Brooklyn Law Review

Volume 60
Issue 2
The Second Circuit Review: 1992-93 Term

Article 16

2-1-1994

CRIMINAL PROCEDURE: Property, Privacy and the Fourth Amendment

William C. Heffernan

PROPERTY, PRIVACY, AND THE FOURTH AMENDMENT

*William C. Heffernan**

INTRODUCTION

"There is nothing," wrote William Blackstone, "which so generally strikes the imagination, and engages the affections of mankind, as the right of property."[1] The framers of the Fourth Amendment[2] surely would have agreed with this. Indeed, it is well known that they were deeply influenced by the property rights analysis Lord Camden employed in the 1765 case of *Entick v. Carrington*.[3] In *Entick*, Camden argued as a general matter that the "great end, for which men entered into society,

---

* Associate Professor of Law, John Jay College of Criminal Justice and the Graduate Center, City University of New York. The author thanks Marc Bernstein, Noel Carter, Matthew G. Mayer and Steven Wasserman for their comments on an earlier draft of this Article.

[1] 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

[2] The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

[3] 19 Howell's State Trials 1029 (1765). For analysis of *Entick*'s significance for the framers of the Fourth Amendment, see NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 47-49 (1937) and JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 29 (1966). In Boyd v. United States, 116 U.S. 616 (1886), the case in which the Supreme Court first attempted a systematic construction of the Fourth Amendment, Justice Bradley, writing for the Court, stated: "It [Lord Camden's opinion in *Entick*] is regarded as one of the permanent monuments of the British Constitution, and is quoted by English authorities on that subject down to the present time." *Id.* at 626. Contemporary acknowledgement of *Entick*'s importance is to be found in Judge Easterbrook's concurring opinion in Soldal v. Cook County, 942 F.2d 1073 (7th Cir. 1991) (en banc), *rev'd*, 113 S. Ct. 538 (1992), discussed *infra* at notes 52-64 and accompanying text. Judge Easterbrook began his concurrence by remarking: "One might think from reading the dissenting opinion that we have rejected *Entick v. Carrington*." *Id.* at 1080.

was to secure their property."[4] In applying his property-based approach to the search and seizure of private papers, Camden stated:

> Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.[5]

Early in this century, the Supreme Court, taking its cue from Camden's *Entick* remarks, treated property rights as dispositive in determining the scope of the Fourth Amendment. In *Olmstead v. United States*,[6] a case now remembered chiefly for a great Brandeis dissent,[7] the Court held that the Fourth Amendment does not protect a home dweller against wiretaps of his or her phone conversations as long as those taps are not the product of a trespass on the home dweller's property. Since there was no trespass on the *Olmstead* defendants' property, the Court concluded that the Fourth Amendment was simply not relevant to the case. "There was no searching," the Court stated. "There was no seizure. The evidence was secured by the use of the sense of hearing and that only."[8]

In the years following *Olmstead*, property rights were dethroned as the central concern of fourth amendment jurisprudence. In *Warden v. Hayden*,[9] the Warren Court remarked that it was unwilling "'to import into the law [of search and seizure] * * * subtle distinctions, developed . . . by the common law in evolving the body of private property law.'"[10] Two

---

[4] 19 Howell's State Trials at 1066.

[5] *Id.*

[6] 277 U.S. 438 (1928).

[7] It was in *Olmstead* that Justice Brandeis claimed that the Constitution protects "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478. Interestingly, Brandeis had previously used the phrase "right to be let alone" in speaking of a *common law* right of privacy. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). In the article, Warren and Brandeis acknowledged that it was Thomas Cooley who coined the phrase "right to be let alone." *See id.* at 195 n.4.

[8] 277 U.S. at 464.

[9] 387 U.S. 294 (1967).

[10] *Id.* at 305 (quoting Jones v. United States, 362 U.S. 257, 266 (1960)).

months after *Hayden*, the Court overruled *Olmstead*, holding in *Katz v. United States*[11] that the Fourth Amendment protects individuals from wiretapping even when no trespass has been committed.[12] *Katz*, it is clear, stands for the proposition that the Fourth Amendment protects privacy interests *independently* of its protection of property interests.

Katz's reach has been so substantial, however, that one could plausibly read it and the numerous cases that flowed from it as holding something more—as holding that the Fourth Amendment protects property interests *only to the extent* that it protects privacy interests.[13] Thus, to take an obvious example, in the post-*Katz* world of the 1970s and 1980s, one might have argued that the Fourth Amendment protects the home (a critical property interest) whenever government officials enter it and examine its contents, but that the amendment offers no protection for mere seizure of the home as a physical entity. Indeed, the Seventh Circuit Court of Appeals, on examining the Supreme Court's post-*Katz* decisions, reached exactly this conclusion in *Soldal v. Cook County*,[14] holding that a trailer home was not seized within the meaning of the Fourth Amendment when members of the Cook County sheriff's office aided employees of a trailer park in severing the home's connection to park facilities and hauling it away to another location. No privacy interest was implicated in this eviction process, the Seventh Circuit reasoned, so the Fourth Amendment did not come into play.[15]

---

[11] 389 U.S. 347 (1967).

[12] *Id.* at 353.

[13] *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 (1984) ("Since *Katz*, the touchstone of [Fourth] Amendment analysis has been the question of whether 'a person has a constitutionally protected reasonable expectation of privacy.'") (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring)). Indeed, even before *Katz*, the Court seemed to make privacy the central issue in fourth amendment jurisprudence. For example, in Warden v. Hayden, 387 U.S. 294 (1967), it stated that "the principal object of the Fourth Amendment is the protection of privacy rather than property." *Id.* at 304.

[14] The Seventh Circuit decided *Soldal* in two stages. In the first case, the court affirmed in part, reversed in part, and remanded. *See* Soldal v. Cook County, 923 F.2d 1241 (7th Cir. 1991). The Circuit then reheard the case *en banc*, affirming in part and reversing in part. *See* Soldal v. Cook County, 942 F.2d 1073 (7th Cir. 1991) (en banc), *rev'd*, 113 S. Ct. 538 (1992).

[15] 942 F.2d at 1076-79.

The Supreme Court disagreed.[16] The Court concluded, as the Seventh Circuit had, that an eviction proceeding in which government officials do not effect entry into a home does not implicate fourth amendment *privacy* interests. However, the Court also concluded that because of its prohibition of unreasonable seizures of houses, the Fourth Amendment is nonetheless implicated when officials aid in the termination of *property* interests.[17] *Soldal* does not take us back to *Olmstead*. On the Supreme Court's analysis, *Soldal* creates *independently* actionable interests—a privacy interest that is protected in the absence of interference with a property interest (as in a wiretapping case) and a property interest that is protected in the absence of interference with a privacy interest (as in a government-aided eviction). To use the Fourth Amendment's terminology, the Court now recognizes the possibility of a search without a seizure and the further possibility of a seizure without a search.[18]

In this Article, I consider the implications of this multi-interest analysis of the Fourth Amendment. In particular, I examine three cases decided by the Second Circuit Court of Appeals in which property interests played a role independent of privacy interests. I begin by considering the interpretive framework that underlies the Supreme Court's multi-interest analysis. The key to this framework lies in a disjunctive interpretation of the terms "search" and "seizure," one which does not require a search *and* a seizure to trigger fourth amendment protection, but instead allows for the possibility of fourth amendment protection when a search occurs in the absence of a seizure, or a seizure in the absence of a search.[19] After I

---

[16] *See Soldal*, 113 S. Ct. 538.

[17] *Id.* at 544.

[18] The Court first made clear its receptiveness to a disjunctive analysis of the phrase "searches and seizures" in United States v. Jacobsen, 466 U.S. 109, 113 (1984). By contrast, under Chief Justice Taft's analysis in *Olmstead*, a search cannot occur within the meaning of the Fourth Amendment unless it involves an item that can be seized. *See Olmstead*, 277 U.S. at 466. Although he did not comment on it, one must assume that Taft allowed for the possibility of a seizure without a search—for example, an arrest not accompanied by a search of the arrestee's person.

[19] The Court employed a disjunctive analysis of the terms "searches and seizures" in *Soldal*, where it remarked that "our cases . . . hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." *Soldal*, 113 S. Ct. at 547 (citing

consider Supreme Court opinions that bear on this interpretation of the Fourth Amendment, I turn to recent Second Circuit cases in which the property/privacy distinction is relevant. My particular concern with regard to Second Circuit opinions is with forfeiture seizures, a subject that takes on special importance in light of the Supreme Court's holding in *Soldal* that the Fourth Amendment offers independent protection for property interests, apart from privacy interests.

I. THE SUPREME COURT ON THE FOURTH AMENDMENT'S PROTECTION OF PROPERTY AND PRIVACY INTERESTS

In his opinion for the Court in *United States v. Jacobsen*,[20] Justice Stevens stated that the Fourth Amendment protects "two types of expectations, one involving 'searches,' the other 'seizures.'"[21] Stevens linked searches to privacy, stating that a "'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."[22] In contrast, he linked seizures to two types of interests. On the one hand, he stated, a "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."[23] On the other hand, he argued, a "'seizure' of a person [occurs when there is] . . . meaningful interference, however brief, with an individual's freedom of movement."[24]

Although Justice Stevens's comments attracted little attention at the time *Jacobsen* was decided, they in fact provide a remarkably lucid framework for thinking about the Fourth Amendment. If one looks at the cases that preceded *Jacobsen*, one can see that Stevens's analysis incorporated the Court's conclusions in *Katz* and, by implication, its rejection of *Olmstead*.[25] If one looks forward from *Jacobsen*, one can see

---

United States v. Jacobsen, 466 U.S. 109, 120-25 (1984)); *see also* United States v. Place, 462 U.S. 696, 706-07 (1983); Cardwell v. Lewis, 417 U.S. 583, 588-89 (1974).

[20] 466 U.S. 109 (1984).

[21] *Id.* at 113.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 113 n.5.

[25] The *Katz* Court did not advance a disjunctive analysis of the phrase "searches and seizures." Indeed, it remarked that "the question . . . is whether the search and seizure conducted in this case complied with constitutional standards."

that his comments anticipated the Court's conclusions in *Soldal*.[26] By tracing this process of interpretive development, we can note not only changes in doctrine but also the challenges that can be mounted against both past and present interpretations of the Fourth Amendment.

A. Olmstead's *Practice-Based Originalism*

It was in *Olmstead* that the Court first confronted the constitutional implications of electronic surveillance. All forms of electronic surveillance that do not involve some form of physical trespass pose an interpretive challenge for the Fourth Amendment. In *Entick*, it will be recalled, Lord Camden declared that "though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass."[27] If one takes *Entick* as a guide to the Fourth Amendment's meaning, then it would seem that while the amendment is indeed concerned with privacy—hence the aggravation of harm when private papers are removed and carried away—its protection comes into play only when there is an encroachment on physical items—i.e., when there is a trespass on them.

In wiretapping the phone conversations of the *Olmstead* defendants, federal officials carefully avoided trespassing on the defendants' property. Writing for the Court, Chief Justice Taft described the way in which the wiretaps were placed:

> Small wires were inserted along the ordinary telephone wires from the residences of four of the [defendants] and those leading from the chief office [used by the defendants]. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.[28]

Katz v. United States, 389 U.S. 347, 354 (1967). Justice Stevens's suggestion that the term "searches" implicates privacy interests makes it possible to say that in both *Katz* and *Olmstead*, government officials conducted a search without a seizure.

[26] In fact, the *Soldal* Court drew on Justice Stevens's *Jacobsen* framework in holding that a seizure of property can occur in the absence of a search of that property. *See* Soldal v. Cook County, 113 S. Ct. 538, 547 (1992).

[27] 19 Howell's State Trials 1029, 1066 (1765).

[28] Olmstead v. United States, 277 U.S. 438, 456-57 (1928).

Taft viewed these facts as critical to a proper resolution of the case. To understand why he took this position, it is essential to note that he relied on an interpretation of the Fourth Amendment he had first outlined when writing for the Court in *Carroll v. United States*,[29] decided three years before *Olmstead*. In *Carroll*, Taft stated that the Fourth Amendment "is to be construed in the light of what was deemed an unreasonable search and seizure *when it was adopted*."[30] This interpretive theory may be termed "practice-based originalism,"[31] an originalism that focuses not on the general aims of those drafting a constitutional provision, but instead on specific practices the provision's drafters wished to prohibit.

