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Katz at Forty: A Sociological Jurisprudence Whose Time Has Come

Jonathan Simon*

The Warren Court was vigorously accused of relying on sociological jurisprudence by enemies of its *Brown v. Board of Education* decision. This charge embodied a highly pejorative view of sociological jurisprudence as a strategy of judicial arbitrariness and social engineering. Furthermore, as many defenders of *Brown* pointed out at the time, it was not accurate. If the Warren Court can be said to have formed a sociological jurisprudence, *Katz v. U.S.* is a much better example. This Article argues that this promising jurisprudence was largely abandoned due to inconsistency on the demand side by the U.S. Supreme Court, and inability by lawyers on the supply side, to deliver the kind of empirically oriented advocacy that *Katz* invited.

I try to reconstruct this jurisprudence, which I term a “jurisprudence of the social,” to distinguish it from the pejorative view articulated by the historical and contemporary enemies of *Brown*. Properly understood, a jurisprudence of the social can help the Fourth Amendment as a whole to avoid judicial arbitrariness, and the danger of instability in constitutional protections which many have accused the *Katz* framework of leading to. Moreover, the rise of empirical legal studies today suggests that this is a jurisprudence even more promising now than in the 1960s.

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Many acute observers have come to believe that the *Katz* doctrine should first be eulogized then buried as a noble effort to increase the protections of the Fourth Amendment for private life under modern social conditions.¹ These critics view the *Katz* doctrine as, at best, an obstacle to modernizing those protections.² This Article argues that *Katz*, in its most promising aspects, was never fully developed by the U.S. Supreme Court, and that there has been no time as promising as the present for revitalizing these features of *Katz* (and with it the reformist potential of the doctrine). To do so, I will recover and reclaim that which, in 1967, was one of *Katz*'s most ambitious and vulnerable claims: to bring constitutional analysis into an engagement with an empirically informed analysis of social life. Often scorned as "sociological jurisprudence,"³ this engagement between constitutional and sociological analysis deserves new consideration, and possibly, a revitalization of what I would prefer to call a "jurisprudence of the social."

I. EMBRACING THE SOCIAL: *KATZ* AND *BROWN*

The charge that the Warren Court was going sociological emerged earlier than *Katz* in the great controversy unleashed by the Court's school segregation decisions, especially the foundational *Brown v. Board of Education I* in 1954.⁴ From its inception, many critics of *Brown*, who dared not attack its ruling on the merits, chose instead to castigate it as an example of sociological jurisprudence, i.e., little more

¹ They include Professor Erik Luna's perceptive article in this Symposium. See Erik Luna, *The Katz Jury*, 41 UC DAVIS L. REV. 839 (2008). Another recent voice questioning the relevance of the *Katz* doctrine (even if not avowedly calling for its reversal) is Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 799, 838 (2004) (stating that we should not expect Fourth Amendment alone to provide adequate protections against invasions of privacy made possible by law enforcement's use of new technologies); see also Peter P. Swire, *Katz is Dead — Long Live Katz*, 102 MICH. L. REV. 904, 905 (suggesting Court rather than Congress should come up with new principles)

² Luna, *supra* note 1.

³ See, e.g., ROBERT A. HEINEMAN, *AUTHORITY AND THE LIBERAL TRADITION: FROM HOBBS TO RORTY* 129-32 (1984) (asserting sociological jurisprudence was unnecessary in *Brown v. Board of Education* in light of availability of judicial precedents); GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* 12-13, 34 (1986) (explaining Warren Court's use of science in constitutional adjudication, and critiquing general popularity of sociological jurisprudence since Justice Oliver Wendell Holmes).

⁴ 347 U.S. 483 (1954).

than sociological reasoning masquerading as constitutional argument.⁵ Even a *Life* magazine article on *Brown* summarized such criticism as suggesting that “its reasoning was based not only law but on sociological considerations.”⁶ While *Brown*’s defenders largely ran away from the decision’s invocations of the social, the Warren Court’s criminal procedure jurisprudence showed a continuing interest by the Court in investing that relationship with doctrinal authority. This interest was particularly evident thirteen years later in *Katz*, wherein the majority looked to the very existence and design of telephone booths to draw the boundaries of the specific privacy right that required protection. Specifically, in *Katz*, the Court offered a reading of the telephone booth comparable to the work of anthropologists and sociologists.⁷

A. *Brown* as “Sociological Jurisprudence”

Earlier in the 20th century, the term “sociological jurisprudence” signified optimism about the ability of social science to help modernize American law.⁸ By the time it was leveled at the unanimous decision of the Supreme Court, though, criticism of sociological jurisprudence sounded several specific grievances against what was seen as an abandonment of a legally purer form of judicial reasoning. These grievances included criticisms of sociological jurisprudence’s inclusion of empirical sources of knowledge, its reliance on speculative theories of the social sciences, and its apparent readiness to engage in social engineering.⁹ Calling *Brown*’s

⁵ Edmond Cahn, *Jurisprudence*, 1954 ANN. SURV. AM. L. 809, 816 (“[I]n the months since the utterance of the *Brown* and *Bolling* decisions, the impression has grown that the outcome . . . was caused by the testimony and opinion of the scientists . . .”).

⁶ *The Warren Court*, LIFE, July 1, 1957, at 33, quoted in Louis H. Pollak, *The Supreme Court Under Fire*, 6 J. PUB. L. 428, 436 (1957).

⁷ *Katz v. United States*, 389 U.S. 347, 352 (1967). *Katz* never drew on social science scholarship, but its style has resonance with some of the leading works of the same period. See, e.g., PIERRE BOURDIEU, AN OUTLINE OF A THEORY OF PRACTICE (1977) (showing how built environment links agency with structure, providing source of shared meanings and possibility of change); ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1971) (describing way institutions of confinement use techniques of organizing people, space, and procedures to accomplish quite different goals, ranging from punishing criminals to projecting military power).

⁸ N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN, SEARCHING FOR AN AMERICAN JURISPRUDENCE 278 (1997).

⁹ See *infra* notes 10-20 and accompanying text.

jurisprudence “sociological” provided critics with an economical way to condense these several related but distinct meanings.

The *Brown* opinion was much criticized for relying on empirical studies, including psychologist Kenneth Clark’s doll studies,¹⁰ the rigor and reliability of which was questionable.¹¹ Such critics ignored the fact that the “separate but equal” standard overturned in *Brown* was itself an invitation to empirical evaluation; how else could courts discern whether separate schools were, in fact, equal? While *Brown* was no more decided on the basis of empirical studies in the record than are most appellate court decisions that depend on the factual findings made by the trial courts, it showcased the rising ambitions of post-World War II social sciences to shape public policy as much as physics and chemistry had since the war.

Brown was also criticized for ignoring the traditional sources of constitutional interpretation in favor of sociological speculation about the consequences of segregated education.¹² The most famous example of this was the late Professor Herbert Wechsler’s article, *Toward Neutral Principals of Constitutional Law*, in the *Harvard Law Review*.¹³ Wechsler did not reject the outcome in *Brown*, but he accused the Court of failing to produce reasons for this outcome of a sufficiently general nature, instead relying excessively on the social facts of the case.¹⁴

¹⁰ In the 1939 experiment conducted by Kenneth Clark and Mamie Clark, preschool-aged African American children offered a choice of black or white dolls preferred the white dolls overall. The Clarks interpreted that to be evidence of school segregation causing damage to self-esteem. See Kenneth Clark & Mamie Clark, *The Development of Consciousness of Self and the Emergence of Racial Identification in Negro Preschool Children*, 10 J. SOC. PSYCHOL. 591, 596-98 (1939). The Clarks’ study was among the scientific evidence cited by the *Brown* Court in support of the finding that segregated education damaged children in the plaintiff class. See Edgar G. Epps, *Impact of School Desegregation on Aspirations, Self-Concepts and Other Aspects of Personality*, in THE COURTS, SOCIAL SCIENCE, AND SCHOOL DESEGREGATION 303 (Betsy Levin & Willis D. Hawley eds., 1977).

¹¹ Cahn, *supra* note 5, at 81 (noting emerging myth that *Brown* was decided on social science evidence and rejecting it).

¹² Pollak, *supra* note 6, at 435-36.

¹³ Herbert Wechsler, *Toward Neutral Principals of Constitutional Law*, 73 HARV. L. REV. 1, 35 (1959).

¹⁴ *Id.* at 15. *Brown*’s defenders did not so much as defend the use of social science as they articulated the kind of neutral principals that Wechsler called for. See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE. L.J. 421, 421 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 1-2 (1959).

Later, *Brown* was criticized for opening the door for courts to engage in “social engineering.”¹⁵ In this sense, “the social” was meant to invoke technologies of power that some considered illegitimate because they went beyond remedying specific harms to specific parties and sought instead to alter the operation of whole institutions, affecting the mass public.¹⁶

Criticism of *Brown* as too social, or too sociological, seems in retrospect to have done little to impede the case as either a legal or a cultural matter. For the social sciences, the 1950s were, in fact, a period of unprecedented ascendance in both popular acceptance (e.g., a sociologist on the cover of *Time* magazine¹⁷) and as a form of governmental knowledge.¹⁸ There was an inherent irony in this context. During its takeoff on American university campuses during the early 1900s, sociology was sometimes associated with a strong defense of the racist status quo in America on the grounds that positive law could not be expected to alter evolved social norms like segregation.¹⁹ By the 1950s, however, sociology was already coming to be associated with liberal positions on the race question.²⁰

¹⁵ A. James Gregor, *The Law, Social Science, and School Segregation: An Assessment*, 14 W. RES. L. REV. 621, 630 (1963). The icon of social engineering was invoked just this last term by Justice Thomas in his concurrence to the race conscious school assignment policy cases, noting tersely in a footnote, “we are not social engineers.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2779 n.14 (2007) (Thomas, J., concurring).

¹⁶ To its defenders, this new approach to public law was an essential tool for courts to enforce constitutional guarantees in conditions of modern society. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282, 1284, 1304, 1307-09 (1976).

¹⁷ David Riesman, whose iconic study of 1950s society, *The Lonely Crowd*, became a national bestseller, appeared on the cover of *Time Magazine*. TIME, Sept. 27, 1954.

¹⁸ Jonathan Simon, *Law After Society*, 24 LAW & SOC. INQUIRY 143, 144, 150 (1999).

¹⁹ See, e.g., WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES AND MORALS* 75-18 (1906) (asserting priority of informal norms over positive law); see also Steve J. Shone, *Cultural Relativism and the Savage: The Alleged Inconsistency of William Graham Sumner*, 63 AM. J. ECON. & SOC. 697, 697-98 (2004) (noting that Sumner appears contradictory to contemporary political categories because he embraced ethnocentrism and cultural relativism, while simultaneously accepting Social Darwinism). Sumner was politically conservative, a Social Darwinist, and in some ways a Libertarian. *Id.* at 697.

²⁰ See JAMES B. MCKEE, *SOCIOLOGY AND THE RACE PROBLEM: THE FAILURE OF A PERSPECTIVE* 257 (1993) (arguing that 1950s saw sociology shift from conservative to liberal reform approach to race).

