Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province

James J. Tomkovicz
Beyond Secrecy for Secrecy's Sake:
Toward an Expanded Vision of the
Fourth Amendment Privacy Province

By James J. Tomkovicz*

The fourth amendment to the United States Constitution proclaims "the right of the people to be secure against unreasonable searches and seizures." Although the provision has a "central [role] . . . in our scheme of constitutional liberty," the explicit terms of the guarantee confine it to the regulation of governmental searches and seizures. The task of defining the constitutional concept of "searches" has attracted much judicial attention, produced considerable analysis, raised complex, troublesome issues, and generated an intricate body of doctrine. Because the fourth amendment exerts regulatory control over government action only if a search has occurred, development of a framework for

* Associate Professor of Law, University of Iowa College of Law; B.A., 1973, University of Southern California; J.D., 1976, University of California Los Angeles.

I am indebted to Patrick Heider for his dedication and his intelligent and exceptionally diligent research assistance during the preparation of this Article. My colleagues, Martha Chamallas, David Vernon, Gregory Williams, and Patricia Fetzer all provided helpful criticism and even more valuable encouragement. Murray L. Schwartz, mentor that he is, wisely counseled and supported my efforts. John Odendahl also provided helpful research assistance. Finally, the tireless secretarial labors of Sandra Reese contributed enormously to the production process. For all of these individuals, and for their assistance, I am deeply grateful.

1. United States v. Mara, 410 U.S. 19, 42 (1973) (Marshall, J., dissenting); see also 2 J. Story, Commentaries on the Constitution of the United States 679 (1858) ("This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty and private property."); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 396 (1974) ("The amendment is not 'a kind of nuisance, a serious impediment in the war against crime' or 'an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society.'") (quoting Harris v. United States, 331 U.S. 145, 157, 161 (1947) (Frankfurter, J., dissenting)).

2. In his 1966 fourth amendment study, Jacob Landynski noted that Boyd v. United States, 116 U.S. 616 (1886), "the first Fourth Amendment case of real consequence," began "the judicial definition of the Fourth Amendment, a task not yet ended and growing ever more complicated." J. Landynski, Search and Seizure and the Supreme Court 49 (1966). The task is still far from complete and the complications it presented in 1966 pale by comparison to those that have emanated from Katz v. United States, 389 U.S. 347 (1967).
that threshold decision is an endeavor of enormous significance. The purpose of this Article is to propose such a framework.

During the past century, the Supreme Court’s approach to deciding whether conduct falls within the ambit of fourth amendment searches has changed radically. First, in *Boyd v. United States*, the Supreme Court held that any activity which accomplished the same purposes or objects as prototypical searches fell within constitutional bounds. Forty years later, in *Olmstead v. United States*, the Court relied upon fourth amendment text and history in concluding that an “actual physical invasion” of a protected location was the critical attribute, an essential characteristic of a fourth amendment search. The tangible intrusion requirement proved dominant and lasted for another forty years, but was gradually tempered by the Court’s growing conviction that the primary fourth amendment objective is privacy protection.

In *Katz v. United States*, the semantic-historical *Olmstead* standard succumbed to the combined pressure of the privacy protection rationale and the sense that fidelity to fourth amendment goals necessitated

---

3. I use the word “threshold” to refer to determinations, issues, or processes concerned with whether the fourth amendment operates in a particular situation. Unless there is some basis for distinction or a contrary intent is expressed, these references should be understood to encompass “standing” matters also. I merely employ “threshold” as a shorthand expression for all matters concerned with the definition of fourth amendment boundaries.

4. I can think of few constitutional issues more important than defining the reach of the fourth amendment—the extent to which it controls the array of activities of the police . . . . I can think of few issues more important to a society than the amount of power that it permits its police to use without effective control by law.

Amsterdam, supra note 1, at 377 (emphasis added).

It was resentment of the twin instruments of British arbitrariness and oppression, general warrants and writs of assistance, that produced the fourth amendment. See *Weeks v. United States*, 232 U.S. 383, 390 (1914); N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 100 (1937); T. Taylor, *Two Studies in Constitutional Interpretation* 38 (1969); Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part Two*, 4 U. Rich. L. Rev. 60, 74 (1969). When government investigatory practices are found outside the fourth amendment and freed of any constitutional reasonableness requirements, the scope of official discretion allowed creates risks of arbitrariness and oppression similar to, and potentially more hazardous than those feared by the Framers. See *Goldman v. United States*, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting).

5. 116 U.S. 616 (1886).
6. Id. at 622.
7. 277 U.S. 438 (1928).
8. Id. at 466.
a purpose-oriented methodology. The Court, simply and concisely, held that official behavior which "violate[s] . . . privacy upon which [one] justifiably relie[es]" lies within the scope of the fourth amendment.\textsuperscript{12} The interest-dictated methodology of \textit{Katz}\ and its mandate to assess "privacy violations" has endured and remains the prescribed method for defining fourth amendment scope today.

The \textit{Katz} approach reflects a commendable recognition that the "Constitution would be an utterly impractical instrument of contemporary government if it were deemed to reach only problems familiar to the technology of the eighteenth century,"\textsuperscript{13} and that although "the Framers . . . focused on the wrongs of the day, [they] intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."\textsuperscript{14} Yet \textit{Katz} itself provided little guidance and information concerning the operation and content of the new methodology.\textsuperscript{15} Without a more specific understanding of the nature of the new controlling force, fourth amendment privacy, the future bore risks of either excessive restriction of governmental action by an overly expansive privacy spirit or, conversely, of deficient regulation by an overly narrow concept. \textit{Katz} merely began the revolution, presenting the challenge of understanding and defining fourth amendment privacy and developing workable doctrine.

The Court soon responded to the challenge by adopting the "reasonable expectation of privacy" formula to describe more precisely the interest sheltered by the amendment.\textsuperscript{16} Later, the Court endorsed a two-stage test for assessing the reasonableness of expectations, and over time several specific criteria have emerged to guide application of the test.\textsuperscript{17} At present, a considerable body of doctrinal refinements supplements the basic methodology. Unfortunately, the developments have neither fulfilled the promises of \textit{Katz} nor been consonant with an appropriately conceived fourth amendment core. In the almost twenty years since \textit{Katz}, the Court has neglected development of a clear vision of fourth amendment privacy. It has also, through the medium of reasonable expectations doctrine,\textsuperscript{18} allowed a restrictive, de facto conception of privacy to operate,

\begin{itemize}
  \item \textsuperscript{12} \textit{Id.} at 353.
  \item \textsuperscript{13} Lopez v. United States, 373 U.S. 427, 459 (1963) (Brennan, J., dissenting).
  \item \textsuperscript{14} United States v. Chadwick, 433 U.S. 1, 9 (1977).
  \item \textsuperscript{15} See Amsterdam, supra note 1, at 349, 386; see also infra notes 29-30 & accompanying text.
  \item \textsuperscript{16} See infra notes 31-34 & accompanying text.
  \item \textsuperscript{17} See infra notes 35-65 & accompanying text.
  \item \textsuperscript{18} While the \textit{Katz} majority criticized its predecessors for unthinking "incantation of the phrase 'constitutionally protected area,'" \textit{Katz}, 389 U.S. at 350, subsequent majorities can be fairly indicted for unconsidered incantation of the reasonable expectation of privacy formula. See United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). The bestowal of such magical powers upon any verbal formula is inconsistent with \textit{Katz}. The great failure of subsequent development, however, transcends excessive faith in a collection of words.
\end{itemize}
and has utterly failed to look beyond mere secrecy to the reasons why people need confidentiality in their relationships with government. As a result, the fourth amendment cannot perform its function as groundwork for the free society envisioned by the Constitution. While “[t]he shadow of 1984 has . . . not yet fallen upon us,” the failings of current doctrine and analysis have brought us much too close to “an Orwellian society in which a citizen, in order to preserve a modicum of privacy, [is] compelled to encase himself in a light-tight, air-proof box.”\footnote{19. Lorenzana v. Superior Court, 9 Cal. 3d 626, 637, 511 P.2d 33, 41, 108 Cal. Rptr. 585, 593 (1973).}

The first part of this Article analyzes \textit{Katz} and its progeny and documents the doctrinal factors that form the reasonable expectations test. The second part reviews the character of privacy, criticizes the conception of privacy that underlies the current doctrine, and proposes a view of fourth amendment privacy as instrumental, existing for the protection and promotion of other vital liberties and interests. The third part criticizes the language of the reasonable expectations test as misleading and unjustifiable and maintains that the determinative factors in current fourth amendment analysis, when evaluated against the instrumental view of privacy, prove to be inappropriate, irrelevant, or even counter-productive. The fourth section articulates proposals for the development of doctrine faithful to an instrumental view of privacy. Finally, to illustrate the serious defects in current doctrine and analysis and to demonstrate the remedial potential of those proposals, five “problem contexts” raising threshold fourth amendment questions are examined in light of the analysis suggested.

\textbf{Understanding the Boundaries of the Fourth Amendment Regulation of Searches: Birth, Maturation, and Refinement of the Interest-Dictated Approach}

All current doctrine and analysis concerning the scope of the fourth amendment coverage can find an origin in \textit{Katz v. United States}.\footnote{20. 389 U.S. 347 (1967). Unfortunately, some of the doctrinal refinements of \textit{Katz} are throwbacks to pre-privacy conceptions of fourth amendment reach. \textit{See infra} note 205.} The goals of this part are to describe the holding and assess the significance of \textit{Katz}, to review the evolution and refinement of threshold doctrine since that seminal case, and, thus, to present a complete picture of the present state of fourth amendment jurisprudence.
The *Katz* Revolution\(^{21}\)

In *Katz v. United States,*\(^{22}\) federal agents attached an electronic device to a telephone booth and recorded Mr. Katz' conversations regarding illegal wagering. The lower courts, bound by doctrine demanding a physical intrusion, properly rejected Mr. Katz' fourth amendment challenge. By deciding to consider the case, the Supreme Court set the stage for the most significant of all developments in fourth amendment purview law.

Justice Stewart laid the groundwork for the demise of the "physical intrusion" doctrine by emphasizing that privacy, not property, is the primary object of fourth amendment concern.\(^{23}\) Once the Court acknowledged that privacy was the predominant motive for the constitutional safeguard against "unreasonable searches and seizures, it [became] clear that the reach of [the Fourth] Amendment [could not] turn upon the presence or absence of a physical intrusion into any given enclosure."\(^{24}\)

Put simply, because the physical intrusion doctrine was neither designed for nor capable of preserving the core fourth amendment interest, it had to be categorically abandoned.\(^{25}\)

---

21. Prior to *Katz*, the law of fourth amendment purview had passed through two major phases. The first phase began in 1886 with *Boyd v. United States*, 116 U.S. 616 (1886), wherein Justice Bradley concluded that compulsory production of an invoice was a search and seizure because "it accomplishe[d] the substantial object of . . . forcing from a party evidence against himself." \(^{21}\) at 622. In other words, a production order entered the fourth amendment realm "because it [was] a material ingredient, and effect[ed] the sole object and purpose of search and seizure," \(^{21}\), which "almost always" was "compelling a man to give evidence against himself." \(^{21}\) at 633.

The *Boyd* methodology persisted until 1928, when the Court took a conservative turn in *Olmstead v. United States*, 277 U.S. 438 (1928). Taking guidance from both the literal terminology of the fourth amendment and the specific historical practices that had spawned that guarantee, the Court held that wiretapping "did not amount to a search" because there was no "actual physical invasion" of a home or other protected place. \(^{21}\) at 466. The *Olmstead* approach prescribed comparison of the physical attributes of a challenged government activity to those of traditional searches and seizures and demanded one essential similarity for inclusion—tangible breach of a physical envelope.

The restrictive *Olmstead* approach survived for nearly 40 years despite vehement dissent. \(^{21}\) See, e.g., *Lopez v. United States*, 373 U.S. 427, 446-51 (1963) (Brennan, J., dissenting); *On Lee v. United States*, 343 U.S. 747, 758 (1952) (Frankfurter, J., dissenting); \(^{21}\) at 762 (Douglas, J., dissenting); *Goldman v. United States*, 316 U.S. 129, 141 (1942) (Murphy, J., dissenting). It was not until 1967 when the Court, in *Warden v. Hayden*, 387 U.S. 294 (1967), referred to the "premise that property interests control the right of the government to search and seize" as "discredited," \(^{21}\) at 304, and emphasized that "privacy," not property, was the "principal object" of that guarantee, \(^{21}\), and that the property-oriented "physical intrusion" foundation of *Olmstead* was damaged beyond repair.

23. \(^{21}\) at 351-52.
24. \(^{21}\) at 353.
25. The recognition that privacy is the fourth amendment's object did not compel the conclusion that the *Olmstead* approach was erroneous. Although not designed to promote
After overthrowing the previous methodology, the Court majority replaced it with the simple conclusion that a fourth amendment search occurs when governmental conduct violates justifiably relied upon privacy. For the first time, the Court defined the ambit of fourth amendment regulation by evaluating the threat to its core interests. Activity would no longer be categorized as a search or nonsearch due to its purpose or physical qualities, but would instead be judged by whether it jeopardized the privacy entitlements that the Framers sought to safeguard against official encroachment.

The truly monumental theoretical achievement of Katz was its liberation of the fourth amendment by the announcement that purview determinations must be informed primarily by the values underlying the guarantee. The majority opinion, liberator, efficient dismantler, but privacy, Olmstead did in fact result in some privacy protection. The Katz Court might have concluded that “people, not places,” are protected, id. at 351, but only when intrusion into places associated with those people occurs; that privacy, not property, is safeguarded, but only the privacy contained within physical enclosures. See id. at 374 (Black, J., dissenting). In other words, disavowal of Olmstead required not only the acknowledgement of privacy as the core constitutional concern, but also the recognition that the privacy deserving protection was broader than the privacy that the physical intrusion doctrine had sheltered.

26. “The Government's activities in electronically listening to and recording [Mr. Katz'] words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.” 389 U.S. at 353 (emphasis added).

27. According to Professor Amsterdam, Katz did not break new ground: Katz . . . returned to the grand conception of Boyd v. United States . . . which the Supreme Court had largely forgotten throughout the Olmstead era. Katz held, as Boyd had, that whatever “is a material ingredient, and effects the sole object and purpose of search and seizure” is a search and seizure in the only sense that the Constitution demands. Amsterdam, supra note 1, at 384 (emphasis in original) (footnotes omitted).

28. The choice of an interest-guided mode for interpreting a Bill of Rights provision was certainly not novel or surprising. Maintaining the vitality of principles worthy of constitutionalization demands an approach based ultimately upon the animating spirits of such guarantees. While other sources of understanding—for example, history and the common law, language, and practical constraints—should contribute, they should ordinarily serve as no more than supplemental aids. Cf. Oliver v. United States, 104 S. Ct. 1735, 1745-46 (1984) (Marshall, J.,
neglectful reconstructor, bestowed a controlling role upon privacy, but neglected to provide any clear or comprehensive standards for determining whether a relevant privacy interest is threatened in a particular case. Accurate discernment of the new substantive limitations upon fourth amendment scope and derivation of suitable boundary criteria required that the Court identify clearly the character of the core privacy interest.

The Emergence of Reasonable Expectations Doctrine

When the Supreme Court began the task of making Katz operational, it did not look far for assistance. Within Justice Harlan’s brief explanatory Katz concurrence the Court discovered an acceptable description of the focal fourth amendment interest and a two-pronged doctrinal test for resolving threshold “search” questions. Justice Harlan had observed that it is not simply “privacy,” but “reasonable expectations of privacy” that reside at the heart of the guarantee. According to his “understanding of the rule that [had] emerged from prior decisions” and had been implicitly endorsed by the Katz majority, establishment of a cognizable fourth amendment privacy interest requires “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” Soon after Katz, the Court adopted Justice Harlan’s “reasonable expectation of privacy” characterization of the cen-

29. See Amsterdam, supra note 1, at 385 (“Katz . . . offers neither a comprehensive test of fourth amendment coverage nor any positive principles by which questions of coverage can be resolved.”); Bacigal, Some Observations and Proposals on the Nature of the Fourth Amendment, 46 GEO. WASH. L. REV. 529, 533-34 (1978) (The Katz “majority opinion failed to delineate the contours of the right of privacy or explain when and why an individual is justified in relying on this right.”); Kitch, Katz v. United States: The Limits of the Fourth Amendment, 1968 SUP. CR. REV. 133, 138 (1968) (“It seems clear that the [Katz] opinion is intentionally ambiguous . . . .”).

30. A quest for the more precise limitations of the Katz methodology is not contrary to that opinion’s spirit. Any impression that Katz was intended to be an open-ended, accommodating vehicle for the protection of all privacy from government encroachment is belied by the majority’s admonition that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’” 389 U.S. at 350; see also Chadwick v. United States, 433 U.S. 1, 1 n.6 (1977).


32. Id. at 360.

33. Id. at 361.
central fourth amendment interest. It took twelve years, however, for the Court to complete the merger of the Stewart and Harlan Katz opinions by endorsing the latter's twofold requirement.

In Smith v. Maryland, the Court majority reiterated the entrenched view that "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable' or a 'legitimate expectation of privacy' that has been invaded by government action." Drawing support from the Katz majority's language, the Smith Court then announced that this "inquiry . . . normally embraces [the] two discrete questions" prescribed by Justice Harlan. That embracement of the Harlan interpretation is the most significant development in the maturation of Katz' general threshold theory into functional doctrine. The courts have consistently relied upon the Katz-Smith standard to resolve fourth amendment coverage questions, and in refining the standard have provided insights into the perceived nature of reasonable privacy expectations.

Evolution of the Katz-Smith Doctrine—Characteristics and Qualities of Reasonable Privacy Expectations

Although judicial treatments of threshold claims under reasonable expectation of privacy standards often seem excessively conclusional, courts repeatedly advert to and purport to apply certain criteria. The

34. A majority of the Court first employed the Harlan terminology less than one year after Katz. In Terry v. Ohio, 392 U.S. 1 (1968), Chief Justice Warren stated: "We have recently held that 'the Fourth Amendment protects people, not places,' and whenever an individual may harbor a reasonable 'expectation of privacy,' he is entitled to be free from unreasonable governmental intrusion." Id. at 9 (quoting Katz, 389 U.S. at 351, 361 (Harlan, J., concurring)). In the years following Terry, although the particular language varied, the essence of the reasonable expectation of privacy description generally survived. See, e.g., Smith v. Maryland, 442 U.S. 735, 740 (1979); Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Chadwick, 433 U.S. 1, 7 (1977); United States v. Miller, 425 U.S. 435, 442 (1976); United States v. Dionisio, 410 U.S. 1, 8 (1973); Couch v. United States, 409 U.S. 322, 336 (1973); United States v. White, 401 U.S. 745, 752 (1971); Mancusi v. DeForte, 392 U.S. 364, 368 (1968).

It is somewhat surprising that the adoption of the Harlan characterization by a majority of the Court occurred without dissent or debate. Although the several post-Katz opinions that effected the transition convey the impression that Justice Stewart's omission of the Harlan phrase was a mere inadvertent oversight, see, e.g., Smith, 442 U.S. at 740; Terry, 392 U.S. at 9, it is more likely that the majority's omission reflected a conscious choice not to endorse the Harlan characterization at that time.

36. Id. at 740 (citation omitted).
37. Id. The Court did qualify its approval of the actual expectation requirement. See infra note 165 & accompanying text.
present section identifies the noteworthy doctrinal features that have emerged during the evolution of the reasonable expectation formula.

**The Actual, Subjective Expectation Requirement**

Ostensibly, the Court demands an actual privacy expectation as a prerequisite to, although not sufficient for, a cognizable fourth amendment interest. The meaning of the actual expectation requirement, however, has been confused by its protean capacity to assume two different shapes. In *Smith v. Maryland*, the Court's reliance upon that element first found expression in its "doubt that people in general entertain any actual expectation of privacy in the numbers they dial" and in the similar reference to the mindsets of "telephone users, in general." Shortly thereafter, however, the Court phrased the issue as whether Mr. Smith "did harbor some subjective expectation." In *Rawlings v. Kentucky*, the latter, individualized visage of the actual expectation requirement appeared in the Court's reference to the petitioner's "frank admission . . . that he had no subjective expectation . . . [of freedom] from governmental intrusion."

Thus, the Court has promulgated both "people in general" and "particular individual" perspectives on actual expectations, but has provided little insight into the rationale for any such requirement or the appropriate role of either version of the actual expectation component. In sum, despite the effective abandonment of the "actual (subjective) expectation" ingredient by its author, a majority of the Court remains wedded to the requirement.

944 (6th Cir. 1980); United States v. Clayborne, 584 F.2d 346, 351 (10th Cir. 1978); United States v. Moore, 562 F.2d 106, 112 (1st Cir. 1977).

The *Katz* Court certainly did not intend to replace the former determinants of fourth amendment scope with a "standard to be evolved according to the notions of judges of a given time and place." United States v. Michael, 645 F.2d 252, 261 (5th Cir.) (concerning the amount and kind of privacy preserved by the fourth amendment), *cert. denied*, 454 U.S. 950 (1981). That has, however, been the frequent upshot of lower court implementations of reasonable expectation doctrine.

40. *Id.* at 743 (emphasis added).
41. *Id.*
42. 448 U.S. 98 (1980).
43. *Id.* at 105 (emphasis added); see also Walter v. United States, 447 U.S. 649, 658-59 n.12 (1980) (reference apparently made both to the expectations of specific individuals and those of people in general).
44. Only four years after proffering his two-pronged test in *Katz*, Justice Harlan observed that "analysis must . . . transcend the search for subjective expectations . . . ." United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); see also Hudson v. Palmer, 104 S. Ct. 3194, 3199 n.7 (1984).
45. Analysis of the actual expectation component is undertaken in a subsequent portion of this Article. See *infra* text accompanying notes 139-60.

In the face of uncertain rumblings from the Supreme Court about the meaning of and
The Reasonable Expectation Requirement

The resolution of threshold issues under the Katz-Smith doctrine usually has hinged upon the second prong inquiry: whether society is prepared to recognize a privacy expectation as reasonable. Several criteria for judicial assessment of the reasonableness of actual privacy expectations have emerged.

Taking its cue from the Katz declaration that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," the Court has deemed public accessibility or exposure a pertinent criterion and has rejected reasonable expectation claims due to the "openness" of an individual's conduct or property. Nonetheless, on occasion the Court has limited the impact of the exposure factor, in one case repudiating the suggestion that the proper role for the actual expectation prong, the lower courts rarely have resolved questions of fourth amendment purview on the basis of that element. The question often asked has been whether or not one acting like the claimant has behaviorally exhibited an expectation of privacy, not whether the particular individual had a subjective expectation. See, e.g., State v. Thorton, 453 A.2d 489, 494 (Me. 1982) ("In the present case, the defendant's conduct evidenced a clear expectation of privacy. He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.") (emphasis added), rev'd, 104 S. Ct. 1735 (1984); see also United States v. Bailey, 628 F.2d 938, 943 (6th Cir. 1980); United States v. Cassity, 546 F. Supp. 611, 618-19 (E.D. Mich. 1981); State v. Rickard, 420 So. 2d 303, 306 (Fla. 1982). That perspective is not disloyal to its origins. Justice Harlan's original formulation of the first question was whether "a person [has] exhibited an actual (subjective) expectation of privacy." Katz, 389 U.S. at 361 (emphasis added). His phraseology permits, and may even suggest, reference to the expectations of those whose conduct resembles the claimant's. See United States v. Taborda, 635 F.2d 131, 137 (2d Cir. 1980).

46. Katz, 389 U.S. at 351. Even if interpreted literally, the quoted language declares not every exposure fatal to fourth amendment protection. Only those exposures that are sufficiently "knowing" or "public" forfeit constitutional shelter.

While the liberating character of the fundamental purpose-guided Katz message casts some doubt on any interpretation of Katz that yields a categorical, inflexible constraint upon fourth amendment reach, it is possible that the Katz Court was misled by an improperly narrow vision of fourth amendment privacy into erroneously believing that a knowing and public exposure limitation upon constitutional scope is universally appropriate. Under an instrumental view of privacy, however, there are instances in which even "knowing" and "public" exposure ought not preclude the right to claim fourth amendment protection. See infra text accompanying notes 192-96.

47. See United States v. Knotts, 460 U.S. 276 (1983) (exposure of automobile travel on a "public thoroughfare" counted against reasonableness of privacy expectations in such movements and contributed to "nonspeech" conclusion for "beeper" surveillance); United States v. Dionisio, 410 U.S. 1 (1973) (grand jury subpoenas of voice exemplars held not to implicate fourth amendment interests because a person publicly exposes such characteristics in daily life); United States v. Mara, 410 U.S. 19 (1973) (same result for handwriting exemplars); see also United States v. Place, 103 S. Ct. 2637, 2644-45 (1983) (conclusion that canine sniffs are not searches bolstered by the presence of the sniffed luggage in a public place); Texas v. Brown, 460 U.S. 730, 740 (1983) (illuminating and observing automobile interior with flashlight not a search because those areas "may be viewed from outside the vehicle").
“congregation of a large number of persons in a private home [automatically] transform[s] it into a public place open to the police,” and in another case rejecting the similar contention that the public display of a businessowner’s wares renders his expectations of privacy unreasonable. In sum, while expressing misgivings about its indiscriminate operation, the Court has continued to rely upon the principle that individuals sacrifice fourth amendment interests when they expose their behavior or possessions to others. A related criterion that has surfaced among the factors apposite to deciding whether an expectation is reasonable is the failure of individuals to take precautionary measures to safeguard their privacy. While not relying upon this element frequently, the Court has indicated—contrary to Justice Harlan’s admonition that “the burden of guarding privacy in a free society should not be on its citizens”—that failure to erect barriers against the government can deprive one of fourth amendment entitlement.

49. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979); cf. Cardwell v. Lewis, 417 U.S. 583, 590-91 (1974) (dicta to the effect that “the exercise of a desire to be mobile does not, of course, waive one’s right to be free of unreasonable government intrusion”).
50. See United States v. Knotts, 460 U.S. 276 (1983) (use of beeper to document travel patterns is outside fourth amendment due to public nature of individual’s conduct). The lower courts, possibly reflecting the equivocation of the Supreme Court, have been somewhat divided concerning the appropriate operation and significance of the public exposure criterion. They have pointed to the factor most often in open fields cases, see, e.g., United States v. Swart, 679 F.2d 698, 701 (7th Cir. 1982); United States v. Holmes, 521 F.2d 859, 869 (5th Cir. 1975), aff’d in part, rev’d in part, 537 F.2d 227 (5th Cir. 1976), in common area cases, see, e.g., United States v. Arboleda, 633 F.2d 985, 992 (1st Cir. 1980), cert. denied, 450 U.S. 917 (1981); United States v. Burns, 624 F.2d 95, 100 (10th Cir.), cert. denied, 449 U.S. 954 (1980); United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir. 1976); United States v. Freeman, 426 F.2d 1351, 1353 (9th Cir. 1970); United States v. Llanes, 398 F.2d 880, 884 (2d Cir. 1968), cert. denied, 393 U.S. 1032 (1969), in beeper surveillance cases, see, e.g., United States v. Bailey, 628 F.2d 938, 942-43 (6th Cir. 1980); United States v. Miroyan, 577 F.2d 489, 492 (9th Cir.), cert. denied, 439 U.S. 896 (1978); United States v. Moore, 562 F.2d 106, 112 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); United States v. Hufford, 539 F.2d 32, 34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976), and in trash container inspection cases, see, e.g., United States v. Michaels, 726 F.2d 1307, 1312 (8th Cir. 1984); United States v. Reichertner, 647 F.2d 397, 399 (3d Cir. 1981); United States v. Vahilak, 606 F.2d 99, 101 (5th Cir. 1979), cert. denied, 444 U.S. 1081 (1980); United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972).


51. See Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (“precipitous nature” of bailment fails to support “a reasonable inference . . . [of] normal precautions to maintain . . . privacy”); Rakas v. Illinois, 443 U.S. 128, 152 (1978) (Powell, J., concurring) (“precautions customarily taken by those seeking privacy” included in compilation of relevant reasonableness factors). Of course, because public accessibility can result from the failure to engage in precautionary measures, these two factors are related in many cases, and reliance upon both of them in such cases may amount to unfair double-counting.

A factor that has played a decisive role in some prominent post-*Katz* cases is the voluntary disclosure of information to third parties who, acting as agents of the government, convey such information to the government. To preserve reasonable expectations, according to the Court, individuals must not grant government enlistees, even unknown agents, specific access to information. One who discloses surrenders any legitimate interest in privacy.

The ability of an individual to do more than he or she has done to safeguard his or her interest in privacy is a favorite criterion of the lower courts. The close relationship between this factor and the public accessibility component, as well as the suggested possibility of double-counting, are highlighted by the reliance upon the "precaution availability" element in the exact settings in which "public exposure" has been influential. See, e.g., United States v. Michaels, 726 F.2d 1307, 1312-13 (8th Cir. 1984); United States v. Terry, 702 F.2d 299, 309 (2d Cir.), cert. denied, 103 S. Ct. 2095 (1983); United States v. Vahalik, 606 F.2d 99, 101 (5th Cir. 1979), cert. denied, 444 U.S. 1081 (1980); United States v. Crowell, 586 F.2d 1020, 1025 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979).


Dispute sometimes centers upon the degree of responsibility with which anyone ought to be chargeable and whether a given person has done enough. See, e.g., United States v. Oliver, 686 F.2d 356, 360, 371-72 (6th Cir. 1982) (Keith, J., dissenting), aff'd, 104 S. Ct. 1735 (1984); id. at 373 (Lively, C.J., dissenting); United States v. Ramapuram, 632 F.2d 1149, 1156, 1160 (4th Cir. 1980) (Ervin, C.J., dissenting); see also United States v. Allen, 675 F.2d 1373, 1380 (9th Cir. 1980) ("We agree . . . that a person need not construct an opaque bubble over his or her land in order to have a reasonable expectation of privacy regarding the activities occurring there in all circumstances.").

In any event, most concur that the protective means available to and utilized by those claiming fourth amendment entitlement are relevant considerations. See, e.g., United States v. Haydel, 649 F.2d 1152, 1155 (5th Cir.), cert. denied, 455 U.S. 1022 (1981); United States v. Brien, 617 F.2d 299, 306 n.9 (1st Cir.), cert. denied, 446 U.S. 919 (1980); State v. Rickard, 420 So. 2d 303, 306 (Fla. 1982); *Thornton*, 453 A.2d at 496 (Me. 1982).

54. See Smith v. Maryland, 442 U.S. 735 (1979) (pen registers found outside fourth amendment ambit because numbers dialed are voluntarily conveyed to phone company); United States v. Miller, 425 U.S. 435 (1976) (financial record procurement and review not a search because information obtained was voluntarily conveyed to bank); see also United States v. White, 401 U.S. 745 (1971) (pre-*Katz* holding regarding fourth amendment status of "secret agents" reaffirmed after *Katz* due to voluntary disclosure). *Pre-Katz* and post-*Katz* opinions have also couched their reasoning in the alternative terminology of "assumed risks" and "mis-
mate claim to a protectable fourth amendment interest.55

"[B]y focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned the use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment."56 The Court has, in fact, specifically relied on ownership, possession, and the related right to exclude others from property in evaluating privacy interests.57 The Court, however, has neither proffered a comprehensive catalogue of relevant property concerns, nor prescribed the weight particular property placed trust." See White, 401 U.S. at 752; Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting).

The Court's current reliance upon the voluntary disclosure to a third party criterion is reminiscent of the Olmstead Court's earlier reliance upon the telephone user's "conversational voluntariness" as a basis for holding that wiretapping was beyond fourth amendment control. See Olmstead v. United States, 277 U.S. 438, 464 (1928). The criteria, however, are not identical. The conversations in Olmstead that contributed to a forfeiture of fourth amendment protection, although voluntary, were directed to another private party and not to a government agent. The mere fact that the claimant's speech was voluntary and not compelled influenced the Court's decision that the fourth amendment did not prevent the government from intruding upon the conversation. The current criterion, on the other hand, refers to noncompelled disclosure directly to an agent of the government. It is not simply voluntary speech, but voluntary speech to a government agent that forfeits constitutional coverage today. See United States v. Karo, 104 S. Ct. 3296, 3304 n.4 (1984).

