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To cite this article: Lawrence S. Zacharias (2011) The Narrative Impulse in Judicial Opinions, Law & Literature, 23:1, 80-128

To link to this article: http://dx.doi.org/10.1525/lal.2011.23.1.80

Published online: 19 Dec 2013.

Article views: 36

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The Narrative Impulse in Judicial Opinions

Lawrence S. Zacharias*

Abstract. This essay examines the backdrop for the Supreme Court’s expansive reading of the Fourth Amendment in Katz v. United States, namely, “The right of the people to be secure in their persons . . . against unreasonable searches . . . shall not be violated.” Katz, and perhaps more significantly its precursor, Olmstead v. United States, reflected not only a doctrinal move toward restricting government surveillance, but also a confluence of two approaches to judicial writing on the subject. The first was the traditional conceptual approach that law schools have long promoted; it consists of textual analysis that enables judges to designate the bright lines for shaping citizens’ and public officials’ conduct. The second was a narrative approach buried beneath the surface of the opinions; it consists of stories, some real, others projected, that enable judges to introduce long-standing social norms into their decision-making process.

The narratives that Justices Holmes and Brandeis introduced in their respective dissenting opinions in Olmstead were reconfigurations of the “surveillance tragedy,” a narrative that antedated the framing of the Bill of Rights. In its most refined form, namely William Shakespeare’s Hamlet, the surveillance tragedy encompassed a range of themes, such as government excess, intrusions into citizens’ privacy with resulting paranoia, paralysis or psychological imprisonment, loss of citizen autonomy sufficient for a robust democracy, and ultimately the full-blown corruption and destruction of the state. This essay elaborates the surveillance tragedy more systematically, in part by giving critical attention to Hamlet itself, but also by showing how this narrative fleshes out much of what the conceptual dialogue of the Fourth Amendment omits.

Keywords: Fourth Amendment, surveillance, privacy, narrative, conceptualism, Shakespeare, Hamlet

Surveillance, along with its consequent searches and seizures, is often directed at one thing, investigating, say, an ongoing criminal conspiracy or course of crimes, or a specific activity that threatens the security of the community, but
discovers something else and then looks for more of that. Accordingly, surveillance can feed on itself, and then demand intrusive privileges into a widening realm, from spaces that are entirely public—the so-called “public roads” and “open fields”—to spaces that are at the intersection of public and private, such as phone booths, banks, mail services, Internet sites, and so forth. The government claims a monopoly on what it deems to be “public space,” and as it encroaches on more and more transactions, it drives its subjects to seek shelter from the government agents’ gaze, no doubt in some instances for patently illegal activities, but inevitably also for a broad range of benign activities that are simply not meant to be shared with a wide audience. Eventually citizens in general are driven to conform narrowly with the rulers’ expression of social norms, and many of those citizens who would choose not to conform narrowly may be confined to a sort of “psychic imprisonment” or paranoia, not knowing where or for what the government’s agents may be looking or that they may be (inadvertently) spying.

The relationship between surveillance and the Fourth Amendment’s proscription against “unreasonable searches and seizures” has been ambivalent. By and large the Court has been reluctant to extend the Constitution’s traditional protections against home and office invasions or physical searches of the person to cover the intrusive gaze of government agents in public and quasi-public spaces. At one point, following Katz v. United States, it appeared that the Court might be willing to resist the government’s expanding technological capabilities by insulating citizens’ activities from intrusive surveillance. But Warren Burger’s installation as Chief Justice of the Court terminated this prospect. And though Justice Scalia and others have shown some inclination to revisit the issue in recent years, the government retains a secure grip on its monopoly of the public and quasi-public space.

This essay examines the backdrop for the Court’s expansive reading of the Fourth Amendment in Katz, namely, “The right of the people to be secure in their persons . . . against unreasonable searches . . . shall not be violated.” My point here is that Katz, and perhaps more significantly its precursor, Olmstead v. United States, reflected not merely a doctrinal move toward restricting government surveillance, but also a confluence of two approaches to judicial writing on the subject. On the one hand was the traditional conceptual approach that law schools have long promoted, consisting of textual analysis that enables judges to designate the bright lines for shaping citizens’ and public officials’ conduct. On the other was a narrative approach buried beneath
The point of introducing a narrative is to persuade, to move judges out of their conceptual ruts. For once judges have assigned to a text a particular meaning, that meaning becomes privileged, notwithstanding alternative interpretations. One seeking to move a court along an alternative line of interpretation must propose a context—that is, a narrative—that renders the alternative more plausible than the earlier interpretation. Let me add that the introduction of a narrative is not necessarily an instance of “judicial activism,” but merely “judicial creativity.” Indeed, to the extent that the narrative in question, along with the social norms it expresses, can be tied to the adoption of the law itself—for our purposes, here, the Constitution’s Fourth Amendment—the narrative may enjoy a kind of legitimacy that even some textual interpretation cannot. Of course, when a lawyer or judge simply makes up stories or draws on ones that are not in some way intertwined with the adoption of the rule(s) at hand, then the use of narrative may become problematic from the standpoint of “constitutional tradition.”

The narratives that Justices Holmes and Brandeis introduced in their respective dissenting opinions in *Olmstead* were reconfigurations of what I term here the “surveillance tragedy.” That narrative was one that antedated the framing of the Bill of Rights. In its most refined form, namely William Shakespeare’s *Hamlet,* the surveillance tragedy encompasses a number of themes that include government excess, intrusions into citizens’ privacy along with the resulting paranoia, paralysis or psychological imprisonment, loss of citizen autonomy sufficient for a robust democracy, and ultimately the full-blown corruption and destruction of the state. The point of this essay is to elaborate on the surveillance tragedy more systematically, in part by giving our critical attention to *Hamlet* itself, and to show how this narrative fleshes out much of what the conceptual dialogue of the Fourth Amendment omits. In a companion piece, I shall show how the Court, following *Olmstead,* has continued to invoke this narrative to move the law beyond conceptually entrenched, though not necessarily justifiable positions.

*Hamlet* was certainly known to the constitutional framers, though perhaps not expressly as the prototype for the surveillance tragedy. Not much has been written on Shakespeare’s influence during the time of the Constitution’s development, but Kim Sturgess, writing about the American appropriation of
Shakespeare during the nation’s earlier history, notes that the moral content of Shakespeare’s plays not only resonated with American audiences at the time of independence, but was specifically embedded in some of the constitutional framers’ values. My point is not that the framers incorporated the surveillance tragedy into the meaning of the Fourth Amendment; indeed, the evidence for such an argument is beyond slender. Rather, I am suggesting that even “originalists” are bound to take into account the narrative traditions that reflected social norms at the time the text was conceived. And the work of Shakespeare—and *Hamlet* was performed more than most Shakespeare plays around the time of independence—was certainly part of those traditions.

**OLMSTEAD, KATZ, AND THE NARRATIVE IMPULSE**

*Olmstead v. United States* (1928) grew out of the federal government’s surveillance of the operations of the notorious bootlegger Roy Olmstead, charged with violating the National Prohibition Act. The case has long been cited as a harbinger of modern Fourth Amendment surveillance doctrine, the intellectual prelude to the Supreme Court’s landmark decision in *Katz v. United States*. Less remarked upon, however, is that *Olmstead* reflected a literally dramatic turn in judicial writing styles, namely the importation of narrative elements and themes into the Court’s opinions. This development is reflected in the stark contrast in styles between Chief Justice Taft’s opinion in *Olmstead* and those of the dissenters, Justices Holmes and Brandeis. The Chief Justice’s opinion was a rather poor example of the traditional conceptual style of legal argument, which focused on the words of the Fourth Amendment. I say poor example, because Taft’s opinion explicates some words (i.e., “houses, papers, and effects”), but largely disregards others (“The right of the people to be secure in their persons . . . against unreasonable searches and seizures”). The dissenters, meanwhile, elaborated on the narrative behind the words; they introduced the surveillance tragedy to support their interpretation of the Fourth Amendment’s words.

The method of surveillance in *Olmstead* was wiretapping. As part of its surveillance the government had been intercepting telephone conversations for nearly five months by tapping into the wires in the basement of the building where the bootleggers had their offices. Chief Justice Taft’s opinion for the majority reasoned narrowly, based on the words of the Constitution.
The “language of the [Fourth] Amendment” he concluded, “can not be extended and expanded to include telephone wires reaching to the whole world from the defendant’s house or office.”25 To the contrary, Taft went on, the “reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside.”26 In the case at hand, “those who intercepted the projected voices were not in the house of either party to the conversation” and accordingly not engaged in a search of the defendant’s house or “tangible material effects.”27

The dissenting justices, Holmes and Brandeis among them, prodded the majority to exclude the wiretap evidence because it was obtained in violation of state law. Taft, however, rejected this argument, relying instead on his “general experience” with criminal investigations:

The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received. 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.28

Again, Taft’s opinion, in cleaving to the well-worn technique of textual interpretation, failed to acknowledge that the Fourth Amendment’s sanction against “unreasonable searches and seizures” might have implied a standard that prohibited ordinarily illegal searches. In effect, Taft was asserting a government monopoly on all space outside the citizen’s house.

Holmes and Brandeis, in their respective dissenting opinions, noted Taft’s formalism. Holmes, for instance, chided Taft, observing that “Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.”29 Holmes also offered something like a counternarrative to Taft’s rationalization of dodgy criminal investigations, his “this is the way it always has been” justification. Holmes acknowledged that government is the agent for defining and apprehending criminals, and this included the acquisition of evidence that would lead to convictions. At the same time, he imagined a crossing of paths where the price of getting bad guys is the government’s own increasing engagement in “dirty business.”30
On this point Holmes opined that it is “less evil that some criminals should escape than that the Government should play an ignoble part.” Holmes’s dissent stopped short of describing, precisely, where the government may have crossed the line into ignobility in the case at hand, but he argued strongly that courts should exclude evidence secured by government activities in violation of state law.

Brandeis’s dissenting opinion extends and embellishes Holmes’s story line, combining both a narrative and the more traditional juristic or conceptual approach. First, he projected a vision of a society marked by regular improvements in surveillance technology but without corresponding regulation of its use, in particular its use to subvert personal liberty and privacy:

Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.

Very plainly, Brandeis’s opinion projects a future of insidious behaviors, boundless intrusions, and the corresponding loss of private citizens’ autonomy.

Second, Brandeis turned what Holmes described as a logical path into irreversible path dependence. Holmes had observed that government, by paying its agents to procure evidence without restricting the manner in which the evidence was obtained, in effect provided its agents with an incentive to break the law. Brandeis’s narrative takes Holmes’s sense of inevitability a step further. Whereas Holmes merely projects the corrosive effects of allowing the police to benefit from their own insidious and illegal investigative techniques, Brandeis notes that such police behavior corrupts society more broadly. To wit, Brandeis converts what Holmes described as economic tendency into pathology, a disease that will infect not only the government’s agents, but also its subjects, an epidemic waiting to happen:

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.
“Can it be,” he asked, “that the Constitution affords no protection against such invasions of individual security?”36 Like Holmes, Brandeis could not articulate exactly where or when the agents in *Olmstead* had crossed the line. Yet, in answer to his own question about the level of protection that the Constitution affords, Brandeis went beyond Holmes in responding to Taft’s narrow interpretation of the Amendment’s words:

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.37

To achieve these lofty purposes, Brandeis had to find in the Constitution a barrier to government intrusions that would modernize that earlier catchphrase for privacy, “the home as castle.” So he concluded this line of argument with an alternative reading of the Amendment, one that focused on the right of individuals “to be secure in their persons” against the “unreasonable searches and seizures” of government agents:

[The founders] 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.38

In aiming for practical, bright line conceptual solutions, Brandeis did resort to conventional techniques.39 Taft had rejected the claim that illegality under *state* law was grounds for excluding wiretap evidence, relying instead on a “federal common law”; in this context, Taft opined that any change in federal evidence rules had to be enacted by Congress.40 Brandeis used the opportunity to make the case that the common law of the land did in fact proscribe intercepting telephone and telegraph transmissions: thirty-seven states had already adopted laws to that effect. Just in case federal legislators were unaware, Brandeis’s opinion provides them with a comprehensive listing of such statutes.41

Brandeis’s dissent in effect draws on the elements of the surveillance tragedy to sway the Court to an alternative reading of the Fourth Amendment’s
words; his reading focuses attention on the phrases “unreasonable searches” and “secure in their persons.” First, he projects the increasingly insidious intrusions by the state’s agents with ever-developing surveillance technologies. Second, he projects a citizenry impelled to adopt similarly insidious countermeasures. And third, he projects inevitable doom, a body politic corrupted by the cancer of surveillance, a society ultimately divested of all privacy and meaningful individual autonomy, the very lifeblood of a constitutional democracy. To be sure, Brandeis’s narrative is a generalized account of the future, whereas the prototypical surveillance tragedy lays out the necessary conditions in dramatic form that will lead to a tragic outcome. Still, the dissent illustrates ways that judges have imported elements of this narrative into surveillance doctrine.\footnote{42}

What renders Brandeis’s dissent remarkable is that it gave his successors on the Court a new lens with which to examine surveillance cases, one that exposed not only the behaviors of the police, but also the interests of those subjected to intrusive police practices (e.g., “the right to be let alone”).\footnote{43} Six years after Olmstead, Congress did adopt the Federal Communications Act (1934). Section 605 of the Act broadly outlawed wiretapping, though the following thirty years of experimentation in federal wiretapping regulation revealed a variety of potential loopholes in the terms of the Act.\footnote{44} These loopholes, together with the still lurking formalism of Taft’s Olmstead opinion, laid the foundation for a change in doctrine that Justice Stewart expressed in Katz.\footnote{45} There the Supreme Court concluded that the Fourth Amendment “protects people, not places,” that it is not physical invasions and seizures that should determine the outcome of wiretapping cases, but citizens’ “expectations of privacy.”\footnote{46} In effect, Katz made clear that some form of Brandeis’s “right to be let alone” (including its relationship to autonomy, nonconformity, fearlessness, or risk-taking) serves as a useful constitutional counterpoint to the state’s presumptive power to investigate crime, a conceptual boundary in the definition of what constitutes “unreasonable.”\footnote{47}

\textbf{LOOKING BACK}

Brandeis did not pluck the surveillance tragedy out of thin air any more than the founders did the terms of the Fourth Amendment itself. Indeed, as I noted earlier, this narrative had been around for at least 300 years before Olmstead, long before the framing of the Constitution. To discover its roots we have
to go back to a place and time when the oppressiveness of government surveillance—espionage and counterespionage leading to a violent regime of searches and seizures—found resistance and written opposition. That place and time was England in 1603. What we find there is not merely the Crown’s oppressive regime, but two expressions of opposition that capture, on the one hand, the spirit of Fourth Amendment conceptualism and, on the other, the narrative prototype of the surveillance tragedy. Not surprisingly, this opposition was penned, respectively, by England’s leading jurist at the time and by its leading dramatist. Below, we shall examine Lord Coke’s opinion in *Semayne’s Case* and William Shakespeare’s tragedy *Hamlet*.

