**People, not Places: *Carpenter vs. United States* and the Future of the Reasonable Expectation of Privacy Test**

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*Abstract:*

The United States Supreme Court’s holding in *Carpenter vs. United States* (2018) recognizes the unique nature of modern technology and the need for Fourth Amendment protections. While upholding the expectation of privacy test from *Katz vs. United States* (1967) the Court declined to extend the third-party doctrine to cellphone location data. The fact that we knowingly provide information about ourselves to others, was not enough to avoid the warrant requirement. In this case, the use of location data generated automatically when we carry our cell phones required a warrant supported by probably cause, not a lower standard as provided by federal statute. The Court attempts to address the dominance of cell phones and computers in our everyday lives and the ways they continue to alter our expectations of what is and should be private. Modern technology continues to blur the line between public and private. Yet, Justices seem more willing to return to a property-based understanding of privacy, rather developing a modern standard for privacy that recognizes privacy as a complex social practice that differs across time and space. This paper will examine the holding in *Carpenter* and the future of the expectation of privacy test.

Privacy is a complex social practice that differs across time and space. As a result, scholars continue to struggle to define privacy in different contexts and disciplines. Since *Katz vs. United States* (1967)[[1]](#footnote-1), the courts define privacy in the context of Fourth Amendment search and seizure law with reference to an individual’s subjective expectation of privacy, and consideration of society’s objective understanding of what is private. The notion of a reasonable expectation of privacy and the two-prong test established by Justice Harlan in *Katz* continue to be the starting point for analyzing Fourth Amendment privacy. In *Carpenter vs. United States* (2018)[[2]](#footnote-2), the United States Supreme Court confirmed the continued applicability of the *Katz* test in Fourth Amendment privacy jurisprudence but refused to extend the third-party doctrine to cell site location information. The third-party doctrine establishes that an individual does not have an expectation of privacy regarding information we knowingly provide about ourselves to others. While originally used to justify the police subpoena of a suspect’s bank records, the third-party doctrine has become a significant hurdle to Fourth Amendment restrictions on new surveillance technologies as a result of the essential role third parties play in providing internet services. Yet, as we will see, this doctrine is not well suited to address privacy in the digital era. Nor does it adequately address the importance of social practices in defining and understanding privacy. This paper will examine Fourth Amendment privacy jurisprudence, the reasonable expectation of privacy test, and the third-party doctrine in light of modern technology and *Carpenter. Katz* and the reasonable expectation of privacy test have been widely criticized, but the alternatives could be much worse.

**Development of Privacy Law in the United States**

In American jurisprudence, discussions about the existence of a right to privacy start with a law review article published in the *Harvard Law Review* in 1890. In the article titled “The Right to Privacy,” Louis D. Brandeis, the future Supreme Court Justice, and Samuel D. Warren, his former law partner, announced that “the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”[[3]](#footnote-3) Brandeis and Warren recognized that from time to time we must “define anew the exact nature and extent of such protection.”[[4]](#footnote-4) It is particularly interesting that more than 100 years ago Brandeis and Warren recognized the impact of technology on privacy:

Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life, and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the housetops.’[[5]](#footnote-5)

Arguably, this statement is more true today than ever. A cell phone can easily reach a much larger audience than one could ever hope to reach from the “housetops.”

After recognizing a constitutional right to privacy in *Griswold vs. Connecticut* (1965), the Supreme Court had the opportunity to further articulate the contours of this right in *Katz.* In that case, the Court was asked to define the limits to government eavesdropping activities based on the Fourth Amendment. The defendant was convicted of transmitting gambling information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute. At trial, the government was allowed to introduce evidence obtained by attaching a listening device to a public telephone. Although the Court acknowledged a person’s general right to privacy, the majority opinion noted that privacy laws are largely left to the individual states. Nevertheless, the majority opinion reversed the conviction, because government agents had failed to get a warrant.

In his concurrence, Justice Harlan focused on the nature of the Fourth Amendment right discussed in the majority opinion. He noted that the Fourth Amendment protects people, not places. In this regard, the Court rejected the “trespass” doctrine used in cases, like *Olmstead vs. United States* (1928)[[6]](#footnote-6) and *Goldman vs. United States* (1942).[[7]](#footnote-7) Justice Harlan provided a two-fold requirement that he claimed emerged from prior decisions: (1) that a person has exhibited an actual subjective expectation of privacy, and (2) that the expectation is one that society is prepared to recognize as reasonable. The critical fact for Justice Harlan was that a person that uses the telephone booth shuts the door behind him and assumes that his conversation is not being intercepted. Therefore, the telephone booth “is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.”[[8]](#footnote-8)

The reasonable expectation of privacy test borrows from the reasonable person standard used with negligence in tort law and was suggested to the Court for the first time during oral argument, as noted by Justice Clarence Thomas in his dissent in *Carpenter*. This is a clear effort to combine the objective and subjective components of privacy and make clear that privacy follows the person. It is important to note that this requires judges to determine reasonableness, a standard that they would be familiar with and perhaps comfortable applying in this new context.

Since *Katz*, the use of the concept of ‘a reasonable person and his or her expectations’ is widely used in legal reasoning and used generally to justify the creation of statutory privacy protections, and the application of privacy law. But, under what circumstances does an individual have a subjective expectation of privacy? Clearly, individuals as well as judges can, and do disagree. And, when is such a right objectively reasonable? It should not be surprising that the courts have struggled to apply this standard to determine whether there is a search, and if so, whether there is a reasonable expectation of privacy that society is willing to protect.

Despite the fact that *Katz* explicitly overruled *Olmstead*, the courts continue to rely heavily on property-based conceptions of privacy. This can be seen with the development of the third-party doctrine in *United States vs. Miller* (1976)[[9]](#footnote-9) and *Smith vs. Maryland* (1979).[[10]](#footnote-10) As stated in *Miller,* the “Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities” and the “issuance of a subpoena to a third party does not violate the rights of the defendant.”[[11]](#footnote-11)In *Smith*, the Supreme Court ruled that a robbery suspect had no reasonable expectation that his right to privacy extended to the numbers dialed from his landline phone.[[12]](#footnote-12) The Court found no expectation of privacy, holding that the use of a pen register[[13]](#footnote-13) does not constitute a search because the “petitioner voluntarily conveyed numerical information to the telephone company.” Once a number is dialed, the phone company connects the call to another line. The Court reasoned that since the suspect had voluntarily turned over that information to a third party, he could not therefore claim that he had a reasonable expectation of privacy. Speaking for the majority, Justice Blackmun, held that:

Given a pen register's limited capabilities, therefore, petitioner's argument that its installation and use constituted a "search" necessarily rests upon a claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone.

