.

...

The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects", is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 B1. Comm. 223, 225, 226.

The following broad questions arise:

- 1) Whether the court properly applied Blackstone's exposition on burglary;
- 2) Whether on the facts in *Hester*, the search and seizure was conducted in the curtilage or homestead and thus was not conducted in the open fields;
- 3) Whether the Court was correct to apply a common law definition of burglary, as authority, in a constitutional case;

- 4) Whether Hester's possessory right to occupation of the property was at law an "effect", which fell within the wording of the Fourth Amendment;
- 5) Whether Hester "disclosed" the evidence "by his own act" or there was a seizure of the evidence;
- 6) If it was Hester's "own act", was the Fifth Amendment engaged;
- 7) Whether Hester abandoned the evidence.
- 8) Whether there was "justification" for the revenue officers' actions.

Whether the court properly applied Blackstone's exposition on burglary

In regard to this issue the court held:

The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers and effects", is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

4 Bl. Comm. refers to Book IV of *Blackstone's Commentaries* and chapters, 223,225,226 provide Blackstone's exposition of the crime of burglary. Holmes' J's grandiose claim that the "distinction between the [open fields] and the house is as old as the common law" is directly refuted by Blackstone, in the very passages Holmes J quotes. As set out below, in these passages Blackstone took issue with Sir Edward Coke's position that burglary only applied to "manor-houses", arguing that the offence properly applied beyond this, to other occupied premises, to which the act of breaking and entering could properly apply.

In relation to burglary, what constitutes "the house", far from being "as old as the common law" changes between Coke and Blackstone and has since been the subject of the ongoing substantive redefinitions of burglary. For Blackstone, a defining feature of burglary was the act of breaking before entering, which is no longer an element of the offence in many jurisdictions. Rather than being Holmes J's rock of ages, these shifting sands are a poor foundation for constitutional jurisprudence.

Set out below are the passages from Blackstone's *Commentaries*³. The paragraph numbers in this modern translation do not exactly correspond with the original and are inserted in bold. References are omitted.

Book IV Ch.16 Public Wrongs

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Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our anti-ent law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation which every individual might acquire even in a state of nature; an invasion which in such a state would be sure to be punished

³Online Library of Liberty: Commentaries on the Laws of England in Four Books, vol. 2 PLL v6.0 (generated September, 2011) 424. <http://oll.libertyfund.org/title/2142>

with death, unless the assailant were the stronger. But in civil society the laws also come in to the assistance of the weaker party; and, besides that they leave him this natural right of killing the aggressor if he can, (as was shown in a former chapter), they also protect and avenge him in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house that it styles it his castle and will never suffer it to be violated with impunity; agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully: "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason, no outward doors can, in general, be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers, nuisancers, and incendiaries; and to this principle it must be assigned that a man may assemble people together lawfully, (at least if they do not exceed eleven,) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case.

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The definition of a burglar, as given us by Sir Edward Coke, is "he that by night breaketh and entereth into a mansion-house with intent to commit a felony". In this definition, there are four things to be considered: the *time*, the *place*, the *manner*, and the intent.

1. The time must be by night, and not by day, for in the daytime there is no burglary. We have seen, in the case of justifiable homicide, how much more heinous all laws made an attack by night rather than by day, allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night and what day, for this purpose, antiently the day was accounted to begin only at sunrise and to end immediately upon sunset; but the better opinion seems to be that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary. But this does not extend to moonlight, for then many midnight burglaries would go unpunished; and, besides, the malignity of the offence does not so properly arise from its being done in the dark as at the dead of night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner and rendered his castle defenceless.

2. As to the place. It must be, according to Sir Edward Coke's definition, in a mansion-house; and therefore, to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei*. But it does not seem absolutely necessary that it should in all cases be a mansion-house, for it may also be committed by breaking the gates or walls of a town in the night; though that, perhaps, Sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be "*nocturna diruptio alicujus habitaculi, vel ecclesiae, etiam murorum portarumve burgi, ad feloniam perpetranda*".

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And therefore we may safely conclude that the requisite of its being *domus mansionalis* is only in the burglary of a private house, which is the most frequent, and in which it is indispensably necessary, to form its guilt, that it must be in a mansion or dwelling-house. For no distant barn, warehouse, or the like are under the same privileges, nor looked upon as a man's castle of defence; nor is a breaking open of houses wherein no man resides, and which therefore for the time-being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary, though no one be in it at the time of the fact committed. And if the barn, stable, or warehouse be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or home-stall. A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner. So also is a room or lodging in any private house the mansion for the time-being of the lodger, if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and hath but one outward door, at which he and his lodgers enter, such lodgers seem only to be inmates and all their apartments to be parcel of the one dwelling-house of the owner. Thus, too, the house of a corporation inhabited in separate apartments by the officers of the body corporate is the mansion-house of the corporation, and not of the respective officers.

But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there, it is no dwelling-house, nor can burglary be committed therein, for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein when I never lie there.

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Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices; a house or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open than it would be to uncover a tilted wagon in the same circumstances. 3. As to the *manner* of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once; for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars. There must in general be an actual breaking; not a mere legal *clausum fregit*, (by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption. As at least by breaking or taking out the glass

of, or otherwise opening, a window; picking a lock or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein it is no burglary; yet, if he afterwards unlocks an inner or chamber door, it is so. But to come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit. So, also, to knock at the door, and upon opening it to rush in with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house.

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all these entries have been adjudged burglarious, though there was no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process.

In the above exposition, Blackstone placed burglary within a set of offences, the illegality of which ring-fences the home as a castle. Just as a castle may have moat and will have defendable walls Blackstone saw the home as being protected by “the animadversion of the law upon eaves-droppers, nuisancers, and incendiaries”⁴. To abstract burglary from this set of offences, is to lose the common law constitutional dimension, which is that of a domain protected by law against all comers, including the King, as discussed in *Semaynes Case*⁵.

Whether on the facts in *Hester*, the search and seizure was conducted in the curtilage or homestead and thus was not conducted in the open fields

As set out above, Holmes J’s ratio was:

... the special protection accorded by the Fourth Amendment to the people in their “persons, houses, papers and effects”, is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

The above dicta is a false dichotomy. Between the house and the open fields is curtilage or homestead. In the passages of Blackstone’s *Commentaries* Holmes J relied on, there is no reference to “open fields” and it is explicitly stated that the crime of burglary applied to entry into any buildings within the curtilage or homestead of the home, or “capital” house as follows:

And if the barn, stable, or warehouse be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or

⁴Bl Comm 223.

⁵All ER Rep 62.

home-stall⁶.

*Black's Law Dictionary*⁷ defines "curtilage" as:

The enclosed space of ground and buildings immediately surrounding a dwelling-house. In its most comprehensive and proper legal signification, it includes all that space of ground and buildings thereon which is usually enclosed within the general fence immediately surrounding a principal message and outbuildings, and yard closely adjoining to a dwelling-house, but it may be large enough for cattle to be levant and couchant therein. 1 Chit. Gen. Pr. 175. The curtilage of a dwelling-house is a space, necessary and convenient and habitually used for the family purposes, and the carrying on of domestic employments. It includes the garden, if there be one, and it need not be separated from other lands by fence. *State v. Shaw*, 31 Me. 523; *Com. v. Rarney*, 10 Cush. (Mass.) 480; *Derrickson v. Edwards*, 29 N. J. Law, 474. SO Am. Dec. 220. The curtilage is the courtyard in the front or rear of a house, or at its side, or any piece of ground lying near, enclosed and used with, the house, and necessary for the convenient occupation of the house. *People v. Geduey*, 10 Ilun (X. Y.) 154. In Michigan, the meaning of curtilage has been extended to include more than an enclosure near the house. *People v. Taylor* (1992), 2 Mich 250.

"Home stall" is the old English word for "homestead". *Black's Law Dictionary*⁸ defines "Homestead" as:

The home place; the place where the home is. It is the home, the house and the adjoining land, where the head of the family dwells; the home farm. (Emphasis added.) The lived residence of the head of a family, with the land and buildings surrounding the main house. See *Oliver v. Snowden*, IS Fla. 825, 43 Am. Itep. 33S; *In re Allen* (Cal.) 16Pac. 319; *McKeough v. McKeough*, 69 Vt. 34, 37 Atl. 275; *Iioitt v. Webb*, 36 N. II. 158; *Frazer v. Weld*, 177 Mass. 513, 59 N. E. IIS; *Lyou v. Hardin*, 129 Ala. 643, 29 South. 777; *Xorris v. Kidd*, 28 Ark. 493.

As set out above, property law distinguishes between curtilage or homestead on the basis of size, curtilage being more apposite to a dwelling-house, homestead to a farm. Both are distinct from other lands, which could be termed "open fields". Prior to *Hester*, there was no black and white division between the house and the open fields. Between the two there was the curtilage or homestead. If relying on Blackstone, to gauge whether any "open fields" doctrine can even be applied, the court was first obliged to either adopt or make a factual determination of whether curtilage or homestead applied to *Hester's* property and the extent of this. Then an enquiry was required as to whether the evidence was found within or without this domain. There remained an appraisal of whether the

⁶BL Comm 225.

⁷Free Online Legal Dictionary 2nd Ed.

⁸Free Online Legal Dictionary 2nd Ed.

Fourth Amendment applied, to any or all of these discrete areas, but that any mention of these questions is entirely absent in *Hester*, disqualifies it as a reasoned decision based on Blackstone.

Beyond this, Holmes J's advocacy of a vague "open fields" doctrine is in stark contrast with Blackstone's comments on trespass, as follows:

EVERY unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause, *quare clausum querentis fregit* [why he broke his close]. For every man's land is in the eye of the law enclosed and set apart from his neighbor's: and that either by a visible material fence, as one field is divided from another by a hedge; or, by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other: for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, *viz.* the treading down and bruising his herbage⁹.

Although the property at issue was Hester's father's property, it was not in issue that Hester was the lawful occupier, a revenue officer stating that he "supposed they were on Hester's land". Leaving aside the argument that the revenue officers were conducting a warrantless search, indisputably they were trespassers. While the civil nature of society provides that outside of express notice to the contrary, any person can come to another's front door, they cannot do so with the intent to act adversely to the occupant's interests. This is because such an entry is based upon implied consent, but no consent can be implied to an action known to be adverse to the occupant's interest *TCN Channel Nine Pty Ltd v Anning* (2002).

Justice Holmes creation of a vague and indeterminate "open fields" doctrine, has spawned the "curtilage cases", which struggle to give practical shape to a doctrine which is at odds with both constitutional rights and property law.

Whether the Court was correct to apply a common law definition of burglary, as authority, in a constitutional case

In *Hester* the court was not hearing an appeal on a conviction for burglary. The question before it was one of constitutional law, not common law. In the same measure that constitutional law does not apply to relationships between individuals, but governs relations between the state and the people, the common law, as it relates to burglary, cannot be relied on, as authority, to decide constitutional claims. While it may be the case that when confronted with a difficult constitutional issue, analogies with common law principles may be of assistance, Holmes J did not do this. When Holmes J wrote "BL Comm 223 225 226", he may as well have written QED. However, in doing so, rather than proving the proposition, Holmes J revealed a sea-change in the court whereby it abdicated its

⁹BL Comm. Book 3, Chapter 12.

role of adjudicating constitutional law, by determining a constitutional case on the basis of the common law.

Of all the many errors in *Hester*, perhaps worst of all, Holmes J enlisted Blackstone as an authority for a stance which is antithetical to Blackstone's own approach to constitutional law. For Blackstone: "the absolute rights of man ... are ... summed up in one appellation ... the liberty of mankind. This natural liberty ... being a right inherent in us at birth, and one of the gifts of God to man at his creation, when He imbued him with the faculty of free will"¹⁰.

Under this overarching principle, Blackstone advocated three subsidiary rights:

a. "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"¹¹.

b. "personal liberty [which] consists in the power of loco-motion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law"¹².

c. private property, which as a constitutionally protected domain, outside the grasp of the state is so important: "that it will not authorise the least violation of it; no, not even for the general good of the whole community"¹³.

As set out above Blackstone saw liberty as being three part, personal security, personal liberty and private property. For Blackstone, private property is a "constitutionally protected domain", which the state should have no power over. Here Blackstone uses the word "violation", the same word used in the Fourth Amendment, which explicitly forbids the state from breaching the security of private property, without the Court's sanction.

If Holmes J had wished to properly rely on Blackstone, reliance on his constitutional principles would have been justified, as these had had enormous influence on the formulation of the US Constitution, L C Warden writing that:

the authors of the Declaration of Independence, the Federalist Papers, and the framers of the U.S. Constitution in 1787 took the Commentaries as the main authority on the British Constitution and all common law (p. 140-159). Warden (1938) Warden, L. C. (1938) *The Life of Blackstone*. Charlottesville, VA: Michie.

Rather than rely on Blackstone's writings on constitutional law, which are voluminous, Holmes J misappropriated his formulation of burglary and misrepresented it as being a foundation for the evisceration of a constitutional protection at the centre of Blackstone's constitutional philosophy. The common law, as it relates to burglary, cannot be binding authority in constitutional cases. Blackstone makes no such claim and his legal philosophy is diametrically opposed to the position taken by Holmes J. As Holmes J could not rely on Blackstone, he and the other members of court simply created the "open fields" doctrine, as it

¹⁰BL Comm. Vol. 1, p. 125.

¹¹Ibid (Vol. 1, p. 127).

