

BRANDEIS IN *OLMSTEAD*: “OUR GOVERNMENT IS THE POTENT, THE OMNIPRESENT TEACHER”¹

Carol S. Steiker*

Greatness, of course, lies in the eye of the beholder. A large part of what makes us revere a judicial dissent as “great” is our current conviction that the dissenter was “right” in some important way. At the most particular level, a dissenter could be right about a specific legal point. At a level of greater generality (and therefore of greater “greatness”), a dissenter could be right about a whole area of law or an interpretive approach that the dissenter brings to bear. At the most general (and therefore “greatest”) level, a dissenter could be right not only about law or legal methodology, but also about something even bigger—a vision of constitutionalism, democracy, or the human condition.

Justice Louis Brandeis’s dissent in *Olmstead v. United States*² from the Taft Court’s decision to exempt governmental wiretapping from constitutional regulation is a natural choice for the category of “great dissents” because there is widespread consensus about its greatness. Such a consensus could also make it a boring choice because there is nothing very interesting about telling people something they think they already know. However, the consensus appears to be that Brandeis’s *Olmstead* dissent is great in the first two senses previously described—its vindication on the issue of the constitutional status of wiretapping by the Warren Court in the famous *Katz* decision³ and its grounding of Fourth Amendment guarantees as

¹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

* Howard and Kathy Aibel Professor of Law, Harvard Law School. I thank the participants—faculty and judges alike—in the 2009 Fourth Amendment symposium sponsored by the National Judicial College for their helpful feedback. I also am grateful to Cassandra Barnum and Michal Rosenn for excellent research assistance.

² *Id.* at 471-85.

³ *Katz v. United States*, 389 U.S. 347 (1967).

rights of “privacy.”⁴ This conventional story, well-known to any reader of casebooks and law review articles on the Fourth Amendment, turns out to be seriously incomplete. The claim of Brandeis’s dissent to “greatness” along these first two dimensions is less strong than is commonly believed because his view of wiretapping and his more general view of the “privacy” orientation of the Fourth Amendment have been far less fully vindicated than the celebratory view of his dissent implies. Moreover, I wish to assert that Brandeis’s strongest claim to greatness in *Olmstead* lies in what is perhaps his least heeded exhortation, partially quoted in the title to this essay and more fully explored below. Thus, while I advocate for the greatness of Brandeis’s *Olmstead* dissent, it is with an eye for complicating its legacy in ways that both diminish and augment the obvious grounds for cherishing it.

OLMSTEAD

To understand Brandeis’s dissent in *Olmstead* requires an understanding of the underlying legal controversy. Just as the development of Fourth Amendment law in the latter part of the twentieth century has been driven in large part by the war on drugs, the *Olmstead* case was driven by the exigencies of enforcing Prohibition, which began in 1920, the year after the thirty-sixth state ratified the Eighteenth Amendment, and lasted until its repeal by the Twenty-first Amendment in 1933. *Olmstead* involved the investigation and eventual successful prosecution of Roy Olmstead, the infamous “King of the Puget Sound Bootleggers.”⁵

Olmstead had begun his professional career on the other side of the billy club, as an officer in the Seattle Police Department. In 1920, still in his early thirties, Olmstead was the

⁴ See, e.g., WAYNE V. MCINTOSH & CYNTHIA L. CATES, JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS 26 (1997) (describing how Brandeis’s conception of Fourth Amendment “privacy” was “completely vindicated” and “enshrined in American law” in *Katz*).

⁵ Daryl C. McClary, Olmstead, Roy (1886–1966) – King of King County Bootleggers, HISTORYLINK: THE FREE ONLINE ENCYCLOPEDIA OF WASHINGTON STATE HISTORY (2002), <http://www.historylink.org> (search encyclopedia for “Roy Olmstead” and then follow hyperlink under “Cyberpedia and Features”).

youngest Lieutenant on the Seattle force when he was caught by federal agents from the Treasury Department's Prohibition Bureau smuggling liquor from Canada in violation of the National Prohibition Act, which had gone into effect on the first of the year.⁶ Fined \$500 and fired from the force, Olmstead devoted himself full time to bootlegging and quickly became the most successful and powerful bootlegger in the Seattle area, eventually running an organization of some fifty employees.⁷ Olmstead's operation imported liquor from England to Vancouver in ocean freighters, transferred it to a fleet of speedboats that could each smuggle over 700 cases at a time into the United States, and distributed it by truck and car throughout the Seattle area.⁸ Olmstead supplied not only numerous individual clients, but also "many of the better known hotels and restaurants in town, and even the local press club."⁹ Distributing as many as 200 cases of alcohol a day, Olmstead's operations garnered gross receipts of as much as \$200,000 a month and more than \$2 million a year.¹⁰ Olmstead was the general manager of the business, which he founded and ran with the assistance of eleven others.¹¹ Having contributed roughly half of the initial capital investment, Olmstead in return received half of the profits, with the other eleven partners sharing the remainder.¹² Olmstead's employees admiringly called him the "Big Boy," and he soon became a prime target for criminal investigation.¹³

State and local law enforcement were not much of a problem for Olmstead.¹⁴ He was regularly tipped off by officials inside the Seattle police department, and even the city's mayor

⁶ *Id.*

⁷ WALTER F. MURPHY, *WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS* 17 (1965); McClary, *supra* note 5.

⁸ Murphy, *supra* note 7, at 17.

⁹ *Id.*

¹⁰ *Olmstead*, 277 U.S. at 456 (majority opinion); Murphy, *supra* note 7, at 17.

¹¹ *Olmstead*, 277 U.S. at 456.

¹² *Id.*

¹³ Murphy, *supra* note 7, at 16; *see also* David A. Sklansky, *Katz v. United States: The Limits of Aphorism*, in Carol S. Steiker, ed., *CRIMINAL PROCEDURE STORIES* 227 (Carol S. Steiker ed., 2006) (citing Norman H. Clark, *Roy Olmstead, A Rumrunning King on Puget Sound*, 54 PAC. NORTHWEST Q. 89 (1963) and Emmett Watson, *Seattle's Colorful Past*, SEATTLE POST-INTELLIGENCER, Oct. 20, 1974, at A1, A2).