Using this kind of originalism as his guide, Taft provided two rationales for holding the Fourth Amendment irrelevant in *Olmstead*. The first rationale, clearly the dominant one as far as he was concerned, was that the Fourth Amendment was designed to prohibit unreasonable trespasses on property.[32] The second rationale, its inconsistency with the first Taft seems not to have noted, was that the Amendment was designed to protect people in their possession of material things; the "Amendment itself," Taft noted, "shows that the search is to be of material things—the person, the house, his papers or his effects."[33] Taken on its own, this second rationale would make the Fourth Amendment irrelevant to electronic surveillance *even when* government officials carry out surveillance by means of a trespass. If the amendment's scope is limited to material things, then uttered words would not come within the amendment's purview. Because Taft seems to have been unaware of the inconsistency between his two rationales, we can

---

[29] 267 U.S. 132 (1925).

[30] *Id.* at 149 (emphasis added).

[31] To my knowledge, no one else has used the terms "practice-" and "principle-based originalism." The distinction, however, is implicit in many discussions of originalism. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143-60 (1990). Interestingly, Justice Scalia did not draw on any version of the distinction in his defense of Chief Justice Taft's constitutional jurisprudence. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINC. L. REV. 849 (1989).

[32] "The evidence [in the case] was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." *Olmstead*, 277 U.S. at 464.

[33] *Id.*

assume that he wished to resolve the case on the basis of the first, trespassory rationale. The inconsistency should not be ignored, however, for it raises the question, which will be considered later: whether the Fourth Amendment, when it is construed as offering independent protection for property interests, protects intangible, as well as tangible, property.[34]

On either *Olmstead*'s first or second rationale, it should be noted, Taft allowed for the possibility of *incidental* fourth amendment protection for privacy interests—that is, for protection of privacy interests as long as government officials have interfered with some property interest that has a bearing on privacy. This interpretation of the Fourth Amendment is entirely consistent with Camden's comments in *Entick*. But while Camden made *Entick* hinge on the factors Taft cited in *Olmstead*, it is also clear that Camden accorded substantial weight to informational privacy as a value in its own right. While characterizing private papers as goods and chattel, Camden stated that they are their owner's "*dearest* property" and that their illegal seizure constitutes an "*aggravation* of [a] trespass."[35] Given remarks such as these, one need not go beyond constitutional originalism in challenging Taft's *Olmstead* conclusions. That is, one could argue for a principle- rather than a practice-based originalism and so give weight to the values, and not simply the practices, that the Fourth Amendment's framers took seriously. Justice Brandeis appealed to this principle-based originalism in his *Olmstead* dissent when he argued that clauses "guaranteeing to the individual protection against specific abuses of power must have a . . . capacity of adaptation to a changing world."[36] Brandeis's point underscores the narrowness of Taft's analysis. Given Camden's language, it is clear that eighteenth-century jurists accorded substantial weight to privacy interests. It thus seems foolish indeed to confine one's originalism to specific practices. The *concerns* of the framers provide the foundation for reversing Taft's conclusions.[37]

---

[34] See *infra* notes 99, 164 and accompanying text.

[35] 19 Howell's State Trials 1029, 1066 (1765) (emphasis added).

[36] 277 U.S. at 472; *see also id.* at 473 ("In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.") (Brandeis, J., dissenting).

[37] According to the arguments I advance here, Judge Bork can be classified as

B. Katz's *Principle-Based Originalism*

Despite widespread criticism of *Olmstead*'s framework,[38] the Court adhered for decades to Taft's approach in the case. During that time, Court opinions sometimes used *Olmstead* not to endorse but to reject government surveillance efforts. For example, in *Silverman v. United States*,[39] the Court employed *Olmstead*'s physical trespass framework in holding inadmissible evidence secured through the insertion of a "spike mike" a few inches into a suspect's wall. The facts of the case, the *Silverman* Court stated, did not require it to consider the larger question of whether to overrule *Olmstead*. It was enough to note that "the eavesdropping [in the case] was accomplished by means of an unauthorized physical penetration

---

a principle-based originalist. *See, e.g.*, Robert Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986). Commenting on original intent, Judge Bork stated:

> In short, all the intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That premise states a core value that the Framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee.

Id. at 826.

Brandeis and Bork would thus have reached the same result in *Olmstead*. Moreover, one would have to say that they would have reached this result for much the same reason. *See supra* note 36 and accompanying text. However, Brandeis presented other, nonoriginalist justifications for suppressing the evidence in *Olmstead*—(1) that the Constitution protects a "right to be let alone" and (2) that, whatever one's position on the constitutionality of the eavesdropping conducted in *Olmstead*, federal courts should not accept as evidence information gained through violation of a state criminal statute. *See* Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting). I have not thought it necessary to comment on these arguments here since I think principle-based originalism provides sufficient grounds for rejecting Taft's conclusions. Brandeis's alternative arguments are relevant in other contexts, however. Indeed, while the explicit text of the Constitution provides adequate protection for privacy as informational control, it does not for other kinds of privacy that come within the umbrella term "the right to be let alone." Although I rely on principle-based originalism in resolving the *Olmstead*/*Katz* sequence of cases, I do not wish it to be understood that I think principle-based originalism exhausts the range of legitimate approaches to constitutional jurisprudence.

[38] Criticism came from the highest source. The Communications Act of 1934 provided statutory protection against the kind of wiretapping undertaken in *Olmstead*. *See* Communications Act of 1934, Pub. L. No. 416, 48 Stat. 1064, 1103-04 (1934).

[39] 365 U.S. 505 (1961).

into the premises occupied by the petitioners."[40]

No such easy distinctions were available to the Court in *Katz v. United States*.[41] During the course of their investigation of Katz, government agents meticulously complied with *Olmstead*'s strictures on physical encroachment. While gathering evidence against Katz for alleged violation of gambling laws, agents noted that often he had made phone calls from a public booth located near his home. Believing that Katz was conducting a gambling pool by means of the calls, and without securing a warrant for their actions, the agents placed a listening device on top of the booth, which picked up only Katz's end of his phone conversations.[42] The placement of the device was clearly consistent with the framework Taft adopted in *Olmstead*. Katz had no possessory interest in the phone booth, so he could not complain about a trespass on it. And in any event, the device was placed in such a way that no penetration was made into the ceiling of the phone booth.

Given these facts, *Katz* directly raised the question of whether the Fourth Amendment protects privacy interests *independently* of its protection of property interests. Writing for the Court, Justice Stewart held that it does. Quoting *Warden v. Hayden*,[43] a case decided only six months before *Katz*, Justice Stewart stated that the "'premise that property interests control the right of the Government to search and seize has been discredited.'"[44] Continuing in this vein, Stewart argued that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.'"[45] The activities of the agents investigating Katz, Stewart concluded, "violated the privacy upon which [Katz] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[46]

Given these remarks, there can be no doubt that Stewart

---

[40] *Id.* at 509.
[41] 389 U.S. 347 (1967).
[42] *Id.* at 348.
[43] 387 U.S. 294 (1967).
[44] 389 U.S. at 353 (quoting *Warden*, 387 U.S. at 304).
[45] *Id* (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).
[46] *Id.*

recognized privacy as an independent variable within fourth amendment jurisprudence. However, precisely because he took this position, Stewart was also careful to note the *kind* of privacy the amendment protects. The amendment, Stewart declared, does not protect a "person's *general* right to privacy."[47] Eighteen months prior to *Katz*, the Court had stated in *Griswold v. Connecticut*[48] that "penumbras" of various constitutional provisions protect a married couple's "privacy" right to use contraceptives.[49] The Fourth Amendment was among the penumbra-generating provisions cited in *Griswold.*[50] But given Stewart's disclaimer that the Fourth Amendment does not offer general privacy protection, it is clear that in *Katz* Stewart was concerned only with informational privacy—that is, he was concerned only with the type of privacy in which individuals control the dissemination of information about themselves.[51] Informational privacy is an intangible good. Information can, of course, be *embedded* in a tangible item—think, for example, about how facts concerning someone's life can be discovered by reading that person's diary. But embeddedness is hardly essential to informational privacy. Indeed, the facts in *Katz* illustrate well how informational privacy can be important when only uttered words are at stake. In *Katz,* information was communicated simply through sounds and the meanings those sounds convey. 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.

Bearing this point in mind, it will be possible to see how Stewart gave modern meaning to the understandings about

---

[47] *Id.* at 350.

[48] 381 U.S. 479 (1965).

[49] *Id.* at 484.

[50] *Id.*

[51] It is important to note that, in *Katz*, Justice Stewart went out of his way to distinguish between the comprehensive concept of privacy employed by the *Griswold* Court and the narrower conception of privacy with which he was concerned in *Katz*. *See Katz*, 389 U.S. at 350 n.5. Stewart was among the dissenters in *Griswold*. His approach to *Katz* was entirely consistent with his approach to *Griswold*, for while he rejected the proposition that the Constitution creates a "general right of privacy," 381 U.S. at 530, he was prepared to hold that the Fourth Amendment provides a textually grounded foundation for a limited type of privacy—that is, informational privacy.

privacy that had prevailed in the eighteenth century. To Camden (*Entick*'s author) and to the framers of the Fourth Amendment, informational privacy was indeed a matter of embeddedness—that is, to eighteenth-century minds, one enjoyed privacy by exerting control over tangible objects such as one's house or one's papers. The words of the Fourth Amendment reflect this understanding. They refer only to tangible objects—persons, houses, papers, and effects—that to eighteenth- as well as twentieth-century minds have a central bearing on a person's existence as a distinct individual. Stewart's updating of the Fourth Amendment was, admittedly, awkward as far as terminology is concerned, for while one can seize and then search a person's house or papers (and so discover secrets about that person's life), one cannot "seize" a conversation, nor is it particularly graceful to speak of "searching" a conversation.

This terminological point conceded, though, it is obvious that Camden and the Fourth Amendment's framers were vitally concerned with informational privacy. Once again, think of *Entick*'s reference to private papers as their owner's "dearest property" and the Fourth Amendment's inventory of items essential to sustaining individual identity. In *Katz*, Stewart simply acknowledged a brute fact of modern life—that changes in technology have made it possible for the government routinely to interfere with informational control in settings where facts about a person's life are not embedded in a tangible object. Stewart's approach can thus be justified as a form of principle-based originalism. In advancing this originalist justification for *Katz*, I do not wish to suggest that nonoriginalism should be rejected as an approach to constitutional law. My point is narrower. I am arguing only that when a specific portion of the Constitution's text is to be construed, interpretation should begin (though it need not end) with consideration of the aims the provision's framers wished to achieve. Taking the framers' intentions as the starting point for thinking about *Katz* also justifies the opinion, making it clear that Stewart, rather than Taft, captured the underlying aims of the amendment's framers.

C. *Determining* Katz's *Reach*

Did *Katz* turn *Olmstead* on its head? That is, where *Olmstead* had made it necessary to show infringement of a property interest to assert a fourth amendment claim, did *Katz* make it necessary to show infringement of a privacy interest to assert such a claim? As we shall see, the answer to these questions is "no": *Katz* heralded not another single-variable approach to the Fourth Amendment, but instead a multi-variable approach in which privacy, property and liberty interests stand on their own. *Katz*'s reach has been so substantial, however, that it is worthwhile thinking about what fourth amendment jurisprudence would be like if an infringement of privacy were indeed a prerequisite to claiming the amendment's protection. This idea can be explored by examining the Seventh Circuit's en banc opinion in *Soldal v. County of Cook*.[52] As I noted in the Introduction, the Supreme Court unanimously reversed the Seventh Circuit in *Soldal*, so that the lower court's conclusions are simply a matter of historical curiosity. They are, however, a matter of substantial curiosity, for they demonstrate how, in puzzling out *Katz*'s significance, a widely respected lower circuit court judge, Richard Posner, concluded that privacy is indeed the organizing concept for fourth amendment jurisprudence.

