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## The Olmsteadian Seizure Clause: The Fourth Amendment and the Seizure of Intangible Property (Abridged)

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### I. INTRODUCTION

¶1 The Fourth Amendment's<sup>1</sup> Seizure Clause is mired in the eighteenth century. Its counterpart, the Search Clause, has evolved through a steady progression of Supreme Court cases from *Berger*<sup>2</sup> to *Katz*<sup>3</sup> to *Kyllo*,<sup>4</sup> no longer confined to the property-based interests embodied in *Olmstead v. United States*.<sup>5</sup> Instead, the Search Clause is sensitive to modern privacy concerns by extending constitutional protection to situations that satisfy the reasonable expectation of privacy test. While imperfect, the evolved Search Clause has kept the protections of the Fourth Amendment relevant in an age of digital evidence, ubiquitous communication networks, and increasingly sophisticated and invasive surveillance capabilities.

¶2 In contrast, the Seizure Clause is in an *Olmsteadian* holding pattern, consistently interpreted to protect only physical property rights and to regulate only the deprivation of tangible things.

¶3 This Article argues for a twenty-first century definition of constitutionally proscribed property deprivation. A constitutionally significant "seizure" occurs whenever the state takes dominion or control of personally owned data or meaningfully interferes with an individual's right to control his data.

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<sup>1</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

<sup>2</sup> *Berger v. New York*, 388 U.S. 41 (1967).

<sup>3</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>4</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>5</sup> 277 U.S. 438 (1928).

¶4 The Supreme Court implicitly supported this rule in *Berger* and *Katz*, holding in no uncertain terms that voice conversations are both searched and seized when recorded by the police.<sup>6</sup> Initially, many lower-court cases extended these rulings and applied the Fourth Amendment’s Seizure Clause to intangible things,<sup>7</sup> but after a few “clarifying” statements of the Supreme Court, particularly some dicta in *Arizona v. Hicks*,<sup>8</sup> most recent courts faced with intangible seizure have ignored the statements in *Berger* and *Katz*.<sup>9</sup> The Article explores the evolution of the rule in Part I.

¶5 Reconceiving the Seizure Clause in light of modern concerns about intangible property rights helps solve many vexing Fourth Amendment puzzles, discussed in Part II, that arise if the sole test is the reasonable expectation of privacy. For example, does a bit-by-bit copy of a computer’s hard drive implicate the Fourth Amendment if the human operator does not “view” the contents as they are copied? Could the government lawfully capture all of the communications traversing a network without a warrant so long as it did not look at the contents without a subsequent warrant?

¶6 Part III urges courts to return to its prior interpretations of the seizure clause, proposing several possible rule formulations. Finally, Part IV wades tentatively into the age-old search to identify the Fourth Amendment’s protected values. Does the Amendment protect privacy, property, security, or something else? For the forty years between *Olmstead* and *Katz*, the Courts answered this question too narrowly, choosing property over the others in the list. *Katz* recognized the Fourth Amendment’s other values, but subsequent decisions have cut back on its important insights.

¶7 It has been forty years again since *Katz*. Awesome technologies have arisen in the meantime that none of the justices in 1967, much less in 1928, could have foreseen. Modern surveillance technologies can duplicate without revelation. Courts might hold that these tools neither search nor seize, unaware that by doing so, they breathe new life into *Olmstead*’s once-dead legacy.

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#### B. *Olmstead Redux*

¶8 In 1977, David Edward Thomas sent a misaddressed package through UPS that never arrived at its destination.<sup>19</sup> Unfortunately for him, the package “inadvertently” broke open in a UPS facility while the shipper was deciding what to do with it, and UPS employees spied inside what they thought was pornography and called the FBI.<sup>20</sup> The FBI photocopied the enclosed papers and returned the originals to UPS.<sup>21</sup> Thomas argued to the court that the documents had been seized by the FBI when photocopied, but his argument was rejected by the Tenth Circuit. A photocopy, the court held, is not a physical dispossession, so nothing had been “seized.”<sup>22</sup>

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<sup>6</sup> See Part I.C.

<sup>7</sup> See Part I.D.

<sup>8</sup> 480 U.S. 321 (1987).

<sup>9</sup> See Part I.E.