Despite that critical distinction, the two factors do share common ground. Beyond the surface similarity of reference to the voluntariness of one's revelatory conduct, both seem to be grounded in the premise that people desiring privacy should not engage in conduct that shows a lack of concern for privacy. That premise has been accorded excessive influence due to an improper conception of fourth amendment privacy. Because the post-Katz voluntary disclosure factor is rooted in that conception, it is as seriously flawed as the pre-Katz conversational voluntariness criterion. See infra text accompanying notes 192-96.

55. The voluntary disclosure ingredient is related to the less firmly entrenched "public exposure" factor. It is different, however, insofar as it involves a specific grant of access to a limited audience and requires that the party with access serve as the conveyor to the government. It does not, therefore, entitle the government to access without the willing assistance of the specific intended recipient. See Karo, 104 S. Ct. at 3304 n.4 ("There would be nothing left of the Fourth Amendment right to privacy if anything that a hypothetical government informant might reveal [i.e., anything voluntarily disclosed to anyone or no one, but not to a government agent] is stripped of constitutional protection." (emphasis in the original)). It also is closely connected to the less confidently endorsed "absence of precaution" criterion insofar as it requires personal responsibility for sheltering privacy as a condition for retaining constitutionally protected interests. The voluntary disclosure rationale would seem to be a narrow subset of each of the two preceding categories.

56. Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978); see also id. at 153 (Powell, J., concurring).

57. See Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (ownership or possession of property seized is relevant, though not decisive on question of privacy interests); Smith v. Maryland, 442 U.S. 735, 741 (1979) (use of pen registers does not involve a property invasion or intrusion into a constitutionally protected area); United States v. Miller, 425 U.S. 435, 440-41 (1976) (lack of property interest in subpoenaed bank records considered relevant to privacy interest).
interests ought to be accorded. 58

Initially, the frequency with which references to intrusion or invasion have appeared in opinions after *Katz* is surprising. 59 The intended

58. Although property interests in seized property do not alone give rise to cognizable *privacy* interests, *Rawlings*, 448 U.S. at 105, ownership or possession can generate protectible fourth amendment interests. The interests of an owner or possessor in the security, integrity, and continued availability of her property are constitutionally protected against governmental seizures. See United States v. Jacobsen, 104 S. Ct. 1652, 1662-63 (1984).

Justice Marshall believes that one with an adequate property basis in a seized item should always be able to contest a precedent search because it is the combination of the search and the seizure that "interferes with his constitutionally protected right to be secure in his effects." *Rawlings*, 448 U.S. at 117-18 (Marshall, J., dissenting). According to Justice Marshall, "[i]f the defendant's property was seized as the result of an unreasonable search, the seizure cannot be other than unreasonable." *Id.* at 118.

Reliance upon property elements does not contravene *Katz*, which declared only that physical intrusions and property interests must not exert absolute control over the operative sphere of fourth amendment protection. The use of property notions, however, must be kept within proper bounds lest a de facto return to the pre-*Katz* approach occur. In lower court threshold determinations, reliance upon property concepts may well be excessive. They are regularly involved in trash cases, see, e.g., United States v. Terry, 702 F.2d 299, 307 (2d Cir.), *cert. denied*, 103 S. Ct. 2095 (1983); United States v. Reicherter, 647 F.2d 397, 399 (3d Cir. 1981), in open fields cases, see, e.g., United States v. Dunn, 674 F.2d 1093, 1099 (5th Cir. 1982), *vacated*, 104 S. Ct. 2380 (1984); United States v. Long, 674 F.2d 848, 853 (11th Cir. 1982); United States v. Holmes, 521 F.2d 859, 870 (5th Cir. 1975), *aff'd in part, rev'd in part*, 537 F.2d 227 (5th Cir. 1976), and in beeper attachment and monitoring cases, see, e.g., Karo, 710 F.2d at 1438; United States v. Bailey, 628 F.2d 938, 944 (6th Cir. 1980); United States v. Bernard, 625 F.2d 854, 860-61 (9th Cir. 1980).

Property-related factors come in a variety of forms. Ownership and possession generate a greater likelihood that privacy expectations will be deemed reasonable. See, e.g., United States v. Hernandez, 668 F.2d 824, 826 (5th Cir. 1982); United States v. Richards, 638 F.2d 765, 770 (5th Cir.), *cert. denied*, 454 U.S. 1097 (1981); United States v. Arce, 633 F.2d 689, 694 (5th Cir. 1980), *cert. denied*, 451 U.S. 972 (1981); United States v. Ochs, 595 F.2d 1247, 1253 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979). But see United States v. Dall, 608 F.2d 910, 914-15 (1st Cir. 1979) (despite ownership, giving of temporary vehicle to another deprived defendant of reasonable expectation of privacy), *cert. denied*, 445 U.S. 918 (1980). At times distinctions between open fields and curtilage, and between those two areas and houses have been determinative. See, e.g., *Dunn*, 674 F.2d at 1100; United States v. Van Dyke, 643 F.2d 992, 993 (4th Cir. 1981); Magda v. Benson, 536 F.2d 111, 112 (6th Cir. 1976); Ball v. State, 205 N.W.2d 353, 356-57 (Wis. 1973). The reasonableness of expectations declines as one moves from the realm of the home to the curtilage and finally out into the open fields. The Supreme Court recently settled some of the disputed matters in this area by declaring that open fields cannot harbor any reasonable privacy expectations. See infra text accompanying notes 276-91.

In addition, an individual's incapacity to possess a legitimate property interest in contraband has lessened or destroyed the reasonableness of the claimed privacy expectations. See, e.g., United States v. Washington, 586 F.2d 1147, 1154 (7th Cir. 1978); United States v. Moore, 562 F.2d 106, 111 (1st Cir. 1977), *cert. denied*, 435 U.S. 956 (1978); United States v. Emery, 541 F.2d 887, 889-90 (1st Cir. 1976). Finally, the "abandonment" of one's personal property is usually fatal to a claim of fourth amendment protection. See, e.g., *Terry*, 702 F.2d at 309; United States v. Pirolli, 673 F.2d 1200, 1204 (11th Cir.), *cert. denied*, 459 U.S. 871 (1982); *Reicherter*, 647 F.2d at 399; *Magda*, 536 F.2d at 112; United States v. Mustone, 469 F.2d 970, 972 (1st Cir. 1972).

meaning of those terms, however, is not always clear. Although the words connote physical breach or trespass, it is by no means clear that in all instances in which the Court has employed such language it has intended to deliver that message.\footnote{In United States v. Place, 103 S. Ct. 2637, 2644 (1983), the Court mentioned the intrusion factor in concluding that canine sniffs are not fourth amendment searches. The discussion in that opinion might be understood as referring to “physical intrusiveness.” Subsequently, however, the Court has explained that it was not the absence of physical invasion itself that was critical in \textit{Place}, but rather the lessened risk of intrusion upon legitimate privacy interests because only limited information could be acquired from a canine sniff. See \textit{United States v. Jacobsen}, 104 S. Ct. 1652, 1662 n.24 (1984). The \textit{Jacobsen} opinion downplays the significance of tangible, physical breaches and undercuts possible contrary implications of earlier opinions.
}

Whatever its intended significance, intrusion or invasion has been another undeniable factor in reasonable expectation evaluations.\footnote{As with property notions, the spirit of \textit{Katz} is not violated as long as the physical intrusion factor functions as an aid in discerning protectable privacies, see, e.g., \textit{Jacobsen}, 104 S. Ct. at 1662 n.24, and does not become a necessary component of reasonable expectations. Difficulties arise, however, when such criteria assume excessive and undeserved significance in defining the constitutional boundaries. That may be the case in the lower courts. Although some courts have disputed the pertinence and usefulness of the intrusion factor, see, e.g., \textit{United States v. Beale}, 674 F.2d 1327, 1332 n.7 (9th Cir. 1982); \textit{United States v. Taborda}, 635 F.2d 131, 138 n.9 (2d Cir. 1980); \textit{United States v. Bailey}, 628 F.2d 938, 940 n.4 (6th Cir. 1980); \textit{United States v. Holmes}, 521 F.2d 859, 865 (5th Cir. 1975), aff'd in part, rev'd in part, 537 F.2d 227 (1976), the absence or minimal degree of intrusion effected by a government activity has often weighed against the reasonableness of an alleged expectation. See, e.g., \textit{Horton v. Goose Creek Indep. School Dist.}, 690 F.2d 470, 477 (5th Cir. 1982); \textit{United States v. Walterz}, 682 F.2d 370, 372-73 (2d Cir. 1982); \textit{United States v. Weir}, 657 F.2d 1005, 1007 (8th Cir. 1981); \textit{United States v. Viera}, 644 F.2d 509, 510-11 (5th Cir.), cert. denied, 454 U.S. 867 (1981); \textit{United States v. Choate}, 576 F.2d 165, 177 (9th Cir.), cert. denied, 439 U.S. 953 (1978), aff'd, 619 F.2d 21 (9th Cir.), cert. denied, 449 U.S. 952 (1980).
}

Whatever its intended significance, intrusion or invasion has been another undeniable factor in reasonable expectation evaluations.\footnote{In many of the cases in which the lack or negligible extent of an intrusion has contributed to rejection of a fourth amendment claim, the courts' references have clearly been to the physical quality of the intrusion. These references have sometimes been explicit. See, e.g., \textit{Horton}, 690 F.2d at 478-79; \textit{In re Grand Jury Proceedings (Cecil Mills)}, 686 F.2d 135, 139 (3d Cir.), cert. denied, 459 U.S. 1020 (1982); \textit{Weir}, 657 F.2d at 1007. At other times, courts have evinced a physical focus through the language of trespass. See, e.g., \textit{United States v. Dunn}, 674 F.2d 1093, 1101 (5th Cir. 1982), vacated, 104 S. Ct. 2380 (1984); see also \textit{Walterz}, 682 F.2d at 372-73; \textit{Viera}, 644 F.2d at 510-11.}
In a growing number of fourth amendment contexts, the Court has accorded the interest in efficient law enforcement an ever-expanding doctrinal role.\(^{62}\) In threshold analysis, however, its influence has been relatively modest. Until recently, the Court had adverted to that element in only one major post-*Katz* threshold decision.\(^{63}\) During the 1983-1984 term, however, the Court showed an inclination to expand the role of the criminal law efficacy factor in threshold analysis.\(^{64}\) Thus, the law enforcement factor cannot be dismissed as inapposite to reasonable expectation doctrine.\(^{65}\)

As keeper of the fourth amendment gateway, the *Katz-Smith* reasonable expectation of privacy formula governs some of the most significant adjudications in constitutional law. Despite its importance, the formula's theoretical roots and doctrinal refinements have been subjected to only the most shallow judicial analysis. The doctrine's central role in

---

\(^{62}\) The interest in effective criminal law enforcement has been quite influential in the "stop and frisk" line of cases, beginning with Chief Justice Warren's observation in *Terry*:

One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is not probable cause to make an arrest.


The concern for an efficient and successful law enforcement system has operated in other fourth amendment contexts as well. See, e.g., *United States v. Ross*, 456 U.S. 798, 805 (1982) (discussing the "automobile exception" to the warrant requirement); *United States v. Havens*, 446 U.S. 620, 626-27 (1980) (holding that illegally seized evidence may be used to impeach defendant); *United States v. Watson*, 423 U.S. 411, 417 (1976) (holding that police officers need not obtain warrants to make public felony arrests). This listing is certainly not exhaustive. The law enforcement factor has become one of the most prevalent forces in fourth amendment reasoning.

\(^{63}\) *United States v. White*, 401 U.S. 745, 753 (1971) (expressing fear that a contrary threshold holding regarding "secret agent" activity would "erect constitutional barriers to relevant and probative evidence which is also accurate and reliable"); see also *id.* at 786 (Harlan, J., dissenting) (suggesting factoring "the utility of the conduct as a technique of law enforcement" into the constitutional threshold calculus).

\(^{64}\) *See* Hudson v. Palmer, 104 S. Ct. 3194, 3200-01 (1984) (prisoners' expectations of privacy in jail cells not reasonable because of the paramount interest of society in security of penal institutions); *Oliver v. United States*, 104 S. Ct. 1735, 1743 n.13 (1984) (unwillingness to "shelter criminal activity" influenced decision that fourth amendment does not apply in open fields).

fourth amendment threshold decisionmaking, its expansion into the "standing" area, and its frequent invocation by litigants and widespread employment by the courts make a thorough understanding and evaluation critical. That task requires identification and comprehension of the true character of fourth amendment privacy.

Proper Guides to Constitutional Coverage: The Nature of Fourth Amendment Privacy Interests

Perhaps the most famous legal definition of privacy is the simple, exceedingly open-ended Warren and Brandeis formulation: "the right to be let alone." That description encompasses most, possibly all, of the

66. A most significant expansion of the doctrine's functions occurred when the Court gave it control over the territory traditionally ruled by "standing" analysis. See Rakas v. Illinois, 439 U.S. 128, 134 (1978) (only individuals who demonstrate infringement of reasonable expectation of privacy are entitled to exclusion of evidence by virtue of unreasonable search); see also infra notes 342-50. Since Rakas declared that the reasonable expectation of privacy formula is the determinant of whether an activity that is a search in the abstract is a search as to a particular individual, it transformed the former "standing" inquiry into an intimate relative of the fourth amendment threshold inquiry. Because they both involve the definition of fourth amendment scope, this Article treats both inquiries.

67. For several reasons, it is important to focus concern upon threshold fourth amendment questions of coverage independent of substantive questions of content. First, scope inquiries pose the initial fourth amendment analytical hurdle. It is illogical not to address them first and would be pointless and academic to discuss how the guarantee will operate if, in fact, it does not operate at all. Fourth amendment content questions (for example: Is a warrant required? Should probable cause be replaced by reasonable suspicion?) are clearly distinct in character and purpose. They involve a balancing process—often done by the Constitution itself—aimed at evaluating the "reasonableness" of an activity that is subject to some constitutional regulation. Threshold matters, on the other hand, should not involve such balancing. See infra text accompanying notes 200-04. Unprincipled balancing at the content stage might well nullify liberty gains made possible by proper threshold analysis. That potentiality, however, rather than detracting from the propriety of initial, separate confrontation of scope questions, simply raises questions about, and should prompt critical analysis of, the processes used to determine fourth amendment substance.

Furthermore, collapsing the coverage and content stages into one analytical inquiry is inadvisable for reasons beyond their logical separateness. If substantive determinations were melded with threshold analyses, the risk of total sacrifice of individual entitlements to the compelling needs of law enforcement would increase. Separately performed threshold tasks will result more often in declarations that individuals are entitled to some measure of constitutional protection. The symbolic worth of such declarations and their practical effects on law enforcement should not be minimized. See New Jersey v. T.L.O., 105 S.Ct. 733, 760 (1985) (Stevens, J., dissenting). It may well be that the fact of limitation is of greater ultimate importance than the character of that limitation. Additionally, as a practical matter, affirmative threshold declarations ensure some operative safeguards against unbounded government power and discretion. Moreover, correctly performed threshold analyses should isolate and define the values and concerns which ought to weigh on the individual's side in the balancing processes used to determine substantive fourth amendment content.

68. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 193 (1890). Certain members of the Supreme Court have found this definition a fitting description of the fourth amendment entitlement. See Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis,
variant interests which have been labelled "privacy." While the interest in peace, quiet, repose, and freedom from physical disturbance\(^6\) may be the most apparent referent of the Warren and Brandeis description, being let alone includes other "privacies," such as the interests in not having potentially embarrassing facts publicly disseminated,\(^7\) in not having another profit from such information,\(^7\) in autonomy to decide how to conduct intimate, personal affairs,\(^7\) and in generally controlling access to confidential information about one's life.\(^7\) Considering the variety of privacy species, it is not surprising that the "right to be let alone" has been termed "the most comprehensive of rights and the right most valued by civilized men,"\(^7\) and that privacy has had a prominent and enduring role in Anglo-American society.\(^7\)

Privacy's amorphous nature and chameleon-like capacity to describe disparate interests make it a somewhat problematic concept,\(^7\)

---


70. See United States v. Kramer, 711 F.2d 789, 793 (7th Cir.), cert. denied, 104 S. Ct. 397 (1983); Henkin, Privacy and Autonomy, 74 COLUM. L. REV. 1410, 1419 (1974); cf. Prosser, supra note 69, at 389 (at common law, "right to privacy" included cause of action for "public disclosure of embarrassing facts about the plaintiff," and for "publicity which places the plaintiff in a false light in the public eye").

71. See M. ERNST & A. SCHWARTZ, PRIVACY, THE RIGHT TO BE LET ALONE 1 (1962); Prosser, supra note 69, at 389.

72. See Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Comment, A Taxonomy, supra note 69, at 1466-78; cf. United States v. Bailey, 628 F.2d 938, 949 (6th Cir. 1980) (Keith, J., concurring) (referring to "control of personal identity" which "extends to those elements which constitute one's existence as a sentient being").


74. Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting).

75. Not all civilized societies hold privacy as dear as we traditionally have. "One could compile a long list of societies, primitive and modern, that neither have nor admire the norms of privacy found in American culture—norms which some Americans regard as 'natural' needs of all men living in society." A. WESTIN, supra note 73, at 12. Nonetheless, apparently some "[n]eeds for individual and group privacy . . . are present in virtually every society." Id. at 13; see also Freund, Privacy: One Concept or Many?, in PRIVACY, supra note 69, at 196.

76. See Gerety, Redefining Privacy, 12 HARV. C.R.-C.L. L. REV. 233, 261 (1977) ("In the inevitable muddle of adjudication, privacy may still look, as it did to Paul Freund, like 'too greedy a concept' to let into the storehouse of legal rules and principles."); footnote omitted; id. at 234 ("[T]he privacy is indeed the most comprehensive of rights, is it not then too vast and weighty a thing to invoke in specific legal settings for specific and narrowly defined purposes?"); Comment, A Taxonomy, supra note 69, at 1448 ("Different interests, which compel
preventing definition of the term that is both comprehensive and comprehensible. Fortunately, ascertaining the appropriate scope of fourth amendment privacy protection does not require such definition. Fidelity to constitutional purposes, however, does demand understanding and isolation of those attributes that are a proper part of the fourth amendment privacy entitlement and elimination of those that are not.

The Primarily “Informational” Nature of the Privacy Protected Against Searches

The Constitution grants no general, comprehensive right to privacy. The term, of course, is not even in the Bill of Rights. Nevertheless, the entity has been discovered within more than one of that charter’s specific guarantees, and plays its most significant constitutional role in the different treatment by court and counsel, have nonetheless been included under the common rubric of ‘privacy.’); id. at 1482 (“Whenever a generalized claim to privacy is put forward without distinguishing carefully between the transactional types, parties and courts alike may become hopelessly muddled in obscure claims.”); see also Henkin, supra note 70, at 1425. But cf. Gerety, supra, at 236, 296 (“Privacy . . . , as a concept and a right, stands in great need of the few certainties and limitations that definition affords us.”).

77. See Henkin, supra note 70, at 1419. For a sample of definitional attempts evincing both the diversity and ambiguity bound to result from such an effort, see Roe v. Ingraham, 403 F. Supp. 931, 936 (S.D.N.Y. 1975), rev’d sub nom., Whalen v. Roe, 429 U.S. 589 (1977); PRIVACY, supra note 69, at xi-xiii; A. WESTIN, supra note 73, at 7; Henkin, supra note 70, at 1419; Parker, supra note 73, at 283-84.

Any attempt at comprehensiveness is destined for inadequacy due to the variety of qualities and characteristics that have been joined under the common title. Although they share some common ground, the different kinds of privacy are so unrelated that a successful effort at capturing them all will likely be exceedingly nebulous, unfocused, and unmanageable. See Bacigal, supra note 29, at 534. One risk of an ill-defined, all-inclusive definition is that privacy becomes paradoxically vulnerable to deprivation of content. Vagueness and imprecision permit not only inclusion, but also selective exclusion of interests. One who disfavors a given claim to privacy can interpret ambiguity in ways which exclude the claim. Also, definitions that bring various facets of privacy beneath one umbrella generate opportunities for manipulative focus upon one variety at the expense of others. The reasonable and feasible alternative is formulation of many definitions, each concerned with a segregable portion of privacy.

It is understandable that “[t]he concept of a constitutional right of privacy still remains largely undefined.” Kurland, The Private I, U. Chi. Mag., Autumn 1976, at 7, 8. Faced with the different forms of privacy contained in the first, third, fourth, fifth, and ninth amendments, the Supreme Court has wisely not even attempted to furnish a comprehensive definition.

78. Refinement of our understanding of fourth amendment privacy is critical because privacy does “service in a variety of legal contexts” and, as a result, “entails risks of slovenly, overbroad, and one-dimensional thinking.” Freund, supra note 75, at 196-97. “The clearer the understanding of what privacy is, the wiser judgments will be concerning when to protect it and when to sacrifice it.” Parker, supra note 73, at 296. In addition, our judgments concerning how much and what kind of protection to afford privacy will also be immeasurably wiser if grounded in a clearer comprehension of the concept.

79. See Gerety, supra note 76, at 239-40; see also Katz, 389 U.S. at 357, 373 (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 508 (1965).

80. In addition to the fourth amendment, the Court has determined that the first amendment and the ninth amendment are repositories of privacy interests. See, e.g., Stanley v. Geor-
fourth amendment sphere. Unfortunately, the Supreme Court's responses to the critical inquiry for fourth amendment threshold analysis—which of the various privacy interests are protected by that guarantee?—have been sketchy, indirect, and largely unenlightening.

The text of the fourth amendment literally restricts only "searches." Inherent in the notion of "searching" is an attempt to acquire, or the acquisition of, information. A common feature of indisputable governmental searches is the objective of obtaining data in order to fulfill an "ultimate" institutional purpose. From the historical entering and rummaging to secure proof of seditious libel to the modern attachment of electronic listening devices on telephone booths to uncover organized crime, the governmental design has been "the securing of information to fortify the coercive power of the state." A commonsense understanding of "searching," therefore, would seem to encompass government efforts intended to result in, or even unintentionally but conveniently, the acquisition of information.

The fifth amendment also protects privacy, although no broader a zone than that necessarily delineated by the prohibition of compelled self-incrimination. The unused third amendment "prohibition against the quartering of soldiers in any house in time of peace without the consent of the owner is another facet of privacy." Griswold, 381 U.S. at 484.

A narrow linguistic approach and a myopic focus upon historically objectionable practices once limited the scope of "searches" to physical entries. See supra note 21. Notions of privacy and adoption of an interest-oriented approach to definition of the term released the fourth amendment from that suffocating confinement. See supra text accompanying notes 23-27. Adoption of the latter approach, however, did not render language and history useless in ascertaining what privacy rests within the fourth amendment core. Katz merely admonishes us not to rely excessively upon those valid sources of constitutional construction.

It would be unwise to refuse the assistance of language and history in understanding fourth amendment privacy. Justice Black was correct in believing that language and history are useful guides that should not be ignored. He erred, however, in finding them dispositive and controlling. See Katz, 389 U.S. at 366 (Black, J., dissenting). Language and history ought to perform the significant, but more modest role of assisting our understanding of that interest which, ultimately, must be the prime determinant of coverage.


A common-sense understanding of the fourth amendment language led the Court in Olmstead v. United States, 277 U.S. 438 (1928), to impose the "physical intrusion" limitation. That gloss on "searching," however, is not consonant with the dictionary definitions of the word which are not confined by a physical intrusion qualifier. See 9 OXFORD ENGLISH DICTIONARY 333-34 (1961). The predominant themes among those definitions are ascertainment, exploration, investigation, and examination—concepts quite consonant with information gathering and not demanding a physical intrusion.
potentially resulting in, information acquisition.84

Examination of the government practices that inspired constitutional protection from a perspective that emphasizes their purposes and effects, rather than merely their tangible attributes, also supports an “information-acquisitive” characterization of fourth amendment searches.85 The physical breaches of and rummaging within homes that prompted constitutional control were ordinarily designed to acquire, and inevitably had the effect of yielding, information about the affairs of their victims. They were, if nothing else, information-gathering endeavors.86

Recognition of the fundamentally information-acquisitive nature of constitutional searches leads logically toward a conception of the fourth

84. Scholarly commentary reinforces the information acquisition aspect of fourth amendment searches. See Bacigal, supra note 29, at 562; Grano, Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement, 69 J. CRIM. L. AND CRIMINOLOGY 425, 434-35 (1978); Hufstedler, The Directions and Misdirections of a Constitutional Right of Privacy, 26 REC. N.Y.B.A. 546, 561 (1971); Comment, Pen Registers After Smith v. Maryland, 15 HARV. C.R.-C.L. L. REV. 753, 761 (1980) [hereinafter cited as Comment, Pen Registers]; Comment, A Taxonomy, supra note 69, at 1461. While these commentators include all information-gathering endeavors within the concept of fourth amendment searches, I suggest that information acquisition is but the initial criterion for deciding whether the constitutional threshold has been crossed. I consider the crucial additional criteria to be the liberties potentially infringed by governmental information-gathering efforts.

Almost all government activities which should be considered searches would be included if the initial criterion were simply an intent or design to acquire information. Nonetheless, I have included unintentional information acquisitions because the government should be held accountable for fortuitous impacts upon informational privacy. See Bacigal, supra note 29, at 573. Whether or not their design is obtainment of data, when agents acquire information they have satisfied the initial prerequisite for a search.

85. In Olmstead, Chief Justice Taft also relied upon history to bolster his conclusions about the limits of constitutional coverage. He stated that the “well known historical purpose of the Fourth Amendment . . . was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will.” 277 U.S. at 463.

It is the narrowness of his historical perspective, rather than the accuracy of his reading of history, that is objectionable. Rather than examining the underlying purposes of the fourth amendment, he focused narrowly upon the unimportant physical attributes of the historically offensive governmental conduct. Such a confined perspective on history neither gives sufficient credit to the wisdom or intent of the Framers, nor accords with the true nature of a Constitution which, to endure, must not be limited by the abuses or technology of any particular time period. See Oliver v. United States, 104 S. Ct. 1735, 1745-46 (1984) (Marshall, J., dissenting). A proper historical perspective faithful to the Framers’ purposes looks beneath the superficial characteristics of quintessential searches and seizures, and generalizes from those practices by evaluating their perpetrators’ goals and their impacts on victims. See Olmstead, 277 U.S. at 487-88 (Butler, J., dissenting).

86. One of Patrick Henry’s most famous admonitions alludes to this facet of traditional searches. Henry feared authorities “who may search, at any time, your houses and most secret recesses” and who “may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms and search, ransack and measure everything you eat, drink or wear.” N. LASSON, supra note 4, at 92-93 (emphasis added).
amendment's ward as primarily informational privacy—that is, an interest in maintaining confidentiality or secrecy, in not having data about one's life learned by the government.\(^8\) Apparently, the Supreme Court has accurately perceived the informational character of fourth amendment privacy.\(^8\) Nevertheless, its analyses and resolutions of threshold questions have often proven unsatisfying and unfaithful to constitutional goals.\(^9\) The inadequacies transcend the mere selection of inappropriate terminology, or a failure to explain adequately results that are consistent with fourth amendment intent. The Court's discussions betray an illiberal, truncated conception of informational privacy that is fundamentally incompatible with the ambitious aims of that provision.\(^9\)

---

87. Another variety of “privacy” mentioned earlier is the interest in “repose,” \(i.e.,\) in not being physically or psychologically unsettled or disturbed by governmental action. Protection of repose may have been among the Framers' purposes, and enforcement of the fourth amendment's safeguards will certainly result in some protection for that interest. Nevertheless, it should not be treated as the primary or even as a significant fourth amendment goal.

First, unless “repose” is defined broadly, a focus upon perils to that interest would threaten severe shrinkage of the fourth amendment domain. Many modern activities that are presently considered “searches,” for example, electronic eavesdropping and beeper monitoring, probably would not be constitutionally controlled if repose protection dictated coverage. Even traditional searches might be unregulated if the government invaded premises only during our absences and left the scenes physically undisturbed. Furthermore, repose-type privacy interests are less significant and valuable than informational privacy interests because deprivations of informational privacy pose much more serious and extensive threats to the free exercise of other liberties.


89. The Court's discussions and depictions of fourth amendment privacy can fairly be described as skeletal. See, e.g., Whalen v. Roe, 429 U.S. 589, 599 n.24 (1977) (The “facet” of privacy “directly protected by the Fourth Amendment” is “the right of the individual to be free in his private affairs from governmental surveillance and intrusion.”). The unsatisfying, disloyal reasoning and results in purview cases may well be directly attributable to the failure to investigate and explain the nature of fourth amendment privacy in any depth. Cf. Weinreb, *Generalities of the Fourth Amendment*, 42 U. Chi. L. Rev. 47, 49 (1974) (“The absence of a continuously developing rationalization of the amendment has enabled the Court to change direction, even veer rapidly or sharply, without too obvious inconsistency; but the result is a body of doctrine that is unstable and unconvincing.”).

90. See infra notes 91-136 & accompanying text.
Remedying the Inadequacies of the Current Conception of Fourth Amendment Privacy: Beyond Secrecy for Secrecy's Sake

The emphasis upon secrecy and confidentiality in current conceptions of fourth amendment privacy does not mischaracterize or devalue the core of the guarantee. Focus upon that facet of privacy is appropriate and defensible in terms of the language, history, and intent of the Framers. The flaws in doctrine and analysis have been spawned by an excessively limited vision of the significance and ambitions of informational privacy—that is, by valuing secrecy merely for secrecy's sake. While secrecy and confidentiality are recognized as the guiding lights of fourth amendment analysis, only rarely is any underlying rationale or purpose for such a secrecy grant acknowledged. The notion that an interest in keeping affairs undisclosed is the ultimate constitutional value seems to be a basic, widespread, but unexamined working assumption.

The informational privacy protected by the fourth amendment, however, is not important and valuable merely for its own sake. The constitutional text, structure, and history, as well as early fourth amendment cases, support the conclusion that the main reason for constitutionalizing informational privacy is its instrumental role as a medium within which other rights and interests can survive, even flourish. Just as confidentiality-type privacy, in general, permits individuals to be themselves, to behave and conduct their lives in ways that might otherwise be difficult and impractical, if not inconceivable, constitutional informational privacy enables people to enjoy and freely exercise other entitlements afforded by our free society. The uninhibited exercise of fundamental rights and the complete enjoyment of constitutionally guaranteed benefits often depends upon the ability to keep matters unknown and undisclosed to the government. Thus, to the extent that the fourth amendment grants a secrecy entitlement, it affords opportunities to take advantage of other guarantees. Conversely, insofar as our constitutional secrecy entitlement is restricted, and the government is permitted cognizance of our affairs, those opportunities are diminished. In essence, fourth amendment privacy stands as a bulwark against governmental omniscience and its consequences—the subtle, unwarranted contraction of fundamental rights and liberties.


92. Confidentiality vis-a-vis the government is inherently valuable, and undoubtedly the fourth amendment is concerned with protecting that intrinsic worth. The point is simply that the fourth amendment intent is to secure that interest and much more.

93. See, e.g., Greenawalt, The Right to Privacy, in THE RIGHTS OF AMERICANS 301 (N. Dorsen ed. 1971); Simmel, supra note 69, at 81; see also United States v. Kramer, 711 F.2d 789, 793-94 (7th Cir.), cert. denied, 104 S. Ct. 397 (1983).
The Status of Fourth Amendment Privacy

An initial reason for according fourth amendment privacy a role as protector and nurturer of other liberties is the relatively insubstantial object of fourth amendment concern that otherwise results. Although secrecy for secrecy’s sake, because of the comfort and contentment that can be derived simply from the availability of such a private sphere, is valuable, the fourth amendment would not seem to merit its prominent place among vital Bill of Rights constituents if that were its sole object of protection. It is difficult to believe that the Framers considered mere secrecy worthy of the respect and commitment given expression in their constitutionalization of protection against unregulated search and seizure power. Nor would such a limited goal deserve the judicial attention and reverence accorded it through time. Fourth amendment privacy’s

94. Cf. Mapp v. Ohio, 367 U.S. 643, 655 (1961) (without exclusionary rule sanction, freedom from governmental invasions of privacy would “not . . . merit . . . high regard as a freedom ‘implicit in the concept of ordered liberty’ ”). There are provisions of the Bill of Rights centered around quite limited and relatively insignificant concerns, for example, the second and third amendments. Such guarantees have proven to be of little value in post-colonial society. If confined to the safeguarding of secrecy for its own sake (a danger posed by current doctrine), the fourth amendment undoubtedly retains more significance than the two amendments which precede it. Nonetheless, its role in American society is attenuated to a degree dissonant with the importance expressly accorded it by its Framers, later analysts, and the judiciary since Boyd.