At stake in *Soldal* was a claim that the Fourth Amendment was implicated by the removal of a trailer home from its mooring in a trailer park. The owner of the trailer park, Terrace Properties, brought an eviction suit in an Illinois state court against Edward Soldal, who lived in the trailer home with his wife and four children. Two weeks prior to the eviction hearing, the officers at Terrace Property decided to proceed with the eviction immediately. Because the Terrace officials feared resistance, they were accompanied by Cook County deputy sheriffs, who told Soldal that they were present to restrain him in case he tried to prevent the eviction. The Terrace officials damaged the Soldals' trailer home as they removed it from its moorings and towed it out of the trailer park's lot. No eviction order was ever issued in the case since the Soldals had

---

[52] 942 F.2d 1073 (7th Cir. 1991) (en banc), *rev'd*, 113 S. Ct. 538 (1992).

already been expelled from the trailer park.[53]

The Soldals subsequently brought a § 1983 action for money damages against the deputies who had aided in their eviction. After the district court granted summary judgment in favor of the deputies, a three-judge panel of the Seventh Circuit affirmed in part and reversed in part.[54] The circuit judges then granted a petition to rehear the case *en banc*, at which time Judge Posner wrote the majority opinion for a narrowly divided court. Posner began by agreeing with the reasoning employed by the three-judge panel in holding that the case had properly been brought under § 1983. To survive a summary judgment motion in a § 1983 action, a plaintiff must allege that a defendant acted under color of state law and that, in doing so, the defendant deprived the plaintiff of a federally guaranteed right.[55] The second point lay at the heart of the case, for the Soldals claimed, and the deputy sheriffs denied, that their trailer home had been "seized" within the meaning of the Fourth Amendment when it was uprooted from its moorings and towed away. Even the first point was in doubt, though, for it was the Terrace Park officials who uprooted the home, not the deputies. Judge Posner, however, held that, given the state of the record, the deputies' actions satisfied the "under-color-of-state-law" requirement of § 1983. Because his eviction was unlawful, Posner noted, Soldal had a common law right to resist it. According to the record, it was the deputy sheriffs who prevented Soldal from exercising his right of resistance. Posner thus concluded that the record required the court to assume that the deputies had conspired with the Terrace Park officials to evict the Soldals.[56]

This brought Posner to what he called a question of "surprising novelty, [one with] implications for other forms of eviction and even perhaps for the repossession of automobiles and other personal property."[57] The question, Posner noted, had to do with *Fourth Amendment* claims about property. The Soldals, he pointed out, had wisely avoided mounting a due process challenge to their eviction. Because Illinois law made it

---

[53] *Id.* at 1074.
[54] *See* 923 F.2d 1241 (7th Cir. 1991).
[55] *See* Parratt v. Taylor, 451 U.S. 527, 535 (1981).
[56] 942 F.2d at 1075.
[57] *Id.*

possible for the Soldals to sue the deputies for the damages caused by their illegal eviction,[58] it is unlikely that they would have been able to bring a § 1983 action predicated on due process liability.[59] Posner thus suggested that the question before the court was "whether the Fourth Amendment should be bent to provide the Soldals with still another remedy."[60]

In holding that it does not, Posner argued that the amendment should be considered as a provision that protects property interests only as an incident to its protection of privacy interests. He stated:

> In modern law the interests in property and in (Fourth Amendment) privacy are protected by different constitutional provisions and by different bodies of constitutional doctrine. It is true that the older cases, illustrated by *Olmstead*, often tied the protections of the Fourth Amendment to property concepts, such as trespass. The modern cases, however, well illustrated by *Katz*, which overruled *Olmstead*, refocus the amendment from property to privacy in accordance with Justice Brandeis's dissent in *Olmstead*. This leaves deprivations of property to be regulated by the due process clause [and the takings clause]. [Neither one of which Posner considered relevant to the case].[61]

Reasoning from this premise, Posner had little difficulty disposing with a claim that the Soldals' interest in informational privacy had been infringed by the eviction. "The police did not enter Soldal's trailer home," Posner noted. "They did not rummage among his possessions."[62] The confidential status of the Soldals' "papers and effects" had thus not been impaired.[63]

But in treating privacy as the organizing concept of fourth amendment analysis, Posner had to allow for another type of privacy besides informational control, for the amendment, through its proscription of unreasonable seizures of the person, clearly has a bearing on a person's interest in freedom of movement. Posner thus posited that the amendment also protects

---

[58] *See* ILL. REV. STAT. ch. 80, para. 221 (1980).

[59] In Parratt v. Taylor, 451 U.S. 527 (1981), the Court held that a due process property rights claim is not actionable under § 1983 unless a plaintiff has no adequate judicial remedies available under state law.

[60] 942 F.2d at 1076.

[61] *Id.* at 1077 (citation omitted).

[62] *Id.*

[63] *Id.*

an individual's interest in privacy-as-personal-solitude, an interest that is implicated by an intrusion into a person's home and also by physical detention, such as an arrest or a forcible stop.[64] It is on this point that Posner's analysis is open to challenge.

One challenge is relatively abstract in nature, though critical to our general understanding of the Fourth Amendment. It is plausible to think of a seizure of the person as implicating an interest in personal solitude when one is speaking of arrests or forcible stops. Even here, the characterization is only barely plausible, for one strains accepted usage in speaking of the arrest of a pedestrian who is disturbing the peace by screaming in the middle of the night as an interference with personal solitude. One goes beyond mere strain of usage, though, if one says that police use of deadly force against, say, a fleeing felon constitutes an interference with personal solitude. Given the Supreme Court's conclusion in *Tennessee v. Garner*[65] that the use of deadly force in a fleeing-felon setting constitutes a "seizure of the person" within the meaning of the Fourth Amendment,[66] one must conclude that an interest in privacy-as-personal-solitude is at most an occasional adjunct to the interest central to all seizures of the person—the interest in physical liberty.[67] This point alone makes Posner's unitary analysis of the Fourth Amendment unacceptable. Clearly, the amendment protects an interest in physical liberty that only sometimes overlaps with an individual's interest in personal solitude.

One more difficulty with Posner's privacy analysis must be considered. If one *were* to reason in terms of Posner's unitary approach to the Fourth Amendment, then one would have to confront the question of whether the Soldals' interest in privacy-as-personal-solitude was infringed by their eviction. Although the record is silent about key facts related to this point,

---

[64] *Id.*

[65] 471 U.S. 1 (1985).

[66] *Id.* at 7-9.

[67] This is also the conclusion Justice Stevens reached in *Jacobsen*; there he stated that "a 'seizure' of a person [occurs] within the meaning of the Fourth Amendment [when there is] meaningful interference, however brief, with an individual's freedom of movement." United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984).

it seems safe to assume that the Soldals' personal solitude was shattered when they heard people outside their trailer home making preparations to remove it from its moorings. Moreover, the record does make clear that the Soldals' opportunity for solitude was impaired after the eviction, for their home was towed away and left without any connection to sewer pipes and electrical wires. In taking these points into account, Posner might argue that the Fourth Amendment protects against only certain kinds of intrusions on solitude. This claim, however, would have to be tested against the amendment's reference to "[t]he right of the people to be secure in their . . . houses."[68] Given the text's obvious concern with this dimension of personal security, Posner should have explained why, on his privacy conception of the Fourth Amendment, the Soldals were without legal protection.

If we set aside privacy for a moment, we can at least see why Posner was on fairly firm ground in not treating *property* as an independently actionable interest under the Fourth Amendment. Posner, of course, recognized that the *Jacobsen* Court had stated that the Fourth Amendment protects possessory interests by virtue of its prohibition of unreasonable seizures of houses, papers and effects.[69] He also conceded that "[l]iterally there was a seizure here."[70] However, Posner went on to say that "to use a literal interpretation of a constitutional provision enacted two centuries ago" would be to trivialize the provision and, in the process, "make every repossession and eviction [carried out] with police assistance actionable" under the amendment.[71] On this point, Posner's argument was quite strong, for despite *Jacobsen*'s reference to possessory interests, it was by no means clear that the Court was prepared to give substantial weight to fourth amendment claims involving property, as opposed to privacy and liberty, interests.

An example—drawn from *Oliver v. United States*,[72] a case Posner also cited[73]—will illustrate the stepchild status of

---

[68] U.S. CONST. amend IV.

[69] Soldal v. Cook County, 942 F.2d 1073, 1078 (7th Cir. 1991) (en banc), *rev'd*, 113 S. Ct. 538 (1992).

[70] *Id.* at 1077.

[71] *Id.*

[72] 466 U.S. 170 (1984).

[73] 942 F.2d at 1079.

property rights in post-*Katz* jurisprudence. At stake in *Oliver* were government efforts to locate marijuana grown in open fields. Despite "No trespassing" signs posted prominently on the defendant's property, government agents entered his land, drove past his house, and traveled several hundred yards along a road until they reached an open field, where they discovered patches of marijuana. It was only after they had made this discovery that the officers obtained a search warrant and returned to the field to gather the marijuana, which was then used as evidence against the defendant.[74]

Given these facts, the Court could readily have invoked *Jacobsen*, which it had decided only fifteen days earlier, to hold that the defendant had suffered a "meaningful interference" with his property interests in his lands, thus triggering fourth amendment protection. Instead, in holding the Fourth Amendment inapplicable in the case, the Court focused exclusively on the defendant's privacy interests, which, it concluded, had not been infringed by the government agents' activities. "Since *Katz*," the Court remarked, "the touchstone of [Fourth] Amendment analysis has been . . . whether a person has a 'constitutionally protected reasonable expectation of privacy.'"[75] In holding that the defendant did not, the Court stated that open fields, unlike the home, "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[76] As for the fact of trespass, the Court simply stated that the "existence of a property right is but one element in determining whether expectations of privacy are legitimate."[77] It was understandable, then, that Posner gave little weight to property as an independent factor in fourth amendment analysis. *Oliver*, it must be remembered, treated privacy as "the *touchstone*" of fourth amendment jurisprudence.[78] *Katz* indeed seemed to have turned *Olmstead* on its head.

We can summarize a somewhat complicated argument by bearing three points in mind. The first is that it is a mistake

---

[74] 466 U.S. at 170.

[75] *Id.* at 177 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

[76] *Id.* at 179.

[77] *Id.* at 183.

[78] *Id.* at 170.

to treat privacy as the unifying concept of fourth amendment jurisprudence. Although the *Oliver* Court spoke of privacy as the "touchstone" for the Fourth Amendment, it is clear, whatever the status of property interests under the amendment, that the Court conceived of the amendment as protecting an analytically distinct *liberty* interest—that is, an interest in freedom from physical restraint. Second, even if one were to adopt a single-interest approach (such as Posner's) that focuses on privacy, one might have to concede that activities such as evictions implicate the Fourth Amendment to the extent that they interfere with privacy-as-personal-solitude. But third, one certainly would have to concede that, post-*Katz*, the Court was less than clear about the status of property interests under the Fourth Amendment. If we say that federal circuit court judges engage in a process of divination (with the Supreme Court as the inscrutable oracle whose sayings they must interpret), then one can readily understand why a judge such as Posner could conclude that property interests enjoy no special protection as such under the Fourth Amendment.

D. Soldal *in the Supreme Court*

Soldal reached a Court particularly receptive to claims about the Constitution's protection of property interests. In the years immediately preceding *Soldal*, the Court had carefully considered takings-clause and due process challenges involving a wide variety of property issues such as the regulation of coastal real estate,[79] a municipal imposition of a rent control ordinance,[80] and the use of punitive damages in tort judgments.[81] While the Court moved cautiously in dealing with these issues, many of its members—in particular, Chief Justice Rehnquist and Justices Scalia and Thomas—consistently showed an interest in elevating property rights above the lowly status into which they had fallen following the crisis of legitimacy the Court suffered in the late 1930s.[82] Indeed, if we ex-

---

[79] *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

[80] *See* Yee v. City of Escondido, 112 S. Ct. 1522 (1992); Pennell v. San Jose, 485 U.S. 1 (1988).

[81] *See* Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) (Oregon's procedure denying appellate court review of punitive damages violates the Fourteenth Amendment's Due Process Clause).

[82] *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2320 (1994) (Takings Clause

amine the *Olmstead-Katz-Soldal* sequence of cases in light of a larger trend in American constitutional law—a trend in which property claims were ascendant until the late 1930s, then subsequently fell into disrepute, and finally enjoyed modest rehabilitation by the Rehnquist Court—we can see that *Soldal* is part of a wide range of cases in which property interests have gained new-found respect in the Court.

But we should not focus simply on the Rehnquist-Scalia-Thomas wing of the Court in thinking about property interests. Throughout his tenure on the Court, Justice Stevens, who has never been identified with this wing, consistently had argued that the Fourth Amendment provides independent protection for property interests. It was Stevens's earlier pronouncements on property that provided the foundation for the Court's conclusions in *Soldal*. In writing for a unanimous Court in *Soldal*, Justice White prominently quoted Stevens's statement in *Jacobsen* that a "'seizure' of property . . . occurs [within the meaning of the Fourth Amendment] when 'there is some meaningful interference with an individual's possessory interests in that property.'"[83] Drawing on this statement, White wrote: "We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment."[84] White emphasized, of course, that this did not mean that the Soldals' fourth amendment rights had been violated.[85] To find a fourth amendment violation, the Court also would have had to conclude that the seizure of their home had been unreasonable, an issue not before the Court since it had granted certiorari merely to determine whether the Fourth Amendment had been implicated by the deputies' efforts to evict the Soldals from their home.

White might have concluded his opinion at this point. He went on to argue, however, that prior Court decisions supported his analysis of the case, stating that the message of *Katz* and the cases following it was not that "the Fourth Amend-

---

should not be viewed as a poor stepchild of provisions such as the First and Fourth Amendments).

