The *Katz* Jury

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This Article challenges Katz v. United States *— the seminal case on whether a given state action implicates the Fourth Amendment — not in terms of its "expectation of privacy" formulation but instead the choice of institution to fulfill its promise. After reviewing the background and doctrine of* Katz*, as well as discontent with its application, the Article poses a thought experiment where juries rather than judges determine the threshold question of search and seizure law. Various arguments are offered in support of this institutional reassignment, such as the opportunity for untainted judgments through strategic opacity. Although not endorsing the concept of a* Katz *jury, the Article hopes to inspire introspection about a landmark Supreme Court decision and the ensuing four decades of Fourth Amendment jurisprudence.*

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INTRODUCTION

Most discussions of *Katz* have the feel of either a wake or a celebrity roast. In the past, some U.S. Supreme Court Justices have lamented that subsequent decisions act "as if *Katz v. United States* had never

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been decided."[1] Others have lambasted the original opinion as creating a "circular"[2] and "notoriously unhelpful test"[3] to determine whether a given state action implicates the Fourth Amendment. Both groups seem to agree, however, that there is something wrong with the Court's approach to this threshold question of search and seizure doctrine. The sentiment is widely held by scholars — and law students, too, as evidenced by the dismay that can accompany class discussions about warrantless perusal of personal bank records, for example, or agents trespassing on private land. It can be disconcerting to learn that such action may not even be a "search" under the Fourth Amendment.

In its fortieth year, *Katz* has reached the age when people begin to suffer mid-life crises, questioning the choices they made and the consequences that ensued. In this Symposium contribution, I recommend some soul-searching for *Katz*, not in terms of its formulation but instead the choice of institution to fulfill its promise. Specifically, should Supreme Court Justices and lower court judges be the ones determining society's privacy expectations? In the end, this may be easily answered or totally unanswerable; but after four decades, at least the question should be asked. Following a quick doctrinal review, this Article offers a thought experiment to press the issue, a scheme where juries rather than judges decide what counts as a search. The goal is neither to praise nor bury *Katz*, but to inspire introspection about a seminal case of constitutional criminal procedure.

I. SOME BACKGROUND

The historical and doctrinal background of *Katz* is well known in academe. *Boyd v. United States*, the chestnut of pre-twentieth century Fourth Amendment law, chronicled the issuance of writs of assistance that allowed customs agents to search private buildings and seize smuggled goods in the American colonies, as well as the British Crown's oppressive use of general warrants to rummage through homes and confiscate allegedly libelous materials.[4] Because these

[1] Florida v. Riley, 488 U.S. 445, 456 (1989) (Brennan, J., dissenting, joined by Marshall and Stevens, JJ.).

[2] Kyllo v. United States, 533 U.S. 27, 34 (2001) (Scalia, J., delivering opinion of Court).

[3] Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring, joined by Thomas, J.).

[4] 116 U.S. 616, 624-26 (1886).

instruments were premised on little if any individualized suspicion of criminal activity, "they placed 'the liberty of every man in the hands of every petty officer.'"[5] With unfettered discretion came the invasion of substantive rights, chief among them a Lockean-style right of private property, "'[t]he great end for which men entered into society.'"[6]

The American affinity for property rights remains strong to this day, almost always for the better, providing the underpinnings of individual autonomy and national prosperity. Over time, however, some applications of property rights have proven to be indefensible,[7] or at least somewhat strained. For example, the Court's Fourth Amendment jurisprudence clung to the "mere evidence" rule until 1967, limiting government to searches and seizures of objects for which it could claim a superior property interest (e.g., stolen goods) but not items that had mere evidentiary value in criminal cases (e.g., a bloody shirt).[8]

Most relevant for present purposes, the courts often deemed law enforcement actions to be "searches" under the Fourth Amendment only if they amounted to a trespass of private property or an intrusion of a "constitutionally protected area."[9] The ensuing doctrine took on a highly stilted character, drawing idiosyncratic lines between permissible police techniques and prohibited surveillance. Law enforcement might eavesdrop on conversations in a residence, for instance, so long as the wiretap or listening device was placed outside the individual's property. But inserting a spike-microphone into the wall of a home, no matter how de minimis the trespass on private property, could violate the Fourth Amendment.[10]

The tension finally came to a head in the case of Charlie Katz, who was convicted on federal gambling charges based in part on his conversations in public telephone booths.[11] FBI agents overheard Katz's

[5] *Id.* at 625 (quoting THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE IN THE AMERICAN UNION 301-03 (Lawbook Exchange 1999) (1898)).

[6] *Id.* at 627 (quoting Entick v. Carrington, 95 Eng. Rep. 807 (1765)).

[7] The most repugnant example being chattel slavery in pre-twentieth century America.

[8] *See* Gouled v. United States, 255 U.S. 298, 309 (1921), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967).

[9] *See* Lopez v. United States, 373 U.S. 427, 438-39 (1963).

[10] *Cf.* Berger v. New York, 388 U.S. 41, 50-53 (1967) (describing line of cases). *Compare* Silverman v. United States, 365 U.S. 505, 512 (1961), *with* Goldman v. United States, 316 U.S. 129, 135-36 (1942), *and* Olmstead v. United States, 277 U.S. 438, 466 (1928).

[11] For the story behind the case, see David A. Sklansky, Katz v. United States: *The*

words by placing a listening device on the outside of the enclosure. Under then-existing doctrine, the issue was whether a public telephone booth was a constitutionally protected area and, if so, whether a physical penetration of that area was required for a Fourth Amendment violation.[12] In an opinion by Justice Potter Stewart, however, the Court rejected this formulation of the questions presented, and in so doing, it abandoned the notion of constitutionally protected areas and the trespass doctrine. In Justice Stewart's memorable phrase, "the Fourth Amendment protects people, not places."[13]

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected . . . . [What Charlie Katz] sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen . . . . One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.[14]

Given the reality of modern society and technological advancement, the wooden property-based formalism could no longer stand. But Justice Stewart's opinion lacked a viable standard by which to evaluate the unforeseen controversies that inevitably came before the Court. For this, later cases drew upon Justice John Marshall Harlan's concurrence in *Katz* and its two-prong test for Fourth Amendment protection: (1) whether a person "exhibited an actual (subjective) expectation of privacy," and (2) whether "the expectation [was] one that society is prepared to recognize as 'reasonable.'"[15] These criteria had a certain yin-yang feel, premised on both the subjective beliefs of the individual and the (supposedly) objective norms of society.

Eventually, however, the subjective component of the *Katz* test came to be viewed as largely pointless and possibly dangerous.[16] Of

Limits of Aphorism, *in* CRIMINAL PROCEDURE STORIES 224, 224 (Carol S. Steiker ed., 2006).

[12] Katz v. United States, 389 U.S. 347, 349-50 (1967).

[13] *Id.* at 351.

[14] *Id.* at 351-52 (citations omitted).

[15] *Id.* at 361 (Harlan, J., concurring).

[16] *See* 1 WAYNE LAFAVE, SEARCH AND SEIZURE § 2.1(c) (4th ed. 2007); *see also*

course, every criminal defendant in his right mind would claim shock at the police intrusion in question as violating his expectation of privacy. Moreover, the subjective prong might allow government to condition people to believe that they were under constant surveillance — for example, by announcing "on nationwide television that all homes henceforth would be subject to warrantless entry"[17] — thus undermining any actual expectation of privacy among the citizenry. Although the Court has occasionally hinted that a given defendant could not have harbored the necessary privacy expectation,[18] the subjective prong has never been dispositive of Fourth Amendment protection and instead remains as some type of jurisprudential makeweight in the *Katz* standard.

Over the past decades, the real action has been in the objective inquiry — whether society is prepared to recognize a particular expectation of privacy as "reasonable" (or "legitimate" or "justifiable").[19] As with the circumstances leading up to *Katz*, subsequent applications have become well-known among academics. In fact, the cases have achieved a degree of scholarly infamy, providing material for scores of law review publications. Of note, the Court has held that law enforcement may, without a warrant:

- sneak onto the property surrounding homes and peek into adjacent buildings, disregarding "no trespassing" signs and locked fences in the process;[20]
- fly over residences in planes and helicopters to spy on backyard activities, no matter how intimate;[21]
- rummage through garbage bags to discover what individuals are doing in the privacy of their own homes;[22]

Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 250-51 (1993).

[17] Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979); *see also* United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 76-77 (4th ed. 2005).

[18] *See* California v. Ciraolo, 476 U.S. 207, 211-12 (1986).

[19] *See Smith*, 442 U.S. at 740. "The Court treats these words interchangeably," Professors Dressler and Michaels note, "and yet a distinction arguably could be drawn between, on the one hand, 'reasonable' expectations and, on the other hand, 'legitimate' or 'justifiable' ones." DRESSLER & MICHAELS, *supra* note 17, at 77-78.

[20] *See* United States v. Dunn, 480 U.S. 294, 297-98 (1987); Oliver v. United States, 466 U.S. 170, 173, 181 (1984).

[21] *See* Florida v. Riley, 488 U.S. 445, 448, 452 (1989); *Ciraolo*, 476 U.S. at 209.

[22] *See* California v. Greenwood, 486 U.S. 35, 37 (1988).