95. Patrick Henry described Virginia’s constitutional search and seizure provision as the result of “some celestial influence governing those who deliberated on that Constitution; for they have with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred” N. LASSON, supra note 4, at 93.

96. In Boyd v. United States, 116 U.S. 616 (1886), Justice Bradley stated that the “principles” behind restraint upon searches and seizures “affect the very essence of constitutional liberty and security.” Id. at 630. He referred to the “indefeasible right of personal security, personal liberty and private property” embodied in the fourth amendment as a “sacred right.” Id. In Gouled v. United States, 255 U.S. 298, 304 (1921), the Court declared fourth amendment rights “to be . . . of the very essence of constitutional liberty.” See also ICC v. Brimson, 154 U.S. 447, 479 (1894) (“[O]f all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security . . . .”) (quoting In re Pacific Ry. Comm’n, 32 F. 241, 250 (N.D. Cal. 1887)).

While modern Supreme Court majorities have not been as generous in praising fourth amendment blessings, the lower courts have not entirely lost sight of the vital significance of that provision. See, e.g., United States v. Butts, 710 F.2d 1139, 1153 (5th Cir. 1983) (“The fourth amendment has been the individual’s shield for decades, one of the primary bulwarks of our liberty and freedom. Few other nations have given their citizens such privileges. Let us be the last to yield them.”). Dissenters on the High Court have also continued the tradition. See, e.g., United States v. Leon, 104 S. Ct. 3405, 3446 (1984) (Brennan, J., dissenting) (“There is hope, however, that in time this or some later Court will restore these precious freedoms to their rightful place as a primary protection for our citizens against overreaching officialdom.”); id. at 3453 (Stevens, J., dissenting) (Fourth amendment rights “are not mere second-class rights, but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.”) (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dis-
significance must be commensurate with our profound and enduring dedication to the fundamental principle of constrained search and seizure power.97

The elevated status of the fourth amendment should prompt us toward a suitably broad vision of informational privacy, but does not indicate the direction or form that a more expansive conception should take. The need for a more significant privacy entitlement does not lead ineluctably to the concept of privacy as a medium, for other conceptions might also substantially enhance the value of fourth amendment privacy. Furthermore, even if an instrumental view is the most logical reinterpretation of the significance of informational privacy, support beyond logical inferences from status is desirable, if not essential.

The Character of Informational Privacy

The idea that confidentiality-type privacy, in general, is a medium within which “other values and activities may or may not thrive in the lives of different individuals”98 is not novel or original. While some downplay emphasis upon the instrumental role of privacy,99 others have no difficulty conceiving of privacy as a medium and, indeed, as most valuable for that reason.100


97. See J. LANDYNISKI, supra note 2, at 47 (The fourth amendment embodies “the belief that to value the privacy of home and person and to afford it constitutional protection against the long reach of government is no less than to value human dignity . . . ”); Bacigal, supra note 29, at 559 (“Security against arbitrary police intrusion is a basic tenet of free society and lies at the heart of the fourth amendment.”).

98. Gerety, supra note 76, at 245.

99. Professor Weinreb believes that although the “privacy secured by the fourth amendment fosters large social interests,” it would “misconceive the great purpose of the amendment to see it primarily as the servant of other social goods, however large and generally valuable.” Weinreb, supra note 89, at 85. The suggestion seems to be that the importance of fourth amendment privacy is somehow diminished by discovering much of its significance in its operation as a medium, its role as “guarantor of other guarantees.” To the contrary, acknowledgement of the substantially instrumental role of fourth amendment privacy enhances its value, elevates the constitutional notion of secrecy-confidentiality above its current, unexalted level, and expands its influence beyond the presently constricted sphere. There are few more significant or ambitious constitutional tasks than those the fourth amendment performs under an instrumental view.

100. See, e.g., Gerety, supra note 76, at 245:

[P]rivacy is not a metaphysical entity but an ethical and legal boundary that we prescribe for others and ourselves. In defining it we define . . . a province. Within the bounds of that province other values and activities may or may not thrive in the lives of different individuals. But privacy is the necessary, limiting condition of much or all that we value in our intimate lives. It may well be that as an ethical and philosophical matter, privacy derives rather than creates its own significance. Its value is then a derivative of the value we attach to the possibility of the conditions and activities it protects.
As a value, privacy does not exist in isolation, but is part and parcel of the system of values that regulates action in society . . . . If privacy prospers, much else will prosper. If privacy is extinguished, much else that we care about will be snuffed out. If privacy changes, much else will change.\textsuperscript{101}

The intrinsically instrumental nature of confidentiality-type privacy in general should prompt us toward a similar conception of constitutional informational privacy as an enabler of the exercise of other liberties. The constitutional assurance of informational privacy should be viewed as "empirically necessary to virtually all of our basic political rights."\textsuperscript{102} We should remain constantly aware that "its loss is a prerequisite for a violation of most of [our] other basic rights and freedoms."\textsuperscript{103}

\textit{The Fourth Amendment Text and History}

The object of the fourth amendment guarantee was and is, if one is to believe the exact language of the safeguard,\textsuperscript{104} to promote the \textit{security} of people "in their persons, houses, papers and effects" by regulating governmental searches and seizures.\textsuperscript{105} To purport to discover in the Framers' word choice clear evidence that fourth amendment privacy is inherently instrumental would strain credulity. Nonetheless, the assurance of a "right . . . to be secure" should yield the inference, or at least the suspicion, that the privacy safeguarded was meant to serve a broader end than secrecy merely for secrecy's sake. In sum, the constitutional text is hospitable to an instrumental view of privacy, and nothing in the language undermines that perspective.

Professor Amsterdam has termed history a "standoff" on questions of fourth amendment meaning and scope, and has observed that we cannot know what the Framers thought about modern practices because

\textit{See also} C. Fried, \textit{supra} note 73, at 138, 140, 147; Freund, \textit{supra} note 75, at 194-95; Simmel, \textit{supra} note 69, at 71. Some of the privacy analysts apparently believe that the entire worth of privacy lies in its role as growth medium for other values and interests.

\textsuperscript{101} Simmel, \textit{supra} note 69, at 71.

\textsuperscript{102} Parker, \textit{supra} note 73, at 287.

\textsuperscript{103} \textit{Id.} at 288. I concede that Professor Parker does not go so far as to declare that the fourth amendment is the prime intended guardian of the instrumental privacy that he describes. Although he does characterize the fourth amendment as among those guarantees "peculiarly related to privacy," \textit{id.}, his discussion contains neither the express conclusion nor the clear implication that the fourth amendment's inherent nature and vital role is as shelter for other Bill of Rights provisions. In contrast, I expressly maintain that the fourth amendment is the master and servant of our other political liberties.

\textsuperscript{104} "The right of the people to be \textit{secure} in their persons, houses, papers, and effects shall not be violated." U.S. Const. amend. IV (emphasis added).

\textsuperscript{105} Illinois v. Andreas, 103 S. Ct. 3319, 3326 (1983) (Brennan, J., dissenting); ICC v. Brimson, 154 U.S. 447, 479 (1894); Boyd v. United States, 116 U.S. 616, 630 (1886); \textit{cf.} T. Taylor, \textit{supra} note 4, at 68 ("[P]ersonal security is the fourth amendment's declared and prime aim . . . .")
they had no opportunity to confront them or to consider the fundamentally different social conditions of today.\textsuperscript{106} We can only know for certain what the Framers thought of the breaking, entering, and rummaging that directly affected them.\textsuperscript{107} It is undeniable that history frequently proves to be an uncertain, even contradictory, guide to the resolution of specific fourth amendment issues.\textsuperscript{108} It provides no definitive answers concerning the constitutional validity of conceiving of privacy as a medium concept. Nevertheless, pertinent and helpful intimations regarding the nature of fourth amendment privacy are discernible in the historical record.\textsuperscript{109}

The fourth amendment’s earliest judicial ancestor, \textit{Entick v. Car-\textit{rington}},\textsuperscript{110} proffered the preservation of secrecy in our relationships with the government as a purpose of protection against searches and seizures. Lord Camden’s condemnation of general warrant authority indicated more than once that secrecy was the jeopardized desideratum.\textsuperscript{111} In this country, one of Patrick Henry’s most memorable arguments in support of a Bill of Rights, specifically, a fourth amendment guarantee, warned of

\begin{itemize}
\item \textsuperscript{106} Amsterdam, \textit{supra} note 1, at 401.
\item \textsuperscript{107} \textit{Id.} at 398.
\item \textsuperscript{108} As one fourth amendment history scholar has understated this case: “[T]he historical record is not always as clear as we should like it to be . . .” J. LANDYNISKI, \textit{supra} note 2, at 19-20. For illustrations of how the unclear historical record is subject to multiple, contradictory interpretations, see the majority and dissenting opinions in the trilogy of cases dealing with the warrant requirement in felony arrest contexts: Steagald v. United States, 451 U.S. 204 (1981); Payton v. New York, 445 U.S. 573 (1980); United States v. Watson, 423 U.S. 411 (1976).
\item \textsuperscript{109} It certainly is neither futile nor unwise to extrapolate from our knowledge of the Framers’ attitudes toward certain historical activities and to hypothesize their probable attitudes toward modern practices. While we cannot “know” what they thought about novel investigatory conduct, by relying on their purposes we can make rational, educated inferences concerning what they would have thought. \textit{See J. LANDYNISKI, supra} note 2, at 19-20:

\begin{quote}
History alone cannot, of course, provide the Supreme Court with clear guidance on all search and seizure questions up for decision, if only because the historical record is not always as clear as we should like it to be, and also because some issues raised under the Fourth Amendment—such as the constitutionality of wire tapping or compulsory blood tests in criminal cases—are of recent origin and could not have been anticipated by those who drafted the Bill of Rights. However, even concerning those questions—and they are many and important—to which the words of the Fourth Amendment do not address themselves with a clarity sufficient to forestall constitutional controversy, history can shed a beam of light to illuminate the underlying purposes of the amendment and thereby provide some guidance for a selection from the possible interpretations of the one that would best realize those purposes.
\end{quote}

\item \textsuperscript{110} 19 Howell’s State Trials 1030 (1765).
\item \textsuperscript{111} \textit{See, e.g.}, \textit{Id.} at 1063 (If the legality of the warrants is upheld “the secret cabinets and bureaus of every subject in this kingdom will be thrown open to search and inspection . . . .”); \textit{Id.} at 1064 (During searches under the warrants at issue the victim’s “most valuable secrets are taken out of his possession.”); \textit{Id.} at 1066 (“Papers are the owner’s . . . dearest property; . . . where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass.”).
\end{itemize}
the dangers of invasions of "houses and most secret recesses" by excisemen who would "go into ... cellars and rooms and search, ransack and measure everything" eaten, drunk, and worn. Undeniably, the high value placed upon informational secrecy was an influential motivation for the regulation of searches in England and this country.

Conceivably, the respect accorded secrecy might have been engendered wholly by its inherent worth. The Framers might have preserved secrecy for its intrinsic value, for the solace and nurture that a confidential domain can afford. While neither the Entick quotations nor Patrick Henry's rhetoric precludes that possibility, other historical facts indicate that more was known to be at stake.

First, the search and seizure practices that prompted British and American cries for protection were designed to, and did in fact, suppress political and religious freedom. Excessively discretionary general warrants and writs of assistance were employed to impede the exercise of freedoms of speech, press, and religion and made enjoyment of those liberties difficult, if not impossible. The unfettered power exercised by virtue of those law enforcement tools led to demands for regulation of searches and seizures. Framers who were aware that unregulated government access to our affairs provided by those writs and warrants entailed serious costs to freedom could hardly be ignorant of the proposition that the informational privacy of those affairs was valuable because of the opportunities it afforded for enjoyment of religious, expressive, and political freedoms.

In addition, some of the earliest comments concerning the desirabil-

112. N. LASSON, supra note 4, at 92-93. Henry's use of the term "secret" coupled with his concern with official measurement of personal items suggests that he regarded the loss of information privacy as one of the reasons for constitutionally curbing government conduct.

113. See Lopez v. United States, 373 U.S. 427, 469-70 (1963) (Brennan, J., dissenting) ("We must bear in mind that historically the search and seizure power was used to suppress freedom of speech and of the press.") (citation omitted); see also N. LASSON, supra note 4, at 37-50; Hufstedler, Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering, 127 U. PA. L. REV. 1483, 1487 (1979); Stengel, The Background of the Fourth Amendment to the Constitution of the United States, Part One, 3 U. RICH. L. REV. 278, 283-98; Comment, Pen Registers, supra note 84, at 760.

In America, abusive search and seizure powers were primarily used to assist enforcement of colonial trade restrictions and regulations. Writs of assistance employed by customs officers constituted "continuous license[s] and authority" which "empowered the officer and his deputies and servants to search ... wherever they suspected uncustomed goods to be and to break open any receptacle or package. ..." N. LASSON, supra note 4, at 54. Consequently, "[t]he principal agitation in the colonies in regard to search and seizure ... did not focus on the use of the general warrant in proceedings involving political and religious offenses, ... but instead ... in proceedings concerning commercial offenses ..." Stengel, supra, at 293-94; see also T. TAYLOR, supra note 4, at 35. Nevertheless, the Framers undoubtedly were aware of the British experience and were conscious of the threats to political and religious freedom posed by unbridled search and seizure power.

114. See N. LASSON, supra note 4, at 55-73.
ity of reining in power to search and seize suggest a concern broader than secrecy alone. In *Entick v. Carrington*, Lord Camden stated that legalization of general warrant power "would be subversive to all the comforts of society." James Otis, the patriot-orator whose denunciation of writs of assistance and general warrants is said to have commenced the course of events that culminated in the birth of our nation, termed such devices "most destructive of . . . liberty." Such expressions convey strong hints that more than mere secrecy is jeopardized by searches and, consequently, that more is preserved by restricting them.

In sum, neither the fourth amendment text nor the historical record are unduly strained by an interpretation of fourth amendment informational privacy as more expansive than simply secrecy for its own sake. The constitutional language and background events accommodate and furnish bases for crediting an instrumental vision of privacy.

The Quintessential Search and the Sacredness of the Home

The Framers of the fourth amendment constitutionally curbed official authority to search with the specific intent to eliminate the abuses and harms resulting from physical intrusions, most particularly, entries into the home. From earliest times to today, the home has been accorded a special, almost sacred place in our social and constitutional scheme. The unchanged reverence for the home could lead to the inferences that the only privacy intended for constitutional protection is

---

115. 19 Howell's State Trials 1030 (1765).
116. Id. at 1066.
117. N. LASSON, *supra* note 4, at 59. Similarly, others had called general search and seizure powers "badge[s] of slavery," id. at 39, and "rod[s] of iron for the chastisement of the people," which were "totally subversive of the liberty of the subject." Id. at 45.
118. Historically, general warrants and writs of assistance were objectionable mainly because they invested executive authorities with nearly boundless discretion to search and seize persons, homes, and effects. It is consonant with the history of the fourth amendment to err on the side of caution in making threshold determinations because the conclusion that any given "technique" is not a "search" means that it "need not be reasonable and may be employed without a warrant and without probable cause, regardless of the circumstances surrounding its use." United States v. Jacobsen, 104 S. Ct. 1652, 1669 (1984) (Brennan, J., dissenting). In other words, a decision against fourth amendment coverage generates harm from executive discretion identical to that feared and loathed by the Framers. *See supra* note 4.
119. U.S. CONST. amend IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .") (emphasis added).
120. *See* N. LASSON, *supra* note 4, at 123-24 ("[W]ith regard to the dwelling house, the traditions of time immemorial still control in holding its privacy to be most inviolable.").

The sanctity of the home, a notion of ancient origin reflected in both "custom and law, [was] partly . . . a result of the natural desire for privacy, partly an outgrowth, in all probability, of the emphasis placed by the ancients upon the home as a place of hospitality, shelter, and protection." Id. at 13. Early on, the home assumed an exalted place in the development of Anglo-Saxon culture. *See* Stengel, *supra* note 113, at 280. In England, Lord Chat-
that resulting from the provision of this tangible enclave and that the intended benefits of that privacy are solitude, quiet repose, and secrecy for secrecy's sake. Such benefits undoubtedly are among the fourth amendment's objectives, but limiting its goals to those benefits reflects much too narrow a perspective on the rationales for home privacy.

The home not only provides a domain in which to enjoy solitude and secrecy, it also furnishes a readily identifiable space within which people can fearlessly enjoy other entitlements of our free society. Homes, for example, furnish opportunities for free expression, free religious practice, and "personal autonomy."1 Security against physical intrusion into the home provides both a clearly delineated, necessary realm of confidentiality for its own sake and space for the exercise of other personal freedoms.1 In the latter respect, home privacy is archetypically instrumental, exemplifying the role of privacy as a medium that makes other benefits realizable.1 Home searches threaten a free and open society.

1 T. Cooley, Constitutional Limitations 610 n.2 (8th ed. 1927). In the colonies, James Otis invoked the same theme in his orations against writs of assistance:

Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.

T. Taylor, supra note 4, at 37 (quoting from 2 Legal Papers of John Adams 141-44 (Wroth & Zobel eds. 1965)).

No study of the scope of fourth amendment coverage would be complete without acknowledging that the principle of home sanctity resides securely at the core of the guarantee and motivates its restraints upon official search and seizure power. See T. Cooley, supra, at 611; J. Landynski, supra note 2, at 25; N. Lasson, supra note 4, at 13, 49-50; Bacical, supra note 29, at 532 n.20; Stengel, supra note 113, at 280, 288. The sanctity of the home remains today probably the most unassailable fact of fourth amendment jurisprudence. The Supreme Court regularly reiterates that theme. See, e.g., Welsh v. Wisconsin, 104 S. Ct. 2091, 2097 (1984); Michigan v. Clifford, 104 S. Ct. 641, 648 (1984); Payton v. New York, 445 U.S. 573, 589 (1980); Silverman v. United States, 365 U.S. 505, 511 (1961); Weeks v. United States, 232 U.S. 383, 390 (1914). For an eloquent restatement of the notion, see United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting). The Burger Court's assault on fourth amendment protections recently, however, led it to compromise home sanctity to some degree. See Segura v. United States, 104 S. Ct. 3380, 3404 (1984) (Stevens, J., dissenting) (concluding that the "Court's rhetoric" will result in "erosion of the sanctity of the home").

121. Throughout this Article, "personal autonomy" is used as a shorthand expression for the privacy rights recognized in such cases as Griswold v. Connecticut, 381 U.S. 479 (1965). See infra note 357 & accompanying text.

122. While property interest protection is not the main purpose of the guarantee against unreasonable searches, regulation of physical breaches of the home does protect the integrity of our dwellings and of the objects within, as well as our undisturbed possession of them.123. See supra notes 92-93 & accompanying text.
not only because they disturb the repose of citizens and deprive them of a right to pure secrecy, but also because they undermine the corollary assurance of opportunities to enjoy other entitlements. The confidentiality assured by our homes is valuable not just because it closes actual doors to the government, but because it opens figurative doors for those who dwell within.\textsuperscript{124}

Thus, the quintessential governmental search and the sacredness of the home which stands in opposition to it, rather than circumscribing our view of the constitutional core, should promote an expanded, instrumental conception of the privacy interest protected by the fourth amendment.

\textit{Judicial Intimations of Instrumental Privacy}

The opinions of the Supreme Court have apprised us that privacy interests are at the fourth amendment core, but have taught us little about the true nature of those interests.\textsuperscript{125} The development of fourth amendment privacy theory in the lower courts has been similarly deficient. The weight of direct judicial authority, therefore, will not support any conception of the core interest, much less the privacy-as-medium view. Expressions in early Supreme Court opinions, however, are noteworthy because they are consistent with, and might well suggest, an instrumental conception.

In \textit{Boyd v. United States},\textsuperscript{126} the first fourth amendment landmark, the Court took the position—substantially discredited today—that the fourth and fifth amendments are so intimately related that they “run almost into each other”\textsuperscript{127} and suggested that the guarantee against unreasonable searches and seizures and the privilege against self-incrimination “shed great light on each other.”\textsuperscript{128} Implicit in those observations is the acknowledgement that Bill of Rights provisions need not and ought not always be viewed in isolation—that more than one safeguard might combine to produce the constitutional liberties sought by the Framers. Without denying that each guarantee addresses an essentially independent concern, \textit{Boyd} recognized the potential for relying on the principles of one provision to comprehend another fully and accord it its intended

\begin{itemize}
\item \textsuperscript{124} \textit{Cf.} Gerety, supra note 76, at 285 n.190 (security of constitutionally protected areas makes conduct of “intimacies of life” possible); Hufstedler, \textit{supra} note 113, at 1520 (zones of privacy, including the home, “are essential to fill some of our most basic human needs”); Parker, \textit{supra} note 73, at 286-89 (at time of framing of fourth amendment, home protection was sufficient to preserve privacy, that is, power or control over person, houses, papers, or effects).
\item \textsuperscript{125} \textit{See} Amsterdam, supra note 1, at 386; Weinreb, \textit{supra} note 89, at 49.
\item \textsuperscript{126} 116 U.S. 616 (1886).
\item \textsuperscript{127} \textit{Id.} at 630.
\item \textsuperscript{128} \textit{Id.} at 633; \textit{see also} Hudson v. Palmer, 104 S. Ct. 3194, 3211 (1984) (Stevens, J., concurring in part and dissenting in part).
\end{itemize}
An instrumental vision of fourth amendment privacy comports with and implements that recognition.

Additionally, those *Boyd* observations portray fourth amendment regulation as a second line of defense against compulsory self-incrimination. The fourth amendment is seen as an assistant to the fifth amendment in providing shelter against inquisitional methods. Justice Bradley's opinion thus suggests the specific possibility that the fourth amendment is concerned with preserving other Bill of Rights values. That intimation—not wholly undermined by subsequent interpretation—furthers the case for an instrumental conception of fourth amendment privacy.

According to the Court in *ICC v. Brimson*, "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security . . . . Without the enjoyment of this right, all others would lose half their value." Later, in *Gouled v. United States*, the majority described fourth amendment protection as "indispensable to the 'full enjoyment of personal security, personal liberty and private property' " and observed that it should "be regarded as of the very essence of constitutional liberty . . . ." Both of these opinions express sentiments consonant with an instrumental vision of fourth amendment privacy.

In sum, in *Boyd* and a few other early opinions, the Court, with varying degrees of precision, pointed toward a conception of privacy which recognized its critical importance to, indeed, its close relationship

---

129. Cf. Note, *Alternative Approaches for Resolving Associated First and Fourth Amendment Issues*, 44 TEMP. L.Q. 420, 420 (1971) ("Since compartmental approaches have been applied by courts when confronted with [constitutional] issues, judicial interpretations of the various guarantees insured in the Bill of Rights have developed more or less independently. However, these approaches often break down when issues overlap articulated compartments.")

130. See *Lopez v. United States*, 373 U.S. 427, 456 (1963) (Brennan, J., dissenting). Although not the main object of fourth amendment protection against unreasonable searches and seizures, promotion and strengthening of the anti-inquisitorial principles upon which our system was built were among the historical purposes of that guarantee. See F. STIMSON, FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES 45-46 (1908).

131. The Supreme Court has found fault with *Boyd*'s perception of the closeness of the relationship between the fourth and fifth amendments, see *Andresen v. Maryland*, 427 U.S. 463, 472 (1976); *Fisher v. United States*, 425 U.S. 391, 407 (1976), but has not precluded the possibility of some relationship between the two provisions. While indicating that analysis of the significance of the two provisions should be separate, the Supreme Court has not held that a complete divorce is necessary. Such a holding would be in serious conflict with the historical origins of the two amendments. See supra note 130; see also *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

132. 154 U.S. 447 (1894).

133. *Id.* at 479 (quoting *In re Pacific Ry. Comm'n*, 32 F. 241, 250 (N.D. Cal. 1887)).

134. 255 U.S. 298 (1921).

135. *Id.* at 304.
with, the other entitlements that are part and parcel of our free society. 136

A Critique of and Proposals for Modification of the Current Doctrine of Fourth Amendment Purview

The leading actor in the current drama of fourth amendment scope is the "reasonable expectation of privacy," a formula of relatively recent origin and without textual basis in the Constitution. 137 The goal of this section is analysis of the fidelity of the current reasonable expectations doctrine to the instrumental conception of privacy explained in the last section. 138 After examining the suitability and impact of the language

136. When the approach to the delineation of fourth amendment territory was narrowed by *Olmstead*, majority expressions consistent with an instrumental perspective disappeared. Dissenters, however, refused to allow the sense that fourth amendment privacy is an encompassing and instrumental entitlement to be extinguished. In *Olmstead* itself, Justice Brandeis, speculating about the perils of future technological innovations, observed:

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. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?

277 U.S. at 474 (Brandeis, J., dissenting) (footnotes omitted). Other voices of protest in later cases have repeatedly reminded the majority of the true breadth of fourth amendment privacy. See, e.g., Smith v. Maryland, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting) ("[G]overnmental access to telephone records on less than probable cause may . . . impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society."); United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (proposing that questions of fourth amendment application "be answered by assessing . . . the likely . . . impact on the individual's sense of security" which "is the paramount concern of Fourth Amendment liberties"); Lopez v. United States, 373 U.S. 427, 457 (1963) (Brennan, J., dissenting) ("purpose of the Fourth Amendment is to protect individual liberty in the broadest sense from governmental intrusion"); Goldman v. United States, 316 U.S. 129, 137 (1942) (Murphy, J., dissenting) (The "spiritual freedom of the individual depends in no small measure upon the preservation" of the right to privacy enshrined in the fourth amendment.); see also Warden v. Hayden, 387 U.S. 294, 323-24 (1967) (Douglas, J., dissenting).

Some lower court opinions have reflected similar ideas. See, e.g., State v. Hunt, 91 N.J. 338, 347 (1982) ("dangers to political liberty" acknowledged); see also id. at 351 (Pashman, J., concurring) (warning of the "danger of political abuse posed by unlimited police access"); People v. Sporleder, 666 P.2d 135, 143 n.7 (Colo. 1983) ("chilling effect" on associational rights); cf. United States v. Choate, 576 F.2d 165, 198-99 (9th Cir.) (Hufstedler, J., concurring and dissenting) (fourth amendment privacy is "related to the liberty interests which preclude governmental interference with highly personal decisions and the right to keep personal facts to oneself.") (footnote omitted), cert. denied, 439 U.S. 953 (1978), aff'd, 619 F.2d 21 (9th Cir.), cert. denied, 449 U.S. 951 (1980).

137. See supra text accompanying notes 31-34.

138. In evaluating the theoretical appropriateness of the formula and its doctrinal
chosen to perform the definitional tasks, I will assess the operational details of the accepted doctrine, that is, the factors that have figured prominently in the "reasonable expectation" threshold cases. The discussion indicates how the current approach has gone astray and wherein its deficiencies lie.

The Language of the Current Formula

The Expectational Prerequisite

The Katz Court gave its stamp of approval to a conclusion that has since become a central principle of fourth amendment law, "that the principal object of the fourth amendment is the protection of privacy, rather than property . . . ."\(^{139}\) Katz' further conclusion that the "principal object" must control threshold decisions\(^{140}\) generated a critical need for identification and refinement of the constituency of fourth amendment privacy. Naked privacy alone would not do. The adoption of the simple "reasonable expectations of privacy" language commenced the descriptive task. Beneath the mantle of that deceptively straightforward benchmark, however, intriguing, unsettling connotations and critical, unanswered questions crept into constitutional law.

One problematic aspect of the formula is the selection of the concept of "expectations" as a qualification upon the fourth amendment core.\(^{141}\) It was but a small and natural step from that gloss to the "actual expectation" prong of the two-stage test. The illogic of inquiry into the reasonableness of a nonexistent expectation—that is, the apparent impossibility of possessing a reasonable expectation of anything without first possessing an expectation of that entity—made introduction of the "actual expectation" element an almost inevitable occurrence.\(^{142}\)


\(^{140}\) Katz, 389 U.S. at 353.

\(^{141}\) It is noteworthy that Justice Stewart never used the words "expectation" or "expect" in the Katz majority opinion. He stated only that Mr. Katz had "justifiably relied" upon privacy. 389 U.S. at 353.

\(^{142}\) Reasonable expectations of privacy are inconceivable without actual expectations of some kind. Those requisite actual expectations, however, did not have to take the form of subjective expectations of specific claimants or presumed subjective expectations of people in general. Such expectations could have been conceptualized as those that would be harbored by the "reasonable person" in a given setting. Although that perspective may be akin to the "people in general" approach to actual expectation assessment, the latter does not make reference to "reasonable" people. Also, assessment of actual expectations objectively would not be duplicative of the second Harlan prong, which demands expectations that society is prepared to recognize as reasonable, not expectations that the reasonable person would possess. The
In accord with Justice Harlan's later repudiation of some implications of his Katz concurrence, courts and commentators have criticized the actual (subjective) expectation component. Purely subjective expectations have been said to have no proper place in a description of fourth amendment privacy. According to the critics, individuals should be capable of neither expanding nor contracting the extent of fourth amendment coverage. More importantly, that component has raised concerns about unwarranted and intolerable government control of the constitutional scope by designed manipulation of what the populace expects.

Some courts apparently believe that the proper solution to those problems is objectification of the first step of the Harlan standard. They would ask not what a specific victim of an alleged search in fact expected, but what people in general who behave like a given victim has behaved would expect. While eliminating fourth amendment idiosyncracies resulting from an aberrant or oblivious individual, that approach will not extirpate the inherent risk of official tinkering with popular expectations.

More importantly, an objective perspective on the actual expectation criterion fails to address the basic issue of the propriety of imposing any expectational qualification upon the central fourth amendment interest. Should people have to conduct themselves in manners exhibiting certain expectations of the public or the government to be entitled to potential differences among these standards need not be fully explored in light of my conclusion that no expectational component should be involved in fourth amendment analysis. See infra notes 153-60 & accompanying text.

144. See, e.g., Amsterdam, supra note 1, at 384 (“An actual, subjective expectation of privacy obviously has no place in a statement of what Katz held or in a theory of what the Fourth Amendment protects.”); Comment, A Taxonomy, supra note 69, at 1462 (“For the courts . . . to say that privacy will be protected only where people expect such protection is a circular avoidance of responsibility.”).
145. “[An actual expectation of privacy] can neither add to, nor can its absence detract from, an individual's claim to Fourth Amendment protection.” Amsterdam, supra note 1, at 384.
146. See, e.g., United States v. Taborda, 635 F.2d 131, 137 (2d Cir. 1980) (“The use of a subjective test as to expectations of privacy has been criticized by some courts and commentators on Orwellian grounds, that is, that it would be possible for the government by edict or by known systematic practice to condition the expectations of the populace in such a way that no one would have any real hope of privacy.”); Amsterdam, supra note 1, at 384 (“The government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance.”); Note, supra note 138, at 157 (“The government might reduce—or even make it impossible to have—such expectations simply by announcing prior to initiating any investigation that it intends to conduct searches.”).
147. See supra note 45. The Supreme Court might be among this objectifying group, for its pronouncements concerning the character of the actual expectation requirement support both a subjective, “individual claimant” and an objective, “people in general” perspective. See supra text accompanying notes 39-45.
fourth amendment shelter? Other fundamental rights do not appear to be dependent upon the expectations of potential claimants. Considering the implications of its adoption, such an ostensibly novel qualifier must be theoretically justified. Unfortunately, the judiciary has defaulted on that task.

