**“Privacy: what do you expect?”**

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*Abstract:*

Many would like to believe that there is a realm of personal space that is and should be protected from unwelcome intrusion. This has been codified in in state, federal, as well as regional and international privacy laws. In addition, it has been found within a penumbra of rights in the United States Constitution. In this regard, the courts have defined privacy with reference to a reasonable expectation of privacy. So, what do we expect? This paper lays out the case law recognizing a reasonable expectation of privacy and discusses its relevance for modern conceptions of privacy. The dominance of computers and cell phones in our everyday lives has the potential to significantly alter our expectations of what is and should be considered private. This is especially relevant as we trade our privacy for a more efficient consumer experience, and in the process redefine the human experience.

It has been suggested that we live in a “post privacy era.”[1] In 1999, Scott McNealy, the chief executive officer of Sun Microsystems, announced to a group of reporters and analysts that we “have zero privacy anyway -- get over it."[2] One thing seems clear, the nature of privacy is changing as we reorder our lives around different forms of technology. This sentiment is shared by many and reflects the double-edged sword of privacy in the modern era. As new technologies change the way in which we live, they also have profound impacts on our expectations of privacy, and in turn, the circumstances in which our privacy is protected from government

[1] Lazarus 2012, pp. B1, B4.

[2] Ibid. “It’s not just that we no longer feel outraged by repeated incursions on our virtual personal space. We now welcome the scrutiny of strangers by freely sharing the most intimate details of our lives on Facebook, Twitter and other sites.”

intrusion. This paper will look at the development of privacy law in the United States, focusing on case law surrounding a reasonable expectation of privacy and discuss its relevance for modern conceptions of privacy.[3] The dominance of computers and cell phones in our everyday lives has the potential to significantly alter our expectations of what is and should be considered private. This is especially relevant as we trade our privacy for a more efficient consumer experience, and in the process redefine the human experience.

Privacy jurisprudence can be seen as a search for universal principles, with explicit recognition of the importance of social practices. As we will see, the courts have struggled to define privacy with reference to an individual's subjective expectation of privacy, as well as consideration of society's objective understanding of what is private. Yet, the notion of a reasonable expectation of privacy and the two-prong test established by Justice Harlan in *Katz v. the United States* (1967) continue to be the starting point for debates about privacy. Even more problematic is the applicability of the third-party doctrine to cases involving electronic surveillance. 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

[3] Privacy is an important concept with a rich history of scholarship. Scholars in a variety of fields have looked at its significance for social and political development. It has been acknowledged to be critical to "our ability to create and maintain different sorts of social relationships with different people," necessary for "permitting and protecting an autonomous life," and important for "emotional and psychological tranquility." Rachels, 1984; Rössler, 2005; Miller, 1971. Politically it has been described as "essential to democratic government," the "heart of our liberty," and "the beginning of all freedom." Gavison, 1980; *Lake v. Wal-Mart Stores, Inc,* 1998; *Pub. Utilities Comm'n v. Pollak*, 1952. Yet, philosophers, legal theorists, and jurists have struggled to reach a satisfactory conception of privacy. See, e.g., Gavison, 1980, 422 (lamenting the lack of a useful, distinct, and coherent concept of privacy); Westin, 1967, 7 ("Few values so fundamental to society as privacy have been so undefined in social theory"). As Robert Post puts it, "Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all." Post, 2001. Nevertheless, privacy has become an all-encompassing concept that includes the freedom of thought, control over one's body, solitude in one's home, control over personal information, freedom from surveillance, protection of one's reputation, and protection from searches and seizures. Solove, 2008.

services. In this regard, this paper will address the adequacy of the reasonable expectation of privacy test, as well as the third-party doctrine in light of modern technology and *Carpenter v. United States,* a pending case in which the U.S. Supreme Court is considering the fate of privacy in the digital age.

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

In American jurisprudence, debates 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 confidently 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."[4] It is particularly interesting that Brandeis and Warren, more than 100 years ago 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]

Arguably, this statement is truer today than ever. Brandeis and Warren recognized that from time to time we must "define anew the exact nature and extent of such protection."[6] This is precisely what the Supreme Court is posed to do in *Carpenter v. United States*, a case involving the use of

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4 Brandeis & Warren, 1890.