- eavesdrop on otherwise private conversations in residences transmitted by wired informants;[23]
- deploy dogs to sniff personal belongings in search of narcotics;[24]
- place tracking devices on people's property in order to follow their movements;[25]
- install pen registers on home phone numbers to determine whom someone is calling;[26] and
- obtain bank records detailing an individual's otherwise private financial information.[27]

In each case, the Court concluded that no societal expectation of privacy had been infringed, meaning that the Fourth Amendment was not implicated and thus no warrant was required.

The *Katz* formula has also influenced the "standing"[28] doctrine of search and seizure law — whether someone may claim that a government intrusion violated his Fourth Amendment rights. Although an overnight guest can object to a search of his host's home, for instance, an individual may be out of luck if he is on the premises for a short period of time to conduct a commercial transaction.[29] Applying *Katz*, the latter guest might be regarded as having "no legitimate expectation of privacy" in the otherwise private activities occurring within the residence.[30] To be sure, several post-*Katz* decisions have found the Fourth Amendment applicable to surveillance activities, such as law enforcement's use of thermal

[23] *See* United States v. White, 401 U.S. 745, 747, 754 (1971).

[24] *See* Illinois v. Caballes, 543 U.S. 405, 406, 410 (2005); United States v. Place, 462 U.S. 696, 697-98 (1983).

[25] *See* United States v. Knotts, 460 U.S. 276, 276 (1983).

[26] *See* Smith v. Maryland, 442 U.S. 735, 737-38, 752 (1979).

[27] *See* United States v. Miller, 425 U.S. 435, 436-37 (1976). The Supreme Court has found other warrantless surveillance techniques not to be searches within the meaning of the Fourth Amendment. *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227 (1986) (using high-power camera); United States v. Jacobsen, 466 U.S. 109 (1984) (using on-the-scene drug test).

[28] It should be noted, however, that Chief Justice Rehnquist balked at the term "standing," arguing the relevant inquiry was simply the *Katz* standard. *See* Minnesota v. Carter, 525 U.S. 83, 87-88 (1998); Rakas v. Illinois, 439 U.S. 128, 138-40 (1978).

[29] *Compare* Minnesota v. Olson, 495 U.S. 91 (1990), *with Carter*, 525 U.S. 83.

[30] *See Carter*, 525 U.S. at 91.

imagers to detect infrared radiation emanating from a home.[31] Ironically, though, these cases have only strengthened critiques of the Court's jurisprudence. For example, why is it considered a search when an officer identifies the heat coming from a dwelling, but not when he gathers the phone numbers called from that same home?[32]

II. FOURTH AMENDMENT DISCONTENT

Over the years, a number of factors have been cited to justify one decision or another, like the exposure and perceptibility of the information to the public, or the nature and degree of the government intrusion.[33] When comparing cases, however, one immediately notices the Court's selective and sometimes contradictory deployment of such arguments. Using planes and helicopters to inspect residential property was not a search in part because officers were in lawful airspace, yet illegality was deemed entirely irrelevant when officers committed a trespass in order to snoop around private land and structures surrounding homes.[34] Likewise, the Court has upheld warrantless surveillance because, among other things, police could have obtained the damning details by other techniques,[35] only to conclude later that "[t]he fact that equivalent information could

[31] *See* Kyllo v. United States, 533 U.S. 27, 27, 41 (2001); *see also* Bond v. United States, 529 U.S. 334, 337-38 (2000) (using exploratory manipulation of bag); United States v. Karo, 468 U.S. 705, 707-08 (1984) (using tracking device on object taken within home).

[32] *See* George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1502-03 (2005).

[33] *See, e.g.*, Florida v. Riley, 488 U.S. 445, 452 (1989) (emphasizing that police helicopter did not interfere with defendant's "normal use of the greenhouse or of other parts of the curtilage" and that "no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury"); *see also* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 564-75 (1990) (discussing Court's "knowing exposure" doctrine).

[34] *See also Riley*, 488 U.S. at 458-59 (Brennan, J., dissenting) (describing as "curious" that Court "relies to such an extent on the legality of the officer's act, when we have consistently refused to equate police violation of the law with infringement of the Fourth Amendment"). *Compare id.* at 452, *and* California v. Ciraolo, 476 U.S. 207, 213-14 (1986), *with* United States v. Dunn, 480 U.S. 294, 312 n.3 (1987) (Marshall, J., dissenting), *and* Oliver v. United States, 466 U.S. 170, 183-84 (1984).

[35] *See Oliver*, 466 U.S. at 179; United States v. Knotts, 460 U.S. 276, 281-83 (1983).

sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment."[36]

To a certain extent, the problem may appear to be the haphazard application of factors associated with the *Katz* test; if only the Court would be more methodical in its analysis, all might be well in this area of Fourth Amendment law. But as suggested at the beginning, it seems to me that *Katz* and its progeny raise a larger institutional issue — whether judges should determine if an expectation of privacy is reasonable. Sometimes it appears that the Court is engaged in a form of outcome-based jurisprudence, reaching a conclusion first and then reasoning backward to justify it. The aforementioned inconsistency in arguments indicates as much, as does the way in which case issues are framed. For example, if the question is defined narrowly to focus on the specific illegal conduct (particularly drug crimes) rather than the plausible activities that might occur in the relevant area, you can bet that the Court will find no societal expectation of privacy.[37] More generally, there is an "uncanny resemblance" between the purported privacy expectations of society and those of the Justices themselves, producing a most "self-indulgent test."[38]

Maybe this would be acceptable if the underlying question was a pure value judgment for the Court, irrespective of what the rest of society believes.[39] But a Fourth Amendment inquiry that amounts to nothing more than an aggregation of the Justices' personal views would seem to clash with the very words of the *Katz* standard, which asks whether "*society* is prepared to recognize [a privacy expectation] as 'reasonable,'"[40] not whether Article III judges expect as much.[41] Rather than relying upon the subjective viewpoints of its members, the Supreme Court has stated that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment," such as "understandings that are recognized and permitted by

[36] *Kyllo*, 533 U.S. at 35 n.2.

[37] *See Oliver*, 466 U.S. at 191 n.13; *see also* Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 757-59 (2002).

[38] Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

[39] *See infra* notes 137-39.

[40] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (emphasis added).

[41] In addition, this approach would be subject to the standard criticisms of supposedly unprincipled judicial review. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting) (assailing Court as acting like "some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy").

society."[42] This approach is consistent with other constitutional doctrines that incorporate societal standards, using objective criteria in an attempt to transcend the Justices' own naked preferences.[43]

In reading the *Katz* line of cases, however, it is hard not to come away with the impression that societal expectations of privacy are mostly decreed rather than meaningfully measured. Such ipse dixit might be tolerable if we were confident that the Justices' privacy expectations matched those of the general public. Yet it almost goes without saying that the Court — composed of mostly affluent, well-educated, older white males — is no bellwether of society. Once on the bench, the Justices are intentionally insulated from political pressures or, for that matter, any type of reality check. As a result, the Court suffers from a distancing effect or some variation on the availability heuristic,[44] with the relevant decision-makers untouched by their current judgments and lacking prior experiences that might provide a basis for understanding.[45] Not surprisingly, one empirical study found "that the Supreme Court's conclusions about the scope of the Fourth Amendment are often not in tune with commonly held attitudes about police investigative techniques."[46] Survey respondents

[42] Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978); *see also* United States v. White, 401 U.S. 745, 786 (1971).

[43] As an example, the Eighth Amendment test of "evolving standards of decency" looks to legislative change as one guideline in the Court's assessment. *See* Roper v. Simmons, 543 U.S. 551, 564-68 (2005); Atkins v. Virginia, 536 U.S. 304, 312-17 (2002).

[44] JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11-14 (Daniel Kahneman et al. eds., 1982) ("availability heuristic"); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society*," 42 DUKE L.J. 727, 760 (1993) ("distancing effect").

[45] *But cf.* Moran v. State, 644 N.E.2d 536, 543 (Ind. 1994) (discussing state supreme court justice's recusal from *Katz* inquiry because of his "own experience as the target of a trash search"); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 117 (3d ed. 2007) (providing excerpt from *Moran* and noting that "[d]uring election season, a judge on Indiana's intermediate appeals court hired a private investigator to search the garbage of Chief Justice Shepard's home to uncover evidence of abuse of alcohol or use of marijuana").