This claim must be rejected. First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed.[[14]](#footnote-14)

The majority argued that there can’t be a subjective expectation of privacy based on existing social practices and created the third-party doctrine with reference to property-based concepts. In this regard, the Court emphasized the fact that “telephone users … ‘convey’ phone numbers to the telephone company…” [[15]](#footnote-15)

However, not all of the justices agreed. In a dissenting opinion, Justice Marshall, joined by Justice Brennan, disagreed with the Court's use of the third-party doctrine, and referred to existing social practices, stating:

The use of pen registers,[[16]](#footnote-16) I believe, constitutes such an extensive intrusion. To hold otherwise ignores the vital role telephonic communication plays in our personal and professional relationships,[[17]](#footnote-17) as well as the First and Fourth Amendment interests implicated by unfettered official surveillance.

As we will see, Chief Justice John Roberts echoed these concerns when he commented on the ubiquitous nature of cell phones in *Riley vs. California* (2014),[[18]](#footnote-18) and again in *Carpenter*.

The Court was able to further elaborate on the expectation-driven conception of privacy in *O'Connor vs. Ortega* (1987).[[19]](#footnote-19) A state hospital searched a doctor's desk drawers and personal file cabinets during a sexual harassment investigation. Investigators seized the doctor's personal letters and photographs, and the doctor filed a federal civil rights claim under 42 U.S.C. § 1983 against the hospital, and alleged violation of his Fourth Amendment rights.[[20]](#footnote-20) Justice O'Connor wrote the plurality opinion, which held that the plaintiff presented sufficient evidence to survive summary judgment.[[21]](#footnote-21) Discussing the Fourth Amendment reasonable expectation test, Justice O'Connor wrote:

The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.[[22]](#footnote-22)

By discussing actual official practices and procedures and operational realities of the workplace as limits on whether an expectation of privacy was reasonable, the Court recognized the role of social practice in determining the scope of privacy. *Ortega* shows that this social understanding “is itself inevitably dependent on changing social values and changing social expectations.”[[23]](#footnote-23)

The Court's reasoning in *Kyllo vs. United States* (2001)[[24]](#footnote-24) also illustrates how changing circumstances and technologies can affect whether expectations of privacy are considered reasonable. In *Kyllo,* the Court held that law enforcement's warrantless use of a thermal imaging device to scan the defendant's house constituted an unreasonable search under the Fourth Amendment.[[25]](#footnote-25) Scanning the defendant's home from across the street revealed that portions of the house were unusually hot, which was consistent with the use of heat lamps to grow marijuana.[[26]](#footnote-26) Relying in part on the thermal imaging scan, the law enforcement officer obtained a search warrant and found that the defendant was, in fact, growing marijuana in his house.[[27]](#footnote-27) The district court denied the defendant's motion to suppress the evidence found in his house, and the Ninth Circuit affirmed.[[28]](#footnote-28)

Writing for the Court, Justice Scalia held that the use of the thermal imaging device constituted a presumptively unreasonable search within the meaning of the Fourth Amendment.[[29]](#footnote-29) Scalia relied heavily on the fact that thermal imaging technology was “not in general public use.”[[30]](#footnote-30) He contrasted the thermal imaging device with widely used technologies, such as airplane and helicopter flights, which have opened to public view areas of the “house and curtilage that once were private.”[[31]](#footnote-31) The logical conclusion of this reasoning is that, if thermal imaging technology finds its way into general public use and social practices change, there may no longer be a reasonable expectation of privacy against such technology.[[32]](#footnote-32)

More recently, the Court addressed the use of the Global Positioning System (GPS) in the context of Fourth Amendment jurisprudence. In *United States vs. Jones,* (2012)[[33]](#footnote-33), police attached a GPS device to the suspect’s car, allowing them to track his movements for 28 days. All nine justices agreed that this was problematic under the Fourth Amendment, but they were divided on the rationale for the decision. The majority argued that the police were not entitled to place the device on private property, which could be a return to the trespass doctrine from *Olmstead*, which was explicitly overruled in *Katz*. But, five justices in concurring opinions expressed unease with the government’s ability to access vast amounts of private information. “The use of longer-term GPS monitoring in investigations of the most offenses impinges on expectations of privacy,” Justice A. Alito Jr. wrote for four of the justices. Further, he states that “[s]ociety’s expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalog every single movement of an individual’s car for a very long period.”

Some legal scholars find support for a transformative view of *Katz*, starting with the *Jones* decision protecting “a defendant’s Fourth Amendment rights in public movements.”[[34]](#footnote-34) However, the majority in *Jones* held that attaching the GPS device to the suspect’s vehicle violated his privacy rights based on the pre-*Katz* “property-based approach” of a “common-law trespassory test” rather than the “reasonable expectation of privacy test.”[[35]](#footnote-35) Justice Alito’s concurrence, backed by three other justices, criticized Scalia’s application of “18th-century tort law” as unsuited to “21st-century surveillance.” He also criticized *Katz*, including its “circularity,” its subjectivity, and especially the erosion of privacy expectations in the face of technology.[[36]](#footnote-36)

The Court specifically addressed cellphones in *Riley*. In this case, the Court ruled that the police must generally have a warrant to search cellphones of people they arrest. “Modern cellphones are not just another technological convenience,” Chief Justice Roberts wrote for the Court. Even the word cellphone is a misnomer: “They could just as easily be called cameras, video players, Rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers,” according to the Chief Justice. As a result of the prevalence and social practices associated with the use of cellphones, the Court recognized a reasonable expectation of privacy in the data on one’s cellphone. It might be worth noting that *Riley* concerned information possessed by the person arrested. As we will see, *Carpenter* involves information that is held by cellphone companies, possibly implicating the third-party doctrine, and raising important questions about how we define privacy in relationship to modern technologies.

*Carpenter vs. United States* (2018)

The United States Supreme Court decided *Carpenter* on June 22, 2018. This case had been touted as the most important privacy case of the digital age.[[37]](#footnote-37) Timothy Ivory Carpenter was convicted and sentenced to more than 116 years in federal prison in 2014 for his role in a string of robberies of cell phone stores in and around Detroit, Michigan. In 2011, police officers arrested four men suspected of being involved. One of the men confessed, and provided the FBI with the identity and cell phone numbers of several accomplices. Federal prosecutors applied for a court order under the Stored Communications Act[[38]](#footnote-38) (1986) which requires only a showing of reasonable grounds that the records are relevant and material to an ongoing criminal investigation instead of the higher standard of probable cause typically required for a search warrant. Magistrate judges granted the requests for Carpenter’s phone records. Carpenter’s cellphone provider, MetroPCS, provided 186 pages of the suspect’s “call detail records” that covered 127 days, while Sprint provided records for two days in Warren, Ohio, where one of the robberies took place. In total, the records showed where Carpenter’s phone connected to cell phone towers during a more than four-month period.