¹²Ibid (Vol. 1, p.134).

¹³Ibid (Vol. 1, p. 139).

relates to constitutional issues, out of thin air.

Whether Hester “disclosed” the evidence by his “own acts” or there was a seizure of the evidence

As set out above, the evidence came to the attention of the revenue officers when they were on Hester’s property and were in the process of interdicting Hester and his associates. It was after the revenue officers had entered the house that they observed the bottle, which was lying outside. In *Hester* the court held:

The defendant’s own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each ...

As the facts clearly provide, all the relevant actions of Hester and his associates were in response to the actions of the revenue officers. In his essay: *Voluntariness—The Missing Link*¹⁴, John Fisher discussed voluntariness in regard to criminal acts. Fisher maintained that in the criminal law there are three basic elements, the *actus reus*, the willed performance of the *actus reus* and *mens rea*. In support of this approach he cited the following:

Lord Denning, *Bratty v Attorney-General for Northern Ireland* (1963):

no act is punishable if it is done involuntarily.

Barwick CJ, *The Queen v O’Connor* (1980)¹⁵:

in all crime, including statutory offences, the act charged must have been done voluntarily, that is accompanied by the will to do it.

... It is clear, I think, that no common law offence is made out by proof of the *actus reus* alone. In the case of all such crimes, at least an actual intent to do the physical act involved in the crime charged must be established.

Woodhouse J, *Tifaga v Department of Labour* (1980):

it must be equally elementary and a matter of common sense as well that where such an offence of strict liability is charged it will still be essential to *link* the defendant with the *actus reus* before he can be found guilty of the alleged offence, no matter how clear it may be that the prohibited event has actually occurred (Emphasis added.)

Looking at this issue in terms of Fisher’s three basic elements; there is the *actus reus* of Hester dropping a jug and leaving it behind. However, in order to properly assess whether there was “willful performance”, the Court in *Hester* was required to address two factual issues:

It is stated in the facts that a revenue officer fired a shot, but it is not stated whether this shot was fired at Hester, or Henderson, or in the air. Neither is it stated when or how far from Hester the shooter was when the shot was fired, this being relative to the state of alarm that Hester may have been reacting to, when he dropped the jug.

¹⁴NZ Law Review 1988.

¹⁵(1980) 146 CLR 64, 71.

What is not referred to at all, is whether the revenue officers identified themselves or whether Hester knew who they were. Although this case predates the St Valentine's Day Massacre, there is no finding or any reference to evidence, as to the threat Hester and his associate may have believed they were fleeing from.

Without these facts being considered, the court in *Hester* was not able to make a determination as to whether Hester's actions were his own or were in response to the actions of the revenue officers. Without being able to determine volition, the court could not determine causation, as to whether the evidence was disclosed or seized. Applying Fisher's indicia, Holmes J imposed absolute liability on Hester, looking only at the performance of the acts and not to whether there was willed performance. Astonishingly, this was not for an absolute liability offence, a category of offences not even in existence at this time in the US, but to deprive Hester of a constitutional protection.

There is no excuse for the court to have ignored the legal principle of voluntariness. The principle of duress excuses acts, which are compelled by another and the law of self-defense justifies reacting to a threat by means of forceful actions. Both of these defences rest on volition and causation, within the criminal law context. In Justice Blackmun's powerful dissent in *United States v. Bailey* (1979), a case involving escape from allegedly brutal incarceration, he stated that the defence of duress is:

“anciently woven into the fabric of our culture”. J. Hall, *General Principles of Criminal Law* 416 (2nd ed. 1960), quoted in Brief for United States 21. And the Government concedes that “it has always been an accepted part of our criminal justice system that punishment is inappropriate for crimes committed under duress because the defendant in such circumstances cannot fairly be blamed for his wrongful act”.

In *Stratton's Case*¹⁶, Lord Mansfield held:

Necessity forcing man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity, forced, his will does not go along with the act.

In *Baily* the serious crime of escaping from lawful custody was in issue. However, Justice Blackmun did not look at the issue as a question of *actus reus* simpliciter, but considered the issue through the lens of what George Fletcher called “normative involuntariness”¹⁷ which posited a societal measure of which circumstances override choice and so justify or excuse wrongful actions. For Justice Blackmun, appalling prison conditions, in the absence of legislative remedy, amounted to duress.

The above cases consider liability for offences. Hester committed no offence in regard to the evidence, according to Holmes J, who found that he abandoned it, not that he attempted to destroy it. As duress usually operates as a defence to

¹⁶21 How. St. Tr. (Eng.) 1046-1223.

¹⁷*Rethinking Criminal Law* Oxford University Press NY 2000.

what would otherwise be the commission of a crime, there is a high threshold but in *Hester* proportionality is not engaged, as no crime was being committed. On the facts in *Hester*, Hester and Henderson were in the act of fleeing. They were not acting autonomously, but were under duress, the extent of which is unknown, due to the paucity of information in *Hester*. Accordingly, there was an insufficient evidential basis to ascribe voluntary action, rather than involuntary reaction, to Hester being assailed by armed trespassers.

Application of the Fifth Amendment

In *Hester* the appeal raised the application of the Fifth Amendment, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation (emphasis added).

In *Hester* Holmes J held both that:

The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle ...

(and that)

The suggestion that the defendant was compelled to give evidence against himself does not require an answer.

In *Boyd* the court held:

... the Fourth and the Fifth Amendments should be read together, as both an unlawful search and seizure and compulsion to give evidence against oneself had the same State purpose, of gaining evidence.

In *Griffin v. California* (1965) the US Supreme Court struck down a conviction on the basis of prosecutorial comments made about a refusal to testify, as follows:

For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice", *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 55, which the Fifth Amendment outlaws". It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.

The ill that the court in *Griffin* identified was the "inquisitorial system of criminal justice ... which the Fifth Amendment outlaws". The court viewed the prosecutor's comments on the refusal to testify as cutting "down on the privilege

by making its assertion costly”. The cost was the inference that Griffin’s own act, of not giving testimony, could be used against him, as evidence of wrongdoing. Seen in this light, a person’s own acts, which are capable of being used as evidence against them, come within the Fifth Amendment, where the gathering of that evidence can be seen as inquisitorial.

As held in *Griffin*, acts come within the Fifth Amendment and according to Holmes J it was Hester’s own act which provided “witness” against him. The issue then becomes whether or not he was compelled. The facts were that Hester reacted to the advance of the revenue officers onto the property by running away. The facts do not disclose whether or not the officer’s identified themselves or whether Hester knew who they were. Without knowing this, it is not possible to know the level of threat Hester thought he was reacting to.

There was also the use of deadly force by one of these officers, who fired a shot. Holmes J gives this the barest of mentions and it is unknown if there was evidence before the court as to whether Hester was shot at, or not. The sequence of events is unclear but it appears from the evidence referred to by Holmes J that Hester dropped the jug after the shot was fired. The gathering of evidence, from a person who has dropped it while fleeing from the use of deadly force, clearly raises the issue of compulsion. This required either the facts to be clarified or compulsion considered. For Holmes J to say in these circumstances, that the Fifth Amendment “does not require an answer”, is a complete denial not merely of the constitutional importance of the Fifth Amendment but also of the judicial function.

Whether the evidence had been abandoned

Justice Holmes held that: “the jug, the jar and the bottle ... had been abandoned”. The issues here are:

- a. Whether Hester abandoned the jug;
- b. Whether Henderson and the occupants of the house abandoned the jar and bottle;
- c. If Henderson and the occupants of the house abandoned the jar and bottle, whether they came into the possession of Hester, as they were on his property;
- d. After the bottle and jar came into the possession of Hester, did he then abandon them;
- e. If Hester and he did not abandon the bottle and jar, whether the revenue officer had any lawful right to them.

Whether Hester abandoned the jug

In *Eads v. Brazelton* (1861), the court found that as a vessel and cargo had been left for 28 years, undisturbed in a shifting river bed that since had formed an island over the vessel, it had been abandoned. The Court held:

Abandonment is an intentional relinquishment of all right, title and possession of a thing without the intention of ever reclaiming it. It consists of two

elements, act and intention, with intention to abandon being the most important. It is a question of fact determined from all the circumstances. A mere passage of time will not necessarily work an abandonment if the owner has clearly shown a constant intent to salvage it.

As held in *Eads v. Brazelton* (1861) abandonment, “consists of two elements, act and intention, with intention to abandon being the most important”. In regard to Hester’s act of dropping the jug, as this occurred on Hester’s property it remained in his possession. As the jug remained in Hester’s possession there was no factual basis for the inference that he had abandoned it.

In *Hester*, of the most important element, intention, there is no mention. Intention may be discerned by the facts, but Holmes J’s decision is light on facts and in some instances they are either contradictory or appear to be founded on assumption. In regard to the dropping of the jug, Holmes J found: “Hester dropped his jug, which broke but kept about a quart of its contents. Henderson threw away his bottle also.” Despite Holmes J linking these two sentences, by the use of the word “also”, they conflict, the verbs “dropped” and “threw away”, having very different meanings, when the issue is abandonment.

The Collins Law Dictionary 2006, in its definition of abandonment, provides:

...The abandonment must be made by the owner without being pressed by any duty, necessity or utility to himself, but simply because he wishes no longer to possess the thing; and further it must be made without any desire that any other person shall acquire the same; for if it were made for a consideration, it would be a sale or barter, and if without consideration, but with an intention that some other person should become the possessor, it would be a gift: and it would still be a gift though the owner might be indifferent as to whom the right should be transferred; for example, he threw money among a crowd with intent that some one should acquire the title to it.

As provided above, Hester could not have abandoned the jug if he were acting under necessity, such as dropping the jug so as to be able to flee faster. Similarly, he could not have abandoned it for the utility of distancing himself from the evidence. Surprisingly, Holmes J did not find that Hester magnanimously gave the jug to the revenue officer, to ease the task of his prosecution. As Hester’s actions cannot establish an intention to abandon there was no basis for a finding of abandonment by Hester.

If Hester did not abandon the jug, on the plain words of the Fourth Amendment, consideration had to be given as to whether it was an effect. The Fourth Amendment expressly protects: “persons, houses, papers, and effects”. Holmes J held that the Amendment did not apply outside the house, but ignored the Fourth Amendment’s protection of a person’s “effects”, presumably on the basis of his finding that Hester had “disclosed” the evidence by his “own acts” and abandoned the jug he dropped. As set out above, there was no lawful basis for

the court to find that Hester had abandoned the jug. If Hester had not abandoned the jug, prima facie it was one of his “effects” and search and seizure of it was a violation of the Amendment.

Whether Henderson and the occupants of the house abandoned the jar and bottle

In regard to Henderson, the facts simply state that he threw the bottle away. For the same reasons as set out above in regard to Hester, this act of itself, cannot imply an intention to abandon as “necessity or utility to himself” was not considered. In addition, as Holmes J conflated “threw away” with “dropped”, we don’t know if Henderson dropped or threw away the bottle.

In regard to the occupants of the house, Holmes J stated:

The other officer entered the house, but being told there was no whisky there left it, but found outside a jar that had been thrown out and broken and that also contained whisky.

It appears from *Hester* that no-one else was charged, which raises the doubt as to whether the revenue officer had actually seen someone throw this jar out the window. Tellingly, there is no identified person to whom this throwing away is imputed to. The above passage does not state that a person was seen doing this and if the act had not been witnessed, then there was no evidential basis for finding it “had been thrown out”. With the act itself in question, there is nothing from which to infer an intention to abandon by the occupants of the house.

After the bottle and jar came into the possession of Hester, did he then abandon them

Assuming that Henderson and the unnamed occupants of the house did in fact abandon the bottle and the jar, they did so on Hester’s property. The issue of who then had a rightful claim to these items is dealt with below. On the premise that these items came into the possession of Hester, as they were on his property, there is no evidence as to Hester’s acts or intentions in regard to any subsequent abandonment of either the bottle or the jar. Accordingly, there was no factual basis for the court to infer both abandonment by Henderson and the occupants of the house, on Hester’s property and then subsequent abandonment of these items by Hester.

If the jar and bottle came into the possession of Hester and he did not abandon them, whether the revenue officer had any lawful right to them

As discussed above, it was an agreed fact that it was Hester’s property. However, Holmes J also refers to the premises as Hester’s father’s. As Hester was convicted of concealing distilled spirits, it appears that he had some form of tenancy in regard to the property. As the court did not deign to address this issue, it is unknown whether Hester had some form of tenancy or not, but this would only clarify who had priority to a possessory claim to any abandoned items on the property, between Hester and his father. Nothing is said of Henderson’s and the occupants of the house’s legal relationship to the premises. In *Eads v. Brazelton* (1861) the claim was stated as follows:

The bill in this case is founded upon a right of occupancy which Brazelton, the plaintiff, insists was vested in him by his discovery of the wreck of the steamboat America, and by his intentions and acts relating thereto. Because this right was not respected by the defendants, partners and servants of a firm of wreckers doing business in the Mississippi river and its tributaries, under the style of Eads & Nelson, Brazelton filed his bill on the chancery side of the circuit court of Mississippi county, to obtain the protection of the court, to relieve him from the interference of the defendants in his own intended labors to recover the property in the wreck, and to obtain compensation for what they had taken therefrom.