<sup>19</sup> *United States v. Thomas*, 613 F.2d 787, 789 (10th Cir. 1980).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 793.

<sup>22</sup> *Id.* (citing *United States v. Lisk*, 522 F.2d 228, 230 (7th Cir. 1975); *United States v. Haden*, 397 F.2d 460, 465 (7th Cir. 1968)).

¶9 In 2000, the FBI duplicated the files of another person, Vasiliy Gorshkov.<sup>23</sup> Gorshkov's files were intangible: data files he had stored on a computer in Russia. Convinced that Gorshkov was hacking into computers and extorting money from American companies, the FBI lured him from his home in Russia to Seattle with the promise of a job, secretly observed him typing in his password to his Russian computer from a bugged system, and logged into that Russian computer and downloaded copies of his files.<sup>24</sup> As in the *Thomas* case, the district court judge held that nothing had been seized.<sup>25</sup> "The data remained intact and unaltered. . . . The copying of the data had absolutely no impact on [Gorshkov's] possessory rights."<sup>26</sup>

¶10 These two cases harken back to an earlier time, when courts embraced a physical, property-based vision of the Fourth Amendment. Almost eighty years after *Olmstead v. United States*,<sup>27</sup> and four decades after *Olmstead* was supposedly laid to rest in *Katz v. United States*,<sup>28</sup> the specter of the property-based Fourth Amendment still haunts our constitutional hallways.

¶11 Under the modern interpretation of the Fourth Amendment, the government *seizes* property only when it "meaningfully interfere[s]" with [a] possessory interest."<sup>29</sup> Courts have not articulated precisely what is meant by this phrase, and "possession" seems broad enough to embrace interests in intangible things, but cases like those cited above reveal that the test applies a physical property-centric model of dispossession. The phrase has been limited to the deprivation of rivalrous, discrete, tangible things that allow a binary state of possession: at any given time, they are either completely "in possession" or else "not in possession." It follows that intangible, nonrivalrous property that lack possessional binary-ness cannot be seized unless and until the government deprives the owner of every last copy of the property.

¶12 The result is positively *Olmsteadian*. The Fourth Amendment protects tangible items and does not protect intangible information. Although intangible information can be searched when the government invades a reasonable expectation of privacy protecting it, when that expectation of privacy is not breached, the Fourth Amendment plays no role. *Thomas* and *Gorshkov* no doubt felt wronged to learn that the FBI had copied their intangible data without warrants, but this felt harm did not rise to the level of government property invasion protected by the Constitution.

¶13 *Thomas* and *Gorshkov* are consistent with a long line of cases stretching back two decades and leading back to Supreme Court cases that have held that seizure means physical dispossession. These two decades, however, themselves represent a break without reason or justification from what the Supreme Court and lower courts had done in the prior twenty years. To explain the shift, we can start back at the beginning, with *Berger* and *Katz*:

### C. The Voice Cases

¶14 The first, most straightforward evidence that cases like *Gorshkov* and *Thomas* have misconstrued constitutional seizure is that the Supreme Court has expressly held that the recording of the human voice is a seizure for Fourth Amendment purposes. Obviously, nobody is deprived of any possessory interest in his voice when a police tape recorder or wiretap records his conversations. Nonetheless, in *United States v. Berger*, the Court struck down New York State's statute governing wiretaps as insufficiently protective of Fourth Amendment interests because it "permit[ted] a trespassory

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<sup>23</sup> See *United States v. Gorshkov*, No. CR00-550C, 2001 WL 1024026, at \*1 (W.D. Wash. May 23, 2001).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*3. In the alternative, the court also held that the computers in Russia owned by a non-resident of the United States were unprotected by the Fourth Amendment under *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

<sup>26</sup> *Id.*

<sup>27</sup> 277 U.S. 438 (1928).

<sup>28</sup> 389 U.S. 347 (1967).