[46] *See* Slobogin & Schumacher, *supra* note 44, at 774; *see also* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 275-86 (2002) (discussing empirical study on intrusiveness of, inter alia, camera surveillance); *cf.* Dorothy K. Kagehiro et al., *Reasonable Expectation of Privacy and Third-Party Consent Searches*, 15 LAW & HUM. BEHAV. 121 (1991). Other biases and heuristics may be implicated as well. *See generally* BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); JUDGMENT UNDER UNCERTAINTY, *supra* note 44.

found police perusal of an individual's bank records to be highly intrusive, for instance, in contrast to the Court's opinion that society would not recognize a reasonable expectation of privacy in such documents.[47]

Hindsight bias may be partly to blame,[48] with evaluations under the *Katz* test tainted by a known outcome, namely, that evidence of the defendant's guilt was uncovered during the relevant intrusion. Even the most conscientious judge may find it hard to separate the facts gathered by law enforcement from an assessment of the privacy expectations at stake. After all, the defendant was caught red-handed.[49] Moreover, those jurists who strive to rise above the details of a given offense may still be affected by other background and foreground knowledge. In almost every case in every courthouse, judges are fully aware of the law enforcement objectives in conducting a particular investigation. Although the goals of an intrusion are separate from and have no logical bearing on the *Katz* inquiry,[50] the circumstances that led to the police action in question may well contaminate an assessment of societal expectations of privacy.[51] In addition, the Court stands as a relatively conservative, risk-averse institution concerned about the impact of its opinions on allegedly critical criminal justice policies — the fallout for the so-called "war on drugs," for instance, if a particular surveillance technique constitutes a search under the Fourth Amendment.[52]

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[47] *Compare* Slobogin & Schumacher, *supra* note 44, at 740, *with* United States v. Miller, 425 U.S. 435, 440-43 (1976).

[48] *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 799-805 (2001); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 588-90 (1998).

[49] *See* Guthrie et al., *supra* note 48, at 805.

> Judges' susceptibility to the hindsight bias is troubling because judges are frequently expected to suppress their knowledge of some set of facts before making decisions. When deciding whether to suppress evidence found during a police search, for example, judges are expected to ignore their knowledge of the outcome of the search for purposes of determining whether the police had probable cause to conduct the search.

Id.

[50] *See infra* text accompanying notes 118-19.

[51] *See* Slobogin & Schumacher, *supra* note 44, at 761 (discussing "knowledge bias").

[52] As suggested elsewhere, the Court seems less willing to recognize an expectation of privacy that might accrue to the benefit of drug offenders, producing a sort of "drug exceptionalism" in constitutional interpretation. *See* Luna, *supra* note 37, at 757-59.

Maybe the answer is to provide more empirical data on society's privacy expectations, along the lines of the studies conducted by Professor Christopher Slobogin.[53] Presumably, the Justices could incorporate such findings into the *Katz* analysis, countering the cognitive limitations that may cause their assessments to diverge from those of the public. For whatever reason, however, the Court has shown no inclination to take a more empirically grounded approach to the preliminary question of search and seizure analysis. As a consequence, its decisions on Fourth Amendment applicability do not seem to comport with the expectations of privacy held by the common citizen. In retrospect, *Katz* thus appears as a most ironic case: Although the original decision was intended to expand constitutional protection by rejecting the artificial formalism of the past, in practice the Court has done no such thing pursuant to *Katz*, which instead has come to stand for, inter alia, the oxymoronic concept of a search that is not a "search."[54]

III. *KATZ* AND INSTITUTIONAL CHOICE

Assume for present purposes that the Court has been too stingy in its interpretation of *Katz*, and more generally, judges may not be in the best position to assess societal expectations of privacy because of their duties and characteristics. As a thought experiment for this Symposium, I would like to ponder the idea of lodging *Katz* determinations in a different entity. The literature has described the relevant inquiry as one of "institutional choice,"[55] scanning alternative bodies for enhanced performance at a given task — in the present context, whether another institution might do a superior job at determining societal expectations of privacy. Innumerable factors might be relevant to this comparative analysis, from the historical and intellectual pedigree of an institution, to its alleged benefits and roles

[53] *See supra* note 46.

[54] *See* DRESSLER & MICHAELS, *supra* note 17, at 69-70; John M. Burkhoff, *When Is a Search Not a "Search?": Fourth Amendment Doublethink*, 15 U. TOL. L. REV. 515, 525-36 (1984).

[55] *See, e.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (discussing institutional choice theory and applying it to public policy and constitutional law); Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557 (2002) (analyzing judicial review using institutional choice theory); *cf.* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (tent. ed. 1958) (classic text on institutional competence).

vis-à-vis other bodies, to analogous cases of institutional transition.[56] But whatever criteria are employed, the ambition is to find an entity that tends to embody community sentiment, one that could be shielded from information that might skew the decision-making process, ultimately providing a more truthful reflection of society's privacy expectations.

For purposes of discussion, consider the following: *What if jurors, rather than judges, decided whether a given police action infringed upon an expectation of privacy that society is prepared to recognize as reasonable?* The basic premise is that juries might render decisions that are less affected by hindsight bias or distorted by background knowledge and excessive angst over potential consequences, either due to the nature of these lay panels or through techniques to withhold information from them. Most importantly, the *Katz* doctrine is explicitly formulated in terms of society's expectations, presumably those of average citizens, and no other official body is composed of such individuals. Thus, juries may be in a better position than judges, particularly Supreme Court Justices, to measure accurately societal expectations of privacy.

The notion of using juries as Fourth Amendment decision-makers is not unheard of in legal opinions and scholarship. Opponents of the exclusionary rule have long recommended tort actions decided by civil juries as an appropriate alternative to suppressing evidence in criminal cases,[57] and the Court itself supported the idea by implying a tort remedy for search and seizure violations committed by federal agents.[58] Moreover, Professor Akhil Amar, a noted proponent of this approach, contends that having civil juries evaluate the reasonableness of a search — and, if appropriate, assess damages against the government — would not only be an improvement over the current regime but also more consistent with the text and context of the Fourth Amendment.[59] Other scholars who have advocated juror

[56] *But see* text accompanying *infra* note 144 (acknowledging that cost-benefit analysis typically drives institutional choice inquiries).

[57] *See, e.g.*, Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 49-58 (discussing tort remedy); *see also* S. 3, 104th Cong. § 507(b) (1995) (replacing evidentiary suppression with tort action); BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 9-19 (1986) (providing historical support for tort-law remedial model in Fourth Amendment cases).

[58] *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-96 (1971); *see also* 28 U.S.C. § 2680(h) (2000) (providing tort action against federal officials); 42 U.S.C. § 1983 (2000) (providing civil rights action against state officials).

[59] *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 816 (1994) [hereinafter Amar, *Principles*]; *see also* Akhil Reed Amar, *The Fourth*

decision-making would not replace the exclusionary rule with a civil remedy, however, but instead would directly integrate juries into constitutional criminal procedure.

A quarter-century ago, Professor Ronald Bacigal proposed a scheme where a jury would reconsider a judge's decision to uphold a search and admit the related evidence, allowing the lay panel to determine for itself whether the government intrusion was constitutional and whether to disregard the fruits of the search.[60] A dozen years later, George Thomas and Barry Pollack claimed that a pretrial screening jury should consider whether law enforcement had violated the Fourth Amendment, and if so, a judge would then decide whether evidence should be excluded.[61] Most recently, Professor Thomas suggested flipping these roles, with judges ruling on the legality of the search and juries fixing the appropriate remedy, fine or evidentiary suppression.[62] While the present hypothetical has much in common with these proposals, there are also some key differences. Previous suggestions have envisioned jurors deciding the legality of a given search and/or suitable remedy, whether in a tort suit or criminal case. The idea here, however, is to incorporate jurors earlier in the constitutional timeline, back to the preliminary question presented by *Katz*: whether the government intrusion was a "search" in the first place.[63]

Amendment, Boston, and the Writs of Assistance, 30 SUFFOLK U. L. REV. 53, 61-62 (1996) [hereinafter Amar, *Boston*]. *But see* Amar, *Boston*, *supra*, at 74 ("[I]n at least a half-dozen places, I made clear that legislators, administrators, and judges would also play key roles under my reading of the Amendment — and that in many situations, juries should not decide."); Akhil Reed Amar, Terry *and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1125 (1998) [hereinafter Amar, Terry] ("Contrary to the claims of some of my critics, I do not believe — and have never said — that juries historically played, or today should play, the sole role in giving meaning to reasonableness.").

[60] *See generally* Ronald J. Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791 (1981) [hereinafter Bacigal, *Jury Determination*] (arguing for jury determination of search and seizure law). In 1994, Professor Bacigal provided an augmented version of this model. *See* Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 425-28 (1994) [hereinafter Bacigal, *Putting the People Back*].

[61] *See generally* George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147 (1993) (arguing for jury-based methodology that asks whether suppression will vindicate societal interests embodied in Fourth Amendment).

[62] *See generally* George C. Thomas III, *Judges Are Not Economists and Other Reasons to Be Skeptical of Contingent Suppression Orders: A Response to Professor Dripps*, 38 AM. CRIM. L. REV. 47 (2001) (arguing that juries should determine fine or evidentiary suppression).

[63] This would not preclude the approaches advocated by Professors Bacigal and

Although well-worn, the standard arguments in favor of juries may have some merit. Certainly, the jury has been described as an institution of great historical significance.[64] The American founders viewed juries as essential to liberty and "the only anchor ever yet imagined by man, by which a government can be held to the principles of its Constitution."[65] Fulfilling this belief, the right to trial by jury was guaranteed in virtually every organic document of the time, including provisions in both the original U.S. Constitution and the Sixth Amendment.[66] Some scholars have suggested that the entire Bill of Rights reeks of juries — grand and petit, criminal and civil — indicating a relationship between the jury convention and various provisions like the Fourth Amendment.[67] At any rate, the jury holds a unique position in the American legal system, protected by constitutional and statutory law,[68] deemed so fundamental as to be

Thomas, however, because a determination that a particular intrusion constitutes a search under the Fourth Amendment does not necessarily mean that the fruits of the search must be excluded.