¹⁴ *See* Murphy, *supra* note 7, at 18.

was in his pocket.¹⁵ Federal law enforcement, however, was another matter.¹⁶ Although the United States Bureau of Prohibition was itself no stranger to corruption, dogged federal Prohibition agents in Washington State were not deterred from patiently building a case against the “Big Boy.”¹⁷ Despite being warned by his informants that “the feds” (also referred to as “Uncle”) were on his tail, Olmstead blithely went about his business, unaware that his downfall would lie in the ubiquitous instrument of his commercial success—the telephone.¹⁸

Olmstead might be forgiven for underestimating the threat of electronic eavesdropping on his telephonic communications. Wiretapping was a criminal offense (though a misdemeanor) under Washington state law, and it was also officially prohibited by the federal government.¹⁹ Harlan Fiske Stone, who was appointed Attorney General under President Calvin Coolidge in 1924—and who would later join the Supreme Court and Brandeis’s dissent in *Olmstead*—ordered Justice Department officials not to wiretap.²⁰ The Treasury Department, which was charged with enforcing Prohibition, also officially opposed wiretapping.²¹ Even J. Edgar Hoover, who was selected by Attorney General Stone in 1924 to be Director of the fledgling FBI (then called the Bureau of Investigation), expressed his disapproval of the practice.²² Despite this official unanimity on the impermissibility of wiretapping, the job of enforcing Prohibition was daunting, if not outright impossible, in light of its enormous unpopularity and the rampant corruption and inadequate resources faced by law enforcement personnel.²³ Prohibition officers “were undoubtedly among the most frustrated people of all history.”²⁴ Under these circumstances, dedicated Prohibition

¹⁵ *Id.*

¹⁶ *See id.*

¹⁷ *See id.* at 12, 18-19.

¹⁸ *See id.*

¹⁹ *Olmstead*, 277 U.S. at 466; Murphy, *supra* note 7, at 13.

²⁰ Murphy, *supra* note 7.

²¹ *Id.*

²² *Id.* at 13; see also *National Affairs: Another Hoover*, TIME, Dec. 29, 1924, at 2-3, available at <http://www.time.com/time/magazine/article/0,9171,751183,00.html>.

²³ Murphy, *supra* note 7, at 12.

²⁴ *Id.*

agents turned to the telephone wires with the hope and expectation that the ends would justify the means.

The wiretapping in Olmstead's case was extensive and methodical.²⁵ Over a period of almost five months, federal agents tapped the phones lines of Olmstead's central office and his home, as well as the homes and offices of several of his associates.²⁶ The agents produced 775 pages of typewritten notes on the conversations overheard during this period.²⁷ Federal investigators used the wiretap evidence to generate search warrants that led to the seizure of further evidence of Olmstead's bootlegging operation,²⁸ and federal prosecutors relied on the wiretap evidence in the grand jury to indict more than 90 people.²⁹ Olmstead eventually stood trial along with forty-six other defendants (including his wife) on charges of conspiring to violate the National Prohibition Act; the prosecutors made the wiretap evidence the centerpiece of their case.³⁰ Olmstead was convicted along with nineteen others (not including his wife) and sentenced to four years in prison plus an \$8,000 fine and responsibility for prosecution costs.³¹

A panel of the Ninth Circuit affirmed Olmstead's conviction by a vote of 2-1, rejecting his challenge to the admission of the wiretap evidence and holding that electronic eavesdropping was not an impermissible Fourth Amendment "invasion" or "seizure," but rather was analogous to simply listening at a door or window, which was constitutionally inoffensive.³² Judge Frank A. Rudkin dissented on the ground that the evidence obtained by the illegal wiretapping should have been suppressed as unconstitutionally seized under the Fourth Amendment.³³ If "ills" such as state-sanctioned illegal wiretapping were constitutionally permissible, Rudkin proclaimed dramatically, "our forefa-

²⁵ See *Olmstead*, 277 U.S. at 471 (Brandeis, J., dissenting).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Murphy, *supra* note 7, at 19-20.

²⁹ *Id.* at 22.

³⁰ *Id.* at 31-45.

³¹ *Id.* at 44; McClary, *supra* note 5.

³² *Olmstead v. United States*, 19 F.2d 842, 847 (9th Cir. 1927), *aff'd*, 277 U.S. 438 (1928).

³³ *Id.* at 849-50 (Rudkin, J., dissenting).

thers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity.”³⁴

OLMSTEAD IN THE SUPREME COURT

The Supreme Court granted review solely on the constitutional question “whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments.”³⁵ The Supreme Court, like the Ninth Circuit, was closely divided (the vote was 5-4), as was the court of public opinion; it is fair to say that *Olmstead* began a national debate about the legal and ethical ramifications of government wiretapping that has waxed and waned to this day. Chief Justice Taft wrote for the Court, rejecting constitutional arguments against the admission of the wiretapping evidence under both relevant Amendments.³⁶

After reviewing the Court’s recent precedents construing the Fourth and Fifth Amendments, Taft quickly dispatched the Fifth Amendment argument in exactly the way it would be dispatched were it to be raised today: there was no “compelled”³⁷ self-incrimination because there was “no evidence of compulsion to induce the defendants to talk over their many telephones.”³⁸ The voluntary choice to transact business over the telephones made the only relevant issue the means used by the government to gain access to those voluntary communications—a question of search and seizure under the Fourth Amendment rather than impermissible compulsion under the Fifth.³⁹

³⁴ *Id.* at 850.

³⁵ *Olmstead*, 277 U.S. at 455.

³⁶ *Olmstead*, 277 U.S. at 466.

³⁷ The relevant phrasing of the Fifth Amendment reads, “No person shall be compelled in any criminal case to be a witness against himself” U.S. CONST. amend. V.

³⁸ *Id.* at 462.

³⁹ In an earlier case, the Court had suggested the possibility that reading the Fourth and Fifth Amendments together might somehow enlarge the scope of protected liberty. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court had held inadmissible private papers whose production was compelled by subpoena, even though the subpoena was not technically a “search” or a “seizure” and the creation (as opposed to the produc-

As for the Fourth Amendment, Taft noted that all of the Court's search and seizure precedents involved some sort of "actual entrance into the private quarters of defendant and the taking away of something tangible."⁴⁰ In contrast, noted Taft, the wiretapping involved "no entry of the houses or offices of the defendants" and "[t]he evidence was secured by the sense of hearing and that only."⁴¹ Rejecting the analogy between clandestine eavesdropping on a telephone conversation and opening a sealed letter in the mail, Taft maintained that a letter was a "paper" or an "effect" while a conversation did not fall within the literal language of the Fourth Amendment, which referred to the right of the people to be secure in "their persons, houses, papers, and effects."⁴² Taft argued that attempting "to effect the purpose of the framers of the Constitution in the interest of liberty . . . [could] not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing and sight."⁴³

In response to the argument that the government's wiretapping was unethical and a misdemeanor under Washington state law, Taft noted that the common-law rule of long standing was that "admissibility of evidence is not affected by the illegality of the means by which it was obtained."⁴⁴ The Fourth

tion) of the private papers was not "compelled." In *Olmstead*, Chief Justice Taft made no mention of such a Fourth/Fifth Amendment merger, although the idea still had enough currency to attract three of the four dissenters. Justices Brandeis and Butler both cited *Boyd* approvingly, with Brandeis even quoting *Boyd's* provocative notion that "the Fourth and Fifth Amendments run almost into each other." *Olmstead*, 277 U.S. at 475 (Brandeis, J., dissenting). Justice Stone noted his agreement with both Brandeis and Butler's analyses. *See id.* at 488 (Stone, J., dissenting). Only Justice Holmes resisted the idea that "the penumbra of the Fourth and Fifth Amendments covers the defendant," though he agreed with the dissenters that the government should not be permitted to use evidence that it had secured through law-breaking. *See id.* at 469 (Holmes, J., dissenting). Today, *Boyd's* notion of a Fourth/Fifth Amendment merger has been repudiated, *see, e.g.*, *Fisher v. United States*, 425 U.S. 391 (1976), and Justice Brandeis's dissent in *Olmstead* is remembered and revered solely as an exemplar of Fourth Amendment analysis.