The genesis of the expectation element may well be attributed to a conception of privacy as essentially and exclusively an interest in secrecy for its own sake. Arguably, insofar as one has any interest in maintaining secrecy, she will necessarily behave in manners evincing that interest. According to that reasoning, the inherent nature of secrecy requires, as a precondition to a meritorious claim, that the interested party not surrender it by revelatory behavior. Rather, secrecy's character necessitates that a person jealously safeguard or "keep" it. Consequently, insofar as a person demonstrates no expectation of confidentiality—for example, by failing to build barriers, by talking openly to others, by travelling in public—she must have little or no interest in preserving secrecy, thus no privacy interest worthy of fourth amendment protection. In sum, threshold analysis includes an expectational element because it is an intrinsic characteristic of the core fourth amendment interest.

That reasoning has several logical flaws. Underlying the argument outlined above lurks the unexpressed assumption that secrecy is an all-or-nothing proposition. There is, however, no sound reason for adherence to an absolutist view of secrecy. Even if the privacy interest safe-

148. In Hudson v. Palmer, 104 S. Ct. 3194 (1984), Chief Justice Burger admitted, in discussing the subjective expectation threshold element, that "constitutional rights are generally not defined by the subjective intent of those asserting the rights." Id. at 3199 n.7. The Chief Justice, however, did not mean that the absence of subjective expectations cannot defeat constitutional protection, but only that their presence does not necessarily generate such protection. Cf. Mapp v. Ohio, 367 U.S. 643, 656 (1961) (reasoning that the exclusionary rule is essential to ensure that fourth amendment rights "would [not] stand in marked contrast to all other rights").

149. LaFave, Nine Key Decisions Expand Authority to Search and Seize, 69 A.B.A. J. 1740, 1740 (1983) (The Court "often has taken an exceedingly narrow view of Katz, relying on the fallacious notion that privacy is an all-or-nothing proposition . . . ").

150. In his Smith v. Maryland, dissent, which contains the seeds of some of the central ideas developed in this Article, Justice Marshall pointedly observed that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts . . . for a limited business purpose need not assume that this information will be released to other persons for other purposes." 442 U.S. at 749 (Marshall, J., dissenting). Earlier, Justice Douglas had stated:

[The] individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. He remains the sole judge as to what must be said and what must remain unspoken. This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth.

guarded by the fourth amendment is purely and simply a confidentiality entitlement, it does not necessarily follow that every instance of open conduct, or that any behavior that permits or demonstrates a breach of total secrecy, ought to result in forfeit of the right to claim any privacy interest. Selective secrecy and partial confidentiality are wholly conceivable and not, despite the superficial allure of the argument to the contrary, internally inconsistent. Not to allow an individual to sacrifice a portion of her secrecy interest, or to suspend confidentiality vis-a-vis specific individuals and not others, without surrenderring all claims to fourth amendment privacy, makes little sense.\textsuperscript{151}

Certain conduct, of course, might demonstrate such a lack of interest in confidentiality that the finding of an insufficient basis for a meritorious fourth amendment claim would be justifiable.\textsuperscript{152} The contention here is simply that not every instance of openness, not every breach of

\textsuperscript{151} One way in which the nondiscriminating, all-or-nothing view of privacy has operated is through the general proclivity to assess a claimant's expectations vis-a-vis the public at large. Analysts have maintained that this is not the appropriate inquiry, that attention must be paid to the differences among one's expectations of different parties. See, e.g., Baciga, supra note 29, at 550; Note, supra note 138, at 166; cf. Simmel, supra note 69, at 72 ("The territory that we claim as our private sphere varies with the adversary we face. It is quite a different thing, depending on whether 'society' manifests itself as a government, or community, school, or employer, neighbor, friend, or spouse."). In addition, if expectations are pertinent to fourth amendment interests, they must be measured with reference to expectations of the government. See, e.g., Grano, supra note 84, at 432; Comment, Pen Registers, supra note 84, at 757-58; see also Rakas v. Illinois, 439 U.S. 128, 164 (1978) (White, J., dissenting) (One who shares an area with a limited number of others, "though his privacy is not absolute, is entitled to expect that he is sharing it only with those persons and that governmental officials will intrude only with consent or by complying with the Fourth Amendment."); People v. Sneed, 32 Cal. App. 3d 535, 541, 108 Cal. Rptr. 146, 150 (1973); State v. Stanton, 7 Or. App. 286, 296-97, 490 P.2d 1274, 1279 (1971); see also Smith v. State, 510 P.2d 793, 798 (Alaska 1973).

The merits of an approach that measures actual expectations vis-a-vis the government will not be analyzed here. From later discussion regarding the flaws in current criteria for judging the existence of a fourth amendment interest, however, it should be evident that the evaluation of entitlements to informational privacy by reference to arguable expectations vis-a-vis other private parties is often seriously inconsistent with the reasons for such a grant of privacy. See, e.g., infra text accompanying notes 257-59, 336-39.

\textsuperscript{152} Just as there is no reason to demand total insulation of all information to preserve a justifiable informational privacy claim against the government, there is no reason to deny that some voluntary behavior is so nonprotective and self-revelatory that it belies any claim to secrecy for its own sake. In essence, individuals who choose to behave in those manners "constructively waive" whatever privacy entitlement they might otherwise possess. It may well be proper, therefore, to deny them the opportunity to revoke their choice at a later date. Such reasoning is most likely to be valid, however, when the only reason for protecting privacy is the
secrecy should result in loss of fourth amendment protection through application of the actual expectation criterion. Unless one takes an absolute view of confidentiality, the critical question is how protective an individual must be, or, in the language of current doctrine, what kind and degree of expectation a person must exhibit to retain a constitutionally protected informational privacy interest. In other words, unless one can preserve an interest in secrecy only by foregoing all openness, the "expectational" issue must be one of degree—that is, how much and what kind of "nonsecretive" behavior is permissible without forfeit of all expectations?

The concession that the nature of secrecy for its own sake might demand some precautionary behavior exhibiting an actual expectation of privacy is not (and is not meant to seem) tantamount to acknowledgment of the appropriateness of that qualification upon our fourth amendment entitlement. That constitutional concession would follow if fourth amendment privacy could properly be viewed as a simple secrecy interest. As the earlier examination of the character of fourth amendment privacy has demonstrated, however, such an interpretation constitutes a serious and unwarranted underestimation of the worth of constitutional protection and the function of the fourth amendment. Consequently, the case for an expectational gloss on the fourth amendment privacy interest cannot be defensibly grounded in a narrow secrecy conception of the constitutional core. Furthermore, an instrumental vision of fourth amendment privacy not only fails to support the expectational ingredient, but proves that element to be an unfaithful, even traitorous guide to fourth amendment scope. The demand for expectation exhibitory behavior as a precondition to valid privacy claims often undercuts the liberty-enhancing objectives of instrumental informational privacy.

The expectational demand of current doctrine is not always inconsistent with correct fourth amendment analysis. In certain instances, an individual's conduct might involve revelation of a type or to an extent that is unnecessary, gratuitous, and easily avoided. In many contexts, however, a degree of openness is essential to and integrally connected with the exercise and enjoyment of constitutional rights. Expressive free-

“inherent” worth of secrecy. It must not be permitted to undermine proper instrumental objectives.

153. See supra notes 91-136 & accompanying text.

154. See supra notes 91-136 & accompanying text.

155. In those cases, it would seem permissible to infer that the person has no need, desire, or concern for the informational privacy furnished by the Constitution. Such truly incautious behavior could appropriately be counted against a claim of confidentiality from the government. Absent reasons for the behavioral failure to demonstrate expectations of secrecy-type privacy vis-a-vis the government, a "constructive waiver" finding is logical. Such a conclusion is consonant with the doctrine of fourth amendment consent. See Bacigal, supra note 29, at 537.
dom, associational rights, and interests in "personal autonomy" can often be fully taken advantage of only by engaging in somewhat revelatory behavior—that is, conduct that makes information about one's affairs more accessible to others, including the government. An appropriately broad conception of fourth amendment informational privacy should provide a medium for the enjoyment of those liberties. Yet current doctrine discovers in the openness involved in the exercise of those freedoms an absence of privacy expectations that is fatal to fourth amendment entitlement. In essence, behavioral characteristics that are part and parcel of the very activities the fourth amendment should be promoting can nullify the viability of a constitutional claim.

In instances in which arguably revelatory conduct is important to enjoying other interests and freedoms, doctrine that responds to any amount of openness with a denial of constitutional protection is perverse and dissonant with the essential purposes of the fourth amendment. Neither a particular individual's expectations nor the expectations of people in general concerning government access to information should be determinative of constitutional scope in those situations. Rather, decisions regarding fourth amendment entitlement must take into account the reasons for according informational privacy. Minimizing the risks of constitutional infidelity requires that the pertinence of "actual expectations" be determined by assessing the degree of, type of, and rationales for nonsecretive conduct in the light of those reasons.

The expectational gloss in current threshold doctrine could be retained, and its impact could be confined to appropriate situations, if it was employed with an understanding of the risks it poses to fourth amendment goals. The perils threatened by continued employment of the language of expectations, however, coupled with the absence of substantial reasons for retaining it, militate in favor of its abolition.

The operation of the actual expectation component is not completely unwarranted in threshold analysis. Nevertheless, the dangers posed by expectational doctrine call for termination of reliance upon it. First, the language of expectations does not indicate the relevant inquiry. What in fact justifies suspension of constitutional coverage are not the "expectations" of privacy, but the "desires" or "needs" for privacy indicated by (or, rather, shown to be lacking by) revelatory behavior. Furthermore, expectational doctrine is burdened by a past pattern of reflexive responses to any revelatory behavior, with conclusions that no privacy entitlement exists, that is, by an all-or-nothing perspective. Yet even in situations in which the purest of interests in secrecy are at stake, and certainly in instances in which additional goals of instrumental informational privacy are implicated, such airtight isolation and self-preservation should not be demanded. The relevance of behavior that fails to exhibit privacy expectations properly can be assessed only if the all-or-nothing perspective on privacy is abandoned and the openness of conduct is critically examined with the specific goals of privacy and needs of the claimant in full view. For these reasons, it is preferable to adopt different, more appropriate language for handling situations in which voluntary revelatory behavior is arguably apposite to fourth amendment rights.

156. See infra notes 257-59, 336-38, 357-58 & accompanying text.
157. See supra note 147 & accompanying text.
158. The operation of the actual expectation component is not completely unwarranted in threshold analysis. See supra note 155 & accompanying text. Nevertheless, the dangers posed by expectational doctrine call for termination of reliance upon it. First, the language of expectations does not indicate the relevant inquiry. What in fact justifies suspension of constitutional coverage are not the "expectations" of privacy, but the "desires" or "needs" for privacy indicated by (or, rather, shown to be lacking by) revelatory behavior. Furthermore, expectational doctrine is burdened by a past pattern of reflexive responses to any revelatory behavior, with conclusions that no privacy entitlement exists, that is, by an all-or-nothing perspective. Yet even in situations in which the purest of interests in secrecy are at stake, and certainly in instances in which additional goals of instrumental informational privacy are implicated, such airtight isolation and self-preservation should not be demanded. The relevance of behavior that fails to exhibit privacy expectations properly can be assessed only if the all-or-nothing perspective on privacy is abandoned and the openness of conduct is critically examined with the specific goals of privacy and needs of the claimant in full view. For these reasons, it is preferable to adopt different, more appropriate language for handling situations in which voluntary revelatory behavior is arguably apposite to fourth amendment rights.
expectational gloss generates the potential for idiosyncratic decisions based on the beliefs or conduct of individual claimants\(^{159}\) and risks of improper governmental control of expectations and constriction of constitutional rights.\(^{160}\) Moreover, even if those pitfalls are avoided, the most significant peril remains—the uncritical reaction to any exposing or revelatory conduct with a rejection of fourth amendment entitlement. The understandable, though misguided, tendency to conclude that people who behave in revelatory fashions must have no interest in confidentiality is a natural outgrowth of the search for expectations. Considering the connotations of the words “expectation of privacy,” their association with an interest in secrecy for its own sake, and the doctrinal roles they have played, it might well be impossible to purge that unwarranted tendency while continuing to employ the criterion. In sum, no matter what perspective one takes on the expectation of privacy requirement, the risks to correct fourth amendment outcomes justify its abolition in favor of doctrine more compatible with the instrumental ends of the fourth amendment’s privacy guarantee.

The Prescriptive Process and the Questionable Language of Reasonableness

Although the actual expectation requirement is theoretically disturbing, its infrequent employment as a ground for denying a protectible interest has minimized its harmful impact on threshold decisions. The second stage of the two-prong test, at which nearly all critical decisions regarding fourth amendment applicability occur, should generate much more serious concern.\(^{161}\)

The determination required by the second stage involves the courts in what has most accurately been termed “prescriptive” duties.\(^{162}\) Justice Harlan’s original formulation of the second prong inquiry was not simply whether an expectation is “reasonable,” but whether “society is prepared to recognize [an expectation] as ‘reasonable.’”\(^{163}\) In later treat-

\(^{159}\) See supra note 145 & accompanying text. Realization of that peril, of course, depends upon a court’s reliance upon the subjective frame of mind of a specific individual. The possibility of such an interpretation cannot be ignored in light of the Supreme Court’s allusions to the validity of that perspective. See Rawlings v. Kentucky, 448 U.S. 98, 105 (1980); Smith v. Maryland, 442 U.S. 735, 742-43 (1979); supra text accompanying notes 39-45. Some lower courts have so construed the actual expectation element. See, e.g., United States v. Haydel, 649 F.2d 1152, 1155 (5th Cir. 1981); United States v. Cassity, 546 F. Supp. 611, 617-18 (E.D. Mich. 1981).

\(^{160}\) See supra note 146 & accompanying text.

\(^{161}\) See Hudson v. Palmer, 104 S. Ct. 3194, 3199 n.7 (1984) (“The Court has always emphasized the second of [Harlan’s] two requirements” and “even Justice Harlan stressed the controlling importance of the second of these two requirements . . . .”).

\(^{162}\) Smith, 442 U.S. at 750 (Marshall, J., dissenting) (“By its terms, the constitutional prohibition of unreasonable searches and seizures assigns to the judiciary some prescriptive responsibility.”).

\(^{163}\) Katz, 389 U.S. at 361 (Harlan, J., concurring).
ment of the subject, he left no doubt that the essential role of the courts is to prescribe entitlements, not to mirror extant individual perceptions or societal conditions.164 Other expressions by members of the Court have betrayed at least the suspicion, if not the awareness, that the Court’s function in this area is the prescription of fourth amendment boundaries, not the endorsement of individual or popular perceptions of its reach.165 Whereas judges might be tempted to reflect current societal conditions in resolving actual expectation questions, once they pass beyond that step their task is to discern and impose norms, to determine what expectations are constitutionally shielded and thus what entitlements the fourth amendment grants.166

164. In United States v. White, 401 U.S. 745 (1971), after reviewing the “risk analysis approach” and the “expectations approach,” and acknowledging that they “represent an advance over the unsophisticated trespass analysis of the common law,” Justice Harlan cautioned that even these approaches “have their limitations” and must “transcend the search for subjective expectations or legal attributions of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.” Id. at 786 (Harlan, J., dissenting) (footnote omitted).

165. See Rakas v. Illinois, 439 U.S. 128, 166, 168 n.21 (1978) (White, J., dissenting); supra note 162 & accompanying text. In Smith, 442 U.S. at 740 n.5, a majority of the Court acknowledged that the determination of “whether a ‘legitimate expectation of privacy’” exists must sometimes be “normative.” Granted, Justice Blackmun’s opinion does not amount to a concession that the Katz inquiry is always, or even ordinarily, essentially “normative.” Rather, the reference to setting norms appears in a footnote cautioning against reliance upon “subjective expectations” and describing a proper inquiry in the presumably rare case in which “subjective expectations had been ‘conditioned’ by influences alien to well-recognized Fourth Amendment freedoms . . .” Id. Still, the Smith “caution” is significant because its reference to “well-recognized Fourth Amendment freedoms” that would, if challenged by “alien influences,” be preserved by “a normative inquiry,” and implies a definable constitutional entitlement not subject to elimination or contraction by individuals or societal majorities.

Unfortunately, the Smith Court’s discussion is unsatisfying in several respects. The general circumstances that should trigger a normative inquiry are not evident. Though the Court provides a couple of exemplary situations, it gives no indication of what quality or attribute renders an influence “alien” to the fourth amendment. Additionally, the features of the normative inquiry that would be proper in special situations are not apparent. Although the majority might have envisioned the possibility of disregarding both prongs of the Harlan test, its discussion focuses upon only the potential inaptness of the actual expectation prong. Consequently, the Court left open the possibility that a special, normative decision might incorporate the reasonable expectation prong of current doctrine without modification. The most curious, unexplained (possibly because it is inexplicable), and flawed aspect of the Smith discussion, however, is the implication that threshold inquiry does not ordinarily involve the judiciary in the ascertainment and prescription of fourth amendment privacy norms. That suggestion ignores the fact that the second stage of Harlan’s Katz test, the stage at which virtually all critical decisions have occurred, is inherently prescriptive and requires the Court to make normative judgments. The Smith majority opinion seems to assume that only the rare, extreme threshold case demands a normative judgment. The antithesis should be true, however. Normative judgments should be the rule, and judgments grounded in subjective perceptions (i.e., the “constructive waiver” cases) should be the exception. The Court cannot avoid the prescriptive nature of its constitutional threshold task by denial.

166. Scholars have acknowledged the essentially prescriptive character of the judiciary's
Recognition of the real nature of judicial responsibility raises additional questions about the language of the current formula. Although I have invariably used the word “reasonable” in the “reasonable expectations of privacy” formula, both “legitimate” and “justifiable” are judicially endorsed adjectives for qualifying privacy expectations.

Nevertheless, perhaps because it was the word initially chosen by Justice Harlan and because the Court originally borrowed it and continues to use it today, the term “reasonable” has had substantial impact upon the threshold processes. At the risk of indictment for semantic quibbling, I would suggest that its use generates considerable danger of unconstitutional task. See, e.g., Amsterdam, supra note 1, at 384; Bacigal, supra note 29, at 536; Note, supra note 138, at 155-56; Comment, A Taxonomy, supra note 69, at 1462.

The linguistic evolution of the description of the core interest and the second stage of the Harlan test is interesting. Initially, the Court adopted the term “reasonable.” See Terry v. Ohio, 392 U.S. 1, 9 (1968). That adjective continued to operate exclusively until “justifiable” surfaced in United States v. White, 401 U.S. 745, 752 (1971). “Legitimate” debuted and dominated the majority analysis in Rakas v. Illinois, 439 U.S. 128, 142-48 (1978). Justice Blackmun’s majority opinion in Smith specifically endorsed all three alternatives as descriptive of the central concern, but referred to the second step of the Harlan test as an inquiry into society’s preparedness to recognize privacy expectations as “reasonable.”

Since Smith, both “legitimate” and “reasonable” have been employed interchangeably in majority and dissenting threshold and “standing” opinions. It seems that “legitimate” has become the preferred option in recent majority discussions. See, e.g., United States v. Jacobsen, 104 S. Ct. 1652, 1657 (1984); Illinois v. Andreas, 103 S. Ct. 3319, 3323 (1983); United States v. Place, 103 S. Ct. 2637, 2644 (1983); United States v. Knotts, 460 U.S. 276, 285 (1983). Nevertheless, “reasonable” appears as an acceptable surrogate in majority discussions, see, e.g., United States v. Karo, 104 S. Ct. 3296, 3302 (1984); Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984); Jacobsen, 104 S. Ct. at 1656; Knotts, 460 U.S. at 283, surfaces in dissents and concurrences, see, e.g., Andreas, 103 S. Ct. at 3326 (Brennan, J., dissenting); Knotts, 460 U.S. at 285 (Brennan, J., concurring), and has even returned to center stage in one of the most recent majority treatments, see Oliver v. United States, 104 S. Ct. 1735, 1740 (1984). In the last week of the 1983-1984 term, the Court issued two threshold opinions. In both United States v. Karo, 104 S. Ct. 3296 (1984) and Hudson v. Palmer, 104 S. Ct. 3194 (1984), all three alternatives—reasonable, legitimate, and even the less-favored “justifiable”—appeared.


“Reasonable” probably has had the most influence in Supreme Court analysis. Despite the apparent current Supreme Court “preference” for “legitimate,” see supra note 168, the
proper analysis and that the alternative term "legitimate" is more appropriate.

First, "reasonable" is a useful, but much overused term in legal parlance.\textsuperscript{170} It already bears cumbersome fourth amendment baggage due to its presence within that provision's very language and its consequent central role as the benchmark for determining the constitutionality of government conduct that amounts to a search or seizure. When employed in that respect, it refers to the constitutional mandate that the government demonstrate adequate justification for the infringement of protected interests.\textsuperscript{171} Although no one contends that the significance of the word at

\textsuperscript{170} The word "reasonable" is undoubtedly one of the law's favorite adjectives. It enjoys varied uses in different fourth amendment contexts. Not only do "reasonable expectations of privacy" trigger fourth amendment protection, but an officer's "reasonable suspicion" of criminal activity can justify a brief, investigatory stop, see Brown v. Texas, 443 U.S. 47, 52 (1979), and the amendment only prohibits those searches that are "unreasonable." United States v. Rabinowitz, 339 U.S. 56, 60 (1950).

A police officer may use "reasonable force" to apprehend an arrestee, State v. Lingle, 209 Neb. 492, 500, 308 N.W.2d 531, 537 (1981), assuming that the officer has "reasonable grounds" to make the arrest. State v. Davis, 620 F.2d 1209, 1212 (Mont. 1980). In the ensuing criminal prosecution, the state must establish the defendant's guilt "beyond a reasonable doubt." See In re Winship, 397 U.S. 358, 364 (1970).

In any civil or criminal action, the trier of fact may draw "reasonable inferences" from the testimony and evidence presented. Mele v. All State Ins. Corp., 453 F. Supp. 1338, 1341 (E.D. Pa. 1978). In quantum meruit actions, the plaintiff may recover the "reasonable value of the services rendered." Cavic v. Missouri Research Labs, Inc., 416 S.W.2d 6, 9 (Mo. 1967). In an action for lost profits due to breach of a contract, damages must be established to a "reasonable certainty." Della Ratta Inc. v. American Better Community Developers, Inc., 38 Md. App. 119, 143, 380 A.2d 627, 641 (1977). Of course, the "reasonable person" and the "standard of reasonable care" are familiar tort law concepts. See J. Dooley, Modern Tort Law § 3.05 (1982).

Even the phrase "reasonable expectations" is employed in other than fourth amendment contexts. See, e.g., Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 721 (8th Cir. 1981) (ambiguities in insurance policy to be resolved "in accordance with the reasonable expectations" of insured); Leonard Duckworth, Inc. v. Michael L. Field and Co., 516 F.2d 952, 955 (5th Cir. 1975) (reasonable expectancy of a prospective contract is a protectible property right); Stark v. Chock Full O'Nuts, 77 Misc. 2d 553, 554, 356 N.Y.S.2d 403, 404 (1974) (under reasonable expectations doctrine, breach of the implied warranty of fitness is shown if "the natural substance was not to be reasonably anticipated to be in the food, as served").

In sum, one can reasonably expect to encounter the word "reasonable" frequently when engaged in legal endeavors, and to discover an unreasonable variety of meanings and connotations.

\textsuperscript{171} In light of the extant, though exception-riddled, rule that "warrantless searches are per se unreasonable," United States v. Ross, 456 U.S. 798, 825 (1982), the word "reasonable" also refers to the preferred "procedural" course of judicial review of law enforcement assessments of cause prior to searches. That ostensibly "procedural" reasonableness hurdle is intended to guarantee "substantive" reasonableness at a time when meaningful privacy protection for prospective victims is still possible. See Johnson v. United States, 333 U.S. 10, 14 (1948).
the threshold stage should be the same, connotations of the former usage can slip into the latter context in which they have little, if any, relevance.\textsuperscript{172}

The widespread employment of the word in other legal domains—in which it often calls for decisions that are more factual than legal (one might say more “reflective” than “prescriptive”)\textsuperscript{173}—engenders risks of importing inappropriate criteria from those domains into threshold analysis.\textsuperscript{174} The “reasonable person” tort law standard, for example, has surfaced in some cases concerned with fourth amendment scope.\textsuperscript{175} That standard signifies a reflection of what the average, rational person thinks or believes and, therefore, could undermine proper performance of the

\textsuperscript{172} Considerations relevant to reasonable search determinations, but not to threshold matters, have entered into reasonable expectation analysis under the guise of the “governmental interest” factor. Although law enforcement interests are appropriately put in the balance when assessing the reasonableness of searches, they do not belong in threshold analysis. See infra text accompanying notes 200-04. When they enter into the definitional stage they exert more influence than is proper. See, e.g., Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984); United States v. DeBacker, 453 F. Supp. 1078, 1081 (W.D. Mich. 1980).

Justice O'Connor demonstrated the potential for confusing the two fourth amendment roles of reasonable—that is, “reasonable searches” versus “reasonable expectations”—in Hudson, 104 S. Ct. 3194. Claiming to concur with the majority holding that the fourth amendment does not cover prison cell inspections, she first appropriately reasoned that the “fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects,” before mistakenly concluding that “therefore all searches and seizures of the contents of an inmate's cell are reasonable.” 104 S. Ct. at 3206 (O'Connor, J., concurring). Justice Stevens pointedly commented that he was “not entirely sure whether [Justice O'Connor] believes that an inmate can be harassed consistently with the Fourth Amendment . . . because 'incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects,' . . . or because 'all searches and seizures of the contents of an inmate's cell are reasonable' . . . ” Id. at 3209 n.8 (Stevens, J., concurring in part and dissenting in part). The two are distinct issues and should be kept analytically separate.

\textsuperscript{173} Cf. United States v. Vicknair, 610 F.2d 372, 380 (5th Cir.) (“What is a reasonable expectation of privacy is by definition related to time, place and circumstance.”), cert. denied, 449 U.S. 823 (1980); State v. Settle, 122 N.H. 214, 220, 447 A.2d 1284, 1287 (1982) (“The protection of constitutional rights and effective law enforcement will be better aided by a simpler, less fact-specific test.”).

\textsuperscript{174} For an explanation of the term “threshold” as used in this Article, see supra note 3.

\textsuperscript{175} See, e.g., United States v. Hensel, 699 F.2d 18, 32 (1st Cir.) (The defendant “should have known” the government's activity.), cert. denied, 103 S. Ct. 2431 (1983); United States v. Barry, 673 F.2d 912, 919 (6th Cir. 1982) (“[N]o reasonable man could expect to remain free from governmental intrusion . . . .”); United States v. Allen, 675 F.2d 1373, 1381 (9th Cir. 1980) (“[A]ny reasonable person . . . could expect” the government conduct.), cert. denied, 454 U.S. 833 (1981); United States v. Shelby, 573 F.2d 971, 973 (7th Cir.) (Trash cans “could not reasonably be expected by defendants to be secure.”), cert. denied, 439 U.S. 841, (1978); United States v. Choate, 422 F.2d 261, 270 (C.D. Cal. 1976) (A “reasonable person's expectation of privacy with regard to return addresses on mail is a somewhat limited one.”), rev'd, 576 F.2d 165 (9th Cir.), cert. denied, 439 U.S. 953 (1978), aff'd, 619 F.2d 21 (9th Cir.), cert. denied, 449 U.S. 951 (1980).
constitutional prescriptive assignment. Reliance upon the conduct or beliefs of the reasonable person in fixing the fourth amendment entitlement is more than questionable, for the ultimate issue is what enduring benefits the Constitution grants, not what individuals or the public in general believe, expect, or even desire it to grant. Such a focus also runs the risk of assigning prescriptive responsibilities to society at large, thereby injecting an unwarranted majoritarian element into threshold analysis.

Additionally, the term “reasonable,” due at least in part to its innate flexibility and variant meanings, virtually invites ipse dixit resolutions.

176. See Bacigal, supra note 29, at 535 (“The reasonable man standard is . . . troublesome in this context . . . ”).

177. See supra notes 164–66 & accompanying text. It is arguable that Justice Harlan’s specific standard, i.e., “society’s preparation to recognize given expectations as reasonable,” Katz, 389 U.S. at 361 (Harlan, J., concurring), avoids some of the fallout from reliance on the single word “reasonable.” Harlan’s embellishment is not an adequate amelioration, however, for it fails to eliminate all of the dangerous connotations inherent in the word “reasonable” and spawns new perils of its own. First, while his phraseology may not mandate, it does permit consultation of and influence by the “reasonable person.” Furthermore, the language suggests that the public in general (and possibly the “reasonable public”) is responsible for defining fourth amendment interests. Fourth amendment blessings ought to rest on more stable ground than the beliefs of the reasonable person or the preparedness of society at any given time.

178. The Bill of Rights is counter-majoritarian, pro-minoritarian in nature. See Hudson v. Palmer, 104 S. Ct. 3194, 3216 n.33 (1984) (Stevens, J., concurring in part and dissenting in part); N. Lasson, supra note 4, at 78 n.91 (quoting James Madison); J. Story, supra note 1, at 659; Gerety, supra note 76, at 277 n.160. Reliance upon either the reasonable person or the reasonable society in defining fourth amendment rights runs contrary to the purpose and character of that provision and risks contraction of those rights by the restrictive whim and oppression of the greater numbers. In defining fourth amendment entitlement, the question is not what the reasonable person believes, what “society is prepared to recognize,” what “society would insist” upon, Hudson, 104 S. Ct. at 3201, what “millions of citizens may well believe,” id. at 3214 n.28 (Stevens, J., concurring in part and dissenting in part), what “society is willing to invest with privacy interests,” United States v. Trickey, 711 F.2d 356, 372 (6th Cir. 1982) (Keith, J., dissenting), or what “society is prepared . . . to give deference to,” United States v. Taborda, 635 F.2d 131, 138 (2d Cir. 1980). Both the reasonable person standard and Justice Harlan’s formulation, in any form, are unsuitable and replete with danger to the vitality of constitutional blessings.

179. Recognition of that potential impact of the word in the “reasonable search” context prompted Justice Frankfurter’s famous caution in United States v. Rabinowitz:

To say that the search must be reasonable is to require some criterion of reason. It is no guide at all either for a jury or for district judges or the police to say that an “unreasonable search” is forbidden—that the search must be reasonable . . . . It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable.


The Supreme Court’s approach to the “reasonableness” of privacy expectations is vulnerable to similar criticism, for it lacks appropriate “criteria of reason.” In Rakas v. Illinois, 439
The open-ended character of the word, and the potential for standardless discretion which it generates, might well be responsible for the inordinately conclusional decisions abounding in the threshold area.

Because of these serious problems, and because it does not clearly refer to the judicial responsibility to prescripte the ambit of guaranteed informational privacy based on the instrumental objectives of the fourth amendment, use of the term “reasonable” should be discontinued. The recognized alternative “legitimate” should assume the central role in the prescriptive process.\textsuperscript{180}

In sum, both the quest for “expectations” and the demand of “reasonableness” in fourth amendment threshold determinations engender serious risks of inappropriate analyses and incorrect discernment of informational privacy entitlements. Even more problematic and disconcerting than those conceptual flaws, however, are the operational criteria that regularly have been used to decide whether expectations are reasonable.

The Operation of the Prescriptive Process: The Unsuitability of Recurrent Factors in Current Doctrine

Despite the semantic flaws in the formulation of the general threshold standards, it is conceivable that the courts have developed functional criteria consonant with the instrumental objectives of the fourth amendment.\textsuperscript{181} The aim of the following discussion is to determine whether the recurrent factors in threshold cases and the results they yield are consistent with a proper conception of fourth amendment privacy.