[64] *See, e.g.*, WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (1875) (discussing origins of jury trial and comparing and contrasting jury systems in western Europe and United States in nineteenth century); THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800 (1985) (analyzing origins and pre-Victorian history of English criminal jury); LEONARD W. LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY (1999) (providing historical study of juries and their role in criminal justice); LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY (2d ed. 1988) (discussing evolution of jury trial); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994) (discussing historical evolution of juries, including changes in composition and extent of influence on common law). The American colonists brought the convention with them to the New World, viewing trial by jury as part of their "birthright and inheritance," as well as a bulwark against arbitrary power. *See* Duncan v. Louisiana, 391 U.S. 145, 151-54 (1968). Eventually, colonial juries would be celebrated as delivering justice in the face of royal tyranny, with the Crown's deprivation of trial by jury serving as an explicit justification for the American Revolution. *See id.* at 152-53.

[65] Galloway v. United States, 319 U.S. 372, 397 n.1 (1943) (Black, J., dissenting) (quoting 3 WRITINGS OF THOMAS JEFFERSON 71 (H.A. Washington ed., 1859)); *see also* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 55 (C. Bradley Thompson ed., 2000).

[66] *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); *see also* U.S. CONST. amend. VII (providing for juries in civil cases).

[67] *See* Amar, *Boston*, *supra* note 59, at 62.

[68] *See* 28 U.S.C. §§ 1861-1878 (2000).

obligatory on state government,[69] occasionally modified in pursuit of fairness,[70] and yet still generating novel jurisprudence to this day.[71]

Aside from its historical foundation and constitutional dimensions, the use of a jury is said to have several benefits that help explain its high regard as an institution.[72] For present purposes, the most relevant aspects are the jury's role as a check and balance on government and its capacity for democratic participation and community representation. The checking function has been heralded in judicial opinions, with some claiming that "[t]he primary purpose of the jury in our legal system is to stand between the accused and the powers of the State."[73] According to the Supreme Court, the jury trial right was specifically granted to prevent government oppression, not only by demagogic lawmakers or "the corrupt or overzealous prosecutor," but also the "compliant, biased, or eccentric judge."[74] Because the jury is a transient, multi-member body, its decision-making may be less susceptible to various agency costs like the desire

[69] *See Duncan*, 391 U.S. at 149.

[70] *See, e.g.*, J.E.B. v. Alabama, 511 U.S. 127 (1994) (holding that preemptory challenge based on gender violates Equal Protection Clause); Batson v. Kentucky, 476 U.S. 79 (1986) (holding that prosecutor cannot challenge potential jurors based on race); Taylor v. Louisiana, 419 U.S. 522 (1975) (striking down Louisiana law barring women from serving as jurors); Strauder v. West Virginia, 100 U.S. 303 (1880) (invalidating West Virginia law that excluded non-white citizens from serving as jurors).

[71] *See* United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 296 (2004); Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000).

[72] *See, e.g.*, AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6-7 (1999), *available at* http://www.abanet.org/media/perception/perceptions.pdf (discussing survey showing general public's confidence in U.S. justice system stems from its feelings about juries). The ability to serve as a juror is seen as an important incident of citizenship, not unlike the right to vote, thereby symbolizing what it means to be a coequal member of American society. Jury service can even provide a form of civic education for the citizenry, what Tocqueville termed a "free school," where "each juror learns his rights" and is "given practical lessons in the law." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 275 (J.P. Mayer ed., George Lawrence trans., 1969) (1840); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1210 (1991). In general, supporters believe that jurors tend to be conscientious in their decision-making, fully recognizing the gravity of their duties. Moreover, most jurors come away with positive feelings about their experience. *See* NANCY S. MARDER, THE JURY PROCESS 1-2, 260-61 (2005). For judges' views of juries, see RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 81-83 (2003); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 428-33 (1970); Allen Pusey, *Judges Rule in Favor of Juries*, DALLAS MORNING NEWS, May 7, 2000, at 1J.

[73] Lewis v. United States, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring).

[74] *Duncan*, 391 U.S. at 155-56; *see also* Williams v. Florida, 399 U.S. 78, 100 (1970); Singer v. United States, 380 U.S. 24, 31 (1965).

for professional prestige and career advancement, the type of self-serving interests that can influence the actions of any entrenched government official.[75]

The American commitment to juries thus reflects "a profound judgment about the way in which law should be enforced and justice administered,"[76] protecting individuals from both political actors *and* sitting judges. The latter may be "more tutored but perhaps less sympathetic" and lacking "common-sense judgment," providing good reason to deny "plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[77] In this way, juries offer an *intra*branch check within the judiciary, acting as a counterbalance to the powerful but often insulated and unelected jurist.[78] Yet they also complement judges and even relieve them of difficult obligations. When jurors are entrusted with controversial issues, they serve as a sort of "lightning rod,"[79] making judgments without fear of direct repercussions. Unlike judges, the jury's collective, transitory, and effectively anonymous nature may allow it to make tough decisions without regard to the consequences.

Moreover, juries deliver a form of feedback to government officials, expressing (dis)agreement with a given law or prosecution through their judgments. A series of jury decisions in criminal cases, and on occasion, a single noteworthy verdict, can affect charging and plea-bargaining practices and even force legislative change.[80] But jury decision-making is not merely a public opinion poll — it is participatory democracy in action. In modern America, jury service provides one of the few means by which average citizens can participate directly in government. Through their verdicts, jurors do not authorize others to make decisions for them (*à la* representative democracy), but instead decide for themselves the justice of law on the

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[75] *See* Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 85 (2003).

[76] *Duncan*, 391 U.S. at 155.

[77] *Id.* at 156.

[78] *See* JONAKAIT, *supra* note 72, at 30-35, 47-49; MARDER, *supra* note 72, at 11. Some have described juries as the "lower house" of a bicameral judiciary, providing a potential safeguard against abusive judges. *Cf.* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 94-96 (1998).

[79] *See* Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221, 240 (1998); *see also* Carrington, *supra* note 75, at 86-87.

[80] *See* JAMES P. LEVINE, JURIES AND POLITICS 171 (1992); MARDER, *supra* note 72, at 11-12; Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 102 (1980).

books and on the streets. "More than when they vote, or pay taxes, or attend a parade, they are realizing the democratic vision that sustains our nation: They are governing themselves."[81] And for better or worse, juries provide America's "most honest mirror,"[82] a direct reflection of society, its values, and its expectations. When a jury deliberates as a group of otherwise ordinary people, it brings to bear the social norms that prevail in the community from which its members were drawn.

For this reason, it has been argued that juries provide a key vehicle of consensual governance, placing "important determinations back into the hands of the people who are the ultimate agents of the conditions of their social life," and whose decision-making "better expresses the will of those whose system it ultimately is."[83] The Court has recognized this important feature, with juries providing "community participation and shared responsibility," as well as the "commonsense judgment of a group of laymen."[84] To the extent that principles can be extracted from their decisions, jurors are declaring what society expects of the legal system and how the law should be interpreted and applied. These opinions are not rendered by the political or legal elite, those of privilege and training, but instead by average citizens giving voice to the community.

From this admittedly rosy perspective, a jury may appear to be an ideal institution to evaluate societal expectations of privacy. The panel is not composed of professional repeat players who might be jaded by recurring fact patterns and the unending queue of criminal defendants.[85] Nor are jurors' own interests at stake, such as career retention or advancement. Compared to judges, for example, they need not be hypervigilant to avoid higher court reversals or misperceptions of party bias.[86] Likewise, the fleeting nature of jury

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[81] STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 242 (1994).

[82] JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 250 (1994); *see also* LEVINE, *supra* note 80, at 17.

[83] John Kleinig & James P. Levine, *Ethical Foundations of the American Criminal Jury*, *in* JURY ETHICS: JUROR CONDUCT AND JURY DYNAMICS 4, 4-5 (John Kleinig & James P. Levine eds., 2006).

[84] Brown v. Louisiana, 447 U.S. 323, 330 (1980) (quoting Williams v. Florida, 399 U.S. 78, 100 (1970)).

[85] Of course, jurors may be affected by other distorting phenomena, such as news coverage of high-profile cases or television-based assumptions about the nature of trial evidence. *Cf.* Kit R. Roane & Dan Morrison, *The CSI Effect*, U.S. NEWS & WORLD REP., Apr. 25, 2005, at 48.