But if criticisms of *Brown* for sins of sociological jurisprudence are unpersuasive, there is an important respect in which the Warren Court can be rightly regarded as having charted new ground in articulating constitutional norms in explicit relation to “the social” as a source of legal knowledge and meaning.²¹ Here, “the social” does not mean sociology per se, but the domain of relations, norms, and institutions which have indeed been the focus of sociology (and other “social” sciences) since the late nineteenth century.²² “The social” in this sense has also been a focus of governmental and private sector strategies (this was the original domain of philanthropy) since at least that time.²³

U.S. courts, especially the Supreme Court during the first third of the twentieth century, often seemed to be the sector of government most inclined to ignore or even deny the importance of the social, a factor that surely contributed to the perception of the courts as solidly conservative and pro-business in the era.²⁴ The jurisprudence supporting judicial hostility toward acknowledging social relations, norms, and institutions, came under increasing assault from the broad family of academic legal writing under the banner of “legal realism.”²⁵ While individual Justices since Holmes and Brandeis had voiced this criticism and invoked the social in various ways in their opinions (occasionally for the majority), the majority that emerged during the New Deal fight never articulated a doctrinal expression of the social to accompany their overturning of formalist precedents.²⁶ The Warren

²¹ Charles L. Black, Jr., *The Segregation Decisions*, 69 YALE L.J. 421, 427 (1960) (“The issue is seen in terms of what might be called the metaphysics of sociology: ‘Must Segregation Amount to Discrimination?’ That is an interesting question; someday the methods of sociology may be adequate to answering it. But it is not our question. Our question is whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid.”).

²² NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 119-20 (1999).

²³ JACQUES DONZELOT, THE POLICING OF FAMILIES 88-89 (1979).

²⁴ This perception of the Supreme Court as monolithically hostile to modernizing attempts to use law to manage the social has been challenged by recent historians. The most infamous example that lent its name to the whole era was *Lochner v. New York*, 198 U.S. 45 (1905) (holding that New York law regulating bakery employee hours violated due process).

²⁵ See HULL, POUND & LLEWELLYN, *supra* note 8, at 35.

²⁶ The closest must be *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

Court, beginning with *Brown*, included in many of its important decisions broad invitations to the bar and bench to incorporate knowledge about social relations, norms, and institutions (collectively, “the social”) into the analysis of constitutional rights.²⁷

While the able defenders of *Brown* largely ran away from the charge of sociological jurisprudence, I intend here to defend it, rephrasing it slightly differently (to loosen the connection to legal scholar Roscoe Pound and early twentieth century realists) as a “jurisprudence of the social.” This title fits important aspects of the Warren Court’s constitutional jurisprudence, including *Brown*. The Court cited the doll studies and other empirical data in *Brown*²⁸ to support factual findings about the damage to plaintiffs, rather than to interpret the law of the Fourteenth Amendment. But the Court based its recognition that education is vital to determining a person’s standing in the community on its analysis of modern social relations, norms, and values, not on an a priori discussion of education as a human activity in the abstract.²⁹ Here, constitutional and other legal authority are not derived from sociological claims, but rather as applied to individual cases in an analysis informed by knowledge of “the social.”

But from this perspective, *Brown* is not the exemplary case after all. In general, the Warren Court’s criminal procedure decisions stand out as among the best examples of the Court’s effort to articulate the relationship among legal subjects, rights, and social formations. Nowhere is this jurisprudence of the social better exemplified than in *Katz v. United States*,³⁰ where the Court tied one of the gateway questions of Fourth Amendment analysis, i.e., whether government surveillance of some particular sort has intruded into an area or activity protected by the Fourth Amendment’s requirement that “searches” be reasonable,³¹ to the question of what “society” is prepared to recognize as reasonable.

²⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (analyzing Fifth Amendment rights in context of police interrogation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (analyzing Sixth Amendment rights in context of adversary system of criminal justice).

²⁸ See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 n.11 (1954).

²⁹ *Id.*

³⁰ 389 U.S. 347 (1967).

³¹ This may mean that the police have to obtain a warrant, or at least probable cause that a crime has been or is being committed, and that related evidence is likely to be found (there are many exceptions to the first and many to the latter requirement, however).

For reasons well articulated by other participants in this Symposium,³² *Katz* has been increasingly criticized as an unreliable instrument for defining the all-important concept of a “search” under the Fourth Amendment.³³ In ways that now resonate with some of the “sociological jurisprudence” criticism of *Brown*, *Katz*’s socially reasonable expectation of privacy analysis is seen as tying constitutional meaning to the fickle and superficial domain of social significance, thus opening the door to unlimited judicial imposition of subjective preferences.³⁴ Unlike criticism against *Brown*, however, this criticism is not generally inapt to the case and its progeny. In a long list of decisions excluding police action from being analyzed as searches, the Warren Court, and even more so its successors, has narrowed the scope of the Fourth Amendment.³⁵ This has led some to suggest that the *Katz* analysis be replaced altogether, perhaps by returning to a revitalized conception of property rights.³⁶

I suggest that by reading *Katz* as a strong endorsement of a jurisprudence oriented toward knowledge of social relations, norms, and institutions, we can recover an essential component of that decision in both Justice Potter Stewart’s opinion for the majority and the celebrated concurrence by Justice John Marshall Harlan, which was lost almost from the beginning. A stronger embrace of the role of social knowledge in *Katz* offers a solution to some major criticisms of the “reasonable expectations of privacy test,” including that it offers little substantial constraint on judicial preference, and that it is subject to rapid downward shifts in protection during periods of public acceptance of government intrusion (whether due to fear, cynicism,

³² See generally Luna, *supra* note 1 (suggesting that *Katz* be replaced by jury judgments as to reasonableness).

³³ See AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 40 (1997); see also Kerr, *supra* note 1; Swire, *supra* note 1; Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 *STAN. L. REV.* 119, 121 (2002).

³⁴ See Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 *MICH. L. REV.* 154, 154-56 (1977).

³⁵ See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988) (holding that examination of garbage in plastic garbage bags taken from suspect’s curtilage is not search); *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that aerial surveillance by fixed wing aircraft is not search); *Oliver v. United States*, 466 U.S. 170 (1984) (holding that aerial surveillance by fixed wing aircraft is not search); *United States v. White*, 401 U.S. 745 (1971) (holding that undercover agent with microphone infiltrated among suspects is not search).

³⁶ See Orin Kerr, *Searches and Seizures in a Digital World*, 119 *HARV. L. REV.* 531, 576-84 (2005).

intimidation, or all of the above).³⁷ Indeed, what I term a “jurisprudence of the social” may also provide a more robust source of Fourth Amendment protection during such periods like the present “War on Terror” than either the Court’s current version of *Katz*³⁸ or a return to a property-based regime.³⁹ This is especially true when our already decades-old war on crime is being expanded and exceeded by a “War on Terror.”⁴⁰ *Katz* went beyond previous decisions by confronting the degree to which “the social” should enter into the consideration of the specific boundary of constitutional protections. In doing so, the *Katz* majority demonstrated confidence in the ability of courts, and by implication lawyers, to imagine the social significance of the key aspects of a challenged police practice, and where available, to utilize evidence of the social meaning, applicable norms, and institutional roles of specific privacy rights in contemporary society. This confidence turned out to be misplaced, though not necessarily mistaken.

Despite significant inroads into legal education at a few elite law schools, most lawyers and judges in the remainder of the twentieth century had, at best, an undergraduate knowledge of social science methodologies or findings.⁴¹ Moreover, the rising status of the social sciences as sources of popular and state expertise peaked in the years just after *Katz*, then diminished in the 1980s and 1990s as more conservative national governments emphasized individual behavior over social dynamics as the key to governing, and much of the popular media followed.⁴² There are reasons to believe that both of these conditions are changing today. Unlike many other aspects of 1967 perhaps best left as history, *Katz* is a piece of that tumultuous year

³⁷ See Colb, *supra* note 33, at 121, 188-89.

³⁸ See generally *Kyllo v. United States*, 533 U.S. 27 (2001) (reaffirming significantly *Katz v. United States*, 389 U.S. 347 (1967)).

³⁹ As suggested by Professor Erik Luna in this issue. See Luna, *supra* note 1.

⁴⁰ See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 259-83 (2007) (arguing that methods, metaphors, and mentalities of war on crime now shape war on terror).

⁴¹ Courses in social science methodology have always been available on university campuses to enterprising students. Since the 1970s, many law schools have also employed teachers who provide courses in basic empirical research literacy to law students. To my knowledge, however, no U.S. law school makes empirical research skills a required course for the Juris Doctorate.

⁴² See Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC'Y REV. 409, 414 (1998) (noting social science generally, and law and social science in particular, declined in relative prestige starting in 1980s).

whose time may have finally come. Academic law is embracing empirical studies far more broadly than in the past, and law faculties increasingly have the capacity to train lawyers in social science methodology, thereby bringing the relevant findings of research social science into the analysis of legal doctrines.⁴³ There is also at least modest evidence of a revival of government interest in a broader array of social science knowledge, compared to the highly theoretical law and economics that lie behind the dominant social policies of the 1980s and 1990s.⁴⁴

B. Katz and the Architecture of Privacy

The place to start is with the Court's analysis in *Katz* and its celebrated but underappreciated discussion of the telephone booth in which Mr. Katz made his fateful call. The telephone *booth*, rather than simply the fact of the telephone *call*, documented an expectation of privacy, one embedded in the relatively durable objectivity of architecture and design.⁴⁵ It is this simple but revealing step into

⁴³ We in the UC system can take some pride in the fact that UC law faculties went interdisciplinary quite early. Professor Floyd Feeney came to the UC Davis School of Law faculty in 1971 with an extensive background in empirical research on the criminal justice system. At UC Berkeley, the objective of training legal scholars in social science was fully elaborated into the Jurisprudence and Social Policy program, which awards academic Ph.D.s within the faculty of law.

⁴⁴ This is especially true at the state level where decades of tough on crime policies designed by voting consultants are beginning to be challenged by demands for evidence-based policies. For an analysis of how little social science expertise was valued in criminal justice policy as recently as the 1990s, see FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 13-14 (2001) (noting lack of public belief in importance of social science expertise); Alan Maynard, *Time to Be 'Confused' by Facts?*, 97 ADDICTION 654, 655 (describing war on drug policies in United States and United Kingdom as "evidence free"). In California there has been increasing evidence of a turn back toward greater ties between state penal policies and academic research. Cal. Dep't of Corr. & Rehab., *California to Fund Prison Research Center at UC Irvine*, STAFF NEWS, Aug. 8, 2005, at 2, 8, http://www.cdcr.ca.gov/About_CDRCR/Staff_News/sn20050808.pdf; Cal. Dep't of Corr. & Rehab., *Expert Panel on Corrections Reform Offers California a Roadmap for Reducing Recidivism and Overcrowding*, <http://www.cdcr.ca.gov/News/ExpertPanel.html> (last visited Jan. 3, 2008). There has been less evidence of interest in social science based policies at the federal level. Shortly before the 2004 election, the Bush Administration was described as disdaining the "reality-based community." See Ron Suskind, *Faith, Certainty and the Presidency of George W. Bush*, N.Y. TIMES MAG., Oct. 17, 2004, at 51, available at <http://www.nytimes.com/2004/10/17/magazine/17BUSH.html>.