⁴⁰ *Olmstead*, 277 U.S. at 464.

⁴¹ *Id.*

⁴² U.S. CONST. amend. IV.

⁴³ *Olmstead*, 277 U.S. at 465.

⁴⁴ *Id.* at 467.

Amendment exclusionary rule (announced by the Court in the relatively recent *Weeks* case⁴⁵) was an exception to the common-law rule that should otherwise prevail in the general run of cases.⁴⁶ In the absence of a Fourth Amendment violation, Taft disclaimed Supreme Court authority to order the exclusion of evidence that was obtained unethically but not unconstitutionally, noting there was “no case that sustains, nor any recognized text book that gives color to such a view.”⁴⁷ Moreover, in Taft’s view, exclusion in such circumstances would constitute bad policy: “A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore.”⁴⁸ As for Washington State’s misdemeanor law prohibiting wiretapping, nothing in the state statute purported to (nor lawfully could pretend to) prescribe rules of evidence for federal trials.⁴⁹ According to Taft, if wiretapping by federal officials was to be banned, it fell to Congress to say so.⁵⁰

Justice Brandeis’s dissent disagreed with the Court’s analysis on both the construction of the Fourth Amendment and the relevance of the government’s law breaking. Repudiating the majority’s cramped textual analysis, Brandeis made a plea for what is now often referred to as “living constitutionalism,” explaining: “Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.”⁵¹ Looking backward, Brandeis observed that at the time of the adoption of the Fourth Amendment, “‘the form that evil had theretofore taken,’ had been necessarily simple.”⁵² Seizures took place “by breaking and entry.”⁵³ But more modern times gave the government “[s]ubtler and

⁴⁵ *Weeks v. United States*, 232 U.S. 383 (1914).

⁴⁶ *Olmstead*, 277 U.S. at 467.

⁴⁷ *Olmstead*, 277 U.S. at 468.

⁴⁸ *Id.*

⁴⁹ *Id.* at 469.

⁵⁰ *Id.* at 468.

⁵¹ *Id.* at 472 (Brandeis, J., dissenting).

⁵² *Id.* at 473.

⁵³ *Id.*

more far-reaching means of invading privacy. . . .”⁵⁴ And electronic eavesdropping was only the beginning, warned Brandeis: “The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping.”⁵⁵ Brandeis asked, rhetorically, “Can it be that the Constitution affords no protection against such invasions of individual security?”⁵⁶

The proper methodology for construing the Fourth Amendment, urged Brandeis, was not an approach of “unduly literal construction,” but rather one that reasoned by analogy and sought to effect the underlying general purpose of the Amendment.⁵⁷ The proper analogy for wiretapping, argued Brandeis, was the opening of a sealed letter in the mail, a practice that the Court had ruled unconstitutional.⁵⁸ Moreover, in Brandeis’s view, wiretapping was much *worse* than opening mail or the ordinary searching and seizing of tangible objects that could have been imagined at the time of the framing of the Constitution: “As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.”⁵⁹

According to Brandeis, the underlying general purpose of the Fourth Amendment was the protection of the right to privacy, or what Brandeis called, with simple elegance, “the right to be let alone”⁶⁰—a right he had advocated and elaborated in the civil context in an influential article published in the *Harvard Law Review* before taking the bench.⁶¹ In what is probably the most famous passage of his dissent, Brandeis expounded on his idea of privacy as the foundation the Fourth Amendment:

⁵⁴ *Id.*

⁵⁵ *Id.* at 474.

⁵⁶ *Id.*

⁵⁷ *Id.* at 476.

⁵⁸ See *Ex Parte Jackson*, 96 U.S. 727 (1878) (holding that letters and sealed packages in the mail may be opened only pursuant to judicial warrant).

⁵⁹ *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

⁶⁰ *Id.* at 478.

⁶¹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.⁶²

Moreover, to Brandeis, the noble intentions of the frustrated Prohibition agents did not mitigate in the least the wrongness of their intrusion on Olmstead's privacy; in another famous passage, Brandeis cautioned:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁶³

Brandeis also argued that the Court should have suppressed the use of the wiretap evidence on *non*-constitutional grounds, based on the unlawfulness of the government's conduct (presumably by use of the Court's inherent supervisory powers). Brandeis observed that wiretapping was a crime under Washington state law and not authorized by Congress, the Department of Justice, or the Prohibition Unit of the Treasury. In contrast to Taft's invocation of the common-law rule allowing the admission of evidence that had been illegally obtained, Brandeis invoked the principle of "unclean hands" from courts of equity, also commonly applied in courts of law in private disputes.⁶⁴

⁶² *Olmstead*, 277 U.S. at 478-79 (Brandeis, J., dissenting).

⁶³ *Id.* at 479.

⁶⁴ *Id.* at 483-84.

This counter-doctrine denies the court's aid "when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress."⁶⁵ In one sense, the precept that courts should not allow people to profit from their own crimes appeals to a non-instrumental sense of purity, to an idea of contamination more familiar to the ancient world than our own; Holmes captured this sense in his separate dissent when he referred to the government's law breaking as a "dirty business."⁶⁶ Brandeis, on the other hand, focused on the equally strong instrumental grounds for the doctrine of unclean hands, explaining that it was essential in order "to maintain respect for law."⁶⁷ Moreover, he noted that when the government (rather than a private party) was the lawbreaker, the reasons for applying the doctrine were "even more persuasive," and that when the case was one involving criminal punishment, the reasons became "compelling."⁶⁸ In the most stirring passage in a dissent full of passionate verve, Brandeis proclaimed:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.⁶⁹

⁶⁵ *Id.* at 484.

⁶⁶ *Id.* at 470 (Holmes, J., dissenting).

⁶⁷ *Id.* at 484 (Brandeis, J., dissenting).

⁶⁸ *Id.*

⁶⁹ *Id.* at 485.