Before we attempt to analyze the two readings at hand, it will be useful to put them in context. 1603, the last year of Queen Elizabeth’s life and reign, was fraught with questions about dynastic succession. As Andrew Hadfield, in his book *Shakespeare and Renaissance Politics*, has observed about the writing of the period, and here we can point to Coke’s opinion in *Semayne’s Case* as well as to Shakespeare’s *Hamlet*, “it demands to be read in terms of the political anxieties of (very) late Elizabethan England, ruled by a decrepit, dying Queen who could no longer command the respect of many of her most influential subjects, with the uncertainty of being ruled by a new dynasty in prospect, surrounded by enemies (France, Spain, Ireland), divided in religious affiliation, and riven by factions at court.”

At the core of dynastic decay was surveillance. The ideals of sovereignty and good statesmanship at the turn of the seventeenth century depended on “intelligence” in its best sense. Nevertheless, as John Michael Archer describes in *Sovereignty and Intelligence: Spying and Court Culture in the English Renaissance*: “Intelligence in the sense of the sovereign’s ideal knowledge became in practice intelligence as spying, a relation governed as much by opacity as by understanding.” Englishmen under Elizabeth’s rule experienced “the first large-scale intelligence networks” of the state. Yet, espionage at the time was hardly institutionalized as it would be by the modern nation-state:

There was no professional secret service, no systematic apparatus of surveillance at home or abroad. The field of intelligence was instead a particularly obscure sector of the greater field of patronage. The queen solicited information from her mightiest servants, rewarding them with prestige and authority. Rival officeholders like Burghley and Walsingham competed for whatever scraps of intelligence their own clients—spies in their pay, pursuivants, and occasional informers—discovered or invented.
Curtis Breight’s *Surveillance, Militarism and Drama in the Elizabethan Era*\(^{26}\) goes beyond Archer’s more general characterization of Elizabethan ideals and their degradation; he spells out the details of surveillance in England at the time. Breight’s project is essentially to revise the conventional account of Elizabeth’s superb statecraft in defending weak England against its stronger and more willful enemies, an account that has been memorialized and reproduced in literature as well as history. Instead of that glorifying account, Breight asserts an alternative one of the period, one in which Elizabeth’s handlers, most prominently Lord Burghley, set about to exploit the English working classes through a reign of disinformation and terror. In particular, Burghley relied on intrigue to provoke the Spanish and Catholic enemy, prodded the British to unite across classes through dissembling pamphlets and the like, sent British workers abroad to die as soldiers and seamen, and finally filled his own coffers at the expense of those very same working classes. Among other things, Breight addresses the production of culture in support of Elizabethan national pride and classlessness, particularly in the drama of the time.

At the heart of Breight’s thesis is an explication of Lord Burghley’s four-pronged strategy for centralizing power: surveillance, capitalism, violence, and the construction of deviance (that then justified centralized control of violence to combat the deviance). To promote an effective system of surveillance, Burghley had to rely on agents: in Breight’s words, “the agent thus specifies the most crucial component of the state’s surveillance apparatus.”\(^{57}\) These agents were placed everywhere, bringing back “intelligence” (a newly coined expression at the end of the sixteenth century) to the authorities—the Privy Council, the High Commission, and above all to Lord Burghley himself. Sir Francis Walsingham, Lord Burghley’s protégé early on, was the spymaster, the “latter day equivalent to the head of British intelligence’s MI5 (domestic intelligence) and MI6 (overseas).”\(^{58}\) Among other kinds of informants, Walsingham patronized writers and used his theater contacts to create the Queen’s Men, a travelling troupe that not only performed plays with high propaganda content for the wealthy and influential, but also provided eyes in the homes of known and suspected Catholic sympathizers when they performed there.\(^{59}\) Breight refers to a number of additional practices involving agents. For instance, the writer Thomas Nashe, in 1591, described the “haunting [of] ‘booksellers’ stalls in St. Paul’s churchyard’ in the post-Armada period by *agents provocateurs* who sought to entrap the unwary ecclesiastical ‘malecontent.’”\(^{60}\) “The government also ‘turned’ other
‘agents’—unfortunate Catholics, captured priests, etc.—into willing or unwilling double agents.61

Both Breight and Archer observe that the era was violent, “but violent oppression was only the most visible expression of sovereignty.”62 Meanwhile, the sovereign learned to conceal surveillance itself, the “practices of courtly observation.” Drawing on Norbert Elias’s work,63 Archer suggests that “competitive practices of mutual observation generated a specific kind of individual consciousness during the Renaissance,” one that enriches our “psychological understanding of human behavior” at the time.64 The monarchy “maintained a constant and productive relationship with intelligence techniques that were deployed through patronage systems and aristocratic codes of mutual scrutiny. . . . Diplomatic maneuvering, the creation and investigation of conspiracies, royal employment of unscrupulous servants—a number of practices underlay the idealized intelligence of the ruler.”65 Given the era’s focus on “intelligence,” spying remained the period’s “emblematic activity—a dark secretive activity.”66

Surveillance was the first in a series of steps that carried the Crown along the path from persecution to prosecution. Apart from resistance maneuvers by those who were the targets of surveillance, public opposition based on broader, quasi-constitutional principles was slow to materialize. Since surveillance took place in public and shared private spaces, it had to be concealed to be effective. Accordingly, insofar as surveillance remained hidden and ephemeral, the critique tended to focus on its consequences, that is, its effects on subjects, rather than on the specific practices of intelligence gathering.67 That critique arose from literary quarters rather than legal ones. Indeed, in 1603, the concept of personal privacy was barely formed, and the Crown’s monopoly of the common or public space was hardly in question.68 So at that moment in history, it was the literary or narrative sources that were laying the thematic bases for constitutionalizing personal privacy and its norms.

The law, meanwhile, focused on visible activities, not their felt consequences. As intelligence gathering moved toward prosecution, the state’s practices became overt, visible, and violent. The Crown’s agents proceeded with physical intrusions into, even invasions of, the homes and personal possessions of subjects, searches that were readily apparent to English subjects at the turn of the seventeenth century. Semayne’s Case was decided following more than a century of expanding intrusions into the homes and the bodies
of individual subjects. William John Cuddihy’s brilliant study, *The Fourth Amendment: Origins and original meaning, 602–1791,* maps out a history of Crown-authorized searches and seizures that began with a narrow set of targets and rapidly grew to include virtually all British subjects. “In the century after 1485, the typical searches shifted from inspections of ships for contraband and of workmen’s shops by brother artisans to door-bursting invasions of entire villages in the depth of night by large bands of intimidating, heavily armed strangers.” The Tudors and early Stuarts expanded the range of search objects from three or four categories to fifteen: (1) vagrancy, (2) recreation, (3) the apparel of lower classes, (4) hue and cry, (5) the crown’s pursuit of accused persons, (6) the recovery of stolen possessions, (7) game poaching, (8) economic regulation, (9) sumptuary behavior, (10) bankruptcy, (11) weapons, (12) customs and importation, (13) guilds, (14) censorship, and (15) suppression of political and religious unrest.

Before Lord Burghley assumed control under Elizabeth, the most vigorous searches had targeted vagrants and their sports. Under Henry VII the privy search had grown as a method for social control; it was designed to keep the lower classes in check—their vagrancy, illicit recreation, and so forth. In time the lower classes were also targeted because they seemed more likely sources of rebellion against the Crown. These kinds of searches persisted throughout Elizabeth’s reign. In 1573, for instance, Elizabeth authorized searches “to insure that only privileged persons wore ostentatious headgear.”

During the early years of Elizabeth’s rule, however, Lord Burghley refocused the searches and increasingly made dissidents and their books the targets. These searches in fact (and by intention) regulated much of political life. The searches involved “dragnets” to find fugitives. Cuddihy provides extensive descriptions of the lengths to which the dissidents went to hide (false walls, etc.) and the similar lengths the searchers went to uncover the fugitives (knocking down virtually whole buildings and dismantling their insides). The search warrants were all-encompassing: an order to search for dissident Catholics in 1582 commands the searchers “with all care and diligence, in all places . . . inquire. . . .” As a result, large bodies of officials and their deputies spent days searching throughout entire cities, including London, for dissidents.

The result of all this surveillance followed by searches and seizures rendered the era very intimidating, especially if one was at all at risk. This was certainly reflective of the paranoia that Breight, Archer, and Hadfield describe
and that we find reflected in contemporary writing. This trend culminated in the “Martin Marprelate” searches: the Archbishop of Canterbury (John Whitgift), the driving force behind the High Commission, sought to find the author of a tract by a protestant critic of the Anglican hierarchy. The searchers and the fugitives played cats and mice for a while, but at the end of fourteen months, the Privy Council and the High Commission succeeded in crushing the dissidents: Lord Burghley (Chancellor and Treasurer) ordered the High Commission to conduct a search that stopped at nothing, and the searchers wound up arresting all the prominent dissidents (which stopped their writing and publishing). Thereafter the searches became more and more strategic and invasive, not to mention unscrupulous. Objects were stolen and sold, sometimes back to the owners.

Cuddihy’s point is that, as the searches expanded in purpose from social to religious to political, and became more invasive, and cut across class lines, the responses of the oppressed converged. By 1603, according to Cuddihy,

the multiple house search via a single warrant of similar device was not an infrequent, extreme response to rare emergencies but England’s conventional method of search for most purposes. Every suspicious residence in a village could be entered and examined not just for pesky vagrants, religious fanatics, and political conspirators but also for stolen merchandise, smuggled contraband, illicit gambling establishments, anyone accused of committing any felony, and even for persons eating meat in their own homes on prohibited days.

This leads Cuddihy to the conclusion that, “Such was not only the law but, of vastly greater significance, the reality.” He goes on to say that this was a new reality that Englishmen were experiencing for the first time after 1580. In this context, “Elizabethan Englishmen began to insist that their houses were castles for the paradoxical reason that the castle-like security that those houses had afforded from intrusion was vanishing.”

Semayne’s Case, then, reflected this convergence of perception and response. In this regard, Cuddihy notes two paradoxes of English history. First, the capability for mass and broad searches had long existed in the law even before the first systematic search practices began in 1485. Second, despite the steady, incremental expansion of searches after 1485, it took almost a hundred years for strong objections and protests to be voiced. Cuddihy assigns two reasons for the subjects’ long acquiescence. For one, the expansion of searches and
intensification of search methods evolved incrementally so that a wide range of social groups experienced the effects only gradually. Accordingly, though there were protests and objections from several quarters, each one discretely sought to protect a narrow set of interests. Cuddihy notes that the “concept of unreasonable search and seizure was not a single coherent idea but a loose collection of inconsistent perceptions.” So, too, was the writing that opposed surveillance in general.

It was not until later that the critics began describing the subjects of searches somewhat more broadly, for instance as “persons who should have been socially immune to such treatment—honest matrons, sound christians, unassailable gentlefolk,” and the perpetrators of the searches as uniformly disreputable, for instance as “subhuman garbage and worse: ‘hungrye . . . beasts runing most fierslie on every pray of bootyie’ . . . .” In addition, protest remained somewhat quiescent because the expansion of searches was not experienced until fairly late among members of the leading classes. A 1591 critic, for instance, describes a search as “a thing most intolerable to flesh and blood to have so base and infamous castaways to come and crow over the best gentlemen—yea nobleman in his owne house and use such imperious and princely behavior as wold move choler to the most patient minds, the vyleness and contempt[1] of so base as commander.”

In sum, the spread of experience plus the subjection of upper classes to the practice ultimately led, after 1585, to the idea of “unreasonable searches.” In Cuddihy’s words, “since most proprietors of those homes were unaccustomed to their routine entrance by officials, they had cause to perceive this proliferation of searches as excessive and to formulate the concept of unreasonable search and seizure.” This idea then became the subject of a series of cases in which justices essentially offered some resistance to general search and arrest warrants. But as a practical matter the resistance was weak since the courts permitted broad searches in cases of felony or treason, crimes that many of the searches claimed to be pursuing. Lord Coke’s opinion in Semayne’s Case was a significant marker that gave voice to an emerging public consciousness about citizens’ general rights to be secure in their homes, that is, to what we now term rights of privacy; it is in this context that we examine his opinion. Although the courts did establish the notion that some searches were “unreasonable,” during the earlier seventeenth century, following Semayn’s Case, the courts’ resolve seemed to weaken and gave agents of the Crown license to engage in most of their searches.
On its face, *Semayne’s Case* does not appear to involve surveillance, but in context it almost certainly did. And it is useful to take note of the form of Lord Coke’s argument so we can contrast it with the narrative that informed the opposition to surveillance. *Semayne’s Case* is in any case a forerunner of Fourth Amendment jurisprudence: it recognized a legal conception of privacy and juxtaposed the individual’s right against outsiders’ powers of intrusion. Notwithstanding its mundane subject matter (property repossession), *Semayne’s Case* reflected the surveillance issues that had arisen under Tudor rule. Cuddihy’s history places the case in this broader surveillance context, in particular the far-flung dragnets that led ultimately to violent house invasions and arrests. A closer reading of the opinion, however, will give us a grasp on the limited tools of a purely conceptual approach to legal reasoning (or how narrow legal reasoning was in that earlier era).