His phone was tracked through cell site location information, which is data created when phones connect with nearby cell towers. Service providers store that data, including location information for the start and end of phone calls, the transmission of text messages and routine internet connections as phones check for new emails, social media messages, weather updates, and more. At trial, FBI Special Agent Christopher Hess, a cellular analysis specialist, testified for the prosecution. “If you dial a number and you hit send, the tower information is populated in the cell detail record,” he explained. Hess identified eight calls to or from Carpenter’s phone that happened around the time of four the robberies. He presented maps of cell phone towers that connected those calls to demonstrate that Carpenter’s phone was within a half-mile to 2 miles of the crime scenes. In the Government’s view, the location records clinched the case: they confirmed that Carpenter was “right where the . . . robbery was at the exact time of the robbery.”[[39]](#footnote-39)

Carpenter challenged the warrantless collection of cell-site data as an unconstitutional search under the Fourth Amendment. He lost in the lower courts and was convicted of all six robbery charges he faced under the federal Hobbs Act[[40]](#footnote-40) (1946) and five of the six firearms charges. On appeal, Carpenter again raised his challenge to the use of cell-tower evidence. The Court of Appeals for the Sixth Circuit held that Carpenter lacked a reasonable expectation of privacy in the location information, because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as “a means of establishing communication,” the court concluded that the resulting business records are not entitled to Fourth Amendment protection.[[41]](#footnote-41) The Court of Appeals acknowledged that, in *Jones,* five justices agreed that people have a reasonable expectation of privacy in information very similar to cell-site data. But, the appeals court said Carpenter’s case was different because it involved “… business records obtained from a third party.”

Writing for the majority of the Court, Justice Roberts reversed and remanded, and confirmed the Court’s commitment to the *Katz* framework.[[42]](#footnote-42) The Court reiterated that the Fourth Amendment protects not only property interests but certain expectations of privacy as well.[[43]](#footnote-43) As a result, when an individual “seeks to preserve something as private,” and his expectation of privacy is “one that society is prepared to recognize as reasonable,” official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause.[[44]](#footnote-44) The majority opinion traced the development of Fourth Amendment protections to the Founding generation’s desire to safeguard against ‘general warrants’ and ‘writs of assistance’ in the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.”[[45]](#footnote-45) But the majority, noted that “[a]lthough no single rubric definitively resolves which expectations of privacy are entitled to protection, analysis is informed by historical understandings “of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.[[46]](#footnote-46) But, as the majority acknowledged in the first footnote, Justice Kennedy believes that there is such a rubric – the “property-based concepts that *Katz* purported to move beyond[[47]](#footnote-47)). It is also noted in this same footnote that Justice Thomas and Gorsuch also seem more interested in a return to property-based conceptions of privacy, but that neither party in this case had asked the Court to reconsider *Katz*. This seems like a question that will inevitably be presented to the Court for further consideration. Hence, this article is written at a precipice in regard to the development of Fourth Amendment privacy jurisprudence. With Justice Kennedy announcing his retirement the day before the Court decided *Carpenter*, the fate of *Katz*, the third party doctrine, and privacy more generally will likely be presented to a new Court, including several justices that have been very critical of the reasonable expectation of privacy test, several that are clearly more comfortable with property based conceptions of privacy, and a new justices that might be more sympathetic to the property based arguments presented by their other conservative colleagues. This article critically analyzes the arguments presented in order to determine the future of *Katz* and the reasonable expectation of privacy test.

To reach the conclusion that the Fourth Amendment required a warrant in *Carpenter*, the Court noted that the digital data at issue did not fit neatly within existing precedents, but lies at the intersection of two lines of cases: those establishing a person’s expectation of privacy in his physical location and movements, and those establishing a person’s expectation of privacy in information voluntarily turned over to third parties. The first line of cases starts with *United States vs. Knotts*, in which the Court concluded that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” Knotts could not assert a privacy interest since the movements of the vehicle and the final destination had been voluntarily conveyed to anyone who wanted to look. But, even in *Knotts,* the Court was careful to distinguish the tracking capacity of a beeper, as presented in that case, and the possibility of twenty-four-hour surveillance.[[48]](#footnote-48)

The second line of cases involve the third-party doctrine, and the implications of sharing information with others. Relying on *Smith*, the Government typically can obtain information shared with others without triggering the Fourth Amendment. As mentioned above, the third-party doctrine traces its roots to *Miller*, which involved bank records. The Court noted that Miller could “assert neither ownership nor possession” of the documents, since they were “business records of the banks.”[[49]](#footnote-49) Similarly, in *Miller,* the Court applied the same principle to the information conveyed to a telephone company. In this case, the Governments use of a pen register did not receive Fourth Amendment protections. In both cases the defendants “assumed the risk” that the company’s records “would be divulged to police.”[[50]](#footnote-50)

The majority opinion, as well as all of the concurring and dissenting opinions discuss privacy concerns with reference to social norms and practices. Justice Roberts stated, “Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so “for any extended period of time was difficult and costly and therefore rarely undertaken.”[[51]](#footnote-51) For that reason, “society’s expectation has been that law enforcement agents and others would not— and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual’s car for a very long period.”[[52]](#footnote-52) The majority also referenced social practices when it noted that “Unlike the bugged container in *Knotts* or the car in *Jones,* a cell phone—almost a ‘feature of human anatomy,’[[53]](#footnote-53)—tracks nearly exactly the movements of its owner. The Court continued, “[while] individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales.” Further, the Court noted that “nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower.”

Ultimately, the Court declined to extend *Smith* and *Miller* to cover the unique nature of cell-site records. Roberts mentioned that historical cell-site records present even greater privacy concerns than the GPS monitoring considered in *Jones*. Cellphone location data gives the Government near perfect surveillance and allow it to travel back in time to retrace a person’s whereabouts, subject to wireless carrier’s five-year retention policies. The Government argued that the third-party doctrine was decisive because cell-site records are “business records,” created and maintained by wireless carriers. However, the Court distinguished the limited types of personal information addressed in *Smith* and *Miller* from the exhaustive chronicle of location information collected by wireless carriers. In this regard, the Court stressed the revealing nature of cell phone location data and pointed out that cell phone location data is not truly “shared” as the term is normally understood. The Court noted that cell phones and the services they provide are “such a pervasive and insistent part of daily life” that carrying one is indispensable to participation in modern society.[[54]](#footnote-54) In addition, cell phone location data is generated without any affirmative act on the user’s part beyond powering up.