<sup>29</sup> *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (quoting *Maryland v. Macon*, 472 U.S. 463, 469 (1985)); see also *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The word "seizure" in the Fourth Amendment has also been interpreted to regulate the government's seizure of people, for example in investigatory situations. See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002) (finding passenger questioned on a bus not seized). This Article is limited to seizure of property.

invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment.”<sup>30</sup> Along the way, the Court, in the words of Justice Douglas’s concurring opinion, overruled *Olmstead* “sub silentio.”<sup>31</sup>

¶15 In so ruling, the Court made it plain that the wiretaps authorized by the New York statute were seizures, as well as searches. It held that “the statute’s failure to describe with particularity the conversations sought gives the officer a roving commission to ‘seize’ any and all conversations.”<sup>32</sup> Furthermore, the Court held that “authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause,”<sup>33</sup> and also that during this time “the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately.”<sup>34</sup>

¶16 Similarly, in *Katz v. United States*,<sup>35</sup> which extended the Fourth Amendment to recorded voice conversations, the Supreme Court, in response to the government’s argument that the Fourth Amendment “was thought to limit only searches and seizures of tangible property,”<sup>36</sup> noted that “(t)he premise that property interests control the right of the Government to search and seize has been discredited.”<sup>37</sup> “[T]he Fourth Amendment governs not only the seizure of tangible items,” the Court continued, “but extends as well to the recording of oral statements overheard without any ‘technical trespass under \* \* \* local property law.’”<sup>38</sup> On this point, the Court was unambiguous: “The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”<sup>39</sup>

¶17 \* \* \*

#### *D. Early Intangible Seizure Cases*

¶18 In the first two decades following *Berger* and *Katz*, a number of lower courts cited the pair of cases to support holding that intangible items can be seized. For example, in *LeClair v. Hart*, the Seventh Circuit held that IRS agents seized documents by dictating their contents verbatim into a tape recorder and by taking copious notes.<sup>46</sup> Pointing to *Berger*, the court ruled that these acts constituted seizure under the Fourth Amendment:

Following *Berger*, it has been clear that the Fourth Amendment embraces more than just the forced physical removal of tangible objects . . . . Indeed, *Berger* stands for the proposition

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<sup>30</sup> 388 U.S. 41, 64 (1967).

<sup>31</sup> *Id.* at 64 (Douglas, J., concurring).

<sup>32</sup> *Id.* at 59; *see also id.* (holding that the statute’s requirement that persons be named “does no more than identify the person whose constitutionally protected area is to be invaded rather than ‘particularly describing’ the communications, conversations, or discussions *to be seized*”) (emphasis added).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 389 U.S. 347 (1967).

<sup>36</sup> *Id.* at 352-53.

<sup>37</sup> *Id.* at 353 (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)).

<sup>38</sup> *Id.* at 353 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)) (omission in original).

<sup>39</sup> *Id.* at 353.

<sup>46</sup> 800 F.2d 692 (7th Cir. 1986).

that the government may seize intangible items such as the information contained in the financial documents which the IRS agents copied.<sup>47</sup>

¶19 Questions of intangible seizure have often arisen when the police have copied down the serial numbers inscribed on suspected stolen property. Until the Supreme Court mis-analyzed this issue in *Hicks*, discussed in the next Subpart, a number of lower courts had held that the act of copying down numbers amounted to a seizure. For example, in *United States v. Gray*, the Sixth Circuit held that an officer seized the serial numbers inscribed on rifles when he copied them down.<sup>48</sup> The Fifth Circuit came to a similar conclusion in a case involving serial numbers on air conditioners.<sup>49</sup>

¶20 All of these cases place the seizure of intangible property squarely within the ambit of the Constitution.<sup>50</sup> Also, in every one of the cases cited, the court also held that the seizure was unlawful. The trend recognizing intangible seizure is even broader if one also takes into account cases that have found intangible seizure reasonable or otherwise constitutional, often under the plain view rule.<sup>51</sup> In fact, this seemed like a reasonable application of *Berger* and *Katz*. Intangible property was seized when reproduced, subject to many exceptions. Unfortunately, the Supreme Court upset this logical approach, perhaps inadvertently, in a few subsequent cases.