Lord Coke issued his opinion in *Semayne’s Case* late in 1603. George Beresford had died as joint tenant of a house with one Richard Gresham and indebted to another man, Richard Semayne. Gresham, as the surviving joint tenant, took full possession of the house, along with some of the goods that had belonged to the decedent. Meanwhile, Semayne, pursuant to a writ, had the sheriff to go to Gresham’s house to take possession of the decedent’s goods. When the sheriff arrived at the house, Gresham apparently closed the door (or refused to open it), and the question presented to the court was whether the sheriff had a right to enter regardless. The case was appealed to Coke, who wrote an opinion not only to resolve the case, but also to guide homeowners and sheriffs on their respective rights and powers more generally.

The basic premise of home ownership, according to Coke, was “that the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose. . . . if thieves come to a man’s house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house it is not felony, and he shall lose nothing.” As it turns out, this maxim had relatively little to do with the facts of the case except insofar as it supported, in spirit, Lord Coke’s ultimate decision in favor of the homeowner against the Crown. Indeed, the case itself was not about private interlopers and homeowners at all, but about the powers of the sheriff executing process against goods that happened to be in the home of the defendant. Coke’s opinion goes on to demonstrate that the homeowner’s
rights are substantially limited. In this regard, Coke notes a range of cases in which the Crown might have a direct interest, cases that were no doubt familiar to many Englishmen at the time. In such cases, the sheriff, though obliged to “knock” and disclose his business (e.g., the basis for process), was empowered to break down the doors if the homeowner resisted.96

Still, by examining the opinion in Semayne’s Case more closely, we may come to grips with how turn-of-the-seventeenth-century jurists constructed a conception of what we today call “privacy.” The opinion reflects Coke’s brilliance as a jurist, for it goes beyond the question that the case presents by mapping out and justifying the respective powers of officials and rights or liberties of homeowners in comprehensive detail. Coke’s frame of reference as Chief Justice was to defend “the validity of the common law against the King’s assumption that royal prerogative always came first.”97 He believed that “the monarch’s powers had to be limited by his or her subjects” so that they would have the “liberty and ability to enjoy their freedom without undue restraint.”98 In Semayne’s Case Coke first delineated the kind of liberty or immunity a house affords its owner under the law. For instance, if one were to kill another, either accidentally or in self-defense, then ordinarily one would be deemed to have committed a felony and one’s property would be confiscated.99 This was so because the law valued human life dearly. In contrast, however, if one were to commit a similar “crime” inside one’s home against an attacker or a trespasser, then charges would not issue. This was so because, in effect, “one’s home is one’s castle.”100 But the privileges of home ownership were restricted to the home itself. For instance, one could not, as Coke elaborates, use one’s home to assemble a posse and go after a threat outside the home.101

Next, Coke limited the rights of the home to those who were, in fact, rightfully in the home and claiming the privileges of occupation appropriately. Thus, he observed, the sheriff may wrest possession of a house pursuant to an action at law for possession of the house itself, and to do so he may “break the house and deliver the seisin or possession.”102 He also noted that sheriffs had the power to walk into a house if the door had been left open, and this power extended even to the landlord, who could enter an open house to collect rent or other debts from the tenant.103 More importantly, Coke turned to cases when process issued from the Crown: “In all the cases when the King is party, the sheriff (if the doors be not open) may break the party’s house,” either to arrest the owner or otherwise execute process.104 If, for instance, the homeowner
had committed a felony or was harboring a fugitive, then the sheriff had the right to come after the one charged, the home-as-castle presumption notwithstanding. Similarly, the sheriff could enter in a case in which the owner was storing another’s goods subject to repossession.

This broad exception to the occupant’s privileges, namely “when the King is party,” was at the heart of the kinds of oppressive home invasions that Cuddihy describes and had grown out of the vast Elizabethan surveillance apparatus Breight and Archer describe. Nevertheless, in acknowledging the sheriff’s power to enter, Coke also offered a balm to the homeowner. To wit, he encouraged sheriffs to engage in civilized behavior: “But before [the sheriff] breaks it, he ought to signify the cause of his coming, and to make request to open doors.” In other words, in any case in which the Crown had an interest, the homeowner’s rights to self-protection were compromised. The occupant’s only protection was a procedural one, namely that the official should state his business and request admission before kicking in the door. Curiously, in the case at hand, *Semayne’s Case*, Coke elevated this expectation of civility to something like a privacy right, despite first rationalizing the sheriff’s powers of entry. In the case, the defendant had barred the sheriff from entering, so the sheriff had returned to court and filed a complaint based on the defendant’s resistance. But the sheriff’s complaint did not allege that he himself had signified the cause of his coming; he merely alleged that he had been refused access to the goods of the plaintiff that were in the house. Based on this, Coke gave judgment to the defendant.

Just what this meant vis-à-vis the Crown’s agents in cases involving espionage, sedition, and other perceived threats against the state was not clear. According to Cuddihy, *Semayne’s Case*, especially in light of subsequent cases, had “the effect of legitimizing” what Lord Coke could hardly have intended, namely, general or broad and relatively nonspecific searches. There is little indication that intrusive surveillance and its associated search methods became any more civilized following Lord Coke’s intervention. Whether contemporaries would have seen Lord Coke’s decision as a break in the oppressive climate of that era is difficult to say, for little seems to have been written about its reception at the time.

Indeed, if Lord Coke had meant to offer resistance, his approach was doomed from the outset. At the very heart of the conceptual practice lies boundary shaping, the drawing of bright lines. But in the case of surveillance—even in its violent, overt manifestations such as house searches and
body seizures—there were no clear lines to draw. The sense of injustice ("unreasonableness") that subjects experienced and the emotional and psychological consequences subjects manifested (from outrage to neuroses to paranoia) had no direct correspondence with particular acts of intrusion on the part of the Crown and so could not be pinned to a conceptual boundary in the law. Rather, it was an aggregation of insults against a broad range of subjects that ultimately went too far. In time those insults gave rise to widespread resistance and protest, and ultimately to civil war against the Crown.

The surveillance tragedy, in turn, anticipates that progression from particular intrusions to aggregate unreasonableness. The aim of ascribing legitimacy or not to particular acts or behaviors constrains the conceptualizing of formal law. In contrast, narrative generally encompasses a broad moral perspective on a whole series of transactions, rather than on a single one. In the surveillance tragedy, moreover, the series of acts may vary in form and their impact on the subjects of surveillance become paramount in the moral evaluation. Interestingly, clear lines of right and wrong tend not to emerge in this narrative. That is, the audience has no clear way of discerning at what point precisely intrusions have crossed from morally acceptable to unacceptable; it is only in retrospect that an audience knows that the campaign of surveillance taken as a whole has crossed the line. Just how this becomes relevant in defining the law is a matter for discussion in the sections that follow.

SURVEILLANCE AND ELIZABETHAN DRAMA: WHY POLONIUS HAD TO DIE

The conceptual approach reflected in Lord Coke’s Semayne’s Case opinion had its limitations as a form of opposition to the Crown’s oppressive regime of surveillance and searches. The more direct challenge to these intrusions is found in narratives of the period, most prominently Shakespeare’s Hamlet. Shakespeare was adept at hiding his political ideals under the proverbial bushel, at evading censors and staying out of jail, things a number of his contemporaries, such as Christopher Marlowe and Ben Jonson, were less skilled at. The result was a good deal of political ambiguity in his plays, which probably served him well not only in his personal happiness, but also in the lasting appeal of his legacy. Notwithstanding the ambiguity in his works, however, it seems apparent that Shakespeare did have a political outlook and designed
his plays at least to raise political questions, if not provide answers. My aim in what follows is to show how Shakespeare’s *Hamlet* was, at least in part, a jeremiad against the Crown’s unreasonable surveillance activities.

How do we know William Shakespeare meant to make surveillance the crux of the tragedy in *Hamlet*? The starting point is Polonius’s death: Prince Hamlet stabs him through the arras as the latter eavesdrops on Hamlet’s conversation with his mother Gertrude in her boudoir. That moment represents the culmination of three acts of carefully plotted espionage and counterespionage activities—that is, concealed surveillance and intelligence gathering—as well as the turn toward overt violence that will bring down not only the protagonist himself, but the Hamlet dynasty in its entirety. Up to the point of his death, Polonius is far from a benign character, and certainly not the buffoon so many actors portray him as. Rather, he is the embodiment of insidiousness insofar as he engages in many of the surveillance practices that would have been familiar to Elizabethan audiences and an instrument of corruption, constantly provoking others—from servants, sycophants and would-be collaborators to opponents reluctant to engage in similar methods of intrigue—to behave badly.

For starters, the queen’s boudoir (“closet”) itself, where Polonius meets his own demise, was familiar as a site for political intrigue. Consider a passage from Dennis Richards’s history of *Britain under the Tudors and Stuarts*:

> The Protestant nobles were the more ready to [conspire with Henry Stuart, Lord Darnley] as besides being eager for power they suspected the upstart [David] Riccio of advising [Mary Stuart] the Queen [of Scotland] how to restore Catholicism. The result was that one night in the spring of 1566 some of the foremost Protestant lords were admitted by Darnley to the Queen’s boudoir, where they seized Riccio [the Queen’s secretary] and bore him off to a violent death outside.

Still, notwithstanding some similarities, it seems unlikely that Shakespeare was modeling Elsinore on Stuart Scotland. Andrew Hadfield addresses this point, observing that, “More pertinent than such a specific reading of the play [i.e., tying the plot of *Hamlet* to Mary Stuart’s exploits] . . . is the representation of a paranoid and unstable court in which the proper functions of advice, counsel and debate have degenerated to flattery, espionage and silence. Moreover the court is one in which the problem of dynastic succession has not been tackled. Elsinore represents dying Tudor England two or three years before the end of that dynasty as much as embattled Stuart Scotland.”
As noted earlier, the substance of John Michael Archer’s work is to see how this consciousness is reflected in the writing of Elizabethan England. He looks at works by Sidney, Marlowe, Jonson, and Bacon; unfortunately he does not take on Shakespeare. Still, of Jonson’s Roman plays—*Sejanus his Fall* (1603) and *Cataline his Conspiracy* (1611)—Archer notes that they elaborate a “negative depiction of an urban court under a regime of surveillance.”¹¹³ Such a depiction of course flew in the face of the sovereign’s strategy of concealment, so it is hardly surprising that following the performance of *Sejanus his Fall*, “Jonson was called before the Privy Council on charges of ‘popery and treason’.”¹¹⁴

Curtis Breight, too, addresses the consciousness of Englishmen at the time, and brings Shakespeare’s into focus. Breight notes that public reactions to this system of surveillance had begun to turn toward the end of Elizabeth’s reign. During the earlier phase of Burghley’s control, there were many “modes of domestic intelligence gathering, and one chief virtue was their availability on the cheap. Another was their inducement of general paranoia, especially among members of wealthy classes vulnerable to surveillance because of their small numbers.”¹¹⁵ By the end of the sixteenth century, however, “paranoia turned to disgust. . . . When Hamlet calls Rosencrantz and Guildenstern ‘sponges’ mouthed and squeezed dry by King Claudius, he discloses contemporary revulsion against intelligencers.”¹¹⁶

Nevertheless, this revulsion could not be expressed too directly, and so it is not surprising that two of Shakespeare’s more inscrutable plays, *Troilus and Cressida* and *Hamlet*, happened to be written at a time of heightened censorship. In 1599, when Shakespeare wrote *Henry V*, “satires penned by numerous authors were publicly burned in London.”¹¹⁷ In describing *Henry V* as a “slyly ironic send-up of current militarism,” Breight suggests that it be read in conjunction with the other two plays, “the first [*Troilus and Cressida*] a total debunking of war and the second [*Hamlet*] an excoriation of a slimy court infected with surveillance and betrayal.”¹¹⁸

Just why Shakespeare might have suffered personal revulsion can only be shown circumstantially. As a playwright he was subjected to a variety of obstacles and indignities, ranging from censorship, to the use of actors in espionage, to strict regulation of his business.¹¹⁹ Further, Shakespeare’s father was a Catholic who was subjected directly to the oppressive intrusions of Elizabethan surveillance. Andrew Hadfield, though he is less concerned with surveillance, nevertheless comes closest to making the case for *Hamlet* as a tragedy.
of surveillance. He poses as his central problem the republican thrust of Shakespeare’s writings. In general, Shakespeare’s dramas were less overtly political than many of his contemporaries’, and often the moral-political implications of his works were somewhat inscrutable. Still, Hadfield notes that much of Shakespeare’s work has to do with the rights of the sovereign heir and the power of a republic to replace the sovereign heir with a sovereign of its own choosing—that is, to control its own destiny rather than submit to a despot. And Hamlet falls neatly into this category.

