Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence

Michael Campbell

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DEFINING A FOURTH AMENDMENT SEARCH: A CRITIQUE
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The fourth amendment prohibits "unreasonable searches and seizures."¹ Because government actions² that are neither searches nor seizures are not governed by the amendment, and therefore need not be "reasonable,"³ the definitions of search and seizure limit the scope of the amendment’s protection of individual rights.⁴ For this reason, the Supreme Court has defined search and seizure not by their ordinary meanings, but as terms of art that reflect the interests protected by the fourth amendment.⁵

Unlike the definition of seizure,⁶ the definition of search has not been satisfactorily articulated by the Court.⁷ In Katz v. United States, the Warren Court adopted an expansive definition of search,⁸ but the application of this definition has been sharply narrowed by the Burger Court.⁹ The expansion and contraction of the scope of the fourth amendment reflects the changing ideological composition of the Court, but the translation of the Court’s ideology into fourth amendment doctrine has been facilitated by the

¹. The full text of the fourth amendment reads:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
The fourth amendment applies to the states through incorporation in the due process clause of the fourteenth amendment. Ker v. California, 374 U.S. 23, 30-34 (1963).
³. United States v. Dionisio, 410 U.S. 1, 15 (1973); Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 356 (1974). Other constitutional guarantees, such as the due process and equal protection clauses, are inadequate substitutes for rights protected by the fourth amendment. See id. at 377-78.
⁵. For example, if government agents went onto privately owned land to look for marijuana plants, most people would describe this action as a search. The Supreme Court, however, has held that such an action is not a search because individuals do not have a privacy interest in "open fields" that is protected by the fourth amendment. Oliver v. United States, 104 S. Ct. 1735, 1741 (1984).
⁶. Generally, the act of physically taking and removing tangible items constitutes a seizure of those items. 1 W. LAFAVE, SEARCH AND SEIZURE § 2.1, at 221 (1978). In addition, eavesdropping on a conversation may constitute a seizure of that conversation. Berger v. New York, 388 U.S. 41, 59 (1967). A seizure of a person occurs when an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).
⁷. 1 W. LAFAVE, supra note 6, § 2.1, at 221-24. This Comment will be concerned only with the definition of a search.

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Court’s reliance on definitions of search that have lacked any substantial content. The goal of this Comment is to put forth a principled definition of search that, while reflective of fourth amendment interests, is less vulnerable to the Court’s ideological oscillations.

For much of the twentieth century prior to 1967, the Court defined search by reference to the literal language of the fourth amendment. A search was a physical trespass to a “constitutionally protected area,” i.e., a physical trespass to those “areas” explicitly protected by the fourth amendment: persons, houses, papers, and effects.10 As such, this definition principally served to protect property interests from government interference.11

Yet the fourth amendment was meant to protect privacy interests as well as property interests.12 In large measure, of course, the protection of

10. Amsterdam, supra note 3, at 356–57; I. W. LAFAVE, supra note 6, § 2.1, at 223–24.

11. Privacy, as such, was not protected under the “constitutionally protected area” doctrine. Compare Goldman v. United States, 316 U.S. 129 (1942), with Clinton v. Virginia, 377 U.S. 158 (1964) (per curiam), rev’g 130 S.E.2d 437 (Va. 1963), and Silverman v. United States, 365 U.S. 505 (1961). In Goldman, police officers placed an electronic amplifying device against the outside of a party wall in order to listen to conversations in an adjacent office. Goldman, 316 U.S. at 131–32. The Court held that the use of the device was not a search because no trespass was committed in using the device. Id. at 134–35. In Silverman and Clinton, the Court held that the use of similar devices to eavesdrop on conversations was a search because the devices had physically penetrated the premises where the overheard conversations occurred. In Clinton, a microphone was held against a party wall using a thumbtack. Clinton, 130 S.E.2d at 442. In Silverman, a “spike mike” was attached to a heating duct, transforming the duct into “a giant microphone, running through the entire house occupied by appellants.” Silverman, 365 U.S. at 509 (quoting Silverman v. United States, 275 F.2d 173, 179 (D.C. Cir. 1960)). Although the finding of a search despite the triviality of the trespasses in Silverman and Clinton no doubt reflected the Court’s dissatisfaction with the “constitutionally protected area” doctrine, all three of these decisions had little to do with privacy per se, but were concerned with the protection of property from trespass. Only through the protection of property interests were privacy interests protected.

12. Before the development of the Court’s “constitutionally protected area” analysis, the Court had stated in an often-quoted passage, “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .” Boyd v. United States, 116 U.S. 616, 630 (1886). Note also Justice Brandeis’ dissent in Olmstead v. United States, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting):

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


Olmstead’s illiberal interpretation of the Fourth Amendment as limited to the tangible fruits of actual trespasses was a departure from the Court’s previous decisions, notably Boyd, and a misreading of the history and purpose of the Amendment. Such a limitation cannot be squared with a meaningful right to inviolate personal liberty.
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property interests, such as houses, served to protect privacy interests, at least to the extent of preventing arbitrary physical trespasses. But technological developments, particularly in communications and surveillance techniques, left a definition of search based on the protection of property interests increasingly incapable of protecting privacy interests. For example, telephone conversations, because they pass over "wires . . . not part of [a person's] house or office, any more than . . . the highways along which they are stretched," were not protected by the amendment. Moreover, the requirement of a physical trespass permitted the government, through the use of electronic eavesdropping equipment, to interfere with personal privacy even within explicitly protected areas such as houses.

As the Warren Court came to identify fourth amendment interests more closely with privacy than with property, the Court's definition of a search as a physical trespass to a "constitutionally protected area" became insupportable. In 1967, in *Katz v. United States*, the Court abandoned the "constitutionally protected area" definition in favor of a definition based squarely on the protection of privacy. In *Katz*, the Court held that electronic eavesdropping on a telephone booth by government agents was a search because the agents' conduct "violated the privacy upon which [the caller] justifiably relied." *Katz* was widely believed to be a watershed in the definition of a fourth amendment search. Nowhere in *Katz*, however, did the Court identify the privacy upon which individuals could justifiably rely. The task of developing a fourth amendment jurisprudence based upon privacy devolved upon

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15. Such devices as the "detectaphone," see *Goldman v. United States*, 316 U.S. 129, 131–32 (1942), and concealed voice transmitters, see *On Lee v. United States*, 343 U.S. 747, 749 (1952), could not have been anticipated by the framers of the fourth amendment.

By the 1950's, the use of sophisticated sensing and surveillance devices by law enforcement agencies had become pervasive. See, e.g., *Lopez v. United States*, 373 U.S. 427, 466–69 & nn.14–17 (Brennan, J., dissenting) (discussing S. DASH, R. SCWARTZ, & R. KNOWLTON, THE EAVESDROPPERS (1959)).

17. *389 U.S. 347 (1967).*
18. *Id. at 353.*
the Burger Court, but that Court’s application of *Katz* has reaffirmed the results, if not the rationale, of many of the Court’s pre-*Katz* decisions. It should not be surprising, then, that many of the inadequacies of the Court’s pre-*Katz* jurisprudence, such as the arbitrary protection of privacy rights and the vulnerability of those rights to technological developments, have reappeared in the Court’s post-*Katz* jurisprudence. Moreover, while the pre-*Katz* definition of a search at least provided “a workable tool for the reasoning of the courts,” the post-*Katz* definition of the Burger Court is nearly devoid of content.