It is worth mentioning that the Court stressed the limited nature of its decision. The Court makes clear that it is not overruling the third-party doctrine or calling into question conventional surveillance techniques and tools, such as security cameras; nor do they address other business records that might incidentally reveal location information; and they do not consider other collection techniques involving foreign affairs or national security. But, what the Court does is to reaffirm the principle that a person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, “what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”[[55]](#footnote-55) In this regard, the majority seems to be reinforcing the idea that privacy applies to people, not places. Yet, several of the dissenting opinions disagree.

As noted by the majority, Justice Kennedy’s dissenting opinion stresses traditional property-based concepts, such as control and ownership. In his opinion, cell-site records are no different from many other kinds of business records that the government has a lawful right to access. He even chastised the majority when he stated that “the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases.” Justice Kennedy provided his own explanation of the technology involved, suggesting that it is much more imprecise than the majority suggests. He also stressed the fact that cell-site records serve an important investigative function, apparently finding it too onerous to require the government to obtain a warrant first. He would have relied on the third-party doctrine to hold that there was no search and therefore, the Fourth Amendment was not implicated. For Justice Kennedy, *Miller* and *Smith* are appropriate precedents because Carpenter has an attenuated interest in the business records, and that they are subject to compulsory process. So, again, Justice Kennedy laments the Court’s effort to recognize privacy beyond property-based conceptions. As we will see, Justice Gorsuch also supports the use of property-based conceptions of privacy, going as far as suggesting that it may have been Carpenter’s strongest argument.

Justice Thomas wrote his own dissenting opinion to point out that the problem is with the reasonable expectation of privacy test established in *Katz*. Instead of looking at whether a search occurred, he suggested that the case should turn on whose property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of “*their* persons, houses, papers, and effects.” He noted that the majority in *Katz* overruled *Olmstead* without replacing the physical intrusion requirement, leaving it to Justice Harlan to create the expectation of privacy test without citing anything in support. This is where he notes that the test was presented for the first time at oral argument.[[56]](#footnote-56) Further, he belittled *Katz* and the reasonable expectation of privacy test by citing an article written by the lawyer that suggested the test to say that he had an “epiphany” while preparing for oral argument. “He conjectured that, like the ‘Reasonable person’ test from his Torts class, the Fourth Amendment should turn on ‘whether a reasonable person … could have expected his communication to be private.’”[[57]](#footnote-57)

Ultimately, Justice Thomas concluded that reasonable expectation of privacy test has “no plausible foundation in the text of the Fourth Amendment.”[[58]](#footnote-58) He emphasized that the Court strayed even farther from the text of the Constitution by focusing on the concept of privacy. Justice Thomas instead would like to focus on the close connection between the language of the Fourth Amendment and the idea of property. He cites John Locke and the English legal tradition to argue that the Fourth Amendment was meant to secure private property. In this regard, he suggested that the organizing constitutional idea of the founding era was property, while the organizing constitutional idea of the 1960s and 1970s was privacy as reflected in *Katz*, *Griswold*, and *Roe vs. Wade*.

So, for Justice Thomas, it is enough to point out that Carpenter has no property interest in the cell phone location data at issue in his case. Nevertheless, he goes on to further criticize *Katz* test as unworkable in practice, noting that the “*Katz* regime” has been described as “an unpredictable jumble,” “a mass of contradictions and obscurities,” “all over the map,” “riddled with inconsistency and incoherence,” “a series of inconsistent and bizarre results that [the Court] has left entirely undefended,” “unstable,” “chameleon-like,” “’notoriously unhelpful,’” “a conclusion rather than a starting point of analysis,” “distressingly unmanageable,” “a dismal failure,” and “flawed to the core,” …. Justice Thomas went on to note Katz’s circularity problem: “While this Court is supposed to base its decisions on society’s expectations of privacy, society’s expectations of privacy are, in turn, shaped by this Court’s decisions.”[[59]](#footnote-59) But the heart of his critique comes when Justice Thomas suggested that although the *Katz* test was phrased in descriptive terms about society’s views, this Court treats it like a normative question—whether a particular practice *should* be considered a search under the Fourth Amendment*.* In the end, Justice Thomas labeled the *Katz* test as a “failed experiment” that the Court is “dutybound to reconsider . . .”[[60]](#footnote-60)

Of particular interest for those interested in the future of privacy law, Justice Neil Gorsuch was given his first opportunity to articulate his views since replacing Justice Antonin Scalia in 2017. Justice Gorsuch started his dissenting opinion by noting the fact that, “[t]oday we use the Internet to do most everything.… and [c]ountless Internet companies maintain records about us, and increasingly, for us.” Our social practices involving smartphones and technology make it such that even our most private documents are now kept on third party servers. *Katz*, *Smith*, and *Miller* would suggest that police can review all of this material, on the theory that no one reasonably expects any of it will be kept private.

Gorsuch suggested three options. First, we could ignore the problem, rely upon *Smith*, *Miller* and the third-party doctrine, and live with the consequences. This would ultimately mean that privacy, as we know it, would cease to exist. Second, the Court could set aside *Smith* and *Miller* and try again using *Katz.* Lastly, Justice Gorsuch suggests that the Court could look elsewhere. Presumably, Gorsuch is suggesting that the Court could overrule *Katz* and the reasonable expectation of privacy test altogether. In his view, the majority distinguishes between kinds of information disclosed to third parties and require courts to decide whether to “extend” those decisions to particular classes of information, depending on their sensitivity.[[61]](#footnote-61) He agreed with the Sixth Circuit and Justice Kennedy that there is no such balancing test found in *Smith* or *Miller*.