As already noted, Hadfield reads Hamlet as the story of a failed dynasty that very much resembled not only Stuart Scotland, but more importantly, Tudor England. To make his point he focuses on the figure of Polonius, who occupies the same role in the drama, chief counselor, as that occupied by William Cecil, Lord Burghley for most of Elizabeth’s reign until his death in 1598. Putting Polonius in context, Hadfield notes that “contemporary political treatises routinely railed against the dangers of poor advice and urged rulers to select counsellors who could be critical without being subversive or treasonable in their comments. . . . A prince who failed to allow free and open counsel to operate would experience a surly hostile and secretive court which would probably have to be controlled through the use of spies.” Polonius, for his part, “dispenses advice which is generally fatuous, long-winded and too generalized to be useful,” and “meets his end acting as a spy behind the arras, a just fate given his role in using his daughter to inform on Hamlet, a decision which leads to her madness and death.” Furthermore, Hadfield goes on to hold Polonius “responsible for corrupting and poisoning other relationships at Elsinore . . . for the poisoning of all forms of human relationship—paternal, friendly, master/servant and political—only so far as he is chief counsellor.” Yet, notwithstanding his indictment of Polonius, Hadfield returns to his theme that the “real villain is the King: the usurper Claudius.”

Admittedly, reducing Hamlet to merely a tragedy of surveillance would neglect Shakespeare’s genius. There are related themes of class, church and god, fate and free will, and much more that we have not touched upon. Moreover, the obsession of the main characters with gathering intelligence is founded on the desire to conceal (in Claudius’s case) and discover (in Hamlet’s) the truth about some treacherous behavior that goes to the very heart of dynastic succession. Yet even so, the logic of the play is driven ultimately by surveillance and turns on Polonius’s murder. For after all, the audience is informed of the underlying treachery early in the play; what makes it a drama
is the tragic unfolding of the intelligence-gathering process, an unfolding that brings down not only the Hamlet dynasty (which was hardly necessary and in the original Hamlet legend, by Saxo Grammaticus, was distinctly not the case), but also brings down nearly everyone associated with it. English audiences at the time, moreover, would no doubt have recognized Shakespeare’s many allusions to the Crown’s intelligence-gathering tactics and intrigue—for instance, the references to spies in the bookstalls, in the Queen’s boudoir, among the traveling players, among courtiers (Rosencrantz and Guildenstern) and servants (Reynaldo) seeking patronage, and so forth.

INTERPRETING HAMLET AS A TRAGEDY OF SURVEILLANCE

Elizabethan audiences would have recognized the strong antisurveillance portent of Hamlet, even though the surveillance themes may have been lost on subsequent generations of audiences and literary critics not subjected to such intense scrutiny by their sovereigns. The recent work of Breight, Archer, and Hadfield help us recognize these themes anew. The final two sections of this paper elaborate on Hamlet as a prototypical tragedy of surveillance and show how that form of narrative is relevant to judicial interpretation of the Fourth Amendment. What are the surveillance themes that run through Hamlet, and how did Shakespeare configure them as a tragedy? More specifically, how is surveillance the motivating theme—and, from an interpretive or critical perspective, the principal explanatory theme—of the drama? Finally, in the following section, how does the narrative impulse in Olmstead, in particular Justice Brandeis’s dissenting opinion, reflect and capture the tragedy of surveillance?

Polonius was at the center of a series of offensive practices that culminates in his spying on Hamlet while the latter is engaged in a “private” conversation with his mother, Gertrude. But Polonius together with Hamlet is also in a realm that is infected with surveillance and intrigue; and to come to grips with Polonius’s role, we ought first consider just how infected was the realm. The point of this inquiry is to make the case that Hamlet is not merely a tragedy in which surveillance plays a part—something that some critics have come to recognize more recently and some stage productions have emphasized—but that it is a tragedy of surveillance in which the sinister qualities of
intelligence gathering are the plot’s very motivating features. The first act of *Hamlet* establishes the circumstances that give rise to oppressive surveillance techniques, including counterespionage. Acts two and three unfold the ways in which surveillance activities were carried out.

The first five scenes give surveillance, along with intelligence gathering more generally, its context and situate Polonius squarely at its core. The first scene, in which the sentries encounter the ghost of Hamlet’s father along the parapet of Elsinore, establishes two important features of Elizabethan England: that it was infected with paranoia, and that the fear among the working classes, in this case ordinary soldiers, was directed at enemies essentially outside the realm.  

The paranoia is reflected in a number of ways. The opening exchange of the play between the two sentinels, Bernardo and Francisco, is fraught with unease. Thereafter follows Marcellus’s account of the ghost to Horatio, who at that point remains disbelieving. And soon after the ghost appears in armor, and Horatio observes, “This bodes some strange eruption to our state.” If there were any doubt about the soldiers’ fear, Horatio describes it to Hamlet in the following scene: “Thrice he [the ghost] walk’d by their oppress’d and fear-surprised eyes, within his truncheon’s length; whilst they, distilled almost to jelly with the act of fear, stand dumb and speak not to him.”  

That the fear is meant to be directed at an external enemy of the realm becomes apparent when Marcellus exclaims, “tell me, he that knows, why this same strict and most observant watch [i.e., the ghost in armor] so nightly toils the subject of the land,” and notes that everyone in the kingdom seems to be working around the clock to build up the realm’s defenses. Horatio eventually answers that the threat does indeed seem to be external in the figure of Fortinbras trying to recover lands his father had lost to the Danes. The ghost then appears once more, as if on cue, to mock Horatio’s explanation.

The second scene sets a number of themes in motion. First, the scene begins to undermine the notion that what is to be feared lies outside the realm. Claudius opens the scene by referring to the death of his brother, his own succession to the throne, and his marriage to his former sister-in-law Gertrude. He then notes that Fortinbras has been threatening Denmark and commands two envoys, Cornelius and Voltimand, to give notice of Fortinbras’s threats to the latter’s uncle, the King of Norway. At this point these words serve to reinforce the concern with outside enemies, but as we learn later, when the
envoys return, this fear is negligible. Meanwhile, we are soon to learn what really “bodes some strange eruption” to the state.\textsuperscript{142}

The second theme is that of surveillance. The scene creates a contrast between Laertes and Hamlet, in particular the ways in which their respective guardians look after them. Both young men are eager to return to university. Polonius recommends, and Claudius grants, Laertes’s permission to return to Paris (though we learn later that Polonius intends to keep him under close watch there).\textsuperscript{143} Meanwhile, Claudius asks Hamlet not to return to Wittenberg, but rather “remain here in the cheer and comfort of our eye.”\textsuperscript{144} At this moment, Claudius’s request seems innocuous to the audience, but of course it is the initiation of all the surveillance and intrigue that follow.\textsuperscript{145}

The third theme is that those who are being watched surreptitiously begin watching back surreptitiously. Still in the second scene, everyone leaves the stage to Hamlet, who uses the moment to rue his mother’s fickleness in moving all too quickly from the bed of his late father to that of his uncle Claudius. Then Horatio enters with Marcellus and Bernardo in tow to tell Hamlet about the ghost stalking the sentinels (i.e., watching the watchers). Hamlet is intrigued but asks his friends to keep the sighting secret: “whatsoever else shall hap to-night, give it an understanding, but no tongue.”\textsuperscript{146}

In the third scene the audience is introduced more fully to Polonius. The scene is neatly triangulated among the three family relationships: between the siblings, Laertes and Ophelia, then between Polonius and Laertes, and finally between Polonius and Ophelia. Laertes is concerned about Ophelia’s relationship with Hamlet, that she will wind up both disappointed and possibly infected with some venereal disease (“contagious blastments”). So he tells her to be on her guard, for the “best safety lies in fear.”\textsuperscript{147} Polonius, for his part, appears the concerned parent, perhaps a bit overbearing to postmodern sensibilities, but nevertheless apparently interested in the well-being of his offspring. To Laertes he delivers his famous words of advice, including some reflection on how to gather intelligence: “Give every man thy ear, but few thy voice.”\textsuperscript{148}

Polonius’s interaction with Ophelia is somewhat more prying and controlling. First, he is curious to learn what Laertes has said to her; and when he learns their talk was about Hamlet, he asks “What is between you? give me up the truth.”\textsuperscript{149} When Ophelia tells him she’s not sure what weight to put on Hamlet’s affection, Polonius responds quite bluntly: if she overestimates his “entreatments,” she will wind up pregnant.\textsuperscript{150} Ophelia protests that Hamlet
has sworn his earnest affection, but Polonius dismisses the possibility that
Hamlet could be serious: “Do not believe his vows; for they are . . . mere
implorators of unholy suits . . . the better to beguile . . . I would not, in plain
terms, from this time forth, have you . . . give words or talk with the Lord
Hamlet.” To which Ophelia agrees.\textsuperscript{151}

The last two scenes of Act I complete the picture of a court trapped in a
vicious cycle of intelligence gathering and intrigue. The scenes depict Ham-
let and his soldier comrades on the ramparts. Hamlet understands that the
ghost, the very symbol of surveillance, induces others into paranoia, but he
is not afraid of the game that the ghost is playing. “Why, what should be the
fear? I do not set my life at a pin’s fee; and for my soul, what can it do to that,
being a thing immortal as itself?”\textsuperscript{152} Horatio counters, wondering whether
the ghost may “assume some other, horrible form which might deprive your
sovereignty of reason and draw you into madness?”\textsuperscript{153}

Hamlet then goes off with the ghost to learn the story of Claudius’s and
Gertrude’s treachery. At the conclusion, the ghost commands Hamlet to “Re-
member me.” Hamlet reflects: “Remember thee? Ay, thou poor ghost, while
memory holds a seat in this distracted globe. Remember thee? Yea, from the
table of my memory I’ll wipe away all trivial fond records, all saws of books,
all forms, all pressures past that youth and observation copied there, and thy
commandment all alone shall live within the book and volume of my brain,
unmix’d with baser matter.”\textsuperscript{154}

Finally, Hamlet returns to the soldiers, and they ask for news about his
encounter with the ghost. To which Hamlet replies: “No, you will reveal it.”\textsuperscript{155}
The soldiers protest, but Hamlet persists: “How say you then? Would heart
of man once think it? But you’ll be secret?” And later: “Give me one poor
request. . . . Never make known what you have seen to-night.” The soldiers:
“My lord, we will not.” Hamlet: “Nay, but swear’t.” The soldiers are reluctant
to swear, presumably because they owe allegiance to the Crown and swearing
loyalty to Hamlet poisons that allegiance. Yet, as they resist, the ghost keeps
intervening, commanding them to “swear” by Hamlet’s sword. On its fourth
command, they finally do.\textsuperscript{156}

This corruption of the soldiers marks the start of the vicious cycle of sur-
veillance and intrigue from which there is no turning back. Hamlet’s encoun-
ter with the ghost and his enlisting of comrades to secrecy are the beginnings
of his own commitment to intelligence gathering, his preparation for the se-
ries of surreptitious activities designed to avenge his father and win back the
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throne. Note also that from this point on, the surveillance is reflexive—that is, to overcome the intrigue of Polonius and Claudius, Hamlet resorts to intrigue himself; he keeps secrets, feigns madness, acts by indirection, and so forth. And all the while he is backed up by the ultimate surveillance instrument, the ghost itself. The following two and a half acts, then, are a spy-versus-spy game between Polonius and Hamlet that lead inexorably toward Polonius’s murder. Polonius disrupts Hamlet’s life throughout until his intrusion into Gertrude’s bedroom becomes the last straw.\footnote{157}

To this point, Polonius has been intrusive and controlling, but an audience may nevertheless also view him as somewhat well-meaning and not unreasonable, though a bit insensible to Ophelia’s happiness. Act II changes these perceptions, making clear Polonius’s craftiness and fleshing out his role as vile engineer of the intelligence-gathering plot. In the first scene Polonius assigns his agent Reynaldo to monitor Laertes’s activities in Paris. In instructing Reynaldo at length on how to gather the intelligence, Polonius sums up the tricks of the trade as follows:

\begin{quote}
. . . See you now—
Your bait of falsehood takes this carp of truth;
And thus do we of wisdom and of reach,
With windlasses and with assays of bias,
By indirections find directions out.
So, by my former lecture and advice,
Shall you my son. You have me, have you not.\footnote{158}
\end{quote}

Later in the scene, Polonius interviews Ophelia to assure himself that she has kept her distance from Hamlet. Ophelia describes her disturbing encounter with Hamlet, and Polonius asks, “What, have you given him any hard words of late?” She denies having spoken to Hamlet: “No, my good lord, but, as you did command, I did repel his fetters and denied his access to me.”\footnote{159} Polonius infers from this that in forbidding Ophelia to speak with Hamlet, he (Polonius) has driven Hamlet to madness; curiously, he appears to regret that he hadn’t recognized the sincerity of Hamlet’s affection for Ophelia.\footnote{160} The upshot, however, is to report this new intelligence to the King: “This must be known; which, being kept close, might move more grief to hide than hate to utter love.”\footnote{161}

The second scene of Act II is the longest in the play. It contains all the seeds of intrigue and is rife with surveillance themes. This scene unfolds three
subplots. It introduces Rosencrantz and Guildenstern, Hamlet’s childhood friends and university mates, into the Crown’s spy ring.\(^{162}\) It nullifies the possibility of an external Norwegian threat so that all intelligence-gathering efforts and resources can be devoted to securing the Danish Crown from its principal internal threat, Prince Hamlet. Finally, it introduces the traveling troupe of actors, possibly as additional spies. Most significantly, the scene moves subtly from a close view of Polonius and Claudius hatching their intrigue, along with their self-doubts, to a close view of Hamlet’s countermeasures and self-reflections, including his disgust with this sort of intelligence gathering and espionage.