In *Eads v. Brazelton* (1861) it was held:

When things that become property from being appropriated are the property of nobody, are in a state of negative community, the first finder may reduce them to possession, which is a good claim, and under the name of title by occupancy is regarded as the foundation of all property. 2 *Blk's Com.* 3, 258; 1 *Bouv. Am. L.* 194, No. 491; *Pothier Droit De Propriete, Nos.* 20, 21; *La. Civil Code, Art's* 3375, 3376.

As stated above “title by occupancy is regarded as the foundation of all property”. In *Hester* occupancy was held by either Hester himself or his father. Whether or not the Fourth Amendment was infringed, without a warrant, the revenue officers had no lawful power to be on the property and were trespassers. Trespassers cannot have a better claim to items abandoned on a private property than the property holder or any person with a possessory right to the property, as trespassers are tortfeasors and committing a wrong just by being on the property. Being wrongfully on the property, the revenue officers had no right to take anything on the property into their possession, as this would be trespass to goods and the use of the containers, to ascertain whether they contained moonshine, was an act of conversion.

In addition to being tortfeasors at civil law, the revenue officers may have been committing a criminal offence. Current US law provides:

§11.411 Criminal trespass

...

(b) A person commits an offense if, knowing that he or she is not licensed or privileged to do so, he or she enters or remains in any place as to which notice against trespass is given by:

- (1) Actual communication to the actor; or
- (2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
- (3) Fencing or other enclosure manifestly designed to exclude intruders.

In *Hester* there was no enquiry as to whether the property had “fencing or other enclosure”. Importantly such a demarcation clearly maps onto the common law protections of curtilage or homestead, as being private property, in

both senses of the word. That is, property which is both privately held and that which is personal.

Beyond this, the application of the legal concept of abandonment creates a fiction. What is happening is that Hester and his associates are attempting to evade arrest and prosecution for having moonshine. They are either running away with the evidence, accidentally dropping items, or throwing the glass containers on the ground, either to distance themselves from them, or in the hope that they will break, the moonshine will run out on the ground and there will be no evidence against them. The shoe-horning of the legal concept of abandonment into this set of facts distorts the law.

Whether an “effect”, pursuant to the Fourth Amendment, encompassed Hester’s possessory right to occupation of the property

As discussed above, it is unknown whether Hester had some form of tenancy or not, as there is no discussion on what was Hester’s legal relationship to the property. As Hester was convicted of concealing distilled spirits and these spirits were found on the property, it is assumed that at least he had a permissive tenancy in the property. As set out above in the facts of the case, a revenue officer stated that he “supposed they were on Hester’s land” but elsewhere Holmes J refers to “Hester’s father’s land”. Given that the court should not have fallen into ambiguity, it is assumed that Hester had some form of tenancy, or possessory right to the property. If this is correct, the issue arises as to whether a possessory right, as a part of Hester’s personal estate, comes within the term “effects” in the Amendment.

Textual analysis

As a term, “effects” are commonly seen as tangible items, but in property law and particularly wills, the term means “personal estate”, which may include contractual or possessory rights to property. *Black’s Law Dictionary*¹⁸. provides that “effects” mean:

Personal estate or property. This word has been held to be more comprehensive than the word “goods”, as including fixtures, which “goods” will not include. *Bank v. Byram*, 131 111. 92, 22 N. E. 812. In wills. the word “effects” is equivalent to “property,” or “worldly substance”, and, if used simpliciter, as in a gift of “all my effects”, will carry the whole personal estate. *Ves. Jr.* 507; *Ward*, Log. 209. The addition of the words “real and personal” will extend it so as to embrace the whole of the testator’s real and personal estate. *Hogan v. Jackson*, Cowp. 304; *The Aljiena* (D. C.) 7 Fed. 301. This is a word often found in wills, and, being equivalent to “property”, or “worldly substance”, its force depends greatly upon the association of the adjectives “real” and “personal”. “Real and personal effects” would embrace the whole estate; but the word “effects” alone must be confined to personal estate simply, unless an intention appears to the contrary. *Sciouler*, Wills.

As provided in the above definition, an “effect” is a personal estate. A personal

¹⁸*Free Online Legal Dictionary 2nd Ed.*

estate may include contractual or possessory rights. A permissive tenancy is a possessory right to property and as such was a part of Hester's personal estate, or effects. Statutory interpretation provides that a term should be given its natural meaning, within the context of the provision. If required, extrinsic aids may be resorted to.

Extrinsic aids

Maureen Brady's essay: *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*¹⁹ takes the conventional view that "effects" are tangible objects, but helpfully the essay discusses the origin of the term in state constitutional provisions, preceding the US Constitution, references omitted, as follows:

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. It provided "[t]hat the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure". Vermont adopted this section—embodying the houses-papers-possession construct—verbatim, and both Massachusetts and New Hampshire used very similar formulas.

The minority share of members from Maryland, Massachusetts, and Pennsylvania and the majority share of members from New York, North Carolina, and Virginia each suggested that the Constitution include provisions guaranteeing freemen the right to be secure in their "property" or "possessions" from unreasonable searches and seizures²⁰.

In all of these measures Hester's homestead, rather than just his house, would fall under then definition of "possession" or "property". Brady goes on to cite Madison's proposal for what would become the Fourth Amendment, which was phrased:

"[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"

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". This left the Fourth Amendment in substantially its present form²¹.

As discussed by Brady, there appears to be no explanation of this replacement. Brady maintains that the term was little used in the discourse and then primarily by Anti-Federalists. As set out above, there is the extrinsic aid that in the final drafting of the Fourth Amendment, the term "effects" replaced "their other property". The term "their other property", could be interpreted as legal owner-

¹⁹Yale Law Review 982.

²⁰Ibid 983.

²¹Ibid 984.

ship of property. So interpreted it would not encompass a possessory right. Looked at in this light, the use of the term “effects”, is broader than “their other property”, in that it comprises both a possessory right and legal ownership. This expansive view is consistent with the use of a more general term, to placate Anti-Federalists, whose opposition to federation was founded in their concerns that a federal state would have more power, which would be abused.

On the other hand, the term: “their other property” has general application, whereas the word “effects” brings with it the concept of something personal, as in personal effects. This would accord with the prohibition against violation, which again could be seen as being apposite to personhood, although it is also apt to abuse of something sacred. This dimension would narrow the scope of “effects” but would still encompass one’s possessory interest in curtilage or homestead, as these are personal interests. While a textual analysis of the terminology utilised is no doubt helpful in statutory interpretation, ultimately it is the clear light of the intention of the Fourth Amendment which dictates the meaning of the word “effects”. This is discussed below.

Purposive interpretation

The first principle of statutory interpretation is that the words used in provision must be interpreted according to the purpose of the provision. The plain words of the Fourth Amendment establish that was intended to prevent the Executive from conducting specified searches or seizures without a warrant issued by a member of the Judiciary, on the basis of “probable cause”. While this was the specific purpose, this purpose sits within the overarching constitutional purpose, of preventing the Executive from using its mandate to prevent and punish crime, to increase its own power. Ultimately the purpose of the Fourth Amendment was to balance two societal values, prevention of crime and the preservation of a free society.

In *Boyd* the ratio was that: “constitutional provision for the security of person and property should be liberally construed”²². This construction divides the things protected by the Fourth Amendment into two categories. One the one hand there is the “person” exactly as stated in the text of the Amendment. As personhood was not in issue in *Boyd*, there was no need to consider the scope of the protection of “persons”. One the other hand, the other terms in the Amendment: “houses”, “papers” and “effects,” are raised up a level of generality, to the class of things to which they belong, the class of “property”. The ratio in *Boyd* was that in order to uphold the purpose of the Amendment, a liberal interpretation of the above terms was required. On this basis, the curtilage or the homestead would fall with the class of things which were the person’s property. Alternatively, a liberal construction of the term “houses” or “effects” as encompassing possessory rights, would incorporate the curtilage or the homestead.

In *Hester* there is no discussion of the purpose of the Fourth Amendment. Rather than interpret the Fourth Amendment according to its purpose, the ap-

²²*Boyd v US* 616:617.

proach of the court in *Hester* was to substitute the constitutional balance between the power of the state and the liberty of an individual, as laid down in Fourth Amendment, with their view of what was justified and what was not. The court then manufactured a rationale to support this view. That this rationale was entirely specious did not matter, as the decision of the US Supreme Court was final. Why the court abandoned legal principle and even reason, is the topic of the final essay in this trilogy. In this part it will simply be established that it did. As set out above Holmes J held:

The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land (emphasis added).

The evidential basis for the issue of where the examination took place was as follows: "on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact". It is significant that "Hester's land", as it was referred to by the revenue officer, becomes "Hester's father's land" in Holmes J's passage quoted in the paragraph above.

More importantly, this was not a hypothesis but was a fact in the case, as in a legal proceeding any factual issue not contested, which is material to the issues, is taken to be fact, as a matter of law. In a trial there are three groups of facts: those controversial; those agreed and those of a background nature which merely set the scene and are not material. If a fact is not identified as controversial, it is agreed, as it would be unfair for a party to question a fact at trial, which was not previously identified as controversial, as the other party could be unable to produce any conflicting evidence.

Outside of agreed facts which are plainly wrong or subsequently agreed by the parties to be in error, it is not open to a judge to question agreed facts, as there is no evidence before the court on which to make a finding. Holmes J read down an agreed fact, crucial to the case, by referring to it as a "hypothesis", or supposition. In doing so he did not function as a judge but as an advocate. When a judge advocates they are no longer being a judge, as one cannot be a judge in your own cause.

Holmes J carried on the above quote, as follows:

As to that, it is enough to say that, apart from the justification the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers and effects", is not extended to the open fields (emphasis added).

As is explicitly stated in this passage, the Court in *Hester* believed the revenue officers to be justified in their actions. As set out in this essay, *Hester* is bereft of any legal foundation, principle or reason. This means that the decision is in fact founded on the court's belief that the search and seizure was justified. However, not one reason is given in support of this belief. There is simply no discussion of the value which the court believed justified the unwarranted entry and search or

of the intersection of this belief and the purpose of the Fourth Amendment.

The purpose of the Fourth Amendment is to preserve liberty by restricting the power of the State. This was particularly so as Prohibition was the enforcement of morality and so introduced a union of Church and State, which vastly extended the powers of the State. In this environment, to uphold the Constitutional balance between liberty and State power, the Fourth Amendment needed to be upheld to the greatest extent possible. That it was not has led to a situation, in many ways worse, than that which engendered the American Revolution.

Stare Decisis

In *Hester* the court made no reference to *Boyd v US* or any other precedential case. Due to the brevity of the Judgment, it is unknown if submissions were made as to the applicability of *Boyd*. As set out below, the failure to either apply precedent, or provide cogent reason to depart from it, is a breach of *stare decisis* which rendered the impugned Judgment *per in curium*, or outside of the law.

Stare decisis is Latin for “to stand by things decided”. There is both “horizontal” and “vertical” *stare decisis*. Vertical *stare decisis* relates to the system by which lower courts follow higher courts, which provides for parity. It is horizontal *stare decisis* which is in issue here: the requirement that courts of the same level and in particular supreme courts, follow previous precedential decisions. This aspect of *stare decisis* upholds one of the fundamental principles of law, certainty, which entails the law being known, an equally fundamental principle. This in turn grounds the concept that ignorance of the law is no defence and the primacy of mens rea, within the criminal law context.

There is of course a tension between certainty, correction of error and adaption of the law to novel circumstance. Humans are fallible and there is always the possible need for correction. Even if one takes the position that the law is always extant and that courts merely apply principles of law, novel situations can differently illuminate these principles.

At different times the courts have struck different balances between these competing interests. However, key to any system of justice based on reason was the requirement that the prior decision, if not properly distinguished, was demonstrably shown to be founded on faulty reasoning.

Historically, the English House of Lords took a case by case approach to horizontal *stare decisis*. In 1760 the House in *Pelham v. Gregory*, 3 Bro. P. C. (Toml. ed.) 204, overruled its decision made in 1736, in *Brett v. Sawbridge (1736)*, Id. 141, on a question of remoteness. Similarly, in 1821, in the case of *Perry v. Whitehead*, 6 Ves. 544, 548, Lord Eldon said that “* a rule of law laid down by the House of Lords must remain till altered by the House of Lords”. In contrast, in the 1827 case of *Fletcher v. Sondes (1822)*, 1 Bligh, N. s. 144, 249, Lord Eton declared that the House was bound by *Bishop of London v. Ffytche*, 2 Bro. P. C. (Toml. ed.) 211, which was the last case where peers, not learned in the law,

voted, and in which the courts of Common Pleas and King's Bench were overruled by a vote of nineteen to eighteen. As late as 1852 Lord St. Leonards expressed an opinion that the House was not bound by any rule of law which they might lay down, in *Bright v. Hutton*, 3 H. L. C. 341; and in 1860, in *A. G. v. Dean and Canons of Winsor*, 8 H.L. C. 369, 459, Lord Kingsdown reserved his opinion upon the question. However, during this time Lord Campbell was taking the position that the House could not change the rules of law it had laid down. 3 H. L. C. 391; 8 H. L. C. 391, 392.

In the 1861 case of *Beamish v Beamish*²³, there began a sea change towards upholding certainty, this approach being subsequently enunciated in *London Street Tramways Ltd v. London County Council* (1898) by Lord Halsbury LC, as follows:

My Lords, it is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an "extraordinary case", an "unusual case", a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the rehearing and rearguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal? My Lords, "*interest rei publicæ*" that there should be "*finis litium*" at some time, and there could be no "*finis litium*" if it were possible to suggest in each case that it might be reargued, because it is "not an ordinary case", whatever that may mean. Under these circumstances I am of opinion that we ought not to allow this question to be reargued.