[86] *See* JONAKAIT, *supra* note 72, at 34-35.

service may temper any anxieties over the systemic consequences of a given decision. Jurors can focus solely on the present controversy without undue deference to long-term criminal justice policies and the legal parade of horribles from ruling one way or the other.[87] And in applying the *Katz* standard, juries would not be required to either guesstimate or mystically channel the expectations of society, as seems to occur at the Supreme Court. If jurors are drawn from a fair cross-section of the community — in terms of race, gender, socioeconomic background, and so on — their collective expectations, aggregated through a process of group decision-making, should represent those of society (or at least those of the relevant jurisdiction).[88]

IV. JURIES AND QUESTIONS OF LAW

Accepting these pro-jury arguments, a jurisprudential obstacle stands in the way of empowering lay panels as *Katz* decision-makers. Whether a societal expectation of privacy is implicated, and the Fourth Amendment triggered, has been deemed a question of law.[89] While this characterization can be debated, as factual issues seem to be strewn throughout,[90] let's assume that the *Katz* inquiry is a legal question. The knee-jerk doctrinal response would be to allocate this decision to judges rather than juries.[91] The underlying maxim of power distribution — facts are for juries, law is for judges — has not always been true, however, and now is frequently honored in the breach. From colonial times to at least the mid-nineteenth century, American jurors were authorized to decide both the facts and law of

[87] *See id.*

[88] *See* George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1, 23-24 tbl.3 (1992) (finding high correlation between unanimous jury verdicts and decision majority of society would reach). Nonetheless, the notion of drawing a representative jury is deeply problematic. *Cf.* Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319 (2005) (arguing specific segments of society are significantly underrepresented in jury system).

[89] *See* United States v. McIver, 186 F.3d 1119, 1124 (9th Cir. 1999); *cf.* Ford v. United States, 273 U.S. 593, 605 (1927); Steele v. United States, 267 U.S. 505, 510-11 (1925).

[90] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180-82 (1989).

[91] *See* Sparf v. United States, 156 U.S. 51, 102 (1895) ("We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence.").

the case before them.[92] Today, a couple of states continue this practice, with, for instance, the Indiana Constitution declaring that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts."[93] And although considered a taboo topic in open court,[94] juries in all jurisdictions maintain the tacit but absolute authority to nullify the law through their verdicts, refusing to convict a defendant despite his factual guilt.[95]

Indeed, juries inevitably interpret the law in *every* case, regardless of whether officials acknowledge this bit of realism. Not only is the fact-law divide "a fiction that seldom corrals the behavior of actual jurors,"[96] but it is "a gross oversimplification of our trial system."[97] Every time jurors are called upon to decide issues based on vague legal concepts — *premeditation*, for example, or virtually anything containing the word *reasonable* — they are being asked to interpret the law. Some may try to skirt the problem by describing these decisions as mixed questions of law and fact, or perhaps the application of law to particular facts. But jurors are clearly resolving something more than just factual issues, with that something more being the law.[98] And maybe this is a good thing, given the previously mentioned

[92] *See, e.g.*, Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954) (discussing jurors' function as, inter alia, "judges of the law"); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964) (analyzing role of jurors during nineteenth century); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939) (detailing movement in criminal cases to have juries determine facts and judges determine law); John D. Gordan III, *Juries as Judges of the Law: The American Experience*, 108 LAW Q. REV. 272 (1992) (discussing period of American history when juries had right to be finders of law); Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123 (1985) (discussing historical background on jury's function as finders of law and fact); *see* Alschuler & Deiss, *supra* note 64, at 903-21; Bacigal, *Jury Determination*, *supra* note 60, at 794-808; Bacigal, *Putting the People Back*, *supra* note 60, at 364-80.

[93] IND. CONST. art. I, § 19; *see* MD. CONST. art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.").

[94] *See* United States v. Dougherty, 473 F.2d 1113, 1130-38 (D.C. Cir. 1972).

[95] *Cf.* CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 143-66 (1998) (arguing that juries sometimes refuse to convict for reasons other than insufficient evidence of guilt).

[96] ABRAMSON, *supra* note 82, at 64.

[97] JONAKAIT, *supra* note 72, at 64; *see also* Miller v. Fenton, 474 U.S. 104, 113-14 (1985).

[98] *See* ABRAMSON, *supra* note 82, at 57-95; JONAKAIT, *supra* note 72, at 64-74; MARDER, *supra* note 72, at 8-10; Bacigal, *Jury Determination*, *supra* note 60, at 815-16; Bacigal, *Putting the People Back*, *supra* note 60, at 380-82; Broeder, *supra* note 92, at 405; Kotler, *supra* note 92, at 132-34; Thomas & Pollack, *supra* note 61, at 156-58.

limitations of judges. Sometimes it might be preferable to have a group of ordinary folks, each with a unique background and set of opinions, collectively deciding what the law is or should be for themselves and their fellow citizens.

There is even a contemporary analogue, where the Justices took a recurring constitutional issue that had plagued the Court's docket and essentially turned it over to juries for their determination. After declaring that obscenity was not protected by the First Amendment, but that "[s]ex and obscenity are not synonymous,"[99] the Warren and Burger Courts struggled to establish a test for when sexually explicit materials were obscene and therefore prohibitable as a matter of constitutional law. Apparently, many of the Justices had their own standard for obscenity, although these tests would not be articulated in written opinions. For visual depictions, "no erections and no insertions equaled no obscenity" to Justice Byron White.[100] The clerks for Justice William Brennan described their boss's rule as the "limp dick" standard, with oral sex being acceptable so long as no erections were shown.[101] In turn, Justice Stewart followed a "Casablanca test," which was based on his experiences as a World War II naval officer who had seen Casablanca's locally produced pornography brought on board by sailors.[102] Though Justice Stewart would never publicly admit this criterion, he conceded the subjectivity of the entire enterprise in a short, frequently mocked concurrence: "I shall not today attempt further to define the kinds of material I understand to be [obscene]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."[103]

Eventually, the idiosyncratic nature of the constitutional inquiry led the Court to summarily decide obscenity cases regardless of the underlying rationale espoused by each member.[104] Nevertheless, the Justices, or at least their clerks, had to review the materials in question, with books, magazines, and photos circulating through the chambers and films screened on "movie day."[105] The subjective, time-consuming nature of the task was troubling to the Justices — "sitting as the Super Censor of all the obscenity purveyed throughout the

[99] Roth v. United States, 354 U.S. 476, 487 (1957).

[100] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 193 (1979).

[101] *Id.* at 194.

[102] *Id.*

[103] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[104] This approach began with *Redrup v. New York*, 386 U.S. 767, 769-70 (1967).

[105] *See* WOODWARD & ARMSTRONG, *supra* note 100, at 198-200, 233-35.

Nation"[106] — and for some, it was far beyond their background experiences and knowledge.[107] A couple of Court members would have resolved the issue with a near-absolutist stance on the First Amendment, that defining obscenity was hopeless and that government could not suppress speech, no matter how offensive.[108]

But most of the Justices believed that sexually explicit material could be subject to state regulation, and previous decisions had recognized that the perspective of the relevant community was part of the constitutional analysis.[109] In 1973, the Court punted the problem to the American jury as the appropriate body to decide obscenity cases based on, among other things, its assessment of "the average person applying contemporary community standards."[110] According to the

[106] *Jacobellis*, 378 U.S. at 203 (Warren, C.J., dissenting); *see* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83, 92-93 (1973) (Brennan, J., dissenting); Miller v. California, 413 U.S. 15, 22, 29 (1973); Ginsberg v. New York, 390 U.S. 629, 704-07 (1968) (Harlan, J., dissenting); *see also* WOODWARD & ARMSTRONG, *supra* note 100, at 194 (noting Justice White's aversion to case-by-case adjudication and quoting Justice Brennan as saying, "I'm sick and tired of seeing this goddamn shit . . . .").

[107] *See* WOODWARD & ARMSTRONG, *supra* note 100, at 199.

> [Justice] Powell's gaunt face was expressionless. He had never before seen such a film, he explained slowly. He had had no idea such movies were even made. He was shocked and disgusted. He did not wish to discuss it further. Powell's clerks were amazed. There could not have been a milder movie for him to have seen. There had been nothing more than nudity, and facial and bodily expressions that suggested orgasm. How would he have reacted to the hard-core peep-show reels with nothing but explicit sex from beginning to end?

Id.

[108] This was Justice Douglas's position. *See Paris*, 413 U.S. at 70-73 (Douglas, J., dissenting).

[109] *See* Kois v. Wisconsin, 408 U.S. 229, 230 (1972); Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966); *Jacobellis*, 378 U.S. at 191; Roth v. United States, 354 U.S. 476, 489 (1957).

[110] *Miller*, 413 U.S. at 24.

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24. In later decisions, the Court would refine the inquiry. *See, e.g.*, Pope v. Illinois, 481 U.S. 497, 500-01 (1987) (describing "proper inquiry" under *Miller*'s "community standards" prong); Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (explaining why film "'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way").

Court, "The adversary system, with lay jurors as the usual ultimate fact-finders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law."[111] Although the resolution of obscenity cases involves "inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide."[112]

Despite obvious doctrinal differences, there are at least some general parallels between the Court's struggle with sexually explicit materials under the First Amendment and government intrusions under the Fourth Amendment. The majority of cases were brought by individuals who were unlikely to receive much sympathy — criminal defendants involved in vice activity, namely, commercialized sex and illegal drugs — with the decisions in both areas apparently driven by the Justices' personal value judgments rather than objective legal analysis. Moreover, the Court labored over dispositive terms (i.e., "obscenity" and "search"), all the while recognizing, at least implicitly, that the opinion of ordinary people should matter. For obscenity, the issue was contemporary community standards for the average citizen; under *Katz*, the question was expectations of privacy that society is prepared to recognize as reasonable. With the above-mentioned advantages of jurors over judges in making commonsense decisions for common citizens, it could be argued that the institutional reassignment that occurred in First Amendment jurisprudence might be equally appropriate for the Fourth Amendment's gateway inquiry.