⁴⁵ My colleague David Sklansky criticizes the same tendency in Fourth Amendment scholarship, including his own, to ignore, until now, the phone booth in

social analysis that evidences the Court's confidence that it can provide an objective basis for delimiting Fourth Amendment protected areas that goes beyond property law.

Not that architecture is the only objective material for interpreting social significance. The social is crisscrossed by norms, rules, and institutions that give objective presence to the complex web of intersubjective understandings among people socialized to be together in a common framework of equipment, functions, and possibilities. Social analysis can proceed on a wide variety of materials ranging from folklore to observed behavior. Naturally positive law itself (including the property law) is one of the strongest sources of social recognition of an expectation of privacy.⁴⁶ The appeal of architecture, and the built or manufactured environment generally, includes the fact that it is one of the mostly likely forms of social "data" to find its way by happenstance into the trial record and thus be susceptible to direct interpretation by judges unaided by lawyers skilled in developing empirical evidence of relevance to the practices in question.⁴⁷

By accepting *Katz's* invitation to explore the context of police interventions with the aim of discovering the real conditions under which state power is exercised, lawyers and courts can accomplish the real work of constitutional protection required by the Fourth Amendment. In a now-classic exposition of the Warren Court's Fourth Amendment jurisprudence written at the peak of that Court's influence, Professor Anthony Amsterdam described the task of courts as one of evaluating police practices according to whether the specific police conduct, if left unregulated, would leave "the amount of privacy and freedom remaining open to the citizens . . . diminished to a compass inconsistent with the aims of a free and open society."⁴⁸ Law,

favor of the phone call. See David A. Sklansky, "One Train May Hide Another": *Katz*, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 UC DAVIS L. REV. 875 (2008).

⁴⁶ Law as a primary source for revealing underlying regularities in values and sentiments of a population was central to the work of Emile Durkheim, one of the founders of scientific sociology. See generally EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., Free Press 1997) (describing how social order is maintained in societies and transition from "primitive" societies to advanced industrial societies).

⁴⁷ I base this assertion on the fact that police reports often include some details of the place in which searches or seizures took place and that it is reasonably easy for a lawyer to further investigate these circumstances without applying any specialized methodologies.

⁴⁸ Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 357-58 (1974). This remarkable article predicted most of the faults of post-*Katz* doctrinal development while recognizing the potential of *Katz* analysis to extend

naturally, has always required the input of large qualities of social knowledge in the sense of cultural assumptions (common sense if you will).⁴⁹ The difference about the era the Warren Court seemed to be inaugurating was that this knowledge was to be made an explicit problem of and for jurisprudence. The Court's promise to look beyond common sense assumptions about the social context of rights required the assistance of lawyers capable of drawing on the social sciences, where applicable, but most importantly, a willingness to engage in reasoning about the consequences for social relations, norms, and institutions of challenged police practices.

As it had with defense lawyers in *Gideon v. Wainwright*,⁵⁰ the Court seemed both to presume and evoke modes of lawyering not yet in existence, especially with respect to lawyers willing to represent the indigent and lawyers with social science literacy. More fatefully, Justice Harlan's widely adopted concurrence simultaneously recognized and misconstrued the significance of Justice Stewart's analysis. In describing the crucial question about a contested expectation of privacy as whether it was one "society was prepared to recognize,"⁵¹ Justice Harlan named the social clearly and expressed its critical role in defining the boundary of rights. But in crafting a more self-referential legal test, Justice Harlan offered a picture of the social as little more than individual subjective expectations of privacy somehow aggregated into a leviathan-like collective whole. Justice Harlan's formula succeeded in reducing *Katz* to a readily learnable "hornbook" rule, but in doing so, it elided the genius of Justice Stewart's phone booth analysis. While public opinion is susceptible to the Orwellian moves that critics of *Katz* have imagined, architecture provides a slower changing and more robust reflection of the social's significance in analyzing legal doctrine.⁵²

By emphasizing subjective feelings and belittling spatial analysis, Justice Harlan followed the dominant emphasis of American social

protections of the Fourth Amendment. *See id.* at 384.

⁴⁹ Rarely, but occasionally this has even been acknowledged. *See, e.g.,* *McQuirter v. State*, 63 So. 2d 388 (Ala. Ct. App. 1953) (holding that jury could consider racial backgrounds of both alleged defendant and alleged victim in determining whether evidence proved intent to commit rape in case of attempted assault with intent to rape).

⁵⁰ 372 U.S. 335, 342 (1963) (establishing right to counsel in felony cases).

⁵¹ *Katz v. United States*, 389 U.S. 347, 361 (1967).

⁵² In the related context of crime control methods, Professor Neal Katyal has argued that lawyers and government officials should give more attention to architecture in thinking about crime control. *See* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1042 (2002) (noting that architecture offers alternative to legal rules as means of achieving crime control objectives).

science in the 1960s, with its heavy emphasis on public opinion research, and its near blindness about spatial relations.⁵³ Contemporary social science, in contrast, is far more attuned to the spatial, which provides an additional reason we can view the present as a particularly propitious moment to revitalize *Katz*.⁵⁴

II. RECOVERING THE JURISPRUDENCE OF THE SOCIAL IN *KATZ*

A number of critical points have been laid up against the *Katz* test in its forty-year career. In rough order of importance, the charges laid against *Katz* are twofold, both opening from its new test for Fourth Amendment coverage. First, the doctrine failed to provide substantive guidance as to which expectations of privacy are reasonable,⁵⁵ and thus is an invitation to judicial “self-indulgence” in declaring what society is in fact prepared to recognize as reasonable.⁵⁶ Second, by replacing solid, albeit narrow, constitutional standards (property rights) with “a broad, but empty, normative concept,”⁵⁷ the *Katz* Court created the risk that sustained periods of aggressive crime control in the name of a war on drugs (or more recently an age of terrorism) can provide courts with an easy escape from enforcing the Fourth Amendment.⁵⁸

Here I argue that Justice Harlan’s influential concurrence in *Katz* introduced weaknesses and exacerbated the tendency of the Burger and Rehnquist Courts to abandon any serious effort to examine social

⁵³ SIDNEY VERBA, KAY L. SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 24 (1995) (describing contemporary social science as less interested in particular places and people than in abstractions and variables).

⁵⁴ For examples of works of recent social science that emphasize spatial analysis, see DAVID HARVEY, *SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY* (2001); SHERENE H. RAZACK, *RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY* (2002); SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2d ed. 2001).

⁵⁵ Katyal, *supra* note 52, at 1042; Carole S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2495 (1996) (“It was the *Katz* Court that came up with the ‘reasonable expectation of privacy’ rubric . . . without giving any guidance. . .”).

⁵⁶ Richard Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 187 (noting that since *Katz*, Court has been inconsistent in protecting privacy). Justice Scalia has also articulated this criticism quite pointedly. See *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

⁵⁷ Steiker, *supra* note 55, at 2496.

⁵⁸ Silas Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 271 (1984).

sources in understanding the scope of the Fourth Amendment — a task which, surprisingly, the Court has returned to more recently.⁵⁹

A. *Katz and the Social*

Katz redefined the doctrinal regime for determining the relevance of the Fourth Amendment. The rule in *Katz* replaced that of *Olmstead v. United States*,⁶⁰ which was one of spatiality and physical dimension, exemplified by trespass (invasion of private property), or seizure of material objects. In the new regime self-consciously defined by *Katz*, this spatial priority was explicitly trumped by a new focus on people. Justice Stewart dismissed *Olmstead*'s property rule as substantially eroded by subsequent decisions.

Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people — and not simply “areas” — against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.⁶¹

In framing a new standard, Justice Stewart's majority opinion specifically juxtaposed “people” with “places” (or “areas”). Although he never names it as such, and this is no doubt one of the reasons that his majority opinion (much like *Roe v. Wade*⁶²) has a conclusory quality that makes it seem forced and unsatisfying, it is clear that Justice Stewart has the social in mind by “people.” Justice Stewart did not intend to replace the spatial extension of property boundaries with an analysis limited to the physical aspects of people. It is the social world of activity, relations, norms, and institutions that his analysis looked to. This follows directly from his analysis of the phone booth. The existence of the specialized equipment reveals the complex web of meaning and exchange that actually goes on during calls placed from telephone booths.

⁵⁹ See *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (discussing complexities of applying *Katz*).

⁶⁰ 277 U.S. 438, 466 (1928).

⁶¹ *Katz v. United States*, 389 U.S. 347, 384 (1967).

⁶² 410 U.S. 113, 153 (1973) (holding that right to privacy within Fourteenth Amendment includes woman's right to abort her pregnancy).

B. *Telephone Booths and the Structure of Social Meaning*

Despite this tendency to denigrate the spatial, the telephone booth itself, the main star of Justice Stewart's opinion, is a space, and it tells us the most about the centrality of the social to the Court's vision. The Court describes the (at least then) familiar sense of going into a telephone booth as a shared social experience of ironically private communication with others.⁶³ The Court recognized that sociability requires privacy and choice about who hears a conversation.⁶⁴ Our society (at least in 1967),⁶⁵ and thus our Constitution, protects us against having personal communications "broadcast to the world," and the lowly telephone booth signals that in its very design.⁶⁶ Rejecting the government's reading of the telephone booth's design, Justice Stewart sees in its transparent but solid walls a subtle but vital distinction between sight and sound:

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. *One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.* To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.⁶⁷

⁶³ *Katz*, 389 U.S. at 352.

⁶⁴ *Id.* ("To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.")

⁶⁵ Heavy use of the Internet, including emails and social networking sites, might suggest that privacy norms implicit in the 1960s social order have undergone considerable change. See Susan B. Barnes, *A Privacy Paradox: Social Networking in the United States*, FIRSTMONDAY, Sept. 2006, http://www.firstmonday.org/issues/issue11_9/barnes/index.html (noting paradox that private life is being digitalized through social networking sites in ways that make privacy impossible).

⁶⁶ *Katz*, 389 U.S. at 352.

⁶⁷ *Id.* (emphasis added).

Notice that it is the telephone booth itself that allows the Court to engage in a rather sophisticated discussion of what philosophers and anthropologists might describe as the “phenomenology of perception.”⁶⁸ The telephone booth does this because it is an integral part of what philosopher Martin Heidegger called an “equipmental totality,” i.e., a network of things and activities designed to accomplish some routine human activity. The judge as constitutional anthropologist can uncover the legitimate expectations of privacy by pulling the telephone booth out of its ordinary invisible utility and deliberately reading through it to its underlying network and social anchors.

This kind of analysis of behavior in socially structured spaces was carried to a high level of scientific objectivity by the late anthropologist Pierre Bourdieu.⁶⁹ Bourdieu looked at a built environment as a “habitus” or “a structuring structure, which organizes practices and the perception of practices, [and] also a structured structure . . .”⁷⁰ Structures, for Bourdieu, literally structure the active agency of subjects because they embed ways of knowing and acting on the world that a subject who has grown up in those structures knows intuitively how to read and respond to.⁷¹ Such structures are also “durable,” resisting momentary fluctuations in public passions, as suggested by Bourdieu’s description of the habitus as a “durable, transposable disposition.”⁷²

As the included series of photos of telephone booths document,⁷³ the telephone booth is one of the more variable and creatively designed pieces of the everyday environment. Thus, the irony is that

⁶⁸ MAURICE MERLAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* 57 (Colin Smith trans., Routledge 2002) (1945) (arguing that consciousness and perception are shaped by location of human subjects in projects with others that connect us to past, present, and future).