BRANDEIS TRIUMPHANT

One of the primary reasons that Brandeis's dissent in *Olmstead* is so widely recognized as "great" is the fact that he was substantially vindicated by later events. In the short term, although Olmstead's conviction was upheld by the highest Court in the land and he served out the four years of his sentence, Olmstead eventually won his case in another way: he received a full pardon from President Franklin D. Roosevelt during the Christmas week of 1935, a pardon which restored his civil rights and relieved him of the \$8,000 fine plus court costs that he had never paid.⁷⁰ It is hard to say whether the pardon reflected distaste for the government wiretapping that had netted Olmstead or simply for the recently repealed failed experiment with Prohibition. Whatever its motivation, the pardon turned out to be a good bet on the future: Olmstead experienced a religious conversion and went on to live a quiet and law-abiding life over the next three decades, teaching Sunday school and faithfully visiting prison inmates to spread the good word.⁷¹

The future eventually vindicated Roosevelt's pardon of Olmstead and Brandeis's dissent in a more direct and encompassing way—in the Supreme Court's formal overruling of its *Olmstead* decision in the famous 1967 *Katz* case,⁷² decided a year after Olmstead's death at the age of 79. In *Katz*, the Court addressed professional gambler Charlie Katz's Fourth Amendment challenge to the FBI's wiretapping of the public telephone booth in Los Angeles from which he routinely placed his bets, often with out-of-state bookmakers. This wiretap, like that in *Olmstead*, did not require any entrance into the telephone booth (much less into a home or office); rather, the electronic listening and recording device (basically, a tape recorder with a microphone attached) was taped to the back of the phone booth.⁷³ The information collected from the wiretap was used to convict Katz of transmitting wagering information by telephone across state

⁷⁰ See *The Presidency: The Roosevelt Week*, TIME, Jan. 6, 1936, available at <http://www.time.com/time/magazine/article/0,9171,755551,00.html>.

⁷¹ McClary, *supra* note 5.

⁷² *Katz v. United States*, 389 U.S. 347 (1967).

⁷³ *Id.* at 348-49.

lines in violation of federal law. In the Ninth Circuit Court of Appeals, the feds successfully defended their wiretap against Katz's appeal by arguing directly under *Olmstead* that there could be no Fourth Amendment violation because "[t]here was no physical entrance into the area occupied by [Katz]."⁷⁴

The Supreme Court reversed. Although the Court had begun to question the underlying rationale of *Olmstead* in a few recently preceding cases,⁷⁵ it was not until *Katz* that *Olmstead* was clearly and officially interred. Justice Stewart wrote for the Court and squarely rejected the government's argument that the reach of the Fourth Amendment should "turn upon the presence or absence of a physical intrusion into any given enclosure."⁷⁶ Rather, the Court explained, "the Fourth Amendment protects people, not places,"⁷⁷ and thus the crucial question should be whether the government's actions violated the protection that the Amendment bestowed upon Katz himself, rather than upon the integrity of the telephone booth. The Court concluded that Katz's Fourth Amendment rights had been infringed because the government's wiretap "violated the privacy upon which [Katz] justifiably relied while using the telephone booth."⁷⁸ Justice Harlan wrote an influential concurrence that has come to be synonymous with *Katz* (though it was not joined at the time by any other Justice), explaining that the protection of "people, not places" requires an inquiry into whether a person had an "expectation of privacy" that is one that "society is prepared to recognize as 'reasonable.'"⁷⁹

Had Brandeis still been alive in 1967 (he died in 1941), he surely would have had many reasons to count *Katz* as a belated vindication of his *Olmstead* dissent. On the most basic level,

⁷⁴ *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966).

⁷⁵ See *Silverman v. United States*, 365 U.S. 505, 510-11 (1961) (finding that a government recording device constituted a Fourth Amendment violation even in the absence of a "technical trespass" because the placement of the microphone required some "physical encroachment" on the defendant's home); *Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited.")

⁷⁶ *Katz*, 389 U.S. at 353.

⁷⁷ *Id.* at 351.

⁷⁸ *Id.* at 353.

⁷⁹ *Id.* at 361 (Harlan, J., concurring).

Katz declared the “trespass” doctrine of *Olmstead* “no longer . . . controlling,”⁸⁰ and Shephard’s authoritative citation service lists *Olmstead* as “overruled” by *Katz*. Moreover, the rejection of *Olmstead*’s trespass doctrine would allow the Court in the future to regulate the “subtler and more far-reaching means of invading privacy” not involving “breaking and entry” that Brandeis had predicted would evolve.⁸¹ Decades after the *Katz* decision, the Court would invoke it to strike down the government’s use of a thermal imaging device used by federal agents to detect the heat emitted from a home without any trespass on the homeowner’s property.⁸² This sort of technological innovation is precisely what Brandeis imaginatively foresaw in 1928. Finally, Brandeis could have felt vindicated by the Court’s replacement of the trespass doctrine with one more oriented toward the right of “privacy.” The majority’s language emphasizing “the privacy upon which [Katz] justifiably relied” and Harlan’s concurring language emphasizing “reasonable expectations of privacy” appeared to echo Brandeis’s emphasis on privacy as the central value underlying the Fourth Amendment.

THE LIMITS OF BRANDEIS’S TRIUMPH

Brandeis’s triumph, however, is not nearly as neat or complete as it might seem or is often proclaimed to be. First, the last sentence of the preceding section says that the language of the *Katz* majority and Harlan’s influential concurrence “appear” to echo Brandeis’s emphasis on privacy, and the word “appear” is used advisedly here. Although *Katz*’s privacy-affirming language is oft cited, the case also contains important qualifiers on this language that, while less well-known, better predict the path that Fourth Amendment law was to follow after *Katz*. Perhaps most surprising to those familiar with the triumphal account of *Katz*, the majority opinion explicitly rejects the idea of “privacy” as a grounding rubric for the Fourth Amendment:

⁸⁰ *Id.* at 353.

⁸¹ *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

⁸² *Kyllo v. United States*, 533 U.S. 27 (2001).

[T]he Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.⁸³

Perhaps most ironic, in light of the widespread view that *Katz* instantiated Brandeis’s view of the Fourth Amendment, is the fact that while *Olmstead* is discussed throughout the *Katz* opinion, Brandeis’s dissent is never mentioned; indeed, Brandeis’s name appears but once, in a citation to his article about privacy as the right “to be let alone”—but only to clarify that this right is *not* the foundation of the Fourth Amendment!⁸⁴

In the decades following *Katz*, the Court frequently invoked the idea of “reasonable expectations of privacy” in order to determine the scope of the Fourth Amendment, but the Court’s view of which expectations of privacy were reasonable tended to be narrow and bound by conventional understandings of property and place. On the role of property rights in Fourth Amendment analysis, consider *Rakas v. United States*, in which the Court held that the search of car did not violate any reasonable expectation of privacy of an occupant of the car who could assert “neither a property nor a possessory interest in the automobile, nor an interest in the property seized.”⁸⁵ The Court paid lip service to *Katz* but noted that “the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment.”⁸⁶ On the role of place, consider the Court’s opinion in *Kyllo*, which re-affirmed *Katz*’s holding that physical encroachment was not essential to establish a Fourth Amend-

⁸³ *Katz*, 389 U.S. at 350-51 (footnotes omitted).