That part of the scene in which Polonius turns Claudius’s attention from outward threats to the matters at hand provides a neat, though ironic, illustration of the intelligence-gathering process and its fragility.\(^{163}\) On the one hand, the envoys return from Norway,\(^{164}\) on the other, Polonius elaborates on his inquiry into the “very cause of Hamlet’s lunacy.”\(^{165}\) In connection with the latter, Polonius reads Hamlet’s love letter, which Polonius has expropriated from his daughter Ophelia, to the King.\(^{166}\) Polonius explains that he has ordered Ophelia to cut off her relationship with Hamlet, and this, in turn, has sent Hamlet into a tailspin.\(^{167}\) The King questions the intelligence at hand, and Polonius protests: “Hath there been such a time—I’d fain know that—that I have positively said ‘Tis so,’ when it proved otherwise?”\(^{168}\) The King concedes the point (“Not that I know”) and Polonius continues ominously, “If circumstances lead me, I will find where truth is hid, though it were hid indeed within the centre.”\(^{169}\) The King then asks Polonius to plan the next step to confirm the cause of Hamlet’s madness, so Polonius hatches a further bit of intrigue. When Hamlet next wanders around the halls, Polonius says, “I’ll loose my daughter to him: Be you and I behind an arras then; mark the encounter: if he love her not and be not from his reason fall’n thereon.”\(^{170}\)

At this point the scene engages the sides in direct confrontation, gradually shifting the audience’s attention away from Polonius as spy to consider Hamlet as counterspy. In the well-known cat-and-mouse game between Polonius and Hamlet, Hamlet feigns madness and Polonius keeps pushing for information, noting at one point “though this be madness, yet there is method in’t,” before “contriv[ing] the means of meeting between him and my daughter.”\(^{171}\) Part of this curious game revolves around the book Hamlet is reading; this may well have been a reference to Lord Burghley’s use of agents around the bookstalls of religious institutions to gather intelligence on the subjects’
potentially seditious reading habits. In any case, their interchange—that is, Hamlet’s feigned madness—makes it clear that Hamlet has been completely sucked into Polonius’s and the ghost’s slimy world of intelligence gathering, and so the tragedy is well on its way to unfolding. The scene then continues with further intelligence games. Rosencrantz and Guildenstern replace Polonius on stage, and the two sides continue their dissembling. “What news?” Hamlet asks his one-time friends, to which they reply, “None, my lord, but that the world’s grown honest,” which in turn leads to Hamlet’s observation, “But your news is not true.” Hamlet finally gets out of them that they were sent for by the King to gather intelligence on their “friend” (who, suspecting their duplicity, utters in an aside, “Nay, then I have an eye of you”).

The third element in the scene, namely, the appearance of the traveling troupe of actors, completes the depiction of the spy game and gives the audience insight into Hamlet’s machinations. Just as key, Hamlet’s reflections on the spy game here and his self-disgust are at the core of what renders this a tragedy of surveillance. In the scene, Rosencrantz and Guildenstern inform Hamlet that the players are on their way; at this point, the players are “agents” presumably sent for by Polonius on behalf of the King. As we have seen in the preceding section, this would not have been unusual under the reign of Elizabeth. In the last part of the scene Hamlet must “turn” the players into his own agents, much as one might turn spies into counterspies in conventional espionage. In doing so he refers obliquely, but not surprisingly, to one of the most treacherous ruses in history, the Trojan Horse. Hamlet expresses his disgust with the surveillance game to which he has succumbed: “Why, what an ass am I! This is most brave, that I, the son of a dear father murder’d, prompted to my revenge by heaven and hell, must, like a whore, unpack my heart with words, and fall a-cursing, like a very drab, a scullion!” Yet he acknowledges intrigue and surveillance as necessary evils to effect his purpose, and he invokes the ghost as the representative of that way of doing things:

I know my course. The spirit [i.e., the ghost] that I have seen
May be a devil; and the devil hath power
T’ assume a pleasing shape; yea, and perhaps
Out of my weakness and my melancholy,
As he is very potent with such spirits,
Abuses me to damn me. I’ll have grounds
More relative than this. The play’s the thing
Wherein I’ll catch the conscience of the King.
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The tragedy of surveillance plays itself out in Act III. Polonius and the King continue spying on Hamlet to determine whether Hamlet’s madness should be feared: is it the consequence of his grief and unrequited love for Ophelia, or of something more sinister? Hamlet, for his part, continues to feign madness, but meanwhile orchestrates the available pieces the players, Ophelia, Rosencrantz and Guildenstern, his “agent” Horatio to reveal and prove the King’s guilt. At the end of the first scene, Polonius hatches his final, fatal plot. He suggests that Gertrude interview her son to draw him out: “Let his queen mother all alone entreat him to show his grief: let her be round with him; and I’ll be placed, so please you, in the ear of all their conference.”

Claudius agrees, observing ironically that “Madness in great ones must not unwatchd go.” Hamlet, in the following scene, keys Horatio into his scheme to reveal Claudius’s guilt by having the traveling actors reenact Claudius’s treachery. “Observe my uncle,” he tells Horatio, “If his occulted guilt do not itself unkennel in one speech, it is a damned ghost that we have seen. . . .”

The play, which Hamlet names “The Mousetrap,” does its work, and Claudius reveals his treachery to Hamlet and Horatio. In the scenes following this revelation, the surveillance not only reaches its peak, but Hamlet reaches his fill of it. Rosencrantz and Guildenstern, at the behest of Gertrude, come to question Hamlet’s behavior (that is, his negative attitude toward his uncle/stepfather), and they wonder at his motives insofar as Claudius has promised him the throne. Hamlet answers, in effect, that much can happen while he waits for succession, but he also indicates to his former friends that he is on to their duplicity. Polonius then comes to inform Hamlet that his mother would have a word with him. Hamlet agrees to visit her, but comments that “they fool me to the top of my bent.” Shakespeare leaves little doubt that he intended Polonius’s murder to be a central, and purposeful, part of the plot. For in the next scene, just before Claudius kneels before the altar and Hamlet so famously abstains from killing him there, Polonius reminds the King that he will be hiding in Gertrude’s bedroom to learn of Hamlet’s true motives.

Polonius’s final scene and death drive home the centrality of surveillance. This is not only so because Polonius is hiding behind the arras when he is killed. It is so because, apart from Polonius, the ghost, the central symbol of surveillance, chooses that very moment to reappear. In addition, the ghost appears in its nightgown, no longer in armor, because it is apparent that the enemy is not really external to the court, but internal. The ghost comes to remind Hamlet of the point of all the intrigue: “Do not forget. This visitation
is but to whet thy almost blunted purpose." If there is anything like compassionate surveillance, the ghost next attempts to characterize it, telling Hamlet to console his mother. As for that other kind of surveillance, the one represented by Polonius, Hamlet has no regrets about bringing his career to an end; as he drags the dead man from his mother’s bedchamber, he observes “this counsellor is now most still, most secret, and most grave, who was in life a foolish prating knave.” Once Polonius and the ghost have departed, the tragedy of surveillance devolves into an open, blood-and-guts revenge narrative that brings the Hamlet dynasty to a close.

CIRCLING BACK TO OLMSTEAD

One of the telling points in the dissenting Olmstead opinions of Justices Holmes and Brandeis is that they conceded an area in the law to be uncertain—that is, neither justice could demarcate at precisely what point the police had crossed the line into “ignobility” or unreasonableness under the Fourth Amendment. Conceptualism depends on defining behaviors clearly (“bright lines”)—that is, letting citizens and government agents alike know what the rules of conduct and the corollary consequences are. Brandeis more than Holmes took pains to observe that the Fourth Amendment is paradoxical in this regard: for as the forms and techniques and objects of government searches grow more complicated and sophisticated over time, judges must weigh anew whether the searches have crossed the line into unreasonableness. To achieve insight, the courts cannot only focus on the character of the search, but must focus on the underlying purposes of keeping “persons” secure from “unreasonable searches.” Although Holmes and Brandeis agreed without question that the government’s resort to unlawful search techniques is unreasonable under the Fourth Amendment, and that rewarding government agents to do wrong would inevitably cause ills greater than the crimes being investigated, the remaining question, namely, to what extent searches not patently illegal may nevertheless be unreasonable under the Fourth Amendment, remains a conundrum from a traditional conceptual standpoint.

Enter the narrative impulse. As just elaborated upon in connection with Hamlet, surveillance occurs in series, and the point at which investigative behaviors cross from reasonable to unreasonable is not necessarily evident as it occurs. Polonius and Claudius engaged in a series of seamy intrusive
surveillance techniques, any one of which might have driven its subjects to object, any one of which we might term ignoble, insidious, or unreasonable. Indeed, surveillance works differently on different persons, so that point at which citizen-subjects cease to tolerate it is variable.\textsuperscript{195} Judicial ambivalence is apparent in this realm of conception. Yet, Courts have been resistant to limiting the surveillance powers of government agents for a series of well-rehearsed reasons. On the whole, the conceptual approach is conservative, dedicated to maintaining consistency and predictability. This conservatism can be counterproductive in surveillance cases, particularly insofar as new technology is always ahead of new legislation and the kind of social scientific research that supports it. In such cases, even when courts find themselves impelled to intervene, they must find alternative forms of persuasion to overcome their innate conservatism and justify their interventions.

Narrative can provide moral guidance in evaluating surveillance, a realm of social activity tied specifically to emergent technologies.\textsuperscript{196} Resort to moral guidance is appropriate when technology-specific legislation and its complementary regulatory infrastructure are not yet in place. Further, legislators have difficulty relying on economic analysis insofar as emergent technology generally implicates high degrees of uncertainty about the future.\textsuperscript{197} Often, questions about the legitimacy or not of new surveillance technologies must be answered case by case, which is the domain of the judiciary. In this context, narrative plays the role of amplifying the moral character of behaviors that might be difficult to classify under the law.

Consider a modified retelling of ‘Mr. Taylor,’ a short story by Augusto Monterroso.\textsuperscript{198} Mr. Taylor, a sickly looking anthropologist out to do research in the tropical rainforest, encounters a group of head-hunters. The head-hunters, who strive for high quality in their craft, are not particularly taken with Mr. Taylor’s head as an attractive specimen. Instead, they spare his life and present him with a shrunken head. Mr. Taylor sends this head to his cousin in Boston, and the latter, intrigued, asks the anthropologist whether he can procure five more. So the anthropologist reenters the forest and this time arranges to barter some goods for five more already shrunken heads. The cousin from Boston, realizing that these items will fetch a good price, increases his orders for shrunken heads. Mr. Taylor, meanwhile, realizes that this trade provides him with a source of support and, perhaps more significantly, enables him to improve his relations with the tribesmen so that he can do his rainforest research more freely. Yet, the head-hunters’ willingness to
exploit the developing market eventually creates a scarcity of heads to choose from and impels them to become completely indiscriminate producers. So, at the end of the story, the cousin in Boston opens up one last package to find the head of Mr. Taylor himself.

It is easy enough to justify Mr. Taylor’s first exchange with the headhunters. He was saving his life; the head he received did not require anyone new to be killed. On his next foray into the rainforest, he was perhaps “civilizing” the tribesmen. Yet by the end of the story, it is clear that something has gone quite awry despite no apparent changes in Mr. Taylor’s moral disposition. The narrative blurs the line between right and wrong, or between legitimate and illegitimate, for it is only near its conclusion that the story forces its readers to revisit and question the central character’s values. More broadly, a story like Mr. Taylor is effective as a critique of colonialism because it forces us to revisit its beginnings, to question those initial premises that favor what we, in our own culture, may consider to be benign activities (in effect, “civilizing” and market-based economic development). Such stories are powerful because they can transform our moral approval of colonizing and market values, however latent, into disapproval, and point us in a different direction.

The narrative of the surveillance tragedy unfolds in much the same way. As Michael John Archer has noted, “intelligence” in the best sense of the word promises enlightened governance. But intelligence has its own internal logic that can turn what was once promising into something corrosive and destructive. As the process moves from legitimate intelligence gathering and investigation into an ever more intrusive and stealthier search for information designed to reinforce the sovereign’s control, we realize that the project of intelligence gathering, whenever it relies substantially on a campaign of surveillance, may have been infected almost from the start. As Tom Stoppard’s Guildenstern says to Rosencrantz when he recognizes that they are about to meet their demise, “There must have been a moment, at the beginning, where we could have said—no. But somehow we missed it.” Tragedy is about behavior that infects its cast of characters with a pathology that leads inevitably toward self-destruction.

But the Hamlet story goes beyond simply eroding bright lines between good intelligence in theory and bad surveillance in practice. The narrative elaborates some of the broader conditions under which surveillance becomes tragic. For one, the narrative specifies some of the consequences of surveillance from the vantage point of its subjects: the corruption of a subject’s social
network (family, lovers, friends, and associates), the psychic imprisonment of
the subject him- or herself, and the provocation of similarly seamy behaviors
and countermeasures by subjects against the state or against other citizens.
In addition, the serial and escalating nature of surveillance—for surveillance
itself has no natural or self-enforcing boundaries to limit the undesirable
behavior of its agents—clears the path for inevitable social destruction. In
other words, the contagion, to use Justice Brandeis’s characterization, is path
dependent. So the tragedy spells out three clear elements: intrusiveness that
invites the designation of insidious; reflexivity that suggests the forms of cor-
rup tion and social destructiveness; and path dependence that reminds us that
surveillance, its motivations and techniques, have no natural or self-enforcing
limits that will over time secure our interests as citizens against reckless or
criminal rulers.

In a companion piece I elaborate the ways in which justices have incor-
porated these narrative elements into their Fourth Amendment surveillance
opinions following *Olmstead*. For now, however, I shall conclude with Jus-
tice Brandeis’s invocation of these elements as illustrative. Brandeis’s dissent
draws on each of the three tragic elements just discussed. First, he notes the
intrusive nature of modern surveillance technology, projecting a future in
which the government may be able to discover “unexpressed beliefs, thoughts
and emotions” and present evidence of “the most intimate occurrences in the
home” without ever looking at the subject’s papers or opening her drawers.
Intrusion, in other words, knows no bounds, and without limits, the surveil-
lance enterprise cannot be other than sordid and ignoble. Second, Brandeis
notes that the process is reflexive—“contagious” is his word. Subjects being
watched eventually catch on to the enterprise. They react: some by going
under cover to evade the surveillance, others by limiting themselves to the
activities they are willing to share publicly, and still others by taking action
against the government itself. To the extent the government commits crimes
to keep tabs on its citizens, citizens, Brandeis presumes, will surely engage in
crimes themselves either to keep tabs on government agents or on other citi-
zens. More broadly, each increment of intrusive activity by the government
signals to citizens that it is legitimate to engage in those intrusive behaviors.