V. STRATEGIC OPACITY

Let's assume that much of the foregoing is correct, in particular:

- the notion of juries as Fourth Amendment decision-makers has some historical basis and at least a few supporters within academe;
- juries are intended to check overreaching by the political branches and complaisance by the judiciary;

[111] *Miller*, 413 U.S. at 30.

[112] *Id.* at 26. To be clear, this Article should not be taken as an endorsement of the *Miller* approach. *See infra* notes 141-42.

- jurors may be less affected by the prejudices and self-interests that can taint the repeat players of criminal justice, including judges;
- juries decide legal issues as a matter of course;
- an institutional reassignment of constitutional decision-making from Supreme Court Justices to lay jurors would not be unprecedented; and
- juries provide one of the few means of genuine self-governance, with average citizens giving voice to society's values and, in this case, its expectations of privacy.

This seems fair enough, at least on some conceptual level. But how would a *Katz* jury work in practice? A primary concern would be the impact of legally irrelevant information on jury decision-making. As suggested earlier, the problem with Supreme Court assessments of *Katz* issues is not only that the Justices themselves are poor arbiters of privacy expectations, but also that their judgments may be influenced by both background and foreground knowledge. The use of juries would likely temper some of the distortion — for instance, preconceptions that come from the constant flow of accused criminals and the stock claims of legal advocates. There is no reason to believe, however, that jurors would be any more capable than judges at ignoring known outcomes, police objectives, and party characteristics when evaluating particular disputes.

In previous works, I have endorsed transparency in government decision-making, especially for law enforcement activities, including the idea that full information should be provided to the public to ensure democratic accountability and other salutary ends.[113] Nonetheless, I acknowledged that there were exceptions to such openness, not out of an ostrich-style preference for willful blindness, but instead to serve legitimate objectives like guaranteeing witness safety where disclosure might lead to acts of violent retaliation.[114] Strategic opacity may be justifiable when supplying all facts would frustrate the goals of the decision-making process — in the present case, providing information to a jury that might distort its evaluation of reasonable expectations of privacy. What is needed in *Katz* analysis is the impartiality that comes from the lack of certain case-specific

[113] *See generally* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (arguing for transparency in government decision-making).

[114] *See id.* at 1165.

details. So how could jurors be screened from legally extraneous knowledge?

In theory, we might want to have judgments made behind some sort of "veil of ignorance."[115] Using John Rawls's famous procedural device, decision-makers are unaware of their own circumstances, such as socioeconomic status, and instead must determine the appropriate governing principles based on general knowledge of political affairs, economic theory, human psychology, and so on. Needless to say, this philosophical technique would be a practical impossibility; neither judges nor jurors can abstract away their own circumstances and assume the position of a perceptionless amnesiac. Besides, we presumably would want jurors to bring their characteristics and personal histories to the *Katz* inquiry and, through a process of collective deliberation, provide a perspective on privacy expectations that would more accurately reflect those of society at large. What should be suppressed from consideration, however, are the fruits of the intrusion — the drugs, guns, money, etc. — discovered through the law enforcement activity in question.

A better analogy might be the "blind audition" employed today by many symphony orchestras. To eliminate the possibility of biased selection, auditions take place behind a curtain or screen that precludes the evaluators from knowing the candidates' personal characteristics. Prospective musicians are told not to speak (and sometimes even asked to remove their shoes) so that nothing betrays the anonymity of the audition.[116] The selection committee members are unavoidably themselves, but at least they have no clue as to a candidate's race, sex, age, and physical appearance. As a matter of principle, their decision should be based on musical talent not irrelevant information, with the goal of a fair, merit-based process and, in the end, a finer orchestra. Other examples abound in modern life, from blind grading in academic settings to double-blind scientific studies of new medicines. Strategic opacity is also employed in various legal contexts. For instance, some police departments now use identification procedures where the officer administering the lineup does not know which individual is the suspect.[117] In each of

[115] *See* JOHN RAWLS, A THEORY OF JUSTICE 118-23 (rev. ed. 1999).

[116] *See* Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000).

[117] *See* Jascha Hoffman, *Suspect Memories*, LEGAL AFFAIRS, Jan./Feb. 2005, at 42-45. *But see* THE REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 27-29 (2006), *available at* http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.

these examples, potentially prejudicial information is withheld to ensure untainted judgments.

The same argument would seem to apply to *Katz* analysis: The fact that law enforcement turned up incriminating evidence should have no bearing on whether the government action implicated a societal expectation of privacy. In practice, all sorts of information can be kept from jurors based on constitutional and statutory rules — hearsay, character evidence, prior convictions, unreliable or illegal confessions, statements by co-defendants, consequences of particular verdicts, potential sentences upon conviction, and so forth.[118] If this information can be hidden from trial juries, the ultimate fruits of the government action (e.g., a bag of drugs) could be withheld from a *Katz* jury as well. In addition, it seems to me that the objective of law enforcement in conducting the intrusion also should be excludable. This background information might sway an individual's evaluation, with arbitrary invasions more likely to be deemed violations of privacy expectations than those supported by suspicion of wrongdoing, particularly crimes of violence or other serious offenses.

pdf; Melissa B. Russano et al., *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects On Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 355, 357 (2006).

[118] *See, e.g.*, Jones v. United States, 527 U.S. 373 (1999) (jury need not be informed of consequences of failure to agree on verdict); Shannon v. United States, 512 U.S. 573 (1994) (jury need not be instructed on consequences of verdict of not guilty by reason of insanity). In the civil arena, for instance, juries assessing compensatory damages are precluded from knowing a defendant's net worth, and they may not be informed about statutory damage caps. *See, e.g.*, 42 U.S.C. § 1981a(c)(2) (2000) (preventing disclosure to jury of damage caps); *see* Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1364-65 (2005); Michael S. Kang, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. CHI. L. REV. 469, 469-70, 472 (1999). Likewise, juries generally are uninformed about: "subsequent remedial measures taken in the wake of an accident"; "the taxability or nontaxibility of an award," Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1863 (2001); "whether and how much liability insurance a defendant in a civil case has; arrangements for payment of attorneys' fees; whether any original parties have settled, and for how much; settlement offers that were rejected; and that a jury award in a private antitrust suit will by law automatically be tripled by the court." Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 517 (1992). Other opacity techniques include jury sequestration during trial and limitations on party statements that might taint the jury pool. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.6 (2002) (limiting extrajudicial statements by attorneys). *See generally* Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) (holding that attorneys may be precluded from making statements that have substantial likelihood of materially prejudicing proceeding).

Part of the problem is that questions of Fourth Amendment justification, such as the existence of probable cause or exigent circumstances, can bleed into the *Katz* analysis as to whether the Constitution applies at all. People may feel a level of sympathy when police act pursuant to a valid rationale, for instance, or they may believe that only capricious enforcement would ever affect them personally. But the Supreme Court has held that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,"[119] and this kind of limitation should apply with even greater force under *Katz*. A reasonable expectation of privacy either exists or it does not, irrespective of the police intrusion and regardless of whether law enforcement acted for good reason, bad reason, or no reason at all. The fact that police were in hot pursuit of a fleeing felon who ducked into a home may justify a warrantless entry, but it surely does not mean that the resident had no expectation of privacy and that the Fourth Amendment was not implicated by the government intrusion.

The more difficult question is whether and how to conceal: (1) details that might reveal law enforcement objectives and suggest that incriminating evidence was in fact found, including the nature of the case; and (2) information that might inappropriately sway the jury, like the identity of the defendant and the site of the police intrusion. As for the former, juror knowledge that they are deciding an issue in a criminal prosecution might lead them to believe (correctly or incorrectly) that law enforcement had a justification for its actions and to assume (correctly) that police did find incriminating evidence. As for the latter, there may be a well-founded concern that the defendant's characteristics (e.g., his race or ethnicity) or the location of the intrusion (e.g., a housing project in a poor, high-crime neighborhood) might improperly skew the jury's decision-making.

Conceivably, some of this information might be withheld. For example, a judge might inform jurors that the underlying action could be either a criminal case or a civil rights suit, and that their judgment must not be affected by speculation on this matter. Suppressing the defendant's identity and the site of the intrusion would be far harder to do. The defendant might choose not to attend the hearing, for instance, while the parties and witnesses could be instructed not to refer to the specific location of the defendant's home. In the traditional courtroom setting, however, subject to the standard process

[119] Whren v. United States, 517 U.S. 806, 813 (1996). This is not to say, however, that I agree with the *Whren* Court's analysis and judgment.

of evidentiary presentation and with the usual players in their usual positions, the presence of some judgment-distorting information might be unavoidable. Just as there are reasonable exceptions to informational transparency in government decision-making, there may be practical limits to strategic opacity with the *Katz* jury.