[83] 113 S. Ct. at 543 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

[84] *Id.*

[85] *Id.*

ment is only marginally concerned with property rights [but instead] . . . that property rights are not *the sole measure* of Fourth Amendment violations."[86] As should be clear, this is not a wholly credible claim. In *Oliver*, for example, the Court had declared that "[s]ince *Katz* . . . the touchstone of [Fourth] Amendment analysis has been . . . whether a person has a 'constitutionally protected reasonable expectation of privacy.'"[87] Given this statement, the most charitable characterization that can be offered of White's *Soldal* review of prior cases is that he resolved their ambiguities in favor of fourth amendment property interests. White, it is fair to say, found a consistency that had not been discernible in prior cases when he declared in *Soldal* that property claims are cognizable under the Fourth Amendment in the absence of privacy claims.[88]

Can it be said, though, that in *Soldal* White was implicitly concerned with privacy—in particular, with privacy-as-personal-solitude—since that case dealt with the government's seizure of a home? The answer to this must be "no." While White *could have* framed his argument in terms of privacy-as-personal-solitude, the text of his opinion makes it clear that he did not reason from this perspective. Two features of White's opinion are particularly relevant in this context. First, in *Soldal*, White consistently focused on property interests as they stand alone. He spoke, for example, of "pure property interests," asked whether possessory interests are protected by the Fourth Amendment when privacy and liberty interests are not at stake, and stated that it is untenable to conclude that "the Fourth Amendment protects against unreasonable seizures only where privacy or liberty is also implicated."[89] Second, had White viewed the case through the prism of privacy-as-personal-solitude, he would have asked questions about the case's record—for example, whether the Soldals' solitude within their home had been disrupted by the deputies' preparations for the eviction, or whether the possibility of using their home as a place for solitude had been impaired by the way in which the trailer had been removed from its moorings and towed

---

[86] *Id.* at 544-45 (emphasis added).

[87] 466 U.S. at 177 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

[88] 113 S. Ct. at 544.

[89] *Id.* at 543 & 547 n.13.

away—and then would have remanded the case in light of those questions. Given these points, it is clear that White did not think of privacy-as-personal-solitude as an informing principle in resolving the case. *Soldal* thus stands for the proposition that the Fourth Amendment is implicated when there is a seizure of property *in the absence of a search* of that property.

We can generalize on these points by saying that *Soldal* posits three independently cognizable interests protected by the Fourth Amendment—privacy, liberty and property. *Katz* serves as an example of a pure privacy case (since it was concerned with eavesdropping on phone conversations in a setting where a suspect could claim no possessory interests). *Garner* provides an example of a pure liberty case (since it was concerned with the use of deadly force to stop a fleeing felon). And *Soldal* completes the trinity by providing an example of a pure property case. Needless to say, in most instances these interests do not stand alone. Searches can precede seizures; seizures can precede searches. Thus, courts often must be sensitive to the interplay of these interests.[90] What *Soldal* makes clear, though, is that each interest can stand alone. Government agents must be prepared to consider each interest in isolation from the others.

A second general point is also worth noting. Given *Soldal*'s conclusion that the Fourth Amendment protects property interests independently of its protection of privacy and liberty interests, it is essential to ask what role other constitutional provisions, such as the Fifth Amendment's Takings Clause[91] and its Due Process Clause,[92] play in protecting property. A case the Court decided a year after *Soldal*, *United States v. James Daniel Good Real Property*,[93] helps answer this question. At stake in *Good* was the constitutionality of the government's *ex parte* seizure of Good's home four years after he had entered a guilty plea to drug charges following a warrant-based search of

---

[90] For further discussion of the significance of the interplay of Fourth Amendment interests, see William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WISC. L. REV. 1193, 1220-28.

[91] The Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[92] The Due Process clause provides: "nor [shall a person] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[93] 114 S. Ct. 492 (1993).

his home which led to the discovery of eighty-nine pounds of marijuana. Good did not dispute the government's authority to seize his home in an *in rem* proceeding, but argued instead that an *ex parte* seizure so long after the entry of his guilty plea was a violation of due process.[94] The government in turn claimed that the seizure was justified by *Soldal*. In particular, it argued that the Due Process Clause had not been violated by the *ex parte* seizure because the Fourth Amendment afforded Good all the process he was due.[95]

In rejecting the government's argument, the Court held that, under the circumstances, Good was entitled under the Due Process Clause to more extensive protection than he was under the Fourth Amendment.[96] Quoting *Soldal*, it remarked:

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's "dominant" character. Rather, we examine each constitutional provision in turn.[97]

In applying this framework, the Court held that, absent exigent circumstances, a homeowner is entitled under the Due Process Clause to notice and a hearing prior to a seizure of his real property.[98] *Soldal*, of course, established a lesser level of property protection under the Fourth Amendment. Implicit in *Soldal*, then, is the proposition that the Fourth Amendment establishes a *de minimis* standard for the seizure of real estate. The Due Process and Takings Clauses go beyond this. When no exigent circumstance justifies the government's actions, individuals are entitled to protective, pre-seizure procedures that minimize the risk of legally erroneous government interference with their interests. The Fourth Amendment regulates sudden, unexpected interventions in personal life (thus its reference to a "right to be secure"); other constitutional provisions are concerned with less disruptive ways of interfering with property interests.

But while *Soldal* and *Good*, considered together, help to

---

[94] *Id.* at 498.
[95] *Id.* at 499.
[96] *Id.*
[97] *Id.* (citing Soldal v. Cook County, 113 S. Ct. 538, 548 (1992)).
[98] United States v. James Daniel Good Real Prop., 114 S. Ct. 492, 500-05 (1993).

clarify the relationship between the different constitutional provisions that deal with property, other questions about fourth amendment property protection remain unresolved. In the second half of this Article, I consider three Second Circuit cases that have a bearing on the property/privacy relationship. Here, I note some general questions, which have a bearing on those cases, that can be raised in light of the Court's conclusions in *Soldal*:

1. What Kinds of Property Does the Fourth Amendment Protect?

In resolving *Soldal*, Justice White stated:

> In holding that the Fourth Amendment's reach extends to property as such, we are mindful that the Amendment does not protect possessory interests in all kinds of property [citing *Oliver*'s conclusion that the Fourth Amendment offers no protection against trespassory incursions into open fields]. This case, however, concerns a house, which the Amendment's language explicitly includes, as it does a person's effects.[99]

One possible interpretation of this remark is that White believed that fourth amendment property protection is limited to the items the amendment mentions—houses, papers and effects. However, if this is what White meant, it would be hard to square *Soldal* with the interpretive framework the Court employed in *Katz*. As I noted earlier, *Katz* repudiates Taft's *Olmstead* conclusion that the amendment's reference to "persons, houses, papers, and effects" is meant to be exhaustive. If this were an exhaustive list, then conversations could not come within the amendment's reach. Moreover, *Katz* also repudiates Taft's conclusion that the amendment's list protects only tangible items, for conversations involve intangible sounds and associated meanings. Each point is important in thinking about *Soldal*'s scope. If only the amendment's enumerated items are protected, then it could be argued that the amendment does not cover the seizure of automobiles and other means of conveyance. If only tangible items come within its scope, then one might argue that money is protected when it exists as paper cash, but not when it exists as a credit on a

---

[99] 113 S. Ct. at 544 n.7.

computer screen.

2. What Kinds of Property Relationships Does the Fourth Amendment Protect?

Soldal dealt with the simplest kind of property relationship: direct ownership of a tangible asset. Clearly, courts will have to deal with more complex relationships in the future. They will have to ask, for example, whether the Fourth Amendment covers government interference in leasehold relationships and, if so, whether it protects the interests of lessors and lessees. Or, to take another example, they will have to ask whether the amendment covers bailment relationships and, if so, whether it protects the interests of bailors and bailees. One might argue that the amendment's reference to a "right . . . to be secure" suggests that it is concerned only with the kinds of sudden disruptions that interfere with the conduct of everyday life. If so, one could argue that the amendment protects property interests in which people exercise direct control over objects, whether tangible or intangible (for example, one's luggage, home and bank account) but that it does not protect property interests when control is not essential to the conduct of everyday life (for example, a lessor's or bailor's interest in property that other people actually control).

3. What is the Status of Fourth Amendment Property Interests?

With property interests now recognized as an independent variable in fourth amendment analysis, courts must confront two questions about the weight to accord them. First, courts must consider whether probable cause or the lower standard, reasonable suspicion,[100] should constitute the threshold for legitimate interference with those interests. Second, courts

---

[100] The Supreme Court developed the reasonable suspicion standard in reviewing seizures of the person. Its particular concern was with brief, forcible stops that do not amount to an arrest. *See* Terry v. Ohio, 392 U.S. 1 (1968). In the final portion of this Article, I suggest that the reasonable suspicion standard can be applied to brief, forcible detentions of property. *See infra* notes 143-44 and accompanying text. I do not, however, argue that the standard should prevail for lengthy deprivations of property.

must also consider when a warrant should be required for interference with those interests. As a general matter, courts have accorded the greatest weight to privacy interests under the Fourth Amendment, particularly privacy interests in the home. In those cases, the courts have required probable cause for entry into the home and, absent exigent circumstances, a warrant for carrying out arrests and searches in the home.[101] It is possible to imagine different weight being accorded to different types of property interests, with the strongest weight accorded to interests in the home and personal effects and less weight accorded to interests in property that have a less immediate impact on personal security.

4. What Remedial Response Should Courts Offer for Violations of Fourth Amendment Property Interests?

In *Gerstein v. Pugh*,[102] the Court held that the Fourth Amendment requires a prompt probable cause hearing by a neutral magistrate following an individual's arrest. Recently, the Court gave meaning to the term "prompt" by holding that the government bears the burden of showing why it did not provide a probable cause hearing within forty-eight hours of arrest.[103] Since arrests involve a seizure of the person, there is an obvious analogy to *Soldal*'s concern with seizures of property. What is more, the venerable case of *Weeks v. United States*[104] holds that the Fourth Amendment imposes a remedial obligation on courts to order the prompt return of illegally seized property. Thus, assuming that the return of property is possible, it would seem that implicit in the Fourth Amendment is a remedial mechanism that obligates the prompt return of illegally seized property. Beyond this, if return is not possible or the property has suffered damages, then courts can draw on § 1983 and *Bivens*, as in *Soldal* in granting monetary relief to the victims of fourth amendment property wrongs.

---

[101] *See* Payton v. New York, 445 U.S. 573 (1980).
[102] 420 U.S. 103 (1975).
[103] *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991).
[104] 232 U.S. 383 (1914).

II. THE SECOND CIRCUIT ON THE FOURTH AMENDMENT'S PROTECTION OF PROPERTY AND PRIVACY INTERESTS

Because *Katz* has so dominated recent discussion on the Fourth Amendment, some time will be needed before courts and commentators grasp the significance of the role *Soldal* accorded property interests. In this Part, I offer a preliminary assessment of *Soldal*'s significance by analyzing three Second Circuit cases in which property interests loom large. I begin with *United States v. Perea,*[105] a case in which the court considered the strength of a bailee's interest in property directly under his control. I then turn to *United States v. Daccarett,*[106] a complex asset forfeiture case that raises a number of difficult property issues—among them, whether the Fourth Amendment protects against the "seizure" of intangible assets such as computerized bank accounts, and what procedures must be followed for securing warrants to seize such property. Finally, I turn to another forfeiture case, *United States v. $37,780 in U.S. Currency,*[107] which raises questions about the relevance of suppression remedies in settings where government agents are found to have seized assets illegally. None of the cases deal with property interests as they stand alone. Rather, each goes beyond *Soldal* by raising important questions about the interplay of privacy and property interests in fourth amendment jurisprudence.