⁶⁹ Hubert Dreyfus & Paul Rabinow, *Can There Be a Science of Existential Structure and Social Meaning?*, in *BOURDIEU: CRITICAL PERSPECTIVES* 38 (Craig J. Calhoun, Edward LiPuma & Moishe Postone eds., 1993) (describing Pierre Bourdieu’s “phenomenological ontology” with its concept of “habitus” as most sophisticated effort to analyze human social practices and behavior).

⁷⁰ PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 170 (Richard Nice trans., 1984).

⁷¹ See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 72 (1977); Neil Leach, *Belonging: Towards a Theory of Identification with Space*, in *HABITUS: A SENSE OF PLACE* 282 (Jean Hillier & Emma Rooksby eds., 2002) (describing Bourdieu’s contribution as treating architecture as form of knowledge about society).

⁷² BOURDIEU, *supra* note 71, at vii.

⁷³ Wikimedia Commons, Telephone Booth, http://commons.wikimedia.org/wiki/Telephone_booth (last visited Jan. 4, 2008).

while a telephone booth is familiar enough to use almost everywhere in the world, it also typically has a distinctive national design, and in some cases, like the old, red British booths, becomes an icon for the national culture.⁷⁴ Telephone booths are not singular edifices but belong to networks of activities and functions that shape their location and design. As Justice Stewart notes, the acoustic protections offered by the design of the telephone booth (even in the reduced form they often take) are integral to their social function.⁷⁵

As the photograph below from Brazil demonstrates, telephone booths are also anchored in bodies of norms that shape how people behave in and around them. There is probably no law in most places that regulates how far away a person should stand while waiting for a telephone booth in use in order to indicate one's priority while not bothering the current user, but as the photo shows, experienced members of a culture recognize and accept such norms as an integral part of the functionality of telephone booths. It is these norms, as well as the design features that articulate them, that provide an objective basis for judicial analysis of reasonable privacy expectations.⁷⁶

Justice Harlan's concurrence,⁷⁷ which has greatly influenced the subsequent interpretation of *Katz*, acknowledges explicitly the continuing relevance of the spatial.

As the Court's opinion states, "the Fourth Amendment protects people, not places."⁷⁸ The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires a reference to a "place."⁷⁹

In formulating his answer to the protection afforded by place, Justice Harlan once again buried the analytic power of the spatial in favor of an analysis of mental states, both individual and aggregate.

My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a

⁷⁴ The Telephone Box, <http://heritage.elettra.co.uk/phonebox/> (last visited Jan. 4, 2008); see also The Phone Box – Icons of England, <http://www.icons.org.uk/theicons/collection/the-phone-box> (last visited Jan. 4, 2008); Red Telephone Box, http://en.wikipedia.org/wiki/Red_telephone_box (last visited Jan. 4, 2008).

⁷⁵ *Katz v. United States*, 389 U.S. 347, 357 (1967).

⁷⁶ See Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 363 (1997) (arguing that social norms form effective medium through which criminal law can seek to produce social meaning).

⁷⁷ *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

⁷⁸ *Id.* at 351 (majority opinion).

⁷⁹ *Id.* at 361.

person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as “reasonable.”⁸⁰

Justice Harlan’s twofold requirement of protection of a person in a place included both the subjective expectation of privacy and “the expectation . . . that society is prepared to recognize as ‘reasonable.’”⁸¹ This formula, well-loved by treatise writers and criminal procedure professors, makes the analytic importance of “society” as a reference point for constitutional analysis even more explicit than it is in Justice Stewart’s majority opinion, while once again losing sight of the importance of space. The only hint of the spatial and actual social practices is the single word “exhibit” that Justice Harlan used in describing what the individual must do to have a subjective expectation of privacy to receive protection.

Justice Harlan’s prestige with subsequent commentators has probably helped determine the predominant vision of the *Katz* test as a balancing test between the individual subject’s expectations of privacy and that which “society is prepared to accept as ‘reasonable.’”⁸² Stewart’s lush analysis of the telephone booth, in contrast, lacked the easy translation to a rule of law that Justice Harlan provided. Justice Harlan’s formula was one well-fitted to the needs of treatise writers and law professors as an easily remembered test. It was also one that turned the relevance of the social back onto the judicial process. Instead of an invitation to closely examine the practices, norms, and social relations in which police investigations are intruding, Justice Harlan turned the *Katz* test into an invitation for courts to argue about reasonableness and to balance the needs of privacy against society’s interest in order enforcement.

Justice Harlan’s formula came with a heavy thumb on the scale of law enforcement. He might have said that the private expectation must be one “expectation . . . that society recognizes.”⁸³ But his more elaborate formulation adds two layers, “prepared” and “reasonable” (the latter which Justice Harlan put in quotes in the opinion).⁸⁴ The former term speaks to a kind of conflation of the State and society, and a conservative sense that liberties are those granted by the sovereign.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ This is a variation on what Justice Harlan actually wrote in his concurrence. *Cf. id.*

⁸⁴ *Id.*

Justice Harlan seems to imagine the social as a kind of Hobbesian sovereign reluctantly parting with a sliver of control. But as Justice Stewart's telephone booth analysis showed, constitutional privacy protection was to be found not simply in the positive law of the State, but also in the structures of the built environment shaped by the collective actions of countless individuals.⁸⁵

In introducing "reasonable" as yet another reference term between the social and the recognition of privacy, Justice Harlan reinforced a sense of traditional judicial analysis. Judges are used to addressing questions of reasonableness in criminal procedure and other areas of law. Law has long presumed the ability of judges (and juries) to have direct access to knowledge of what is reasonable. While such a presumption can be defended as either necessary to the functioning of courts, or as appropriate to a highly uniform culture where social norms are well understood by all, neither condition applied to the United States in 1960s, and much of the Warren Court's innovation seemed precisely to struggle with the limits of common knowledge available to judges in criminal cases.⁸⁶

With these two carefully chosen words, the great judicial craftsman placed a potentially strong conservative brake on the future application of the *Katz* test: one that favored law enforcement over social reform.⁸⁷ Justice Harlan's formula raised but did not fully answer the question of what kind of knowledge would be useful in discerning just what grants of privacy society is prepared to recognize as reasonable. In some cases, perhaps like *Katz* itself, the facts, like the telephone booth (or doors on public restroom stalls⁸⁸ or dividers sometimes provided between the sections of tables in the public library), might speak for themselves about the existence of an

⁸⁵ In this regard, *Katz* anticipated the turn to the private sector associated with neoliberalism. See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 76-78 (2006) (linking neoliberalism to shift from state power to combination of state and civil society).

⁸⁶ A famous example is *Miranda v. Arizona*, 384 U.S. 436, 445 (1966) (noting difficulty of courts in obtaining reliable information on what actually occurs in police interrogation rooms).

⁸⁷ Justice Harlan offered a way for more conservative judges to protect important public order priorities without having to deny the significance of the social. More conservative justices might reject social analysis from the Fourth Amendment altogether, but not out of any alternative to balancing the liberal tendencies of the test. Indeed, Justice Harlan himself later explicitly suggested balancing social analysis with "the utility of the conduct as a technique of law enforcement." *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

⁸⁸ For the symbolic and legal connections between telephone booths and toilets, see Sklansky, *supra* note 45.

expectation that “society recognizes.” But in other cases where the context of the police action was less familiar, it might take more searching exploration by counsel and judges to test the bounds of societal recognition.

C. *Losing Our Place: The Diminished Sense of the Spatial in Post-War Social Analysis and Policy*

Following Justice Harlan, and reducing the significance of Justice Stewart’s opinion, most criminal procedure scholars have argued that it is the telephone call, rather than the booth, that is the socially relevant aspect, and thus properly protected under *Katz*.⁸⁹ This emphasis on social relations gets the sociological jurisprudence of *Katz* partially right by recognizing its embrace of relations, norms, and institutions as elements of constitutional analysis, but misses the importance of the telephone booth as evidence of the privacy expectations built into that social relationship of the call.

Things like telephone booths are inevitably the result of social relations and the functions they give rise to (i.e., the need for communication with family members or colleagues as real time events alter future plans).⁹⁰ This perspective emphasizes the function, in the facts of *Katz*, of the one-to-one personal communication over distance. This strategy of emphasizing the function and ignoring the specific form in which it was satisfied made it easier to use the *Katz* analysis in the absence of much actual knowledge about how much privacy society was prepared to recognize in various activities. Reasoning about the functional needs of various activities for privacy looked more like the reasonableness tests courts had long applied in criminal procedure matters. But in distancing the *Katz* test from the strange proximity to the actual built environment and its social meanings so

⁸⁹ See, e.g., David Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143 (2002) (discussing increasing emphasis placed on Justice Harlan’s concurring opinions). A recent brief filed by a group of law professors on Internet and electronic privacy law summarized *Katz* precisely this way. See Susan Freiwald & Patricia Bellia, *The Fourth Amendment Status of Stored Email: The Law Professors Brief in Warshak v. United States*, 41 U.S.F. L. REV. 559, 571 (2007) (“[In] *Katz*, the Supreme Court based constitutional protection of telephone calls on the overriding importance of the telephone system.”).

⁹⁰ This is one of the main insights expressed in MARTIN HEIDEGGER, *BEING AND TIME* 109-12 (Joan Stambaugh trans., 1996) (suggesting that philosophical questions about essence of things could not be answered without recourse to social functions in which those things were embedded).

evident in the Stewart opinion, this influential line of reasoning has also cut off a potentially vital source of objectivity for doctrine.

There is a parallel here to the more general elision of the spatial in post-World War II social science and social policy.⁹¹ This emphasis on function at the cost of specific local conditions was to be repeated across a number of areas of social policy in the 1960s.⁹² The readiness of Justice Stewart to explicitly denigrate place has a kinship to the obtuseness of post-war strategies of governing American society, exemplified by the large public housing projects and expressways that were built in huge gashes cut in America's densest cities in the 1950s and 1960s. These strategies, largely those of New Deal Democratic governments' intent on investing in improving society, helped expedite the decline of these cities in favor of suburban sprawl patterns that continue to burden Americans with high energy and stressful lifestyles.⁹³

Whatever its advantages, the reduction of sociological jurisprudence in *Katz* to a kind of functionalism missed the role that the Court's enthusiastic account of the telephone played in its reasoning. It is the telephone booth, after all, that brings the social function into well or poorly executed practice. To this end, it is the very design of the booth, especially its door, that evidences the existence of a robust and legitimate social function. The telephone booth may be a poor sort of dwelling, denying even visual privacy, but its door provides concrete evidence that social norms support an entitlement to expect a public telephone conversation to remain between the caller and the recipient (unless either of them should choose to disclose). The Court can see in the specific features of the telephone booth objective evidence of the "vital role that the public telephone has come to play in private communication."⁹⁴

While Justice Harlan has been seen as giving the potentially incoherent *Katz* decision the look and feel of a legal doctrine, his innovation may have ultimately led to the two most significant claims made by critics of the *Katz* doctrine. First, *Katz* is said to be circular because social expectations of privacy are themselves presumably

⁹¹ EDWARD SOJA, *POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY 1* (1989) (noting that history and time were long privileged by social analysis but that space is increasingly primary source for "emancipatory insight and practical political consciousness").