5 Brandeis & Warren, 1890.

6 Brandeis & Warren, 1890. It is particularly interesting for purposes of this paper that Brandeis and Warren address changes in technology and their impact 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' (Brandeis & Warren, 1890).

cell phone site data obtained from a cellphone provider without a warrant. This case will be discussed in greater detail below and has the potential to significantly alter privacy law in the United States. First, it is necessary to reference several previous cases in which the courts have attempted to define the contours of the right to privacy.

Despite the fact that the United States Constitution does not mention privacy, the Supreme Court recognized a constitutional right to privacy in *Griswold v. Connecticut* (1965). In this case the Court explicitly recognizes that the Constitution protects a zone of privacy in which the individual should be free from government intrusion, as Brandeis and Warren did 75 years before. *Griswold* involved a Connecticut law that made it a crime to use any "drug, medicinal article or instrument for the purpose of preventing conception."[7] Estelle Griswold was the Executive Director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton was a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven. The center was open for about 10 days in November of 1961 when Appellants Griswold and Buxton were arrested for giving "information, instruction, and medical advice to married persons as to the means of preventing conception."[8] This was a deliberate act intended to provoke litigation that could be used to challenge the constitutionality of the statute. The appellants were tried, convicted, and required to pay a $100 fine, which was upheld by the Appellate Division of the Circuit Court, and by the Connecticut Supreme Court.

Griswold appealed her conviction to the U.S. Supreme Court, arguing that the Connecticut statute was unconstitutional as a violation of the 14th Amendment, which states, "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens

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7 *Griswold v. Connecticut,* 1965.

8 *Griswold v. Connecticut,* 1965.

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...nor deny any person the equal protection of the laws."[9] Justice William Douglas, writing for the majority, discussed the existence of a number of rights that are not mentioned in the Constitution or the Bill of Rights. These rights are consistent with the spirit of the Constitution and necessary in order to secure existing rights. For example, Justice Douglas states:

> [t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach -- indeed, the freedom of the entire university community.[10]

These rights are part of what the Court refers to as a penumbra of rights, "formed by emanations from those guarantees that help give them life and substance." Justice Douglas uses these various guarantees to create zones of privacy. He cites the right of association contained in the First Amendment, as well as the Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner. Perhaps most directly on point is the Fourth Amendment's "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Justice Douglas also cites the Fifth Amendment, in its Self-Incrimination Clause, to create a zone of privacy that the government may not force an individual to surrender to his detriment.

According to Justice Douglas, Griswold concerned a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. Therefore, the Connecticut law forbidding the use of contraceptives was found to violate the right of "marital privacy which is within the penumbra of specific guarantees of the Bill of Rights."[11] Many cases since Griswold

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9 U.S. Constitution, Fourteenth Amendment, Section 1.

10 *Griswold v Connecticut*, 1965.

11 *Griswold v Connecticut*, 1965.

have addressed the constitutional right to privacy from government intrusion and the courts have tried to define the contours of such a right. In so doing, the courts have reiterated the ways in which this right depends on a number of factors, including one's expectation of privacy.

A couple of years later the Court had the opportunity to further articulate the contours of this right to privacy. In *Katz v. United States* (1967), the U.S. Supreme Court was asked to define the limits to government eavesdropping activities based on the Fourth Amendment. In that case the defendant was convicted of transmitting gambling information by telephone from Los Angeles to Miami and Boston, in violation of 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 notes that privacy laws are largely left to the individual states. Nevertheless, the majority opinion reversed the conviction because government agents 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 notes that the Fourth Amendment protects people, not places. In this regard, the Court rejects the "trespass" doctrine used in cases like *Olmstead v. United States*, 277 U.S. 438 (1928), and *Goldman v. United States*, 316 U.S. 129 (1942). Justice Harlan provides a two-fold requirement that emerges 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.[12] 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."[13]

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12 *Katz v. United States*, 1967.

13 *Katz*, p. 361.

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. In this regard, privacy law in the United States has developed as a search for universal principles, while recognizing the importance of social norms and practices for shaping our subjective expectations of privacy.