A. Perea *and the Status of Bailments Under the Fourth Amendment*

Of the three cases under review, *Perea* raises particularly vexing questions about the relationship between property and privacy protection. At issue in *Perea* was the legitimacy of a government seizure and subsequent search of a duffel bag that another person had paid the defendant, Reuben Perea, to keep for him (thus creating a bailor/bailee relationship).[108] While conducting surveillance of a residence, government agents first

---

[105] 986 F.2d 633 (2d Cir. 1993).
[106] 6 F.3d 37 (2d Cir. 1993), *cert. denied,* 114 S. Ct. 1294 (1994).
[107] 920 F.2d 159 (2d Cir. 1990).
[108] United States v. Perea, 986 F.2d 633, 636 (2d Cir. 1993).

observed someone who later turned out to be an associate of Perea's—Herman Ortiz—as he left the building.[109] On one of the days they had the residence under surveillance, agents noticed Ortiz arrive in a livery cab, enter the residence, and exit shortly afterward with a duffel bag, which he placed in the cab's trunk. Ortiz then returned to the building and, a few minutes later, Perea came out and entered the cab.[110] Each man's comings and goings were marked by careful glances up and down the street. Moreover, when Perea got into the cab, he had his hand in his left pocket, leading an agent observing him to think that he was keeping a gun there.[111]

Once the cab pulled away from the curb, agents followed it. A number of government cars joined the pursuit and stopped the cabs. What happened when the agents stopped the cab was a subject of disagreement at Perea's suppression hearing.[112] Perea testified that a number of agents surrounded the cab. According to Perea, one of the surrounding agents opened the door and pulled him out, searched him, and then pushed him down against the ground. In the meantime, Perea testified, other agents took the duffel bag from the trunk, though they never asked him whether the bag belonged to him. At the suppression hearing, Perea testified that someone else had paid him to keep the bag. Perea also stated that he knew the bag contained marijuana, cocaine and a scale and that, on the day in question, Ortiz had told him to move it to another location.[113]

At the suppression hearing, one of the government's agents, Brian Aryai, stated that he had simply asked Perea to leave the cab while another agent stated that he could not recall exactly how Perea had been made to exit the cab.[114] After he had taken the duffel bag from the trunk, Aryai also testified that he had asked Perea whether the bag was his and that Perea had responded, "No, that's not my bag."[115] After opening the bag and discovering the drugs it contained, the

---

[109] *Id.* at 635-36.
[110] *Id.* at 636.
[111] *Id.*
[112] *Id.*
[113] *Perea*, 986 F.2d at 636.
[114] *Id.*
[115] *Id.* at 636-37.

agents placed Perea under arrest and read him his *Miranda* warnings. Aryai testified that, during a later interrogation, Perea stated that he had concealed money in the back seat of the cab. A search of the back seat area led to the discovery of about $13,000 in cash.[116]

If nothing else, *Perea* provides a telling reminder of the confusing jumble of facts trial courts often have to confront when conducting suppression hearings. In passing on Perea's motion to suppress the contents of the duffel bag, the statements made to Aryai, and the cash discovered as a result of those statements, Judge Korman, of the Eastern District of New York, held as an initial matter that Perea had standing to challenge the agents' forcible stop of the cab even though he was only a passenger in it.[117] Korman declined to decide whether the force the agents used was so great as to constitute an arrest.[118] Because "nothing followed from the alleged use of excessive force," Korman reasoned, there was no need to pass on the issue of arrest; rather, he concluded, it was enough to hold that reasonable suspicion justified the agents' stop of the cab.[119]

Judge Korman then turned to the evidence Perea wished to have suppressed. He ruled that, as a passenger in the cab, Perea had no reasonable expectation of privacy in the contents of its trunk and so could not object to a search of it.[120] Moreover, Korman stated that since Perea claimed to be only a temporary custodian of the duffel bag, he had not asserted "any facts remotely suggesting that he had any expectation of privacy in [the bag's] contents."[121] As for the statements and money discovered, Korman held that they had been properly obtained since the agents' search of the bag had provided probable cause for arresting Perea.[122] Perea ultimately entered a conditional guilty plea to conspiracy to distribute narcotics, thus setting the stage for his appeal of the denial of his sup-

---

[116] *Id.* at 637.
[117] *Id.*
[118] *Perea*, 986 F.2d at 637.
[119] *Id.* at 638.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 638.

pression motion.[123]

In a thoughtful, meticulous opinion for a unanimous panel, Judge Kearse reversed the judgment of conviction against Perea.[124] The facts relevant to the suppression motion were so complex that Kearse worked cautiously through the case, instructing the district court to consider a number of different possibilities on remand.[125] But while Kearse was properly cautious in approaching the case, one must ask whether she was sufficiently sensitive to the issues that arise when someone claims only to be a bailee of a given piece of property. As Kearse recognized, the critical question for Perea was whether he could claim, as only a bailee, a privacy interest in the contents of the duffel bag.[126] If he could not, then the government's search of it was proper, and his subsequent arrest (for possession of a controlled substance) was lawful as well. By contrast, if one were to hold that the government had only reasonable suspicion to stop Perea and that Perea had a privacy interest in the contents of the duffel bag, one could then argue that no probable cause existed for his arrest (since the contents of the duffel bag could not be used to justify his arrest). It would follow that the statements he had given to the police had been illegally obtained and that the money discovered on the basis of those statements had been illegally seized.

Judge Kearse's conclusion that Perea could claim a privacy interest in the contents of the bag was based on a key passage in then-Justice Rehnquist's opinion for the Court in *Rakas v. Illinois*:[127]

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others [Rehnquist cited Blackstone on this point], and one who owns or lawfully possesses or controls property will *in all likelihood* have a legitimate expectation of privacy by virtue of this right to exclude.[128]

---

[123] *Perea*, 986 F.2d at 639.
[124] *Id.*
[125] *Id.* at 645.
[126] *Id.* at 639-40.
[127] 439 U.S. 128 (1979).
[128] *Id.* at 143-44 n.12 (emphasis added).

The general tenor of these remarks is that one of the ways to justify a claim to a fourth amendment privacy interest is to show that the law recognizes a property interest in a given object. As the italicized portion of the quotation makes clear, however, this is not an invariably successful mode of justification. The Court's holding in *Oliver* illustrates this point, for while Oliver had a "right to exclude others" from his open fields, the Court held that since open fields are not the setting for "intimate activities," he did not have a legitimate expectation of privacy in them.[129] As a general matter, then, we can say that a legally protected property interest generates a privacy interest protected by the Fourth Amendment when the person claiming the property interest can show that he would benefit in his personal (i.e., private) life from exercising the property interest. Thus a homeowner or a lessee of an apartment could claim a privacy interest by showing a property interest in a specific piece of real estate. By contrast, to draw on the example *Oliver* provides, neither an owner nor a lessee of an open field can claim a privacy interest in it despite their property interest in such a field.

In resolving *Perea*, Judge Kearse simply held that since Perea, as bailee of the duffel bag, had a right to exclude others from the bag, he had a privacy interest in its contents. But clearly, this will not do, for Perea could not claim that, as the bag's bailee, he was in a position to benefit in his private life from excluding others from it. Does this mean that Perea did not have a privacy interest in the contents of the bag? The answer to this is that he might have had such an interest—that the outcome of a privacy claim depended on the terms of his bailment. As a matter of law, bailments are contractual relationships.[130] In any bailment of a sealed container, a bailee may or may not have a contractual right to examine the contents of what it is he has contracted to handle. If a bailee does have such a right—for example, if a bailor instructs a bailee to inspect the contents of a bag periodically to make sure everything is all right—then the bailee has a privacy interest in the bag's contents, an interest based not on the

---

[129] Oliver v. United States, 466 U.S. 170, 179 (1984).

[130] *See* Firestone Tire & Rubber Co. v. Cross, 17 F.2d 417, 418-19 (4th Cir. 1927).

principle that sustains privacy claims in homes or apartments but instead on a principle that is concerned with the sharing of information for business purposes against outsiders. On the other hand, if a bailee does not have a right of inspection—for example, if a bailor hands over a bag with firm instructions that the bailee deliver it to a specified recipient without inspecting it—then the bailee does not have a privacy interest in the bag's contents. Accordingly, the key point Perea should have been required to establish on remand was that his bailment agreement authorized him to inspect the bag's contents. This point is critical despite the fact that Perea testified at the suppression hearing that he "knew" what the bag contained. That statement, standing alone, could mean nothing more than that he had heard a rumor about the bag's contents and that he believed this rumor even though he had been told not to look inside the bag. Kearse thus correctly held that a bailee *can* have a legitimate expectation of privacy in the contents of a bailed article. Given the factual record before her, however, she was not entitled to assume that Perea actually had such an interest in the duffel bag seized by government agents.

These comments are significant, of course, only if the government agents did not have probable cause to arrest Perea prior to their inspection of the bag. Judge Kearse agreed with the district court's conclusion that the encounter with Perea began as a forcible stop rather than as an arrest.[131] If the government agents did not have probable cause to arrest Perea before opening the bag, the case would have to be resolved solely in light of the bailment issues just discussed. However, since the officers might have gained probable cause to arrest Perea between the time of the stop and the time of the bag's inspection, Kearse had to allow for the possibility of a valid search of the bag even though Perea had a privacy interest in its contents. Kearse noted, for example, that assuming probable cause for arrest, the government might be able to justify the agents' search of the bag on the ground that its contents would inevitably have been discovered during the course of an inventory search.[132] The complexity of the case thus made it necessary for her to pose multiple questions on remand. It is

---

[131] *Perea*, 986 F.2d at 644.
[132] *Id.*

unfortunate she did not recognize that one of them should have been the nature of the bailment relationship Perea had formed on assuming responsibility for the duffel bag.

B. Daccarett *and the Strength of Property Interests Protected by the Fourth Amendment*

Perhaps the most important question left unanswered in *Soldal* is whether property interests protected by the Fourth Amendment are entitled to the same degree of protection as privacy and liberty interests. This question can rarely be posed in its pure form since property is usually seized through government penetration of some kind of privacy arrangement. What is more, property seizures are often preceded by interference with a liberty interest—by an arrest or a forcible stop, for example. These intertwinings of property with privacy and liberty interests were present in *United States v. Daccarett*.[133] However, because the arrests at stake in the case took place on foreign soil and the measures the government used in penetrating privacy arrangements were held not to be actionable under the Fourth Amendment, the case turned out to be one in which fourth amendment property claims stood on their own.[134] *Daccarett* thus offers a particularly interesting way of thinking about *Soldal*'s significance.

At issue in *Daccarett* was the lawfulness of a series of government seizures of funds that were to be temporarily held by American banks in anticipation of their transfer to Colombian banks.[135] The triggering event for the case was a wiretap by members of the Luxembourg Surete, one of which was placed on the telephone of Jose Franklin Jurado-Rodriguez during a trip he made to Luxembourg in late 1989. While monitoring Jurado's phone conversations, the police overheard him engage in discussions with Jose Santacruz Londono, widely believed to be the leader of the Cali drug syndicate.[136] Jurado informed Londono that he had opened bank accounts in Europe in the name of Londono's father-in-law and that he was plan-

---

[133] 6 F.3d 37 (2d Cir. 1993).

[134] *Id.* at 59.

[135] *Id.* at 44.

[136] United States v. All Funds on Deposit, 801 F. Supp. 984, 988 (E.D.N.Y. 1992).

ning to set up shell corporations which could aid in money laundering.[137] Using wire and fax-taps, the Luxembourg police also learned that a Jurado associate, Edgar Alberto Garcia-Montilla, was opening bank accounts in the name of Londono's parents-in-law.[138]

After Jurado, Garcia and another associate had traveled throughout northern Europe, opening bank accounts in Belgium, Denmark, Sweden, Germany and the Netherlands, they were arrested upon their return to Luxembourg.[139] Jurado and Garcia were subsequently convicted in Luxembourg on money-laundering charges. More importantly however, officials discovered address books and an operating plan for a money-laundering scheme in Jurado's and Garcia's possession at the time of their arrest.[140] In drawing on this information, law enforcement officials seized millions of dollars held in bank accounts world-wide. In all, more than thirty million dollars in Europe, sixteen million dollars in Panama, and twelve million dollars in the United States were seized.[141]

The American asset seizures, the legality of which was the central issue in *Daccarett*, did not involve tangible cash. Rather, the seizures concerned electronic funds transfers ("EFTs") of assets that, as noted, were designated for deposit in Colombian bank accounts.[142] Issuing oral orders and arrest warrants *in rem*, government officials told American banks to attach all funds on deposit in the names of individuals whose identities they had discovered through the documents seized when Jurado and Garcia were arrested.[143] However, because even this information was only fragmentary, the government's agents issued new warrants that were based on facts they subsequently discovered through enforcement of the initial warrants. To gain further information, government agents also issued subpoenas to the banks requiring them to provide financial records for the accounts named in the original and subse-

---

[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 993.
[141] *Daccarett*, 6 F.3d at 44.
[142] *Id.* at 43.
[143] *Id.* at 44.

quent warrants.[144] The assets seized were eventually transferred to the clerk of the United States District Court for the Eastern District of New York, who held them pending disposition of the forfeiture action the government brought concerning the funds.[145]

The forfeiture action brought in *Daccarett* was an *in rem* civil proceeding. Therefore, the nominal defendants were the offending funds themselves, whose forfeiture the government sought because they allegedly had been used to further a massive conspiracy to import drugs. Civil forfeiture, however, often has a criminal flavor.[146] Despite the formal designation of some specific item—such as a financial asset or a home—as the offending party, civil forfeiture is often used as part of a battery of legal devices that further prosecution of criminal enterprises. This was certainly true in *Daccarett* given the government's allegations that the Cali drug syndicate controlled the bank accounts that had been seized. What gave the case its special character, however, was the consistently different story the claimants told about the money. In all, eighteen claimants stepped forward to contest different seizures.[147] The claimants portrayed themselves as Colombian apparel manufacturers who received cash upon sending their products abroad. In offering this account, the claimants not only challenged the government's forfeiture action, they also brought a counterclaim seeking damages for what they alleged to be violations of the Fourth and Fifth Amendments and the Electronic Communications Privacy Act ("ECPA").[148] In related actions, they sued both the American banks that had complied with the *in rem* warrants and the U.S. Attorneys who had ordered the funds seized. Judge Weinstein, the trial judge in the case, granted summary judgment for the banks and dis-

---

[144] *Id.*

[145] *Id.*

[146] *See, e.g.*, Austin v. United States, 113 S. Ct. 2801, 2810 (1993) ("forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment"); *see also* Halper v. United States, 490 U.S. 435, 448 (1989) ("a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term").