Finally, third, Brandeis’s use of the term “contagion” implicates a path-
dependent process. Once these elements are in place—ongoing scientific and
technological improvements in surveillance, a judiciary incapable of setting
limits, and a public largely unaware or powerless to intervene—investigative
(not to mention, partisan political) success from one surveillance campaign will inevitably lead to further, stepped-up surveillance campaigns that spread an ever-widening gaze on the citizenry. As Brandeis put it, “The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”205 And once we are down that path, there is no turning back: surveillance will inevitably contaminate the very fabric of social conduct, and the citizen autonomy that has traditionally founded constitutional democracy will fade away.

Was Brandeis really this prescient? Was he aware of the tragedy of surveillance, and did he deliberately invoke its themes in Olmstead? Certainly Brandeis had read Hamlet, but quite likely he would not have interpreted the play as I have done here.206 More likely Brandeis’s historical understanding of Elizabeth’s reign was influenced by the hagiography American anglophiles of his generation proffered;207 and his recitation of Lord Camden’s judgment in Entick v. Carrington suggests that he was unaware of the extent to which the Crown’s ruthless campaign of surveillance may have dominated, let alone oppressed, English society.208 Still, whether he understood Hamlet as a tragedy of surveillance is not the point: Hamlet was merely a prototype for many surveillance tragedies that followed over the next three centuries, tragedies that renewed their content with ever-emerging surveillance technologies, from Bentham’s “panopticon”209 to a range of twentieth-century electronic devices and computer software.210 So although Hamlet has been slow to reassert itself as a tragedy of surveillance despite centuries of textual analysis by Shakespeare scholars, the roots of this form of narrative are deep and have been present as long as sovereigns have sought to maintain their power in this fashion.

Meanwhile, Brandeis’s distrust of authority,211 together with his sensitivity to individual privacy and modern encroachments on identity and autonomy, have been well established, both in his own writings and in those of his biographers.212 In Olmstead he restates Lord Camden’s take on search and seizure in a way that underscores his own argument with Chief Justice Taft’s disregard of the Fourth Amendment’s use of the word “person”:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment.213
The fact that Brandeis unfolded the tragedy of surveillance so brilliantly sug-
gests, at least, his unconscious recognition of its narrative elements.

The terms of the Constitution were carefully crafted to provide subsequent
generations with conceptual guidelines and practical markers for enforcing or
executing the values contained in the document. Justices have imported those
values in different ways, and much has been written about the role of narrative
in constitutional argument. My point here is not that narrative should be used
as a dispositive way to make law, but rather as a way of moving the law when
it is stuck conceptually in an untenable place. The treatment of surveillance
under the Fourth Amendment, along with its related privacy implications,
provides a useful illustration of a circumstance—at the time of Olmstead as
well as now—that invites the invocation of narrative to move the law.214 Fur-
ther, I would note the difference between importing narrative elements that
express values that resonated with the text at the time of its reception and
narratives that simply reflect the commitments of “interpretive communities”
or other contemporary claims and stories.215 That is not to say that the Con-
stitution should not be a living document that reflects newer values as society
changes. But by using narrative forms more selectively, a judge may be able to
achieve greater consensus among “originalists” and “interpretivists” insofar
as meanings unfolded in the narrative reflect values that surrounded the text
at the time of its framing.

I wish to thank Professor Arthur Kinney, Director of the Massachusetts Center for Renaissance
Studies at the University of Massachusetts, Amherst, for his insight and generous support, and also
Professors Michael Perry, Alan Gaitenby, and my late brother, Fred Zacharias, for their contribu-
tions. I am also grateful to Professor Jessica Silbey who moderated a panel at the National Meeting
of the Law and Society Association in Snowmass, Colorado, June 1998, where I presented an earlier
version of this paper; to Bill Korn who contributed to the presentation; and to Professor Richard
Burt for convening a faculty seminar on censorship at the Institute for Advanced Studies in the
Humanities of the University of Massachusetts, Amherst, in 1992, at which I first presented my ideas
on Hamlet publicly.

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The Unwanted Gaze: The Destruction of Privacy in America

There is a central paradox at the heart of Fourth Amendment jurisprudence: the more intrusive the search and the wider its net, the more likely the police are to succeed in apprehending criminals and inhibiting criminal behavior. Surveillance practices are particularly susceptible to this paradox: if we can watch everything that everyone does, then presumably we will have the optimal handle on crime. At the same time, and this is what makes it a paradox: if we watch everything, our privacy will disappear.

6. There is a central paradox at the heart of Fourth Amendment jurisprudence: the more intrusive the search and the wider its net, the more likely the police are to succeed in apprehending criminals and inhibiting criminal behavior. Surveillance practices are particularly susceptible to this paradox: if we can watch everything that everyone does, then presumably we will have the optimal handle on crime. At the same time, and this is what makes it a paradox: if we watch everything, our privacy will disappear and with it our sense of liberty to act in perfectly legitimate ways that we simply do not wish to share—from making fools of ourselves to breaking out of our conformity in order to develop our minds and bodies. To what extent, then, should we breach the privacy expectations of innocent citizens in order to catch the criminals, to what extent respect the privacy of citizens and let the criminals run free?

7. See LaFave, supra note 3. LaFave counts the following among government surveillance categories: mail covers, pen registers, examination of financial and other business records, examination of medical records, electronic tracking devices, and ongoing surveillance of public movements and relationships. In general, the Court has been reluctant to characterize surveillance as a “search,” even when used in criminal investigations.


10. See, e.g., LaFave, supra note 3. The Burger Court’s holdings in this area were particularly disturbing in light of the fact that they followed not terribly long upon Watergate with all the surveillance excesses and privacy invasions of Nixon’s administration; see e.g., Hearings before the U.S. Congress, House Committee of the Judiciary, 93rd Congress, 2nd Session, pursuant House Resolution 803, Book VII, Part 1, “White House Surveillance Activities & Campaign Activities,” May–June 1974 (hereafter,
“Impeachment Hearings”). Notwithstanding the excesses of the “law and order” era, Justice Burger and the Associate Justices who inclined toward his views were apparently far more impressed than their predecessors had been with, in Yale Kamisar’s words, “the importance of being guilty”; Yale Kamisar, “The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices,” in The Burger Court: The Counter-Revolution That Wasn’t, ed. Vincent Blasi (New Haven, CT: Yale University Press, 1985), 62–91, at 71.


13. My use of the term “narrative” is straightforward insofar as I have little stake in the ongoing debates on narrative in the legal literature—viz., Peter Brooks & Paul Gewirtz, eds., Law’s Stories: Narrative and rhetoric in the law (New Haven, CT: Yale University Press, 1996). Generally speaking, I have drawn some of my ideas from Hayden White’s two books, Metahistory: The historical imagination in nineteenth-century Europe (Baltimore: Johns Hopkins University Press, 1973) and The Content of the Form: Narrative discourse and historical representation (Baltimore: John Hopkins University Press, 1987). My starting point is that judges and historians try to write persuasively, the former to convince their audience about the correctness of the outcome of a given case, the latter to provide fresh insight into causal relationships among historical events. Narrative is simply a technique of persuasion: a deliberate narrator frames the events (e.g., beginning, end), highlights particular kinds of relationships between events (e.g., based on scientific logic, common sense, or experience, proximity), and colors the story emotively (e.g., tragic, comic). The judge, in approaching the law as a static set of rules requiring application to the case at hand, eschews narrative. Yet, this static approach—what I call the classic conceptual mode of judicial decision—is a pretense, especially insofar as the cases in question—viz. constitutional law cases—project a series of consequences over time. So at least implicitly judges tend to resort to some narrative techniques to enhance their persuasiveness about those consequences. They frame their decisions in scope and duration—e.g., “this decision will have limited effect,” “the consequences of this decision will be felt long and widely.” They rationalize their stories—e.g., “social scientists (psychologists, economists, et al.) predict,” “common sense tells us,” “experience dictates.” They color their decisions—e.g., “society will be the better off,” “no one will be the worse off for this decision,” “the consequences will be dire.” It is in this spirit that I refer to a tragic narrative in judicial decision, a mode of writing that White develops in considerable detail; see Metahistory, supra, at 7–11, 27–31, 191–229.

14. My purpose here is not to engage in a full exploration of narrative forms—see supra note 13—only to illustrate one example and elaborate on its legitimacy as a form of judicial persuasion. There is, of course, a large critical literature on narrative, social theory, and the law. Ordinarily, one might at this juncture pay homage to Robert Cover’s work—see, e.g., Robert M. Cover, “Foreword: Nomos and narrative,” 97 Harvard Law Review 1, at 68 (1983), and “Violence and the Word,” 95 Yale Law Journal 1601 (1986)—but I have difficulty separating the man I encountered from his work. Our encounter occurred near the start of my first year in law school, 1970, and he was assigned to be my “faculty advisor” (a misleading term given the minimal roles he and other Columbia Law School faculty advisors played). In any case, during the first week of school he “invited” all of his advisees to something like a cocktail hour, during which I mentioned to him that I would be interested in comparing Talmudic methods of interpretation with the legal methods we were learning in class. He dismissed me quite abruptly—“We are not here to study the Talmud, we’re here to study the law!”—and quickly moved, quite literally, to engage the attention of two of my classmates, who, I concede, were far comelier than I and quite likely more interesting, though he could hardly have known this after only one week of school. Perhaps the encounter was an aberration, or perhaps he changed after his heart attack a year or so later. Nevertheless, I found it ironic that he of all people published “Nomos and Narrative” ten years later as an introduction to an issue on the Supreme Court’s 1982 Term. So it is not my intention here to untangle, in Cover’s words,
our “interpretive commitments” with respect to the Constitution, let alone wrestle with the relevant interpretive communities. Here I merely consider one kind of narrative form, that is, the projection of path dependency in the tragedy of surveillance as an effective means of judicial persuasion and a form that is consonant with the Fourth Amendment’s framing. See, infra text at notes 191 et seq.


18. See, e.g., Kim C. Sturgess, Shakespeare and the American Nation (Cambridge: Cambridge University Press, 2004), 55 et seq. He concludes, at 58, that, “While Shakespeare was still relatively unknown [around the time of independence], the increasing political awareness of the population allowed more Americans to be introduced to his plays and to what would be seen as a source of philosophy and affirmation of cultural values. Following the end of the War of Independence the pace of appropriation increased.” In 1786, both Adams and Jefferson travelled to Shakespeare’s birthplace in Warwickshire; Adams in particular felt that the English “undervalued” Shakespeare; id. at 59. See also, Michael D. Bristol, Shakespeare’s America, America’s Shakespeare (London: Routledge, 1990), on the American appropriation and reinterpretation of Shakespeare. James C. Briggs, “Steeped in Shakespeare,” Claremont Institute working paper, posted February 17, 2009, elaborates on Sturgess’s discussion of Shakespeare’s growing popularity during the first half of the nineteenth century. With regard to the Fourth Amendment’s regulation of the states’ governments, the relevant date would have been 1868, by which time Shakespeare’s influence had grown substantial.


21. The dissenters in Olmstead point to Boyd v. United States, 116 U.S. 616 (1886) as the landmark of privacy law in U.S. constitutional interpretation. Professor Amstard, supra note 9, at 384, agrees.

22. Chief Justice Taft’s opinion is Olmstead at 455–69.

23. Justice Holmes’s opinion is id. at 469–76; Justice Brandeis’s is id. at 471–85. Justice Butler dissented as well, id. at 486–88; see infra notes 27 and 38.

24. The Fourth Amendment reads as follows: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.”

25. Olmstead at 457.

26. Id. at 466.

27. Id. The Constitution, of course, says nothing about “tangible, material” effects, Justice Taft’s presumption to the contrary notwithstanding. Indeed, there is a contentious history on whether a subject’s words, such as those recorded in a transmission, should be considered “papers” or “effects” under the
Fourth Amendment. Justice Butler’s dissent in Olmstead, at 486–88, in effect invokes this debate and then finesses the question; he noted that “[t]apping the wires and listening in by the officers literally constituted a search for evidence,” and further, in line with the Fifth Amendment and the decision in the Boyd case, supra note 21, such evidence was covered by the terms of the Fourth Amendment: “This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words.” See also infra text at note 29 and note 38.

28. Olmstead at 468. Taft had served as Solicitor General as well as Secretary of War before running for President in 1908. He was appointed to the Court in 1921.

29. Id. at 469.

30. Id. at 470: “Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained.”

31. Id.

32. On the issue of using evidence illegally obtained, Holmes observed that “there is no body of precedents by which we are bound and which confines us to logical deduction from established rules.” Id. Contrast Taft’s deduction from “general experience,” supra note 28.

33. Id. at 474.

34. Brandeis notes much the same as Holmes, though his elaboration is less elegant: “When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers’ crimes. And if this Court should permit the Government, by means of its officers’ crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.” Id. at 483 (citations omitted).

35. Id. at 485. By projecting a society inhabited by agents reinforced with improving surveillance technologies, he could make readers reflect back on the values—e.g., catch the criminals at any price, including unrestricted resort to the latest technology—that would inevitably propel the government along the path to ignobility.

36. Id. at 474

37. Id. at 478.

38. Id. Justice Butler’s opinion, supra note 23, gets around Chief Justice Taft’s literal construction of searchable effects by treating telephonic communications somewhat like private property: “The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it.” Id. at 487 (Butler, J., dissenting).