This Comment attributes the inadequacies of the Burger Court’s application of *Katz* to that Court’s identification of an interest in privacy with an interest in the secrecy of information. An interest in privacy, however, should more properly be defined as an interest in being left alone. Accordingly, this Comment proposes that a search be defined by reference to the conduct of the government, rather than by reference to the information uncovered by that conduct. Specifically, a search should be defined as conduct that violates a social norm of privacy. Such a definition of search would have several beneficial consequences. Among these are a definition of search more consonant with social privacy values, less subject to judicial manipulation, and less vulnerable to technological change.

I. PROBLEMS ASSOCIATED WITH THE BURGER COURT’S DEFINITION OF A SEARCH

The Burger Court, drawing upon Justice Harlan’s concurrence in *Katz*, has defined a fourth amendment search by reference to expectations of privacy in information. A government action is a search if the person challenging the constitutionality of the action has a “reasonable” or

20. Of the pre-*Katz* cases in which the Court held that no search occurred, only Olmstead v. United States, 277 U.S. 438 (1928), and Goldman v. United States, 316 U.S. 129 (1942), have been expressly overruled, and those by *Katz* itself. Several other cases thought by courts and commentators to have been implicitly overruled by *Katz* have been expressly reaffirmed in cases subsequent to *Katz*. E.g., Oliver v. United States, 104 S. Ct. 1735, 1740 (1984) (reaff’g Hester v. United States, 265 U.S. 57 (1924) (“open fields” doctrine)); United States v. White, 401 U.S. 745, 749–50 (1971) (reaff’g Lopez v. United States, 373 U.S. 427 (1963) (electronic eavesdropping on conversations with government agents) and On Lee v. United States, 343 U.S. 747 (1952) (electronic eavesdropping on conversations with government agents)).

The evisceration of *Katz* has not been accidental. The Court has almost uniformly granted review in those cases in which a lower court had upheld a defendant’s fourth amendment claim. Wasserstrom, *supra* note 9, at 260.


25. *Id*. A “reasonable expectation of privacy” should not be confused with a reasonable search.
"legitimate" expectation of privacy in the information that the action uncovers.\textsuperscript{26}

Although the Court has often used the terms "reasonable" and "legitimate" interchangeably,\textsuperscript{27} these terms reflect distinctly different expectations of privacy. A reasonable expectation of privacy in information is a reasonable expectation that information will not be discovered, given the information's context.\textsuperscript{28} A legitimate expectation of privacy in information is a legitimate expectation that information will not be discovered, regardless of the reasonableness of such an expectation under the circumstances.\textsuperscript{29} For example, the Court has held that an expectation of privacy in the possession of contraband is illegitimate.\textsuperscript{30} Even if a person possesses contraband under circumstances that would ordinarily support a reasonable

\textsuperscript{26} See, e.g., Smith v. Maryland, 442 U.S. 735, 743–44 (1979).

\textsuperscript{27} See, e.g., id. at 740. The phrase "reasonable expectation of privacy" appeared in Terry v. Ohio, 392 U.S. 1, 9 (1968). The phrase was taken from Justice Harlan's concurring opinion in \textit{Katz}. \textit{Katz}, 389 U.S. at 360 (Harlan, J., concurring). The adjective "legitimate" appeared in United States v. Chadwick, 433 U.S. 1, 7 (1977). In recent years, the Court has interchangeably used several different formulations of "expectation of privacy." See, e.g., United States v. Jacobsen, 104 S. Ct. 1652, 1661–62 & n.22 (1984) ("an expectation of privacy that society is prepared to consider reasonable"; "an interest in privacy that society is prepared to recognize as reasonable"; "a 'legitimate' expectation of privacy"; "a legitimate interest in privacy").

Justice Harlan's concurrence in \textit{Katz}, 389 U.S. at 360, would have required a subjective expectation of privacy in addition to a reasonable expectation of privacy. What Justice Harlan was apparently trying to capture with the subjective expectations test was the notion that information that a person intentionally exposes to the plain view of others is not protected by the fourth amendment. See \textit{Katz}, 389 U.S. at 361 (Harlan, J., concurring). But the essence of this notion is the intentional exposure, not the subjective expectation of privacy. At best, an analysis of the scope of the fourth amendment based upon subjective expectations is unhelpful. At worst, such an analysis is dangerously misleading. The analysis of subjective expectations is unhelpful because subjective expectations of privacy are almost invariably reflections of objective conditions. Even though the Court has adopted the subjective aspect of Harlan's test, see, e.g., Smith v. Maryland, 442 U.S. 735, 740 (1979), the Court has never failed to find a subjective expectation of privacy where it found that an expectation would be objectively reasonable.

The analysis of subjective expectations is misleading because it would permit the government to define the scope of the fourth amendment by manipulating subjective expectations of privacy. As Professor Amsterdam wrote in 1974, if subjective expectations were determinative of fourth amendment rights, "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance." Amsterdam, \textit{supra} note 3, at 384. The Supreme Court has recognized this flaw and has stated that in such extreme circumstances it would engage in a "normative" analysis of the scope of the amendment. Smith, 442 U.S. at 740 n.5. Justice Harlan himself abandoned the subjective expectations test four years after his opinion in \textit{Katz}.


\textsuperscript{30} Id.; United States v. Place, 462 U.S. 696, 707 (1983).
expectation of privacy, e.g., if the contraband is in a suitcase, the Court will not protect such an expectation of privacy since the expectation, though reasonable, is not legitimate. In order for a government action to be a search under the fourth amendment, that action must violate an expectation of privacy that is both reasonable and legitimate.

Both the Court's reasonable expectation of privacy and legitimate expectation of privacy tests inadequately protect fourth amendment privacy interests. A fundamental inadequacy shared by both tests is their focus on the information uncovered by the government, rather than on the means used by the government to uncover that information.

A. Reasonable Expectations of Privacy

A definition of search based upon the reasonableness of an expectation that information will remain private is inevitably arbitrary. First, almost all information is subject to discovery. Some expectations that information will not be discovered are more reasonable than others, but there is no obvious point at which a distinction can be made between reasonable and unreasonable expectations. Second, and more importantly, individuals do not undertake activities that they wish to remain confidential without in some sense reasonably expecting that those activities will not come to light. As such, a reasonableness standard is too broad: if the fourth amendment protected all activities that persons reasonably expected would not be discovered, the government would have to justify under the amendment almost every investigative activity in which it engaged.

Therefore, in order to give content to the phrase "reasonable expectation of privacy," the Court has been forced to decide which expectations of privacy it is willing to recognize as reasonable. In making this decision, the Court has developed a set of largely arbitrary criteria that are strongly reminiscent of the discredited, pre-Katz "constitutionally protected area" definition, albeit without the requirement of a physical trespass.