[147] *Daccarett*, 6 F.3d at 43.

[148] *Id.* at 44.

missed the case against the U.S. Attorneys for failure to state a claim on which relief could be based.[149]

As for the forfeiture action itself, a magistrate judge held an *ex parte, in camera* proceeding on May 13, 1991, about ten months after the seizures had been effected, in which he determined there was probable cause to believe that the funds were the proceeds of narcotics trafficking and/or money laundering.[150] Shortly afterward, Judge Weinstein held an evidentiary hearing at which he concluded there was probable cause to believe the funds were forfeitable.[151] A two-month jury trial was held in early 1992. The jury found for three of the claimants, concluding in two instances that the assets seized from their accounts were not traceable to either drug trafficking or money laundering, and concluding in a third instance that one of the claimants was an innocent owner.[152] On appeal, the unsuccessful claimants argued that the warrants authorizing the seizures had been defective and that the evidence in the case thus should have been suppressed.[153]

Judge Pratt, a member of the Second Circuit who has shown particular interest in asset forfeiture cases, wrote an opinion for a unanimous panel upholding the trial court's judgment.[154] Because of the complexity of the issues he had to address, it is best to consider Pratt's opinion in stages. The first stage will have to do with liberty and privacy issues. After that, I will turn to the many different questions Pratt's opinion raises about the protection of property interests.

1. The Absence of Cognizable Liberty and Privacy Claims in *Daccarett*

At the outset, it should be noted that no fourth amendment liberty claims were before the court. Although the government's case depended on information discovered through the seizure of documents in the possession of Jurado and Garcia at the time they were arrested, those arrests were not at

---

[149] *Id.* at 44-45.
[150] *Id.* at 45.
[151] *Id.*
[152] *Daccarett*, 6 F.3d at 45.
[153] *Id.*
[154] *Id.* at 59.

issue since they had been carried out by foreign police on foreign soil.[155] By contrast, the *Daccarett* claimants did raise of number of privacy issues, but Judge Pratt concluded—correctly, I believe—that none of their claims was legally cognizable.[156]

First, the claimants argued that the subpoenas issued for the financial records held by American banks violated their fourth amendment rights.[157] In responding to this, Pratt noted that the Supreme Court has consistently held that bank customers have no fourth amendment privacy interest in the contents of the records retained by their banks. At most, Pratt noted, the Fourth Amendment guards against "'too much indefiniteness or breadth'" in subpoenas for bank records, and this, he held, had not been a defect of the *Daccarett* subpoenas.[158]

Second, the claimants also argued that they had a statutorily protected privacy interest in their bank records under the Right to Financial Privacy Act.[159] Judge Pratt, however, held that this act protects only accounts held in customers' names.[160] Since the claimants did not hold EFTs in their own names, they were not, Pratt concluded, protected by the act.[161]

Finally, the claimants maintained that the EFTs were protected under the Electronic Communications Privacy Act and that the information gained from the EFTs thus should have been suppressed.[162] Judge Pratt's response to this was that "no 'device' was used to obtain the information as contemplated by the ECPA" and that the act therefore did not come into play.[163]

---

[155] *Id.* at 44.
[156] *Id.* at 50.
[157] *Daccarett*, 6 F.3d at 50.
[158] *Id.* (quoting United States v. Miller, 425 U.S. 435, 445-46 (1976)).
[159] 12 U.S.C. § 3401 (1978).
[160] 6 F.3d at 50-52.
[161] *Id.*
[162] 18 U.S.C. § 2510 (1986).
[163] 6 F.3d at 53-54.

2. Fourth Amendment Property Interests

What about the claimants' property interests in the assets seized? One might argue that the Fourth Amendment does not cover the seizure of an intangible *res* such as a computerized bank account and that the claimants thus were also without fourth amendment protection for their property interests. While Judge Pratt did not address this issue, one can make sense of his approach to the case only by concluding that he assumed that the Fourth Amendment did offer protection in this respect. We should consider first this threshold question about fourth amendment property protection and then turn to the specific property issues at stake in the case.

a. *The Fourth Amendment's Applicability to Intangible Bank Assets*

It is somewhat surprising that Judge Pratt did not address the basic question of whether the Fourth Amendment offers protection for a party's interest in an intangible *res* such as a bank account. In posing this question, we should recall that in *Olmstead*, Chief Justice Taft suggested that the Fourth Amendment's coverage does not extend beyond tangible items.[164] Taft's point cannot be completely dismissed: for example, it certainly would be inappropriate to say that an intangible *res* such as a copyright or a patent can be "seized" within the meaning of the Fourth Amendment. But cash is different. Since tangible cash (the kind of cash carried in a wallet, for example) can of course be seized within the meaning of the Fourth Amendment, it would be anomalous to say that intangible cash (the kind held in a computerized bank) is not subject to fourth amendment protection. Each kind of cash can readily be converted into the other, so one would not come to terms with the practices of everyday life if one said that a seizure occurs within the meaning of the Fourth Amendment when government agents confiscate money that someone is about to deposit in an automatic teller machine but that the Fourth Amendment becomes irrelevant if, say, ten seconds after the deposit, government agents freeze an account which

[164] *See* Olmstead v. United States, 277 U.S. 438, 464 (1928).

was just credited with a deposit of physical cash. Clearly, Pratt should have confronted directly a question as basic as this. In his defense, however, one can at least say that he correctly assumed that the Fourth Amendment comes into play when government officials instruct bank officers to freeze an account.

b. *The Fourth Amendment's Applicability to the Statutorily Specified Procedures Employed in Seizing Computerized Bank Assets*

As Judge Pratt noted, the government has three options in carrying out such seizures.[165] First, in the food and drug laws Congress has authorized *in rem* seizures provided those seizures adhere to procedures specified in the Supplemental Rules for Certain Admiralty and Maritime Claims.[166] Second, the Government can employ the procedures set out in Rule 41(c) of the Federal Rules of Criminal Procedure, which require that a judicial officer determine *ex parte* whether there is probable cause to carry out a seizure.[167] And third, government officials can carry out warrantless seizures when, as the food and drug laws state, "the Attorney General has probable cause to believe that the property [to be seized] is subject to civil forfeiture."[168] Only the first and third options were at stake in *Daccarett*. As Pratt pointed out, neither requires "pre-seizure judicial approval:" the first follows a process in which a clerk issues a warrant upon receipt of a government complaint, while the third of course requires no warrant at all.[169]

In analyzing the asset seizures in *Daccarett*, Judge Pratt distinguished between those that were the culmination of what we can call a rolling warrant process and those that were not.[170] Under a rolling warrant process, the government periodically revises already-issued *in rem* warrants to take into account new information it has discovered through, among other things, the administration of previous warrants. As I noted in discussing *Daccarett*'s facts, the government's initial

---

[165] 6 F.3d at 46.
[166] *See* 21 U.S.C. § 881(b) (1988).
[167] FED. R. CRIM. PRO. 41(c).
[168] 21 U.S.C. § 881(b)(4) (1988).
[169] 6 F.3d at 46.
[170] *Id.* at 47-48.

seizures in the case were based on fragmentary information about the EFTs passing through American banks. The government supplemented this information by issuing subpoenas for bank records and by then issuing new warrants that were based in part on facts discovered through the issuance of the subpoenas and in part on facts discovered through administration of the prior warrants. Given this background, Pratt concluded that the seizures made at the conclusion of the rolling warrant process had to be classified as warrantless ones.[171] He further concluded that the seizures could be justified on fourth amendment grounds as exceptions to the amendment's warrant requirement since exigent circumstances required prompt government action to seize the EFTs.[172]

Judge Pratt was certainly wise not to argue that the rolling warrant process can be justified as a proper instance of a warrant-based intrusion. If the government were allowed to use vague, nonparticularized warrants to secure information and if it then were further allowed to use the information so acquired to produce warrants that particularly describe what is to be seized, then the warrant requirement—indeed, the Fourth Amendment's general premise that the government must possess particularized information of wrongdoing before intervening—would be eviscerated. But given this point, one must ask whether Pratt simply used a definitional sleight-of-hand to evade the Fourth Amendment's requirements; that is, one must ask whether a reclassification of the seizures as warrantless still leaves them invalid since they were based on information gained in part through warrants that were not sufficiently particularized to satisfy the Fourth Amendment. The answer to this is that it appears he did. The warrants that started the rolling process stated only that banks were to freeze "all funds on deposit in [any account of] Jose Santacruz-Londono" and also "all related entities and individuals."[173] It is possible, of course, that the government had probable cause at the time these initial warrants were issued to seize funds in the accounts of "all related entities and individuals."[174] If it

---

[171] *Id.*
[172] *Id.* at 49-50.
[173] *Id.* at 44.
[174] *Daccarett*, 6 F.3d at 44.

did, then the initial seizures were justified and the information gained through the warrants and subpoenas simply provided further support for them. On the other hand, if the government did not have probable cause at the time of the initial warrants, then relabeling the seizures "warrantless" does not help in justifying them. Judge Pratt's opinion is not entirely clear on this point.[175] Thus, only a conditional statement is warranted here: If the government had not met the probable cause threshold at the time it seized the funds of "all related entities and individuals," then its seizure of those funds was illegal.[176]

Let us turn now to the seizures that were not based on the rolling warrant process—that is, the seizures that, in Judge Pratt's words, "were preceded by a complaint and arrest warrant that explicitly named the intended beneficiary."[177] For these seizures, Pratt advanced no exigent circumstances justification, and we should thus assume that none existed. Rather, he claimed simply that the seizures complied with the Fourth Amendment's warrant requirements and so should be upheld.[178] Unfortunately, his argument on this score was undermined by two mischaracterizations of the relevant law at stake. Once we correct his mischaracterizations, we will be able to see why he erred in upholding the warrant-based seizures.

Judge Pratt's first misstep was to speak of a fourth amendment requirement of a judicial determination of probable cause prior to the issuance of a warrant.[179] Under the Supplemental Admiralty Rules, a court clerk must issue an *in rem* warrant "forthwith" once government officials file a complaint that property is forfeitable for a federal statutory violation.[180] In analyzing these rules, Pratt focused on the

---

[175] Judge Pratt stated that government officials "knew that Santacruz-Londono . . . would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his 'businesses' in Colombia". *Id.* at 48. This statement, however, hardly demonstrates that government officials had probable cause with respect to each and every account subjected to a warrantless seizure.

[176] *Id.* at 47.

[177] 6 F.3d at 47.

[178] *Id.* at 49.

[179] *Id.* at 49-50.

[180] *See* SUPP. A.M.C. R.C.(3).

judiciary's role in seizures and held that a prior judicial determination is not required for a seizure.[181] This, however, was not the critical issue posed by the Rules. As the Supreme Court has made clear, the key point that must be considered in thinking about the warrant issuance process is not whether a judge or some official makes a probable cause determination, rather, the key point is that, whoever the official making the determination, that official must act in a neutral and detached manner.[182] On this count, the Supplemental Rules are clearly defective. They require a clerk to issue an *in rem* warrant "forthwith" on receiving a government complaint that property is statutorily forfeitable.[183] Had Pratt identified the issue correctly here—had he focused on the problem of neutral and detached assessment—he would also have detected the fourth amendment problem with the warrant procedure prescribed by the Supplemental Rules.

In compounding this misstep, Judge Pratt also changed the focus of his inquiry about the Supplemental Rules from the Fourth Amendment to the Fifth Amendment's Due Process Clause. How he did so is discernible in a remarkable passage in which he began by discussing fourth amendment requirements for issuing warrants and then moved, without acknowledgement, to fifth amendment standards for forfeiture seizures. Pratt remarked:

> [T]he fourth amendment mandates the existence of probable cause at the time of seizure. However, the government need not obtain a *judicial* determination of probable cause prior to seizure. While

---

[181] 6 F.3d at 47.