#### E. *The (Inadvertent?) Return to the Physical Interpretation of Seizure*

¶21 The Supreme Court is to blame for the confusing turn in the law that has led to opinions like *Thomas* and *Gorshek*. In *United States v. Jacobsen*, the Court was faced with a claim of seizure of physical, not intangible, property: a “trace amount” of white powder which turned out to be cocaine.<sup>52</sup> The Court held that by field testing the trace amount, the DEA agents “seized” the powder, but the seizure was held reasonable when balanced against law enforcement interests and the “de minimis” impact on the defendant’s interest in his property was considered.<sup>53</sup> To support this sensible holding, the Court for the first time relied on the “meaningful interference with an individual’s possessory interests in . . . property” test.<sup>54</sup> Still, the *Jacobsen* Court could not have anticipated how this test would later be used to restrict intangible seizure, because the case dealt only with physical evidence.<sup>55</sup>

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<sup>47</sup> *Id.* at 695. In this *Bivens* action, the Court declined to decide whether the access to the records was also an unlawful search. Because the ruling arose in response to a motion for summary judgment due to qualified immunity, by holding that the seizure was illegal under “clearly established law,” the motion was properly denied, and a ruling on the extent of the constitutional violation could be deferred. *Id.* at 694.

<sup>48</sup> 484 F.2d 352 (6th Cir. 1973).

<sup>49</sup> *United States v. Sokolow*, 450 F.2d 324 (5th Cir. 1971) (holding that taking serial numbers from air conditioners found in a garage is a seizure).

<sup>50</sup> In addition to the cases cited above, see *Davis v. Mississippi*, 394 U.S. 721, 724-28 (1969) (finding an unlawful seizure of fingerprints where police had obtained them during an improper detention); *United States v. Johnson*, 452 F.2d 1363, 1371 (D.C. Cir. 1971) (suggesting, before remanding, that “the photographic seizure of [the defendant’s] person during an involuntary detention may run afoul of the Fourth Amendment’s proscription against unreasonable searches and seizures.”). See also *United States v. Freitas*, 800 F.2d 1451, 1455 (9th Cir. 1986) (construing Rule 41, holding that a “surreptitious entry” warrant authorized a seizure of intangible property, namely, “information regarding the ‘status of the suspected clandestine methamphetamine laboratory’”); *State v. Murray*, 527 P.2d 1303, 1308 (Wash. 1974) (“The serial numbers were not within the plain view of the officers, and their being obtained by the tilting of the Sony television constituted a warrantless seizure of those numbers.”). But see *United States v. Thomas*, 613 F.2d 787, 793 (10th Cir. 1980) (holding that making a photocopy is not a seizure).

<sup>51</sup> See, e.g., *United States v. Marbury*, 732 F.2d 390 (5th Cir. 1984) (finding the copying of identification numbers of equipment was not an unlawful seizure under the plain view doctrine or, alternatively, under the “open fields” doctrine); *Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982) (analyzing note-taking by officers as a “seizure” but ultimately finding no unlawful seizure under the plain view doctrine); *United States v. Espinoza*, 641 F.2d 153, 166 (4th Cir. 1981) (suggesting that photographing the scene of an executed search warrant might be a seizure, but ruling “the plain view doctrine justified” the photographs); *United States v. Wolfe*, 375 F. Supp. 949, 957 (E.D. Pa. 1974) (analyzing the copying of a federal probation report as a seizure, but concluding no unlawful seizure occurred because the plain view doctrine applied or, alternatively, because the report could be considered an item “reasonably related to the purposes of the search” to which the search warrant could lawfully be extended).

<sup>52</sup> 466 U.S. 109, 125 (1984).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 113. In a much earlier case, the Court held that “a seizure contemplates a forcible dispossession of the owner.” *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

<sup>55</sup> *LeClair v. Hart*, 800 F.2d 692, 695 (7th Cir. 1986) (“The Court [in *Jacobsen*] was discussing a package containing drugs, a tangible physical item, and thus the Court had no occasion to discuss the definition of seizures in the context of intangible

¶22 Nevertheless, *Jacobsen* is the source of the river, so to speak, the statement of the rule that has been cited repeatedly for the holding, *contra Berger* and *Katz*, that seizure protects against only physical dispossession. While *Jacobsen* talked only about that which was sufficient to be seizure, the rule has come to stand for what is necessary for seizure.<sup>56</sup>