32. See United States v. Place, 462 U.S. 696, 706-07 (1983). In Place, a dog was used to sniff a suitcase for illegal narcotics. Id. at 699. Since the dog could determine only whether the suitcase contained contraband, and no other fact, use of the dog was not a search. Id. at 707. Although the Court would not protect an expectation of privacy in contraband, a suitcase could contain other, legitimate items. See infra note 65 and accompanying text. Therefore, opening a suitcase is a search, even if the suitcase in fact contains only contraband. See United States v. Chadwick, 433 U.S. 1 (1977).
33. A classic example of this problem is burglary of a summer cabin in the off season. An expectation that such an activity could be performed without discovery would be eminently reasonable. Yet, if the police were by chance to come upon the burglar, no one would seriously suggest that the police would be engaging in a search. The Supreme Court has stated in dicta that such an "expectation of privacy is not one that society is prepared to recognize as 'reasonable.'" United States v. Jacobsen, 104 S. Ct. 1652, 1661 n.22 (1984).
34. In Oliver v. United States, 104 S. Ct. 1735 (1984), the Court stated that "Katz's 'reasonable
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Thus, the Court has held that a person ordinarily has a reasonable expectation of privacy in information contained within areas such as homes ("houses")\(^3\) and suitcases ("effects"),\(^6\) but that a person does not have a reasonable expectation of privacy in information contained within areas, such as "open fields"\(^7\) and public highways,\(^8\) that the Court is unwilling to characterize as "persons, houses, papers, or effects."

In addition to these arbitrary distinctions based upon particular areas, the Court has indicated that a person can have no reasonable expectation of privacy in information that is obtained from an area in which a person does not have a possessory interest.\(^9\) Suppose, for example, that A keeps incriminating evidence in the home of B. If the police forcibly enter B's home and discover the incriminating evidence, the entry of the police is a search as to B because it is B's home. The entry is not a search as to A because A has no possessory interest in B's home, and therefore, according to the Court, has no reasonable expectation of privacy in the incriminating evidence found within B's home. The Court's rationale is that the absence of a possessory interest in the area in which information is uncovered precludes effective control over the information, and thereby precludes a reasonable expectation that the information will remain undiscovered by, or undisclosed to, third parties.\(^40\)
These distinctions with respect to the reasonableness of privacy expectations have led the Court to find similar privacy interests in radically disparate contexts, and significantly different privacy interests in contexts that are nearly identical. For example, the Court has found no meaningful difference between the privacy interest that a person has in a privately owned field that is physically and legally secluded from public view and the privacy interest that a person has on a busy public street.41 A field was not deemed to afford the privacy protection offered by a home, and could not be characterized as a "person, house, paper, or effect."42 Yet the Court would find a significant difference in privacy interests between having one's car monitored by an electronic tracking device while the car is parked in a driveway and having it monitored while it is parked in a garage.43 The Court's justification is that the car is exposed to public view while in the driveway, but the car is not so exposed while in the garage.44

These decisions bear little relationship to the privacy expectations of individuals. Part of the problem is that the Court insists upon applying broad generalizations about privacy to specific contexts. The Court could perhaps have chosen better criteria and applied them less mechanically, but any effort to specify protected and unprotected contexts will lead to unsatisfactory results because individual expectations of privacy are not expectations that specific contexts will be private, but expectations that certain conduct will not occur within those contexts. As the *Katz* Court noted, the fourth amendment protects people, not places.45 Because of the nature of these individual expectations of privacy, the issue is not whether a person has a right to expect that information within a certain context will not be disclosed, but whether that person has a right to be free from a particular type of conduct within that context.46

An expectation of privacy in information is a derivative of expectations of conduct within a particular context. But by focusing only on the derivative expectation of privacy in information, the Court often fails to consider fully the privacy expectations of individuals. In particular, the Court often

42. *Id.*
46. In *Katz*, the government argued that since the "bugged" telephone booth from which the defendant made his calls was constructed partly of glass, the defendant was as visible after he entered the booth as he would have been had he remained outside. *Id.* at 352. The Court responded that what the defendant "sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.* Thus, the booth was protected under the fourth amendment from eavesdropping, but not from visual observation. Whether the booth, viewed in the abstract, was "constitutionally protected" was irrelevant. See *id.* at 351.
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fails to consider an expectation of privacy against the very conduct of the
government in the case before it.

For example, suppose that A talks to B by telephone. Unknown to A, B is
a government informant. Also unknown to A, government agents are
electronically eavesdropping on the conversation. A may have the following
expectations of privacy: (1) that B is a confidant and (2) that no one is
eavesdropping on the conversation. Under the Court's fourth amendment
decisions, the first expectation is unreasonable,47 but the second expecta-
tion is reasonable.48 A, then, has both reasonable and unreasonable expecta-
tions of privacy in the telephone conversation, but under the Court's definition of a search, A's expectation must be characterized as one or the
other.

The Court's solution to this difficulty is simply to deny recognition to
reasonable expectations of privacy if any expectation of privacy in the
information uncovered is unreasonable.49 Thus, the Court often does not
even consider for protection under the fourth amendment a broad range of
individual privacy expectations. In the hypothetical above, A's expectation
of privacy in the conversation is unreasonable because A has no reasonable
expectation of privacy against the government informer.50 That A has a
reasonable expectation of privacy against eavesdropping on the con-
versation is irrelevant. The conversation is therefore unprotected by the
fourth amendment, and the government can uncover the contents of the
conversation, without engaging in a search, by any means that the govern-
ment wishes.51 Moreover, even if the government informer refused to reveal
the contents of the conversation, the eavesdropping by the government
agents would still not constitute a search. The informer's participation in
the conversation would be sufficient to preclude a reasonable expectation of

47. See United States v. White, 401 U.S. 745, 749 (1971) (plurality opinion); Hoffa v. United
States, 385 U.S. 293, 302 (1966); Lewis v. United States, 385 U.S. 206 (1966). The expectation is
unreasonable because the agent has obtained the information through the voluntary, albeit uninformed,
disclosure of the speaker. What the agent does with the information after obtaining it is not governed by
the fourth amendment.
49. See, e.g., United States v. Knotts, 460 U.S. 276 (1983). In Knotts, the Court held that
monitoring a person's movements over public highways by means of a concealed electronic tracking
device was not a search. Id. at 285. The Court reasoned that anyone could follow a person in public,
therefore, the person followed could have no reasonable expectation of privacy in his or her public
movements. Id. at 281. Thus, the Court did not even consider whether a person might have a separate
expectation of privacy against the use of an electronic tracking device, the actual means used to follow
the defendant in the case before it. That the person could have no reasonable expectation of privacy
against being visually followed was dispositive. Id. at 282-84.
51. See id. at 751-53.
privacy in the conversation because the informer could have revealed the contents of the conversation.\textsuperscript{52}

In order to protect information that is meant to be private, individuals must protect that information from exposure to all conduct against which they would not have a reasonable expectation of privacy. This is an important consequence of the Court's failure to protect the full extent of an individual's privacy expectations within a given context. In the hypothetical above, A would have to make certain that B was not a government informant in order to protect himself or herself from eavesdropping by the government. Similarly, in order to be protected from electronic tracking devices, individuals can never leave home. The Court has held that outside homes and other private places, individuals have no reasonable expectation that they will not be visually observed, and therefore, individuals can have no reasonable expectation of privacy in their public movements.\textsuperscript{53} That individuals may have a reasonable expectation that electronic tracking devices will not be attached to their persons and possessions is irrelevant.\textsuperscript{54} It follows that the government's use of any device that can discover the location and movement of individuals in public is not a fourth amendment search.