[182] In Shadwick v. City of Tampa, 407 U.S. 345 (1972), a unanimous Court rejected the notion that "all warrant authority must reside exclusively in a lawyer or a judge." *Id.* at 349. The Court held that "an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest of search." *Id.* at 350. There is little doubt that an *in rem* clerk could meet *Shadwick*'s capacity test; in *Shadwick*, the Court was prepared to "presume from the nature of the clerk's position [in that case] that he would be able to deduce from the facts on an affidavit before him whether there was probable cause." *Id.* at 351. The defect with the *in rem* warrant process thus lies in the neutrality requirement: when a clerk is required to issue a warrant "forthwith" on receiving an application from government officials, one can hardly say that the clerk has the requisite neutrality under *Shadwick*'s test. *See also* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Connally v. Georgia, 429 U.S. 245 (1977).

[183] Supp. R. C(3)

> "absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that the seizure is justified", the Supreme Court has held that "such an extraordinary situation exists when the government seizes items subject to forfeiture."[184]

In "unpacking" these remarks, we should initially note that the first two sentences contain Pratt's mischaracterization of the fourth amendment issue central to *in rem* warrants—that is, Pratt focuses here on whether a judge or nonjudicial officer should make a probable cause determination when the key issue is whether a reviewing officer (perhaps a judge, perhaps not) has assessed a warrant application from a neutral and detached perspective. Whatever their other defects, though, the first two sentences are at least about the Fourth Amendment (which is as it should be since Pratt had entitled the subsection in which they are contained "Fourth Amendment Concerns.").[185] By contrast, in the third and longest sentence of the passage, Pratt draws not on fourth amendment but on fifth amendment due process cases dealing with asset forfeitures.[186] His fifth amendment references are particularly jarring in this context since pre-seizure hearings under the Due Process Clause are adversarial in nature while the most the Fourth Amendment requires is an *ex parte* hearing prior to seizure. The passage thus has a disorienting effect on the reader, making it unclear exactly what Pratt had in mind when he wrote it.

In trying to offer some kind of defense for Judge Pratt, could one argue that, while he of course should not have moved without acknowledgement from the Fourth to the Fifth Amendment, his conclusions can indeed be upheld on fifth amendment grounds once those grounds are made explicit? The answer to this is that a fifth amendment analysis might at one time have provided a plausible justification for a clerk's summary issuance of an *in rem* warrant but that *Soldal*,[187] which the Supreme Court decided four months before the Second

---

[184] 6 F.3d at 50 (quoting United States v. Eight Thousand Eight Hundred and Fifty Dollars, 461 U.S. 555, 562 n.12 (1983)); *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[185] *Id.* at 48-50.

[186] *Id.* at 50.

[187] 113 S. Ct. 538 (1992).

Circuit heard oral argument in *Daccarett*, made this line of defense for Pratt's conclusions untenable. We have already considered *Soldal*'s admonition that when multiple constitutional provisions cover a certain kind of governmental activity, courts are obligated to consider *all* the provisions relevant to that activity.[188] This admonition in *Soldal* is worth quoting again, however, given its relevance to Pratt's remarks. The *Soldal* Court remarked:

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's "dominant" character. Rather, we examine each constitutional provision in turn.[189]

Given this analysis, one cannot save Pratt's conclusions by arguing that the "dominant" character of the *in rem* warrant process made it appropriate to analyze that process under the Fifth Amendment Due Process Clause. Instead, *Soldal* obligated Pratt to consider the Fourth Amendment *as well*, and had he characterized properly the fourth amendment problem posed by the *in rem* warrant process (i.e., the absence of neutral and detached inspection by the clerk issuing the warrant), he would have seen that it is a substantial one indeed. But one further defense of Pratt's conclusions must be considered now that the questions connected with the issuance of *in rem* warrants have been properly stated. In defending Pratt's conclusion, one might argue that, while the Fourth Amendment generally requires a neutral and detached assessment of probable cause prior to the issuance of a warrant, it does not require this when property interests alone are at stake. Liberty and privacy interests, it could be argued, are entitled to enhanced fourth amendment protection. Thus, one could claim that while neutral and detached assessment is required for the issuance of warrants affecting *those* interests, the *in rem* process prescribed by the Supplemental Rules suffices when property interests alone are implicated.

I noted earlier that the *Soldal* Court did not address this question directly.[190] But while it did not, it did go out of its

---

[188] *Id.* at 548.
[189] *Id.*
[190] *See supra* text accompanying notes 179-82.

way to emphasize that property seizures must be considered within the general context of the Fourth Amendment's concern with personal security. The *Soldal* Court remarked:

> In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question of whether the [Fourth] Amendment applies. What matters [in determining whether it applies] is the intrusion on the people's security from governmental interference.[191]

In this passage, the Court quite clearly suggests that both entrance into a home (an activity that affects privacy interests) and effectuation of a seizure (an activity that affects property interests) are significant because they intrude on individual security. The Court does not distinguish between the gravity of these different kinds of intrusions; rather, it states that the aim of the Fourth Amendment is to protect each facet of that security.[192] Besides finding support in *Soldal*, this parity-of-interests thesis can be sustained on its own terms. An individual's sense of personal security is critically grounded in his capacity to control his possessions from arbitrary governmental interference. Personal security is affected not only by indiscriminate wiretapping and forcible stops but also by indiscriminate seizures of property. A requirement of neutral and detached assessment of warrant applications furthers this personal interest by reducing the likelihood of erroneous interference with property interests. The property-is-less-important defense thus cannot be sustained. In turn, this means that Pratt's conclusions concerning the *in rem* warrant process are without constitutional support.

Judge Pratt's approach to the warrant process becomes even more perplexing once one takes into account the general misgivings he expressed about forfeiture proceedings near the end of his *Daccarett* opinion. There, he stated:

> Despite [the] apparent unfairness [of civil forfeiture procedures], the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require [harsh] result[s]. At this point in the development of forfeiture law, any change in the balance of this unique procedural system must come either from the

---

[191] *Id.* at 548.
[192] *Id.*

> Supreme Court or from [C]ongress.[193]

The concern Pratt expressed in this passage stands in stark contrast with the tortured reasoning he followed in upholding the constitutionality of the *in rem* warrants. Had he not mischaracterized the issues at stake in the *in rem* warrant process, he could readily have discerned the basis *Soldal* provides for challenging the warrant process outlined in the Supplemental Rules.

C. United States v. $37,780 in United States Currency *and the Question of the Appropriate Remedy for an Illegal Seizure*

Daccarett focuses on whether seizures of property comply with the Fourth Amendment. The final case under review, *United States v. $37,780 in United States Currency*,[194] raises questions about the remedial steps courts should take on finding that the government failed to comply with the amendment. Stated in this way, the issue of a remedy seems simple. The government, it can be said, should return illegally seized property, just as it should release someone who has been illegally arrested. However, *United States v. $37,780* takes us one step beyond this, for the case requires us to consider whether an order of return is the appropriate judicial response when the government is later able to justify a seizure that was illegal at the time it was made.[195] This before/after problem is critical to the Fourth Amendment. As I have suggested, the amendment is grounded in the premise that the government must meet a given threshold of suspicion before it interferes with the interests it protects. *United States v. $37,780* provides us with an opportunity to consider what should be done when subsequently discovered evidence indicates that an intrusion would have been appropriate in the first place.

The facts in *United States v. $37,780* are straightforward. When Victorino Hernandez placed his attache case under the X-ray scanner at the Buffalo airport in anticipation of boarding a flight to New York, security officers determined, on examining their scanner screen, that the attache case was filled with

---

[193] 6 F.3d at 56.
[194] 920 F.2d 159 (2d Cir. 1990).
[195] *Id.* at 160-61.

cash.[196] The officers asked Hernandez to open his case. He complied, and on inspecting it, the officers discovered $37,780 in cash, most of it in denominations of $20 or less. Asked to explain why he was carrying so much cash, Hernandez stated that his mother had given him the money and that he was taking it to New York to open a restaurant. Hernandez also claimed to be an agent of the Drug Enforcement Agency, though he added that the money in his possession belonged to him, not to the agency. Moreover, in stating that his mother had given him the money, he first said that she had sent him a check, which he had cashed, and later contradicted this by saying that she had brought him the money from the Dominican Republic. Finally, Herndandez claimed that the woman, Linda Matias, who drove him to airport was someone he did not know very well.[197]

Government officials did not arrest Hernandez. However, they did seize the money he was carrying.[198] On looking into Hernandez's story, they discovered that he was not a DEA employee, that he had been convicted on four felony drug charges, that he and Matias apparently were living together, and that both were under investigation for drug activities. The DEA then instituted an administrative forfeiture proceeding against the money seized.[199] When Hernandez filed a claim for the money, the government began a civil *in rem* forfeiture action in federal district court against the currency.[200] Hernandez's argument in challenging the forfeiture action was simplicity itself. The government, he claimed, did not have probable cause at the time of the seizure to take his property.[201] Whatever evidence the government had gathered after the seizure, Hernandez argued, could not be used to satisfy the government's burden of proof in the forfeiture proceeding. Thus, he claimed, the trial court should dismiss the forfeiture and return the money to him.[202]

In countering Hernadez's arguments, the government

---

[196] *Id.* at 160.
[197] *Id.* at 161.
[198] *Id.*
[199] *United States v. $37,780*, 920 F.2d at 161.
[200] *Id.*
[201] *Id.*
[202] *Id.*

claimed that it did in fact have probable cause to seize the money at the airport. Alternatively, however, the government suggested that, whatever the resolution of the probable cause issue arising with respect to the airport seizure, it clearly had enough evidence to satisfy the probable cause standard that prevails at probable cause forfeiture proceedings.[203] This alternative argument, it should be noted, goes to the heart of the before/after problem. The same standard—probable cause—governs both seizures and the government's burden of proof at forfeiture proceedings. While the government conceded it might not have met this standard at the time of the seizure, it claimed that it was indeed able to meet this at the time of the forfeiture proceeding.[204] Because Hernandez advanced no further claims concerning the property (he argued that he should prevail because the money had been illegally seized and did not further argue that the money was not traceable to illegal activity), the government contended that the money was properly forfeitable under either its first or second probable cause claims.[205]

The trial judge, John Elfvin, disagreed with the government's arguments. First, he rejected the "after" component of the government's before/after contentions by holding that the forfeiture could be justified only on a showing that there was probable cause to *seize* the money.[206] Second, Elfvin held that the government had not met this standard—that is, he held that the government did not have probable cause to take the money during the airport encounter.[207] And third, he held that because the "mere exclusion of unconstitutionally seized property from a contested proceeding for its forfeiture is of no practical effect," the money should not simply be suppressed but instead returned to Hernandez, with the government prohibited from seeking its forfeiture again.[208] This final point needs elaboration. In the Second Circuit, the suppression of illegally seized property does not necessarily

---

[203] *Id.* at 161-62.

[204] *United States v. $37,780*, 920 F.2d at 162.

[205] *Id.*

[206] United States v. $37,780 in United States Currency, No. CIV-89-743E, 1989 WL 132005 at *2 (W.D.N.Y. Oct. 31, 1989).

[207] *Id.*

[208] *Id.* at *3

lead to the termination of forfeiture proceedings, for as long as the government is able to provide probable cause by drawing on evidence untainted by the original wrong, it can satisfy its burden of proof.[209] The government's alternative argument in *United States v. $37,780* rested on just this point—that is, it claimed that it was able to satisfy by untainted evidence its probable cause burden in the forfeiture proceeding and that it thus should prevail.[210] Anticipating this point, Judge Elfvin stated that a harsher deterrent than suppression was required. It is for this reason that he ordered the property's return and issued a further order prohibiting the government from reinstituting forfeiture proceedings.[211]

Writing for a unanimous panel, Judge Pratt reversed Elfvin's judgment, holding that while the currency had indeed been illegally seized, the government could (and did) sustain its burden in the forfeiture proceeding by drawing on subsequently secured evidence untainted by the original wrong.[212] On the question of illegal seizure, Pratt noted the possibility that courts might reason in terms of a rebuttable presumption of illegal possession when individuals are found to be carrying large amounts of cash.[213] Pratt, however, did not press this point. He assumed for purposes of the opinion that the seizure had been illegal and so reasoned in terms of an illegal "before" component of the before/after equation.[214] Given this conclusion, Pratt might of course have gone a step further and held that the money seized ceased to exist as far as the forfeiture proceeding was concerned. He avoided this approach, however, and although he did not state his position clearly on this point, it appears that he reasoned in terms of a distinction between evidentiary and jurisdictional consequences of an illegal seizure—on the one hand, holding that the government cannot derive evidentiary benefits from an illegal seizure but, on the other hand, holding that a court can continue to exercise *in*

---

[209] *See* United States v. Premises and Real Property at 4492 S. Livonia Rd., 889 F.2d 1258, 1266 (2d Cir. 1989).