VI. A SPECIALIZED GRAND JURY

At this point, readers might want to hear more about the form and operation of this jury, though it probably would be wise to stop here and avoid getting bogged down in the details. But since the thought experiment has been taken this far, another layer might as well be added: *What if a* Katz *jury was styled not in the form of the traditional petit jury, but instead as a specialized grand jury?*[120] Similar to their trial cousins, grand juries have a noted history of "standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will," thus offering protection "against hasty, malicious, and oppressive persecution."[121] In theory, this decision-making body continues to provide a buffer between individual citizens and the government[122] — screening cases to ensure that there is sufficient justification for a prosecution to proceed — while also serving an investigative function through its subpoena power.[123] Of primary concern here, grand juries are supposed to be "the voice of the community," infusing self-rule and the "élan of democracy" into the initial stages of a criminal case.[124]

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[120] In his proposals, Professor Thomas suggested that a jury deciding Fourth Amendment issues should be empanelled pretrial, possibly deciding multiple cases over some predetermined period of time and thus functioning somewhat like a grand jury. *See* Thomas, *supra* note 62, at 66 n.59; Thomas & Pollack, *supra* note 61, at 150. The present thought experiment would go slightly further with its hypothetical *Katz* decision-maker: The institution deciding societal expectations of privacy should not just be analogous to a grand jury — it should, in fact, be a grand jury. As will be suggested, such an approach might even have benefits that extend beyond the *Katz* inquiry itself.

[121] Wood v. Georgia, 370 U.S. 375, 390 (1962); *see also* United States v. Calandra, 414 U.S. 338, 343 (1974). *See generally* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE §§ 1.1-1.6 (2d ed. 2001) (discussing historical role of grand juries); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.1 (4th ed. 2004) (reviewing development of grand juries); RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES (1963) (discussing history and changing functions of grand juries).

[122] *See* United States v. Williams, 504 U.S. 36, 47 (1992).

[123] *See* United States v. R. Enters., 498 U.S. 292, 299 (1991); Branzburg v. Hayes, 408 U.S. 665, 668 (1972).

[124] State v. Beck, 349 P.2d 387, 388 (1960) (citations omitted).

Grand jury indictment is constitutionally required for all felony prosecutions in federal court.[125] Eighteen states and the District of Columbia also require that serious criminal charges be brought by grand jury, with most of the remaining jurisdictions allowing (but not requiring) indictments to initiate the trial process.[126] Prospective grand jurors are typically summoned for service from a preexisting list (e.g., voter rolls), but unlike the practice with petit juries, venire members are not subject to peremptory challenges. Instead, they may be asked basic questions and excused for cause, such as involvement in the activities that the grand jury will be investigating. The end result can be a rather large body, composed of as many as twenty-three members.[127] After being empanelled and receiving its charge from the supervising judge, the grand jury typically will hear testimony and receive evidence on the case(s) under investigation. Along the way, the prosecutor may provide legal advice and commentary on the evidence, culminating in instructions for the grand jury's deliberation. If the required number of members finds sufficient evidence — in the federal system, twelve or more jurors concluding that there is probable cause that an individual committed a specified crime — a "true bill" will be returned and an indictment will issue.

Given the goal of a hypothetical *Katz* decision-maker — a more accurate assessment of societal expectations of privacy — the grand jury appears attractive, at least at first glance. The larger panel size provides additional perspectives during deliberations and thus seems more conducive to judgments that reflect community sentiment. Moreover, the absence of extended voir dire and peremptory challenges in juror selection may help curb gamesmanship aimed at victory rather than appropriate outcomes. What is troubling, however, is law enforcement's domination of grand jury practice. Not only do prosecutors act as the body's legal advisor and effectively control the presentation of all evidence, but the entire process is ex parte (i.e., no opposing counsel) and even outside the presence of the supervising judge.[128] It is, in other words, an entirely one-sided

[125] *See* U.S. CONST. amend. V. *See generally* SUSAN BRENNER & LORI E. SHAW, FEDERAL GRAND JURY (1996) (discussing basic principles of federal grand jury).

[126] *See, e.g.*, LAFAVE ET AL., *supra* note 121, §§ 1:3(m), 15:1 (discussing jurisdictions).

[127] A federal grand jury is composed of 16 to 23 members, with a dozen votes required for an indictment regardless of the panel's actual size. Some states follow this approach, although others provide for smaller grand juries and require a super-majority vote. *See, e.g.*, BEALE ET AL., *supra* note 121, at § 4:8 (discussing number of grand jurors).

[128] *See* Hawkins v. Superior Court, 586 P.2d 916, 919 (1978).

presentation without any real judicial oversight; and as might be expected, grand juries follow the express or implied wishes of the state's attorney in all but a small fraction of cases. As described by one federal judge, "the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury."[129] Or in the famous judicial jibe, "a grand jury would indict a ham sandwich."[130] The institution thus shares the ironic fate of *Katz*: Originally intended to protect individual liberty, today's grand jury does no such thing.[131]

But like *Katz*, the grand jury may simply require a different approach. In fact, its use to determine societal expectations of privacy might even inspire an institutional overhaul. If this body were assigned *Katz* decision-making, neither historical claims nor constitutional and statutory law would compel current grand jury practice, given that the panel would not be considering alleged criminal conduct or issuing indictments. Instead, the framers of this new, specialized grand jury would be writing on a blank slate. The conventional policy arguments in favor of the status quo would be inapplicable as well. Opposing counsel need not be kept out of the grand jury room for the sake of secrecy, for instance, or because adversarial proceedings have yet to begin. By the time the *Katz* question comes up, a suspect under investigation has become a formally accused defendant, and an ex parte proceeding at this stage could violate various criminal procedure guarantees.[132]

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[129] *Id.* (quoting Judge William Campbell).

[130] *In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (N.Y. App. Div. 1989) (quoting Chief Judge Sol Wachtler).

[131] *See* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 323 (1995); *see also* MARVIN E. FRANKEL & GARY NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 6-17, 52-116 (1977); Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 67-68 (1995); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973); Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM L. REV. 701, 703-55 (1972); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 2-5 (2002); Stuart Taylor, Jr., *End of the Grand Jury Charade*, AM. LAW., June 1992, at 32. *But see* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 3 (2004); Thomas Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1049-50 (1984).

[132] *Cf.* United States v. Gagnon, 470 U.S. 522, 526 (1985) ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.").

Moreover, the institutional goals that prompt a new *Katz* decision-maker would require that a judge be on hand in the grand jury room. Specifically, the supervising judge would be needed to ensure that extraneous details (e.g., incriminating evidence uncovered by the police intrusion) and inappropriate arguments (e.g., law enforcement objectives) were not presented by either party. To be sure, some aspects of current grand jury practice, such as the absence of a public gallery and the (voluntary) nonattendance of the defendant, may be retained precisely because they tend to limit informational distortions. For the *Katz* jury to work, however, the judge and opposing counsel must be present — with the prosecutor assuming the usual role of advocate rather than "neutral" legal advisor — thereby providing a possible model for a more general restructuring of the American grand jury.

So let's imagine a test run of the *Katz* jury based on an actual fact pattern, the case of Charlie Katz. After he had been indicted for interstate wagering, assume that Katz brought a pretrial motion alleging that government eavesdropping on his phone booth conversations was unconstitutional. In turn, the prosecution claimed that the FBI surveillance was not a search within the meaning of the Fourth Amendment. If not already sitting, the special grand jury would be empanelled, and the supervising judge would provide an introductory charge. The panel would be told that its task was to determine whether a particular government action intruded upon an expectation of privacy that society is prepared to recognize as reasonable. The grand jury might also be informed that:

- the Fourth Amendment protects people, not places, and in particular, people's reasonable expectations of privacy;
- what a person knowingly exposes to the public, even in his or her own home, may not be protected by the Fourth Amendment;
- what a person seeks to keep private, even in an area accessible to the public, may be constitutionally protected;[133]
- the decision is being made on behalf of society as a whole, not just one individual or a small group;
- law enforcement's objective in conducting the surveillance and whatever information it obtained are irrelevant to the decision; and

[133] *See* Katz v. United States, 389 U.S. 347, 351 (1967).

- the underlying case might be a civil suit or criminal prosecution, but the nature of the case is immaterial.

The prosecution and defense might then call witnesses to describe the relevant events. For example, the FBI agents might be asked to provide an overview of their activities, excluding the agents' suspicions and the fruits of their surveillance. Or the parties might stipulate to a particular fact pattern, such as the following:

> [The FBI agents] attached a tape recorder on top of the roof of the middle telephone booth [in a bank of three booths]. It was a stereophonic tape recorder, with two microphones. The agents taped the microphones to the backs of two of the telephone booths, and they put a sign on the third saying "Out of Order." . . . Every morning, when Katz left his hotel, an agent stationed outside would radio the news to an agent stationed near the telephone booths. The second agent would turn on the tape recorder and then watch Katz make his calls. After Katz finished his calls and walked away, the tape recorder was turned off, and the tape was retrieved. This went on for a week. The tape recorder picked up only Katz's side of the conversations . . . .[134]

Once evidence had been received, each side could provide a closing argument as to whether the agents' actions intruded on a reasonable expectation of privacy. Maybe the prosecution would claim that the agents simply did with technology what they could have done by placing a lip-reader on a nearby bench. The defense might respond that when someone enters a telephone booth, he reasonably anticipates that his words are heard only by the person on the other end of the line. The grand jurors would then retire to deliberate the issue and reach a decision.