Somewhat ironically, the court in *London Street Tramways* did not itself apply the nuanced precedents of the House of Lords to *stare decisis*, as demonstrated by the above cases, Lord Halbury claiming that ridged adherence to certainty was:

a principle which has been, I believe, without any real decision to the contrary, established now for some centuries...

In addition, the court in *London Street Tramways* caveated their position as follows:

I am therefore of the opinion that in this case it is not competent for us to rehear and for counsel to **reargue a question** which has been recently de-

²³(1861) 11 ER 735.

cided.... (emphasis added).

London Street Tramways pushed the priority of certainty too far, by asserting that an issue of law was not open to re-litigation on the basis that:

it was not argued or not sufficiently argued, or that the decision of law upon the argument was wrong (emphasis added).

While the latter categories in the above quote could be reason for a court to refuse to readdress an issue recently decided, a system of law based on reason cannot refuse to hear a valid point of law which has not been previously considered. It must be recalled that strike out provisions are an efficient way in which the ills addressed in *London Street Tramways* can be avoided.

In 1966, the House of Lords, overruled *London Street Tramways* by way of a practice note as follows:

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what the law is and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. "In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into, and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House".

No such doctrine governs the Judicial Committee of the Privy Council, which is for colonial and certain other matters an ultimate court of appeal. Thus the decision that a colonial legislature had a common-law power to punish contempt, which was made in *Beaumont v. Barrett, 1 Moore (1842)*, was overruled by *Keilley v. Carbon (1842)*, the same judge, Baron Parke, delivering the opinion in both cases.

In the US, *Burnet v. Coronado Oil & Gas Co (1932)* similarly dealt with the tension between certainty and justice, as follows:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank v. Whitney*, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court

bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

The principle of horizontal stare decisis can be stated as follows: while certainty requires that in “most matters it is more important that the applicable rule of law be settled than that it be settled right” human fallibility requires a “process of trial and error” which “bows to the lessons of experience and the force of better reasoning”.

In *Hester*, the Fourth and Fifth Amendments were in issue. As discussed in *Burnet*, as these issues involved the Federal Constitution they were within the court’s original jurisdiction. In *Boyd* the ratio was that:

“constitutional provision for the security of person and property should be liberally construed” *Boyd v. United States* (1886).

The ratio in *Boyd* was settled law so the court in *Hester* was obliged by the *stare decisis* principle to either apply, distinguish or provide better reasoning than that which formed the basis for the previous ratio. Instead the court in *Hester* entirely ignored the ratio in *Boyd*. It follows that *Hester* is *per in curium* and as such has no legal standing. As Lord Camden stated in *Entick v Carrington*:

... declared with great unanimity in the Case of General Warrants, that as no objection was taken to them upon the return, and the matter passed *sub silentio*, the precedents were of no weight.

5. *Olmstead v. United States* (1928)

The facts in *Olmstead*

Olmstead was the principle owner of a large scale bootleg business operation in Washington state. The business ran from an office in a large office building and had three phone lines, that variously dealt with shipment and supply. *Olmstead* and others liaised by phone with the office. Federal Prohibition officers gained access to the basement of the large office building and tapped into the business’s phone lines. The court in *Olmstead* noted that there was no trespass to *Olmstead*’s property but was silent as to any trespass to the office building, trespass to the telephone lines and conversion of the lines to the Prohibition officer’s use. Taps were also placed on the lines of the home phones of *Olmstead* and others, by insertion into phone lines in the streets near the houses. Again it was not stated whether permission was gained to insert these taps. However, as the phone company made submissions that the conduct of the Prohibition officers breached the Fourth and Fifth Amendments, it appears that this was done illegally, despite a Washington State statute prohibited wiretaps. *Olmstead* and others were found guilty of Prohibition offences.

Issues in *Olmstead*

In *Olmstead* the following issues arise:

- a. Whether the Fourth and Fifth Amendments should be read together;
- b. Whether the Fifth Amendment was engaged;
- c. Was the court in *Olmstead* correct to find that Fourth Amendment only protects from physical trespass;
- d. The application of the common law in *Olmstead*.

Whether the Fourth and Fifth Amendments should be read together

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In *Olmstead* the court took the position that any infringement of the Fifth Amendment was contingent upon a prior breach of the Fourth, as follows:

There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated²⁴.

This rigid separation of the two Amendments is directly contrary to the approach taken in *Boyd*²⁵, where the court held:

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the “unreasonable searches and seizures” condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the Fifth Amendment, and compelling a man “in a criminal case to be a witness against himself”, which is condemned in the Fifth Amendment, throws light on the question as to what is an “unreasonable search and seizure” within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms.

This view was also stated by Lord Camden in *Entick v Carrington*, as follows:

It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the

²⁴*Olmstead* 462.

²⁵116 U. S. 634.

innocent would be confounded with the guilty.

Boyd was a precedential case for the court in *Olmstead* and as discussed above in regard to the principle of *stare decisis*, the court in *Olmstead* was obliged to follow it, distinguish it or give reason to set it aside. As set out above, the court in *Olmstead* purported to distinguish *Boyd*, in holding that there was “no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated”.

By referring to “the present case” the court in *Olmstead* must have been referring to a factual distinction. The issue as to whether the two Amendments should be read together or not, was an issue of interpretation, not a matter of fact. *Boyd* was a precedential case. The court in *Olmstead* was obliged to either follow *Boyd* and consider each Amendment in the light of the other, or give reason as to why *Boyd’s* method of interpretation was wrong. As it did neither, *Olmstead* is *per in curium*.

The rigid separation of the Amendments by the court in *Olmstead*, artificially separated verbal evidence, which most obviously falls within the purview of the Fifth, from physical evidence, which most obviously falls within the purview of the Fourth. The court found the verbal evidence obtained by the wiretap was not compelled and so was outside of the scope of the Fifth. However, no consideration was given to whether the unlawful acts of the Prohibition officers, in their obtaining of the spoken words, was tantamount to compulsion under Fifth Amendment. The court then read down the words “person” and “effect” in the Fourth Amendment, on the basis that the Amendment only applied to a physical search, for a tangible object and so did not apply to a person’s speech, or the use of their telephones.

Whether the Fifth Amendment was engaged

The court in *Olmstead* held:

There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception²⁶.

In *Murphy v. Waterfront Commission of New York Harbor* (1964), the court listed recognized policies underlying the Fifth Amendment:

The privilege against self-incrimination... reflects many of our fundamental values and most noble aspirations: Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the

²⁶Ibid 462.

entire load”, ... our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty”, is often “a protection to the innocent”.

As discussed in *Murphy v. Waterfront Commission of New York Harbor* (1964), Fifth Amendment compulsion comprises of two facets, the degree of force or compulsion the government can exert against an accused and unfairness to an accused of being exposed to the hard choice of the “cruel trilemma”. As a constitutional measure, the primary function is the former, to limit the power of the State. There are two concerns here, the setting of “a fair state-individual balance” and the preference for an “accusatorial rather than an inquisitorial system of criminal justice”, the latter tending to degenerate into the brutalisation of State actors.

A fair state-individual balance

There is always a degree of force or compulsion exerted on an accused in any criminal proceeding. The line between questioning and interrogating is a fine one. The mere fact of being arrested and the stress of the trial process, not to mention bail issues, push many into pleading guilty, just to get it over and done with. Bound up in this is the very real apprehension that the accused individual, especially if not wealthy, is completely outgunned by the State. The Fifth Amendment recognises this enormous power imbalance between the State and an accused. In order to redress this imbalance and to some extent right the scales of Justitia, the Fifth requires that, “the government in its contest with the individual ... shoulder[s] the entire load”. Accordingly, an accused is not required to provide any evidence. To maintain “a fair state-individual balance” all improper exercises of State power which elicit self-accusatory evidence must come within the scope of the Fifth Amendment.

Accusatorial rather than an inquisitorial system of criminal justice

The “inhumane treatment and abuses” referred to in *Murphy v. Waterfront Commission of New York Harbor* (1964) has two aspects, that of the abused and that of the abuser. Of these two aspects it is the latter which is of more moment from a constitutional perspective. Grievous as inhumane treatment is to an individual, it is systemic abuse that constitutional law attempts to curtail. The power of the State may include the use of its creatures to torture or psychologically pressure evidence out of an accused, but these are simply more odious exercises of power. On a national level, it is blind obedience and callousness, not sadism, that is the greater problem. In addition, it is generally the case that by the time a State condones torture to elicit confessions, it is beyond legal remedy. The Fifth Amendment was not designed to prevent the press or the rack, it was designed to prevent the first steps towards an unfair “state individual balance”.

Police officers often come across the worst aspects of human nature. This is inherently brutalising. By allowing the right to silence, the Fifth Amendment removes the slippery slope, of what is permissible interrogation and protects the police from descending into brutality. In *Spano v New York* (1959) a 200lb boxer, who had fought at the Madison Square Gardens, took Spano’s bar money.

When Spano remonstrated with him, the boxer beat and kicked Spano till he vomited. Spano got a gun and shot the boxer dead. When Spano handed himself in, police questioned him all night and then tricked him into signing a confession. The assistant DA who oversaw this interrogation then sought the death penalty.

Spano was a Fourteenth Amendment due process case, as despite many requests by Spano to speak with his lawyer, the police denied this. However, it could equally have been argued under the Fifth Amendment, as Spano was convicted on the basis of his confession. In the first instance, Spano had gone to an old friend, who was a policeman and told him he was going to hand himself in. Spano was then questioned, from the early evening till the early morning. The confession was ultimately obtained by having the policeman Spano knew, play on his trust and arouse his sympathy, by falsely saying his job was in jeopardy and how this would affect his wife and family.

In *Spano* the Court held:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

In a concurring opinion Stewart J stated:

Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.

Although care must be taken in differentiating Fifth from Fourteenth Amendment cases, it could not be said that the obligation that: “the police must obey the law while enforcing the law” applies only to the Fourteenth Amendment”. Similarly, Stewart J’s concern about a “midnight inquisition” is of a piece with the concerns expressed in *Murphy v. Waterfront Commission of New York Harbor* (1964), a set out above. It is the unfairness of the State’s actions in *Spano* which are analogous to Fifth Amendment requirement of a “fair state—individual balance”, despite the lack of physical compulsion.

In *Olmstead* the Prohibition officers were not merely acting unfairly but were tortfeasors and were committing serial criminal offences against Washington State law prohibiting phone taps. Here the court simply failed to apply the constitutional control on unfair state actions the Fifth Amendment was intended to sanction. It was this criminal offending on the part of police which was the basis for the dissenting opinion of Holmes J.

As discussed above, in *Griffin* this unfairness was occasioned by the status of

the prosecutor and more importantly, the imprimatur of the court, in not sanctioning the comments of the prosecutor. In *Griffin* Stewart J dissented on the basis that there was no overt compulsion. However, such a view does not take account of the primary purpose of the Fifth Amendment, which is to prevent prosecutorial unfairness. As discussed in *Griffin*, what the jury makes of silence on behalf an accused is their business. However, to allow a prosecutor to impugn silence eviscerates the right. Accordingly, it is the conduct of the prosecutor and particularly the failure of the court, which triggered the Fifth Amendment in *Griffin*. In addition, the prosecutor's comments were an evidential detriment, as they may have caused the jury to believe the accused was required to put an explanation into evidence and failure to do so left the police evidence uncontested. As discussed below, an evidential detriment is Fifth Amendment compulsion, as it vitiates choice.

In his dissent in *Griffin*, Stewart J focused on the Fifth Amendment's use of the term "compelled", as follows:

We must determine whether the petitioner has been "compelled... to be a witness against himself". Compulsion is the focus of the inquiry. Certainly, if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the Fifth Amendment guarantee. When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

Fifth Amendment compulsion, as lack of choice

As set out above for Stewart J, Fifth Amendment compulsion was either physical torture or the threat of punishment if an attempt was made to dissemble. This is to look at the other facet of the Fifth Amendment, from the perspective of the compelled. Here compulsion is the "cruel trilemma" discussed in Warren and it is the compulsion to choose one or the other that that the Fifth Amendment prevents. In stepping in and allowing a person to choose silence, the Fifth Amendment provides a choice, which does not entail an evidential detriment. It follows that from the perspective of the compelled, Fifth Amendment compulsion is the absence of a choice, resulting in an evidential detriment. In *Griffin* the accused had no choice. He had relied on the Fifth Amendment but by his very silence he could not respond, when the prosecutor impugned his lack of evidence.

Considering both the facet of the Fifth Amendment which prevents prosecutorial unfairness and the facet which provides a choice, which does not entail a detriment, Fifth Amendment "compulsion" can be interpreted as: State unfair-

ness, which deprives an accused of a choice, which does not have an evidential detriment.

In *Olmstead* the court held that: “There was no evidence of compulsion to induce the defendants to talk over their many telephones”, but it was not “talk” that was in issue, but self-incrimination, in the circumstances that the defendants had no choice about revealing this evidence, as they were unaware they were being listened to. It is the combination of State unfairness; tortious and criminal interdiction of the telephone conversations and the absence of choice, resulting in an evidential detriment, which amounted to Fifth Amendment compulsion.