Exposure, Precautions, and Disclosure

Three related ingredients that often have entered into reasonable-

---

\textsuperscript{180} U.S. 128 (1978), Justice White challenged the majority’s resolution of the question of “standing” to raise a fourth amendment claim as reflective of “tautological” decisionmaking by “unadorned fiat.” Id. at 165 (White, J., dissenting). Although his characterization of the majority reasoning is accurate, Justice White apparently failed to recognize the typicality of such conclusory disposition of “reasonable” or “legitimate” expectation issues in standing and threshold cases. The recurrent factors relied upon in judicial resolution of such issues can find no principled defense when analyzed in terms of the privacy protection goals of the fourth amendment. See infra text accompanying notes 181-205. They merely conceal ad hoc dispositions grounded in particular jurists’ senses of “reasonableness.” See Hudson v. Palmer, 104 S. Ct. 3194, 3212 (1984) (Stevens, J., concurring in part and dissenting in part) (“The Court’s . . . perception of what society is prepared to recognize as reasonable . . . merely reflects the perception of the four Justices who have joined the opinion that THE CHIEF JUSTICE has authored.”).

\textsuperscript{181} For a discussion of the proposed alternative language, see infra text accompanying notes 210-16.

For a discussion of the various instrumental objectives of the fourth amendment, see supra text accompanying notes 91-93; infra notes 222-28 & accompanying text.
ness calculations—the public exposure or accessibility,\textsuperscript{182} ability to take precautions,\textsuperscript{183} and voluntary disclosure to third party\textsuperscript{184} factors—appear to be logically rooted in the misleading expectational facet of current doctrine.\textsuperscript{185} The logic underlying reliance upon each of these three factors seems to be the same: Those who truly expect privacy conduct their affairs in a manner indicative of such expectations, that is, they take upon themselves responsibility for excluding others and do not divulge their affairs to others who are unquestionably free to reveal the information.\textsuperscript{186} Such logical roots prove those three ostensible determinants of the reasonableness of expectations to be extremely close relatives of the actual expectation component. Consequently, they insinuate many of that doctrinal component's analytical deficiencies into the operative prescriptive process.\textsuperscript{187}

First, although in some cases the public nature of behavior or the failure to protect against exposure or disclosure might properly diminish or even extinguish the validity of an informational privacy claim,\textsuperscript{188} the tendency of the courts has been to react somewhat reflexively to a showing of one of those elements by suspending constitutional coverage.\textsuperscript{189} Ordinarily, the judiciary has neglected to recognize that there can be de-

\begin{itemize}
\item \textsuperscript{182}See supra notes 46-50 & accompanying text.
\item \textsuperscript{183}See supra notes 51-53 & accompanying text.
\item \textsuperscript{184}See supra notes 54-55 & accompanying text.
\item \textsuperscript{185}For a discussion of the error of including such an ingredient in fourth amendment doctrine and analysis, see supra text accompanying notes 141-60.
\item \textsuperscript{186}The "assumption of risk" terminology, which is found in the cases relying upon voluntary disclosure to third parties, clearly evinces the logic implicit in reliance upon the three factors discussed here. Individuals who expose their behavior, who neglect self-protective precautions, and who disclose matters to others are entitled to no informational privacy because they have put their confidentiality at risk. See Note, supra note 138, at 168. That reasoning is not flawed because the risk assumption is involuntary or coerced in a traditional sense, but, rather, because it fails to acknowledge that what is construed as "risk assumption" often is necessary to take advantage of fundamental entitlements. See infra notes 257-59, 334-38 & accompanying text.
\item \textsuperscript{187}Responsibility for the genesis of the factors under discussion can be placed squarely on the shoulders of the majority and concurring opinions in \textit{Katz}. Justice Stewart's famous statement that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," \textit{389} U.S. at 351, and Justice Harlan's concurring view that "objects, activities, or statements that [one] exposes to the 'plain view' of outsiders are not 'protected,'" \textit{id.} at 361, provide impressive parentage for the ingredients at issue. Justice Stewart probably did not intend endorsement of the reflexive "exposure equals privacy loss" routine adopted by courts since \textit{Katz}. Following the statement quoted above, he added that "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." \textit{Id.} at 351-52.
\item \textsuperscript{188}See supra notes 152, 155 & accompanying text.
\end{itemize}
degrees of informational privacy, that it "is not a discrete commodity, possessed absolutely or not at all." In addition, exposure to "the public" or a "trusted acquaintance" frequently has resulted in the lack of a constitutionally cognizable privacy interest vis-a-vis the government. Judges seldom have acknowledged the possibility of differences in the "reasonableness" of one's expectations of different parties. As a result, the three criteria have assumed unwarranted relevance and influence.

Even if a pure secrecy conception of fourth amendment privacy was correct, the impact of the public exposure, lack of precautions, and voluntary exposure criteria on threshold analysis would be diminished by the acknowledgement that secrecy is not an all-or-nothing proposition and the conscientious distinction between the general public and government agents in assessing privacy claims. Recognition of the instrumental nature of fourth amendment informational privacy, however, constrains even more severely the appropriate sphere of influence of these three factors. Reliance upon the precautions, exposure, or disclosure factors often proves wholly inappropriate, even contradictory to the objects of informational privacy guarantee, which promises secrecy not only for its own sake, but because it enables the free exercise and full enjoyment of other entitlements.

According to the instrumental view of fourth amendment informational privacy, much of that interest's function is as a foundation and means for adequate enjoyment of other constitutional entitlements. People have insufficient opportunities to realize the benefits of other guarantees unless they are assured that the government is restricted in its quests for information. Various entitlements need informational privacy as a necessary growth medium. Additionally, by their very nature many of those freedoms cannot be exercised fully without conduct that involves some degree of exposure or publicity. Too much exclusionary or precautionary conduct often could stifle or preclude enjoyment of guaranteed liberties. Freedom of speech, for example, would be virtually worth-

191. See supra notes 151 & accompanying text.
192. See supra notes 91-93 & accompanying text.
193. By consistent reference to "guaranteed liberties" I do not intend to exclude the possibility that the instrumental ends of fourth amendment privacy extend beyond other specific constitutional entitlements. Other interests—for example, those grounded in statutes or the
less without the opportunity to disclose a certain amount to others. Thus, the ability to take adequate advantage of many liberties granted by our free society depends on both the opportunity to behave with some degree of openness, without the strictest of protective precautions, and the assurance that confidentiality vis-a-vis the government will be preserved.

The effect of the current doctrine’s unexamined, automatic reliance upon the three criteria at issue is to preclude coexistence of those prerequisites for full and free enjoyment. If an individual exposes or makes “public” his conduct in exercising his rights, he ordinarily loses the ability to claim fourth amendment privacy protection. Without that shelter, the freedom to exercise and enjoy those rights is severely diminished. On the other hand, if, to ensure retention of the capacity to claim fourth amendment privacy, a person jealously guards against exposure or publicity and takes the precautions doctrinally demanded, the result is a self-imposed constriction of freedom. It is ironic, indeed, that the inherent attributes of the exercise of the very rights which the fourth amendment should promote undermine the ability to claim that guarantee’s protection and, consequently, the opportunity to enjoy the benefits of those rights. The bind is more than ironic; it amounts to a constitutionally impermissible Catch-22.

common law—might well serve as reasons for preserving and guaranteeing protection against unjustified governmental breaches of informational privacy. In federal and particularly in state constitutional adjudication, courts might discover nonconstitutional sources of legitimate reasons for confidentiality vis-a-vis the government. See infra notes 227-28 & accompanying text. In this Article, I suggest that other constitutionally rooted interests provide a minimum content for an appropriately conceived instrumental informational privacy, and leave the door open to further sources of such content.

194. The self-imposed constriction of freedom, although not “coerced” in a fifth amendment sense, is anything but voluntary. It results from the inhibitory pressure generated by the prospect of unregulated governmental awareness. The situation is analogous to that the fourth amendment claimant faced prior to Simmons v. United States, 390 U.S. 377 (1968). To gain standing to raise a fourth amendment suppression claim, an individual had been required to give information which could seal her fate on the ultimate issue of guilt or innocence. To protect against that consequence, she had to forego a fourth amendment claim, no matter how valid. The Simmons Court perceived that dilemma to be constitutionally intolerable. Id. at 394. The choice facing privacy claimants in threshold situations should likewise be considered impermissible.

195. Cf. T. Cooley, supra note 120, at 375-76 n.2. Cooley discusses a case in which a Maine court “decided that a telegraph operator could be compelled to disclose the contents of a message sent by him for another party.” He observed that

the case is treated as if no other considerations were involved than those which arise in the ordinary case of a voluntary disclosure by one private person to another, without necessity. Such, however, is not the nature of the communication made to the operator of the telegraph. That instrument is used as a means of correspondence, and as a valuable, and in many cases an indispensable, substitute for the postal facilities; and the communication is made, not because the party desires to put the operator in possession of facts, but because transmission without it is impossible. It is not
In evaluating the significance of the three criteria, it is imperative to ascertain the liberties involved in a given individual’s exposed or unguarded behavior, the necessity for such behavior in the exercise of those liberties, and the effect upon those liberties of relying upon that behavior to deny claims to informational privacy. Reflexive reference to those suspect factors frequently has produced erroneous fourth amendment judgments. Under an appropriately expanded view of fourth amendment informational privacy, their relevance to threshold determinations becomes extremely limited, at best.\textsuperscript{196}

\textit{Property Rights and Intrusions}

Although the property rights and the degree of “intrusion” criteria would seem to originate in the \textit{Olmstead} doctrine of the pre-\textit{Katz} era, courts frequently find them pertinent to privacy entitlements in the post-\textit{Katz} era.\textsuperscript{197} Property notions and “intrusions” may well be pertinent and useful elements in evaluating fourth amendment privacy claims. The automatic invocation of those criteria across the board, however, is extremely questionable after \textit{Katz} and is rendered all the more suspect by an instrumental conception of constitutional informational privacy.

First, \textit{Katz} directly repudiated the controlling function of property and intrusion notions and established privacy as the ultimate determinant.\textsuperscript{198} Nonetheless, later cases reveal so strong a continuing attach-

\begin{footnotes}
\item[196] Exposure, accessibility, and neglect of precautions vis-a-vis the government are matters of degree. To the extent that they are “gratuitous” because they neither are necessary to nor promoting of the enjoyment and exercise of other rights and interests, it would not seem improper to count them against a claim of informational privacy. One who truly needs and wishes to have secrecy from the government probably does not expose information to government officials, but takes care to safeguard confidentiality. A constructive waiver of privacy rights might well be found in cases of gratuitous exposure or knowing disclosure to the government. See supra notes 152, 155 & accompanying text. In sum, in an appropriate doctrinal scheme, a narrow operating space for the currently active criteria would remain.


\item[198] \textit{Katz}, 389 U.S. at 352-53; see Amsterdam, supra note 1, at 383 (“The problem with the word lies in its subtle suggestion that a particular kind or sort of government activity,
ment to those formerly dispositive factors that Olmstead's prerequisite of a physically invasive trespass has retained an inordinate effect upon, sometimes dictating, constitutional scope in the post-Katz era. If the animating spirit of Katz is to be respected, courts must be much less inclined to permit "property" ingredients to determine outcomes.

Furthermore, the relevance of these factors in the prescriptive process must be evaluated from an instrumental perspective. Because ensuring full and free enjoyment of property rights is a valid, cognizable objective of instrumental informational privacy, it follows that the extent of a claimant's property interests and the intrusiveness of government conduct upon those interests can be relevant criteria. The preservation of such rights, however, is not the only reason for the constitutional privacy grant. In contexts involving other legitimate objectives, the mere absence of a valid property interest or a tangible official intrusion should not be determinative.199 Associational, speech, and travel rights, for example, can be impaired by wholly nonintrusive conduct, and the free exercise of those rights ought not be made dependent upon property rights.

In sum, it is more consistent with Katz' revolution to view property rights and intrusions as two among many factors in the threshold analysis and to accord them substantial weight only when instrumental objectives other than enjoyment of property rights are not involved. Although these factors should not be dismissed as wholly inapposite, their function in the prescriptive inquiry must be kept within proper bounds and justified by reference to the purposes of fourth amendment privacy protection.

Law Enforcement Interests

Finally, the relatively infrequently used, but ever-available, governmental interests criterion is, to be direct, not relevant in threshold assessments of legitimate privacy needs.200 While the reasonableness of a search—the violation of a protected privacy interest—should be calculated by balancing in governmental needs,201 the prior process of determining whether a search has occurred—that is, whether a protected privacy interest has been violated—should not hinge upon official need to jeopardize that interest.202 In other words, the degree of fourth amend-

---

199. Situations in which property interests and intrusions can be relevant and situations in which their impact should be subordinated to other privacy objectives are discussed infra notes 260-63, 300-02, 351-58 & accompanying text.

200. See supra notes 62-65 & accompanying text.

201. Terry v. Ohio, 392 U.S. 1, 20-21 (1968); see also supra notes 171-72 & accompanying text.

202. There is some scholarly support for the contrary position. See Bacigal, supra note 29,
ment protection accorded a cognizable interest may well depend upon the magnitude and urgency of law enforcement interests, but determinations of the existence (or the extent) of an individual’s privacy entitlement should not be affected by the countervailing “public need.”

Those determinations should rest entirely upon the character of fourth amendment privacy and the reasons that people need it in a given setting. The Framers were aware of governmental needs and credited them by means of the “unreasonableness” and “probable cause” standards. To factor them into the threshold-definitional stage muddles analysis and can also amount to unfair double-counting.

Determinations of whether government search activities are reasonable may necessitate a balancing of governmental and individual interests. See supra text accompanying note 201. Accurate balancing demands a fair evaluation of the character and worth of the privacy interests jeopardized. Such evaluation requires recognition of the instrumental goals of fourth amendment privacy. The doctrinal alternatives and the approach proffered in this Article, therefore, will be useful beyond the threshold stage.

203. Determinations of whether government search activities are reasonable may necessitate a balancing of governmental and individual interests. See supra text accompanying note 201. Accurate balancing demands a fair evaluation of the character and worth of the privacy interests jeopardized. Such evaluation requires recognition of the instrumental goals of fourth amendment privacy. The doctrinal alternatives and the approach proffered in this Article, therefore, will be useful beyond the threshold stage.

204. Governmental needs have come to play a prominent part in fourth amendment exclusionary rule decisions. See, e.g., United States v. Leon, 104 S. Ct. 3405 (1984); United States v. Havens, 446 U.S. 620 (1980); United States v. Ceccolini, 435 U.S. 265 (1978); Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974); see also Nix v. Williams, 104 S. Ct. 2501 (1984) (endorsing an “inevitable discovery” exception for sixth amendment determinations that inevitably will be extended to fourth amendment cases). Consequently, the consideration of those interests at the threshold stage raises the possibility of “triple-counting.” Law enforcement interests would enter fourth amendment analysis first when deciding whether the Constitution operates, then when determining how much and what kind of protection it affords, and finally when investigating whether a “remedy” for breaches of that protection should follow.

The temptation to surrender liberty to the demands of criminal law enforcement clearly is nothing new. Patrick Henry defended the inclusion of a Bill of Rights in our Constitution because he recognized that without one the authorities “will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity . . . .” N. LASSEN, supra note 4, at 93. The Framers recognized the necessary costs to law enforcement efficacy, but enacted the fourth amendment because “it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons . . . .” T. COOLEY, supra note 120, at 375.

What the Framers understood [in 1791] remains true today—that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsak-
Two “themes” have emerged from critical analysis of the reasonable expectation of privacy doctrine and its operational principles and ingredients. First, the basic language has seriously misleading aspects and perilous flaws. Second, the elements that courts have used in performing their prescriptive duties—several of which seem to originate in the objectionable terminology of the formula—have not been justified by or reconciled with the ultimate aims and character of the constitutional guarantee. When illuminated by an instrumental vision of fourth amendment privacy, those factors appear in some instances to be impertinent and in others to be counterproductive. Describing how and why the courts have strayed from a course faithful to the Constitution has been relatively easy. It is much more difficult to propose a replacement approach for discerning fourth amendment boundaries.

Fulfilling the Promise of *Katz*: A Reformed Doctrinal and Analytical Approach to Delineation of Fourth Amendment Territory

In the preceding sections this Article has documented the evolution of Supreme Court doctrine concerning fourth amendment scope, depicted the doctrinal development that followed the *Katz* shift, described the instrumental nature of fourth amendment privacy, and evaluated the language and functioning of current doctrine and analysis. The tools used for fixing constitutional boundaries were shown to be misleading and inadequate, and the results reached under current standards proved inconsistent with the instrumental objectives of fourth amendment privacy. In this final section I suggest a more appropriate manner of approaching fourth amendment purview issues. What is proposed is neither a completely refined theory with a finalized, comprehensive

205. Many of the influential criteria should be suspect because of their pre-*Katz* roots. Reliance upon “property interests” and “intrusions” runs the risk of resurrecting the *Olmstead* standard which *Katz* intended to bury. See Rakas v. Illinois, 439 U.S. 128, 162-63 (1978) (White, J., dissenting). “Publicity” factors can also find origins in *Olmstead*. See *Olmstead*, 277 U.S. at 466. Finally, the voluntary disclosure to third parties criterion is well grounded in the “secret agent” cases which predated *Katz*. See infra note 331.

206. See supra notes 31-65 & accompanying text.

207. See supra notes 91-136 & accompanying text.

208. See supra notes 141-205 & accompanying text.
doctrinal structure, nor a rigid and easy-to-follow formula for judges confronting issues of fourth amendment coverage. The proposals made outline an approach that will furnish the basis for future doctrinal and analytical evolution faithful to the fourth amendment privacy entitlement. Illustrations of how the new methodology should operate in concrete cases follow.

A New Methodology for Approaching and Resolving Fourth Amendment Threshold Questions

Having rejected the language of the "reasonable expectations of privacy" formula as misleading, it is first necessary to propose preferable terminology. The central issue is best formulated, not in terms of what privacy people do expect, or even what privacy people are entitled to expect from the government. Rather, the issue is what informational privacy people need to enjoy guaranteed rights and interests. Therefore, my initial, modest suggestion is that the language of "expectations of privacy" be supplanted by the terminology of "needs for privacy." Those "needs" must be judged in light of the underlying reasons for a constitutional right to informational privacy vis-a-vis the government; reasons that should include, but must not be limited to, an interest in secrecy for its own sake.

A focus upon "needs for privacy" should suggest a constitutional mandate to look beyond simple interests in secrecy, thereby avoiding many of the current doctrinal implications that are not faithful to the essence of fourth amendment privacy. Evaluations of needs, in place of expectations, also should improve fourth amendment analysis by implying a more stable constitutional entitlement, diminishing the risks of variations due to individual, eccentric beliefs, and minimizing the perils of governmental manipulation. In these respects, the language of "needs" should serve the ends of fourth amendment privacy better than that of "expectations."

With the term "reasonable" also banished from threshold

209. One of the drawbacks of the foregoing assault on the current approach to threshold questions has been my suspicion all along that it would be extremely difficult to describe a worthy, workable supplanter in sufficiently precise terms. Any losses in specificity inherent in a truly interest-oriented methodology, however, will be tolerable when balanced against the gains in fourth amendment fidelity. "Whatever the application of [the new] standard[s] may lack in ready administration, [they will be] more faithful to the purposes of the Fourth Amendment" than the prior standards. Rakas, 439 U.S. at 152 (Powell, J., concurring).

210. See supra text accompanying notes 144-46. Not all individual control of privacy entitlement will be eliminated by the proposed doctrine. If a person behaves in such a way that it is fair to conclude that she has no need for secrecy from the government, a "constructive waiver" of the fourth amendment right to privacy might properly be found. See supra text accompanying notes 152, 155.
thought, a replacement to describe the privacy needs that qualify for constitutional shelter is necessary. For the reasons outlined earlier, I would adopt the already endorsed alternative "legitimate" to fill the role. While not a panacea, the term is an amelioration that can promote fidelity to fourth amendment ends.

First, although it is not unused in other legal domains, unlike "reasonable," the word "legitimate" has not been exhausted. It seems relatively free of the heavy connotative baggage of the "reasonable" and thus is much less likely to lead to the ready borrowing of such erroneous standards as "reasonable search" or "reasonable person." The ever-present risks of introducing misleading notions into fourth amendment threshold analysis are fewer and less substantial.

Further, and more important, the term "legitimate" more accurately reflects the prescriptive nature of the courts' tasks. The search for "reasonable" expectations has fostered too great a judicial reliance upon certain superficially attractive behavioral factors without reference to the essence and underlying purposes of constitutional privacy. A focus upon legitimacy suggests the necessity to respect the instrumental goals of informational privacy and can prompt the courts to choose appropriate prescriptive criteria based in law, custom, or tradition rather than in extant behavior patterns.

Finally, the fourth amendment should have a more fixed privacy content than whatever a particular court adjudges "reasonable" or whatever society is currently prepared to recognize as reasonable. Legiti-

211. See supra notes 167-80 & accompanying text.
212. See supra notes 170-79 & accompanying text.
213. See supra text accompanying notes 46-65, 182-204.
214. Ordinary dictionary definitions of the two options under discussion bolster the soundness of the contentions regarding the potential for excessive subjectivity and open-endedness in determinations of reasonableness and the preferability of the language of legitimacy in prescribing fourth amendment norms. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1985) includes among the meanings of "reasonable": "agreeable to reason," "not extreme or excessive," "moderate, fair," "having the faculty of reason," and "possessing sound judgment." Id. at 981. "Legitimate" means, inter alia, "accordant with law or with established legal forms and requirements," "law-abiding," "conforming to recognized principles or accepted rules and standards," "lawful." Id. at 683. By definition, therefore, the latter term triggers reference to "recognized principles or accepted rules and standards." Id. The third judicially accepted alternative, "justifiable," has been the least frequently used. According to WEBSTER'S, "justifiable" means "capable of being justified," and to "justify" is "to prove or show to be just, right or reasonable" or "to show to have had a sufficient legal reason." Id. at 656. Like "legitimate," "justifiable" may not yield all the risks engendered by the ubiquity, excess employment, and variable meanings of "reasonable." Unlike "legitimate," however, it does not clearly capture or convey the necessity to refer to "legal" bases, principles, or traditions. Nor does it as clearly imply the stability of content which fourth amendment doctrine needs to avoid the dangerous proclivity for unprincipled, ad hoc decisionmaking apparent under the current doctrine.
macy, as opposed to reasonableness, suggests more permanent, less mutable standards and thus a more stable privacy content.

In sum, it seems preferable to have the courts deciding what protected privacy interests we can "legitimately" claim from the government, not what interests it is "reasonable" for us to claim. The "legitimate needs for privacy" phraseology better reflects the duties imposed upon courts to ascertain and prescribe constitutional entitlements to informational privacy.215 The issue is not whether privacy is in fact expected, but whether people who are in the claimant's situation216 need it for some legitimate purpose. In other words, a qualifying privacy need must have a basis in the laws, principles, traditions, or customs of the American social order and, if so grounded, should not be ignored simply because a court senses that it is not "reasonable."

I do not mean to make too much of the suggested language modifications. Although the choice of terms is significant and influential, simple linguistic changes will not eliminate the extant flaws in the law of fourth amendment scope. The most critical elements of constitutional doctrine are not its terms, but the substantive criteria that give content to the language.217 Thus, development of suitable criteria for determining the legitimacy of claimed privacy needs is essential.

Katz requires that privacy be the prime referent in determining fourth amendment scope. The cornerstone of the instant proposals is

215. While the term "legitimate needs" captures the essence of the fourth amendment privacy promise without substantial risks of error or distortion, the term "needs" could be misused or could give rise to unwanted and unwarranted glosses in the same manner that "expectations" has. In the wrong hands almost any tool is capable of damage. If the possibility of personal or subjective connotations of the word "needs" should pose problems, an even more neutral term such as "entitlements," "grounds," "bases," or "reasons" could be employed. For now, I proffer "needs" because it connotes the possibility of an effective waiver, effectively describes the prescriptive duties of the courts, and does not pose serious risks of error.

216. I do not advocate an inquiry into the precise, subjective needs or desires of any given claimant. The inquiry should focus upon whether people conducting their affairs like the claimant have legitimate needs for privacy. Absent an expressed or clearly demonstrated lack of need for, interest in, or desire for privacy, the question is whether legitimate instrumental goals are promoted by providing privacy protection for those in situations such as the claimant's. Cf. Oliver v. United States, 104 S. Ct. 1735, 1748 n.13 (1984) (Marshall, J., dissenting) (The "inquiry requires analysis of the sorts of uses to which a given space is susceptible, not the manner in which the person asserting an expectation of privacy in the space was in fact employing it . . . ").

217. While no changes in terminology will eliminate all the doctrinal and analytical difficulties in the threshold area, the words chosen to perform the tasks of defining the domain of fourth amendment operation are important, as the reasonable expectation doctrine has proven. They betray mindsets, influence thoughts, and affect outcomes with the often subtle, but effective connotations and limitations they insinuate into the law. They breed doctrinal offspring, which, by force of repetition, gain solid footholds in the law. The terms in which we express our constitutional decisions, therefore, should not be casually or carelessly selected, but should be examined closely for unwanted and unwarranted implications.
accurate comprehension of that privacy as informational and instrumen-
tal—that is, as an interest that is more than secrecy for its own sake. Consecutively, in deciding what factors are relevant to the legitimacy of constitutional privacy needs, the suffocating assumption that secrecy is the ultimate and sole object of the fourth amendment must be abandoned in favor of a conception of informational privacy that factors into threshold calculations the values and interests which are, and are intended to be, promoted by a guaranteed secrecy medium.

In our haste to liberate fourth amendment privacy from its present confinement, however, we must not overlook the intrinsic value of secrecy itself. The need for confidentiality is one of the reasons for protecting informational privacy. The simple assurance of an inviolate domain of thought, feeling, and activity furnishes breathing space for personal growth and development and enables us to lead more satisfying, fulfilled lives. Certainly, the value of such an interest was an important motivation for constitutional protection against searches and is among the purposes of recognizing privacy today. While it is far from the entire ambition of the fourth amendment, the preservation of a pure secrecy interest is one of the potential objectives to be factored into threshold determinations of legitimate needs.

Evaluating the legitimacy of alleged needs for privacy rooted entirely or partially in that objective will be difficult. Courts will be required to decide how much, if any, of the pure secrecy entitlement the fourth amendment affords in particular circumstances. Though relatively easy in the context of the home—indeed, unnecessary barring "sac- rificial" behavior by the claimant—assessments of pure secrecy entitlement become more difficult in traditionally less sacrosanct realms. There can be no ready guides for such value judgments. Nevertheless, determinations of legitimacy must accord recognition and weight to that most elementary benefit of constitutional restraint upon governmental searches.

---

218. See supra notes 87-92 & accompanying text.

219. Cf. Amsterdam, supra note 1, at 401 ("[T]he human soul cries out for someplace it can breathe and not be stared at."); Note, supra note 204, at 987 ("[T]he primary value underlying the constitutional right to privacy is the preservation of an inviolate enclave for one's private personality.").

220. See supra note 112 & accompanying text.

221. The traditional sacredness of the home in fourth amendment jurisprudence must rest, in part, upon its provision of a designated, ascertainable enclave for the enjoyment of the pure secrecy interest. Although the interest may not appear with equal clarity or strength once one ventures into the world, surely one should still be entitled to maintain and enjoy some measure of confidentiality for its intrinsic worth alone when one leaves home. Cf. United States v. Chadwick, 433 U.S. 1, 11 (1977) (The Court's "cases reflect the settled constitutional principle that a fundamental purpose of the Fourth Amendment is to safeguard . . . privacy interests, and not simply those interests found inside the four walls of the home.").
In a search, the government intends, or is likely, to gather information. The individual, by reliance upon the fourth amendment, claims a right to the privacy of that information—a right to keep it from the government. But individuals do not claim that entitlement simply and solely because of its inherent value. They also stake such claims because the privacy enables the exercise of other rights. Those instrumental objectives for which informational privacy exists and is needed in a free society must furnish the substantive criteria and be the prime sources of guidance for evaluations of the legitimacy of claimed privacy needs. Ultimately, they should determine the reach of the fourth amendment, for only governmental information acquisition that treads upon legitimate privacy needs should constitute a constitutional search.

The essence of the instant proposals, therefore, is that the instrumental purposes foraccording secrecy-type privacy against the government must be accorded significant roles in fourth amendment boundary cases. Of course, that requires identification of the various rights whose protection is the objective of a constitutional privacy guarantee. The entitlements preserved in other provisions of the Bill of Rights are the clearest examples of such rights; they are important reasons for protection of informational privacy. The first amendment guarantees of religious freedom, associational freedom, and freedom of speech and press are particularly appropriate objectives. In addition, the autonomy-type privacy rights found within the ninth and fourteenth amendments and the penumbras of the Bill of Rights—particularly interests in familial and procreative liberty—should be considered. The constitutional right to travel, the related liberty entitlement of the fourth amendment


224. See, e.g., Jones v. Helms, 452 U.S. 412, 418 (1981) (“Although the textual source of [the] right [to travel] has been the subject of debate, its fundamental nature has been consistently recognized by this Court.”); Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (“The constitutional right to interstate travel is virtually unqualified.”); Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969) (“Freedom to travel throughout the United States has long been recognized as a
ment, and the property right promises of the fourth and fifth amendments provide further privacy need rationales. Such freedoms can flourish if privacy is protected and will wither if the government is unregulated in monitoring our enjoyment of them.

In this initial effort it would be futile to attempt to provide closure on the subject of possible grounds for the legitimacy of needs for privacy. The listing of recurrent legitimacy bases is not meant to be exhaustive. Other constitutional blessings, if dependent on informational privacy, may be implicated in threshold cases and ought to be seen as proper objects of the fourth amendment privacy grant. Further, as theory and doctrine develop, certain statutory and common law benefits might seem appropriate considerations in legitimacy calculations.

In sum, questions of fourth amendment coverage should be decided 

---

225. The fourth amendment prohibition against unreasonable seizures of the person grants an entitlement to physical mobility, a freedom from restraint of the person that finds expression in the law of detention and arrest. See United States v. Place, 103 S. Ct. 2637, 2645 (1983); Rakas v. Illinois, 439 U.S. 128, 159-60 (1978) (White, J., dissenting) ("[T]he Amendment protects one's liberty ... against unreasonable seizures of self ... ") (footnote omitted); United States v. Watson, 423 U.S. 411, 446 (1976) (Marshall, J., dissenting) ("[A]n unjustified arrest ... forces the individual temporarily to forfeit his right to control his person and movements and interrupts the course of his daily business ... "). A degree of informational privacy can sometimes be essential to maintain the vitality of our physical freedom.

226. The fourth amendment regulation of seizures of houses, papers, and effects safeguards interests in the possession, integrity, and free use of our real and personal property. See United States v. Jacobsen, 104 S. Ct. 1652, 1656, 1662 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property.") (footnote omitted); Illinois v. Andreas, 103 S. Ct. 3319, 3326 (1983) (Brennan, J., dissenting) (The fourth amendment protects a person's "right to maintain the integrity of his container."); Place, 103 S. Ct. at 2645 (The "detention of luggage ... intrudes on ... the suspect's possessory interest in his luggage ... "); Rakas, 439 U.S. at 159-60 (White, J., dissenting) ("[T]he Amendment protects one's ... property interests against unreasonable seizures of ... effects ... ") (footnotes omitted).

The fifth amendment further constitutionalizes property entitlements and restrains the ability of the government to interfere with our interests in enjoying and making use of our property by providing that "no person shall be deprived of ... property without due process of law." U.S. Const. amend. V.

227. The Supreme Court recently held that the fourth amendment does control "searches" of students by school officials. See New Jersey v. T.L.O., 105 S. Ct. 733 (1985). In making such a threshold determination in the school context, an instrumental perspective might well have taken into account the injury that a deprivation of privacy entitlement could cause to rights to education. See Plyler v. Doe, 457 U.S. 202, 221 (1982) (Although "[p]ublic education is not a 'right' granted to individuals by the Constitution," it is not "merely some governmental benefit indistinguishable from other forms of social welfare legislation ... . [E]ducation has a fundamental role in the fabric of our society."); see also N.J. Const. art. VIII, § 4, para. 1.

In a proper case, preservation of the sixth amendment right to counsel could also conceivably ground a legitimate privacy need.

228. States might find, for example, that nonconstitutional interests in the promotion and
by reference to the instrumental character of fourth amendment privacy. In assessing legitimate needs for privacy to determine if the fourth amendment operates at all, rights and freedoms that thrive on privacy but starve without it must be considered. If protection against informational quests by the government is important to the free enjoyment of such rights, then fourth amendment regulatory safeguards ought to be triggered. Those are but the logical conclusions yielded by faithful pursuit of the spirit of *Katz*.