39. As we shall see, infra text at notes 104 et seq., Taft’s notions are a throwback to Elizabethan doctrine, that the Crown’s interests trump its subjects; in contrast, Brandeis’s idea that the Constitution includes a “right to be let alone” reflects the opposition to Elizabethan law reflected over the following two hundred years of English law culminating in Lord Camden’s opinion in Entick v. Carrington, 19 How. St. Tr. 1029, and cited by Justice Bradley in Boyd v. United States, supra note 21. On the evolution of the Fourth Amendment following the Elizabethan era, see Cuddihy, infra note 69.

40. Olmstead at 467.

42. Distilling these tendencies in the Court’s surveillance opinions following


44. See Jacob W. Landynski, Search and Seizure and the Supreme Court: A study in constitutional interpretation (Baltimore, MD: Johns Hopkins Press, 1966), 205–44. Section 605 raised questions about the extent of federal preemption of state law enforcement activities, about the identity of the “sender” who was the source of a communication’s private nature, including its immunity to searches, etc. The loopholes, in turn, together with the Court’s holding in Olmstead, enabled law enforcement authorities to continue at least some wiretapping activities. Perhaps the biggest loophole in Section 605 was the conjunctive wording of the prohibition: “[N]o person . . . shall intercept any communication and divulge or publish the existence, contents, [etc.].” In other words, agents who were engaged in long-term surveillance could argue that, so long as they did not publicly disclose the fruits of their wiretapping, they were not in violation of the prohibition. Under this interpretation, Section 605 continued to inhibit the use of wiretap evidence in public court proceedings, but would not, for instance, have hindered cold war spy catching activities, the surveillance of left-wing political groups, or even routine police investigation of organized crime.


46. Id. at 351 (Stewart, J., opinion of the Court) and 360 (Harlan, J., concurring). Katz made “persons” not only a subject of physical searches and seizures, but also of surveillance that intruded on a person’s “privacy.”

47. In the years leading up to Katz, American society became closely attuned to the ideological paradoxes entailed in the evolving conceptions of privacy. Deborah Nelson, in her research on the “changing material conditions and symbolic status of privacy during the Cold War,” notes one such ideological paradox: “while privileging the nuclear family and the privacy of the home, [ideology] simultaneously rationalized intrusion into this realm as essential to preserving the freedoms of privacy.” The conception of privacy in matters of eavesdropping focused attention on a similar paradox. A secret held fast by one person was certainly private, but a secret shared by two persons—be they friends, lovers, spies, or criminals—verged on conspiracy. In a nation ostensibly threatened by conspiracies of all sorts, the parameters for protecting “private” conversations could only lead to ambivalence. See Deborah Nelson, Pursuing Privacy in Cold War America (New York: Columbia University Press, 2001), at 1–41, 71–111. The point is that Katz grew out of an era in which the government’s power to invade personal privacy had led to widespread conformity, political and social paranoia, and in some cases even the sort of psychological imprisonment that is at the heart of the surveillance tragedy (e.g., the individual tendency to self-destruction that precedes reckless rebellion).

48. Semayne’s Case, 77 English Reports 194–99 (King’s Bench, Michaelmas Term, 1603/4). See also the lower court decision, Seyman vs. Gresham, 78 English Reports 1131 (1602). The case is discussed infra, text at notes 91–107.

49. Later on, I shall elaborate on Shakespeare’s Hamlet as the prototype for the surveillance tragedy. On whether Brandeis might have been influenced by Shakespeare, see, infra text at notes 206–10.


51. Hadfield, Shakespeare and Renaissance Politics, supra note 50, at 97.


53. Id. at 3.

54. Id. at 15.

55. Id. at 4–5.
57. Id. at 49.
59. Id. Cf. infra, text at note 175.
61. Breight, supra note 56, at 50. Cf. Polonius’s turning Ophelia into a source of information against her beloved Hamlet, infra text at note 170 as well as 149–51 and 159–61; and Claudius turning Hamlet’s friends Rosencrantz and Guildenstern into spies to gather intelligence on Hamlet, infra text at notes 162, 174. Even Hamlet turned the actors invited by the court into his own intelligence instruments, infra text at notes 175–77.
62. Archer, supra note 52, at 16.
63. Id. at 7–9; e.g., Norbert Elias, The Court Society (Oxford: Blackwell, 1983).
64. Archer, supra note 52, at 9. In this context, Archer draws on Jacques Lacan’s analysis of Hans Holbein’s painting The Ambassadors, which bears directly on some of Hamlet’s themes, including sovereign intelligence itself: the picture, Archer notes, is emblematic of the era insofar as it reflects the growth of “objectivity” (i.e., the sciences and instruments represented in the picture—optics, in particular) and the annihilation of “subjectivity” (the skull on the floor of the picture). More to the point, perhaps, Archer concludes that “[p]aranoia, in fact, is the psychoanalytic category that comes most readily to mind when we read the descriptions of early modern subjectivity in the work of Elias and Foucault, as well as Lacan,” id. at 10.
65. Id. at 15–16.
66. Id. at 16.
67. The concepts of surveillance and search are overlapping, but somewhat different qualitatively. The Oxford English Dictionary (OED Online, http://www.oed.com.silk.library.umass.edu, accessed January 2011) defines surveillance as “Watch or guard kept over a person, etc., esp. over a suspected person, a prisoner, or the like; often, spying, supervision; less commonly, supervision for the purpose of direction or control, superintendence.” The operative idea here is “direction or control.” In contrast, the definition of search ranges from “examination or scrutiny for the purpose of finding a person or thing. Const. . . . Also, investigation of a question; effort to ascertain something,” to “Examination (with regard to quality, conduct, etc.).” The dictionary also offers a variety of more procedurally specific illustrations: “a. An examination of a ship’s cargo, etc. for the purpose of enforcing customs duties. b. An examination of a register or of documents in public custody, for the discovery of information which is believed to be contained therein. . . . c. Self-examination of conscience, mental introspection.” The operative idea with regard to “search” appears to be the “finding” of some object of “investigation” or “examination.” The role of jurists, speaking conceptually, is to sort out those aspects of surveillance that are essentially congruent with the idea of searching and, to some extent, the Fifth Amendment’s commands against self-incrimination. This is an interesting assignment in semantic problem solving, and one that the Court has largely eschewed. My companion piece—see supra text following note 17—addresses some of these issues.

Id. at 80–82.

Id. at 80–126.

Id. at 128–29.


Cuddihy, supra note 69, at 108–16. Cuddihy maps out the search powers of various British authorities: the High Commission (19 lawyers, knights, bishops and others to “uproot religious nonconformity”), the Privy Council, and the Star Chamber (the Privy Council sitting judicially with the leading common law judges), which could authorize blanket searches.

Id. at 142.

Id. at 150.

See, e.g., supra notes 56–66, and infra notes 112–16, 134–38

Cuddihy, supra note 69, at 154–57.

Id. at 156.

Id. at 161.

Id. at 168. Cf. Justice Douglas’s majority opinion in Griswold v. Connecticut, 381 U.S. 479, 485 (1965): “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”

Cuddihy, supra note 69, at 168.

Id. at 128.

Id. at 186–98.

Id. at 188.

Id. at 48.

Id. at 28–29.

See especially id. at 188.

Id. at 30.

Id. at 126.

Id. at 118–25. Although the idea of privacy developed somewhat later in the law, it was, in my view, already emerging in the literary critique of surveillance during Elizabeth’s reign. Cf. Deborah Nelson’s account of the sentiments that were reflected in literary appraisals of cold war social and political repression before the courts had given those sentiments legal meaning; supra note 47. Cf. also Jeffrey Rosen’s redefinition of privacy in The Unwanted Gaze, supra note 4.

Cuddihy, supra note 69.

“Limited” in the sense that the bigger story and picture—that is, the persecution as well as prosecution phases, together with the Crown’s monopolization of public and shared spaces—is omitted when the focus is on drawing lines to spell out clear rules of conduct. See discussion infra text following note 191.

Semayne’s Case, supra note 48.

Id. at 195.

See infra text at note 105.

Hadfield, Shakespeare and Renaissance politics, supra note 50, at 7.

Id.

Semayne’s Case, supra note 48, at 195.
100. Id. Cf. the Roman law doctrine of patria potestas and the absolute powers of the paterfamilias: the patron or patriarch has unlimited power within the extended family, even the power to kill or have family members executed. See, e.g., Barry Nicholas, An Introduction to Roman Law (Oxford: Clarendon Press [1962], 1975), 65 et seq. Feudalism gave rise to similar power relationships, in particular the powers of lords to replicate within their realms the powers of the Crown. Post-Restoration principles of governance, including those that evolved into the U.S. Constitution, arose in opposition to these doctrines; in this regard, ideals of privacy and values that supported restraints on the sovereign’s power permeated constitutional doctrine.

101. Cf. Justice Scalia’s opinion for the Court in Kyllo v. United States, 533 U.S. 27, 40 (2001): “We have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’ That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. . . . [W]e must take the long view, from the original meaning of the Fourth Amendment forward” (citation omitted).

102. Semayne’s Case, supra note 48, at 195.

103. Id. at 197. Cf. the long line of modern cases in which the Court, especially during Chief Justice Burger’s tenure, has held that any opening is fair game for intrusion; see, e.g., supra notes 3 and 10.

104. Semayne’s Case, supra note 48, at 195.

105. Id. (emphasis added). One might compare Coke’s writing on the “knock rule” with Polonius’s words as a matter of etiquette; cf., Levin, infra note 148.

106. Id. at 197–98. Coke assigned four reasons for sustaining the sheriff’s power: (1) because the entry was pursuant to process of law; (2) because the defendant could not claim immunity if the suit itself was directed at him—only third parties might do so; (3) because the entry was necessary, or else debtors, among others, would simply not repay their loans or turn over their goods or present themselves, but hide behind the doors of their houses; (4) because sheriffs were substantial persons (unlike “bailiffs [who were] persons of little or no value”), they had a reputation for trust and authority to uphold and were also likely to make restitution if found liable for misusing process. Not surprisingly, this level of deference to authority in English society was fast eroding; roughly half a century later John Milton no longer had to read between the lines of the necessity argument, but could write openly: “And with necessity, the tyrant’s plea, excus’d his devilish deeds,” Paradise Lost, Book IV, line 393 (1667).

107. Semayne’s Case, supra note 48, at 199.

108. For a more complete argument, see my earlier paper, “Why Polonius had to die: Hamlet as a tragedy of surveillance,” presented to the Massachusetts Center for Renaissance Studies, Nov. 2007. I presented an earlier version of the same paper at the National Meeting of the Law & Society Association, Aspen (Snowmass), CO, June 1998; I had also elaborated a sketch of that paper during the course of a seminar on Elizabethan era censorship conducted by Richard Burt for the Institute for the Advanced Study of the Humanities at the University of Massachusetts, Amherst, in 1992.

109. My argument begins by correcting the frequent misrepresentation of Polonius, both on stage and in criticism, as a “tedious old fool”—see, e.g., Hugh Grady, “Hamlet as mourning play: A Benjaminsque interpretation,” 36 Shakespeare Studies, 135–64, at 144 (2008).


111. Darnley, Mary’s husband, soon met his own demise at Queen Mary’s hands, a murder that Englishmen might well have been reminded of when they heard about Claudius’s treachery and Gertrude’s unfaithfulness. For Mary had apparently taken up with another man, Bothwell, and to effect her divorce and free herself up for remarriage, she had Darnley killed—he was strangled or suffocated in an orchard while trying to escape a night-time assault on his sleeping quarters. See Raphael Holinshed, The Chronicles of England, Scotland and Ireland (rev. ed., London: Henry Denham Printer, 1587), 382–84 (online edition from the University of Pennsylvania library website, http://dewey.library.upenn.edu/sceti/printedbooksNew/index.cfm?TextID=holinshed_chronicle&pageposition=1
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113. Archer, supra note 52, at 14. Ironically, Shakespeare himself played the role of Tiberius, the almost victim of intrigue, in the original production of Sejanus his Fall.


115. Breight, supra note 56, at 50–51.

116. Id. at 51.

117. Id. at 220.

118. Id. (emphasis added).

119. In Hamlet, II.i.329–78, Hamlet, Rosencrantz, and Guildenstern engage in a critical, though somewhat elusive, discussion about the traveling troupe of actors and why they are on the road. Part of this discussion notes the increase of “eyeases,” or child actors who have been used to displace professional actors more critical of the Crown’s administration.

120. Hadfield, Shakespeare and Renaissance Politics, supra note 50, at 88–90. See also Hadfield’s chapter, “The Radical Hamlet,” in Hadfield, Shakespeare and Republicanism, supra note 50, at 184–204 (interpreting Shakespeare’s more specific political views).

121. Hadfield, Shakespeare and Renaissance Politics, supra note 50, at 1–35, particularly at 12, 26–34.

122. Id. at 88. Note that Lord Burghley died five years before the end of Elizabeth’s reign, just as Polonius died in act III and so was no longer around to advise Claudius at the end of Hamlet.

123. Id. at 89.

124. Id. at 88.

125. Id. at 89–90. I.e., he uses Reynaldo to spy on his son, uses Ophelia to get at Hamlet, conspires with Claudius to corrupt Rosencrantz’s and Guildenstern’s friendship with Hamlet, and so forth.

126. Id. at 90–91. Viz. Laertes’ dying observation: “the King—the King’s to blame.”

127. At the same time, this interpretation illuminates some of the play’s lingering mysteries, such as the inscrutable graveyard scene; see “Why Polonius had to die,” supra note 108. But for a completely different perspective on Hamlet, cf. Carla Spivack, “The Woman Will Be Out: A New Look at the Law in Hamlet,” 20 Yale Journal of Law & the Humanities 31, 60 (2008).

128. Indeed, Claudius is also trying to discover information, namely about Hamlet’s knowledge and intentions, not merely to conceal his own treachery.