⁹² VERBA, SCHLOZMAN & BRADY, *supra* note 53, at 24, 25.

⁹³ This critique was made most influentially by Jane Jacobs in her classic piece. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 201 (1961).

⁹⁴ *Katz v. United States*, 389 U.S. 347, 352 (1967).

influenced by the policy choices of government, including the Supreme Court.⁹⁵ Second, *Katz* is accused of leading the Court into making highly subjective decisions without foundation in clearly discernable principles.⁹⁶ Both vulnerabilities emerge if *Katz* is read as an invitation to consider whether subjective expectations of privacy are reasonable without reference to social practices and social norms.⁹⁷ In judging such expectations, there is a real danger that courts will help reinforce attitudes of social anxiety that support greater degrees of public willingness to sacrifice liberty for security.⁹⁸ Likewise, in leaving judges in the position of determining what protection for privacy society might deem reasonable, the expectations formula exposes judges to the charge that they base constitutional boundaries on their own subjective views.

The alternative legal formula suggested in Justice Stewart's majority opinion was for an analysis of the actual structuring of the social and institutional spaces in which the activity whose Fourth Amendment protection is at stake took place.⁹⁹ The telephone booth from which Katz made his call provided evidence of robust social norms, not themselves expressed as positive law, but clearly establishing regularities of behavior and expectations. It was not Katz's subjective view of what the police might do, or an aggregate of the public's views, but the actual door of the telephone booth that created a constitutional entitlement to acoustic freedom from the interest of professional law enforcement to violate these norms in pursuit of formal lawbreakers. Moreover, the telephone booth, and other examples of the built environment, provides express evidence that even statistics (the predominant tool of social analysis) can often only hint at, i.e., norms expressed by forbearance, such as the respect for privacy shown by not intervening in it, as opposed to intentions that have been put into action.¹⁰⁰

⁹⁵ Posner, *supra* note 56, at 188.

⁹⁶ Steiker, *supra* note 55, at 2495.

⁹⁷ As Justice Scalia noted, even if the *Katz* analysis is unrefined, it can be applied readily to certain instances like the home where there is a well-settled history of protection for privacy. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

⁹⁸ Something very much like this happened during the "War on Crime" between the 1970s to the 1990s. This has been happening again as part of the "War on Terror" since September 11, 2001. SIMON, *supra* note 40, at 272 (arguing that War on Terror has reinforced existing support for "lockdown" strategy in society).

⁹⁹ *Katz*, 389 U.S. at 352.

¹⁰⁰ While neither Justice Stewart nor Justice Harlan appears to have been guided by any academic sociological work, the 1960s did offer a few examples of spatial analysis that formed a counter knowledge to the predominant tendency to ignore the spatial.

The door of the telephone booth and its surrounding glass walls create precisely the kind of “systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures” that Bourdieu described as a “habitus.”¹⁰¹ The “disposition” to grant acoustic privacy to telephone users was built into the structure of the telephone booth. It is “durable,” unlike the more malleable sentiments of individuals, who may indeed be easily moved by a terrible crime or terrorist attack, to accept significant reductions of privacy. And like Bourdieu’s “habitus,” the telephone booth is a “structuring structure,” one which “educates” its users about the meaning of privacy through its use. This means it is neither subjective nor dependent on a highly homogenous culture. The judge’s ability to read the social meaning of the door is neither dependent on her own preferences nor her ability to discern the minds of the aggregate public opinion, because like the grammatical rules of a language, it can be readily discerned by anyone who has become a fully competent user. The judge’s ability to discern the meaning (aided of course by the investigation and argument of prosecutors and defense lawyers) of the telephone booth door is not undermined by the very multicultural quality of contemporary U.S. society, because as a “structuring structure,” the door actually teaches the people who use it just what expectation of privacy it grants.¹⁰²

At the heart of the *Katz* decision, in both the Stewart and Harlan opinions, is an invitation to lawyers and trial courts to investigate the reality of the terrain in which police practices are taking place (as in *Miranda*,¹⁰³ a year earlier, the *Katz* Court seemed to assume lawyers would become the eyes and ears of the courts in the less visible spaces where police operate). The analysis is one that looks to relationships

See MICHEL FOUCAULT, *A HISTORY OF MADNESS* 44-77 (Jonathan Murphy & Jean Khalfa trans., 2006) (analyzing emergence of practices of confinement in fifteenth and sixteenth centuries); GOFFMAN, *supra* note 7, at 235.

¹⁰¹ BOURDIEU, *supra* note 71, at 75.

¹⁰² In discussing Bourdieu, I am neither presuming that Justice Stewart was consciously or unconsciously applying his theory nor that judges today should. Rather, Bourdieu, as an anthropologist, shares with judges the capacity to make objective statements about social meaning. Like the *Katz* Court, Bourdieu faced a powerful tradition in anthropology that took social norms to be very much like legal rules whose precise terms might be discerned from careful analysis of repeated cases. Bourdieu argued that the habitus was an alternative to viewing social norms as a set of rules in that it provided an objective basis for judgment about the appropriateness of any particular action. See BOURDIEU, *supra* note 7, at 20.

¹⁰³ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (holding that for police to avoid violating Fifth Amendment during interrogation, they must notify interrogated of his or her right to counsel and of his or her right to not incriminate himself or herself).

and institutions to discern the actual social practices and norms of privacy that they may exhibit. These practices and norms provide the real analytic basis for discerning just which expectations of privacy society is prepared to recognize as reasonable. Indeed, Justice Harlan himself, in his dissenting opinion to *United States v. White*, called for transcending subjective expectations and “assessing the nature of a particular practice and the likely extent of its impact on individuals’ sense of security.”¹⁰⁴ The built environment and architecture are ready sources of objective evidence that lawyers and judges should turn to. In doing so, they need not look to the works of anthropologists, but they do replicate the same problems of interpretation.

III. GARBAGE, FLY-OVERS, AND CARS: LOST CHANCES TO SOLIDIFY THE JURISPRUDENCE OF THE SOCIAL

Commentators have long appreciated that something potentially revolutionary to at least Fourth Amendment jurisprudence was embedded in *Katz* but had failed to develop.¹⁰⁵ This failure of subsequent legal development under the *Katz* test to deepen the jurisprudence of the social is exemplified by a series of cases in which the majority of Justices purported to apply the test, only to conclude that “no reasonable expectation of privacy” supported Fourth Amendment protection.¹⁰⁶ Two of the most frequently discussed cases are *California v. Greenwood*¹⁰⁷ and *Florida v. Riley*,¹⁰⁸ which involved respectively an intrusion into plastic garbage bags left for the garbage collector on the edge of the defendant’s property, and a police helicopter flying over the defendant’s open-topped greenhouse. In addition, the Court’s car search exception cases, including the cases

¹⁰⁴ *United State v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

¹⁰⁵ WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* 128 (4th ed. 2004) (“The full potential of the *Katz* approach (which certainly has not in all respects been realized)”); Amsterdam, *supra* note 48, at 357-58; Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727, 729 nn.4-9 (1993) (listing cases in which Court has failed to extend Fourth Amendment protections).

¹⁰⁶ See cases cited *supra* note 35.

¹⁰⁷ *California v. Greenwood*, 486 U.S. 35, 40 (1988) (holding that garbage left curbside for pickup on public streets is unprotected by Fourth Amendment’s protection against unwarranted search and seizure).

¹⁰⁸ *Florida v. Riley*, 488 U.S. 445, 450-51 (1989) (holding that greenhouse in curtilage of house with partially open roof was unprotected by Fourth Amendment’s protection against unwanted search and seizure); see also *California v. Ciralo*, 476 U.S. 207, 213-14 (1986) (dealing with fixed wing aircraft overflight).

decided after *Katz* distinguishing between car searches and searches of containers placed inside cars, represent another lost opportunity to develop a sensible reading of the built environment.

Like other commentators,¹⁰⁹ I think the Court's reasoning in these cases is unpersuasive, but here I want to suggest that the reasoning presented as applications of *Katz* specifically lacks what I have already called a jurisprudence of the social as requested by *Katz*. In all of these cases, there is an absence of curiosity, let alone serious inquiry, into what kinds of privacy protection society does or does not grant to these activities.

A. *Plastic Garbage Bags and the Secret Lives of American Homes*

At the outset of his majority opinion in *California v. Greenwood*,¹¹⁰ Justice Byron White nearly quotes Justice Harlan. There is no Fourth Amendment protection of privacy "unless society is prepared to accept that expectation as objectively reasonable."¹¹¹ By placing "objectively" there, Justice White not only emphasized the contrast to the defendant's subjective expectations, but also signaled a shift toward the abstract and the a priori in analyzing what is reasonable.

When Justice White turned to the substantive analysis, he made essentially two arguments. First, plastic garbage bags left on the street are commonly understood to be subject to the vagaries of "animals, children, scavengers, snoops, and other members of the public."¹¹² Second, the purpose of leaving the bags there was to facilitate their collection by garbage collectors, who could well decide to sift through the garbage themselves or allow others, like the police, to do so.¹¹³

In my view, the reasoning here has been often justifiably criticized.¹¹⁴ I want to focus, though, on the kind of knowledge Justice White employs and how much it differs from the jurisprudence of the social advocated by *Katz*. First, he invokes "common knowledge" in determining — astonishingly — that plastic garbage bags are practically invitations for the world to get to know you better.¹¹⁵ Common knowledge implies "common sense," which is precisely not

¹⁰⁹ Steiker, *supra* note 55, at 2494 (describing Court's reasoning as "extreme and unpersuasive").

¹¹⁰ *Greenwood*, 486 U.S. at 39-40.

¹¹¹ *Id.* at 39.

¹¹² *Id.* at 40-41.

¹¹³ *Id.*

¹¹⁴ LAFAVE, ISRAEL & KING, *supra* note 105, at 138.

¹¹⁵ *Greenwood*, 486 U.S. at 39-40.

empirical knowledge, but rather knowledge of the social presumed but not reflected on (which is why ethnographers are always so keen to catalog it).¹¹⁶ Yet Justice White consults only his imagination in deciding what is common knowledge, and that imagination altogether lacks any appreciation of the social. The opinion's strange grouping of animals, children, scavengers, and police, testifies to Justice White's apparent lack of interest in norms, institutions, and social relations.¹¹⁷

Justice White argued that the unreasonableness of Greenwood's expectation was shown by the fact that he left his garbage in an area "particularly suited for public inspection and, in a manner of speaking, public consumption."¹¹⁸ Justice White distanced himself from the entire social focus of *Katz* by emphasizing the role of Greenwood's "assumption of the risk" in relaying his personal matter to garbage collectors who might in turn choose to relay that information to the police, a variant of the argument the Court had already adopted in precedents like the pen register case.¹¹⁹ Turning his reflection away from the actual social experience of garbage, Justice White relies on a variant of "common sense" knowledge that stands in contrast to the more empirical and critical examination of actual practices or discourses in the search for evidence of whether a particular expectation of privacy is one that society is prepared to recognize as reasonable. We learn nothing about the social function of garbage bags or their design features (with the exception of the relative ease of splitting them open). Likewise, we learn nothing about the actual practices of garbage collection and scavenging that go on in communities like Greenwood's. For example, in many parts of the United States, it is common practice to have a small portion of the edge of the yard set aside for items that other people might want to reuse or recycle as well as innocuous waste, like garden clippings and cut wood.¹²⁰ Such areas do in fact invite public scavenging, but often

¹¹⁶ See CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS ON INTERPRETIVE ANTHROPOLOGY* 73 (3d ed. 2000) (describing common sense as cultural system).