¶23 The Supreme Court's first step down the road from *Jacobsen* to a test that precludes seizure of intangible property was *United States v. Karo*.<sup>57</sup> In *Karo*, police placed an electronic tracking device into a container owned by defendant, an act the majority of the Court held not to be a seizure, citing the *Jacobsen* test.<sup>58</sup> The Court held that "[a]lthough the can may have contained an unknown and unwanted foreign object, it cannot be said that anyone's possessory interest was interfered with in a meaningful way."<sup>59</sup>

¶24 The shift in regarding the "meaningful interference" test as not simply sufficient but necessary was finally completed in *Arizona v. Hicks*, where the Court concluded that copying serial numbers from the bottom of a stereo was not a seizure, but suppressed the serial numbers anyway by holding that the police unlawfully "searched" the equipment by moving it to reveal the serial numbers.<sup>60</sup>

¶25 Because the Court found an unconstitutional search and upheld the lower court's decision to suppress the serial numbers as the fruit of the search, anything said in *Hicks* about copying and seizure is dicta. But in this dicta, the Court erred by concluding that copying serial numbers was not a seizure. In the majority opinion, Justice Scalia singled out search as the principal protector of privacy within the Fourth Amendment and relegated seizure to a more crabbed role, protecting only possessory property interests. *Hicks* seems at odds with *Berger* and *Katz*, yet the Court never cites those cases in coming to this conclusion and makes no attempt to explain the discrepancy.

¶26 In light of *Hicks*, in particular, lower courts have retreated from their position in the late 1970s and early 1980s of finding the seizure of intangible property.<sup>61</sup> In addition to *Thomas* and *Gorsbikov*, courts have found all of the following acts not to be a seizure: photographing the scene of the execution of a search warrant;<sup>62</sup> photocopying several file cabinets worth of documents;<sup>63</sup> and copying the VIN from a car.<sup>64</sup>

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property.”)

<sup>56</sup> *Jacobsen* was cited in *Maryland v. Macon* for the proposition that undercover agents do not seize magazines that they buy from the proprietor of an adult bookstore. 472 U.S. 463, 469 (1985). Again, this was a case about tangible property, so the “meaningful interference” test still had no particular bearing on intangible property.

<sup>57</sup> 468 U.S. 705 (1984).

<sup>58</sup> *Id.* at 712.

<sup>59</sup> *Id.* The Court also held that monitoring a beeper while it is inside a private residence requires a warrant. *Id.* at 718.

<sup>60</sup> 480 U.S. 321, 324 (1987).

<sup>61</sup> A few courts have continued to adhere to the rule that intangible data can be seized. *See, e.g., United States v. Meriwether*, 917 F.2d 955, 958 (6th Cir. 1990) (“The agent in the instant case, by seizing and examining the contents of the pager, was acting in conformity with the warrant.”); *Smith v. State*, 713 N.E.2d 338, 344 (Ind. App. 1999) (“[W]e conclude that the Fourth Amendment affords protection from the unreasonable search and seizure of the computer memory of a cellular phone to retrieve its electronic contents.”). *Meriwether* and *Berger* were cited in *United States v. David*, 756 F. Supp. 1385, 1389 (D. Nev. 1991), for the proposition that “[t]he Courts have . . . recognized that information, i.e., *intangible* items, may be seized within the meaning of the *Fourth Amendment*.”

<sup>62</sup> *See United States v. Mancari*, 463 F.3d 590, 596 (7th Cir. 2006) (“Nor did the photographing of the money [at the scene of the executed warrant] by police constitute an unreasonable seizure.”); *Bills v. Aseltine*, 958 F.2d 697, 707 (6th Cir. 1992) (“[T]he recording of visual images of a scene by means of photography does not amount to a seizure because it does not ‘meaningfully interfere’ with any possessory interest.”). Interestingly, the *Bills* court keeps the door open to the possibility that photographing the scene of a warrant’s execution may constitute a seizure. First, as an alternative to the “no meaningful interference” holding, the court notes that “[b]ecause the police officers in this case were properly on the Bills’ premises, they could record by photography scenes presented to their plain view.” *Id.* It should have been unnecessary to talk about the plain view test if nothing had been seized. Additionally, the court hinted that a third party, Meisling, who had been invited along on the search and who took photographs of property possibly stolen from his employer, *might* have been improperly seizing. *Id.* The court declined to reach this question, however, because Meisling had previously settled the section 1983 lawsuit brought against him. *Id.* at 701, 707-08.