In order to exist in society, individuals must "expose" information to discovery by the government and the general public. A measure of privacy can be maintained, without the necessity of living as a hermit, only so long as individuals can risk exposing information to certain types of conduct without risking exposing that information to all types of conduct. The Court, however, has too readily equated the potential exposure of information with the absence of any privacy interest in that information. In addition, this tendency on the part of the Court has left individual privacy vulnerable to advances in surveillance and communications technology.\textsuperscript{55} So long as any exposure of information makes that information fair game for government surveillance, advances in surveillance technology will enable the government to reach further into the private lives of individuals without the restraints of the fourth amendment. Eventually, individuals

\textsuperscript{52} See id. at 753-54.

The Court could have attempted to resolve the problem of contradictory expectations of privacy in the same information by aggregating the expectations of privacy in order to determine whether the "overall" expectation of privacy in the information was reasonable or unreasonable. Yet, even if possible, such an aggregation would inevitably compromise the protection of a reasonable expectation of privacy, particularly if the means used to uncover the information was precisely the conduct against which a reasonable expectation of privacy was held.


\textsuperscript{54} See id.

may have no privacy at all outside the limited confines of their homes, and very little inside. Justice Rehnquist has argued that the abuse of such developments is not likely, and certainly not imminent. But even if such an optimistic view of government were justified, under the Court’s current definition of a search, as under the pre-\textit{Katz} “constitutionally protected area” definition, constitutional protection against the abuse of technology in the area of personal privacy has been foreclosed.

\textbf{B. Legitimate Expectations of Privacy}

Even if an individual’s expectations meet the stringent criteria of the reasonableness standard, the Court’s emphasis on the information obtained by the government may still lead to the conclusion that no search has occurred.

\textbf{1. Contraband}

In \textit{United States v. Jacobsen}, a government agent chemically tested powder that he suspected was cocaine. The test could disclose only whether the powder was cocaine. The Court held that because Congress had decided to treat the interest in privately possessing cocaine as “illegitimate” by making such possession illegal, a test that could disclose only whether the substance tested was cocaine, and no other fact, could infringe no legitimate expectation of privacy. Therefore, the use of the test was not a fourth amendment search.

An expectation of privacy in information, then, must not only be reasonable, it must also be legitimate. That is, not only must a person reasonably expect that information will not be discovered, the information that the person wishes to protect from discovery must also be “legitimate” information. Information that is illegitimate, e.g., possession of contraband, is

\begin{itemize}
  \item[56.] Justice Rehnquist has stated that if the use of electronic tracking devices were to be abused by law enforcement agencies in the future, “there [would] be time enough then to determine whether different constitutional principles may be applicable.” United States v. Knotts, 460 U.S. 276, 284 (1983). He did not suggest what those principles might be.
  \item[57.] Note the abuse of electronic eavesdropping devices by government agencies prior to \textit{Katz}, as presented in \textit{S. DASH, R. SCHWARTZ, \\& R. KNOWLTON, THE EAVESDROPPERS passim} (1959).
  \item[58.] 104 S. Ct. 1652 (1984).
  \item[59.] \textit{Id.} at 1655.
  \item[60.] \textit{Id.} at 1655 n.1.
  \item[61.] \textit{Id.} at 1662.
  \item[62.] \textit{Id.}
  \item[63.] \textit{Id. See also} United States v. Place, 462 U.S. 696, 707 (1983).
\end{itemize}
not protected under the fourth amendment, even if a person reasonably expects that such information will not be discovered.\footnote{In United States v. Place, 462 U.S. 696 (1983), for example, the Court acknowledged that a person has a reasonable expectation of privacy in the contents of luggage. \textit{Id.} at 707. If those contents are contraband, however, the expectation is not legitimate and not protected by the fourth amendment. \textit{See id.}}

The \textit{Jacobsen} Court’s holding that expectations of privacy in certain types of information are illegitimate is contrary to the Court’s holding in \textit{Katz} that any privacy upon which a person could justifiably rely is protected under the fourth amendment.\footnote{Katz v. United States, 389 U.S. 347, 353 (1967).} Under \textit{Katz}, a court is required to assess the justifiability of a claim of privacy. Under the Court’s legitimate expectation of privacy test, the legitimacy or justifiability of a claim of privacy is not at issue. Rather, at issue is the legitimacy of the information protected by a claim of privacy. Only if the information sought to be protected by a claim of privacy is legitimate does the Court assess the justifiability of the claim of privacy.\footnote{See United States v. Jacobsen, 104 S. Ct. 1652, 1662 & n.23 (1984); United States v. Place, 462 U.S. 696, 707 (1983).}

The Court’s legitimate expectation of privacy test is based on the notion that the fourth amendment is meant to protect only the “innocent.”\footnote{See United States v. Jacobsen, 104 S. Ct. 1652, 1662 & n.23 (1984) (citing Loewy, \textit{The Fourth Amendment as a Device for Protecting the Innocent}, 81 MICH. L. REV. 1229 (1983)). Professor Loewy has strongly advocated this approach to the scope of the fourth amendment. \textit{See also} Loewy, \textit{Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term}, 62 N.C.L. REV. 329 (1984).} Under this notion, the “guilty” are protected by the amendment only to the extent necessary to protect the innocent.\footnote{Loewy, \textit{The Fourth Amendment as a Device for Protecting the Innocent}, 81 MICH. L. REV. 1229, 1244-48 (1983).} Because discrete sensing devices such as chemical tests and trained dogs are capable of disclosing only whether a person is guilty of possessing contraband, the fourth amendment does not govern the use of these devices.\footnote{Id. at 1245-48. To the extent that the manner in which such devices are used is offensive (e.g., a body sniff by a drug-detecting German shepherd), or to the extent that such devices produce inaccurate results, the “innocent” are not protected. Professor Loewy would not consider the use of such devices under these circumstances to be immune from the fourth amendment. \textit{Id.} at 1246-47. This Comment assumes that these circumstances are not involved.}

The argument that the fourth amendment protects only the innocent is flawed in several respects. First, it is impossible to protect the privacy of the
innocent without protecting the privacy of the guilty. The use of discrete sensing devices, even in the limited ways explicitly approved by the Court, affects the innocent to some extent. The innocent, as well as the guilty, must have their innocence verified by the government. In addition, the devices disclose not only the presence of contraband, but its absence as well. Information as to what an individual does not possess is no less information than information as to what an individual does possess.

Second, the Court's analysis makes the legislature the arbiter of the scope of the fourth amendment. Because Congress had decreed that cocaine was contraband, the use of the chemical test in Jacobsen was not a search. If Congress were to make the possession of cocaine legal, use of the test presumably would then be a search. The Court should not make Congress the arbiter of the scope of a constitutional provision protecting individual rights.