¹¹⁷ Whatever might be said for children and animals, scavengers and police exist in worlds richly structured by social norms, institutions, and social relations. On police, see generally JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 6 (1966) (describing social relations and limitations on police activity).

¹¹⁸ *Greenwood*, 486 U.S. at 41.

¹¹⁹ *Smith v. Maryland*, 442 U.S. 735, 741-42 (1979) (holding that installation and usage of electronic pen register on telephone is not violation of Fourth Amendment's protection against unwarranted search and seizures).

¹²⁰ In South Florida, where I lived for 11 years, this was called a "swale pit." The swale pit was not the place that you put your garbage; to do so would have violated

this precisely why they are not the place where garbage for disposal is placed.

Had the Court analyzed garbage bags as social objects, the way the *Katz* Court did with telephone booths, a very different picture of socially recognized expectations of privacy would have come into view. The contemporary opaque plastic garbage bag was invented in Canada in the 1960s and was originally marketed to hospitals and clinics to deal with medical waste.¹²¹ Light, yet strong enough to retain integrity during ordinary hauling and dumping, opaque, capable of being sealed with a twist and carried anonymously to landfills, the garbage bag spoke to a strong interest in the deliberate handling of waste. Its extension to ordinary kitchen and household waste during the 1970s suggests the extraordinarily high value middle class Americans placed on hygiene and privacy in this period.¹²²

Had Justice White taken Justice Harlan's approach, he might have balanced this very clear consumer choice for privacy against the needs for police to pursue a war on drugs in the absence of any willing complaining witnesses. Instead, he implied that only the most benighted person could believe in the privacy of materials placed in plastic garbage bags and left in a place where garbage collectors would take it.¹²³

B. *Flying Over the Social*

In *Florida v. Riley*,¹²⁴ the issue concerned whether police surveillance of a greenhouse from 400 feet above in a helicopter was a search for purposes of the Fourth Amendment. Justice White, writing for a four vote plurality, extended the Court's earlier decision in *California v. Cirallo*,¹²⁵ holding that the defendant lacked a reasonable expectation of privacy with respect to observation from an aircraft legally operating above. In holding that the helicopter's compliance with aviation regulations was sufficient to proclaim the expectation of

local norms by inviting the kind of animal activity that Justice White described.

¹²¹ Mary Bellis, *The History of the Green Garbage Bag* — Harry Wasyluk, <http://inventors.about.com/library/inventors/blGarbageBag.htm> (last visited Jan. 4, 2008).

¹²² This is the era of the citizen as consumer, a sensibility born of post-World War II affluence and the baby boom. See generally LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 118-24 (2003) (noting how postwar policies and affluence promoted mass consumption).

¹²³ See *Greenwood*, 486 U.S. at 41.

¹²⁴ 488 U.S. 445, 449 (1989).

¹²⁵ 476 U.S. 207 (1986).

privacy unreasonable, Justice White (as he had in *Greenwood*) dismissed the entire realm of social norms, leaving only positive law as a guide to expectations. In doing so, he practically removed the whole aspect of a jurisprudence of the social from the *Katz* test.

Fortunately, a close count reveals a slight majority in favor of retaining a jurisprudence of the social. Justice Sandra Day O'Connor concurred in the decision (making it 5-4) for upholding the constitutionality of the search but rejected the majority's fixation on the fact that the flight did not violate altitude regulations for helicopters as too narrow (again 5-4).¹²⁶ Justice O'Connor thought that, given the burden on the defense to show a search, the (admittedly under-developed) record best supported the view that flights at the altitude used by the police were common, and thus the defendant's expectations were unreasonable, given actual social practices.¹²⁷ But she explicitly suggested that empirical evidence to the contrary could have dissuaded her of that.¹²⁸ Justice Harry Blackmun's dissent explicitly states that the question in *Riley* should be resolved empirically by examining the volume of non-police helicopter traffic at 400 feet — a burden of proof he would have placed on the government.¹²⁹

Justice William Brennan's dissenting opinion, joined by Justice Thurgood Marshall and Justice John Paul Stevens, criticized the limited inquiry into the social context of *Riley*'s privacy expectations in Justice White's majority opinion.¹³⁰ The plurality's vision of what society is prepared to recognize as reasonable was so shaky that a social norm is defeated if even one member of society could lawfully ignore it.¹³¹ This reflects a strange picture of the social indeed, one in which norms require absolute obedience in order to maintain legitimacy, and in which any defection calls into question the validity of any expectations. This sense of the social as an easily shredded fabric reflects in part the influence of Justice Harlan's concurrence and

¹²⁶ *Riley*, 488 U.S. at 452 (O'Connor, J., concurring).

¹²⁷ *Id.* at 455.

¹²⁸ *Id.* at 454-55.

¹²⁹ *Id.* at 468.

¹³⁰ *Id.* at 456 (Brennan, J., dissenting).

¹³¹ *Id.* at 457 ("Under the plurality's exceedingly grudging Fourth Amendment theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal. It is defeated whatever the difficulty a person would have in so positioning herself, and however infrequently anyone would in fact do so. In taking this view the plurality ignores the very essence of *Katz*.").

its emphasis on the social as the aggregate of individual expectations. In retrospect, it is a vision of society also consistent with the “war on crime,” the law and order mentalities, and ways of governing encouraged by that now four decade long experiment.¹³²

In the precedential garbage and fly-over cases, the *Katz* doctrine is rendered a remarkably flat and unempirical sense of the social. The resulting jurisprudence through most of the 1990s evidenced the absence of any intellectual curiosity as to how people actually live in contemporary America, including the way they cope with garbage and with the increasingly dense air traffic above large cities, and these cases left people with less protection than places received under *Olmstead*.¹³³

C. *The Exceptional Automobile*

One place the failed promise and frustrations of the *Katz* doctrine's jurisprudence of the social is most evident is in the Court's tortured case law on cars and containers. Long before *Katz*, in the 1925 case of *Carroll v. United States*,¹³⁴ the Supreme Court created an exception to the warrant requirement for the then-new mass phenomenon of automobiles, reasoning that it was “impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.”¹³⁵

This reasoning had become extremely antiquated by the 1960s, as motorized police, radios, and broader jurisdiction (not to mention ubiquitous traffic jams), made the situation of the automobile stopped on the highway far less inherently exigent.¹³⁶ Moreover, it left no

¹³² SIMON, *supra* note 40, at 14.

¹³³ See *Olmstead v. United States*, 277 U.S. 438, 463 (1928) (recognizing protection granted by Fourth Amendment to places).

¹³⁴ 267 U.S. 132, 283-84 (1925).

¹³⁵ *Id.* at 283.

¹³⁶ The relative stability of the exigency argument was most likely a product of two circumstances. First, the Prohibition-driven federal war on crime was greatly reduced by the adoption of the Twenty-First Amendment in 1933. It was not until the 1960s that a new federal war on crime, this time focused on drugs, focused police attention and defense motions on automobile searches. Second, the Great Depression and World War II stalled the fast growing automobile market of the 1920s. It was not until the 1950s that the growth in automobile usage resumed and exceeded the growth of the 1920s. See Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years 1919-1941*, 4 CONN. INS. L.J. 521, 530-31 (1998).

rationale for permitting a warrantless search of an automobile totally within police custody.

That was the circumstance when the Court finally got around to reconsidering the automobile exception in *Chambers v. Maroney*.¹³⁷ In that case, the police had arrested Chambers based on probable cause of involvement in a robbery and towed his car to the police station. The Court upheld the warrantless search of the car as a valid search incident to arrest, reasoning that the difference between a roadside search at the time of the arrest and a search after bringing the car and the arrestees back to the police station was too minimal to matter constitutionally, and that the police reasonably chose to conduct the search in the security of the police station.¹³⁸

When the Court next visited the car search exception in *United States v. Chadwick*,¹³⁹ decided a full ten years after *Katz*, it applied the *Katz* test, turning away from the calculus of exigency. But the result was a new kind of exception almost inverse in logic from that of the *Carroll* opinion. There, the very independence and dangerous autonomy of the automobile made it an object of inherent exigency. In *Chadwick*, the Court reasoned that the automobile had become so thoroughly embedded in the state's regulatory system that only a "diminished expectation of privacy" could be held by any person.¹⁴⁰ As it would in the garbage bag case of *California v. Greenwood*,¹⁴¹ the Court looked largely to positive law to determine reasonable expectations, noting that cars are subject to high levels of regulation, and thus sometimes, mandated inspection.¹⁴² The majority did not reject other evidence of social meaning, but instead apparently saw no social significance to the privacy attributes of automobiles. A few years earlier, in the 1974 case of *Cardwell v. Louis*,¹⁴³ in upholding an external search of a vehicle's paint (actually a minor seizure of a paint chip), the Court noted that automobiles are intended only for transportation and are designed with little effort to shelter privacy.¹⁴⁴

¹³⁷ 399 U.S. 42, 52 (1970).

¹³⁸ *Id.*

¹³⁹ 433 U.S. 1 (1977).

¹⁴⁰ *Id.* at 12.

¹⁴¹ 486 U.S. 35, 39-40 (1988).

¹⁴² *Chadwick*, 433 U.S. at 11-13.

¹⁴³ 417 U.S. 583, 590-91 (1974).

¹⁴⁴ *Id.* at 590 ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain

The fact that the Court still recognized the importance of social meanings beyond positive law was evident in *United States v. Chadwick*, where the Court analyzed a footlocker in a car. According to the majority, neither of the logics of the automobile exception applied to “luggage.”¹⁴⁵ The latter could be easily stored while a warrant was obtained, and the panoply of regulations and inspections placed on automobiles were absent generally for luggage, whether a leather briefcase or a footlocker full of marijuana.¹⁴⁶ In subsequent cases, the Court further diminished protection for containers placed within automobiles. In *United States v. Ross*,¹⁴⁷ the Court declined to require a warrant if the police’s probable cause applied to the “car,” even though the narcotics were found within a closed container within a car. For nearly a decade, courts (and presumably police) had to decide whether the probable cause originally applied to a car or to the container that found its way into a car. In *California v. Acevedo*, the Court rejected the distinction as too clumsy for practical application.¹⁴⁸ But having abandoned *Chadwick*’s practical distinction between container and car, the Court appeared to leave intact the earlier decision’s analysis of the social value of containers.