Instead of arguing that Smith and Miller are wrongly applied, Justice Gorsuch took issue with the cases themselves. He did not agree that the third-party doctrine applies to everything citing examples such as email and DNA. He noted that countless scholars have also come to the conclusion that the third-party doctrine is not only wrong, but horribly wrong.[[62]](#footnote-62) Further, he questioned the justification for the third-party doctrine, and noted that the Court has never offered a persuasive justification. The Court has said that by conveying information to a third party you “assume the risk” it will be revealed to the police and therefore you lack a reasonable expectation of privacy in it.[[63]](#footnote-63) The Court borrowed a tort concept, yet according to Justice Gorsuch, it really has no applicability under the circumstances in which the court applies it. Gorsuch also questions whether consent would be inappropriate concept to justify the third-party doctrine. “so long as a person knows that they are disclosing information to a third-party,” the argument goes, “there choice to do so is voluntary and the consent valid.”[[64]](#footnote-64)

Gorsuch doesn’t like the third party doctrine and noted that while the Sixth Circuit Court of Appeals had to follow those cases, the United States Supreme Court does not. In assessing the second option, dropping *Smith* and *Miller* and returning to *Katz*, Gorsuch seems equally unenthusiastic. Here, he agrees with Justice Thomas and suggest that the problem starts with the text an original understanding of the Fourth Amendment. After a brief mention of some of the textual arguments and historical questions, Gorsuch criticized Katz in a variety of ways, expressing his dissatisfaction with the role judges are forced to play. However, Gorsuch does provide an interesting caveat. He lauded judges for their ability to “discern and describe the existing societal norms.”[[65]](#footnote-65)

Similar to the language used by Justices Kennedy, Thomas, and Alito,[[66]](#footnote-66) Justice Gorsuch seems to focus almost exclusively on property-based conceptions of privacy. However, Gorsuch mentioned that property rights, while often informative, are not necessarily fundamental or dispositive in determining which expectations of privacy are legitimate. Here, he cited the holdings from *Florida vs. Riley (*police hovering in a helicopter 400 feet above the persons property does not invade a reasonable expectation of privacy) and *California vs. Greenwood* (holding that a person has no reasonable expectation of privacy in the garbage she puts out for collection). He recognized that if a helicopter were to hover over one’s home or a neighbor was spotted rummaging through one’s garbage, most people would feel that their privacy was violated. He also noted that the courts disagree about what is considered within one’s expectation of privacy. He wrote that, “in the end, our lower court colleagues are left with two

amorphous balancing test, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than product of judicial intuition.”[[67]](#footnote-67)

Gorsuch, went on to find solace in the language of the Fourth Amendment, and a return to property based conceptions of privacy. He insists that this doesn’t necessarily mean a return to the third-party doctrine. Using an example of a bailment, Gorsuch wants to say that property concepts can be used to preserve privacy rights. You don’t always need complete ownership or exclusive control of property. This is already true in his view. So, a return to the Fourth Amendment means a return to property law. We can just rely on state and federal statutory laws to establish property principles as it relates to digital data and other questions posed by modern technology.

Gorsuch seems to agree with the majority that the third-party doctrine is wrong, but he doesn’t like leaving it on life support. Instead, he wants a more traditional Fourth Amendment approach based in property law. In fact, he even thinks Carpenter could be protected under existing property law. Carpenter didn’t try to assert a property interest which may have been his best argument according to Justice Gorsuch. Ultimately, the Sixth Circuit had to follow the third-party doctrine, but he made clear that the US Supreme does not, and likely will not if he can persuade other justices to agree. Justice Gorsuch doesn’t really develop a third option that he lists initially: to look elsewhere, as he put it. Instead he says, the third-party doctrine is problematic, *Katz* itself is problematic, so let’s go back to property law. This is truly troubling since exclusive property-based conceptions of privacy were explicitly overruled in *Katz* and are clearly inadequate to address the myriad threats to privacy presented by modern technology.

**Shifting Expectations and the Adequacy of *Katz***

We must take the Court at its word**,** *Carpenter* is limited to the specific facts presented. It’s also important to recognize that this, or a related issue will inevitably return to the Court, with at least one new justice. Although the majority in *Carpenter* upheld *Katz* and the reasonable expectation of privacy test, it’s not clear that the Court would continue to do so with different facts and legal questions presented. In this regard, it may be accurate to suggest that *Katz* is on life support. Without a more forceful defense of privacy as a social practice, the conservative wing of the Court may be able to convince their colleagues to return to an exclusively property-based conception of privacy.

The reasonable expectation of privacy test incorporates privacy as a social practice and allows for variations depending on time, place, and context. Expectations of privacy are shaped by a community’s sense of space, itself influenced by architecture, family structure, desire or need for intimacy, need to control crime, acceptance of new technologies, and other culturally variant factors.[[68]](#footnote-68) Given the pace and reach of recent technological developments, it’s worth noting that we stand on a precipice. Computers and cell phones have significantly altered the way in which we live and our expectations of what is private. Nevertheless, significant questions remain regarding the adequacy of Katz and the reasonable expectation of privacy test to address threats to privacy presented by modern technology.

There is considerable disagreement about the contours of a right to privacy. This is particularly true when courts are required to determine whether a warrantless search by a government official is considered reasonable. But, as might be expected, what is reasonable to the majority of the United States Supreme Court may not be reasonable to others. So how do we decide, and how should courts make these determinations? It I necessary to recognize that “reasonableness” is a contested concept and therefore must be analyzed with reference to both legal principles and social practices, as discussed in the Fourth Amendment case law. In this regard, privacy is a social practice based on our perceptions, and our perceptions are, at least in part, based on our upbringing, family, education, and experiences. It should not be surprising that there are disagreements about what ethics and law require that differ in different societies with different traditions and different social norms and practices. People live by different codes and standards, and a strong argument can be made that it is not fair to judge them by another standard.

The idea of reasonableness is elusive and judges disagree about whether an expectation of privacy is reasonable. They disagree about whether it is reasonable to have an expectation of privacy in our garbage, in public restrooms, in open fields beyond the curtilage of our homes, and in the contents of our urine.[[69]](#footnote-69) Justice Scalia, for example referred to employment drug testing as “particularly destructive of privacy and offensive to personal dignity.”[[70]](#footnote-70) But, Scalia also dismissed these concerns in the context of testing student athletes, saying “that school sports are not for the bashful.” And, he added that the privacy interest compromised in that case were “negligible.”[[71]](#footnote-71) And, Justice O’Connor disagreed, arguing that monitoring of student athletes’ excretory functions is intrusive and more severe than other searches the court has struck down.[[72]](#footnote-72)

One possibility is that whether an expectation of privacy is reasonable simply depends on the subjective preferences of judges. Chief Justice Rehnquist suggested something similar when he wrote, “because we are dealing with questions of political and philosophical accommodation of values, the point of intersection of the curves [between government and private interests] will, in the last analysis, remain a matter of individual judgment.”[[73]](#footnote-73) This may or may not be problematic. Judicial discretion allows judges the ability to make important case specific judgments that can be used to determine when an individual has a legitimate expectation of privacy that is reasonable and should be protected. Restricting courts to considerations of property law would unnecessarily limit the circumstances under which an individual’s privacy would be protected from government intrusion. In this regard, property law and the third-party doctrine fail to account for the social norms and practices in a given society that create reasonable expectations of privacy. Nevertheless, many see discretion as synonymous with judicial policymaking, and criticize *Katz* for failing to adequately constrain judges.