<sup>63</sup> *Cf. United States v. Chapman*, 559 F.2d 402, 407-08 (5th Cir. 1977) (holding no obligation to return photocopies of materials to former defendant after indictment dismissed).

<sup>64</sup> *McDonald v. State*, 119 S.W.3d 41 (Ark. 2003).

### III. THE GAP IN FOURTH AMENDMENT PROTECTION: TECHNOLOGIES OF REPRODUCTION

#### A. The Masking Effect of Search

¶27 That the *Olmsteadian* Seizure Clause persists four decades after *Katz* and eight decades after *Olmstead* is not entirely surprising. In nearly every case in which intangible property has been “seized,” something first had to have been searched,<sup>65</sup> and the reasonable expectation of privacy test for search has tended to resolve these cases in ways that have been unobjectionable to most observers. Courts have rarely had to grapple with the true effects of the crabbed Seizure Clause because search has been enlisted to lead courts to unobjectionable results. With intangible property, search and seizure often go hand-in-hand because of three facts about the world:

¶28 First, as *Hicks* exemplifies, we live in what I call an *atoms-before-bits* world. Historically, the government has had to deprive a person of physical property (even if momentarily) before it could make a copy of his intangible property. In *Hicks*, the serial numbers were visible only after the stereo equipment was moved.<sup>66</sup> Similarly, in order to copy the bits from a hard drive, the government must open the physical case of the computer containing the hard drive.<sup>67</sup>

¶29 Second, a lot of intangible property is held by third-party intermediaries. Google keeps my calendar and RSS feed reader settings, my employer stores my e-mail messages, and Amazon keeps a record of my past purchases. Intangible data tend not to be left lying around in publicly available spaces, and third parties serve as gatekeepers between the data and the police.<sup>68</sup> These gatekeepers serve as a brake on unchecked police access to data, although some fear that they are merely a speed bump.<sup>69</sup>

¶30 Third, people use code to express expectations of “virtual” privacy when they go online. For example, even in purely virtual settings, the borders of private “spaces” are delineated by virtual walls and doors, such as passwords and computer dialog boxes.<sup>70</sup> You can’t access my inbox unless you know my login name and password.<sup>71</sup> The reasonable expectation of privacy test recognizes these

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<sup>65</sup> The Seventh Circuit has observed that

seizures made in the course of investigations by police or other law enforcement officers are almost always, as in the plain view cases, the culmination of searches. The police search in order to seize, and it is the search and ensuing seizure that the Fourth Amendment by its reference to “searches and seizures” seeks to regulate.

*Soldal v. County of Cook*, 942 F.2d 1073, 1079 (7th Cir. 1991) (en banc), *rev’d*, 506 U.S. 56 (1992). The Supreme Court, in reversing the Seventh Circuit, singled out the passage from which this quote is drawn by saying, “[w]e have difficulty with this passage.” *Soldal v. Cook County*, 506 U.S. 56, 68 (1992). What seemed to trouble the Supreme Court, however, wasn’t the empirical observation that searches and seizures “almost always” happen together, but rather the further part of the quote (omitted above) suggesting that seizures are unprotected when unaccompanied by search. *Id.* at 68-69.

<sup>66</sup> *Arizona v. Hicks*, 480 U.S. 321 (1987) (holding the copying of serial numbers not to be a seizure but suppressing the serial numbers because they were revealed after a “search” involving the lifting of the stereo equipment).

<sup>67</sup> *Cf. United States v. Simons*, 206 F.3d 392, 398-401 (4th Cir. 2000) (treating separately under the Fourth Amendment the government-employer’s entry into the employee’s office and computer to retrieve a hard drive from the monitoring of the employee’s Internet traffic).

<sup>68</sup> See Eric Lichtblau, James Risen & Scott Shane, *Wider Spying Fuels Aid Plan for Telecom Industry*, N.Y. TIMES, Dec. 16, 2007, § 1, at 11 (“The federal government’s reliance on private industry has been driven by changes in technology. Two decades ago, telephone calls and other communications traveled mostly through the air, relayed along microwave towers or bounced off satellites. The N.S.A. could vacuum up phone, fax and data traffic merely by erecting its own satellite dishes. But the fiber optics revolution has sent more and more international communications by land and undersea cable, forcing the agency to seek company cooperation to get access.”)