It may be significant that the Court wrestled with the proper Fourth Amendment analysis of searches of the automobile in a decade — the 1970s — when a period of significant legal developments in the protection of automobile consumers (in contract law, torts, as well as increasingly environmental law) was succeeded by a series of energy crises that may have helped diminish cultural aspirations for the automobile.¹⁴⁹ The decades both before and after offer a great deal of evidence that automobiles have served as much more than transportation, including providing a platform for the public expression of identity (whether low-riding or on giant tires) and the creation of “dream” machines for Americans, a place for both public

view.”).

¹⁴⁵ *Chadwick*, 433 U.S. at 13 (holding factors which diminish privacy aspects of automobile do not apply to respondents’ footlocker).

¹⁴⁶ *Id.*

¹⁴⁷ *United States v. Ross*, 456 U.S. 798, 824 (1982).

¹⁴⁸ *California v. Acevedo*, 500 U.S. 565, 565-66 (1991) (holding distinction “provided only minimal protection for privacy and . . . impeded effective law enforcement.”).

¹⁴⁹ ARLENE S. SKOLNICK, *EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY* 96 (1991) (noting energy crisis along with Vietnam and other factors marked end to era of affluence and optimism that went with it).

exhibition of style and the creation of private sanctuary to those without a home or office, or even those moving between them.¹⁵⁰

In the 1980s, cars began to grow in size and luxury. In the middle of that decade (as the drug war was heating up as well), the Court declined to reconsider its conclusion of diminished expectation of privacy in the potentially distinguishable context of a “motor home.”¹⁵¹ In the 1990s, spurred by relatively low energy prices, Americans indulged this particular vision of the automobile as a homelike sanctuary of the self through a mass demand for “sport utility vehicles” (or “SUVs” as they are commonly called by both friend and foe). Combined with the emphasis on tinted windows in the fast-growing Sunbelt states, the SUVs have moved the car far in the direction of the home (which itself is often heavily regulated in late modern America, sometimes by private associations), thereby collapsing the logic of “diminished expectations of privacy.”

A new and more empirical jurisprudence of the social, recovered from a more robust re-reading of *Katz* of the sort suggested here, would enable the Court to bring new coherence to the automobile search exception, either by finally rejecting it, or by grounding it explicitly in the special needs of law enforcement produced by exceptionalism of the War on Drugs and now the War on Terror.

D. *Without Reflection: Moments When Courts Get It Anyway*

The few cases that have gone the other way suggest that the Justices have an easier time applying *Katz* when their own class backgrounds allow them to identify readily with the social norms violated by police tactics. A telling example is *Bond v. United States*,¹⁵² where a solid majority found that squeezing a piece of luggage carried onto an airplane, in order to determine whether drugs were inside, constituted a search under the *Katz* test. The Court embraced an empathetic reading of the spatial logic of airplanes and the expectations passengers legitimately had (one assumes they fly first class) far more consistently with Justice Stewart’s lucid analysis of the phone booth. The Justices noticed, for instance, the difference between luggage brought onto the plane (at some burden to the passenger) and luggage

¹⁵⁰ ROLAND MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920-1940*, at 118 (1985) (describing General Motors’ early success in marketing automobiles built around style and convenience as opposed to mere functionality).

¹⁵¹ See *California v. Carney*, 471 U.S. 386, 396 (1985).

¹⁵² 529 U.S. 334, 338 (2000).

checked (with the well-known likelihood of it being vigorously handled by others).¹⁵³

Bond is one of the few cases on record where the imperatives of the War on Drugs must bow to a social norm with no apparent foundation in positive law, that travelers should be able to hold close at hand particularly valuable and private things. The majority shows a clear ability to appreciate the way social norms extend well beyond the boundaries of positive law to provide an objective structure of expectations on which subjects can expect to rely, even as against the sovereign. In contrast, those who ride buses in America have faced Supreme Court majorities exhibiting little empathy or even curiosity as to the way a poor, but not for that less equal, subject of the law might pursue dignity in that space.¹⁵⁴

Reading most of the case law summarized too briefly in this part, one could well understand the impulse to lay *Katz* in its doctrinal grave and seek, after forty years, a new foundation for the Fourth Amendment's search doctrine. The Court has subjectively overvalued particular objects that correspond to their class-specific experiences, like luggage (whether as part of the container search cases or in the overhead compartment of an airliner in *Bond*).

It is possible, of course, that some other foundation would provide a more sound basis for analyzing police investigations. I leave the assessment of the interesting proposals made in that regard by my colleagues in this Symposium for another time. In the preceding section, I have also sought to suggest a way to recover objectivity and robust protection for privacy from the *Katz* test by renewing the engagement with the social structuring of space that Justice Stewart's majority opinion in *Katz* modeled. In the remainder of this Article, I offer some reasons for thinking such a revitalization is possible today.

IV. REDISCOVERING THE ROAD NOT TAKEN AFTER *KATZ*

A discussion of revitalizing the Warren Court's jurisprudence of the social might seem as implausible and nostalgic as calling for a new summer of love (that is also enjoying a fortieth anniversary this year). After all, the 1980s and 1990s saw a "re-turn" to market primacies in much of social and legal policy, the "responsibilization" of the individual through the pruning of social benefits, a shift toward punitive incentives for conduct (especially for criminals), and the

¹⁵³ *Id.* at 337-38.

¹⁵⁴ *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991) (holding no seizure on bus stopped by police during intercity route).

retreat of socialism on a global basis, all associated with the rise of harsh market-based policies under the banner of “neoliberalism.”¹⁵⁵ Because the Warren Court is often lumped in with the liberal “Great Society” policies of 1960s, it is tempting to conclude that the Court’s approach to a jurisprudence of the social might be particularly irrelevant to the boundaries of political effectiveness. If, to repeat the famous quip by former British Prime Minister Margaret Thatcher to the effect that “society does not exist,” a jurisprudence of the social is not very promising.¹⁵⁶

Yet from the perspective of the early twenty-first century, the Warren Court seems to have been prescient in not pursuing a more collectivist or statist model of the social along the lines of the European welfare state.¹⁵⁷ Indeed, a close reading of *Katz* shows a vision of the social consistent with American social science that is rooted not in the State but in relations of civil society as a basis for setting limits on the State’s security functions. This vision may be in the process of becoming more, rather than less, relevant, as advanced liberal societies struggle to reinvent the terms of employment, retirement, health care, and education.¹⁵⁸ At the same time, the rise of empirical capacity in law schools and in the bar provides a foundation that was lacking in 1967 for a jurisprudence of the social to develop.

¹⁵⁵ See HARVEY, *supra* note 85, at 92, 160; AIHWA ONG, NEOLIBERALISM AS EXCEPTION: MUTATIONS IN CITIZENSHIP AND SOVEREIGNTY 10-11 (2006).

¹⁵⁶ In an interview published in *Woman’s Own* magazine on October 31, 1987, Margaret Thatcher was quoted as saying, “There is no such thing as society.” In the same interview she went on to say: “There are individual men and women, and there are families. And no government can do anything except through people, and people must look to themselves first. It’s our duty to look after ourselves and then to look after our neighbor.” In a speech given in 1996 Thatcher further glossed these comments, saying: “I have never minimized the importance of society, only contested the assumption that society means the state rather than other people.” See MARGARET THATCHER, THE COLLECTED SPEECHES OF MARGARET THATCHER 576 & n.1 (1997).

¹⁵⁷ The path toward such an approach was clearly available and being paved by left constitutional scholars. See, e.g., David Abraham, *Liberty Without Equality: The Property-Rights Connection in a “Negative Citizenship” Regime*, 21 LAW & SOC. INQUIRY 1, 9 (1996) (noting and reaffirming earlier scholarship calling for constitutional rights to welfare and arguing continued value of positive rights approach); see also Frank Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (arguing for constitutional guarantees to welfare).

¹⁵⁸ ROSE, *supra* note 22, at 187-88.

A. *Katz and the Warren Court's Anticipation of Neoliberalism*

In its embrace of social norms embodied in objective social constructions like phone booths, the *Katz* Court emphasized the role of cooperation and private norms over State power and coercion.¹⁵⁹ Knowledge of the social is not necessarily State knowledge (often in the form of statistics), although today we look to government for much of this knowledge. In fact, at the early stages of the formation of the social, private agencies played the most significant role in gathering statistics about the practices and methods of private actors and organizations.¹⁶⁰ To effectively gather and analyze this kind of knowledge, courts will need lawyers (perhaps in collaboration with social scientists) to seek relevant data about social practice and to make arguments about the role of those practices in the privacy conditions of freedom.

A paradox emerges. As advanced liberalism places more and more governmental emphasis on the ability of subjects to self-manage risk, a subject may need greater protection of privacy in less traditional settings, as the car becomes a home and the Starbucks an office. At the same time, law enforcement increasingly seeks to act through knowledge about the subjects, which is useful in making predictions about their conduct.¹⁶¹ Many of the same technologies that have made it easier for marketers to profile an anonymous website visitor in order to sell something may also identify suspects for closer law enforcement scrutiny. The problems of terrorism have only heightened the need (already established by the expansion of the carceral state in the 1980s and 1990s) to balance these interests.¹⁶²

This represents a real change from the first wave of neoliberal transformation in the United States during the 1970s and 1980s. In that phase, there was little interest in empirical knowledge about subjects or their social settings.¹⁶³ Price signals alone were thought

¹⁵⁹ The Court relied on the architecture of the telephone booth rather than any positive law. *Katz v. United States*, 389 U.S. 347, 357 (1967).

¹⁶⁰ DONZELOT, *supra* note 23, at 88-90 (describing formation of "social sector" of charities between state and subjects of welfare).

¹⁶¹ See BERNARD HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING AND PUNISHING IN AN ACTUARIAL AGE* 51-59 (2006).

¹⁶² See William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1 (2002) (discussing need to "incorporate a serious concern for privacy into Fourth Amendment jurisprudence"). It is these problems of governance rather than changes in technology that drive the need to reconsider and reinvigorate *Katz*.

¹⁶³ Much of the talk of "reinventing government" in the 1990s emphasized replacing public policy with market forces. See DAVID OSBORNE & TED GAEBLER,

capable of governing post-industrial societies.¹⁶⁴ As something like a “neoliberalism 2.0” emerges, the problems of governing increasingly point inside the black box of the subject to topics as diverse as identity, cognition, and faith.¹⁶⁵

The growing importance that both business and government place on the internal operations of the subject leads to a renewed need for courts to consider sensitively the privacy needs of freedom under conditions of advanced liberalism. Consider the car, now a kind of home and business, but still pegged by the Court as a zone where “the expectation of privacy . . . is significantly less than that relating to one’s home or office.”¹⁶⁶ While the contemporary economy requires that individuals be both highly mobile and highly individualistic, the Court’s analysis insisted that automobiles, even those most oriented toward lifestyle, are simply methods of transportation, playing no role in constituting and protecting the subject.¹⁶⁷

Thus, a telephone booth is no substitute for a house, but it is a space functional to activities vital to the successful flourishing of the social institutions of a competitive neoliberal society (ranging from dating to making stock purchases¹⁶⁸) that require privacy to flourish and which are recognized by society simply by virtue of the physical design of the booth.