Third, there is no support in either the language or the history of the fourth amendment for the proposition that it protects only the innocent. There is no distinction in the language of the amendment between the guilty and the innocent; the amendment simply protects the right of "the people" to be secure. Much of the hostility to the colonial writs of assistance and general warrants, which led to the adoption of the fourth amendment, was inspired not by the execution of the writs and warrants themselves, but by the use of the writs and warrants to enforce unpopular laws against smuggling, sedition, and libel. The fourth amendment should not be viewed as merely an instrument for securing the peace and quiet for those

71. See United States v. Jacobsen, 104 S. Ct. 1652 (1984); United States v. Place, 462 U.S. 696 (1983). Jacobsen involved chemical testing of a substance already in the government's possession. In Place, agents had drug-detecting dogs sniff luggage outside the presence of the owner. The Court concluded that "the particular course of investigation" used by the agents was not a fourth amendment search. Id. at 707.

72. Cf. Gardner, Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope, 74 Nw. U.L. Rev. 803, 844–47 (1980) (arguing that people have the right to be free from unwarranted suspicion).

73. Professor Loewy argues that because the fourth amendment permits the government to search for and seize evidence of crime, an individual has no inherent right to secrete such evidence. Loewy, supra note 69, at 1244. Therefore, use of a device that can disclose only evidence of crime is not a search. Id. at 1244–48. This conclusion does not follow from its premise. The fourth amendment obviously permits the government to search for and seize evidence of crime. Moreover, the amendment permits the government to search for and seize any type of evidence. Warden v. Hayden, 387 U.S. 294, 300–01 (1967). But the amendment places restrictions on the manner in which the government may do so. The issue is not whether the government can search for evidence of crime, but how it may do so.


75. U.S. Const. amend. IV.

who obey the laws; it should be viewed as a check on the power of the government to enforce laws that particularly affect activities carried on in private.\footnote{Cf. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (fourth amendment, together with other constitutional provisions, precludes state ban on use of contraceptives by married couples).} In a certain sense, the fourth amendment is very much intended to protect the privacy of "illegitimate" information.\footnote{Cf. Stanley v. Georgia, 394 U.S. 557 (1969) (purely private possession of obscene matter protected by first amendment, though obscene matter is unprotected by first amendment in other contexts).}

2. **Insignificant Information**

A related difficulty caused by the Court's identification of privacy interests with the secrecy of information is the Court's unwillingness to protect information that it deems to be insignificant. To date, the Court has explicitly held only that an expectation of privacy in information concerning the possession of contraband is illegitimate. Nonetheless, several decisions of the Court suggest that where an individual does not have a sufficiently compelling interest in the privacy of the particular information uncovered by the government, fourth amendment protection of that privacy is unwarranted.\footnote{See, e.g., Oliver v. United States, 104 S. Ct. 1735, 1741 (1984) ("There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."); Smith v. Maryland, 442 U.S. 735, 741–42 (1979) (pen register distinguished from "bugging" of telephone conversation on the ground that a pen register does not acquire the contents of conversations, but only the telephone numbers dialed from a particular telephone).}

For example, in Smith v. Maryland,\footnote{442 U.S. 735 (1979).} the Court held that the use of a pen register\footnote{A pen register is a device that records the numbers dialed from a particular telephone. The device can be installed at the offices of the telephone company, thus avoiding the need for trespassing into a home or office in order to install the device.} to record the local numbers dialed from a private phone was not a search because Smith had "voluntarily" conveyed the numbers to the telephone company's switching equipment.\footnote{Smith v. Maryland, 442 U.S. 735, 743-46 (1979).} But as the dissenting Justices noted, the Court's reasoning made the case indistinguishable from Katz: just as Smith had to convey the numbers that he dialed to the telephone company in order to complete his call, Katz had to convey his words to the telephone company so that the words could be relayed to the person with whom he was speaking.\footnote{See Katz v. United States, 389 U.S. 347, 348 (1967).} The majority distinguished Katz on the ground that a pen register was far less intrusive than bugging a telephone conversation because the pen register did not disclose the contents of the
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telephone conversation. Although the Court rested its decision on the “voluntary” conveyance of the numbers dialed, the import of the opinion is that the use of pen registers is not a search because a privacy interest in the numbers dialed from a telephone is not sufficiently compelling to warrant fourth amendment protection.

A definition of a fourth amendment search based on the importance of the information threatened with discovery by the government is objectionable for the same reason that a definition based on the protection of the innocent is objectionable. The nature of the information uncovered by the government has nothing to do with the privacy expectations of individuals. An individual’s right to privacy is no less legitimate because of the nature of the information that the individual chooses to protect with his or her privacy rights. A balancing of individual interests and governmental interests may be necessary when the Court has found that government action constituted a search and must then determine whether that search was reasonable under the fourth amendment. A balancing of interests is improper, however, when the Court must determine whether the action of the government was a search at all. To hold that an action of the government

86. Id. at 743-44.
87. Another instance of the Court’s refusal to protect “insignificant” privacy interests is United States v. Karo, 104 S. Ct. 3296 (1984). As noted, supra note 38, Karo held that monitoring electronic tracking devices while the devices were in public places was not a search, but that monitoring the devices while they were in private places, such as homes and offices, was a search. Karo, 104 S. Ct. at 3303-04. The rationale of the Court’s decision was that information regarding a person’s or a thing’s location in public was available to anyone who cared to look. Id. at 3303. Yet, even granting that following someone in public is not a search, see infra notes 127-28 and accompanying text, the Court’s contention that the use of electronic tracking devices is merely a more efficient means of following someone, United States v. Knotts, 460 U.S. 276, 284 (1983), is untenable. Without the use of electronic tracking devices, the police would not have been able to track the defendants in Karo. See Karo, 104 S. Ct. at 3300-01. Moreover, an electronic tracking device permits the police to locate an object as well as follow it. Id.

A better explanation for the result in Karo is that the Court found the interest in the privacy of location and movement to be uncompelling in public, but compelling in private. Justice White wrote for the Court that “[I]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.” Id. at 3304.

This explanation of Karo is buttressed by the Court’s decision in Oliver v. United States, 104 S. Ct. 1735 (1984). The Court held in Oliver that “an individual may not legitimately demand privacy for activities conducted out of doors in open fields,” even on private property not visible to the public. Id. at 1741. Although the Court’s decision was premised in part on the fact that even secluded fields were open to the view of trespassers, id., the Court contrasted the fourth amendment’s “overriding respect for the sanctity of the home” (quoting from Payton v. New York, 445 U.S. 573, 601 (1980)) with open fields, which “do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance,” Oliver, 104 S. Ct. at 1741. The Court’s refusal to protect even the most inaccessible of private lands indicates that its decision was substantially based on the nature of the information likely to be uncovered in “open fields.”
was not a search is to hold that the action did not interfere with any fourth amendment privacy interest of the individual.