The "third party doctrine" is the closest thing to a universal principle used by the courts in deciding difficult Fourth Amendment privacy cases. But, as we will see, this doctrine is not well suited to addressing privacy in the digital era. As stated in *United States v. Miller* (1976),[14] 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."[15] In *Smith v. Maryland* (1979),[16] 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. In that 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 tells her to go out on her porch at which time the 1975 Monte Carlo drives by. She immediately calls the police

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14 425 U.S. 435.
15 Ibid. at 443, 444.
16 442 U.S. 735.

who had a vehicle nearby. Police officers responding to the call also see the car matching the previous description and ran the plates, finding it registered to the defendant, Michael Lee Smith. The police get the phone company to tap the line and within 24 hours he calls her again. They use that information to get a warrant to search the defendants home, and find a phonebook opened to the victims listing.

The Supreme Court finds no expectation of privacy, holding that a pen register[17] is not a search because the "petitioner voluntarily conveyed numerical information to the telephone company." Once you dial the number, the phone company connects you 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. The court did not distinguish between disclosing the numbers to a human operator or just automatic equipment used by the telephone company. 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. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law."[18]

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[17] 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.

[18] *Smith v. Maryland,* citing *United States v. New York Tel. Co.*, 434 U.S. 159 (1977), at 174–175.

The majority argues that there can't be a subjective expectation of privacy based on existing social practices and creates the third-party doctrine in the process. In a dissenting opinion, Justice Marshall, joined by Justice Brennan, disagreed with the Court's use of the third-party doctrine, but also refer to social practices, stating:

> The use of pen registers, I believe, constitutes such an extensive intrusion. To hold otherwise ignores the vital role telephonic communication plays in our personal and professional relationships, see *Katz v. United States*, 389 U.S., at 352, as well as the First and Fourth Amendment interests implicated by unfettered official surveillance.

It is interesting to note the similarity with Chief Justice Roberts comments regarding the ubiquitous nature of cell phones in *Riley v California* (2014), which will be discussed below.

The third-party doctrine has become a universal legal doctrine that has been applied in many divergent cases to determine whether there is a reasonable expectation of privacy. However, it is worth noting that technological developments make it relatively easy to distinguish a pen register and the third-party doctrine for determining the reasonableness of searches of electronic devices. Nevertheless, 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. It is beyond the scope of this paper to address all of the privacy related issues raised by the different forms of technology. Suffice to say, significant questions exist regarding reasonable expectations of privacy in every use of technology that has the potential to be monitored.

More recently, the Supreme Court addressed the use of GPS in the context of Fourth Amendment jurisprudence. In *United States v. Jones* (2012), 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 said the police were not entitled to place the device on private property, which could be a return to the trespass doctrine from *Olmstead v. United States*, (1928),[19] which was explicitly overruled in *Katz*. But five justices in concurring opinions expressed unease with the government's ability to vacuum up troves 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 justices. "Society'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."

The Court specifically addressed cellphones in *Riley v California* (2014).[20] In that 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 John G. Roberts Jr. wrote for the Court. Even the word cellphone is a misnomer, he said. "They could just as easily be called cameras, video players, Rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers," the chief Justice wrote. 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 v. United States* involves information that is held by cellphone companies. Before discussing *Carpenter* it's important to assess the adequacy of the reasonable expectation of privacy test, as well as the third-party doctrine for determining the contours of the right to privacy and how best to protect it in light of our shifting expectations of privacy.

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19 277 U.S. 438.

20 573 US ____.

**Shifting Expectations of Privacy**

It is important to recognize that our expectations of privacy differ significantly depending on place and context, but also that our expectations have evolved significantly over time. Further, 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. Yet privacy law is slow to catch up with the numerous threats to privacy.

Since the understanding of reasonableness is contested this necessarily requires reference to both legal principles as well as social practices, as seen 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.

This paper has looked at the development of privacy law with reference to reasonable expectations of privacy. *Griswold* establishes a general constitutional right to privacy. Particularly considering that this is a non-textual right, there is considerable disagreement about the contours of such a right. 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?

As with most, if not all issues of constitutional law, debates about privacy include a long history in which courts have attempted to define abstract universal principles for guidance. But ethical and legal judgements rely on principles that are constrained by social practices. Debates between practice and principles occur between Kant and Hegel,[21] as well as Burke and Paine, and are implicit in the debate among jurists concerning the reasonableness of expectations of privacy.