**Illustrative Applications of the Proposed Methodology**

In this final section, the proposed methodology for approaching questions of fourth amendment coverage is clarified by discussing exemplary applications in troublesome contexts. Situations raising the threshold question of whether a search has occurred,229 as well as situations raising the issue of “standing” to challenge the constitutionality of a search, are treated.230 These illustrations demonstrate the concrete significance of an instrumental conception of privacy and the merits of my criticisms of the current approach.

**Electronic Tracking Devices**

Modern technology has provided law enforcement agents with an ingenious device that enables them to track the movements of individuals upon whom some suspicion or interest has focused. Tracking beacons, or “beepers,”231 can be attached to or installed within inanimate posses-

---

229. Due to the Supreme Court’s activities during recent terms, only one of the chosen illustrative contexts—trash inspections—involves a wholly “unsettled” question. The Court’s analyses and resolutions of the federal constitutional issues in these areas, however, are suspect under the instrumental conception of fourth amendment privacy. The permissibility of any of the activities treated here is also subject to independent analysis under state constitutional search and seizure provisions. *See* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); *see also* Michigan v. Long, 103 S. Ct. 3469, 3474-78 (1983) (requiring a plain statement of the independent state ground to preclude federal review).

230. For an explanation of the relationship between threshold and standing issues, see *supra* note 66.

231. An electronic tracking device—also called a “beeper,” “beacon,” or “transponder”—is a miniature, battery-powered radio transmitter that emits a recurrent signal.
sions, including moveable vehicles. They emit a continuous electronic signal which is sensed by receiving equipment monitored by investigators and enables the investigators to determine the location of the carrier. The use of these devices has been the subject of many fourth amendment challenges and much discussion regarding the existence and content of fourth amendment protection.

The Supreme Court recently decided its first beeper cases, United States v. Knotts and United States v. Karo, and resolved some of the major issues in the area. In those two cases, the Court held that monitoring the signals that beepers emit from “public” domains falls outside fourth amendment regulation, while monitoring their signals from homes and other “private” spheres comes within constitutional control. The Court did not resolve the status of beeper installation, but at a set frequency. When monitored by directional finders, the beeper provides information as to the location and movement of the object attached. A beeper is incapable of transmitting conversations or recording sounds.

United States v. Butts, 710 F.2d 1139, 1142-43 (5th Cir. 1983).

232. See, e.g., United States v. Bailey, 628 F.2d 938, 939 (6th Cir. 1980); United States v. Bernard, 625 F.2d 854, 856 (9th Cir. 1980); United States v. Clayborne, 584 F.2d 346, 347 (10th Cir. 1978); United States v. Dubrofsky, 581 F.2d 208, 210 (9th Cir. 1978).


234. Some “transponders” are capable of indicating that the container within which they have been installed has been open. See United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978); United States v. Emery, 541 F.2d 887, 888 n.1 (1st Cir. 1976). Barring unwarranted categorical pronouncements, potential technological innovations make it unlikely that the courts will soon resolve all beeper issues with finality.

235. See cases cited supra notes 232-33; see also United States v. Washington, 586 F.2d 1147 (7th Cir. 1978); United States v. Mirovan, 577 F.2d 489 (9th Cir.), cert. denied, 439 U.S. 896 (1978); United States v. Moore, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978); United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976); United States v. Perez, 526 F.2d 859 (5th Cir. 1976).


238. Knotts, 460 U.S. at 281-82. Due to the specific facts and the narrowness of the challenge raised, the majority opinion in Knotts addressed only a fairly limited sphere of transponder use—monitoring of the signals from an item to track its movements along public roads and to ascertain its location on private property, but outside of any building, i.e., “in the ‘open fields.’” Id. at 282. Justice Rehnquist, writing for the Court, was able to avoid addressing the monitoring of beepers located within private structures. Id. at 285. When the Tenth Circuit, shortly after Knotts, confronted certain of the questions left unsettled in Knotts, see United States v. Karo, 710 F.2d 1433 (10th Cir. 1983), rev’d, 104 S. Ct. 3296 (1984), the Court quickly granted review and finished more of the task that Knotts had merely begun.

239. Karo, 104 S. Ct. at 3304.

240. Resolution of this question was specifically reserved in Knotts, 460 U.S. at 279, and again left open in Karo, 104 S. Ct. at 3301. In Karo, at the time of the installation no claimant had an interest in the object into which the beeper was implanted. The Court held, as a result,
did hold that the transfer of a beeper-bearing item infringes no fourth amendment interest of the recipient.\textsuperscript{241}

According to the Court, monitoring the location and movements of transponders in public areas is outside constitutional control because a person travelling in such spheres "voluntarily convey[s] to anyone who want[s] to look [at] the fact[s]"\textsuperscript{242} concerning his travels. Consequently, he "has no reasonable expectation of privacy in his movements from one place to another."\textsuperscript{243} Documenting a transponder’s location upon private property in the out-of-doors triggers no fourth amendment restrictions because such beeper-revealed information can also be acquired by “the naked eyed from outside” private structures.\textsuperscript{244}

that all defendants lacked the privacy interests necessary for standing to raise a fourth amendment challenge to the installation. \textit{Id.} Similarly, lower courts often have found that a claimant was not constitutionally protected against beeper installation because the object to bear the beeper was owned and possessed by a private third party vendor or by government agents at the time the beeper was implanted. \textit{See, e.g.}, United States v. Bernard, 625 F.2d 854, 860 (9th Cir. 1980); United States v. Miroyan, 577 F.2d 489, 493 (9th Cir.\textit{, cert. denied}, 439 U.S. 896 (1978); United States v. Curtis, 562 F.2d 1153, 1156 n.1 (1977). In several cases in which a claimant has had an ownership or possessory interest in an object at the time of installation, courts have denied fourth amendment coverage because the item at issue harbored contraband in which no legitimate proprietary interest can exist. \textit{See, e.g.}, United States v. Washington, 586 F.2d 1147, 1154 (7th Cir. 1978); United States v. Moore, 562 F.2d 106, 111 (1st Cir. 1977), \textit{cert. denied}, 435 U.S. 926 (1978); United States v. Emery, 541 F.2d 887, 889-90 (1st Cir. 1976). The inability to have valid, cognizable property interests in contraband is well established. \textit{See} United States v. Jacobsen, 104 S. Ct. 1652, 1662 (1984) (“Congress has decided—and there is no question about its power to do so—to treat the interest in ‘privately' possessing cocaine as illegitimate . . . ”).

A minority of courts has concluded that the installation of transponders is fourth amendment activity. \textit{See, e.g.}, United States v. Butts, 710 F.2d 1139, 1147 (5th Cir. 1983); United States v. Michael, 645 F.2d 252, 256 (5th Cir.), \textit{cert. denied}, 454 U.S. 950 (1981); United States v. Moore, 562 F.2d 106, 111 (1st Cir. 1977), \textit{cert. denied}, 435 U.S. 926 (1978); United States v. Holmes, 521 F.2d 859, 864-65 (5th Cir. 1975), \textit{aff’d in part, rev’d in part}, 537 F.2d 227 (1976). Some have reached that conclusion even though the objector did not own or possess the beeper-bearing item at the time of attachment. \textit{See, e.g.}, \textit{Butts}, 710 F.2d at 1147; \textit{Moore}, 562 F.2d at 113. The latter, of course, are contradicted by \textit{Karo}'s holdings regarding standing to object to the attachment and the absence of any fourth amendment interests which protect one against “receipt.” \textit{See infra} note 241.

\textsuperscript{241} \textit{Karo}, 104 S. Ct. at 3302. The Tenth Circuit had acknowledged the claimants’ lack of standing to object to installation per se, but had held that a “violation occurred at the time the beeper laden can was transferred to Karo.” \textit{Id.} The Tenth Circuit’s focus on the damage done to fourth amendment interests by delivery of an item into which a beeper previously had been inserted has not been typical in the lower courts. \textit{But see} United States v. Bailey, 628 F.2d 938, 944 (6th Cir. 1980). The judiciary has focused attention on either the installation or the monitoring.

\textsuperscript{242} \textit{Knotts}, 460 U.S. at 280.

\textsuperscript{243} \textit{Id.}

\textsuperscript{244} \textit{Id.} at 285. According to Justice Rehnquist, an additional reason that neither tracking public movements nor documenting locations in the out-of-doors implicates fourth amendment concerns is that “[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as sci-
beeper signals emitted from homes and other private enclosures to learn
the location and "activities" of objects within those domains constitutes a
search, according to the Court, because in so doing "the Government
surreptitiously employs an electronic device to obtain information that it
could not have obtained by observation from outside" a protected
area.245

The Court has concluded that the critical distinction between public
monitoring and private tracking is that in the former instance "the informa-
tion obtained is 'voluntarily conveyed to anyone who want[s] to
look' . . .,"246 whereas in the latter situation the "monitoring indi-
cate[s] fact[s] that could not have been visually verified."247 A search
occurs in the latter case because "[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."248 In essence, even though it is "less
intrusive than a full-scale search,"249 beeper monitoring of objects inside
protected private areas comes within fourth amendment territory be-
cause it is analogous to, and not materially distinguishable from, other
governmental entrances into those areas.250

ence and technology afford[ ] them . . . ." Id. at 283. The Court's faith in the validity of that
reason, however, seemed less than absolute in Karo. See infra note 266.
245. Karo, 104 S. Ct. at 3303.
246. Id. at 3304 (quoting Knotts, 460 U.S. at 281).
247. Id. Before Knotts and Karo, lower courts ordinarily had found monitoring a beeper's
signal in public domains outside fourth amendment governance. The predominant rationale
for that conclusion was the "publicly exposed" nature of automobile or airplane travel. See,
 e.g., United States v. Miroyan, 577 F.2d 489, 492 (9th Cir.), cert. denied, 439 U.S. 896 (1978);
United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976); United States v. Hufford, 539
F.2d 938, 944 (6th Cir. 1980); United States v. Moore, 562 F.2d 106, 112 (1st Cir. 1977), cert.
denied, 435 U.S. 926 (1978); United States v. Holmes, 521 F.2d 859, 864-66 (5th Cir. 1975),
aff'd in part, rev'd in part, 539 F.2d 227 (1976). A related consideration was that public track-
ing of beepers accomplishes no more than could be accomplished by visual surveillance be-
because those devices merely "augment" or "enhance" the government's visual capacities. See,
 e.g., United States v. Dubrofsky, 581 F.2d 208, 211 (9th Cir. 1978); Hufford, 539 F.2d at 34.
Thus, the Knotts reasoning validated some of the precise analyses of the lower tribunals.

The lower courts had usually drawn a line at the entrance of a dwelling, concluding that
the fourth amendment operates when tracking crosses the threshold of the home. See, e.g.,
United States v. Clayborne, 584 F.2d 346, 350 (10th Cir. 1978); United States v. Moore, 562
F.2d 106, 113 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978). The heightened privacy inter-
est possessed in dwellings and the traditional fourth amendment sacredness of the home were
relied upon to support that conclusion. See, e.g., Clayborne, 584 F.2d at 351; Moore, 562 F.2d
at 113. The Karo majority found the logic of that reasoning persuasive. See infra notes 248-50
& accompanying text.

248. Karo, 104 S. Ct. at 3303.
249. Id.
250. Id.
The Court’s reasoning is disconcerting and seriously flawed. The majority’s reasoning seems to restrict the applicability of Knotts to situations in which the information obtained by electronic tracking definitely could have been secured by continuous visual surveillance. The Karo Court’s emphasis upon the government’s inability to obtain locational and movement information by ordinary sight from unprotected areas suggests that if agents would not have been able to pursue an item by the use of natural senses because initially, or any time thereafter, it was removed from public view (for example, by entrance into a dwelling or nonobservable placement within any other type of protected enclosure), Knotts’ “voluntary conveyance/public exposure” rationale would not justify unregulated monitoring. Without probable cause and/or a warrant, tracking is permissible only when the location of the object being moved about could at all times be known without beeper use—that is, by visual surveillance alone. Once locational knowledge by unaided senses used in “public” areas becomes impossible, subsequent monitoring becomes impermissible.

Still, Karo’s restriction of Knotts might be perceived as less severe. First, the Karo majority opinion’s emphasis upon “homes” and their traditional sanctity, see 104 S. Ct. at 3303-04, could be seen as limiting its holding to monitoring of signals from within dwellings. Such a limitation, however, would neither be consonant with prior law regarding the applicability of the fourth amendment beyond homes, see United States v. Chadwick, 433 U.S. 1 (1971), nor with suggestions in Karo that monitoring signals from within any protected enclosure is covered by its holding. See Karo, 104 S. Ct. at 3305, 3306 n.6; see also id. at 3313 n.8 (Stevens, J., concurring and dissenting).

More significantly, in Karo the majority sustained warrantless monitoring of a can of ether after a period during which the can had entered a private dwelling, had been moved without government awareness and, thereafter, had been located by beeper within a warehouse. Justice White reasoned that the claimants could not object to the beeper-effected locating of the object in the warehouse because of their lack of protected fourth amendment privacy interests there; that the location of the ether in the specific locker in the warehouse where they did have privacy interests was accomplished by the unaided sense of smell that triggered no fourth amendment scrutiny; and that because the can was exposed to public view prior to the contested beeper tracking from the warehouse into another private residence, the post-exposure tracking was permissible under Knotts’ rationale. See id. at 3306.

Although in isolation the post-exposure warrantless beeper monitoring was constitutionally permissible under the Knotts-Karo analysis, the majority erred in failing to recognize that even if the claimants lacked “standing” in the warehouse building, the location of the device while it remained in a “private” locker in the warehouse revealed “private” locational information concerning a specific object that could not have been obtained by the use of unaided senses in “nonprivate” places. Consequently, the later “exposure” of the container to the agents’ view appears to have been the product of Karo-barred monitoring. By revealing information protected by the locker in which the claimants had a clear privacy interest, the monitoring “poisoned” its “fruit,” i.e., the later monitoring that it enabled. The Court’s explanatory observations that the monitoring “did not identify the specific locker” and “revealed nothing about the contents of the locker,” 104 S. Ct. at 3306, are hair-splitting sophistry that does not explain how the use of the warrantless beeper to locate the can at the warehouse respected the claimants’ fourth amendment rights.

The flawed Karo analysis creates the possibility of a broader reading of the scope of Knotts-approved monitoring than Karo reasoning should allow. Karo and Knotts together might be illogically construed to mean that the fourth amendment protects only information concerning the interiors of homes or other enclosures—that is, information not acquirable by ordinary senses operating in public areas. Courts might allow any electronic tracking which could have been accomplished by natural senses in public spheres no matter what preceded it “beeper-wise.” See Karo, 104 S. Ct. at 3307 (O’Connor, J., concurring).
majority opinions in *Knotts* and *Karo* evince a lack of appreciation for the true character of fourth amendment privacy and a total neglect of the substantial reasons, beyond mere secrecy, for granting that constitutional entitlement. The installation and monitoring of an electronic tracking beacon to follow an individual or object indisputably involves a purposeful governmental quest for information and thus possesses the initial essential characteristic of a fourth amendment search. The important and neglected question is whether that activity threatens legitimate needs for privacy.

In most transponder cases the claimant does not challenge the breach of a closed repository sometimes involved in installation. Rather, both installation and monitoring are contested because of the comprehensive information about an individual's movements provided by the combination of the two practices. The needs for privacy against such acquisitive endeavors are grounded in more than an interest in secrecy for its own sake. Informational privacy concerning one's movements is needed to facilitate enjoyment of constitutional rights to travel, liberty of movement, and freedom to associate. Without the assurance

---

252. The *Karo* Court's clear and repeated emphases upon information obtainment, the critical division between sources located in private domains and those in public, the failure to recognize the high potential value of confidentiality in public movements, and the characterization of an object's location and continued presence inside a home as "critical fact[s] about the interior of the premises that the Government is extremely interested in knowing." 104 S. Ct. at 3303-04, all point toward a too narrow conception of fourth amendment privacy. See *also* id. at 3310 (O'Connor, J., concurring in part) ("[O]ne who lacks dominion and control over the object's location has no privacy interest invaded when that information is disclosed. It is simply not his secret that the beeper is disclosing, just as it is not his privacy that would be invaded by a search of the container whose contents he did not control.") (emphasis added)).

Occasionally, lower court opinions have hinted at proper concerns. See, e.g., United States v. Michael, 645 F.2d 252, 265-66 (5th Cir.) (Tate, J., dissenting) (relying on the "fundamental liberty of owning private property free of unauthorized government intrusion . . . a fundamental attribute of individual liberty guaranteed by our Constitution" to reach a decision regarding search status of beeper activity), cert. denied, 454 U.S. 950 (1981); id. at 272 (Godbold, J., dissenting) (referring to fifth amendment self-incrimination concerns for same purpose); United States v. Bailey, 628 F.2d 938, 948-49 (6th Cir. 1980) (Keith, J., concurring) ("Privacy, whether it be of conversation or movement, is destroyed when monitored.") (emphasis in the original).

253. See supra notes 92-93 & accompanying text.

254. See supra note 224. For a discussion of the right to travel, see Note, supra note 224, at 989.

255. The fourth amendment guarantee against unreasonable seizures of the person is essentially an assurance of freedom of physical mobility. See supra note 225. The *Terry v. Ohio* line of cases recognizes that "stops" and "detentions" which interfere with that freedom can occur without actual physical restraint. See, e.g., Florida v. Royer, 460 U.S. 491, 503 (1983). The question is whether a reasonable person would feel free to walk away in the circumstances. See *In re Delgado*, 104 S. Ct. 1758, 1769 (1984) (Brennan, J., concurring and dissenting).

256. Although no specific protection of freedom of association appears in the Constitution,
that our movements will not be surveilled or recorded, these liberties are subject to chill and diminution. Confidence that our movements and associations are not being watched and documented by the government is a foundation that liberates them. The privacy-provided opportunities to enjoy such freedoms infuse claimed needs for constitutional shelter against beeper employment with legitimacy.

The criteria adverted to by the courts appear defective when evaluated in light of the instrumental privacy objectives apparent in the beeper context. Free movement and travel are, by their nature, public activities. It would be ludicrous to speak of freedom to travel in private spheres or of liberty from physical restraint in private places. Similarly, association with those other than the intimates with whom we live often requires some public behavior. To be truly free to associate, we must go to the homes of friends, travel to meeting halls, or convene for business or pleasure in a variety of sites, ranging from tightly "closed" private homes to much more "open," accessible environments. While such public behavior could diminish the merits of a claim to pure secrecy, it should not

the Court has discerned constitutional bases for that liberty. Originally, associational freedom was grounded in the first amendment "right . . . peaceably to assemble, and to petition the Government for a redress of grievances." The Court's recognition that the guarantees within the first amendment are closely related, see UMW v. Illinois State Bar Ass'n, 398 U.S. 217, 222 (1967); Bates v. Little Rock, 361 U.S. 516, 522-23 (1960); Thomas v. Collins, 323 U.S. 516, 530 (1945), led it to expand the basis of the staunchly safeguarded freedom of association to include the freedom of speech. See Griswold v. Connecticut, 381 U.S. 479, 483 (1965); see also Schneider v. Smith, 390 U.S. 17, 25 (1968). The critical importance of freedom of association in our social order finds expression in the close scrutiny to which claims of deprivation are subjected. See NAACP v. Alabama, 357 U.S. 449, 461 (1958). Moreover, the recognition that freedom of association is a part of the bedrock of our nation is no modern phenomenon. More than a hundred years ago Lieber observed:

The associative principle is an element of progress, protection, and efficient activity. The freer a nation, the more developed we find it in larger or smaller spheres; and the more despotic a government is, the more actively it suppresses all associations . . . . There is nothing that more forcibly strikes a person arriving for the first time from the European continent, either in the United States or in England, than the thousandfold evidences of an all-pervading associative spirit in all moral and practical spheres . . . . Strike out from England or America this feature and principle, and they are no longer the same self-relying, energetic, indomitably active people. The spirit of self-government would be gone.

F. LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 125-26 (3d ed. 1874).

A viable freedom to associate is difficult to imagine in the absence of liberty to go from place to place. Unregulated transponder use imperils our first amendment freedom to associate by inhibiting our liberty to move about.

257. Although a measure of free association with those within our households is possible without public conduct, adequate opportunities to nurture and develop those associations probably also require some public behavior. Many of the activities which give meaning and substance to such relationships—for example, worship, entertainment, vacations, therapy—cannot transpire without free physical mobility.
undercut a claim to secrecy for the purpose of exercising those necessarily public rights. The fourth amendment affords informational privacy to enable the full enjoyment of such blessings. To permit the unavoidable attributes of those freedoms to undermine the capacity to claim privacy protection is perverse and indefensible. Thus, contrary to current doctrine, public exposure or accessibility ought not abrogate informational privacy entitlements against beeper employment.

The minimal nature of the "intrusion" is also a misguided criterion of fourth amendment coverage of beacon use. It harks back only too clearly to *Olmstead* and the discredited notion that property interests and

258. See *supra* notes 91-93, 218-28 & accompanying text.

259. In *Knotts*, the Court excluded an instance of governmental transponder employment from fourth amendment control mainly because of public exposure. 460 U.S. at 280. Such reliance on exposure can be wholly inconsistent with an instrumental view of informational privacy. *Karo* may reduce the damage to proper instrumental ends threatened by *Knotts*. See *supra* note 251. If *Karo* means that the Constitution is inapplicable only when the information about locations and movements could be visually obtained from vantage points where officers have the fourth amendment right to be, it substantially limits the opportunities for ceaseless, warrantless monitoring. In addition, *Karo* increases the incentive to have adequate justification in every case of monitoring—even *Knotts*-authorized monitoring—lest permissible activity suddenly become impermissible. See *Karo*, 104 S. Ct. at 3305. The contention, however, that *Knotts* and *Karo* together provide adequate protection for travel and associational rights because the individual truly interested in preserving informational privacy needs only withdraw a beeper-bearing item from public view is completely untenable. The individual will probably be unaware of the transponder employment and, in any case, the object bearing the beeper may be too large effectively to be withdrawn from public view.

The only instances in which it is both logical and fair to count public exposure against a claimant is when the circumstances—including his or her awareness of the beacon, the feasibility of effective concealment, and the reasonableness and onerousness of measures required to remove the beacon from public view—indicate no real interest in and no need for confidentiality. *Karo* and *Knotts*, however, do not limit the significance of exposure to such cases. Perversely, *Karo* most clearly protects information when the target object is confined within a dwelling. Because that information is likely to be less significant and less substantial than data regarding public locations and movements, breach of its confidentiality is less damaging to instrumental goals.

Read broadly, *Karo* will protect free movement to some extent. If an individual is able to conceal a beacon-laden object from public view, either because of "beeper awareness" or fortuity, fourth amendment protection should be available under *Karo*. Awareness of that opportunity for self-protection, however, can provide little assurance or security to the individual who cannot know when or where the government has "infected" his life with an electronic bug. That assurance, and the freedom that goes with it, arise only from the knowledge that, barring relinquishment of our interests, transponder use will fall prey to the regulation of the fourth amendment. But cf. Christie, *Government Surveillance and Individual Freedom: A Proposed Statutory Response to Laird v. Tatum and the Broader Problem of Government Surveillance of the Individual*, 47 N.Y.U. L. Rev. 871, 885 n.68 (1972) ("When 'surveillance' involves the observation of the public activities of an individual and the collection and maintenance of publicly available information about an individual, it is hard to pin down any fourth amendment rights that have been violated.").
physical "trespasses" control fourth amendment scope. The word "intrusion," if used at all, should be understood to refer to the severity of the threat to privacy interests safeguarded by the fourth amendment. In that respect, contrary to current analysis, the "intrusion" in electronic tracking device cases is clearly substantial because the jeopardy to travel and associational rights is grave. Consequently, the needs for privacy against the informational "intrusion" of beepers are weighty.

The questionable conclusion that beepers merely augment or enhance the visual capacities of agents is also an inappropriate basis for denying privacy protection. First, tracking beacons, by providing continuous and comprehensive records of movement, enable "informational intrusions" markedly different in degree and in kind than those accomplishable by the natural human senses. In addition, Katz itself renders suspect the assumption that "mere" augmentation of senses by science is

---

260. See supra notes 21-25 & accompanying text; see also supra note 198 & accompanying text.

261. See supra notes 197-99 & accompanying text. In Katz, Justice Stewart concluded that the government's eavesdropping was within fourth amendment confines because it "violated" the claimant's privacy. 389 U.S. at 353. "Violation" is preferable to "intrusion" since it at least minimizes connotations appropriate to pre-privacy conceptions of the fourth amendment guarantee.

262. While "physical intrusion brings us to the core of our expectations and intuitions about privacy and hence to our rights to it," Gerety, supra note 76, at 265, the language and concept of "intrusions" pose difficulties and engender risks of improperly confining fourth amendment privacy when other than physical "intrusions" are involved. See Amsterdam, supra note 1, at 383.

263. In Karo, the Court employed the language of "intrusions," but commendably refused to judge the severity of the "intrusion" in terms of the physical breach or disruption caused by a beeper's entrance into a dwelling. Instead, "intrusiveness" depended upon the criticality and unobtainability of information concerning the interior of the home. Still, the Court's excessive concern with the interior betrays lingering ties to the notion that conduct must "intrude" (at least informationally) upon protected areas in order to trigger the fourth amendment. Furthermore, the Court completely neglected instrumental goals in assessing the "intrusiveness" of the government's information acquisition.

264. See LaFave, supra note 149; Constitutional Law Symposium Features Discussion of Gates, Bradshaw Cases, 34 CRIM. L. REP. (BNA) 2098, 2100-01 (Nov. 2, 1983).

265. The comprehensiveness and the continuity of the picture provided by tracking devices distinguish them from ordinary, unaided human surveillance abilities. See Comment, Pen Registers, supra note 84, at 757. The fallibility of natural sensory capacities and the related potential for elusion by the target make the possibility of securing a comparably complete record of information concerning any given individual minimal at best. In essence, beepers do not simply increase the range or reach of our human senses, they furnish a new ability, an adjunct to the natural senses. See United States v. Karo, 710 F.2d 1433, 1439 (10th Cir. 1983) ("The beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant."); rev'd, 104 S. Ct. 3296 (1984); see also Moore, 562 F.2d at 112; Holmes, 521 F.2d at 866 n.13; cf. United States v. Dubrofsky, 581 F.2d 208 (9th Cir. 1978) ("Transmitting [a] package's location is merely an aid to what can be accomplished by visual surveillance. Permissive techniques of surveillance include more than the five senses of officers and their unaided physical abilities.").
always constitutionally permissible.\textsuperscript{266} Most important, the unspoken assumption that comprehensive surveillance by means of natural senses is immune from fourth amendment coverage is vulnerable.\textsuperscript{267} The Constitution might well govern such use of \textit{unenhanced} natural senses; if so, it would also control the utilization of “mere” enhancing devices.\textsuperscript{268} Effective and comprehensive visual surveillance and recordation—whether accomplished by the natural senses alone or aided by electronic devices—infringe on the need for the informational privacy essential to travel, physical mobility and association.

Insofar as installation is challenged because it enables tracking, the issues and interests would appear to be the same as those involved in challenges to monitoring, and those two stages of beeper employment can be analyzed together.\textsuperscript{269} On the other hand, if attachment involves the opening of or entry into closed containers or structures, it raises an additional, traditionally recognized fourth amendment concern—the “pure” interest in the secrecy of that enclosure’s contents. Whether or not the government intends to acquire information by opening a

\textsuperscript{266} If the beeper in \textit{Knotts} could be viewed as a “mere augmenter” of visual senses, there is no reason the electronic eavesdropping device in \textit{Katz} could not be characterized as a “mere enhancer” of ordinary auditory faculties. It should be clear from the tenor and intent of the \textit{Katz} opinion that such a characterization would not have obviated the conclusion that the governmental practice “violated the privacy upon which [Mr. Katz] justifiably relied.” \textit{Katz}, 389 U.S. at 353; \textit{see Knotts}, 460 U.S. at 288 (Stevens, J., concurring) (“[T]he Court suggests that the Fourth Amendment does not inhibit ‘the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them’ . . . . But the Court held to the contrary in \textit{Katz}.”); \textit{cf Karo}, 104 S. Ct. at 3302 (expressing the view that the transfer of a beeper-bearing object did not trigger fourth amendment operation because “[it] is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.”).


\textsuperscript{268} Regrettably, the \textit{Karo} Court seemed to endorse the remarkable premise that unaugmented use of human sense capacities does not trigger constitutional concern. If followed to its logical extreme, that premise could lead to no fourth amendment protection against quintessential searches and most of the other actions it clearly should and does cover. After all, the breaking of doors, the entry into homes, and the acquisition of information therein involves no more than the use of ordinary human senses. Because threats to legitimate privacy interests are the true concern, decisions regarding fourth amendment purview should not hinge upon whether ordinary, natural senses, devices that “merely enhance” them, or devices that bestow additional “senses” or “extend” the natural senses are involved in governmental investigatory activity, but should depend upon whether any of those methods infringes upon legitimate fourth amendment privacy interests.

\textsuperscript{269} There seems to be no reason to analyze installation separately from monitoring when the basis of concern with attachment is the revelation of locations and movements. \textit{Cf Karo}, 104 S. Ct. at 3302 (applying similar reasoning to the transfer of a beeper-laden object). \textit{But see id.} at 3310-11 (Stevens, J., concurring and dissenting) (arguing that installation of a beeper and delivery of a beeper-bearing object is a fourth amendment \textit{seizure} of property because “by attaching a monitoring device . . . the agents usurped a part of a citizen’s property” and “in the most fundamental sense [were] asserting ‘dominion and control’ over the property.”).
container to insert a beeper, it is likely to do so.\textsuperscript{270} If agents enter a vehicle or unwrap a parcel to attach a beacon, they threaten the confidentiality of the contents. As long as a person has not evinced a substantial lack of concern for secrecy vis-a-vis the government, the well-recognized fourth amendment interest in maintaining secrecy for its own sake ought to stand as a barrier to the unregulated opening of containers—at least those in which an individual has an ownership or possessory interest.\textsuperscript{271}

In sum, there are legitimate purposes beneath a grant of informational privacy against official use of tracking devices. The opinions that have employed the reasonable expectation of privacy analysis either to deny or to grant protection have invoked inappropriate criteria, paying virtually no heed to the reasons that privacy is constitutionalized. Under a proper conception of the significance of the privacy involved, the fourth amendment regulatory regime ought to operate when the government surreptitiously installs and monitors transponders.

\textit{Open Fields}

In \textit{Hester v. United States},\textsuperscript{272} the Supreme Court held that revenue officers had not “searched and seized” within the meaning of the Constitution when they “trespassed” onto property owned by the claimant’s father, observed the claimant’s moonshining activities, and ultimately acquired evidence that he had jettisoned when alerted to the presence of law enforcement officers. As a basis for rejecting Hester’s claim, Justice Holmes pithily observed that “the special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers and effects,’ is not extended to the open fields.”\textsuperscript{273}

\textsuperscript{270} Of course, the government always does intend to acquire information by beeper employment. There are no conceivable motives for that activity other than the obtaining of data about a person’s or object’s travels and movements. The point of the textual discussion is that, in some instances, the government may unintentionally acquire more confidential information of a different sort than the movement and locational data that it is after. The likelihood of such acquisition ought to suffice for purposes of the initial, information-acquisitive qualification of fourth amendment searches. \textit{See supra} notes 81-88 & accompanying text.

\textsuperscript{271} This conclusion reflects no more than the principles underlying the Court’s container and automobile cases. \textit{See United States v. Jacobsen}, 104 S. Ct. 1652, 1657, 1660 (1984); \textit{Arkansas v. Sanders}, 442 U.S. 753 (1979); \textit{United States v. Chadwick}, 433 U.S. 1 (1977). There is a substantial interest in “secrecy per se” within such objects. Consequently, installation alone could serve as the basis of a cognizable fourth amendment claim. If a claimant has no interest in the object prior to installation, no information regarding his life or activities could possibly be obtained. Thus, insofar as such confidentiality is the interest involved in an installation claim, the conclusion that the fourth amendment does not protect one who has no interest in an item prior to beeper installation seems defensible. Similarly, the mere transfer of the object does not threaten any valid interest the recipient has in the secrecy of the contents because the recipient has no such interest prior to delivery and transfer alone risks no revelation of the contents. \textit{See supra} note 269.