In addition to this fundamental difficulty with the Court's approach, a definition of search based on the importance of the information that the government threatens to uncover is simply impractical. First, the privacy of information is not equally important to all individuals. Information that one individual strongly desires to keep secret may be of no consequence to another. There is no societal consensus upon which the Court can rely as to what information is sufficiently significant for fourth amendment protection.88

Second, the Court's evaluation of the information uncovered by a government action tends to trivialize an individual's privacy interest. Government actions may be identical but for the type of information that they uncover. For instance, a dog may be trained to react to the presence of a wide variety of substances, both contraband and legal. Yet, because a particular dog may be able to uncover only a specific type of information, the collective threat to privacy posed by trained dogs does not enter into the Court's analysis of privacy interests. This "balkanization" of privacy interests is all the more threatening because of the prospect of technological advances in sensing devices that will permit the government to look for specific information without the risk of uncovering other types of unwanted information. Justice Brennan has expressed his fear that, given such advances, the Court's analysis of the legitimacy of information "may very well have paved the way for technology to override the limits of law in the area of criminal investigation."89

Perhaps the most unfortunate aspect of the Burger Court's restrictive definition of a search is that such a restrictive definition has been largely unnecessary to reach the outcomes that the Court has wished to achieve. In nearly all the search cases in which the Burger Court held that no search occurred, and thus that there was no fourth amendment violation, the Court could have reached the same result by holding that the government practice was a search, but a reasonable search.90 In this way, the Court would still

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88. With societal notions about the importance of information, contrast the societal consensus against the act of eavesdropping on telephone conversations and the consensus against the act of trespassing on private land. Social rules against trespassing and eavesdropping have less to do with the importance of privacy in these areas than with more general notions of proper social behavior. Eavesdropping on a conversation and trespassing are no less "wrong" when the information that can be obtained through these acts is of trivial importance.


90. See, e.g., Wasserstrom, supra note 9, at 376-77 (police in United States v. Knotts, 460 U.S. 276 (1983), had reasonable suspicion of commission of a crime, and therefore Court could have held that use of electronic tracking device was a search, but a reasonable search permitted by the fourth amendment). But cf. Amsterdam, supra note 3, at 394-95 (cautioning against too readily abandoning rigid fourth amendment standards for determining the reasonableness of searches, e.g., the warrant
have the power to control the government practice at issue if the practice were to be abused in the future. Instead, the Court opted to divest itself of control over the practices in question by ruling that they were not searches. A better approach to the definition of a search is to focus on the conduct of the government rather than on the information that the conduct uncovers. Such an approach would comport more closely with individual expectations of privacy by protecting the full range of individual privacy expectations, not simply "reasonable" expectations of privacy in information that is "legitimate." By focusing on the conduct of the government, privacy expectations in all types of information would be protected, and individuals could take the risk of exposing private information to one form of conduct, government or private, without relinquishing their privacy as against all forms of government conduct.

II. SOCIAL NORMS OF PRIVACY AS A STANDARD FOR DEFINING FOURTH AMENDMENT SEARCHES

To simply adopt a definition of search that focuses on government conduct, however, is not enough. Some standard must be articulated for determining which particular forms of government conduct constitute a search. This part will argue that social norms of privacy should serve as a standard for defining fourth amendment searches. That is, conduct by the government that violates a social norm of privacy should be deemed a search and be subject, therefore, to judicial oversight under the fourth amendment. Conversely, conduct by the government that does not violate a social norm of privacy should not be deemed a search and should be subject to judicial control only through legislation or other, more general, provisions of the Constitution.91

A. Social Norms of Privacy

In society, there is a tension between the desire for freedom and the desire for privacy. Although few people would wish to live in complete isolation from the rest of the world, everyone would like to control the extent of his or her privacy. But this desire cannot be fulfilled within society. A person who walks down a public street cannot expect others to avert their eyes. Such an expectation would be an unacceptable limitation on the freedom of other individuals, and social intercourse would be

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91. The applicability of other constitutional provisions is discussed in Amsterdam, supra note 3, at 377–78.
impossible. Therefore, society has evolved a set of necessary compromises that define the limits of individual freedom and privacy.

These necessary compromises, or social norms, define and protect the individual’s right to privacy by establishing standards of conduct for other members of society.92 Thus, there are certain areas within which it is unacceptable to intrude, such as houses, automobiles, and even occupied telephone booths. But privacy norms are not simply a catalogue of forbidden places. Eavesdropping on a conversation is forbidden, as is opening other people’s mail. The conduct in each instance is forbidden because it violates socially accepted norms of behavior designed to protect individual privacy.

Social norms of privacy are not a detailed and idealized code of etiquette. Of necessity, norms of privacy must be general principles to which nearly all members of society subscribe. To the extent that some members of society do not subscribe to a particular norm, that norm will be ineffective for protecting privacy. Moreover, the application of these general principles to specific situations must be straightforward and uncontroversial. Otherwise, such principles, again, would be useless for protecting privacy. Norms with such characteristics are only possible through the common socialization of members of society. Thus, even young children know the basic privacy rules of society: that it is “wrong” to enter certain places without permission, to open other people’s mail, to eavesdrop on conversations, and to peek into windows.

B. Fourth Amendment Privacy Interests

The fourth amendment does not grant individuals a general right to privacy. Rather, it protects privacy against certain forms of governmental intrusion.93 The language and history of the amendment, however, provide little guidance for defining the extent of this protection.94 The Supreme

92. Statutory and common law privacy norms naturally mirror social norms of privacy to a great extent (e.g., laws against trespassing, tapping telephones, and tampering with the mails), but do not do so perfectly (e.g., nonelectronic eavesdropping). Moreover, constitutional protections should not be contingent on legislative enactments. Therefore, legal norms should not be substituted for social norms in an effort to define fourth amendment searches more explicitly.


94. See, e.g., Oliver v. United States, 104 S. Ct. 1735, 1745 (1984) (Marshall, J., dissenting); Amsterdam, supra note 3, at 395–401. But see Oliver, 104 S. Ct. at 1740. In Oliver, the Court, for the first time since Katz, purported to define the scope of the fourth amendment by its literal language. Although the Court went on to use a Katz “expectation of privacy” analysis to buttress its conclusion that an “open field” was not a “person, house, paper, or effect,” Justice White was satisfied that the literal language of the amendment was dispositive. Oliver, 104 S. Ct. at 1744 (White, J., concurring). The very premise of Katz, however, was that the language of the fourth amendment was not only unhelpful for defining the scope of the amendment, but misleading. See Katz v. United States, 389 U.S. 208
Court has therefore sought guidance from legislative enactments and social conceptions of privacy. In *Rakas v. Illinois*, the Court stated: “Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” And, in *Katz*, the Court implicitly linked the fourth amendment’s protection of privacy to the protection afforded individual privacy by society: “What a person knowingly exposes to the public, . . . is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”

The purpose of the fourth amendment, then, is not to protect privacy per se, but to protect against governmental encroachment on socially defined privacy rights. Government conduct that violates a social norm of privacy should be considered a search.

One argument against a social norms of privacy standard is that such a standard is too vague. Under a social norms of privacy standard, however, the Court would be guided by generally accepted principles of social behavior. Social norms of privacy, because they must of necessity be understood and acted upon by all members of society, are relatively well defined and easily applied. A social norms of privacy standard would produce more certain results than the Court’s reasonable expectation of privacy standard.