⁸⁴ *See id.*

⁸⁵ *Rakas v. United States*, 439 U.S. 128, 148 (1978).

⁸⁶ *Id.* at 143 n.12.

ment intrusion and while at the same time undermining *Katz*'s insistence that the Fourth Amendment protects people rather than places, by emphasizing the fact that the thermal imaging at issue was of a special place—the home. The *Kyllo* Court, building on a line of cases extending unbroken from long before *Katz* to the twenty-first century, held that the home is a place of unique protection: “In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.”⁸⁷ The turn to property rights and traditional views of constitutionally protected places is perhaps not surprising, given the indeterminacy of the idea of “reasonable expectations of privacy.” But the attempt to give meaning to the *Katz* standard tended to undo it over time; as one scholarly observer has noted, wryly, “the results reached under the new, ‘expectation of privacy’ test looked surprisingly like the results that would have been reached under the old, ‘trespass’ test.”⁸⁸ Thus, the apparent apotheosis of privacy as the Fourth Amendment touchstone in *Katz* quickly gave way to the re-emergence of a kind of constitutional reasoning and a set of constitutional results that would likely be more appealing to the *Olmstead* majority than to Brandeis.

Privacy aside, the *Katz* decision contained an additional twist presenting another divergence from Brandeis's view in *Olmstead*. The *Katz* Court did not conclude its constitutional inquiry with its holding that governmental wiretapping was within the ambit of the Fourth Amendment's protection. Rather, having determined that the Fourth Amendment applied to electronic eavesdropping (even absent a physical intrusion into a constitutionally protected space), the Court went on to hold that what rendered unconstitutional the government's wiretapping of *Katz*'s phone booth was the failure to get a judicial warrant to do so, which could have “accommodated the legitimate needs of law enforcement by authorizing the carefully limited

⁸⁷ *Kyllo*, 533 U.S. at 37. The Court's special Fourth Amendment protection of the home has tended to create reduced protection everywhere else. As David Sklansky has observed, “In other places—automobiles, highways, fields, offices, even backyards—Fourth Amendment protection, as a practical matter, either vanished entirely or dropped off dramatically.” Sklansky, *supra* note 13, at 257.

⁸⁸ Sklansky, *supra* note 13, at 254.

use of electronic surveillance.”⁸⁹ This view of wiretapping—as just another garden-variety search and seizure that can be deemed reasonable (or not constitutionally “unreasonable”) when authorized by a judicial warrant—is wholly out of sync with Brandeis’s view that wiretapping was fundamentally inconsistent with the preservation of Fourth Amendment freedoms. Recall that in Brandeis’s view, “writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.”⁹⁰ Such writs would not be rendered acceptable if issued by a neutral magistrate; rather, their sweeping nature and scope make them so great a threat to liberty that they are constitutionally anathema whatever their source of issuance. In Brandeis’s view, wiretapping belonged in the same category. His view had adherents up until the moment of the *Katz* decision: at the tail end of the Term immediately prior to the one in which *Katz* was decided, the Court debated, without deciding, whether warrants authorizing wiretapping were like general warrants in that they necessarily constituted a dragnet rather than a particularized search.⁹¹ The *Katz* decision resolved this debate without further discussion in favor of permitting judicial warrants, but it is clear that Brandeis’s view would have been to the contrary. Moreover, the failure of the Supreme Court to either ban wiretapping altogether or subject it to more specific limitations than the warrant clause left the whole field of regulation of wiretapping to the legislative branches—exactly the position urged by Chief Justice Taft in his opinion for the Court in *Olmstead*.

One final way in which Brandeis’s *Olmstead* dissent has failed to emerge victorious in the post-*Katz* era has been the Court’s rejection of the general constitutional methodology that Brandeis used to reach his particular interpretation of the Fourth Amendment. Brandeis urged that constitutional protections—*especially* “[c]lauses guaranteeing to the individual protection against specific abuses of power”—must have the “capac-

⁸⁹ *Katz v. United States*, 349 U.S. 347, 356 (1967) (quotation marks and footnote omitted).

⁹⁰ *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting).

⁹¹ See *Berger v. New York*, 388 U.S. 41 (1967).

ity of adaptation to a changing world.”⁹² But in the decades since *Katz*, the Court has increasingly moved toward a textualist/originalist mode of constitutional interpretation—*especially* in the Fourth Amendment context, where the Court has looked to settled understandings at common law at the time of the framing of the Constitution in order to determine which government actions are reasonable today.⁹³ For example, in 1995, in *Wilson v. Arkansas*,⁹⁴ the Court was called upon to determine whether police officers must knock and announce their presence before breaking down a door in the execution of a warrant. Instead of attempting any consideration of the attributes and needs of contemporary law enforcement or the privacy concerns of contemporary citizens vis-à-vis the police in such contexts, the Court consulted only framing-era common law in rendering its decision. Similarly, in 2001, in *Atwater v. City of Lago Vista*,⁹⁵ the Court devoted the bulk of its constitutional analysis of the reasonableness of a custodial arrest for a fineable-only misdemeanor to consideration of whether common-law practices authoritatively precluded such arrests in the vastly different world of the eighteenth century. To what would undoubtedly have been Brandeis’s great dismay, far from being the strongest case for purposive and openly normative constitutional elaboration, Fourth Amendment analysis has become the stronghold of historical exegesis.

The Supreme Court’s failure in *Katz* and beyond to heed Brandeis’s call in *Olmstead* for privacy as the fundamental grounding for the Fourth Amendment might seem naturally to lead here to a full-throated defense of Brandeis’s dissent and a detailed critique of the myriad ways in which current law diverges from his vision. Such critiques are a staple of Fourth Amendment scholarship, along with more recent attempts to replace Brandeis’s privacy grounding with some more attractive

⁹² *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

⁹³ The best description and discussion of this development can be found in David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

⁹⁴ 514 U.S. 927 (1995).

⁹⁵ 532 U.S. 318 (2001).

or administrable alternative.⁹⁶ Rather than engage in this debate over whether Brandeis's defense of privacy in *Olmstead* should have emerged more triumphantly from history than it has, I wish to turn the spotlight from the privacy aspect of Brandeis's dissent to a less discussed but (I suggest) even more significant or "greater" part of his analysis—Brandeis's concern about the "pernicious" effects of intentional government law-breaking.