Was the court in *Olmstead* correct to find that Fourth Amendment only protects from physical trespass

The Fourth Amendment of the US Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Olmstead* the court held that the Fourth Amendment was not engaged as there was “no entry of the houses or offices of the defendants”. However, the Fourth Amendment provides a right to be “secure” not a right that precludes entry to a house. Security has a broader ambit than physical trespass. What the court has done here is to set up, then knock down a false premise. Clearly the interpretation of the word “house” in the Amendment could not be stretched to include other houses or places connected by a telephone. But it is not the definition of the word “house” which is at issue in *Olmstead*, it is the definition of the word “secure” utilised by the Amendment. It is this reductionism, from the abstract to the concrete, which characterises *Olmstead*. For example, the court held:

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance²⁷,

Certainly the specific practices of the pre-revolutionary British Administration in America, which the Founding Fathers objected to, included general warrants and writs of assistance. But these terms are not to be found in the Fourth Amendment, as it is a general statement of principle, applicable to any specific practice which raises the danger of the State enhancing its power, under its mandate to prevent crime. Whereas *Boyd* referred to “the security of person and property” *Olmstead* speaks of the “practical meaning of houses, persons, papers, and effects”. Similarly, the court in *Olmstead* stated that the Fourth Amendment is only violated when there has been an actual “official search and seizure of his

²⁷*Olmstead* 464.

person” and held:

The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized²⁸.

This materialistic characterisation does not reflect the words of the Amendment. The Fourth does not mention the concrete action of “an official search and seizure”, such as a physical entry into the home. Rather, at the core of the Fourth Amendment is the abstract concept of security. The court in *Olmstead* focused on matters which must be material, such as “*things* to be seized” and places which are searched, in support of its reductionist approach. However, it is not these physical actions, but the right to be secure against state incursion into specific domains, which the Fourth Amendment protects.

Whether overhearing was a search

The Court in *Olmstead* held:

The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants²⁹.

The facts in *Olmstead* show that this finding was not based on the evidence. The evidence was in fact obtained by the use of telephone taps and so was not obtained: “by the use of the sense of hearing and that **only**” (emphasis added).

Similarly, the court in *Olmstead* found that the Fourth Amendment could not be interpreted “to forbid hearing or sight”. As the obtaining of evidence by sight was not in issue in *Olmstead*, there was no basis for this finding, as far as it pertains to sight. The court in *Olmstead* bound up hearing and sight as sight never qualified as a trespass at common law, and it wished to analogise between the two. However, sight never qualified as a trespass at common law, for the very practical reason that society would grind to a halt if the passing of one’s gaze over another’s property was a tort. In contradistinction, “peeping and peering”, that is intentional spying, which was what the Prohibition officers were doing, is a crime and Blackstone referred to overhearing, as eavesdropping, in the passages of his *Commentaries* relied on in *Hester*, as follows: “the animadversion of the law upon eaves-droppers, nufancers, and incendiaries”³⁰.

Olmstead cited no authorities in support of the contention that the Fourth Amendment did not pertain to overhearing. Moreover, the cases relied on, as authorities on the issue of whether the sense of sight can qualify for a search under the Fourth Amendment, gave little support to this approach. In *Olmstead* the court relied on *Hester* and two other cases and stated in respect of *Hester* as

²⁸Ibid 464.

²⁹Ibid.

³⁰4 Bl Comm 223.

follows:

Hester v. United States, 265 U. S. 57, held that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects. *United States v. Lee*, 274 U. S. 559, 563; *Eversole v. State*, 106 Tex. Cr. 567.

While in *Hester* the facts indicate that the revenue officers witnessed a transaction, and the assumption is that the admissibility of this evidence was discussed in the Decision, this was not the case. In *Hester* it was held:

The defendant's own acts, and those of his associates, disclosed the jug; the jar and the bottle and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned.

As set out above, the court only related what was seen, as in acts disclosed, to the physical evidence, not any transaction. *Hester* is completely bereft of any discussion in regard to the admissibility of any transaction that the revenue officers' saw. *Hester* was charged with concealing distilled spirits, not supply of such, which may have been on account of there being no evidence of money changing hands. The Volstead Act appears to merely prohibit sale not supply. If this was the case, any evidence of the transaction was immaterial to the charge, hence the admissibility of this evidence was irrelevant to the appeal. In any event, there being no discussion, let alone finding, in *Hester* as to the admissibility of witness evidence of *Hester* being seen handing over of a bottle of whiskey to another, the court in *Olmstead* was plainly wrong to regard *Hester* as an authority on this point.

In *Hester* the legal issue was whether the evidence, the dregs of alcohol contained in the various containers, was obtained as a result of an unlawful search and seizure. There was no discussion in regard to trespass, or whether there was any search of *Hester*'s person, the findings being that as the search did not take place in the house and the vessels were not seized but abandoned, the Fourth Amendment was not engaged.

Neither do either of the other cases referred to by the court in *Olmstead* provide much support for the position taken in *Olmstead*, that overhearing could not constitute a search. In *United States v. Lee*, Brandeis J. another member of the panel in *Olmstead*, held:

Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution. Compare *Hester v. United States*, 265 U. S. 57.

In *Lee* the issue was whether a coast guard boat, carrying out a permissible interdiction of another vessel, had conducted a search by means of directing a

searchlight onto the vessel and seeing contraband alcohol. This is not overhearing and there was no basis for Brandeis J's reliance on *Hester*, as in *Hester* there was no discussion as to admissibility of what was seen, either by the naked eye or by the "use of a marine glass or a field glass", as discussed above.

Eversole v. State (1972) was a decision of the Court of Criminal Appeals of Texas, dismissing an appeal for conviction of theft and slaughter of a cow. There was no discussion as to trespass or whether sight constituted a search pursuant to the Fourth Amendment. Interestingly, despite *Hester*, the Texas Court of Criminal Appeals applied a definition of "house" consonant with Blackstone's discussion on burglary, as follows:

There is no showing in the bill that the barn in which the witness remained all night was a private dwelling occupied as such, or that it was in any way connected with or adjacent to such dwelling, and further, the bill does not show that the barn was a place forbidden to be searched under the provisions of Art. 4a, Code of Criminal Procedure but merely shows the witness concealed himself there for the purpose of observing the movements of appellant.

Whether there was a seizure of evidence

The Court in *Olmstead* held:

There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants³¹.

As set out above, the court in *Olmstead* found that there was no search prohibited by the Fourth Amendment, as there was no physical trespass. However, in *Boyd* there was no physical trespass, just a statutory requirement to surrender documents. As discussed in *Boyd*, what is to be considered is the purpose of the State actors. In *Olmstead*, this was not to play around with wiretaps, or spend time listening to others' conversations, it was to gather evidence. It follows that it is the seizure, which is the proper focus of a Fourth Amendment enquiry, yet this is almost completely elided by the court in *Olmstead*.

The only "discussion" on seizure is the above passage and the assertion that, "evidence was secured by the use of the sense of hearing and that only". However, the court itself referred to "refreshing stenographic notes" which Brandeis J stated comprised of "775 typewritten pages". It is not clearly stated in *Olmstead* but these notes must have been read into the record. If this is correct then the claim, that "evidence was secured by the use of the sense of hearing and that only", cannot be correct.

Whether the term "person" in the Fourth Amendment includes a person's speech

In *Olmstead* the court held:

Justice Bradley in the *Boyd* case, and Justice Clark in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally

³¹Ibid.

construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, ...³²

The above finding is one which adopts a strict textual approach to the interpretation of the Fourth Amendment. However, far from applying a strict textualist approach, the court in *Olmstead* then excised the words “person” and “effects” from the text of the Fourth Amendment, as it based its finding on there being “no entry of the houses or offices of the defendants”.

The court in *Olmstead* stated:

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person³³,

Here the court is abdicating the role of a supreme court. Though there may have been no previous case law dealing with wiretaps, it is the function of a supreme court to state the law in novel cases. In *Olmstead* the use of a technology unknown to the Framers required the court to assess the application of the Fourth Amendment to a new phenomenon. While prior consideration may be of assistance, the lack of prior consideration cannot be reason weighing against a proposition.

Here again the issue of security, is key. The Fourth Amendment protects the right to be secure in one’s person. The court in *Olmstead* supplanted the plain words of the Amendment with a gloss and did not consider whether a person’s security was impinged by the State listening in to their private conversations.

Beyond the penumbra that security provides, the natural meaning of “person” within the Fourth Amendment is that a physical search of the person is what is at issue. It is the Fifth Amendment that controls the use of anything said by the person. However, as the court in *Olmstead* ruled out the Fifth Amendment, this left it up to the Fourth Amendment to achieve the purpose underlying the Fourth Amendment. To achieve this purpose, it is necessary to give a more expansive interpretation of the term “person”, which encompasses a person’s speech.

In *Olmstead* the court read down *Boyd* by claiming that despite the ratio in *Boyd*, that in regard to constitutional protections, an expansive interpretation should be made, the Fourth Amendment could not be interpreted “beyond the possible practical meaning” of the terms used. This is incorrect, as it is not the “practical meaning” which is at issue in constitutional protections but the constitutional meaning, which gives effect to the constitutional purpose, as Butler J stated in his dissent in *Olmstead*.

³²Ibid 465.

³³Ibid 455.

However ephemeral, speech is a material phenomenon. In *Olmstead* the court averred a practical, tangible interpretation was all that was permissible, but if materiality is the touchstone, one looks in vain in *Olmstead* for any reason why the word “person”, cannot include words uttered by that person. While the intention to utter the words may not be material, the same could not be said of the musculature and facial movement deployed in the utterance, which are visibly part of the person. While it could be said that any unused oxygen exhaled in the act of speaking, was not part of the person, the same could not be said of any CO₂ produced by the body and similarly exhaled, but surely this is splitting hairs. There is also the problem that if speech is not part of a person, what is testimony?

Were the petitioners’ telephones “effects” pursuant to the Fourth Amendment

In *Olmstead* the court held:

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his **tangible material** effects, or an actual physical invasion of his house “or curtilage” for the purpose of making a seizure³⁴ (emphasis added).

Tangible materiality is redundant nonsense. A telephone is an effect. The value of a telephone is not principally in its materiality, it is in its function. It does not distort the Fourth Amendment to read it as providing for a person’s security in using their phone. It is to head off such an interpretation that the court in *Olmstead* held that phone conversations did not fall within the Amendment.

In *Olmstead* counsel for the telephone company submitted:

A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well. *International News Service v. Associated Press*, 248 U. S. 215. It is of the very nature of the telephone service that it shall be private; and hence it is that wire tapping has been made an offense punishable either as a felony or misdemeanor by the legislatures of twenty-eight States, and that in thirty-five States there are statutes in some form intended to prevent the disclosure of telephone or telegraph messages, either by connivance with agents, of the companies or otherwise³⁵.

In *Olmstead* the Court held:

The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing

³⁴Ibid 455.

³⁵Ibid 438.

over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation...³⁶

An interpretation of the Fourth amendment which forbids a policeman from secreting himself behind the sofa to listen in to a private conversation, but allows him to achieve the same end by the use of technology, is not so much outdated, as it is incoherent. As stated in *Boyd*, it is the purpose and conduct of the state actor that the Fourth Amendment controls.

The application of the common law in *Olmstead*

In *Olmstead* the court explicitly adopted a private property/trespass interpretation of the Fourth Amendment. As discussed above, this was entirely wrong as the Fourth Amendment overrode all other law and had its own jurisprudence. Leaving aside this point, it is maintained that *Olmstead* is in error on its own terms, as follows:

- a. Were the actions of the Prohibition officers in breach of common law;
- b. Did the court in *Olmstead* correctly state the common law rules as to admissibility;
- c. Did the court in *Olmstead* correctly find that the common law rules as to, admissibility, trumped the Fourth Amendment.

Were the actions of the Prohibition officers in breach of common law

While both Blackstone and Lord Camden referred to the constitution of England as the “Ancient Constitution”, this is not found in a single document and the English Constitution inheres in various forms, one of which is the common law, as discussed in [the Prorogation Case \(2019\)](#). As discussed above, the common law of trespass provided the constitutional centrality of the: “immunity of a man’s house, that it styles it his castle”³⁷. This “immunity” was both a common law principle which enunciated a person’s priority to their own place and a constitutional principle, in that it was a limit on the domain of the King, as discussed in *Seymanes Case*.

In *Olmstead* the court focused on the evidence being conveyed by telephone lines, across public space, but the evidence used against *Olmstead* and others comprised of words they uttered within their homes. If the King could not put his foot past *Seymanes*’s door, no more could the Prohibition officers reach inside *Olmstead*’s house, by the interdiction of the words he uttered in his home.

In *Olmstead* the court held:

The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses³⁸ (emphasis added).

In regard to the wire taps inserted in the basement, there is no reference to

³⁶Ibid 366.

³⁷Blackstone’s Commentaries Part IV 223.

³⁸Ibid 457.

permission being given to enter the property or to place the wire taps on the phone lines. In regard to the former, as discussed above, trespass is tempered by an implied right of entry, based upon the nature of civil society. However, this is a right to go to the front door, not to rummage around in the basement. Moreover, there can be no implied right to enter, when the intent is to commit the torts of trespass to goods and conversion. On the facts available in *Olmstead*, the Prohibition officers' entry into the basement entailed the commission of the torts of trespass to property, trespass to goods and conversion, as they converted the phone lines to their own use.