While telephone booths themselves are becoming increasingly scarce and underutilized, contemporary society has even more need

REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 25-48 (1993) (arguing that government should shift from “rowing” to “steering”). More recent efforts at promoting innovation in public policy are less axiomatically oriented toward the market and more self-consciously experimentalist. See Michael F. Dorf & Charles C. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 285 (1998) (calling for pragmatic approach to reforming governance).

¹⁶⁴ For the orthodox view, see generally Asher Wolinsky, *Prices as Signals of Product Quality*, 50 REV. ECON. STUD. 647 (1983), which argues that prices can provide crucial information on quality to consumers with access to imperfect information. For a less sanguine view of price signals, see Rebecca M. Blank, *When Can Public Policy Makers Rely on Private Markets? The Effective Provision of Social Services*, 110 ECON. J. 34, 39 (2000), noting that the price signal itself may be easy to observe, but not its quality.

¹⁶⁵ ROSE, *supra* note 22, at 188 (arguing advanced liberalism brings ethical features of subject into problem of government).

¹⁶⁶ *California v. Carney*, 471 U.S. 386, 391 (1985).

¹⁶⁷ *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

¹⁶⁸ These are two areas in which contemporary social conditions have seen a greater burden placed on ordinary individuals to manage risky decisions and for which privacy is both important and often elusive.

for spaces which support privacy beyond the traditional spaces, like homes and offices. Such places must provide the kind of routine and affordable refuge that Justice Stewart described in such simple but rich terms in *Katz*:

The critical fact in this case is that “(o)ne who occupies [a telephone booth] shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume” that his conversation is not being intercepted The point is not that the booth is “accessible to the public” at other times, . . . , but that it is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.¹⁶⁹

There are signs that the transformations in governance associated with neoliberalism, along with the pressures placed on courts by the aggressive law enforcement efforts associated with the ongoing war on drugs and the more recent war on terrorism, may be spurring a reawakening of *Katz*’s largely stillborn call for a jurisprudence of the social. Recently, in *Kyllo v. United States*,¹⁷⁰ an unusual alliance of Rehnquist Court Justices extended the scope of the search doctrine for the first time in some years, and against a promising technology for policing the war on drugs, showing that the *Katz* doctrine is quite alive (much as *Planned Parenthood v. Casey* reaffirmed the core holding of *Roe v. Wade*). As my colleague Professor David Sklansky¹⁷¹ has argued, Justice Scalia’s opinion in *Kyllo* reflected a significant move away from an alternative common law approach that would look to eighteenth century understandings to define the scope of the Fourth Amendment and other constitutional doctrines. In earlier opinions, Justice Scalia had been openly critical of *Katz*:

In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those “actual (subjective) expectation[s] of privacy” that society is prepared to recognize as “reasonable” bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is

¹⁶⁹ *Katz v. United States*, 389 U.S. 347, 352 (1967).

¹⁷⁰ 533 U.S. 27, 40 (2001).

¹⁷¹ Sklansky, *supra* note 89, at 161.

employed . . . it has no plausible foundation in the text of the Fourth Amendment.¹⁷²

In *Kyllo*, Justice Scalia seemed to accept the social anchors of the *Katz* doctrine as a workable and effective way to preserve the kinds of freedom that the Framers sought to constitutionalize.¹⁷³ Justice Scalia noted that the *Katz* test has often been criticized as “circular, and hence subjective and unpredictable”:

While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes . . . there is a ready criterion¹⁷⁴

Discovering some social limits to law enforcement convenience in the structure of the home is a mark of how shrunken the ambitions of the *Katz* doctrine have become. *Kyllo* may only be a beginning. A robust account of American privacy practices would show that our needs are much different for privacy than they were in the eighteenth century. *Katz* can be refined in any particular case by analyzing the social practices that establish the recognition by others of norms that preserve privacy in specific settings. Sometimes, as in the carry-on luggage case,¹⁷⁵ the Court will have little difficulty doing this based on the class-specific knowledge of elite lawyers. In *Bond v. United States*, the Court was perfectly capable of seeing past the exigencies of the War on Drugs to the stable structures of normative order provided by the overhead bins on airliners.¹⁷⁶ But when the situations of the poor, minorities, or those with disabilities are before them, the cultural knowledge of individual judges is less helpful, and the failure of lawyers (and of our current criminal lawyering pedagogy, which fails to encourage empirical enrichment of the record available for *Katz* analysis) is costly to the

¹⁷² *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

¹⁷³ *See Kyllo*, 533 U.S. at 33-34.

¹⁷⁴ *Id.* (citing Posner, *supra* note 56, at 189). Posner, a libertarian, was affronted that the Burger Court had provided so little protection to privacy under the *Katz* doctrine. He was especially disturbed by the secret agent cases. “An American citizen should have a reasonable expectation based on customs and mores of a free society that people who represent themselves to him as trustworthy friends are not in reality secret policemen or paid informants.” Posner, *supra* note 56, at 189.

¹⁷⁵ *Bond v. United States*, 529 U.S. 334, 338 (2000).

¹⁷⁶ *Id.* at 338-39 (noting difference between touching bag in course of placing additional baggage in overhead bins and investigatory squeeze by police in current situation).

preservation of liberty and to the production of a coherent jurisprudence.

B. *The Age of Empirical Lawyering*

Katz seemed to assume that lawyers (and judges) would respond to its invitation to undertake analysis of the social context of privacy claims. This was not altogether unfounded. By 1967, the modern law and society movement was well underway. The Law & Society Association, a major vehicle for bringing social scientists into the study of law and legal institutions, was founded in 1964.¹⁷⁷ Major foundations, like the Ford Foundation, had invested in creating social science programs at top law schools. For example, the Center for the Study of Law & Society was founded at UC Berkeley in 1961.¹⁷⁸

Katz seemed to reach out to this emerging socio-legal capacity of American law, and to invite its extension into the frontlines of criminal law practice. But this invitation largely failed to be accepted.¹⁷⁹ A fuller treatment of the reasons for this failure must await another occasion, but a brief outline will help make visible the reason for my relative optimism about the improved prospects for a jurisprudence of the social today.

First, despite the interest in empirical socio-legal studies, most legal scholarship remained steadfastly doctrinal, which was especially true of the constitutional scholarship that arose to elaborate the meaning of the Court's new criminal procedure cases.¹⁸⁰ Second, these legal commentators quickly reformulated *Katz* as a test about *expectations*, with little analytic framework to guide litigation strategies, a weakness that has since been read back onto the *Katz* doctrine itself.¹⁸¹ Third, the 1970s and 1980s saw an important turn in the larger relationship

¹⁷⁷ Garth & Sterling, *supra* note 42, at 415.

¹⁷⁸ School of Law — Boalt Hall, Center for the Study of Law & Society, <http://www.law.berkeley.edu/centers/cslls/index.html> (last visited Jan. 4, 2008).

¹⁷⁹ As reflected by Justice Blackmun's evident frustration in his dissent to *Florida v. Riley*, as to the absence of evidence in the record regarding the frequency of helicopter fly-overs, lawyers have not routinely sought to introduce evidence about social regularities even in a high stakes Supreme Court case. *Florida v. Riley*, 488 U.S. 445, 468 (1989) (Blackmun, J., dissenting).

¹⁸⁰ Until very recently, empirical research on criminal procedure topics has been so scarce that Professor Christopher Slobogin published the results of a survey he produced on his law students. See Slobogin & Schumacher, *supra* note 105, at 738-39.

¹⁸¹ RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 356 (2d. ed. 2005) (stating *Katz* offered no comprehensive test of Fourth Amendment coverage, nor any general theory of privacy); L'AFAYE, ISRAEL & KING, *supra* note 105, at 138; Amsterdam, *supra* note 48, at 357-58.

between the American government, especially at the national level, and the social. Empirical social science suffered a significant loss of influence and prestige after the heady expectations created by the liberal national administrations of the 1960s, a loss largely equaled by the gains in influence by the largely theoretical school of law and economics.¹⁸²

Perhaps the *Katz* Court was overly optimistic about the ability of lawyers in the late 1960s to rise to the challenge of producing evidence with which to inform a jurisprudence of the social (as they were about the ability of defense lawyers to improve the investigatory process more generally). But a number of recent trends suggest that this failure can now be remedied. One is the increasingly evident empirical turn in legal scholarship that has witnessed the emergence of new journals, professional conferences, and a growing demand for empirically trained law professors.¹⁸³ The other is the increasing demand for legal advice that is socially sensitive.¹⁸⁴ Litigants increasingly need social strategies to go along with their legal ones.¹⁸⁵ Otherwise, they may find that they have won the case, only to lose market share. A recent example is the fast food industry and the problem of obesity. While beating back efforts to extend tort liability for the health effects of obesity, the fast food industry has had a difficult time responding to cultural pressure from films like Morgan Spurlock's *Super Size Me*,¹⁸⁶ which drew on and extended the arguments raised in unsuccessful lawsuits brought against McDonald's on behalf of children suffering health effects of obesity allegedly linked to eating McDonald's food.

Both trends are likely to see more law schools offering courses in both quantitative and qualitative empirical methods. If more lawyers emerge with training in how to collect and analyze empirical data, they may also find a growth of data sources about ordinary conduct (public access being a separate problem). If these trends continue, it should be easier for both prosecutors and defense lawyers to develop empirical evidence about social norms, practices, and institutions. Once presented with a record that includes an enterprising collection

¹⁸² Garth & Sterling, *supra* note 42.

¹⁸³ For a criminal law example, see Michael Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 J. EMPIRICAL LEGAL STUD. 331, 361-69 (2004) (demonstrating that judges, jurors, and lawyers exhibit different standards for case complexity).

¹⁸⁴ WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 7-10 (2004) (discussing importance of managing social meaning of litigation).

¹⁸⁵ *Id.*

¹⁸⁶ *SUPER SIZE ME* (Kathbur Pictures 2004).

of available data, including careful analysis of the built environment, the “sociological imagination” of judges may be more easily awakened, despite decades of disuse.¹⁸⁷

CONCLUSION

I have sought to praise *Katz* rather than eulogize it. The case’s promise of a jurisprudence of the social was derailed into a thin analysis of reasonable expectations of privacy, with little knowledge of or reckoning with the social context of privacy and policing. The case’s potentially radical style of reasoning about searches was lost almost from the start in favor of a far more traditional analysis of reasonableness. Rather than abandon this precedent, I argue that we should recover the possibilities for a more effective and legitimate judicial analysis grounded in *Katz*’s model of social analysis of context, especially with respect to the built environment. This possibility was obscured at the time by the very ambivalence of contemporary social science toward the spatial features of social life. It was also rendered implausible by the lack of empirical skills and sociological analysis in the bar. Both of these epistemological barriers have been reduced in recent years with the trends running in positive directions. *Katz*’s promise of a jurisprudence of the social is one whose time may have just come now after forty years.

¹⁸⁷ C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 123-25 (rev. ed. 2000).



Photos 1-3. Clockwise from top left: Belgium, United Kingdom, Brazil. Wikimedia Commons, Telephone Booth, http://commons.wikimedia.org/wiki/Telephone_booth (last visited Jan. 4, 2008).



Photo 4. Robert Taylor Homes, Chicago. Rap Dictionary, Robert Taylor Homes, http://www.rapdict.org/Robert_Taylor_Homes (last visited Jan. 31, 2008).