THE GOVERNMENT AS TEACHER

What could possibly constitute a bigger fish to fry than the right to privacy? My nomination for the "greatest" aspect of Brandeis's *Olmstead* dissent is his at once lyrical and indignant call for the repudiation of government lawbreaking in the pursuit of its own law enforcement goals.⁹⁷ Here, Brandeis went beyond offering a grounding theory or rubric for a particular constitutional provision and offered a more general normative observation about the relationship between government and citizen. Brandeis portrayed government ("our" government) as a teacher—and not just as any teacher, or as one among many teachers, but as "the potent, the omnipresent teacher." In Brandeis's view, government teaches not only by what it says, but by its example; if the government breaks the law, it teaches contempt for law, and thus "it invites every man to become a law unto himself; it invites anarchy." Government law breaking in pursuit of government law enforcement would, in Brandeis's dire prediction, "bring terrible retribution." "Against that pernicious doctrine this court should resolutely set its face." Bran-

⁹⁶ See, e.g., Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?* 33 WAKE FOREST L. REV. 307 (1998); Christian M. Halliburton, *How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803 (2009); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995); Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?" 94 COLUM. L. REV. 1751 (1994).

⁹⁷ The relevant passage, beginning "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen . . ." is reproduced in full above. The quotations in the following paragraph are found in this previously cited material. See *supra* note 69.

deis urged the Court's rejection of the government's lawbreaking not as a product of constitutional interpretation, but instead as grounded in the Court's inherent powers of justice, citing the similar exercise of power by courts of equity through the doctrine of "unclean hands."⁹⁸

This passage is beautiful, but it has two other attributes that render it "great." First, it is astonishingly relevant. Brandeis was extrapolating from a specific context of government lawbreaking involving frustrated federal agents attempting to enforce Prohibition at a time when wiretapping was clearly (and criminally) prohibited. He wrote long before our country's most dramatic encounter with government lawbreaking—the Watergate scandal, often cited as promoting a sea-change in public attitudes about government.⁹⁹ Even more recent and more relevant is our country's post-9/11 encounter with the assertion by the federal executive branch of the right to use means that had long been considered illegal to fight the "War on Terror"—racial profiling, detention without hearing, torture, and domestic eavesdropping without congressional authorization. Brandeis presciently saw that the temptation "[t]o declare that in the administration of the criminal law the end justifies the means" was a universal one, and his warning against it remains startlingly fresh.¹⁰⁰ Second, Brandeis was right about the consequences of government law breaking—or as right as the current state of social science can confirm. Brandeis's assertion that government law breaking leads to private "contempt for law" has turned out to be more than homely folk wisdom—social scientists have treated it (or cognates of it) as a testable hypothesis that has tremendously important implications, both for the administration of criminal justice and for the establishment of appropriate moral and legal limits on the exercise of state power.

Of course, Brandeis's government integrity argument did not win in *Olmstead*, nor has it triumphed in the succeeding

⁹⁸ *Olmstead*, 277 U.S. at 483-84.

⁹⁹ See, e.g., Adam Clymer, *Watergate's Shadow Lies Across the Land*, N.Y. TIMES, June 14, 1992, at § 4; p. 3; col. 1.

¹⁰⁰ *Olmstead*, 277 U.S. at 468.

eighty years. Although I argue above that Brandeis's privacy grounding for the Fourth Amendment has been far less vindicated than is commonly imagined, his "unclean hands" or government integrity argument has had even less success. In what follows, I will track the largely negative legal treatment of Brandeis's government integrity argument, particularly with reference to the Fourth Amendment, and then contrast this dismissal with the much more respectful treatment of Brandeis's argument by social scientists seeking to understand the wellsprings of human behavior.

As a doctrinal matter, what Brandeis appeared to be calling for in his government integrity argument in *Olmstead* was more robust use of courts' inherent, non-constitutional supervisory powers to refuse to participate in government wrongdoing and to sanction government actors for law breaking by excluding evidence obtained unlawfully from court. Even during the Warren Court era, however—the relative heyday of the use of the Fourth Amendment exclusionary rule—Chief Justice Warren himself dissented from the Court's failure to use its non-constitutional supervisory powers to exclude the testimony of a shady informant that the government had planted to infiltrate Jimmy Hoffa's legal team during the infamous "Test Fleet" trial.¹⁰¹ An even more outrageous case during the Burger Court found the use of the Court's supervisory powers inappropriate, despite the fact that government agents had broken into a hotel room and stolen a briefcase with incriminating papers in it, on the ground that the person whose hotel room they broke into was not the defendant against whom the papers were used.¹⁰² As a practical matter, although federal courts have invoked their inherent supervisory power with some frequency over the years to regulate a broad range of conduct,¹⁰³ the use of supervi-

¹⁰¹ See *Hoffa v. United States*, 385 U.S. 293, 315 (1966) (Warren, C.J., dissenting) ("[O]ne of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement.").

¹⁰² See *Payner v. United States*, 447 U.S. 727 (1980).

¹⁰³ See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV.

sory power to exclude relevant evidence of guilt in criminal trials in order to promote government integrity has been rare.¹⁰⁴

Although Brandeis did not advance this argument himself in *Olmstead*, later judges (generally, though not always, dissenters) have used arguments founded on government integrity as a means to construe the Fourth Amendment itself, rather than as an extra-constitutional consideration. These judges have maintained either that law breaking by the government is relevant to determining whether the government's conduct is "reasonable" under the Fourth Amendment or that the preservation of government integrity is a (or even *the*) key rationale for the Fourth Amendment's exclusionary rule. Neither of these categories of attempts to import the government integrity idea into the Fourth Amendment itself has triumphed, but the argument has not been extinguished and still sparks to life occasionally in both federal and state opinions.

In the context of determining the Fourth Amendment "reasonableness" of various investigative tactics, the Supreme Court has given little or no weight to the fact that the tactics employed by the government were themselves criminal offenses. For example, in *Oliver v. United States*, the Court held that state narcotics agents in Kentucky did not invade any "reasonable expectation of privacy" by entering onto the defendant's land and bypassing a locked gate with a "no trespassing" sign posted on it, despite the fact that such action would almost certainly constitute a criminal trespass under Kentucky law.¹⁰⁵ Over strenuous dissent, the Court dismissed the criminal trespass law as protecting interests distinct from privacy and thus deemed it of "lit-

1433, 1433 (1984) (describing the robust use of such power by lower federal courts and its "sporadic" invocation by the Supreme Court).

¹⁰⁴ *Id.* at 1453:

The exclusion of evidence to preserve the integrity of the courts and to deter official misconduct may interfere with the accuracy and reliability of the courts' search for the truth. Although the Court has often been divided on this issue, it has generally given precedence to the search for the truth . . . (footnote omitted). *Id.*

¹⁰⁵ *Oliver v. United States*, 466 U.S. 170, 190 (1984) (Marshall, J., dissenting) ("In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass.") (citing KY. REV. STAT. §§ 511.070(1), 511.080, 511.090(4) (1975)).

tle or no relevance” to Fourth Amendment analysis.¹⁰⁶ The Court took a similar approach in *California v. Greenwood*, validating the warrantless search and seizure of garbage bags left at the curb as constitutionally “reasonable” despite the widespread existence of ordinances prohibiting anyone except authorized trash removal personnel from interfering with garbage left for collection, presumably on similar grounds (i.e., that prohibitions on interfering with garbage are more likely based on aesthetic and public health grounds than on privacy grounds).¹⁰⁷ In a related and more general context, the Court in *Virginia v. Moore* held that arrests that are illegal under state law are still constitutionally reasonable, as long as they are supported by probable cause.¹⁰⁸ Here, the arrest was unlawful in the sense of unauthorized (and thus subject to disciplinary sanctions and tort remedies, rather than criminal punishment), and the Court relied on the undesirable complexity of altering the constitutional standard of reasonableness to accommodate the variety in state and local laws.¹⁰⁹ The Court did not suggest, however, that the lack of a criminal sanction for the violation was key to its holding; it simply did not consider any form of the argument from government integrity or consider whether the constitutional analysis might change in the context of willful violations of state criminal laws.