As set out above, "taps from house lines were made in the streets near the houses" but there is no reference to any permission being given for this action. As the telephone company, whose property these lines were, made submissions that the Fourth Amendment had been infringed, it appears that they had not given permission. On the premise that no permission had been given, the Prohibition officers again committed the torts of trespass to property and conversion of property, when they tapped the telephones lines in the street.

In the above quotation of the court in *Olmstead*, care was taken to mention that "insertions were made without trespass upon any property of the defendants". However, nothing was said of the tortious acts identified above. It is the reliance on a constricted formulation of trespass, together with the failure to factor the bundle of common law limitations on State actors, which renders *Olmstead* unprincipled.

Did the court in *Olmstead* correctly state the common law rules as to admissibility

In *Olmstead* the court simply ignored the Prohibition officers' tortious conduct. It could not ignore their criminal conduct in breaching the statute forbidding telephone intercepts, but held:

The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained³⁹.

The writer is not conversant with the complex and indeed convoluted adoption of common law in the US, but the above statement does not accord with English common law. In *R v McKay* (1965) Qd R 240 Mack J, as he was then, following a line of English cases, held that in order to ensure a trial was fair, it was within a judge's discretion to exclude evidence "notwithstanding that it is admissible in law". In *Ibrahim v R* (1914) the House of Lords held:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.

³⁹Ibid 467.

A statement made to another and surreptitiously overheard by police is not a voluntary statement and it is the requirement of voluntariness, which in part, underlies current UK legislation that renders wiretap evidence entirely inadmissible, in the UK.

Did the court in *Olmstead* correctly find that the common law rules as to admissibility trumped the Fourth Amendment

The court in *Olmstead* found that the Fourth and Fifth Amendments had not been violated and so there was no basis on which to override the extant rules of evidence. This is a circular argument. As the Amendments are a control on State action, the nature of the State action is a factor in determining if the Amendments had been violated.

What this approach shows is a complete shift from *Boyd*. In *Boyd* it is the purpose and conduct of the State actors which is central and the control of that conduct was seen as the function of the Fourth Amendment. In *Olmstead* the conduct of the State actors was not a consideration. What this did was derogate from the constitutional dimension. Constitutionally, what *Olmstead* did or did not do and what were the consequences for him, or lack of them, is almost irrelevant. The constitutional consideration is focused on the conduct of the State actors, as this sets the bar throughout society.

The Dissent's in *Olmstead*: Brandeis J's evocation of privacy as the value underlying the Fourth Amendment

Holmes, Butler and Stone

Holmes J's opinion was that the criminal breach, of the Washington statute forbidding wiretaps, required the exclusion of the evidence. Holmes J's dissent was short and alluded to the "exhaustive" dissent of Brandeis J. Holmes J did not explicitly adopt Brandeis's privacy thesis but did say:

While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.

Butler J's opinion, which was joined by Stone J, was that the issue, of whether there was a search, should be decided on the facts and that tapping wires and listening in "literally constituted a search for evidence". Butler J then cited *Boyd* and stated:

This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words.

Brandeis

It is in Brandeis's dissent that privacy, rather than security, is first put forward

as the value protected by the Fourth Amendment. Brandeis, together with Samuel Warren, close friends who had a legal chambers together, had published an article in 1890, entitled “*The Right to Privacy*”. This article will be analysed in the final part of this series. It suffices to say here that it appears to have been written at the instigation of Warren, whose wealthy socialite family objected to the downside of their display of status. It is little more than a lengthy exposition on the well-established right to be let alone, under another name. Nowhere in this article was it presumed that privacy was the basis of the Fourth amendment.

In *Olmstead* Brandeis stated:

Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world⁴⁰.

Brandeis was an ingenious advocate and as set out above, he begins with an assertion that is unassailable and central to his thesis. Constitutional protections are intended to reach into the future, so must be adaptable to change. Engrafted onto this unassailable point was Brandeis’ new, improved, privacy based conceptualisation, of the Fourth Amendment.

Brandeis then stated:

Protection against such invasion of “the sanctities of a man’s home and the privacies of life” was provided in the Fourth and Fifth Amendments by specific language. *Boyd v. United States* (1886), 116 U. S. 616, 630⁴¹.

Here Brandeis evokes *Boyd*, the authoritative precedent on the Fourth Amendment and is careful to select the solitary passage in which privacy is adverted to. From *Boyd*, Brandeis went on to establish a lineage from James Otis and Lord Camden’s *Entick v Carrington*.

An authoritative basis having been established, Brandeis then focuses on the privacy aspect of listening in to another’s conversation, as follows:

The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded...⁴²

Then Brandeis took a passage directly from Warren and Brandeis’ ‘*The right to Privacy*’ but here the “right” is linked to the Constitution by reference to the pursuit of happiness:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts,

⁴⁰Olmstead 472.

⁴¹Ibid 473.

⁴²Ibid 475.

their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men⁴³.

Next privacy, as the right to be let alone, “the right most valued by civilized men” is asserted by Brandeis to be the underlying value protected by the Fourth Amendment, despite the Amendment explicitly stating that it protects “the right to be secure”.

To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment⁴⁴.

In conclusion, Brandeis rounds off with another unassailable proposition. This is classic rhetoric.

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding⁴⁵.

6. Transition Cases

Grau v. United States (1932)

Grau was determined in November 1932, one year before the 18th Amendment was repealed in December 1933. Grau was charged with unlawfully manufacturing whisky, and being in possession of property designed for the unlawful manufacture of intoxicating liquors. Relying on *Boyd* and *Gouled*, the court held:

The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed. The guaranties of the Fourth Amendment “are to be liberally construed to prevent impairment of the protection extended”, and cases cited. It is evident that to allow the Government to use evidence obtained in violation of the Fourth Amendment against parties not victims of the unconstitutional search and seizure is to allow the Government to profit by its wrong and to reduce in large measure the protection of the Amendment.

...

Congress intended, in adopting section 25 of Title II of the National Prohibition Act, to preserve, not to encroach upon, the citizen’s right to be immune from unreasonable searches and seizures, and we should so construe the legislation as to effect that purpose⁴⁶.

By late 1932 Prohibition had been seen to be a failure and the Democrats were campaigning on a promise to abolish it. One of incoming President Roosevelt’s first actions on taking office, was to sign into law an amendment to the Volstead Act, allowing the sale of low alcohol beverages. The last paragraph cited above,

⁴³Ibid 478.

⁴⁴Ibid.

⁴⁵Ibid 479.

⁴⁶Ibid 128.

reversed the actual practice of the court in *Hester* and *Olmstead*, which was to take the 18th Amendment as overruling the Fourth and Fifth.

Goldstein (1942) and Goldman (1942)

Both these cases were decided in 1942, after the US entered WWII. Neither of these cases are espionage cases but they were decided at a time when national security and hence law enforcement were prioritised. *Goldstein* involved a medical racket and *Goldman* a property scam. In these cases, the majority continued to apply *Olmstead* but there were strong dissents by Murphy J, in which he was joined by Stone CJ and Frankfurter J.

Goldstein

In *Goldstein*, Federal agents had wiretapped phones and used this evidence to suborn some of the participants in the racket, to induce them to give evidence against others. *Goldstein* was not a party to the intercepted conversations, but other evidence implicated him. The appeal to the court was on the basis of s605 of the [Federal Communications Act \(1934\)](#) and its provision that any use of intercepted conversations was an offence, precluded their use by police to induce the giving of evidence. The court found that as *Goldstein* was not a party to the intercepted conversations sought to be excluded, he had no standing to seek their exclusion.

In his dissent Murphy J quoted from the [Federal Communications Act, 1934](#) as follows:

...or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, *or use the same or any information herein contained for his own benefit or for the benefit of another not entitled thereto ...*" (emphasis original).

Murphy J then stated:

The statute expresses a rule of public policy. In enacting §605, Congress sought to protect society at large against the evils of wire-tapping and kindred unauthorized intrusions into private intercourse conducted by means of the modern media of communication, telephone, telegraph, and radio.

The Federal Communications Act was enacted in 1934, 6 years after *Olmstead*. The court's evisceration of the Fourth Amendment had resulted in the Legislature attempting to protect that which properly should have been protected by the Amendment, but the court overruled it.

Goldman

In *Goldman*, two federal agents, with the assistance of the building superintendent, obtained access at night to Shulman's office and to the adjoining one and installed a listening apparatus in a small aperture in the partition wall, with a wire to be attached to earphones extending into the adjoining office. This was for the purpose of overhearing a conference with Hoffman set for the following

afternoon. The next afternoon, one of the agents returned to the adjoining room with two others and a stenographer. They connected the earphones to the apparatus but it would not work. They had with them another device, a detectaphone having a receiver so delicate as, when placed against the partition wall, to pick up sound waves originating in Shulman's office, and means for amplifying and hearing them. With this the agents overheard, and the stenographer transcribed, portions of conversations between Hoffman, Shulman, and Martin Goldman on several occasions, and also heard what Shulman said when talking over the telephone from his office.

The appeal was taken on the basis that *Olmstead* could be distinguished as this was not a wiretap, but eavesdropping and that if it could not be distinguished, *Olmstead* should be overruled. The majority declined to revisit *Olmstead* and held:

We think, however, the distinction is too nice for practical application of the Constitutional guarantee and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the *Olmstead* case.

What the above finding states is that wiretaps are eavesdropping. Eavesdropping and the animadversion of the common law to it, was referred to in the passages of Blackstone's Commentaries relied upon by Holmes J. Elsewhere Blackstone, in his *Commentaries on the Laws of England (1769)* stated that eavesdropping came within the tort of nuisance, recording that: 'eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet.' If wiretaps are eavesdropping they are a subset of common law trespass and should have been factored into any "trespass" doctrine asserted in *Olmstead* and upheld in *Goldman*. This illustrates that the court was picking and choosing only those parts of the common law which suited their rationale. As in *Olmstead*, in *Goldman* the trespass into Shulman's office was considered to be irrelevant.

Stone CJ and Frankfurter would have joined a majority to overrule *Olmstead* and Murphy J wrote a powerful and passionate dissent. Laudable as that was, the judge founded his position on the fragile ground of privacy, as follows:

One of the great boons secured to the inhabitants of this country by the Bill of Rights is the right of personal privacy guaranteed by the Fourth Amendment.

As set out above the judge used the word "secured" and linked it to "the right of personal privacy guaranteed by the Fourth Amendment". However, the meaning of the adjective "secure" is quite different to the meaning of the verb "secured". Nowhere in the Fourth Amendment is there any reference to a "right of personal privacy". What is guaranteed is the right is to be secure.

In characterising the Fourth Amendment as a right of personal privacy Murphy J stated:

On the value of the right to privacy, as dear as any to free men, little can or need be added to what was said in *Entick v. Carrington*, 19 How.St.Tr. 1030, *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, and Justice Brandeis' memorable dissent in *Olmstead v. United States*, 277 U.S. 438, 471, 48 S.Ct. 564, 570, 72 L.Ed. 944, 66 A.L.R. 376. 24.

However, in *Entick v. Carrington* (1765) Lord Camden never mentions a right to privacy. Rather, he founded his decision on the inviolability of security, as follows:

The great end, for which men entered into society, was to secure their property.

...

By the laws of England, every invasion of private property, be it ever so minute, is a trespass.

...

Papers are the owner's goods and chattels. They are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

Certainly, confidentiality or personal privacy, is a subset of so being secure, but as discussed in the final paragraph set out above, Lord Camden saw the concomitant breach of personal privacy merely as aggravating the trespass, not as the core peril. *Boyd v US* quoted at length Lord Camden's related decision in *Wilkes v Wood* and held that the Fourth and Fifth, "amendments relate to the personal security of the citizen." *Boyd v. United States* (1886) Murphy J had no legitimate basis to claim that a "right to privacy" was asserted in *Entick v Carrington* (1765) or *Boyd v. United States* (1886).

On Lee v. United States (1952)

In *On Lee* narcotics police suspected On Lee of selling opium. Police obtained the services of a friend and former employee of On Lee, one Chin Poy. Poy wore a wire, entered Lee's premises and "engaged the accused in conversation in the course of which petitioner made incriminating statements"⁴⁷. It is unclear from the Decision whether there was any issue of entrapment, despite Chin Poy not being called to give evidence. The Court found there was no violation of the

⁴⁷Ibid 749.

Fourth Amendment.

In *On Lee* it was argued that the deception by Poy, as a government agent, rendered him a trespasser ab initio, citing [the Six Carpenters' Case \(1610\)](#) The Legal Dictionary provides:

Trespass ab initio is a form of trespass. The term trespass refers to an act of intrusion into another person's property. Ab initio is a Latin term meaning, "from the beginning". A person is said to have committed trespass ab initio, when s/he has abused the authority granted by law to enter a property or land.

In regard to this submission the court held:

But petitioner's argument comes a quarter of a century too late: this contention was decided adversely to him in *McGuire v. United States*, 273 U. S. 95, 98, 100, where Mr. Justice Stone, speaking for a unanimous Court, said of the doctrine of trespass ab initio: "This fiction, obviously invoked in support of a policy of penalizing the unauthorized acts of those who had entered under authority of law, has only been applied as a rule of liability in civil actions against them. Its extension is not favored." He concluded that the Court would not resort to "a fiction whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved". This was followed in *Zap v. United States*, 328 U. S. 624, 629⁴⁸.