*Katz* and the reasonable expectation of privacy test has also been criticized as tautological and circular. Amitai Etzioni, for one, points out, that “[b]oth the individual and the societal expectations of privacy depend on judicial rulings—while judges, in turn, use these expectations as the basis for their rulings. Mr. Katz had no reason to assume a conversation he conducted in a public phone booth would be considered private or not—until the court ruled that he had such an expectation.[[74]](#footnote-74) Richard Posner, also notes that “it is circular to say that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy; whether he will or will not have such an expectation will depend on what the legal rule is.”[[75]](#footnote-75) Similarly, Richard A. Epstein states:

It is all too easy to say that one is entitled to privacy because one has the expectation of getting it. But the focus on the subjective expectations of one party to a transaction does not explain or justify any legal rule, given the evident danger of circularity in reasoning.[[76]](#footnote-76)

And, Anthony G. Amsterdam suggests that the “actual, subjective expectation of privacy … can neither add to, nor can its absence detract from, an individual’s claim to [F]ourth [A]mendment protection,” suggesting that “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.”[[77]](#footnote-77) Although this may be difficult to imagine in a modern democracy, clearly the same effect can be achieved in more subtle yet pervasive ways.

With the increasing use of cell phones and other forms of technology, we must recognize that our expectations of privacy are constantly changing. Shaun Spencer suggests that the expectation driven conception of privacy establishes a privacy marketplace in which societal expectations of privacy fluctuate in response to changing social practices. For this reason, privacy is susceptible to encroachment at the hands of large institutional actors who can control this market place by affecting social practices.[[78]](#footnote-78) In this regard, it is important to recognize that powerful institutions can influence the social practices that affect our expectations of privacy “by changing their conduct or practices, by changing or designing technology to affect privacy, or by implementing laws that affect society’s expectation of privacy.”[[79]](#footnote-79) In this regard, many argue that privacy and the reasonable expectation of privacy test are undermined by the rise of social media, such as Facebook. Originally, Facebook was intended and promoted as a social networking tool for college students, but it has become omnipresent as billions of people constantly and voluntarily share the most intimate details of their lives. Some of the privacy implications have been revealed in news stories about the 2016 election, as well as third party vendors and Cambridge Analytica’s access to private information about users and their contacts. Further, it has become commonplace for employers to screen candidates and fire employees based on material posted on Facebook.[[80]](#footnote-80) And, it has been well documented that Facebook is monitored by intelligence and law enforcement agencies.[[81]](#footnote-81)

Social practices surrounding cell phones and social media have drastically changed the way we live our lives and have altered our expectations of privacy. In *Carpenter,* the Supreme Court recognized the unique threat posed by modern technology and held that individuals have a reasonable expectation of privacy in cell phone location data, and that the third-party doctrine does not eliminate the need for a warrant when the government desires this information from a cell phone service provider. The Court explicitly states that the holding is narrow and important questions exist about the contours of the right to privacy, and the future of Fourth Amendment jurisprudence.

**Conclusion**

It has taken many years and many cases to define the contours of the right to privacy, and much work remains to be done. Privacy remains elusive, more a matter of social norms and customs than universal principles that can be applied to all cases and all forms of technology. Technology tends to blur the line between public and private, in courts have struggle to keep up with the speed of modern innovation. As a result, the way in which we respond to this erosion of privacy may be one of the most profound issues facing humanity. As some scholars have noted, technology has the potential to reduce, if not eliminate an individual’s zone of privacy, but it also can be used to enhance and protect meaningful privacy rights.

Several members of the current US Supreme Court take the position that Fourth Amendment privacy is limited to property-based conceptions of privacy and they will likely rule very differently in future cases. However, property as a legal concept is inadequate and misrepresents the nature of privacy and the need for its protection. Privacy is a complex social practice that varies over time and space and is essential to the development of the individual. It is not limited to places. The Court in *Katz* recognized this when Justice Potter Stewart said, “The Fourth Amendment Protects ***people, not places***.” In *Carpenter,* the Court recognizes this as well, and protects privacy by requiring a warrant in the specific circumstances presented.

It is important to recognize that privacy is a contested concept, and rightfully so. Courts and scholars have struggled to understand and define privacy because it is complicated, and different to different people in different cultures and at different times in history. In this regard, the courts have tried to develop legal principles, while considering the importance of social norms and practices. Universal principles have the appeal of uniformity and are perceived as impermeable to judicial activism. But ethical and legal judgments rely on principles that are constrained by practice. Expectations of privacy are shaped by a community’s sense of space, architecture, family structure, desire or need for intimacy, need to control crime, acceptance of new technologies, and other culturally variant factors.[[82]](#footnote-82) Privacy varies across time and space and depends on countless factors that are difficult to account for in a single universal legal principle, like property.

Our subjective expectations of privacy maybe irrational, unreasonable, or just bad ideas, but no one is suggesting uncritical deference to social practice.[[83]](#footnote-83) Nevertheless, it cannot be ignored. This paper has considered the role social practices play in determining what is a reasonable expectation of privacy. At an abstract level, social practices are the basis of intuitions which we often rely in developing and justifying legal principles. It can be argued that all moral rules include reference to reasonableness, either implicitly or explicitly.[[84]](#footnote-84) Social practice also provides standards for interpreting moral principles in other ways. For example, a moral principle may declare that it is wrong to harm others, but we need to know what counts as harm and social practices help to determine this. Similarly, Fourth Amendment privacy law must remain flexible enough to protect privacy in relation to social norms and practices. The Fourth Amendment test does not involve a fixed moral conception of what ought to be private, nor does it involve application of a formal legal test. Instead, courts must look at society as it is and . . . look at what society thinks of as private. In this regard, the Fourth Amendment recognizes and hinges on the idea that what society understands as private and free from government intrusion is itself inevitably dependent on changing social values and social expectations.[[85]](#footnote-85) Let’s hope it stays that way.