129. Except Horatio, who must remain as the witness to and putative “narrator” of this history. One of Shakespeare’s sources derived from the twelfth-century history of Amleth; see Books 3 and 4 of the Gesta Danorum [The Danish History] by Saxo Grammaticus at http://omacl.org/DanishHistory/book3.html and http://omacl.org/DanishHistory/book4.html (accessed Dec. 2010). In the Danish version, the protagonist Amleth not only avenges his father Horwendil by killing his uncle Feng, but also survives to rule over his homeland Jutland for a time.

130. Supra text at note 60.

131. Supra text at note 110.

132. Supra text at note 59.

133. Supra text at note 61.

134. On the criticism, Andrew Hadfield, whose contributions I discussed earlier, supra text at notes 120–26, is the leading example. Kenneth Branagh’s 1996 staging is the closest example of this on film.


137. Id. at I.i.18–48.
138. Id. at I.ii.214–18.
139. Id. at I.i.82–91.
140. Id. at I.i.108–20. “Now, sir, young Fortinbras, / Of unimproved mettle hot and full, / Hath in the skirts of Norway here and there / Shark’d up a list of lawless resolutes / For food and diet, to some enterprise / That hath a stomach in’t; which is no other, / As it doth well appear unto our state, / But to recover of us, by strong hand / And terms compulsatory, those foresaid lands / So by his father lost; and this, I take it, / Is the main motive of our preparations, / The source of this our watch, and the chief head / Of this post-haste and romage in the land.”
141. Id. at I.ii.26–39.
142. Feigned and real concern with “outside enemies” and “threats to the state” is a longstanding justification for tyrannical rule, including oppressive surveillance. See, e.g., Breight’s account of Lord Burghley’s rule, supra text at notes 56–57. McCarthyism, Richard Nixon’s impeachable offenses, and the stink of the Bush-Cheney regime are recent examples in our own history in which those in power have used excessive surveillance less to protect the state than to entrench their own political security; see, e.g., supra notes 1, 5, 10.
143. Hamlet at I.ii.43–67; see also II.i.1–82.
144. Id. at I.ii.118–23.
146. Hamlet at I.ii.269–73.
147. Id. at I.ii.45–46.
148. Id. at I.ii.72, 82–84. Notwithstanding Harry Levin’s disparaging appraisal of Polonius’s advice—“etiquette rather than ethics”—the speech did contain some enduring words of wisdom, to wit: “This above all: to thine ownself be true, and it must follow, as the night the day, thou canst not then be false to any man.” See, Levin, The Question of Hamlet (New York: Oxford University Press, 1959), 25–26.
149. Id. at I.ii.104.
150. Id. at I.iii.111–14: “Marry, I’ll teach you: think yourself a baby; that you have ta’en these tenders for true pay, which are not sterling. Tender yourself more dearly; or—not to crack the wind of the poor phrase, running it thus—you’ll tender me a fool.”
151. Id. at I.iii.134–43: “I shall obey, my lord.”
152. Id. at I.iii.71–74.
153. Id. at I.iv.79–84: “Think of it,” Horatio continues, “The very place [i.e., the ramparts of Elsinore] puts toys of desperation, without more motive, into every brain that looks so many fathoms to the sea and hears it roar beneath.”
154. Id. at I.v.98–111. Cf. John Michael Archer’s contrast of intelligence in the ideal against intelligence in practice, supra text at notes 52–55. In the context of my argument here, that Shakespeare framed Hamlet not as a drama about ambivalence and resolve but as a tragedy of surveillance and intrigue, these lines show Hamlet’s resolve to avenge his father from the outset and thereby suggest that the unfolding of the drama is about playing—or getting sucked into playing—the intrigue/spionage game to win, notwithstanding its unpleasantness.
155. Hamlet at I.v.130.
156. Id. at I.v.132–35, 159–63, 164–208.
157. See discussion on “drawing lines” in the text following infra note 191.
158. Hamlet at II.i.68–74.
159. Id. at II.i.118–21.
160. Id. at II.i.123–24: “I am sorry that with better heed and judgment I had not quoted him.”
161. Id. at II.i.130–32.
162. Id. at II.ii.5–7. Claudius has sent them to probe into Hamlet’s recent “transformation; so call it, sith nor the exterior nor the inward man resembles that it was.” The King entreats them to keep company with Hamlet, to “gather, so much [information] as from occasion you may glean.” Id. at II.ii.15–16. They affirm their loyalty to the King.

163. Ironic in that both aspects appear to be in error: Fortinbras does ultimately triumph, and of course Polonius’s insight into Hamlet’s lunacy turns out to be entirely wrong.

164. Hamlet at II.ii.45. The news from Norway closes the loop on the misdirection noted earlier; see supra text at notes 139–40, showing that the soldiers’ fears of an external threat—to wit, Fortinbras—were unfounded. Hamlet at II.ii.64–90. On surveillance and the creation of external threats to keep the working class in fear or militarily occupied, see supra text at notes 56–61.

165. Id. at II.ii.52.

166. Id. at II.ii.113–16.

167. Id. at II.ii.156–60. “And he [Hamlet], repulsed—a short tale to make—fell into a sadness, then into a fast, thence to a watch, thence into a weakness, thence to a lightness, and, by this declension, into the madness wherein now he raves.”

168. Id. at II.ii.164–67. Both Archer, supra text at notes 52–55, and Hadfield, supra text at notes 120–25, elaborate on the relationship of sovereignty to the quality of intelligence.

169. Hamlet at II.ii.171–73. Cf., Brandeis’s projection in Olmstead, supra text at note 33, that “[a]dvances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.”


171. Id. at II.ii.222–23. “Cat and mouse” seems to be the characteristic description of this interaction—viz., Grady, “Hamlet as mourning play,” supra note 109.

172. See supra text at note 60.


174. Id. at II.ii.305–7. See supra text at note 61.

175. See supra text at note 59.

176. Hamlet, at II.ii.461.

177. Id. at II.ii.590–95. The contrast here is to Fortinbras, who does not get sucked into the tragedy of surveillance, but avenges his father by force of arms.

178. Id. at II.ii.606–13.

179. Id. at III.i.191–95 (emphasis added). Shakespeare twice has Polonius mention that he will hide out in Gertrude’s bedroom deliberately to spy. It is curious that even such a recent film adaptation of Hamlet as Mel Gibson’s could make it seem that Polonius’s presence behind the arras was inadvertent and coincidental.

180. Id. at III.i.199.

181. Id. at III.ii.81–83.

182. Id. at III.ii.273–305.

183. Id. at III.ii.365–79.

184. Id. at III.ii.391.

185. Id. at III.iii.29–37: “My lord, he’s going to his mother’s closet: / Behind the arras I’ll convey myself, / To hear the process; and warrant she’ll tax him home: / And, as you said, and wisely was it said, / ’Tis meet that some more audience than a mother, / Since nature makes them partial, should o’erhear / The speech, of vantage. Fare you well, my liege: / I’ll call upon you ere you go to bed, / And tell you what I know.”

186. Id. at III.iv.117.

187. Id. at III.iv.125–26.

188. Compassionate surveillance is, of course, an alternative theme in the literature that does not lead to tragedy; that is, narratives involving angels, guardians, and observant bystanders such as Boo Radley in Harper Lee’s To Kill a Mockingbird (Philadelphia: J. B. Lippincott, 1960).
Viz

Thomas Kyd’s Spanish Tragedy, a play many scholars have identified as Shakespeare’s model for Hamlet. There is one detour as the narrative hurtles through its closing scenes toward the final, dynasty-destroying train wreck: namely, the gravediggers’ scene, a scene that has eluded definitive scholarly interpretation. Elsewhere, I have suggested ways in which the scene can be better understood by highlighting the backdrop of Elizabethan surveillance; see Zacharias, “Why Polonius had to die,” supra note 108.

Holmes, in Olmstead, at 469–70, opined that “While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. But I think, as MR. JUSTICE BRANDEIS says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act” (emphasis added, citations omitted).

Brandeis, in contrast, began not with the government agents’ behavior, but instead asked the question, “Can it be that the Constitution affords no protection against such invasions of individual security?” Olmstead at 474. He then went on to suggest the extensive protection of individual privacy that the Fourth Amendment affords citizens before concluding that, in any case, searches using unlawful means should be held unconstitutional. Id. at 479–80.

Rosen’s book, supra note 4, provides frequent examples of the courts’ inability or unwillingness to draw sensible lines that would secure to subjects of surveillance or investigation some measure of privacy. Consider, e.g., his despairing summary of the court’s failure to respect Monica Lewinsky’s privacy, at 36: “There is, after all, a world of difference between committing mass murder and lying about a consensual affair, and any sane legal system that prohibits ‘unreasonable’ searches and seizures should at least try to distinguish between the two crimes in deciding whether or not a witness’s reading habits or intimate thoughts should be exposed to public view.”

It bears repeating that the Court’s decisions in modern times have hardly deemed surveillance to be searches at all, and so not even subject to the reasonableness and warrant requirements. My companion piece, “The tragedy of surveillance and Fourth Amendment jurisprudence,” supra note 17, addresses this issue squarely. Surveillance has many purposes: one form keeps track of a subject’s activities, conversations, wherewithal as part of an ongoing investigation; other forms happen to focus on subjects incidentally as part of a more general tracking operation to secure one or another general purpose—e.g., deter bank fraud, street crime, terrorist plotting. In this context, the Fourth Amendment is designed to secure the innocent from intrusive observations as well as those subjects under investigation as suspects. Yet, as Prof. Amsterdam has written, supra note 9, at 402–3:

[It is natural enough to say] that anyone who commits a crime or leaves criminal evidence lying around in front of an open window deserves exactly what he gets. Let him at least have the decency to draw the shade before he commits a crime.

But, unless the fourth amendment controls tom-peeking and subjects it to a requirement of antecedent cause to believe that what is inside any particular window is indeed criminal, police may look through windows and observe a thousand innocent acts for every guilty act they spy out.

Surveillance, by its nature, occurs over time and space and includes many acts of observation, some recorded. See, e.g., Blitz, supra note 2.

Some subjects have a high tolerance for conforming their behaviors to narrowly prescribed social norms, others do not; yet among the latter, there are many who are “innocent non-conformists,” and though some are not averse to publicizing their nonconformity, others prefer to keep their “deviance” private.
196. References, such as those noted supra in notes 2–3, elaborate on a variety of innovations in surveillance technology, ranging from video cameras with face recognition to smart transportation systems, and so forth.

197. Ethical analysis tends to be more persuasive in policy debates when legislation pertaining to the issues has not been crafted and the economics of the situation are uncertain; the realm of changing technology is, generally speaking, fertile ground for moral guidance, and new surveillance technologies provide an apt illustration. This is not the place to embark on a discussion of the Court’s role as the nation’s ultimate moral safeguard in such instances, but with regard to surveillance policy making, see Katz v. United States, 389 U.S. 347 (1967), and Kyllo v. United States, 533 U.S. 27 (2001).


199. Cf. Holmes’s analysis in Olmstead: “It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits.” Olmstead at 470 (Holmes, J., dissenting).

200. With regard to conceptualism, such stories fill out the landscape along a putative “slippery slope.” In other words, to a conceptualist no appropriate concept lies between the top and bottom of the slope that can afford purchase around a reasonable solution or, at least, compromise. In such cases, the judge generally chooses to stay in his or her rut (i.e., the top of the hill), rather than risk tumbling to the bottom. Yet once the landscape is made more visible, judges may be more courageous in taking that first step.

201. See supra text at notes 52–55.

202. Judges don’t see this when asked to evaluate a single technique or form of surveillance, let alone one instance, for its legitimacy (reasonableness). No single investigative technique on Richard Nixon’s surveillance agenda (see “Impeachment Hearings,” supra note 10) or on that of the Bush-Cheney administration (see Mayer, supra note 4) stands out as the one where agents crossed the line, though no doubt by the time Nixon’s henchmen had broken into various offices for information or Bush’s henchmen had resorted to torture for information, they had long since crossed the line. Still, it was the acts seen in their larger contexts, the untrammeled quest for control, that cast the light of illegitimacy on those presidencies.


204. See Zacharias, supra note 17.

205. Olmstead at 479 (Brandeis, J., dissenting).


208. See infra text at 212. The following lines from Olmstead indicate the extent to which Brandeis was unaware of Lord Burghley’s surveillance campaigns that had operated largely by stealth: “Force and violence were then [i.e., when the Fourth Amendment was adopted] the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry.” Olmstead at 474 (Brandeis, J., dissenting).

209. Bentham’s “Panopticon” was a milestone of the nineteenth century’s technology of social control, and it became a symbol for a much wider range of intrusions than Bentham’s prison design originally intended. See Michel Foucault, Discipline and Punish: The Birth of the Prison, trans. Alan Sheridan (New York: Random House, 1977 [orig., Surveiller et Punir, 1975]), 195–228. As an example of the Panopticon theme in literature, see Franz Kafka’s The Castle (Das Schloss), published originally in 1926, two years before the Court decided Olmstead.


211. See supra text at note 205.


213. Olmstead at 474–75.

214. On the untenable state of the Court’s current Fourth Amendment interpretations respecting surveillance, see LaFave, supra note 3. See also Professor Amar’s characterization of the Court’s interpretation of the Fourth Amendment as a “doctrinal mess”: “Make no mistake: I come to praise the Fourth Amendment, not to gut it. It is a priceless constitutional inheritance, but we have not maintained it well. Refurbished, it is a beauty to behold, for it was once—and can once again be—one of our truly great Amendments”; Akhil Reed Amar, “Fourth Amendment First Principles,” 107 Harvard Law Review 737–819, at 761 (1994). On Amar’s reflections on treating surveillance, see id. at 803–4.

215. See supra text and notes at notes 13–15.