Trespass ab initio is not a fiction, it is a common law constitutional protection against abuse of authority and should have been seen to be such by the court, considering that the Fourth Amendment has exactly the same purpose. What the doctrine of trespass ab initio does, is recognize that it is very easy for a government official to abuse their authority by entering premises, ostensibly on a proper basis but actually for an improper basis. The doctrine also takes account of the fact that it is very difficult for an aggrieved person to prove this. In *On Lee* the court completely failed to engage in the constitutional function of the doctrine.

That the doctrine "had only be applied as a rule of liability in civil cases", is not a reason for it being inapplicable to the Fourth Amendment. To say that, "its extension is not favoured" is not a legal reason. The above passage refers to "the right of the government to make use of evidence" but there is no reference to *Weeks v US* and the exclusionary rule.

It is noted that the English Supreme Court did not refer to the Six Carpenters' Case as being a fiction, when it referred to it in the 2014 case of *Eastenders Cash and Carry Plc and Others, Regina (on The Application of) v Revenue and Customs (2014)*.

In *On Lee* it was also argued that the deception by Poy, as a government agent, rendered him a tortious trespasser and he had no implied consent to enter with the intent of surreptitiously recording conversations.

⁴⁸ *On Lee* 752.

In regard to this submission the court held:

By the same token, the claim that Chin Poy's entrance was a trespass because consent to his entry was obtained by fraud must be rejected. Whether an entry such as this, without any affirmative misrepresentation, would be a trespass under orthodox tort law is not at all clear. See Prosser on Torts, § 18. But the rationale of the McGuire case rejects such fine-spun doctrines for exclusion of evidence.

As discussed above, it is quite clear that being on another's property rests on implied consent, which cannot be imputed if vitiated by deceit. Fraud defeats all. Once again we have the court purporting to found the Fourth Amendment on private property and trespass but cutting down those aspects of the law of trespass, which would restrict law enforcement, effectively replacing the balance set by the Fourth Amendment, with their own view on where this balance should lie.

Frankfurter, Douglas and Burton dissented, together with Black J, who did not give an opinion. Frankfurter and Douglas JJ both quoted extensively from Brandeis J's dissent in *Olmstead*, with particular reference to the lacuna in Fourth Amendment jurisprudence, when it came to technological developments.

Abel v. United States (1960)

Here a person suspected of being a spy was arrested by the Federal Immigration authority, then the I.N.A, after the FBI requested an investigation into whether he was an illegal alien. An arrest was made by the I.N.A in collaboration with the FBI and Mr. Able was taken from the hotel room he was residing in. A number of challenges were made in regard to evidence gathered. Some of this evidence, false ID documents and a hollowed out pencil containing microfilm, was gathered after Mr. Able was arrested and held in custody. Mr. Able had placed the documents in the waste paper basket and had left the pencil on a window ledge. On the basis that the hotel's terms of service meant that once Mr. Able ceased paying for the room, he was no longer a lawful occupier, the court held:

So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were *bona Vacanti*. There can be nothing unlawful in the Government's appropriation of such abandoned property. See *Hester v. United States* (1924), 265 U. S. 57, 58.

Bona Vacanti is Latin for ownerless goods. The Merriam Webster legal dictionary definition is: "goods that are unclaimed and without an apparent owner". As discussed above in relation to *Hester*, neither did the evidence in *Able* demonstrate abandonment, but rather that:

a. Mr. Able, knowing that everything he took with him would be taken into custody along with himself and found, has hoped that the incriminating items would not be found. To this end he put papers into the wastepaper basket and left the pencil on the window sill. These were not express acts of abandonment,

but were acts of concealment. These are entirely distinct intents.

b. Mr. Able did not relinquish his possessory right to the premises, he was arrested and spirited 1000 miles away to a detention centre for interrogation, where he was held for months.

c. The FBI did have permission to search the room after Mr. Able had left it, but it was their actions which terminated Mr. Able's lawful occupation.

Because they are at odds with the law of personal property, *Hester* and *Able* have not become authorities in US law. In *United States v. Calise*, 217 F. Supp. 705 (1962), a decision of the US District Court for the Southern District of New York. which would usually apply Supreme Court authority, the District Court held:

It was trash, in the nature of *bona Vacanti*, which the defendants had abandoned for collection by a trash truck after the lease of the premises in which they formerly did business had expired. And since the permission of the owner of the building was obtained for entering the premises, there is nothing at all to indicate that the appropriation of this abandoned material constituted an illegal search or seizure.

The *Calise* definition of abandoned property, able to be utilized as evidence, comprises of the following elements:

a. Express intention or act of abandonment—the arranging of collection as trash;

b. Leaving of the property on premises in regard to which there was no possessory right—the lease had expired;

c. Lawful police entry onto the premises—permission from owner.

As set out above, none of these factors apply in *Able*, in which the majority held:

... items (1)-(5) were seized as a consequence of wholly lawful conduct. That being so, we can see no rational basis for excluding these relevant items from trial: no wrongdoing police officer would thereby be—indirectly condemned, for there were no such wrongdoers; the Fourth Amendment would not thereby be enforced, for no illegal search or seizure was made; the Court would be lending its aid to no lawless government action, for none occurred⁴⁹.

In a dissenting opinion Justice Douglas, with whom CJ Black concurred, stated:

Some things in our protective scheme of civil rights are entrusted to the judiciary. Those controls are not always congenial to the police. Yet if we are to preserve our system of checks and balances and keep the police from being all-powerful, these judicial controls should be meticulously respected. When we read them out of the Bill of Rights by allowing short cuts as we do

⁴⁹Ibid 240.

today and as the Court did in the Frank and Carlson cases, police and administrative officials in the Executive Branch acquire powers incompatible with the Bill of Rights.

In a separate dissent Justice Brennan emphasized that the correct approach was not to confine the Fourth Amendment stating:

... it was the Boyd case itself which set what might have been hoped to be the spirit of later construction of these Amendments by declaring that the start of abuse can “only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed”⁵⁰.

Able was a spy case in which national interests were at stake, according the law enforcement faction in the court predominated.

Jones v US (1960)

In *Jones* police searched an apartment looking for narcotics. There were two issues involved. Whether Jones had standing to challenge the search, as he was staying at a friend’s apartment and whether there was probable cause for a Commissioner to sanction a warrant. In regard to the standing issue, the State argued that a guest, who had only the “use” of a premises did not have sufficient “measure of control” to challenge the search. Finding that Jones had standing, the court held:

The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy⁵¹.

No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched⁵².

In the first paragraph above, the court states than anybody legitimately on premise when it is searched may challenge its legality but says those wrongfully present, “cannot invoke the privacy of the premises searched”. This is a conceptual muddle. Being legitimately on premises means that there is a possessory right, one does not have a privacy right to be on premises. Wrongful presence means lack of a possessory right, but it does not make a premise less private. The court is postulating that a possessory right gives standing to invoke a privacy right, but a privacy right is redundant as the Fourth Amendment does not have a

⁵⁰Ibid 256.

⁵¹Ibid 8.

⁵²Ibid 18.

property qualification and a possessory right is all that is required to trigger its operation.

As can be seen above, this transition case evokes both “official invasion of privacy” and the “security of property”, as the values underlying the Fourth Amendment. Both are incorrect. The Fourth Amendment makes no reference to privacy. It is the “right of the people to be secure”, not the right of their property to be secure, that the Amendment protects.

In *Jones* the court noted that the State position, as to standing, mirrored common practice in the courts. However, the Fourth Amendment, in its reference to “houses” does not set out a property qualification, this was a gloss which had been inserted by the courts. As Lord Camden noted in *Entick v Carrington* (1765):

What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.

At common law, a guest or invitee has a possessory right to a premises, if that right has not been withdrawn by one with better title, an owner or tenant. A rightful possessor has a better right to a house than trespassers, burglars or narcotic agents. The Fourth Amendment has no property qualification and so properly interpreted the term “house” simply means, place of abode. As such the Amendment applies not only to owners but also to tenants, guests and squatters, who have not had their possession challenged by an owner. Accordingly, this is a problem of the courts making, which read a property qualification into the Amendment, when there is no basis for this. It was not necessary for the court to invent a right of privacy to rectify this ill, as the cure was simply to apply the Amendment, without the unfounded qualification.

***Silverman v. United States* (1961)**

In *Hester* the court never considered whether or not the revenue officers were eavesdroppers. The modern form of eavesdropping, bugging, was the subject of the 1961 *Silverman v. United States* (1961) in which illegal gambling was in issue. Police had gained entry to an adjoining premises and pushed a spike microphone through the wall which hit the heating duct, as intended, enabling them to hear conversations within. The Court found that eavesdropping by an unauthorized physical penetration into the premises occupied by petitioners, violated their rights under the Fourth Amendment. Distinguishing *Olmsted*, *Goldman* and *On Lee* and relying on *Jones*, the majority held:

In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.

...

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. *Entick v. Carrington* (1765), 19 Howell's State Trials 1029, 1066; *Boyd v. United States* (1886), 116 U. S. 616, 626-630.

...

What the Court said long ago bears repeating now: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure". *Boyd v. United States* (1886), 116 U. S.

616, 635. We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch⁵³.

Despite these ringing endorsement of the Fourth Amendment and even their reference to the dissent in the Court of Appeal decision in *On Lee*, when the court had upheld the decision of the majority, this was not enough for the privacy faction. Justice Douglas (concurring), stated:

Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded...⁵⁴

In *Silverman* the majority, although on the back foot, remained locked into the truncated "trespass" doctrine, which did not consider how the actual words of the Fourth Amendment, "the right to be secure" intersected with "constitutionally protected areas".

Lopez v. United States (1963)

In this 1962 case the court distinguished *Silverman* on the ground of consent and followed *On Lee*. In *Lopez* an IRS agent was investigating nonpayment of a cabaret tax. When he raised this issue with the owner of the cabaret he was offered a bribe. The agent took the bribe but reported it. He later returned with a hidden recording device and recorded a conversation in which the bribe was discussed. The recording and the agent's testimony was sought to be excluded in reliance on *Gouled v. United States* (1921), 255 U. S. 298, and *Silverman v. United States*, 365 U. S. 505 (1961). The court held:

He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. Compare *Gouled v. United States* (1921).

This is not correct, as the consent and any implied license was vitiated by the lack of knowledge the conversation was being recorded. The majority distinguished *Gouled* on the basis that there was a lack of violation of privacy. But in *Gouled*, like *Lopez*, evidence was obtained surreptitiously. Justice Brennan in a

⁵³Ibid 512.

⁵⁴Ibid 513.

dissenting opinion arguing for the reversal of the doctrine of *On Lee v. United States* (1952), supra, had this to say:

Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny. The foregoing analysis discloses no adequate justification for excepting electronic searches and seizures from the requirements of the Fourth Amendment. But to state the case thus is to state it too negatively. It is to ignore the positive reasons for bringing electronic surveillance under judicial regulation. Not only has the problem grown enormously in recent years, see, e.g., *Todisco v. United States*, 9 Cir., 298 F.2d 208; *United States v. Kabot*, 2 Cir., 295 F.2d 848, but its true dimensions have only recently become apparent from empirical studies not available when *Olmstead*, *Goldman* and *On Lee* were decided⁵⁵.

Here Brennan J correctly identifies the constitutional issue, police omniscience leading to tyranny, but he is incorrect to state that the “true dimensions” of the issue were only recently apparent, the court split five to four in *Olmstead*. What is seen here is despite the rugged approach to error adopted in *Burnet v. Coronado Oil & Gas Co* (1932), the court has become more precious.

Warden v. Hayden (1967) “*Hayden*”

In hot pursuit of an armed robber, police entered *Hayden*’s home and arrested him, seizing weapons and clothes. While conceding that seizure of the weapons was permissible, it was argued that seizing the clothes violated the Fourth Amendment as they were “mere evidence” as discussed in *Boyd*, as follows:

The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man’s private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law, and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past, and the like seizures have been authorized by our own revenue acts from the commencement of the government⁵⁶.

In *Hayden* the court held:

Nothing in the language of the Fourth Amendment supports the distinction between “mere evidence” and instrumentalities, fruits of crime, or contraband. On its face, the provision assures the “right of the people to be secure in their persons, houses, papers, and effects ...”, without regard to the use

⁵⁵Ibid 466.

⁵⁶Page 116 U. S. 623.

to which any of these things are applied. This “right of the people” is certainly unrelated to the “mere evidence” limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same “papers and effects” may be “mere evidence” in one case and “instrumentality” in another. See Comment, 20 U.Chi.L.Rev. 319, 320-322 (1953).

As set out above, it is in *Hayden* that we first see “privacy” as the touchstone in Fourth Amendment jurisprudence, being used to cut down the protections of the Fourth Amendment. In regard to the above passage the following issues arise:

- a. Does the fact that the Fourth does not make a distinction between “mere evidence” and items traditionally subject to seizure mean that the “right of the people” is “certainly unrelated to the ‘mere evidence’ limitation”;
- b. Is the distinction between mere evidence and items traditional subject to seizure “wholly irrationally”.

Does the fact that the Fourth does not make a distinction between “mere evidence” and items traditionally subject to seizure mean that the “right of the people” is certainly unrelated to the “mere evidence” limitation

The Fourth Amendment is a statement of first order principle, which does not descend into detail. That it does not differentiate between types of evidence, able to be seized, does not indicate one way or the other. No extrinsic evidence, as to the intention of the Amendment in this respect, is relied on by the Court in *Hayden*. As the Amendment simply utilizes the word “seizure” it is the legal meaning of the word at the time it was used, which is the proper meaning of the word. In *US v Aaron Burr (1807)*, in regard to the meaning of the word “levy”, the court held:

But the term is not for the first time applied to treason by the constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it.