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1. 389 U.S. 347. [↑](#footnote-ref-1)
2. 585 U.S. \_\_\_, Docket No. 16-402. [↑](#footnote-ref-2)
3. Brandeis & Warren, 1890. [↑](#footnote-ref-3)
4. Brandeis & Warren, 1890. [↑](#footnote-ref-4)
5. Brandeis & Warren, 1890. [↑](#footnote-ref-5)
6. 277 U.S. 438. [↑](#footnote-ref-6)
7. 316 U.S. 129. [↑](#footnote-ref-7)
8. *Katz*, at 361. [↑](#footnote-ref-8)
9. 425 U.S. 435. [↑](#footnote-ref-9)
10. 442 U.S. 735. [↑](#footnote-ref-10)
11. *Miller* at 443 and 444. [↑](#footnote-ref-11)
12. 442 U.S. 735. In this case, a woman was mugged in Baltimore, Maryland and gave the police a description of the mugger and the getaway car that was used, a 1975 Monte Carlo. Soon thereafter, the victim received a phone call and the caller told her to go out on her porch at which time the 1975 Monte Carlo drove by. She immediately called the police who had a vehicle nearby. Police officers responded to the call and see a car matching the previous description. They ran the plates and found it registered to the defendant, Michael Lee Smith. The police got the phone company to tap the line and within 24 hours he called her again. They used that information to get a warrant to search the defendant’s home, and found a phonebook opened to the victims listing. [↑](#footnote-ref-12)
13. The term pen register originally referred to a device for recording telegraph signals. Samuel F. B. Morse, Improvement in the Mode of Communicating Information by Signals by the Application of Electro-Magnetism, U.S. Patent 1647, June 20, 1840; see page 4 column 2. [↑](#footnote-ref-13)
14. *Smith vs. Maryland,* at 174–175. [↑](#footnote-ref-14)
15. *Id.*  [↑](#footnote-ref-15)
16. Technological developments make it relatively easy to distinguish a pen register from modern technologies. However, Section 216 of the 2001 USA PATRIOT Act expanded the definition of a pen register to include devices or programs that provide an analogous function with internet communications. [↑](#footnote-ref-16)
17. See *Katz vs. United States*, 389 U.S. at 352. [↑](#footnote-ref-17)
18. 573 U.S. \_\_. [↑](#footnote-ref-18)
19. 480 U.S. 709. [↑](#footnote-ref-19)
20. *Id.* at 713-714. [↑](#footnote-ref-20)
21. *Id.* at 728-729. [↑](#footnote-ref-21)
22. *Id.* at 717. [↑](#footnote-ref-22)
23. *Id.* [↑](#footnote-ref-23)
24. 533 U.S. 27. [↑](#footnote-ref-24)
25. *Id.* at 40. [↑](#footnote-ref-25)
26. *Id.* at 30. [↑](#footnote-ref-26)
27. *Id.* [↑](#footnote-ref-27)
28. *Id.* A divided panel of the Ninth Circuit originally reversed the district court, see *United States vs. Kyllo*, 140 F.3d 1249, 1250 (9th Cir. 1998), but on rehearing the still divided panel (after a change in composition) affirmed the district court, see *United States vs. Kyllo*, 190 F.3d 1041, 1043 (9th Cir. 1999). The second panel reasoned that the defendant had no subjective expectation of privacy because he did not try to conceal the heat radiating from his home. 190 F.3d at 1046. [↑](#footnote-ref-28)
29. *Kyllo*, 533 U.S. at 40. [↑](#footnote-ref-29)
30. *Id.* at 34. [↑](#footnote-ref-30)
31. *Id*. For cases finding no unreasonable search based on warrantless aerial observations, see *Florida vs. Riley*, 488 U.S. 445, 445 (1989) (observation of partially exposed residential greenhouse from helicopter at altitude of 400 feet); *Dow Chem. Co. vs. United States*, 476 U.S. 227, 229 (1986) (aerial photography of industrial plant from between 1200 and 12,000 feet); *California vs. Ciraolo*, 476 U.S. 207, 209 (1986) (surveillance of fenced-in backyard from helicopter at altitude of 1000 feet). [↑](#footnote-ref-31)
32. Some may consider it unlikely that such a highly specialized technology would become widely used. The same might have been said of global positioning system (GPS) technology when it was a purely military application. Today, GPS technology has widespread public applications, and has been addressed in *Jones*, which will be discussed next. See Sabra Chartrand, Patents: Tapping Global Positioning Technology to Send an S.O.S., Raise Drawbridges and Monitor Workouts, N.Y. Times, Mar. 5, 2001, at C6. [↑](#footnote-ref-32)
33. 565 U.S. 400. [↑](#footnote-ref-33)
34. Daniel T. Pesciotta, Note, *I’m Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century*, 63 Case W. Res. L. Revs. 187, 230 (2012) noting that the Court took a “more than ten-year hiatus from deciding a Fourth Amendment case involving technology.” [↑](#footnote-ref-34)
35. Ibid. [↑](#footnote-ref-35)
36. *Jones,* (Alito, J., concurring). [↑](#footnote-ref-36)
37. Rosen. [↑](#footnote-ref-37)
38. 18 U.S.C. Chapter 121 §§ 2701-2712. [↑](#footnote-ref-38)
39. App. 131 (closing argument). [↑](#footnote-ref-39)
40. 18 U.S.C. § 1951 (1946). [↑](#footnote-ref-40)
41. Id., at 888 (quoting *Smith*, 442 U. S. 735, 741 (1979)). [↑](#footnote-ref-41)
42. In Footnote 1, the Court notes that neither party in this case asked the Court to reconsider *Katz.* Nevertheless, Justice Kennedy, Justice Thomas, and Justice Gorsuch suggest abandoning *Katz* and returning to an exclusively property-based approach. Post, at 3 (Kennedy, J., dissenting); Post, at 1–2, 17–21 (Thomas J., dissenting); post, at 6–9 (Gorsuch, J., dissenting). [↑](#footnote-ref-42)
43. *Katz*, 389 U. S. 347, 351. [↑](#footnote-ref-43)
44. *Smith*, 442 U. S. 735, 740. [↑](#footnote-ref-44)
45. Citing *Riley vs. California*, 573 U.S. \_\_\_,\_\_\_ (2014)(slip op., at 27). [↑](#footnote-ref-45)
46. Citing *Carroll vs. United States,* 267 U.S. 132, 149 (1925). [↑](#footnote-ref-46)
47. Footnote 1 citing Post, at 3 dissenting opinion. [↑](#footnote-ref-47)
48. *Id.* at 283-284. [↑](#footnote-ref-48)
49. *Id.* at 440. [↑](#footnote-ref-49)
50. *Id.* at 745. [↑](#footnote-ref-50)
51. *Id*. at 429. [↑](#footnote-ref-51)
52. *Id.* at 430. [↑](#footnote-ref-52)
53. *Riley*, 573 U.S., at \_\_\_ (slip op., at 9). [↑](#footnote-ref-53)