Obviously, scores of questions would have to be answered before this thought experiment could be made a reality, from the size of the panel, to the standard of proof, to the requisite level of juror agreement (e.g., unanimity). The thorniest issues might involve the form that judgments would take and the role of judges in reviewing such decisions, either in the first instance or on appeal. Would we want a *Katz* jury to return a type of general verdict — "yes," there was a reasonable expectation of privacy, or "no," there was not — possibly with a vote tally? Instead, would we want the panel to provide a written opinion supporting its judgment, sort of a shorter, focused

[134] Sklansky, *supra* note 11, at 224-25.

version of the civil grand jury reports that are issued in certain jurisdictions?[135] If so, who would write the opinion, the jurors themselves or a staff attorney (or maybe a law clerk) assigned to the grand jury? Assuming that the supervising judge and even an appellate court might have reason to evaluate the decision, what standard of review should be applied? And would the grand jury's judgment be binding for the underlying prosecution alone, or might it carry some precedential value in future cases?

In truth, there are no clear answers to any of these questions, only an array of possibilities.[136] Given that this is a mere thought experiment for a brief Symposium contribution — and one that may have overtaxed the imagination — it seems best to leave these issues for a later date. The bigger question, however, and the point of this structured hypothetical, is whether some other entity besides the Supreme Court would be in a better position to determine societal expectations of privacy. If so, the rest is just details, undoubtedly consequential and full of complexity, but ones that probably can be worked out — that is, if we want to.

CONCLUSION

Therein lies the greatest challenge for *Katz v. United States*. After four decades and numerous cases, the preliminary issue of Fourth Amendment analysis is now firmly established, not just as a legal standard but also as a courtroom practice. Every time a new surveillance technique or police intrusion arises in criminal proceedings, the issue will be addressed as a matter of law by trial courts, then by appellate courts, and if necessary, by the Supreme Court, all without question as to whether the prevailing means to assess reasonable expectations of privacy can serve this end, or whether some other approach might prove superior at measuring societal expectations. At middle age, the *Katz* doctrine — personified for this Symposium — may have become set in its ways, somewhat lethargic and fearful of change.

Admittedly, this Article has made a number of assumptions that may turn out to be dubious or flatly erroneous on further inspection.

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[135] *See* Stephanie A. Doria, *Adding Bite to the Watchdog's Bark: Reforming the California Civil Grand Jury System*, 28 PAC. L.J. 1115, 1130-31 (1997); Barry Jeffrey Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 112-13 (1987).

[136] *Cf.* Thomas & Pollack, *supra* note 61, at 183-88 (detailing potential workings of authors' Fourth Amendment model).

Perhaps the *Katz* analysis is a pure value judgment for the courts, with the Justices sitting as the final arbiters of privacy expectations in America. Other scholars have concluded that the standard is (or should be) normative, not a question of empirics or majority views.[137] When the Justices parrot the *Katz* standard, maybe they should not be taken at their word,[138] with any reference to society's expectations of privacy being code for their own beliefs, kind of like a monarch using the royal "we."[139] Moreover, this piece has intentionally sidestepped a large issue — the definition and content of "society" or "community." In an elegant critique of the latter term, Professor Robert Weisberg has argued:

> "Community" is a very dangerous concept because it sometimes means very little, or nothing very coherent, and sometimes means so many things as to become useless in legal or social discourse, and because sometimes the sunny harmonious sound of the very word "community" masks the conflict and uncertainty underlying legal issues, and because sometimes "community" turns out to refer to something very concrete but which is actually very bad for justice.[140]

If Weisberg is correct, as I suspect he is, then turning over Fourth Amendment decision-making to juries might be doubly dangerous, giving a group of legal amateurs the power to decide fundamental constitutional rights based on a mushy standard. Lest readers take me as some type of jury-phile, I must emphasize that the foregoing has been a mental exercise, not an advocacy piece. Unlike some, I do not get all misty-eyed about juries and their capacity to do justice. The same institution that acquitted John Peter Zenger of seditious libel also acquitted the Rodney King assailants (and O.J. Simpson, too); the entity that protected colonists and U.S. citizens from government caprice was also part and parcel of a ruthless system of social control over minorities and the lower socioeconomic classes; and for every

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[137] *See* DRESSLER & MICHAELS, *supra* note 17, 77-80; ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 95-97 (1997).

[138] *But see* Slobogin & Schumacher, *supra* note 44, at 732 ("[I]f one takes the Justices at their word, a sense of how (innocent) U.S. citizens gauge the impact of police investigative techniques on their privacy and autonomy is highly relevant to current Fourth Amendment jurisprudence.").

[139] It should be noted, however, that the few empirical studies that have been conducted to date show that Supreme Court doctrine does not contradict societal expectations in *all* cases. *See generally id.*

[140] Robert Weisberg, *Restorative Justice and the Danger of "Community*," 2003 UTAH L. REV. 343, 343.

illustrious proponent of the jury system, an opponent of equal eminence will decry the jury's "infinite capacity for mischief."[141] If major responsibility for the *Katz* inquiry is to be reassigned from the judiciary, there may be very good reasons to choose an institution other than the American jury.[142]

As a result, the hypothetical may suffer from "single institutionalism"[143] by assuming that the defects of judicial determinations would be remedied by the alleged merits of jury decision-making. Moreover, while previous works have described institutional choice as a cost-benefit exercise pursuant to some set of criteria,[144] this Article has neither offered a definitive list of factors nor engaged in any serious economic analysis. And even if it had attempted to do so, there could be serious grounds for skepticism about the ensuing conclusions. As Professor Adrian Vermeule has argued with

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[141] Skidmore v. Balt. & Ohio R.R. Co., 167 F.2d 54, 60 (2d Cir. 1948) (Frank, J.). Indeed, empirical research suggests that jury decision-making can be tainted by irrelevant factors, such as the physical attractiveness of the defendant. *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 678-84 (2001); Robert J. MacCoun, *The Emergence of Extralegal Bias During Jury Deliberation*, 17 CRIM. JUST. & BEHAV. 303, 303 (1990). Moreover, there may be reason to believe that jurors will speculate about information deliberately withheld from them:

> Jurors bring expectations and preconceptions with them to the jury box, actively search for causal explanations to make sense of the events described, and consciously or unconsciously process information so as to fill in missing blanks or interpret ambiguities in testimony in ways that may strongly influence their decisions. Jurors' expectations, beliefs, and values affect the way they react to evidence.

Diamond & Vidmar, *supra* note 118, at 1860. In addition, "blindfolding may produce undesired inter-jury variation," given that "[s]ome juries may have correct expectations . . . while others operate on incorrect assumptions." Diamond & Casper, *supra* note 118, at 518; *see also* Hollander-Blumoff & Bodie, *supra* note 118, at 1384-86, 1388-96 (discussing potential for evasion/reactance and diminished perceptions of procedural justice).

[142] *Cf.* David Schuman, *Taking Law Seriously: Communitarian Search and Seizure*, 27 AM. CRIM. L. REV. 583, 604-07 (1990) (arguing for lawmakers as Fourth Amendment decision-makers).

[143] *See* KOMESAR, *supra* note 55, at 6-7.

[144] *See, e.g.*, *id.* (proposing "participation-centered approach" to institutional choice utilizing, inter alia, interest group theory and Coase theorem of transaction costs); Vermeule, *supra* note 55, at 1559 (describing "principal determinants of the institutional choice question" as agency costs, moral hazard effects, optimal rate of legal change, and transition costs); *cf.* Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 59-76 (2005) (analyzing institutional choice using factors of competency, responsiveness, and resilience).

regard to institutional choice analysis of judicial review: "The information necessary to make the assessment is unobtainable, or at best excessively costly to obtain; the scale of the questions is too large; the interaction between institutions is too dynamic and complex; and the possibility of unintended consequences from any choice of institutional arrangement is too great."[145] Given the natural bias toward the status quo,[146] a preferable approach may be the idea of "institutional design,"[147] searching for ways to improve the judiciary's decision-making process rather than reassigning *Katz* issues to another body.[148]

Nonetheless, this Symposium contribution has attempted to inspire some introspection about a landmark Supreme Court decision on its fortieth birthday, a point in time when people are known to take stock of their lives, the paths that were taken — and those that were not, as illustrated by the preceding thought experiment. The goal has only been reflection, to force an anthropomorphized *Katz* doctrine to take a look in the mirror. What does it see? Society at large or some particular subset? The Supreme Court Justices and their lower court cohorts? Prosecutors and police officers? Or instead a mélange of criminal justice actors and defendants? If the image proves disappointing, then maybe it is time for a change.

[145] Vermeule, *supra* note 55, at 1558; *see also id.* at 1563 (noting that "the number and scope of the variables we'd need to consider, in a fully specified institutional-choice analysis of judicial review, is staggering.").

[146] *Cf.* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988) (discussing human preference to maintain status quo).

[147] *See, e.g.*, Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183 (2003) (discussing institutional design as means to improve performance of institution and its interactions with other bodies).

[148] One possibility has already been mentioned: providing more empirical data on society's expectations and incorporating this information into judicial decision-making. *See* text accompanying note 53. Another option would be to provide only limited, relevant information to a separate judge or judicial panel, who would then decide *Katz* issues in a manner similar to the above jury-based hypothetical.