For example, contrary to the Court’s conclusion that an expectation of privacy in “open fields” is unreasonable, most individuals would probably assume that they had a right to expect that information contained in

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96. Id. at 143 n.12.
98. Although the Court has recognized that the scope of the fourth amendment should be defined by “social understandings” concerning privacy, see supra note 96 and accompanying text, the Court has never satisfactorily defined “social understandings.” The Court has used a variety of purported social understandings to rationalize the decisions that it has reached in particular cases. For example, the Court has used property laws, Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978); business practices, Smith v. Maryland, 442 U.S. 735, 742–43 (1979); and Congressional enactments, United States v. Jacobsen, 104 S. Ct. 1652, 1662 (1984). Most importantly, the Court has not used these “understandings” to evaluate the behavior of government agents, but has used them to evaluate the reasonableness or legitimacy of expectations of privacy in information uncovered by the government.
99. See Part III, infra, for illustrative applications of this approach.
100. See supra Part II.
101. See infra Part III.
secluded fields, clearly marked as private, would remain private. But whatever conclusion is drawn about the reasonableness of expectations that information contained in open fields would remain private, there is no doubt that trespassing onto clearly marked private property is socially unacceptable. If the Court were to define fourth amendment searches by reference to social norms of privacy, such a trespass would easily be identified as a search.

Of course, in seeking to define the scope of the fourth amendment, there will always be difficult cases, even for a social norms of privacy standard. Nevertheless, such a standard provides a more certain definition of fourth amendment searches because it is based on existing rules of social behavior, rather than on an unprincipled evaluation of the reasonableness or legitimacy of an expectation that a particular piece of information would have remained undiscovered.

A second argument against a social norms of privacy standard is that, because the government has a greater legitimate interest in violating individual privacy than do private parties, fourth amendment privacy rights should not be linked to social privacy rights. The government's functions, in particular the police function, require the government to pry into private affairs. The government's justification for doing so is greater than that of individuals; therefore, it should not be held to the standards of individuals.

Linking the definition of a search to social norms of privacy, however, requires only that the government justify those actions that violate social norms of privacy; linkage does not prohibit those actions per se. To the extent that the government does have a greater justification for violating individual privacy than do private individuals, the government will be able to undertake the violation. The government's action will be a search, but, if justified, the action will be a "reasonable" search permitted by the fourth amendment. On the other hand, if the government does not have sufficient justification, then the fourth amendment should prohibit the government's invasion of privacy.


104. See infra notes 120-22 and accompanying text.

105. For example, from the standpoint of privacy, there is little that is objectionable about aircraft flying at normal altitudes over private property. A helicopter hovering ten feet above a backyard, however, would be a different matter. Still, there is no readily apparent altitude at which privacy norms are violated. The Court must simply be guided by its own understanding of what height would be socially unacceptable. What is clear, though, is that there is a minimum socially acceptable altitude.

106. Although a justification may exist, the government may not be able to demonstrate the justification adequately, especially as against a particular individual. (For example, the government may have information that a suitcase on a particular aircraft contains contraband, but the government may not know which suitcase.) But justification need not meet a rigid standard, and as Terry v. Ohio indicates, the justification required by the Court is flexible. Terry v. Ohio, 392 U.S. 1, 20-27 (1968). As
Nor can it be argued that since the impact of government violations of individual privacy is greater than that of individual violations, the government should be held to a higher standard than private individuals. The class of practices defined as a search would be quite broad under a social norms of privacy standard—far broader than the class defined as searches under the Burger Court. Thus, the government would be held to a higher standard than it now is. Moreover, placing constitutional restraints on government conduct is pointless in circumstances where anyone could engage in the same conduct without any social opprobrium. Perhaps most importantly, no readily apparent definition of a search emerges to delineate the higher standard to which the government is to be held. The argument requires the Court to make a value judgment that a certain government practice infringes too greatly on privacy interests to escape judicial scrutiny under the fourth amendment. Given the shifting political constitution of the Court, such a standard provides little protection for individual privacy interests.

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107. See infra Part III.

108. Part of the difficulty with this second argument is that it confuses to some extent the distinction between privacy and secrecy. The fourth amendment guarantees the right of the people to be free from certain acts, viz., unreasonable searches and seizures. The amendment does not, as such, guarantee that certain information will remain secret. See Katz v. United States, 389 U.S. 347, 350 (1967). Cf. Warden v. Hayden, 387 U.S. 294, 300-01 (1967) (abandoning the “mere evidence” rule of limitation on the scope of searches and seizures). For example, in an area that is deserted, but open to the public, a person’s activities are more secret than in an area where there are large numbers of people. This does not mean that that person’s right to privacy is any greater in the deserted area. If the deserted area were to be suddenly inundated with people, that person could not complain of a loss of privacy rights, only of a loss of secrecy. Government actions that do not violate privacy norms may be analogized to the inundation of a secluded area by large numbers of people—the impact on secrecy is substantial, but privacy rights are not diminished. A government action cannot be a search under the fourth amendment simply because that action has a substantial impact on secrecy. If that were true, government would have to justify almost every act designed to gather information. The better approach to the definition of a search is to look only to those privacy expectations that individuals possess by virtue of social norms of privacy, and to require the government either to conform to those expectations or to provide justification for violations of those expectations. Whether government acts are searches should depend on what the government does, not on what it is likely to discover.

III. APPLYING THE SOCIAL NORMS OF PRIVACY STANDARD

A. Identifying Social Norms of Privacy

Under a social norms of privacy standard, a court must determine whether the government’s conduct would be socially unacceptable if engaged in by a private individual. Where the conduct is of the sort that is occasionally engaged in by private parties, this determination is relatively straightforward because everyone, including judges, has been socialized against such conduct if it violates a social norm of privacy. Everyone knows not to enter other people’s houses without permission, open their mail, eavesdrop on their conversations, or go through their belongings.

More difficult are circumstances in which the conduct of the government involves the use of a novel technique or a practice in which private parties almost never engage. Because private individuals do not engage in these practices, they will not have been socialized against them. Examples of these practices are the use of drug-detecting dogs, electronic tracking devices, and spy satellites. Such practices, however, can be evaluated under the fourth amendment through analogies to practices for which there are relevant social norms of privacy. For instance, drug-detecting dogs are used to investigate private containers for the presence of contraband. Such an investigation if undertaken by a human would violate a social norm of privacy against prying into closed containers of others. Therefore, the use of drug-detecting dogs should constitute a search.

B. Illustrative Applications of the Social Norms of Privacy Standard

The cases in which the post-Katz Court has had the most difficulty determining the proper scope of the fourth amendment can be divided into four broad categories: (1) questions of standing to assert fourth amendment rights; (2) government requests for personal and financial records from third parties; (3) physical entries onto or into various locations and things; and (4) the use of sophisticated sensing and surveillance devices. This part will use these categories to illustrate the application of a social norms of privacy standard.

1. Standing

Under the fourth amendment, standing is treated as a substantive issue. To have standing, a person must have a reasonable expectation of privacy in information uncovered by the government. Generally, before finding

110. See supra note 40.
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such an expectation, the Court has required a very strong possessory interest in the location in which the information was uncovered.\footnote{See supra notes 39–40 and accompanying text.} Because a person’s expectation of privacy in information located in an area controlled by another is deemed to be unreasonable, the government’s conduct in exposing such information cannot be a search as to a person who does not have a possessory interest, even though the conduct is a search as to a person who does have a possessory interest.

Under the social norms of privacy standard urged in this Comment, standing would not be contingent on possessory interests. Rather, standing would follow when an injury results from the government’s violation of a social norm of privacy. Individuals act in reliance on social norms of privacy; they should be able to rely on their expectations that the police will not forcibly enter their friends’ homes, just as they rely on their expectations that the police will not forcibly enter their own homes.