\textsuperscript{272} 265 U.S. 57 (1924).

\textsuperscript{273} \textit{Id.} at 59.
The "open fields doctrine" of that case did not generate controversy until 1967, when Katz revamp ed the law of fourth amendment reach. In the new light cast by the emerging "reasonable expectation of privacy" doctrine, courts began to question the meaning, scope, and continuing validity of Hester. Analyses, conclusions, and results varied. Some held that by virtue of Hester, any activity in the "open fields" remained wholly unprotected after Katz. Others, however, concluded that Katz' replacement of property-based limitations on fourth amendment scope with the reasonable expectation of privacy standard severely curtailed the constitutional validity of Hester. Those courts required examination of all circumstances to ascertain whether a protected privacy expectation was threatened.

In Oliver v. United States, the Supreme Court finally settled the controversy over the relationship between Katz and Hester. The Court held that despite the intervention of the reasonable expectation doctrine, Justice Holmes' refusal to extend the protection of the fourth amendment to the open fields remains sound constitutional law. The majority opinion in Oliver seemed to follow "two independent analytical routes" to Hester's reaffirmation.

Initially, the Court relied heavily upon the restrictive terminology of the fourth amendment, which specifically guarantees security in "persons, houses, papers and effects," thus "indicat[ing] with some precision the places and things encompassed by its protections." Because

274. See United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982), aff'd, 104 S. Ct. 1735 (1984); United States v. Brown, 473 F.2d 952, 954 (5th Cir. 1973); Atwell v. United States, 414 F.2d 136, 138 (5th Cir. 1969). The faithful Hester disciples who perpetuated the categorical exemption of the "open fields" from fourth amendment coverage were apparently in the minority. See Oliver, 686 F.2d at 372-73 (Keith, J., dissenting). The minority, however, was not as small a group as it might have seemed. Some courts, while purporting to apply the "reasonable expectations" doctrine, actually were adhering to a disguised Hester doctrine by placing the determinative line between "searches" and "nonsearches" at the boundary between the "curtilage" of homes and the "open fields." See United States v. Berrong, 712 F.2d 1370, 1374 (11th Cir. 1983), cert. denied, 104 S. Ct. 2397 (1984); United States v. Long, 674 F.2d 848, 852-53 (11th Cir. 1982); United States v. Van Dyke, 643 F.2d 992, 993-94 (4th Cir. 1981). The approach of the covert Hester adherents imposed the same limitation upon fourth amendment coverage as that imposed by the Hester followers because their conclusion was, in essence, that no reasonable privacy expectation could exist outside the curtilage. This holding received Supreme Court sanction in Oliver. See infra note 299.


277. Id. at 1744 (Marshall, J., dissenting).
278. U.S. CONST. amend. IV.
279. Oliver, 104 S. Ct. at 1740.
"open fields" are not described by that language, "the government's intrusion upon [them] is not one of those 'unreasonable searches' proscribed by the text." In essence, "the open fields doctrine, as enunciated in Hester," was sustained because it "is consistent with the plain language of the Fourth Amendment and its historical purposes." The majority opinion in Oliver strongly suggested that such textually grounded reasoning, with support from the history of the common law, would be an independently adequate basis for retaining Hester. Nevertheless, Justice Powell was not content with mimicking the "characteristically laconic style" of Justice Holmes, for he proceeded to analyze the open fields situation in light "of the 'reasonable expectation of privacy' doctrine developed in subsequent decisions of [the] Court."

That analysis opened with the conclusion that the majority's "interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in [the Court's prior] Fourth Amendment jurisprudence." In explaining that conclusion, however, the majority departed markedly from well-established doctrinal paths, apprising us that "factors" that "may be relevant to Fourth Amendment analysis in some contexts . . . cannot be decisive on the question whether the search of an open field is subject to the Amendment." Those suddenly irrelevant factors that earlier opinions had

280. Id.
281. Id. at 1744.
282. The brief, text-based portion of the majority opinion is contained in a separate section that "conclud[ed], as did the Court in deciding Hester v. United States, that the government's intrusion upon the open fields is not one of those unreasonable searches proscribed by the text of the Fourth Amendment." Id. at 1740. Only then did the Court proceed to its reasonable expectation of privacy analysis, which commenced with the observation that the preceding "interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence." Id. Thus, both the structure and language of the opinion provide support for the view that the Court majority thought its semantic analysis alone could support reaffirmation of Hester's open fields doctrine. Justice Marshall so assessed the majority's effort. Id. at 744-45 (Marshall, J., dissenting).
283. Id. at 1740.
284. Id. at 1744. Justice White would have been content with such a "laconic," language-based resolution of Oliver. In an extremely concise concurrence, he concluded that "[h]owever reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a 'house' or an 'effect.'" Id. at 1744 (White, J., concurring).

Justice Marshall believed that the Court majority shied away from such wholesale reliance on the constitutional text because it was "[s]ensitive to the weakness of its argument that the 'persons and things' mentioned in the Fourth Amendment exhaust the coverage of the provision." He was optimistic that the Court's inclusion of an analysis of "the privacy interests that might legitimately be asserted in 'open fields,'" plus the "reaffirmation of Katz and its progeny, . . . strongly suggest that the plain-language theory . . . will have little or no effect on our future decisions in this area." Id. at 1746 n.7 (Marshall, J., dissenting).
285. Id. at 1740.
286. Id. at 1743.
ensconced as determinants of fourth amendment operation\textsuperscript{287} included “steps taken to protect privacy”\textsuperscript{288} and the “existence” of “general rights of property protected by the common law.”\textsuperscript{289} Eschewing reliance upon those ingredients, the Court based its conclusion that “the asserted expectation of privacy in open fields is not an expectation that ‘society recognizes as reasonable’”\textsuperscript{290} on the premises that “open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter,” and that “[t]here is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in the open fields.”\textsuperscript{291}

Insofar as the \textit{Oliver} Court intended to suggest that the fourth amendment’s text alone provides an independently sufficient source of definitive answers to questions of constitutional scope posed in open fields contexts, its opinion is unfaithful to and “inconsistent with the [Katz] line of cases and with the understanding of the nature of constitu-

\textsuperscript{287} Between \textit{Katz} and \textit{Oliver}, the lower courts had rested their decisions in open fields cases upon elements prescribed by the Supreme Court as apposite to boundary disputes, see \textit{supra} notes 46-58 & accompanying text, namely: (1) precautions, see, e.g., United States v. Oliver, 686 F.2d 356, 371 (6th Cir. 1982), rev’d, 104 S. Ct. 1735 (1984) (Keith, J., dissenting); United States v. Dunn, 674 F.2d 1093, 1100 (5th Cir. 1982), \textit{vacated}, 104 S. Ct. 2380 (1984); State v. Rickard, 420 So. 2d 303, 306 (Fla. 1982); State v. Brady, 406 So. 2d 1093, 1097 (Fla. 1981), \textit{vacated}, 104 S. Ct. 2380 (1984); State v. Thornton, 453 A.2d 489, 494 (Me. 1982), rev’d, 104 S. Ct. 1735 (1984), (2) public exposure or accessibility, see, e.g., United States v. Hensel, 699 F.2d 18, 32 (1st Cir.), \textit{cert. denied}, 103 S. Ct. 2431 (1983); \textit{Rickard}, 420 So.2d at 305-06; \textit{Brady}, 406 So. 2d at 1098; \textit{Thornton}, 453 A.2d at 495, and (3) property concepts and interests, see, e.g., Dunn, 674 F.2d at 1100; United States v. Ramapuram, 632 F.2d 1149, 1159 (4th Cir. 1980), \textit{cert. denied}, 450 U.S. 1030 (1981) (Ervin, J., dissenting); United States v. Holmes, 521 F.2d 859, 870 (1975), \textit{aff’d in part, rev’d in part}, 537 F.2d 227 (5th Cir. 1976); \textit{Rickard}, 420 So. 2d at 306.

\textsuperscript{288} \textit{Oliver}, 104 S. Ct. at 1743. The Court made passing reference to the public accessibility factor by observing that the precautions taken by the defendants might have made their property accessible to “few members of the public.” \textit{Id.} In an earlier portion of the opinion, however, the Court had suggested that “as a practical matter these lands [i.e., open fields] usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be. It is not generally true that fences or no trespassing signs effectively bar the public from viewing open fields in rural areas.” \textit{Id.} at 1741. The Court, thus, could have reached the same noncoverage result for most open fields cases without suspending current doctrine. The public access factor would provide a basis for declaring most claimants’ expectations of privacy in open fields unreasonable.

\textsuperscript{289} \textit{Id.} at 1744. The Court “reject[ed] the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate.” \textit{Id.} at 1743. It termed “general rights of property protected by the common law of trespass [of] little or no relevance to the applicability of the Fourth Amendment.” \textit{Id.} at 1744. The dissenters relied heavily upon the “property rights” and “precautionary measures” criteria. \textit{Id.} at 1747-50 (Marshall, J., dissenting).

\textsuperscript{290} \textit{Id.} at 1741.

\textsuperscript{291} \textit{Id.} (footnote omitted). Justice Marshall also referred to the activities that might occur in or the uses to which one might put open fields. A primary reason that his ultimate conclusion diverged from the majority’s was his perception of a broader range of potential endeavors in the out-of-doors that “deserve privacy.” \textit{Id.} at 1748-49 (Marshall, J., dissenting).
tional adjudication from which it derives.” The propriety of such analysis merits no further discussion here, for the day of such blind faith in constitutional language is long past. The Court’s alternative “reasonable expectations” route, however, merits critical attention.

Considering the fallacies and misunderstandings of fourth amendment privacy injected by the recurrent criteria that had come to dictate threshold decisionmaking, the Oliver Court’s decision to abandon rigid reliance upon them seems a step in the right direction. Furthermore, the Court’s focus upon “activities that the Amendment is intended to shelter” and prescription of “the correct inquiry [as to] whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment,” appear to contain the potential for progressive redirection of fourth amendment law along instrumental lines. Close examination, however, shows that those doctrinal choices do not make the progressive promises suggested at first glance.

First, the Court’s eschewal of precautions, exposure, and property rights evidently constitutes an exception to otherwise applicable reasonable expectations doctrine, rather than a general reform of purview analysis. Second, if the prescribed inquiry into “personal and societal

---

292. Id. at 1745 (Marshall, J., dissenting). The Court’s literal reading of the constitutional text is irreconcilable with the spirit and result of Katz because “neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper or effect; yet [Katz] held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation.” Id. at 1745 (Marshall, J., dissenting) (footnote omitted). Moreover, the Court’s literal approach to the fourth amendment betrays “the understanding of the nature of constitutional adjudication” which should guide threshold decisions because [t]he Fourth Amendment . . . was designed, not to prescribe with “precision” permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion . . . . [W]hen interpreting . . . seminal constitutional provisions, [the Court must strive] to effectuate their purpose—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials. Id. at 1745-46 (Marshall, J., dissenting) (footnotes omitted). In other words, the Court’s text-based analysis is unfaithful to the “purpose” or “interest-based” mode essential to preserve the fourth amendment’s vitality.

293. This should be evident from Justice Black’s “lone wolf” position in Katz, 389 U.S. at 364 (Black, J., dissenting). See supra note 81.

294. See supra notes 182-205 & accompanying text.

295. Oliver, 104 S. Ct. at 1741, 1743.

296. The lower court in Oliver had also shown some analytical progress along instrumental lines. Regrettably, like the Supreme Court, see infra note 298, the Sixth Circuit Court ultimately underestimated privacy needs in the out-of-doors. See United States v. Oliver, 686 F.2d 356, 360 (6th Cir. 1982), aff’d, 104 S. Ct. 1735 (1984).

297. Justice Powell stated that “the factors” that “may be relevant . . . in some contexts . . . cannot be decisive on the question whether the search of an open field is subject to the Amendment.” Oliver, 104 S. Ct. at 1743 (emphasis added). The unexplained departure from accepted threshold doctrine in situations in which the traditional approach could militate strongly in favor of fourth amendment application creates an impression of result-oriented analysis, corruptive of doctrine and designed to continue a recent trend toward narrow fourth
values" does reflect an awareness of the instrumental character of informational privacy, that awareness is incipient at most and bears little promise of growth. The Court does not discuss the nature of such an inquiry, and, ultimately, the one it conducts in Oliver is superficial and conclusory. The deficiencies in the Court’s analysis are evident in the decision to adhere to Hester and to declare categorically that privacy protection for activities in the out-of-doors is a constitutional impossibility.

The potential legitimate bases for recognizing some privacy entitlement in the open fields are more substantial and persuasive than the Court was willing to acknowledge.

Real property rights of ownership and possession are valuable for many reasons, not the least of which are the opportunities to make use of our land and conduct our lives on it as we see fit and the ability to share it with associates, acquaintances, family, and friends. Our interests in land would lack substance without the possibilities afforded by free use and exploitation. We may choose to cultivate our lands or to leave them in a natural state in order to enjoy their benefits and beauties. We might take advantage of the out-of-doors by sunning ourselves in various states of undress, by speaking our minds to no one in particular, or by meeting with others. None of these possible exploitations of the opportunities that secluded lands afford are criminal. And, contrary to the Oliver amendment confines. See, e.g., United States v. Karo, 104 S. Ct. 3296 (1984); Hudson v. Palmer, 104 S. Ct. 3194 (1984); United States v. Jacobsen, 104 S. Ct. 1652 (1984); Illinois v. Andreas, 103 S. Ct. 3319 (1983); United States v. Place, 103 S. Ct. 2637 (1983); United States v. Knotts, 460 U.S. 276 (1983); Smith v. Maryland, 442 U.S. 735 (1979); Rakas v. Illinois, 439 U.S. 128 (1978). "Of late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen." New Jersey v. T.L.O., 104 S. Ct. 3583, 3584 (1984) (Stevens, J., dissenting). Moreover, the Court's complete and categorical rejection of precautions and property rights as irrelevant to fourth amendment coverage of "open fields" is unsound. See infra notes 300-02 & accompanying text.

298. The superficiality of the majority's search for "personal and societal values protected by the Fourth Amendment" is evinced by its facile rejection of the possibility of uses of open fields other than "the cultivation of crops." Oliver, 104 S. Ct. at 1743, 1741. After the cursory evaluation of potential reasons for recognizing privacy entitlement in the open fields, the Court easily found "no basis for concluding that a police inspection of open fields accomplishes . . . an infringement" upon the "personal and societal values protected by the Fourth Amendment." Id. at 1743. Apparently, the majority thought that the only out-of-doors activities for which a claimant might need or desire informational privacy are criminal, and therefore underving of protection. See id. at 1741 n.10, 1743 n.13.

299. Actually, not all out-of-doors conduct is left unsheltered by Oliver because the Court recognized a "curtilage" exception. Id. at 1742. The Court found it unnecessary "to consider the scope of the curtilage exception to the open fields doctrine," but hinted that the curtilage might be accorded less than full fourth amendment protection. Id. at 1742 n.11.

300. Id. at 1748-49 (Marshall, J., dissenting). Justice Marshall's observation that "one of the purposes of the law of real property . . . is to define and enforce privacy interests," id. at 1747 n.10, however, seems to have the analysis backwards. The purpose of informational privacy in this context is the preservation and enforcement of property rights.
Court's conclusion, many activities that property rights make possible, which are an integral part of the worth of land, generate legitimate needs for informational privacy.

The free exercise of property rights in the manners described depends upon an assurance of privacy vis-a-vis the government. The privacy grant of the fourth amendment can assure us that authorities will not have unregulated access to information about the conduct of our lives in the open fields. That assurance can liberate our actions, enabling us to take full advantage of property interests. Conversely, a lack of informational privacy and the resultant knowledge that authorities have unrestrained access can only yield inhibition, self-censorship of behavior, and a corresponding diminution of the ability to enjoy the benefits of ownership or possession. In sum, privacy in the open fields should be constitutionally protected to safeguard and promote property values. The Oliver Court's decision, however, by excluding open fields from the fourth amendment regulatory scheme, gives notice that we are entitled to no confidentiality for our conduct there and therefore constrains free property use and enjoyment.

The hazardous implications of Oliver, however, ought not send us hastily back to the shelter of the doctrine conveniently avoided by the Court. Automatic, uncritical reference to the "public exclusion" and "precautionary measures" criteria could also undermine the very values that fourth amendment privacy should promote. Under the regime of those criteria, if one seeks to enjoy the benefits of property ownership or possession by permitting others onto her land, by not turning her realty into a fortress, the government's access to information about her life and conduct on such property will be constitutionally uncontrolled.\textsuperscript{301} As suggested, the knowledge that authorities have unfettered access can only chill our freedom, thus our property enjoyment. If we have to take exclusionary or precautionary measures that curtail the free exercise of our rights in order to avoid that chilling awareness and preserve privacy, an impermissible bind involving no-win alternatives is created for the individual interested in property enjoyment.\textsuperscript{302}

We should not pursue an approach to fourth amendment threshold


\textsuperscript{302} Unrestricted public access probably is not a prerequisite for adequate enjoyment of property rights. Similarly, the erection of a perimeter fence or the posting of a few "No Trespassing" signs will not interfere significantly with full property enjoyment or with associational freedom. Such minimal restrictive measures generally evince a need for confidentiality and put investigators on notice of fourth amendment operation. Because such measures are not harmful to legitimate interests, an owner or possessor who neglects them might fairly be perceived as unconcerned with and therefore willing to forego fourth amendment privacy.
questions that precludes ample enjoyment of the benefits of our property
rights by dictating that both the necessary concomitants of the exercise
of those rights and the liberating security that comes from restrictions
upon the government's power to acquire information cannot coexist.
The legitimacy of a fourth amendment interest cannot depend upon
"public exclusion" and "precautionary measures" which defeat the very
interests the Constitution ought to promote. Threshold methodology
and doctrine should ensure that informational privacy is protected in the
open fields whenever it is important to the full enjoyment and free exer-
cise of our constitutionally protected property and associational rights.

Canine Detection of Contraband

A large majority of lower courts had foreshadowed the Supreme
Court's conclusion in United States v. Place\textsuperscript{303} that the use of trained
canines to detect the presence of contraband in containers does not con-
stitute a search.\textsuperscript{304} In Place, the Court acknowledged "that a person pos-
sesses a privacy interest in the contents of personal luggage that is
protected by the Fourth Amendment,"\textsuperscript{305} but concluded that canine
sniffs do not significantly infringe that interest because the "manner in
which information is obtained," involving no opening and rummaging
that could expose noncontraband, "is much less intrusive than a typical
search," and "the information obtained is limited [to] only the presence
or absence of narcotics, a contraband item."\textsuperscript{306} In sum, no reasonable
privacy expectation is jeopardized because of the "limited . . . manner in
which the information is obtained and . . . the [limited] content of the
information revealed by the procedure."\textsuperscript{307}

\textsuperscript{303} United States v. Place, 303 S. Ct. 2637 (1983).

\textsuperscript{304} The conclusion is dictum, unnecessary to the decision in Place, because a majority
held that the detention of the claimant's luggage exceeded the scope justified by the govern-
ment's showing of cause and purpose. Id. at 2646.

\textsuperscript{305} Id. at 2644; see also Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chad-

\textsuperscript{306} Place, 103 S. Ct. at 2644.

\textsuperscript{307} Id. For pre-Place lower court decisions based on similar reasoning, see United States
v. Waltzer, 682 F.2d 370, 372-73 (2d Cir. 1982), cert. denied, 103 S. Ct. 3543 (1983); United
States v. Solis, 536 F.2d 880, 882-83 (9th Cir. 1976); United States v. Bronstein, 521 F.2d 459,
463 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); People v. Mayberry, 31 Cal. 3d 335, 341,
644 P.2d 810, 813, 182 Cal. Rptr. 617, 620-21 (1982); cf. United States v. Beale, 674 F.2d 1327,
1334 (9th Cir. 1982) (holding that "reasonable suspicion" is required to justify the canine-
niff), vacated, 103 S. Ct. 3529 (1983). Lower courts had also observed that the information
gained in canine sniffs is acquired from the airspace surrounding the container, an area in
which there could be no reasonable privacy expectation. See United States v. Lewis, 708 F.2d
1078, 1080 (6th Cir. 1983); Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 477 (5th
Cir. 1982), cert. denied, 103 S. Ct. 3536 (1983); United States v. Goldstein, 635 F.2d 356, 361
(5th Cir.), cert. denied, 452 U.S. 962 (1981). Apparently, that territory was considered a pub-
lic domain and thus one which the government is wholly free to explore and probe by any
means, including canine and human. See United States v. Sentovich, 677 F.2d 834, 835-36
The majority opinion in Place evinces a fairly clear conception of fourth amendment privacy as primarily informational in character.\textsuperscript{308} The Court's sketchy analysis conveys the message that fourth amendment operation depends upon the extent of jeopardy to interests in secrecy, but fails to explore the instrumental purposes for which informational secrecy in one's belongings is needed. Although such a neglect in a threshold context ordinarily would result in too constricted a territory of regulation, in the case of drug-sniffing canines the Court's failure to look beyond secrecy alone does not seem to lead to erroneous results.

As noted before, the inherent worth of secrecy ought to be taken into account in threshold calculations.\textsuperscript{309} In the canine situation, minimal threats to pure secrecy are posed because the external olfactory examination reveals only the presence or absence of contraband and discloses nothing about other contents.\textsuperscript{310} In the scheme of societal values, an interest in the secrecy of contraband is negligible and ought to be an inadequate basis for legitimate privacy needs. Arguably, more is at stake. The freedom to travel and move about without governmental restraint is compromised by the knowledge that what we bear is examinable in the unfettered discretion of investigating officials. The potential merit of that argument, however, is limited because only the physical freedom of those transporting contraband is threatened by reliable, discriminating canines. That "liberty" interest, a cognizable instrumental end of fourth amendment privacy, is also of scant social worth and should be inadequate to support legitimate privacy needs.\textsuperscript{311}

\textsuperscript{308} See Place, 103 S. Ct. at 2644 ("[T]he sniff discloses only the presence or absence of narcotics, a contraband item . . . . Thus, . . . the information obtained is limited."); see also United States v. Jacobsen, 104 S. Ct. 1652, 1658-59, 1660 (1984) (analyzing the threshold question by reference to what agents learned by their challenged conduct).

\textsuperscript{309} See supra text accompanying notes 218-21.

\textsuperscript{310} The container cannot be opened based on a canine alert alone. The substantial threat to the confidentiality of a repository's contents posed by opening it necessitates that, absent an exception, a probable cause showing be made to a neutral judicial officer and that a search warrant issue prior to the breach of the container. See People v. Mayberry, 31 Cal. 3d 335, 342, 644 P.2d 810, 814, 182 Cal. Rptr. 617, 621 (1982).

\textsuperscript{311} As long as the only information acquired pertains to an individual's knowing transportation of contraband, similar reasoning would support the installation and monitoring of a beeper. See United States v. Emery, 541 F.2d 887, 889-90 (1st Cir. 1976) (upholding beeper use on basis that contraband was bearer). If private information about noncontraband matters
The foregoing analysis relies substantially upon the limited character of the activity exempted from constitutional regulation. The extremely limited nature of the informational breach accomplished by canines minimizes the potential threats to both pure secrecy interests and legitimate instrumental ends.\textsuperscript{312} If the attributes of the governmental device change, however, the analysis may well change. For example, some canines apparently can detect alcohol and noncontraband drugs.\textsuperscript{313} Because they reveal information about legally possessed items, the threat posed to pure secrecy interests becomes more significant. Likewise, the potential chill upon free movement and travel spreads to those bearing solely licit belongings and therefore merits more concern. If dogs do disclose, and we are aware that they disclose, information about a broader range of subjects than simply the presence of contraband, the threat to our interests in secrecy and to the further benefits afforded by informational privacy preservation might well furnish legitimate bases for recognizing privacy needs.\textsuperscript{314}

is threatened, however, fourth amendment operation is in order. \textit{Contra} Grano, \textit{supra} note 84, at 438 n.113.

312. Professor Grano thinks that a similar rationale can support the refusal to apply fourth amendment constraints to cases like Lewis v. United States, 385 U.S. 206 (1966), and undercover “stings.” In \textit{Lewis}, a pre-\textit{Katz} case, “a federal narcotics agent, by misrepresenting his identity and stating his willingness to purchase narcotics, was invited into petitioner’s home where an unlawful narcotics transaction was consummated.” \textit{Id.} at 206-07. The Court found no privacy breach because the agent’s pretense “merely encouraged the suspect to say things he was willing and anxious to say to anyone who would be interested in purchasing marijuana.” \textit{Id.} at 212. According to Professor Grano, the proper question in such cases is “whether the conduct at issue could ever threaten or intrude upon informational privacy expectations unrelated to criminal conduct.” Grano, \textit{supra} note 84, at 437-38. He believes that \textit{Lewis} is correct because “the fourth amendment’s concern for the security of persons is exceeded when justifiable expectations of privacy include expectations that relate to nothing more than a propensity for wrongful conduct.” \textit{Id.} at 438.

Although I agree with that basic hypothesis, I believe that both the Court in \textit{Lewis} and Professor Grano misanalyze the risks to legitimate privacy interests posed by unregulated entries into homes and other protected areas. The agent’s entrance in \textit{Lewis} created a serious threat to informational privacy interests therein, and there was no guarantee that all information acquired, like that provided by accurate canines, would be pertinent to unlawful conduct. Although the acquisition of information solely related to a target individual’s willingness to engage in criminal conduct is of little concern, concern should increase dramatically when there is no assurance that an informational privacy breach will be so confined. See \textit{infra} note 315. It is interesting that Professor Grano declares that his hypothesis is not satisfactory, in a setting where it seems to make eminently good sense—use of a “sensor that detects narcotics but nothing else . . . at airports.” Grano, \textit{supra} note 84, at 437 n.111. Like a canine-sniff, that situation poses a minimal threat to legitimate secrets and ought to trigger no fourth amendment concern.

313. \textit{See} Horton, 690 F.2d at 474 (involving “dogs . . . trained to alert their handlers to the presence of any one of approximately sixty different substances, including alcohol and drugs, both over-the-counter and controlled”).

314. The accuracy of canine olfactory detection abilities is questionable. \textit{See} id. (two students of several subjected to sniffs “triggered alerts,” but neither was found to possess contra-
Thus, in the limited context of Place and many canine-sniff cases the results reached by the Supreme Court and the lower courts probably are defensible. If the investigatory procedure changes, however, the situation must be examined for potential jeopardy to the panoply of blessings promoted by constitutional privacy.\footnote{315}

\textit{Trash Inspection}

Federal and state courts have long been confronted with fourth amendment challenges to law enforcement inspections of trash.\footnote{316}

\footnote{Trash Inspection; see also Experts Question Ability of Evidence-Sniffing Dog, Des Moines Register, July 26, 1983, at 3T, col. 1 (discussing suspicions about the claimed olfactory exploits of an alleged "superdog"). Risks of canine error may raise privacy concerns similar to those generated by canines trained to respond to lawfully possessed items. If the rate of alerts to noncontraband items is more than de minimis, and if magistrates routinely rely on such error-prone animals alone in granting search warrant applications, the threat of breaching legitimate confidentiality interests is serious. Although the violation of informational privacy interests is one step removed from the dog sniff—that is, the serious confidentiality breach occurs upon opening of the container pursuant to a search warrant—if and when magistrates routinely defer to such erring beasts, the costs to constitutionally protected interests due to revelation of information concerning the contents are directly attributable to the dog sniffs. \textit{Cf.} LaFave, supra note 149, at 1742 ("If [Place's] underlying assumption is that the use of these dogs jeopardizes only the guilty, it is in error," because canine use creates the "risk of unnecessary intrusions on innocent persons . . . ."). Magistrates must hold canines to rigorous standards of reliability, thereby curbing the canine-generated peril to legitimate informational privacy interests.}

\footnote{315. \textit{Cf.} United States v. Jacobsen, 104 S. Ct. 1652, 1660-62 (1984) (A chemical field test that "can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." Reopening of a privately-opened package is "not a 'search'" because "there was a virtual certainty" that the inspection "would not tell [the agent] anything more than he already had been told."). The Jacobsen Court's reasoning is palatable only when it truly is \textit{virtually certain} that no infringement of a legitimate interest in informational privacy is threatened by government conduct because of a clearly neutral, disinterested method of learning only information about contraband or a means of discerning only information that is already known. If not so confined, the analysis could undermine much of the fourth amendment's protection. \textit{See id.} at 1667 (White, J., dissenting). The risk of undue reliance upon the Jacobsen rationale is evidenced by United States v. Bonfiglio, 713 F.2d 932, 937 (2d Cir. 1983), a case involving the warrantless playing of a cassette tape. The court reasoned that a somewhat cryptic "notation on the envelope" containing the cassette "had the practical effect of putting the contents of the tape in plain view and therefore reducing the expectation of privacy" sufficiently to suspend constitutional protection of the recorded contents. \textit{Id.} at 937. Clearly, the court erred, for the information gained by playing the cassette was substantial. \textit{Jacobsen} will not support the Bonfiglio conclusion, and Walter v. United States, 447 U.S. 649 (1980), would seem to contradict it.}

Agents use various methods to obtain access to the contents of refuse receptacles. In some cases, they openly rummage through containers placed for collection; in others they pose as collectors or arrange for actual collectors to segregate or inspect targeted trash. Ordinarily, officers wait until individuals have removed their refuse from its customary resting place on private land and have transported it to a publicly accessible spot for pickup. On infrequent occasions, officers have trespassed onto private land to investigate the contents of rubbish.

The Supreme Court has not yet confronted the issues raised by fourth amendment challenges to trash inspections. In general, the lower courts have not viewed such claims favorably. While California has found such conduct to be within fourth amendment and equivalent state constitutional regulation no matter where the rubbish is located, most state tribunals have joined with every federal appellate court that has considered the subject in holding that inspections of garbage not retained within the home or its curtilage are not searches. A dominant theme in the usually brief opinions is "abandonment," a property-related concept referring to the relinquishment of interests in an object. In essence, the courts have typically held that when people discard their trash by removing it from their property and placing it on a site reserved for collection and accessible to others, they cannot expect (or cannot reasonably expect) that it will remain secure and unknown. In effect, such persons have sacrificed their privacy interests by allowing their refuse to pass out

317. See, e.g., Smith, 510 P.2d at 794; Chapman, 250 A.2d at 206; State v. Oquist, 327 N.W.2d 587, 589 (Minn. 1982); Ball, 57 Wis. 2d at 656, 205 N.W.2d at 354; see also People v. Whotte, 113 Mich. App. 12, 15, 317 N.W.2d 266, 267 (1982) (inspection of trash strewn about defendant's backyard).

318. See, e.g., United States v. Biondich, 652 F.2d 743, 744-45 (8th Cir.), cert. denied, 454 U.S. 975 (1981); Crowell, 586 F.2d at 1024; Shelby, 573 F.2d at 973; Krivda, 5 Cal. 3d at 360, 486 P.2d at 1263, 96 Cal. Rptr. at 63.

319. See, e.g., United States v. Terry, 702 F.2d 299, 306 (2d Cir.), cert. denied, 103 S. Ct. 2095 (1983); United States v. Reicherter, 647 F.2d 397, 398 (3d Cir. 1981); Magda, 536 F.2d at 112; Mustone, 469 F.2d at 972; Smith, 510 P.2d at 794; Oquist, 327 N.W.2d at 589.

320. See, e.g., United States v. Kramer, 711 F.2d 789, 794 (7th Cir.), cert. denied, 104 S. Ct. 397 (1983); Chapman, 250 A.2d at 206; Whotte, 113 Mich. App. at 15, 317 N.W.2d at 267; Ball, 57 Wis. 2d at 659, 205 N.W.2d at 356.