Despite the Supreme Court’s skepticism regarding the relevance of government law breaking to Fourth Amendment reasonableness, the argument has had some greater appeal in state constitutional litigation, most likely because individual states do not face the problem that the Court noted in *Moore*—state constitutional standards need apply only statewide and thus do not have to accommodate any variety in the substance of criminal prohibitions. As a consequence, Brandeis’s *Olmstead* dissent regarding government integrity finds its most approving

¹⁰⁶ *Id.* at 183-84 (majority opinion). Ironically, the interests promoted by criminal trespass laws that the Court declared to be distinct from privacy interests were the landowners’ property interests. See *Rakas*, 439 U.S. at 148.

¹⁰⁷ *California v. Greenwood*, 486 U.S. 35 (1988).

¹⁰⁸ 128 S. Ct. 1598 (2008) (upholding a full custodial arrest despite the fact that state law authorized only the issuance of a summons for the offense in question).

¹⁰⁹ *Id.* at 1607.

citations by state supreme courts interpreting their own analogs to the Fourth Amendment. For example, courts in both New York and Oregon have rejected the U.S. Supreme Court's holding in *Oliver* that entry onto "open fields" is constitutionally reasonable, citing the existence of state criminal trespass statutes prohibiting such conduct.¹¹⁰ These courts held not only that the existence of these criminal statutes expressed state-wide understandings of privacy, but also that the maintenance of governmental integrity required the suppression of evidence collected in such a manner. Both courts cited—indeed, quoted!—Brandeis's "government as teacher" language from *Olmstead*. Other state courts have used Brandeis's government integrity rationale (and credited his *Olmstead* dissent) to depart from additional restrictive Fourth Amendment rulings issued by the Supreme Court.¹¹¹ These deviations from the Supreme Court's federal constitutional rulings on the Fourth Amendment do not represent a majority or even a very substantial minority of state court rulings, but they do show that Brandeis's argument from integrity is alive and well, at least in pockets of state constitutional jurisprudence.

The second way that the argument from government integrity might play a role in Fourth Amendment analysis is as a rationale for the Fourth Amendment's exclusionary rule. Although the Court gave sympathetic voice to that argument in *Mapp v. Ohio* when it first incorporated the exclusionary rule (indeed, *Mapp* is the most famous and important case that quotes Brandeis's "government as teacher" language from *Olmstead*),¹¹² the integrity rationale has long been authoritatively discarded as a principle that should shape the constitutional contours of the rule. Although Justice Clark, writing for the Court in *Mapp*, invoked "the imperative of judicial integrity"

¹¹⁰ See *People v. Scott*, 593 N.E.2d 1328 (N.Y. 1992); *State v. Dixson*, 740 P.2d 1224 (Or. Ct. App. 1985).

¹¹¹ See, e.g., *State v. Hess*, 770 N.W.2d 769 (Wis. Ct. App. 2009) (modifying the "good faith" exception to the warrant requirement under the Wisconsin state constitution in order to preserve government integrity); *State v. Van Haele*, 649 P.2d 1311 (Mont. 1982) (applying exclusionary rule under the Montana state constitution to exclude evidence illegally seized by private citizens and turned over to the police).

¹¹² *Mapp v. Ohio*, 367 U.S. 643 (1961).

and quoted Brandeis's *Olmstead* dissent at length,¹¹³ little time passed before the Court fundamentally reoriented the grounding of the exclusionary rule. The following decade, in holding that the exclusionary rule did not apply in grand jury proceedings, the Court in *United States v. Calandra* sweepingly pronounced that the exclusionary rule was wholly preventive in nature: "[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect"¹¹⁴ Thus, held the Court in *Calandra* and many subsequent cases, the remedy of exclusion, which engenders substantial social costs by suppressing reliable evidence of guilt, should be limited to those circumstances in which it will have a significant marginal deterrent effect on government wrongdoing.¹¹⁵ Consequently, because law enforcement officers presumably will be sufficiently deterred by the prospect of the suppression of illegally seized evidence at trial, there is no need to apply the exclusionary rule in grand jury proceedings as well. In such a calculus of marginal deterrent effects, there is simply no room for government integrity as a value to be safeguarded by the exclusionary rule. Two years after *Calandra*, in holding that Fourth Amendment exclusionary rule claims could not be raised on federal habeas corpus, the Court in *Stone v. Powell* placed the final nail in the integrity rationale's coffin.¹¹⁶ After reviewing all of its Fourth Amendment holdings that appeared to be inconsistent with the judicial integrity rationale, the Court declared: "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."¹¹⁷

While the role of the integrity argument as a grounding for the federal Fourth Amendment exclusionary rule might seem to be a long dead letter, a very recent decision by the Supreme Court appears to have breathed new life into the dispute,

¹¹³ *Id.* at 659 (citation omitted).

¹¹⁴ *United States v. Calandra*, 414 U.S. 338, 348 (1974).

¹¹⁵ *Id.*

¹¹⁶ *Stone v. Powell*, 428 U.S. 465 (1976).

¹¹⁷ *Id.* at 485.

though without changing the doctrine. Last Term in *Herring v. United States*, the Court refused to apply the exclusionary rule to suppress evidence found when the defendant, Herring, was searched pursuant to an arrest warrant listed in a neighboring county's database that had been recalled months earlier, though this recall had never been entered in the database.¹¹⁸ The Court held that the exclusionary rule did not apply to the fruits of an unlawful arrest that was the product of "isolated negligence attenuated from the arrest,"¹¹⁹ rather than from "deliberate, reckless, or grossly negligent conduct" or "recurring or systemic negligence."¹²⁰ Although the facts of *Herring* are odd enough that the reach of the Court's holding remains in doubt, the bare majority's announcement of what sounds like a new limitation on the scope of the exclusionary rule drew furious fire from the dissenters and resulted in a dissenting opinion that raised the government integrity rationale from the grave. Writing for all four dissenters, Justice Ginsburg questioned the deterrence rationale as the sole basis for the exclusionary rule and invoked instead "a more majestic conception of the Fourth Amendment and its adjunct, the exclusionary rule."¹²¹ Lest it be unclear what such a conception could be, Justice Ginsburg explained the government integrity rationale with as much clarity, if not quite as much verve, as Brandeis:

[T]he rule also serves other important purposes: It "enabl[es] the judiciary to avoid the taint of partnership in official lawlessness," and it "assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."¹²²

Following this explanation comes the obligatory quotation from Brandeis in *Olmstead*.¹²³

¹¹⁸ *Herring v. United States*, 129 S. Ct. 695 (2009).