<sup>69</sup> This is because third-party intermediaries tend to make it easy for the police to access data, and to do so without the subscriber’s knowledge. This is the lesson of the Thomas case. Because UPS possessed the box that was “inadvertently broken open,” the FBI could investigate without ever needing to notify the defendant. *United States v. Thomas*, 613 F.2d 787, 789 (10th Cir. 1980); see also Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 518-21 (2005) (discussing the third-party doctrine).

<sup>70</sup> See *United States v. Andrus*, 483 F.3d 711, 723 (10th Cir. 2007) (McKay, J., dissenting) (describing “outward signs of . . . protection” that indicate security used on computers, such as password prompts at boot, log-in, and re-activation from a screen-saver).

<sup>71</sup> Until recently, virtual doors could be opened simply by knowing some fact stored in my brain or written down on a piece of paper in my office. New technology sometimes requires also having some physical thing belonging to me, like a keychain displaying a highly accurate, frequently changing six-digit number, or my fingerprint or retina pattern.

virtual doors and walls, treating them like their physical equivalents.<sup>72</sup> Similarly, people “delete” files, expressing their desire to make data inaccessible to others. The rules for search are flexible enough to apply in these situations, and the police can’t bypass these virtual constraints without complying with the Fourth Amendment.

¶31 For these three reasons, until recently, the police have not been able to grab intangible data without first intruding physically or virtually on expectations of privacy. When they have done that, they have searched, subjecting their acts to constitutional scrutiny. In this way, the Search Clause has served as a mask, obscuring the negative effect of the cramped way in which seizure has been construed.

#### B. *Why the Search Clause is Not Enough*

¶32 There are significant problems with relying on search to do all of the work in protecting privacy when it comes to our intangible property. First, the word “search” often inadequately describes the government’s invasions. Atoms-before-bits cases like *Hicks* seem strangely counter-intuitive; the Fourth Amendment protects what we really cared about—our information—only because it happens to be encased in a physical box we care very little about.<sup>73</sup> Cases like *Hicks* reach the right result but only by focusing on issues of relatively marginal importance, leading to hyper-technical rulings.

¶33 Second, comparing virtual doors and walls to their physical counterparts raises problems typical with reasoning by analogy.<sup>74</sup> Software is contingent and constructed, and it can be used to create an infinite variety of “doors,” many of which differ in fundamental ways from physical doors. Analogy’s problems do not lead inexorably to unfair results, but they cause unpredictability. Given the infinite variability of the many aspects of physical walls and doors that can be compared, courts can often pick or chose analogies to support any result. Everybody—the police in the field as well as the people trying to protect their intangible data from government invasion—is left unsure about how a court will rule on any particular police act. Third, this counter-intuitiveness and unpredictability make the test very difficult to apply.

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<sup>72</sup> *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (“[P]assword-protected files are analogous to the locked footlocker inside the bedroom.”).

<sup>73</sup> See William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 643 (1994) (“What is critical to informational privacy, then, is not the presence of a physical ‘shell’ that contains facts about someone’s life, but an individual’s control over the dissemination of the facts themselves.”).

<sup>74</sup> See generally Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357 (2003).

#### IV. TWENTY-FIRST CENTURY SEIZURE

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In *Hicks*, the Court was wrong about seizure, and the cases which follow its dictum have incorrectly concluded that the Seizure Clause does not apply to copies of intangible data. The test from *Hicks*—meaningful interference with a possessory interest—should be replaced or expanded to encompass other Fourth Amendment interests. There are two possible doctrinal approaches for expanding the rule, each of which leads to a slightly different articulation of the new test but to similar ends. Although these two tests would bring within the Fourth Amendment many activities that might not be considered seizures under the *Hicks/Jacobsen* test, each would still be subject to the many exceptions to the Fourth Amendment’s warrant requirement.<sup>100</sup> For this reason, as I will discuss below, application of the new test is not likely to change the outcome of many prior cases, although it may have a profound effect on future police practices.

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<sup>100</sup> See *California v. Acevedo*, 500 U.S. 565, 584 (Scalia, J., concurring) (listing exceptions to the warrant requirement).