2. Requests for Personal and Financial Records from Third Parties

The Court has held that individuals have no legitimate expectation of privacy in personal and financial records held by third parties.\footnote{See Smith v. Maryland, 442 U.S. 735, 743–46 (1979) (dicta) (telephone billing records); United States v. Miller, 425 U.S. 435, 442–43 (1976) (banking records).} The Court’s rationale is that there can be no expectation of privacy in information voluntarily conveyed to another.\footnote{See Smith v. Maryland, 442 U.S. 735, 744 (1979) (quoting United States v. Miller, 425 U.S. 435, 443 (1976)).}

Under the social norms of privacy standard, the question is whether the government’s conduct violated a social norm of privacy. For example, if the government broke into a bank’s offices to obtain a customer’s financial records, such conduct would obviously violate a social norm of privacy, and would therefore be a search as to both the bank and the customer. Under the Court’s standing doctrine, such conduct would be a search only as to the bank.\footnote{See supra Part III.B.1.}

A somewhat different situation is presented by the bank’s disclosure of financial records at the request of the government. Ordinarily, a request for information made to an independent party capable of refusing the request violates no privacy norm. For the request to succeed, the cooperation of the requestee is required, and the requestee has presumably obtained the requested information through the voluntary and knowing disclosure of the person about whom the information is sought. The unauthorized disclosure of information by the requestee may amount to a betrayal of trust, but
neither the betrayer nor the government actor who requested the information would have obtained the information by violating a norm of privacy. Moreover, the fourth amendment does not govern the private actions of the requestee unless those actions are so intertwined with the government as to amount to a government action.\textsuperscript{115}

This last caveat suggests, however, that disclosures of personal information by banks and other heavily regulated industries should be considered a fourth amendment search. Moreover, even if a bank is not sufficiently intertwined with the government to make the bank an agent of the government, the degree of government regulation precludes the conclusion that the bank is making a voluntary disclosure of the information.

\section{Physical Entries}

In \textit{United States v. Oliver},\textsuperscript{116} the Court upheld the pre-\textit{Katz} “open fields” doctrine of \textit{Hester v. United States}.\textsuperscript{117} According to this doctrine, the fourth amendment does not apply to government entries onto “open fields,” i.e., those areas not a part of a building or the curtilage of a home, even though the fields may be private property.\textsuperscript{118} The bases of the Court’s decision were that “open fields” are accessible to the public and the police in ways that a home, office, or commercial structure would not be, and that the activities that take place in “open fields” are not sufficiently deserving of fourth amendment protection.\textsuperscript{119}

\textit{Oliver} would have been decided differently under a social norms of privacy standard. Under this standard, the accessibility of open fields is irrelevant to whether a social norm of privacy prohibits entry onto such fields. The deliberate entry onto the clearly identified private property described in \textit{Oliver} violated a norm of privacy. Such an entry should have been considered a fourth amendment search.\textsuperscript{120}

More generally, any encroachment onto areas that are defined as private by social norms should be a search,\textsuperscript{121} regardless of whether a possessory interest in such an area is recognized in the law of property. To this extent,

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\textsuperscript{115} See Burdeau v. McDowell, 256 U.S. 465, 475 (1921).
\textsuperscript{116} 104 S. Ct. 1735 (1984).
\textsuperscript{117} 265 U.S. 57 (1924).
\textsuperscript{119} See supra note 87.
\textsuperscript{120} In some instances, there is an implicit invitation for strangers to enter private property for limited purposes. This is true of the public portions of stores, offices, and, absent an indication to the contrary, sidewalks leading to the front doors of homes. Such entries, if conducted within socially accepted limits, would not violate any privacy norms and should not be considered searches.
\textsuperscript{121} Such an interest need not be a legal interest. For example, a person does not have a legal interest in occupying a clothing store changing room, but social norms of privacy dictate that others may not enter while the changing room is occupied.
\end{flushleft}
the social norms of privacy standard is consistent with *Katz*. Both the majority opinion and Justice Harlan’s concurrence identified a telephone booth as a temporarily private place once a person has occupied it for the purpose of making a call, thereby manifesting a socially recognized interest in the privacy of the booth. Similarly, department store changing rooms, restaurant booths, and a variety of other places would be considered “private places,” even though easily accessible to the public.

4. **Use of Sophisticated Sensing and Surveillance Devices**

Under the Court’s current standard, whether the use of sensing and surveillance devices is a search turns on whether a person has a legitimate expectation of privacy in the information uncovered by the devices. A social norms of privacy standard, on the other hand, requires courts to assess whether the use itself of a particular sensing or surveillance device violates a social norm of privacy. The required assessment is best analyzed by looking at two broad classes of these devices: those that operate surreptitiously and those that operate openly.

Devices that operate surreptitiously violate social norms of privacy. The surreptitious use of sensing and surveillance devices is akin to eavesdropping. In our society it is generally unacceptable to observe or listen to other persons when those persons believe that they are unseen and unobserved and have no reasonable means of discovering that they are being monitored.

The open use of sensing and surveillance devices in places where a human observer could not legitimately be present clearly violates a social norm of privacy. A more difficult question is the open following of an individual in public or the posting of television cameras on public streets. Certainly, no norm of privacy is violated when an individual observes another from a public place. In a certain sense, a video camera in a public

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123. If a person is engaged in an activity other than eavesdropping, social norms of privacy probably do not require that person to inform others that they are being observed or to refrain from observation. Those persons observed could probably have reasonably ascertained the presence of others or the risk that others could observe them. For example, if one is in a secluded area of a park and observes others who believe that they are unobserved, no norm of privacy is violated by observing without betraying one’s presence. A police officer who observes a drug transaction under such circumstances would not be engaging in a search. Quite another matter, however, is hiding in a bush or placing hidden microphones with the intention of spying on others. The difference is that persons who wish to preserve their privacy can take reasonable steps to do so if they need only expect the presence of others engaged in “normal” activities. To check every bush and every inch of ground for hidden observers and microphones is unreasonable. People should be able to rely upon norms against eavesdropping in these situations.
place does nothing more than would an individual in a similar location. But a video camera also permits an observer to stare without being seen, and a plethora of video cameras may be the equivalent of following a person. Intentionally following a person does violate a privacy norm. Therefore, just as the open following of individuals by the police should require some justification under the fourth amendment, the extensive use of video cameras, even in the open, should require a similar justification.

CONCLUSION

The Burger Court has progressively narrowed the scope of the fourth amendment’s protection of individual privacy. That Court has done so by defining a fourth amendment search by reference to the secrecy and legitimacy of information uncovered by the government. Such a definition is unrelated to individual privacy expectations. This Comment has proposed that fourth amendment searches be defined as government conduct that violates a social norm of privacy. This proposal would not only more completely protect privacy interests, but would also provide the Court with more guidance in defining the scope of the fourth amendment.

Michael Campbell

125. There is probably a norm against taking other people’s photographs in public without permission, but this norm may not be sufficiently universal to elevate a similar police practice to the status of a search.
126. Video cameras also enable the viewer to observe an object or person from more than one angle.
127. Temporarily following someone by happening to travel the same route is not objectionable, but deliberate, long term following is objectionable.