¹¹⁹ *Id.* at 698.

¹²⁰ *Id.* at 702.

¹²¹ *Id.* at 707 (Ginsburg, J., dissenting) (citation omitted).

¹²² *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

¹²³ *Id.*

Herring by no means suggests that the Court is teetering on the edge of reviving the integrity rationale for the exclusionary rule. The integrity rationale garnered only four votes last Term, and Justice Souter has already been replaced by Justice Sotomayor, who may not turn out to be a traditional Fourth Amendment liberal (or not as much of one as Souter was).¹²⁴ But while it is undeniable that Brandeis's government integrity argument has not been wildly successful in shaping legal doctrine, it is still fair to suggest that it remains a powerful idea with enough force to keep it alive in legal discourse, move the occasional state constitutional court, and perhaps—who knows?—spark a larger revival sometime in future.

In contrast, Brandeis's view has had the most success outside of the courts, in the non-legal, non-normative study of human behavior—the field of psychology. Brandeis's "government as teacher" argument posited that government law breaking would have a substantial effect on the behavior of ordinary citizens—in particular, that the courts' apparent imprimatur on government misconduct would "breed[] contempt for law" and "invite[] anarchy."¹²⁵ Brandeis's folk wisdom has a corresponding folk response: No, the best way to promote respect for law and to prevent anarchy is to ensure that those prosecuted for crimes are convicted. That is, inflicting just punishment on criminals is a better way to promote compliance with law than standing up for government integrity when doing so will interfere with the infliction of just punishment. It turns out that this folk debate is the stuff of serious scholarly inquiry and that over the past few decades, the tide has swung considerably toward the Brandeis view.

In his groundbreaking work *Why People Obey the Law*, psychologist Tom Tyler describes a longitudinal empirical study in which he measured the effect of "normative factors" in influencing citizens' compliance with the law independently of "deterrence judgments."¹²⁶ Tyler explains that people may obey the

¹²⁴ See Jess Braven & Nathan Koppel, *Nominee's Criminal Rulings Tilt to Right of Souter*, WALL ST. J., June 5, 2009, at A3.

¹²⁵ *Olmstead v. United States*, 277 U.S. 438, 468 (1928).

¹²⁶ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4 (Yale Univ. Press 1990).

law because they view it is as just and moral to do so, as opposed to simply calculating whether they may face unpleasant sanctions for failing to obey. People's ideas about what is just and moral may come from their own internal morality, or from the perceived "legitimacy" of the authority enforcing the law (the view that "the authority enforcing the law has the right to dictate behavior").¹²⁷ Tyler's experiment demonstrated that "normative issues matter"—that people obey the law because they believe it is proper to do so, that their views of whether it is proper to do so depend on perceived legitimacy, and—crucially, for the Brandeis perspective—that perceptions of legitimacy are influenced by adherence to procedural justice.¹²⁸ In particular, "[w]hen people react to their dealings with police officers and judges they focus their attention sharply on questions of procedural justice."¹²⁹ While the concept of "procedural justice" is a broad umbrella that encompasses many aspects of fairness that are far afield from Brandeis's concern about the toleration of government law breaking (such as consistency and suppression of bias), procedural justice also includes evaluation of "honesty and "ethicality" in the administration of the law,¹³⁰ concerns that presumably would encompass the toleration of law breaking by the judicial process. Tyler, in collaboration with others, has followed up with many further empirical studies consistently supporting the role of legitimacy and procedural justice in promoting legal compliance, particularly in the context of policing.¹³¹

Legal scholars have speculated that Tyler's work may explain some of the variations in crime rates and other forms of legal noncompliance that appear to correlate to places and times in which law enforcement legitimacy ebbs and flows. Law pro-

¹²⁷ *Id.*

¹²⁸ *Id.* at 178.

¹²⁹ *Id.* at 104.

¹³⁰ *Id.* at 118; see also, Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Address the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

¹³¹ See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Tom R. Tyler & Cheryl Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004).

fessor and former federal prosecutor Bennett Capers has speculated that the month-long spike in crime across the board following the fatal shooting of unarmed Amadou Diallo in New York City, as well as the additional spike that followed the acquittal of the officers involved that following year, supports Tyler's claim that there is a correlation between perceptions of legitimacy and levels of crime.¹³² He further suggests that there may be "smaller rebellions" or forms of legal noncompliance that may be the product of ebbing legitimacy, such as "[n]ot assisting the police by providing information about a crime," or "[d]isregarding jury duty, or serving but voting to acquit a guilty defendant to send a message about police practices."¹³³ The work of law professor and former state prosecutor, Tracey Meares, also stresses the links between legitimacy and law enforcement, with a particular interest in addressing crime policy in poor, minority neighborhoods.¹³⁴

The insights of psychology have been far more kind to Brandeis's "government as teacher" argument than the courts have been. But that is no criticism; rather, it is the reason to celebrate this aspect of Brandeis's argument more than other aspects which may have found more vindication in the courts. The greatest sign of "greatness" is to be right—not in the sense of being borne out by legal doctrine, but rather right in the larger sense of describing a truth about the human condition. Brandeis's folk wisdom about the dangers that might follow from the official condoning of government law breaking has found strong vindication in the work of contemporary psychologists and offers insights to contemporary legal scholars and policy makers that have tremendous significance for the difficult policy choices that our criminal justice institutions currently face.

¹³² Bennett Capers, *Crime, Legitimacy and Testifying*, 83 IND. L.J. 835, 865 (2008).

¹³³ *Id.*

¹³⁴ See, e.g., Tracey L. Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391 (2000); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651 (2009).

“FOR GOOD OR FOR ILL . . .”

Although Brandeis declared that the government is a teacher “for good or for ill,” his warning and this essay both focused on the “ill” part of his observation, on the consequences that might flow from official tolerance of government law breaking. But Brandeis’s dissent is itself an illustration of the “good” aspect of his observation. Supreme Court Justices are, after all, part of the government, and they teach—perhaps most especially through their dissents.¹³⁵ Brandeis’s dissent thus performs what I maintain is his “greatest” message in an opinion full of quotable, thought-provoking passages—in a government of law and not of men, the actions of the government are not merely the actions of men (or women), but rather, they carry a meaning and a consequence to which we fail to attend at our peril.

¹³⁵ For a wonderful exploration of the ways in which dissents play an important role in promoting deliberation and legitimacy, see Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).