As discussed in *Hayden* itself, historically, “mere evidence” was not able to be lawfully seized. As this was the common law at the time the Amendment was incorporated, it must follow that “seizure” under the Fourth Amendment only applied to things able to be seized and did not apply to “mere evidence”, as it would be absurd to suggest that a constitutional provision, designed to limit the

power of the State to seize, enlarged that power.

Contrary to the court in *Hayden*, the “right of the people” is certainly related to the “mere evidence” limitation, as it is the purpose of the Fourth Amendment to limit the power of government, as it was historically by the “mere evidence” distinction.

Is the distinction between “mere evidence” and items traditional subject to seizure “wholly irrational”

The proposition that a distinction between the category of “mere evidence” and the category of items traditionally subject to seizure, is irrational, when items may fall into both categories, is a proposition of formal logic. However, formal logic has no place in constitutional jurisprudence, as formal logic operates either independently of context or within a prescribed logical context, and constitutional jurisprudence operates within the context of the power dynamic in society. Looked at from the perspective of the power dynamic in society, the distinction operates as follows:

a. That the fruits of crimes are subject to seizure derives from rightful possession and the apprehension that society cannot flourish where there is brigandage;

b. In the utilisation of its mandate to suppress crime, historically, the State has advanced its own interests. Seizure of contraband most clearly demonstrates this. This phenomenon requires the above conclusion to be modified to read: society cannot flourish where there is too much State brigandage. In *Entick v Carrington* (1765) Pratt CJ observed:

The practice of searching for stolen goods crept into the law by imperceptible practice. It is not the only case of the kind that is to be met with. No less a person than my lord Coke denied its legality.

c. The expansion of State power, enlarging what it can seize, was opposed by those who are wary of the growth of State power. This group upheld property rights, as a domain, inviolable by the State.

d. The resultant common law, as to what the State can and cannot seize, is the outcome of the above struggle. This outcome is not logical in terms of formal logic but it is a logical consequence of a power struggle.

That the court in *Hayden* bases its reasoning on formal logic, demonstrates how far the court has gone from acting in accordance with constitutional principle, as prevention of the State’s use of its mandate to suppress crime, to increase its own power, is the clear purpose of the Fourth Amendment.

***Berger v. New York* (1967)**

Eavesdropping, as in bugging, was also the issue in the 1967 case of *Berger*. In *Berger* evidence was obtained by a bug authorized by a warrant issued under a NY state ordinance. In ruling that the evidence was obtained in breach of the Fourth Amendment and that the ordinance was over broad, Justice Clark, for the majority stated: “Few threats to liberty exist which are greater than that

posed by the use of eavesdropping devices”⁵⁷.

To these strong words Justice Douglas concurred, stating:

I would adhere to the protection of privacy which the Fourth Amendment, fashioned in Congress and submitted to the people, was designed to afford the individual⁵⁸.

In Douglas J’s concurrence are two of the core flaws in the privacy doctrine. The first is that the Fourth Amendment, as conceived, was designed to protect privacy, when in fact it had a much wider ambit, that of security. The second is that the right was afforded to the individual. The Fourth Amendment states it is a right of the people. It is a collective right to ensure a free society by preventing the State misusing its powers. It is stated that it is to protect the people in their houses etc. but this is merely the ambit of the right and provides standing, as “the people” is an abstraction and cannot pursue a remedy. The remedy is primarily the vindication of the public right, not the right itself. This may be a windfall for the individual, but as Lord Camden demonstrated in the swingeing awards he made against the Administration of King George III, to be a remedy an award may need to be punitive.

7. *Katz v. United States* (1967)

Mr. Katz was using public telephones to engage in interstate wagering. The FBI bugged phones he had been using, obtained evidence of these conversations and prosecuted him. The State relied on *Olmstead* and *Goldman*, in which it was held that there was no breach of the Fourth Amendment as the listening device was not attached to the office. The court explicitly overruled *Olmstead* and *Goldman*, without much discussion as it relied on subsequent decisions, principally the wiretap cases, *Jones* and *Hayden*, as follows:

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the “trespass” doctrine there enunciated can no longer be regarded as controlling.

...

The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a “search and seizure” within the meaning of the Fourth Amendment⁵⁹.

This is the final triumph of the privacy doctrine. However, the court also held:

...the Fourth Amendment cannot be translated into a general constitutional “right to privacy”. That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and

⁵⁷Ibid 41.

⁵⁸Ibid 68.

⁵⁹Ibid 354.

often have nothing to do with privacy at all.

The above passage in *Katz* is entirely correct, but contrary to its intent the Fourth Amendment has largely been translated into a “general constitutional ‘right to privacy’”. This is for two reasons. First the motor of technology, which provided the impetus for the right to privacy to gain traction within Fourth amendment jurisprudence, has not let up. Notwithstanding cases such as *Jones v US* (2012) which have been decided on a conventional trespass basis, in the technological age, physical trespasses are less required by law enforcement, as Brandeis envisaged. Secondly and more importantly, ultimately rights are about values. The clear enunciation of privacy as a value, in comparison to the virtual disappearance of security as a value since *Hester*, despite Butler J’s dissent in *Olmstead*, means that privacy has become the ruling value.

8. Conclusion

The court followed *Boyd* until the Prohibition era and *Hester*. In *Hester* the political unity in support of Prohibition was reflected in a unanimous decision, in which the 18th Amendment overruled the Fourth and Fifth.

By 1928 and *Olmstead*, support for Prohibition was waning and the Democrat Party was positioning itself to be the anti-Prohibition party. The court split five, four. The majority read down the Fourth Amendment in favour of law enforcement, on the basis of the “trespass” doctrine. It is a core thesis here that the “trespass” doctrine was not in fact based on common law trespass, but only those aspects of trespass law which favoured law enforcement.

On the other side there were two contending opinions, that of Butler J and that of Brandeis J. Butler J’s opinion was that as a matter of fact there was a search and that on the authority of *Boyd*, protection against such should be liberally construed. It is the writer’s view that this was the correct interpretation of the Fourth Amendment. However, it was Brandeis J’s opinion and his evocation of privacy as the core value underpinning the Fourth Amendment which came to be the ruling interpretation among the liberal judges.

Post *Olmstead* and the unfettering of government use of wiretaps and the like, social concern resulted in the enactment of statutes and in particular the Federal Communications Act 1934, which contained broad prohibitions on the interception of telephonic communications. The overruling of this Act by the court in *Goldstein*, by its restrictive interpretation of the Fourth Amendment was a travesty, which could not be long ignored. Frankfurter J made this point strongly in *On Lee*. It was also becoming grossly apparent that the failure to exclude evidence, obtained in breach of statute law, was encouraging lawlessness by the police. It was the purported grounding of *Olmstead* in trespass and its grossly apparent failure to address social concern about wiretapping, that led to the replacement of the “trespass” doctrine with a privacy doctrine.

It is the central thesis in this work that neither doctrines properly interpret the Fourth Amendment. As discussed above the “trespass” doctrine was in fact a law

enforcement doctrine, that picked and chose those aspects of trespass which suited and ignored or rejected those which did not. This approach did not consider the constitutional role of trespass at common law. Instead the court viewed a truncated version of trespass as a remedy, not a right and so read it down.

The privacy doctrine found a natural fit with the Democrat judges as the “trespass doctrine” rested on what was perceived to be a property qualification. There was reason for this as the courts had themselves engrafted a property qualification on Fourth Amendment rights. However, there is no property qualification in the Fourth Amendment.

It was the failure of the court to not consider possessory rights or the penumbra “the right to be secure” threw over the categories of “houses, persons, papers and effects”, which led to the adoption of the privacy doctrine. This was a failure to address the constitutional need to control state power and centrality of the abstract concept of security within society.

In contradistinction, privacy is egalitarian. Moreover, without proper application of the Fourth Amendment, it had a good fit with protection of private conversations. It is not maintained that personal privacy does not come within the Fourth Amendment. It is maintained that it is not the core value protected and that its apotheosis as the core value, diminishes the Fourth Amendment.

The text of the Fourth Amendment is clear, it does not mention privacy or the right to be left alone, but protects the right of the people to be secure. The Amendment provides a public right to a society free of police overreach, which necessarily avers to persons, as in “their houses” etc, as this is the ambit of the right and it is only individuals who can vindicate the right. That there is such abuse of police power in the US today, is in part due to the failure of the court to uphold the Fourth Amendment. In *Hester* there is not the slightest indication of any hostile action by Hester and his associates. Apart from the bare mention, that a shot was fired by the revenue officers, the court did not trouble itself to ask whether this shot was fired at Hester, when material to abandonment and compulsion. A century later the number of unarmed persons killed yearly by US police is currently declining, but is estimated to be about 1000, for the fourth year running⁶⁰.

Despite the plain words of the Amendment, recent decisions of the court try to engraft the privacy doctrine onto previous cases, in which the doctrine was unknown. In the 2018 decision of *Carpenter v US* the court held:

The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings “of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted”. *Carroll v. United States*, 267 U. S. 132, 149.

In *Carroll* there is no reference to privacy and the full quote is:

The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner

⁶⁰<https://www.themarshallproject.org/records/141-unarmed-shooting>.

which will conserve public interests as well as the interests and rights of individual citizens.

Carroll was a Prohibition case, more concerned with allowing warrantless searches of rum runners than the purpose of the Fourth amendment, as follows:

It would take from the officers the power that they-absolutely must have to be of any service, for if they can not search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.

On the facts of *Carroll* it does not seem that obtaining a warrant would have been that difficult, as the Prohibition officers had previously attempted to entrap the drivers of the vehicle at issue and had its plate number.

In *Carpenter* one does find a masterful exposition of the failures of the privacy doctrine, in the dissent of Thomas J.

It is not maintained that the switch from a “trespass” doctrine to a privacy doctrine on the part of the conservative law enforcement faction of the court was cynical. The record is clear that Brennan J perceived the failings of the old model. So to with Douglas J, whose mea culpa in *On Lee*, could be nothing but genuine. However, the fact remains that the descent of the Fourth Amendment into irrelevance and its rate of shrinkage, has remained depressingly constant, no matter what the doctrine.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

- Abel v. United States, 362 U.S. 217 (1960).
 Beaumont v. Barrett, 1 Moore (1842). 4 Moore, P. C. 63.
 Berger v. New York (1967). 87 S. Ct. 1873.
 Bishop of London v. Ffytche, 2 Bro. P. C. (Toml. ed.) 211.
 Boyd v. United States, 116 U.S. 616 (1886).
 Bratty v Attorney-General for Northern Ireland (1963). AC 386 at 409.
 Brett v. Sawbridge (1736). Id. 141.
 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932).
 Carpenter v US, 201 L. Ed. 2d 507, 2018 U.S.
 Commentaries on the Laws of England (1769).
 Eads v. Brazelton (1861). 22 Ark. 499 (1861).
 Eastenders Cash and Carry Plc and Others, Regina (on The Application of) v Revenue and Customs (2014). SC 11-Jun-2014 ([2014] 4 All ER 1, [2014] WLR(D) 262.
 Entick v. Carrington (1765). 19 How.St.Tr. 1030.
 Eversole v. State (1927). 106 Tex. Cr. 567 (1927).

Fletcher v. Sondes (1822) 1 Bligh (n. s.) 144, 4 Eng. Rep. 826.
Goldman v US, 316 US 129 (1942).
Goldstein v. United States, 316 U.S. 114 (1942).
Gouled v. United States, 255 U.S. 298 (1921).
Grau v. United States, 287 U.S. 124 (1932).
Griffin v. California, 380 U.S. 609 (1965).
Hester v. United States, 265 U.S. 57 (1924).
Ibrahim v R (1914). AC 599 ALL ER Rep. 874.
Jones v US (1960). 362 U.S. 257.80 S. Ct. 725.
Jones v US (2012) 362 US 257.
Katz v. United States, 389 U.S. 347 (1967).
Keilley v. Carbon (1842). 4 Moore, P. C. 63.
On Lee v. United States (1952). 1952343 U.S. 747, 72 S. Ct. 967, 96 L. Ed.
London Street Tramways Ltd v. London County Council (1898). AC 375.
Lopez v. United States, 373 U.S. 427 (1963).
Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964).
Olmstead v. United States, 277 U.S. 438 (1928).
Pelham v. Gregory, 3 Bro. P. C. (Toml. ed.) 204.
People v. Taylor (1992).
Perry v. Whitehead, 6 Ves. 544, 548.
R v McKay (1965) Qd R 240.
Silverman v. United States, 365 U. S. 505 (1961).
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
Spano v New York, 360 U.S. 315 (1959).
TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 33.
The Federal Communications Act (1934). Act of June 19, 1934, c. 652. 48 Stat. 1064, 1103;
47 U. S. C. §605.
The Prorogation Case (2019). R (on Application of Miller) [2019] UKSC 41.
The Queen v O'Connor (1980). 146 CLR 64, 71.
The Six Carpenters' Case (1610). 8 Co Rep 146.
Tifaga v Department of Labour (1980). 2 NZLR 235, 237.
United States v. Bailey, 444 U.S. 394 (1979).
United States v. Calise, 217 F. Supp. 705 (1962).
US v Aaron Burr (1807).
Warden v. Hayden (1967). 387 U.S. 294.
Weeks v. United States, 232 U.S. 383 (1914).