[210] *United States v. $37,780,* 189 WL 132005, at *2-*3.

[211] *Id.* at *4.

[212] *United States v. $37,780,* 920 F.2d at 163-64.

[213] *Id.* at 162 (citing United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975)).

[214] *Id.* at 162.

rem jurisdiction over an illegal seized *res*.[215] In following this line of reasoning, Pratt was able to hold that the government satisfied the "after" part of the equation.[216] By the time of the forfeiture proceeding, Pratt noted, governmental officials were in a position to demonstrate that Hernandez had lied about his employment and arrest status and his connection with Linda Matias.[217] Moreover, they also were able to show that he had been under surveillance for drug dealing at the time of the seizure. The government, he held, had therefore satisfied its burden of proof.[218]

Clearly, Judge Pratt's opinion raises important questions about the nature of suppression and also about a court's power to order the return of illegally seized property. Curiously, Pratt addressed these questions in only the most cursory way; indeed, when one compares the three and one-half pages he devoted to *United States v. $37,780* with the seventeen he devoted to *Daccarett*, one gains the impression that he was impatient with the subtle problems that arise once property has been illegally seized but deeply fascinated by the constitutional questions connected with an initial interference with property interests. Rather than continue to pore over Pratt's opinion in *United States v. $37,780*, then, it will be best to consider his conclusions in light of more general principles that have a bearing on these issues. Let us turn first to the nature of suppression and then consider orders of return.

1. The Nature of Suppression

At the heart of Judge Pratt's opinion is an assumption about suppression: that suppression does not deny a court jurisdiction over an illegally seized *res* but simply denies the government the opportunity to gain an evidentiary benefit from what it has seized. This assumption finds support by analogy with the Supreme Court's illegal arrest cases, for the Court has long held that the fact of an illegal arrest, while depriving the government of the opportunity to make use of

---

[215] *Id.* at 163.
[216] *Id.* at 163-64.
[217] *United States v. $37,780*, 920 F.2d at 163-64.
[218] *Id.*

evidence that is the fruit of an illegal arrest, does not deprive a trial court of jurisdiction over the person illegally arrested.[219] Given this point, we can see that suppression stands, under current doctrine, as an information-depriving mechanism within the courts. Its consequence is to deprive the government of admissible evidence but not to deprive a court of jurisdiction over a specific object, whether a *res* or a body. Given the analogy provided by illegal arrest case law, Pratt was therefore correct in his approach to suppression.[220]

A related point should also be noted here. Although he did not comment on this, it appears that Judge Pratt believed that the X-ray scanning officials did not violate Hernandez's privacy interests on discovering the contents of his attache case. I believe Pratt was also correct on this point—that is, given the facts Pratt reported in his opinion, I think Hernandez can be held to have consented to the X-ray scanning of his attache case and can also be held to have consented to open it when the scanning officials asked him to do so. However, it is important to note the suppression consequences that would follow from a conclusion that Herndandez's privacy interests had in fact been violated. If this had been the case, then Pratt would have had to hold the brief detention for questioning illegal and so would have to hold that the answers Hernandez gave to the X-ray scanning officials were tainted. By contrast, given Pratt's (correct) conclusion that Hernandez's privacy interests were not violated, he was able to treat as untainted the information gained from the questioning and so was able to draw on that information in holding that the government would have been able to satisfy its burden of proof in the forfeiture proceeding.[221]

---

[219] *See* Ker v. Illinois, 119 U.S. 436 (1886).

[220] Judge Pratt advanced a further argument about suppression when he stated that "the [Supreme] Court has suggested that in a civil forfeiture proceeding the exclusionary rule does not apply to the forfeitable property itself." *United States v. $37,780*, 920 F.2d at 163 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1040 (1984)). One might interpret Pratt's statement as advancing the radical claim that even information gained from the illegal seizure of property is not suppressible in a civil forfeiture proceeding. However, in the remainder of *United States v. $37,780*, he drew only on evidence which he claimed had been lawfully obtained.

[221] *Id.* at 164.

2. The Interplay of Suppression and Orders of Return

But while Judge Pratt's approach to suppression was sound, he failed altogether to account for its relationship to orders of return. In fact, Pratt said nothing about returning property aside from noting that Judge Elfvin had issued an order of return. Clearly, more was needed. I will begin by considering the order of return apart from its connection to suppression and then examine how suppression can be intertwined with return.

The order of return is a straightforward remedy when no information is available to justify a seizure. If a seizure of property was unjustified at the time it was made and also cannot be supported afterwards by relevant information, then the remedy courts must employ is straightforward: they must order the prompt return of the property, thereby restoring the condition that prevailed prior to the wrong. Support for this line of reasoning can be found by analogy with fourth amendment liberty interests. In a line of cases that begins with *Gerstein v. Pugh*,[222] the Supreme Court has held that the Fourth Amendment requires a prompt probable cause hearing by a neutral and detached magistrate following arrest—indeed, the Court has specifically held that "prompt" in this instance means that, absent a weekend, holiday or some kind of unusual circumstance, a hearing must be held within forty-eight hours of an arrest.[223] With *Soldal* having recognized that the Fourth Amendment protects property interests independently of its protection of other interests,[224] it is clear that the Fourth Amendment imposes a mandate on the courts to order the return of property the government has no justification in holding.

But what if the government illegally gains a justification for holding property in the course of seizing it—for example, what if the government draws on information gained through a privacy wrong committed prior to a seizure to justify that seizure? As we know, this is not what happened in *United States v. $37,780*, but it will be helpful to think about this point be-

[222] 420 U.S. 103 (1975).
[223] *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991).
[224] Soldal v. Cook County, 113 S. Ct. 538, 544 n.7 (1993).

fore turning to *United States v. $37,780* itself. As it happens, *Weeks v. United States*,[225] the 1914 case generally considered the one that established suppression doctrine, is directly concerned with a sequence of events in which a privacy wrong preceded a seizure. In securing evidence against Weeks, government officials illegally entered his home and examined documents contained in his bureau drawers (thus the privacy wrong). They then seized the documents and held them, anticipating that they would be used against Weeks at trial.[226] Weeks, however, moved prior to trial for the documents' return.[227] Weeks's motion rested on the interplay of suppression and an order of return. In holding that the motion should have been granted, the Supreme Court can be understood to have concluded that the government could not use the information gained from its privacy wrong (the examination of Weeks's documents) to justify its property wrong (the seizure and retention of those documents).[228] The Court can further be understood to have concluded that since the government had no other information to justify retention of the documents, the trial court should have ordered their return to Weeks. Suppression doctrine was in this sense connected with the substantive remedy of return-of-property.[229] Under this analysis, suppression still functions as an information-depriving mechanism; however, its effect is to further a substantive remedy that vindicates rights of possession.

In *United States v. $37,780*, we confront a variation on *Weeks*, one in which a property wrong has occurred (thus establishing a prima facie case for an order of return) but in which the information the government subsequently secures independently of the property wrong provides an after-the-fact justification for the seizure. Judge Pratt simply did not consider how courts should act in a setting such as this. His failure to address this question is disturbing because his opinion seems to allow the government to pursue a seize now/investigate later strategy with respect to all private property. That is, Pratt seems not to have been troubled by the

---

[225] 232 U.S. 383 (1914).
[226] *Id.* at 389.
[227] *Id.* at 393.
[228] *Id.* at 398.
[229] *Id.*

possibility that the government can seize property illegally, hold it for a substantial period of time, and then (provided it is able to produce information about the property independently of its wrong) secure the property's forfeiture. This approach turns the Fourth Amendment on its head. The amendment speaks of a right to be secure in one's house, papers and effects. The seize now/investigate later strategy, by contrast, creates profound insecurity. It defeats the baseline expectation of freedom from arbitrary government interference that is implicit in all fourth amendment jurisprudence.[230]

If Judge Pratt's approach to the case was flawed, how, then, should it have been resolved? The answer, I suggest, hinges on the legality of the government's seizure of Hernandez's cash. If we adopt Pratt's analysis and treat the seizure as illegal, then we would also have to say that the government had no justification for holding his cash and so should have been ordered to return it to him promptly. Indeed, if we were to say that the government's subsequent untainted acquisition of information relevant to an illegal seizure could be used to justify that seizure, we would then be treated to the shabby spectacle of a race to the courthouse—with a claimant seeking implementation of the constitutional mandate of prompt return and the government seeking to delay this while it tried to come up with untainted evidence to justify its initial wrong. The better approach is to state flatly that the government cannot hold property it has illegally seized. On this line of reasoning, Judge Elfvin's approach to the case was essentially correct and so should have been upheld.

But what if the seizure were held to be proper under the Fourth Amendment? Although he toyed with the idea, Judge Pratt was unprepared to hold that the mere fact that someone is found to be in possession of large amounts of cash creates probable cause to believe that the cash was derived from illegal activity. On balance, Pratt was right as far as this specific point is concerned. It may well be that, as a matter of empirical probability, most people who carry large amounts of cash have derived it from illegal activity. It remains the case, though, that some people accumulate their wealth from wholly

---

[230] For further development of this argument, see Heffernan, *supra* note 90, at 1220-28.

legal sources and simply prefer to keep that wealth in cash they can carry around. To reason in terms of probable cause with respect to these wholly innocent owners would make it necessary for them to prove their status in a forfeiture proceeding—a wholly inappropriate burden given their complete innocence as possessors.

However, one other option was open to Judge Pratt in thinking about the initial seizure—the possibility of reasoning not in terms of probable cause but in terms of reasonable suspicion. Under the rule announced in *Terry v. Ohio*,[231] government officials are permitted to detain individuals on reasonable suspicion (a lower standard than probable cause) for brief periods of time while investigating the possibility of wrongdoing.[232] *Terry* is of course concerned with a seizure of the person rather than a seizure of property, but the analogy between liberty and property interests is compelling here. In dealing with airport seizures in which government officials happen upon large amounts of cash, Pratt thus could have held that the fact of such cash justifies brief interference with an individual's possession of it while government officials investigate its provenance.[233] Because Pratt did not consider this approach to *United States v. $37,780*, he did not comment on the length of time it took to question Hernandez, nor did he comment on the speed with which they established that Hernandez's answers to their questions were false. It is possible of course that the investigating officers did not penetrate Hernandez's story within the brief period of time they are allowed under *Terry* to convert reasonable suspicion into probable cause. If they did not, then Judge Elfvin's disposition of the case was correct. Whatever the specifics of *United States v. $37,780*, however, Pratt could have used the case to establish a framework in which government officials, consistently with the

---

[231] 392 U.S. 1 (1968).

[232] *Id.* at 20-22.

[233] In United States v. Place, 462 U.S. 696 (1983), the Court held that a 90-minute airport detention based only on reasonable suspicion of a traveler and his luggage violated the Fourth Amendment. There is a strong analogy between the facts in *Place* and those in *United States v. $37,780*. Thus, in trying to give an operational definition of term "brief interference" when it is applied to the detention of domestic airline travelers, one would have to say that it must be less than 90 minutes.

Fourth Amendment, can seize—first briefly, and then (with probable cause established) for a longer period of time—large amounts of cash they discover in the course of their work.

CONCLUSION

In *United States v. James Daniel Good Real Property*,[234] decided twelve months after *Soldal*, the Supreme Court declared that "[i]ndividual freedom finds tangible expression in property rights."[235] While *Good* was concerned with the Fifth Amendment's Due Process Clause, its general comment on individual freedom captures well the contemporary Court's effort to rehabilitate property as a key category in constitutional law. Viewed in this light, *Olmstead* can be said to embody, for fourth amendment purposes, the early twentieth-century Court's veneration of property as the central constitutional value; *Katz*, the mid-twentieth-century Court's relative indifference to property interests; and *Soldal*, the contemporary Court's cautious rehabilitation of property as a constitutionally protected interest.

In this Article, I have traced the development of the Supreme Court's approach to fourth amendment property claims and have also considered Second Circuit cases in light of the Court's current doctrines. Ultimately, the Court will have to consider questions about the relationship of property to privacy claims, the weight to be assigned property claims, and the relationship between suppression and motions for return of property. My aim here has been to show how urgent these issues have become now that the Court has held property interests are independently protected by the Fourth Amendment.

---

[234] 114 S. Ct. 492 (1993).
[235] *Id.* at 505.