321. See Krivda, 5 Cal. 3d at 366-67, 486 P.2d at 1268-69, 96 Cal. Rptr. at 68-69.

322. See, e.g., Terry, 702 F.2d 299; Biondich, 652 F.2d 743; Reicherter, 647 F.2d 397; Vahalik, 606 F.2d 99; Crowell, 586 F.2d 1020; Shelby, 573 F.2d 971; Magda, 536 F.2d 111; Mustone, 469 F.2d 970; Smith, 510 P.2d 793; Stone v. State, 402 So. 2d 1330 (Fla. Dist. Ct. App. 1981); Whotte, 113 Mich. App. 12, 317 N.W.2d 266; Oquist, 327 N.W.2d 587; Commonwealth v. Minton, 288 Pa. Super. 381, 432 A.2d 212 (1981). When the refuse bins inspected have not yet been transferred to resting places outside the home and its curtilage, courts have been willing to find fourth amendment activity. See, e.g., Chapman, 250 A.2d at 212; Ball, 57 Wis. 2d at 664, 205 N.W.2d at 358; see also Biondich, 652 F.2d at 745 (emphasizing the distinction: "A person ordinarily retains some expectation of privacy in items that remain on his or her property."). Those holdings are consonant with the Supreme Court's distinction in the "open fields" context. See supra note 299.
of their sole control and into a publicly accessible domain.\textsuperscript{323}

The results reached by the majority may be correct; their analysis, however, is incomplete. In the trash context it is difficult to discern any substantial reasons for needing informational privacy other than the value of pure secrecy.\textsuperscript{324} No other significant value or interest seems to hinge upon an ability to dispose of refuse freely and anonymously.\textsuperscript{325} The questions confronting courts, therefore, are whether and to what extent the interest in pure secrecy protected by the fourth amendment in our homes, automobiles and other closed repositories ought to extend to discarded, "containerized" garbage.

Clearly, we are constitutionally entitled to a domain of confidentiality. Just as clearly, our daily lives necessitate that we find some way for disposing of various items, some of which we might wish to keep unknown to others, including the government.\textsuperscript{326} Given that necessity, the critical inquiry is whether the domain of pure personal secrecy afforded by the Constitution is impermissibly narrowed and denied adequate breathing space if it does not extend to garbage put out for pickup in the ordinary course of human affairs. If government access to our refuse does not significantly jeopardize the potential for such self-realizing secrecy afforded by constitutional sheltering of unquestionably protected zones (for example, homes or closed containers), it is probably not necessary to extend that shelter to discarded matter.\textsuperscript{327}

Courts might arrive at different answers to the basic questions raised by trash inspections. They should not, however, be diverted from their prescriptive responsibilities by inordinate reliance upon misleading, unenlightening criteria and "magical" language such as "abandonment" and the "reasonableness" of expectations.\textsuperscript{328} Decisions should be in-

\textsuperscript{323} See, e.g., Biondich, 652 F.2d at 745; Reichert, 647 F.2d at 399; Vahalik, 606 F.2d at 101; Crowell, 586 F.2d at 1025; Mustone, 469 F.2d at 972; Dzialak, 441 F.2d at 215.

\textsuperscript{324} See Krivda, 5 Cal. 3d at 366, 486 P.2d at 1268, 96 Cal. Rptr. at 68 (apparently reflecting only the interest in pure secrecy when considering the reasons why residents would not want their trash examined).

\textsuperscript{325} See infra note 329.

\textsuperscript{326} See Smith, 510 P.2d at 798 ("[A]lmost every human activity ultimately manifests itself in waste products and . . . any individual may understandably wish to maintain the confidentiality of his refuse.").

\textsuperscript{327} The protection afforded a garbage receptacle located within the curtilage of a dwelling, see supra note 322 & accompanying text, must and should be grounded on the conclusion that the health of our interests in pure secrecy depends upon recognition of a zone of informational confidentiality that extends beyond the four walls of the home. The question here is whether the legitimate need for such a zone of privacy extends further, justifying constitutional shelter for discarded items within enclosed rubbish containers even after they have traversed the border of the curtilage and entered more public realms.

\textsuperscript{328} The elements that have been influential in trash cases may be appropriate in some cases. If "abandonment" is used to refer to privacy relinquishment, and not some archaic property notion, see, e.g., Oquist, 327 N.W.2d at 590, it is closely related to the precautionary measures factor that has also found utility in trash cases. See Terry, 702 F.2d at 309; Biondich,
formed by a proper view of the character of privacy and guided by an inquiry into the legitimate reasons for needing informational privacy in trash.\textsuperscript{329}

\textit{Surreptitious Surveillance by False Friends}

Although technological advances have undoubtedly improved its efficacy today, the practice of employing recruits and volunteers to insinuate themselves into, or simply to remain within, the company of persons about whose activities information is desired is far from novel.\textsuperscript{330} From their debut in the Supreme Court until today, fourth amendment challenges to this law enforcement method, in all its forms, have inevitably fallen upon a majority of deaf ears.\textsuperscript{331} Consequently, the police are free to use such agents to hear, report, record, and transmit the conversations of family, friends, acquaintances, and strangers with no fourth amendment restraint.\textsuperscript{332}

\textsuperscript{329} It is arguable that garbage inspections indirectly could threaten some instrumental privacy goals, for example, by revealing associations, personal expressions, or intimacies of family life. Although unfettered governmental access to such data could chill freedoms of speech and association and familial autonomy, the connection between our opportunities for confidential trash disposal and the enjoyment of such rights is not a close one. Consequently, the threats to those rights are not too severe even if the government has uncontrolled access. Moreover, if there are readily available alternatives to ordinary disposition methods for that data (e.g., burning, burying, shredding, or other destructive techniques), and if such alternatives as exist pose no serious hindrances to the free exercise or enjoyment of other rights, there seem to be no constitutionally legitimate reasons for needing constitutional privacy protection for trash.

\textsuperscript{330} See On Lee v. United States, 343 U.S. 747, 749 (1952); United States v. Wainer, 49 F.2d 789, 790-91 (W.D. Pa. 1931); Blanchard v. United States, 40 F.2d 904, 905 (5th Cir.), cert. denied, 282 U.S. 865 (1930); see also Olmstead v. United States, 277 U.S. 438, 468 (1928).


\textsuperscript{332} The Court has not even seen fit to apply watered-down fourth amendment safeguards
The currently accepted, exceedingly simple rationale for the conclusion that secret agents do not trigger fourth amendment protection is that the victims of the practice have “voluntarily disclosed” the information obtained to third parties, thereby “assuming the risk” of disclosure to the government. There is no search because such voluntary disclosure renders any expectation of privacy “unreasonable.” That conclusion appears rooted in the logic that secrecy is the protected object of the fourth amendment. A person who freely discloses information to others demonstrates an insufficient interest in the confidentiality of that information. As a result, that person cannot reasonably expect, and therefore is not entitled to, the fourth amendment protection of secret information.

The consequences of such reasoning present the clearest illustrations of the serious perils to protected interests posed by current reasonable expectation doctrine. From an instrumental perspective of informational privacy, that logic proves fundamentally defective and exceedingly dangerous to liberty. The values most obviously compromised by the spectre of unregulated official presence in our lives through undercover agents are freedoms of association and of speech. To be meaningful, those freedoms must encompass opportunities to communicate thoughts to others. Free communication, in turn, often depends upon the assurance that, absent adequate justification, the government cannot gain access to the information communicated. In essence, expressive and

to false friends. In the past decade, the Court has been increasingly willing to “split the baby” by balancing interests and arriving at diluted requirements. See, e.g., New Jersey v. T.L.O., 105 S. Ct. 733, 741-44 (1985) (Stevens, J., concurring and dissenting); Michigan v. Long, 103 S. Ct. 3469, 3479 (1983); United States v. Villamonte-Marquez, 103 S. Ct. 2573, 2579 (1983); Michigan v. Summers, 452 U.S. 692, 699-700 (1981); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). That approach has typically been employed to weaken the substance of fourth amendment protection, not to provide or enhance shelter where it has traditionally been nonexistent or weak.

Perhaps that is why the secret agent context has given rise to the clearest judicial, see infra note 338, and scholarly recognitions of the instrumental character of fourth amendment privacy. See, e.g., Amsterdam, supra note 1, at 407, 408-09; Comment, Domestic Intelligence Informants, the First Amendment and the Need for Prior Judicial Review, 26 BUFFALO L. REV. 173, 173 (1977); Comment, The Applicability of the “New” Fourth Amendment to Investigations by Secret Agents: A Proposed Delineation of the Emerging Fourth Amendment Right to Privacy, 45 WASH. L. REV. 785, 810 (1970) [hereinafter cited as Comment, Right to Privacy]; see also C. FRIED, supra note 73, at 139; Bacigal, supra note 29, at 553-54, 570; Note, supra note 204, at 988-89.

A less serious flaw in the logic is the failure to acknowledge that even a pure secrecy interest against the government need not be extinguished whenever one selectively sacrifices it to private individuals. See supra notes 149-51, 191 & accompanying text.

See Amsterdam, supra note 1, at 407-08; Comment, Right to Privacy, supra note 334, at 786.

In United States v. White, 401 U.S. 745 (1971), Justice White stated that “conversation” would cease if “individual defendants” knew or suspected “that their colleagues have gone or will go to the police or are carrying recorders or transmitters” and that if “one con-
associational rights demand both disclosure to others and a measure of protected confidentiality with respect to the government.\textsuperscript{338} Once again, the perversity of current analysis is its preclusion of the simultaneous presence of those two foundational requirements. On the one hand, first amendment freedoms are inhibited by the lack of an informational confidentiality assurance generated by the uncurbed risk that an associate-recipient is the government. On the other hand, to earn the informational secrecy needed to exercise those freedoms amply, one must avoid voluntary disclosures to others and thus self-constrict his first amendment enjoyment. In effect, to enjoy the rights, one must not enjoy the rights. Such a trap is certainly antithetical to the spirit of our constitutional liberties.

The preferable approach recognizes that expressive and associational freedoms are seriously threatened by the unregulated use of "false friend" investigatory techniques. The severe perils to liberty provide substantial, legitimate grounds for respecting claimed needs for informational privacy against \textit{all} forms of governmental false friend employment.\textsuperscript{339} Focusing upon reasonable expectations of privacy and templating illegal activities \ldots sufficiently doubts [his companions'] trustworthiness, the association will very probably end or never materialize." \textit{Id.} at 751-52. It is regrettable that he failed to acknowledge that \textit{all} communication and association, not just criminal communication and association, is potentially threatened by unregulated false friend surveillance by law enforcement.

338. Supreme Court members have recognized the importance of both privacy and openness to meaningful first amendment rights and the role the fourth amendment must play in ensuring the privacy medium. \textit{See, e.g.}, Smith v. Maryland, 442 U.S. 735, 751 (1979) (Marshall, J., dissenting) (The decision that pen registers fall outside fourth amendment control "ignores the vital role telephonic communication plays in our personal and professional relationships."); \textit{White}, 401 U.S. at 762-63 (Douglas, J., dissenting) ("Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse \ldots is not free if there is surveillance."); \textit{id.} at 787-89 (Harlan, J., dissenting) (many "values are sacrificed by a rule of law that permits official monitoring of private discourse"); Warden v. Hayden, 387 U.S. 294, 323 (1967) (Douglas, J., dissenting) ("Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses."); Lopez v. United States, 373 U.S. 427, 452 (1963) (Brennan, J., dissenting) ("I believe that there is a grave danger of chilling all private, free, and unconstrained communication if secret recordings, turned over to law enforcement officers by one party to a conversation, are competent evidence of any self-incriminating statement the speaker may have made. In a free society, people ought not to have to watch their every word so carefully."); \textit{see also} United States v. United States Dist. Court, 407 U.S. 297, 314 (1972) ("[T]he fear of unauthorized official eavesdropping [must not] deter vigorous citizen dissent and discussion of Government action in private conversation.").

339. Although the chance of any form of governmental monitoring of our speech and relationships is hazardous to our freedoms, the threats are variable. The specific character of the practice employed in a given setting determines the kinds and intensities of the dangers posed. The possibility of a permanent record of one's thoughts, words, and associations by means of tape or videotape probably generates a greater potential inhibition than the possibility of the capture of the same information by a human memory. \textit{See White}, 401 U.S. at 787-88 (Harlan, J., dissenting); \textit{Lopez}, 373 U.S. at 448 (Brennan, J., dissenting). Similarly, the poten-
allowing reasonableness to be negated by voluntary disclosure has done a disservice to the instrumental purposes of fourth amendment privacy.\textsuperscript{340} Fourth amendment fidelity demands full investigation of the reasons people need constitutional privacy in the false friend context. Such an investigation reveals a degree of jeopardy to significant fourth amendment objectives that ought to trigger operation of the constitutional scheme.\textsuperscript{341}

\textsuperscript{340} The inappropriateness of reliance upon voluntary disclosure in this context has not escaped notice. See Lopez, 373 U.S. at 452 (Brennan, J., dissenting); see also Note, supra note 204, at 989.

In recent years, the voluntary disclosure factor has surfaced in other contexts, notably the governmental use of pen registers, Smith v. Maryland, 442 U.S. 735 (1979), and inspections of bank records, United States v. Miller, 425 U.S. 435 (1976); see supra note 54 & accompanying text. Pen register surveillance threatens the same values as false friend employment. Awareness that the government is unlimited in its power to learn of the parties we telephonically encounter creates undeniable potential for chilling our willingness to express ourselves and to begin, continue, and preserve relationships. Justice Marshall recognized such threats in his Smith dissent. See 452 U.S. at 751 (Marshall, J., dissenting); see also People v. Sporleder, 666 P.2d 135, 143 n.7 (Colo. 1983); cf. Comment, Pen Registers, supra note 84, at 753, 760, 766 (recognizing that pen registers implicate associational and travel rights); Goodman, In Place Of Being There, Des Moines Register, Mar. 29, 1983, at 6A, col. 3 (“My friends live in other places: other neighborhoods, other towns, other states. For us, the telephone is a meeting hall, a neighborhood; it is the way we keep our small community together.”). The threat of bank record access does not seem as serious or substantial because instrumental goals of privacy are not as apparent in that context. But see Miller, 425 U.S. at 451 (Brennan, J., dissenting). Because only pure secrecy interests are implicated in the bank records context, the question is similar to that posed by trash rummaging. See supra notes 324-29 & accompanying text. Any pressure to address that question has diminished since congressional enactment of the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (1982).

\textsuperscript{341} One interesting, but infrequently litigated, surveillance method that might be thought of as a "postal pen register," is the "mail cover." A mail cover involves official recordation of all the information concerning the senders of letters to a given individual. See Vreeken v. Davis, 718 F.2d 343, 345 n.1 (10th Cir. 1983). The government can learn who is communicating by post with a target individual and effectively catalogue his correspondents. See United States v. Choate, 576 F.2d 165, 187 (9th Cir.), cert. denied, 439 U.S. 953 (1978), aff’d, 619 F.2d 21 (9th Cir.), cert. denied, 449 U.S. 951 (1980) (Hufstedler, J., dissenting).

Lower courts have analyzed this practice as the Supreme Court analyzed pen register use. Vreeken, 718 F.2d at 348; see supra note 54. Considering the importance of postal communication to expressive and associational freedoms, see Rowan v. United States Post Office Dep’t, 397 U.S. 728, 736 (1970); United States ex rel Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting); Choate, 576 F.2d at 202 (Hufstedler, J., dissenting), it would be more faithful to the nature of fourth amendment privacy to hold that mail cover use is a search. Hufstedler, supra note 113, at 1511. Reliance upon
The Question of Standing to Raise a Fourth Amendment Claim

Finally, the ramifications of the instrumental perspective can be illustrated by considering its application to the issue of "standing" to challenge government conduct under the fourth amendment. This section does not deal with the threshold question of whether a specific governmental investigatory practice triggers any fourth amendment regulation. Rather, the concern here is whether government conduct that threatens the fourth amendment interests of some person threatens the interests of the particular individual who desires to litigate a fourth amendment claim. Although threshold and standing issues are distinct, both share the common function of defining the sphere of fourth amendment operation, and after *Rakas v. Illinois*, standing both depend upon reasonable expectations doctrine.

The central role of reasonable expectations doctrine in "standing" cases has resulted in judicial reliance upon the same factors as those operative in threshold cases. The presence or absence of property rights in the place searched or the effect seized, precautions taken to safeguard privacy, and public accessibility or exposure predominate in "voluntary disclosure" to deny protection and undermine confidence is as inappropriate here as in other situations in which rights cannot be exercised without such disclosure.


344. Since the Court informed us that standing questions should be analyzed like threshold questions, see supra note 66, the former have played a larger role in defining fourth amendment territory. Consequently, they merit separate treatment here.


346. See, e.g., United States v. Freire, 710 F.2d 1515, 1519 (11th Cir. 1983), cert. denied, 104 S. Ct. 1277 (1984); United States v. Parks, 684 F.2d 1078, 1086 (5th Cir. 1982); United States v. McGrath, 613 F.2d 361, 365 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980).


348. See, e.g., *Trickey*, 711 F.2d at 58; *Nadler*, 698 F.2d at 999; United States v. Perez, 689
the courts' reasoning. The consequences of ready reliance upon those criteria have often been similar to those occasioned by reflexive reference to the identical criteria in threshold cases. Put simply, analyses have frequently been superficial and facile, and interests worthy of shelter have been ignored, if not undermined, in the process. Because standing cases come in such variant forms, it is not possible to isolate one or more values or rights that fourth amendment privacy will promote in every case. It is possible, however, from the array of fact situations presented by these cases, to distill some potential objects of a properly focused inquiry.

The exercise of associational freedom necessarily involves convening with others in various places. We join others in their homes, automobiles, and places of business and come together in meeting halls, clubs, and auditoriums. Without free access to those places, associational liberty would be severely constricted. Current doctrine makes our privacy dependent upon such things as our proprietary interests in, our maintenance of precautionary measures regarding, and our restriction of public access to those places. Given the character of some of our gathering sites, however, we are quite likely to fail to satisfy one or more of those criteria of reasonableness when associating in groups. We often come together in places where we have no proprietary or possessory claims, where we possess no authority or ability to erect special barriers to access, or where exclusion of others is contrary to the purpose of the convocation. Consequently, under current doctrine, the free exercise of rights of association frequently generates circumstances that can

F.2d 1336, 1338 (9th Cir. 1982); Vicknair, 610 F.2d at 380.

349. All of those elements find sanction in the Supreme Court’s recent significant decisions in this area. See United States v. Karo, 104 S. Ct. 3296, 3301, 3306 (1984) (property interests); Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (right to exclude and take precautions to exclude others); Rakas v. Illinois, 439 U.S. 128, 148-49 (1979) (referring to property interests in a car and the diminished expectation of privacy in cars, which is based, in part, on public exposure notions).


351. To form, promote, and maintain associations, we join others in their automobiles, yards, and homes. Clubs, religious congregations, and political entities convene in structures that might be institutionally owned. Under the current scheme, the lack of possessory or ownership interest in those locations can deprive many individuals involved in the gathering of the security provided by the fourth amendment’s privacy grant.

352. We do not have the ability to post warnings or to construct physical impediments to access in the contexts described infra note 353. Yet, under present analysis it is possible that only those with such power will reap the benefits of the fourth amendment.

353. Clubs, political assemblies, and church groups, for example, may wish to ensure not only that members will be able to attend, but also that others will feel invited to join. Inclusion is important and exclusion contrary to associational continuity and development. Consequently, to demand exclusion in order to secure protection from unregulated government awareness is to undermine a prime reason for seeking privacy protection. Although current
defeat entitlements to the informational privacy critical to the unconstrained exercise of those associational rights. To preserve privacy we are forced to restrict opportunities for association. As suggested earlier, something is seriously awry with an approach to fourth amendment privacy that yields effects antithetical to its instrumental objectives.

Other important values are involved in many contexts in which personal entitlements to fourth amendment privacy have been challenged. Physical liberty and the related right to travel freely are often realized only outside our own proprietary spheres, in realms where strict precautions against exposure are infeasible, if not impossible. We do not always move from place to place in our own automobiles. Of necessity, we sometimes ride with friends, acquaintances or family members, borrow the vehicles of those individuals, or avail ourselves of public transportation. To suggest that we can avoid taking our “secrets” along in those

document would imply the contrary, invitations to others to become members of groups or to attend gatherings do not implicitly include invitations to the government to snoop.

354. The major recent Supreme Court standing cases illustrate the potential for constriction of associational opportunities that can result from reliance upon the accepted factors to deny privacy protection. In *Rakas*, passengers in an automobile owned by another were found to lack standing due to the natural attributes of a typical associative setting, i.e., a lack of property interest and public exposure. In *Rawlings*, the defendant lacked standing to object to the search of his companion’s purse. It is arguable that people need opportunities to turn their property and information over to others to fully realize the benefits of association. Again, the normal characteristics of such sharing—i.e., absence of a property interest and failure to take precautions—defeated privacy interests. Finally, in *Karo*, the lack of property interests in an associate’s dwelling defeated the right to object to monitoring of a beeper that had entered that structure. If we cannot claim the security of informational privacy in our acquaintances’ homes unless we buy into their realty, our associational opportunities will surely shrink. Lower court cases also illustrate the counterproductive results reached under current “standing” doctrine. See United States v. One 1977 Mercedes Benz, 708 F.2d 444, 449 (9th Cir. 1983), cert. denied, 104 S. Ct. 981 (1984); United States v. Rodriguez-Ramos, 704 F.2d 17, 21 (1st Cir.), cert. denied, 103 S. Ct. 3542 (1983); United States v. Nadler, 698 F.2d 995, 999-1000 (9th Cir. 1983); United States v. Lochan, 674 F.2d 960, 965 (1st Cir. 1982); United States v. Meyer, 656 F.2d 979, 981 (5th Cir. 1981). Some do not simply ignore, but directly deny the relevance of associational factors to standing decisions. See, e.g., United States v. Vicknair, 610 F.2d 372, 379 (5th Cir.), cert denied, 449 U.S. 823 (1980); United States v. Crowell, 586 F.2d 1020, 1026 (4th Cir. 1978). But see Rodriguez-Ramos, 704 F.2d at 21.

355. Yet the current approach, with the imprimatur of the Supreme Court in *Rakas*, holds that the absence of some property right in the vehicle in which we are travelling counts strongly against a fourth amendment privacy entitlement. See *Rakas*, 439 U.S. at 148; see also United States v. Parks, 684 F.2d 1078, 1086 (5th Cir. 1982); cf. United States v. Trickey, 711 F.2d 56, 58 (6th Cir. 1983) (“Clearly, both the owner and the lessee of the premises would be recognized by society as having a legitimate expectation of privacy . . . .”). It is no answer to say that if we want privacy we should travel in our own vehicles. The liberty of those who cannot afford private transportation should not be limited by their relative poverty. Furthermore, there are reasons other than financial for using or riding in public transportation or the vehicles of others. Our own autos will inevitably be incapacitated at times, premiums on parking space might require carpool arrangements, others’ vehicles might be suited to tasks that our own are not. Additionally, meaningful association often means group travel in a vehicle in which some will lack property and exclusionary rights. To deprive individuals of
situations is ludicrous, for the reasons we travel in society necessitate carrying along parts of our lives and the information inherent therein. If our freedom to move about is conditioned on not bearing our belongings, that freedom loses much substance. Uncontrolled official access to the information passengers carry with them in vehicles they do not own and to which they cannot restrict access diminishes opportunities for personal physical freedom.

Enjoyment of familial autonomy rights seems to demand free and open use of areas and items in which some members do not have strict property interests and requires that some information about our lives be made accessible to several others. Family members who reside in a common dwelling must share certain areas and may need access to even the personal domains of fellow members. Again, precautions and restricted access would be counterproductive, preventing realization of the nurturing goals of familial autonomy. The potential for familial intimacy, development, growth, and fulfillment which autonomy rights seek to promote would shrink if information could not be freely shared among members, but instead had to be jealously guarded. Further, to condition privacy entitlement upon members' possession of property interests in the areas within which they share, exchange, or retain information about their lives is surely to ignore the realities of many, if not most, familial arrangements.

privacy in such instances will discourage people from involvement in those situations and impermissibly infringe on our associational and physical freedoms.

According to the dissenters, that is the upshot of the majority decision in *Rakas*. 439 U.S. at 157 (White, J., dissenting) ("Insofar as passengers are concerned, the Court's opinion today declares an 'open season' on automobiles. However unlawful stopping and searching a car may be, absent a possessory or ownership interest, no 'mere' passenger may object, regardless of his relationship to the owner.").

Constitutional autonomy-type privacy rights—rights that pertain to the privacy of and freedom to make decisions and choices regarding familial, marital, and procreative matters—find their sources in more than one Bill of Rights provision. See *Griswold* v. Connecticut, 381 U.S. 479, 484-85 (1965) (citing the first, third, fourth, and fifth amendments and "penumbras, formed by emanations from" the Bill of Rights, while emphasizing the ninth amendment); see also *Moore* v. City of East Cleveland, 431 U.S. 494, 503 n.12 (1977) (mentioning ninth amendment); *Whalen* v. Roe, 429 U.S. 589, 598 n.23 (1976) (explaining that Roe v. *Wade*, 410 U.S. 113 (1973), was based solely on the fourteenth amendment); *Stanley* v. Illinois, 405 U.S. 645, 651 (1972) (ninth amendment); *Gaugush*, supra note 223, at 27 (concluding that Justice "Douglas' . . . contributions . . . [in *Griswold*] have not been modified, limited or overruled"). No matter the source, the Court has continued to recognize basic rights to privacy and unhindered decisionmaking in familial matters. See *Moore*, 431 U.S. at 503; *Stanley*, 405 U.S. at 651; see also, Comment, *A Taxonomy*, supra note 69, at 1469 (referring to objectionability of even "indirect" influence on "an individual's decision calculus").

Not every member of a nuclear family, and certainly not those within extended families, will possess property rights in homes, automobiles, and other familial possessions. To count this against their entitlement to privacy results in an erosion of their freedom to exchange information, thus constraining their abilities to engage in free decisionmaking and action pertaining to intimate family matters. When fourth amendment privacy becomes a slave
In sum, factors such as the lack of a proprietary or possessory interest and the failure to foreclose the access of others ought not count against the privacy needed for adequate enjoyment of various rights. Determinations of whether the fourth amendment should operate in either threshold or standing cases require an inventory of the potential instrumental goals in any situation and evaluation of the elements ordinarily or necessarily involved in realization of those goals. Legitimate individual needs for informational privacy find foundations in the ends served by guaranteeing that interest and should not be disregarded because of factors that are irrelevant to, or attributes that are integral parts of, the free exercise and enjoyment of the very freedoms that the fourth amendment should preserve.

Conclusion

Both the current methodology for defining fourth amendment scope and the approach proposed here are interest-dictated and are therefore consonant with the spirit and major contribution of Katz: the announcement that governmental "violations of privacy" must determine the operation of the fourth amendment regulation of searches. The fundamental defect of current doctrine is its limited conception of the fourth amendment privacy interest as merely an interest in secrecy for secrecy's sake. The methodology proposed here revolves around an expanded vision of that privacy interest, a vision that looks beyond a simple interest in the secrecy of information to the instrumental ends that secrecy promotes, to the reasons why secrecy against the government is valuable and merits constitutional shelter. This instrumental view of the purpose of the fourth amendment is supported by the text and history of the fourth amendment, its place in the structure of the Constitution, and the role that protection against governmental searches plays in the legal traditions and principles of a free society.

The adjustment of perspective involved in adoption of an instrumental view would bring about a major change in fourth amendment threshold jurisprudence. The erroneously narrow view of privacy that is express or implicit in the courts' opinions has had enormous influence upon the development of the doctrinal framework used to resolve cases. An instrumental view leads to different doctrine, radically altering the analysis and resolution of many threshold issues. Through corrective expansion of our perspective on privacy, the instrumental view exposes the deficiencies of the current scheme and points the way toward resolutions of threshold issues that are consistent with the purposes of the fourth amendment.

to property interests in such situations, it is derelict in its duty to enable the enjoyment of other constitutional benefits.
The proposals can be summarized as follows: Fourth amendment threshold questions should be resolved not by asking whether an individual had a reasonable expectation of privacy, but by asking whether that individual had a need for informational privacy in order to enjoy fully the benefits of various constitutional entitlements. Automatic reference to the recurrent factors operative in reasonable expectations doctrine should be abandoned outright. Instead, courts should attempt to ascertain whether the government’s actions deprived an individual of informational privacy and whether the individual’s freedom to exercise and enjoy constitutional rights required some degree of informational privacy vis-à-vis the government. Reasonable expectation doctrine has ordinarily protected, at most, an interest in secrecy for its own sake. The proposed methodology, consistent with the purposes of the fourth amendment, also protects privacy that enables the exercise of rights protected by other constitutional provisions.

The methodology proposed and the criteria suggested here provide anything but a rigid, formulaic scheme for resolving threshold questions. They call for difficult judgments about the legitimacy of claimed privacy needs. Because it does not prescribe methods of quantification nor the levels of need that qualify as legitimate, the suggested approach involves much judicial discretion. A substantial degree of discretion and ambiguity, however, is inherent in the Katz-prescribed task. The best that can be hoped for is specification of the most appropriate and accurate linguistic tools and inquiries and an indication of the relevant types of criteria.359

The analytical and doctrinal structure constructed here is no less administrable or feasible than the current scheme. The quantifiability of the factors that dictate current decisions is usually chimerical.360 The proposed methodology eliminates ambiguity and constrains discretion to the extent possible in such constitutional decision making. More important, fidelity to fourth amendment goals is greatly advanced by the proposed methodology, which seeks to identify the real harms occasioned by

359. As Justice Powell observed:

This is not an area of law in which any “bright line” rule would safeguard both Fourth Amendment rights and the public interest in a fair and effective criminal justice system. The range of variables in the fact situations of search and seizure is almost infinite. Rather than seek facile solutions, it is best to apply principles broadly faithful to Fourth Amendment purposes.


360. There is no greater precision in the assessment of “precautions taken” or “public access” or “degree of intrusion” than in the evaluation of risks to freedoms of association, travel, and familial autonomy, for example. Current doctrine provides no more precise tools for assessing “reasonableness” than the present proposals furnish for determining “legitimacy.” Moreover, current doctrine provides less stability and uniformity by neglecting reference to the enduring goals of instrumental informational privacy, and relying instead upon variable factual details.
governmental privacy deprivations and provides appropriate terminology for expressing the prescriptive tasks involved. If carefully employed, the proffered methodology can lead to constitutionally supportable answers to difficult questions concerning the reach of fourth amendment protection. The instrumental approach to resolving fourth amendment threshold questions will further realization of the full potential of the \textit{Katz} revolution, and, by ensuring more faithful patrol of fourth amendment borders, it will promote preservation of those invaluable liberties that are central and indispensable to the American social order.

361. By suggesting sources of guidance for determining whether privacy needs are legitimate, the proposed scheme avoids begging the question involved in the declaration “that the fourth amendment protects those interests that may justifiably claim fourth amendment protection.” Amsterdam, \textit{supra} note 1, at 385. It also provides more specific guidance than a broad inquiry into “whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining would be diminished to a compass inconsistent with the aims of a free and open society,” \textit{id.} at 403, or an unconfined determination of “which expectations of privacy are justifiable and desirable in society.” Bacigal, \textit{supra} note 29, at 543.

The proposed methodology should also have constructive impact in other fourth amendment doctrinal domains. For example, proper identification of the interests and values at stake should promote more “accurate” determinations of the kind and degree of justification needed to make a search reasonable under the fourth amendment. \textit{See supra} note 203.

362. The fate of other republics, their rise, their progress, their decline, and their fall, are written but too legibly on the pages of history, if indeed they were not continually before us in the startling fragments of their ruins. They have perished, and perished by their own hands.

Let the American youth never forget that they possess a noble inheritance, bought by the toils, and sufferings, and blood of their ancestors; and capable, if wisely improved, and faithfully guarded, of transmitting to their latest posterity all the substantial blessings of life, the peaceful enjoyment of liberty, property, religion, and independence. The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or negligence of its only keepers, THE PEOPLE.

2 J. \textit{Story}, \textit{supra} note 1, at 685, 687.