54. *Riley*, 573 U. S., at \_\_\_. [↑](#footnote-ref-54)
55. *Katz*, at 351–352. [↑](#footnote-ref-55)
56. See Winn, *Katz* and the Origins of the “Reasonable Expectation of Privacy” Test, 40 McGeorge L. Rev. 1, 9-10 (2009). [↑](#footnote-ref-56)
57. Thomas Dissent page 4, citing Id. at 19. [↑](#footnote-ref-57)
58. Thomas Dissent p. 5 citing Carter, 525 U.S. at 97 (opinion of Scalia, J.). [↑](#footnote-ref-58)
59. p. 19. [↑](#footnote-ref-59)
60. p. 21. [↑](#footnote-ref-60)
61. Gorsuch opinion, p. 2 citing See *ante*, at 10-18. [↑](#footnote-ref-61)
62. Gorsuch opinion p. 3, citing Kerr, The Case for the Third Party Doctrine, 107 Mich L. Rev. 561, 563, n.5, 564 (2009)(collecting criticisms but defending the doctrine). [↑](#footnote-ref-62)
63. Citing Smith, supra, at 744. [↑](#footnote-ref-63)
64. Gorsuch opinion citing Kerr, Supra, at 588. [↑](#footnote-ref-64)
65. Gorsuch opinion p. 8 citing See, e.g. *Florida vs. Jardines*, 569 U.S. 1, 8 (2013)(inferring a license to enter on private property from the “habits of the country” (quoting *McKee vs. Gratz*, 260 U.S. 127, 136 (1922))); Sachs, Finding Law, 107 Cal. L. Rev. (forthcoming 2019). [↑](#footnote-ref-65)
66. Justice Alito also frames his arguments in reference to the language of property rights, and speaks of kings and common law writs to suggest that a compulsory process is not a physical intrusion nor a taking of property. He suggested that the Court’s decision will do more harm than good, causing a “blizzard of litigation.” [↑](#footnote-ref-66)
67. Gorsuch opinion p. 12. [↑](#footnote-ref-67)
68. Tunick 1998, p. 16. [↑](#footnote-ref-68)
69. On expectations of privacy in our garbage, compare *California vs. Greenwood*, 486 U.S. 35 (1988), *State vs. De Fusco*, 606 A 2d 1 (1992), and *State vs. Schultz*, 388 So 2d 1326 (1980) with *State vs. Tanaka*, 701 P 2d 1974 (1985), *State vs. Hempele,* 576 A 2d 793 (1990), *State vs. Boland*, 800 P 2d 1112 (1990), *People vs. Hillman*, 821 P 2d 884 (1991). On expectations of privacy in toilet stalls of public restrooms, compare *Smayda vs. U.S.*, 352 F 2d 251 (1965) with, for example, *Bielicki vs. Superior Court of L.A. County*, 371 P 2d 288 (1962). On open field doctrine, compare the majority and dissenting opinions in *United States vs. Dunn*, 480 US 294 (1987) and *Oliver vs. United States,* 466 U.S. 170 (1984). In *Oliver vs. United States*, Kentucky police acting on a lead drove past Oliver’s house which had no trespassing signs and a locked gate, walked around the gate, passed a bar and camper, and traverse to a secluded field, bounded by woods, fences, and no trespassing signs posted at regular intervals, eventually finding a marijuana grow over a mile from Oliver’s house. No warrant. With a six to three majority, the Court held that the search was not unreasonable. Justice Powell, for the majority, argued that no reasonable expectation of privacy was violated, but Justice Marshall in dissent, appealed to custom and practice to reach the opposite conclusion: “many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshipers, still others to engage and sustained creative endeavor.” [↑](#footnote-ref-69)
70. *National Treasury Employees Union et al. vs. Von Raab*, 489 U.S. 656, 680 (1989)(dissent). On urinalysis drug testing, compare *Acton vs. Vernonia School District* *47J*, 23 F 3d 1514 (1994) with *Schaill vs. Tippecanoe County School Corp*., 864 F 2d 1309 (1988); and compare the majority and dissenting opinions in *Vernonia School District vs. Acton*, 518 U.S. , 115 S Ct 2386, 132 L Ed 564 (1995).” [↑](#footnote-ref-70)
71. *Vernonia School District vs. Acton*, 63 LW 4653, at 4656. [↑](#footnote-ref-71)
72. Ibid, at 4660. [↑](#footnote-ref-72)
73. Rehnquist, “Expanded Right to Privacy,” 14. [↑](#footnote-ref-73)
74. Amitai Etzioni (2014). “Eight Nails into Katz’s Coffin,” Case Western Reserve Law Review, Volume 65, Issue 2, p. 413. [↑](#footnote-ref-74)
75. Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Revs. 173, 188. [↑](#footnote-ref-75)
76. Richard A. Epstein, Principles for a Free Society: Reconciling Individual Liberty with the Common Good 210 (1998). [↑](#footnote-ref-76)
77. Anthony G. Amsterdam, *Perspective on the Fourth Amendment*, 58 Minn. L. Revs. 349, 384 (1974). [↑](#footnote-ref-77)
78. Shuan B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 San Diego L. Revs. 843 (2002). [↑](#footnote-ref-78)
79. *Id.* at 844. [↑](#footnote-ref-79)
80. In some cases, employers and universities demand Facebook passwords from current or perspective employees and students, a practice that, despite controversy, remains legal in the majority of the United States. Jonathan Dame, *Will Employers Still Ask for Facebook Passwords in 2014?*, USA Today (Jan. 10 2014, 2:03AM), (http://www.usatoday.com/story/money/business/2014/01/10/facebook-passwords-employers/4327739/). [↑](#footnote-ref-80)
81. Etzioni 2014, p. 422. [↑](#footnote-ref-81)
82. Tunick, p. 16. [↑](#footnote-ref-82)
83. Tunick pp. 140 and 141. The author cites Justice Harlan for suggesting that a judge is not solely bound by social practices, but can decide that something is morally or otherwisely wrong. From this he concludes that it is essential that we consult both existing norms and practices, as well as principles that might be critical of existing practices. [↑](#footnote-ref-83)
84. Tunick p. 137. The author cites the principle of detrimental reliance and explains that in order for this concept to be persuasive it must include the requirement that reliance is reasonable. [↑](#footnote-ref-84)
85. Frederick Schauer, The Social Construction of Privacy, Discussion Draft 10 (Mar. 20, 2000) (unpublished manuscript, at http:// [www.ksg.harvard.edu/presspol/publications/pdfs/schauer1.PDF](http://www.ksg.harvard.edu/presspol/publications/pdfs/schauer1.PDF)). P. 9. [↑](#footnote-ref-85)