The development of privacy law in the United States can be seen as a search for universal abstract principles of proper conduct, with respect for social practices and norms of behavior. In this regard, the courts are required to consider the role social practices play in ethical and legal judging. In this regard, 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.[22] In cases such as *Griswold* and *Katz* the Court recognizes this, while struggling to develop abstract universal principles that can be used consistently by courts and others in determining what is a reasonable expectation of privacy. This has become even more pressing as technology continues to shift the line between public and private in ways that inevitably change our expectations of privacy.

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,

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[21] For Kant, we decide what we morally ought to do without making any reference to what we do. Instead, we apply the categorical imperative, which is universally valid for all rational beings. In this regard, Kant's approach is grounded in principles and excludes reference to practice. For Hegel, moral judgments must be rooted in actual agreement, as expressed in our shared social practices. Tunick 1998, p. 14-15.

[22] Tunick 1998, p. 16.

and in the contents of our urine.[23] Justice Scalia, for example has referred to employment drug testing as "particularly destructive of privacy and offensive to personal dignity."[24] 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."[25] And Justice O'Connor disagrees, arguing that monitoring of student athletes' excretory functions is intrusive and more severe than other searches the court has struck down.[26]

One possibility is that whether an expectation of privacy is reasonable simply depends on the subjective preferences of judges, leaving *Katz* without any teeth. Chief Justice Rehnquist suggest something similar when he writes, "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.[27] It should be stressed that if *Katz* does have any teeth and judges are free to decide

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[23] On expectations of privacy in our garbage, compare *California v. Greenwood*, 486 US 35 (1988), *State v. De Fusco*, 606 A 2d 1 (1992), and *State v. Schultz*, 388 So 2d 1326 (1980) with *State v. Tanaka*, 701 P 2d 1974 (1985), *State v. Hempele,* 576 A 2d 793 (1990), *State v. Boland*, 800 P 2d 1112 (1990), *People v. Hillman*, 821 P 2d 884 (1991). ON expectations of privacy in toilet stalls of public restrooms, compare *Smayda v. U.S.*, 352 F 2d 251 (1965) with, for example, *Bielicki v. Superior Court of L.A. County*, 371 P 2d 288 (1962). On open field doctrine, compare the majority and dissenting opinions in *U.S. v. Dunn*, 480 US 294 (1987) and *Oliver v. U.S.,* 466 US 170 (1984). In *Oliver v. US,* Kentucky police acting on a lead drove past Oliver's house which had no trespassing signs in 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. A six to 3 majority 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."

[24] *National Treasury Employees Union et al. v. Von Raab*, 489 US 656, 680 (1989)(dissent). On urinalysis drug testing, compare *Acton v. Vernonia School District 47J*, 23 F 3d 1514 (1994) with *Schaill v. Tippecanoe County School Corp*., 864 F 2d 1309 (1988); and compare the majority and dissenting opinions in *Vernonia School District v. Acton*, 518 US , 115 S Ct 2386, 132 L Ed 564 (1995)."

[25] *Vernonia School District v. Acton*, 63 LW 4653, at 4656.

[26] Ibid, at 4660.

[27] Rehnquist, "Expanded Right to Privacy," 14.

when an expectation of privacy will prohibit the government from gathering data about a criminal suspect, then the Fourth Amendment will inevitably fail to protect privacy.

*Katz* and the reasonable expectation of privacy test has also been criticized as tautological and circular. Amitai Etzioni 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.[28] 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."[29] Richard A. Epstein states:

> It is all too 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 evidence danger of circularity in reasoning.[30]

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 fourth amendment 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."[31] Although this may be

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[28] Amitai Etzioni (2014). "Eight Nails into Katz's Coffin," Case Western Reserve Law Review, Volume 65, Issue 2, p. 413.

[29] Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 Sup. Ct. Rev. 173, 188.

[30] Richard A. Epstein, Principles for a Free Society: Reconciling Individual Liberty with the Common Good 210 (1998).

[31] Anthony G. Amsterdam, *Perspective on the Fourth Amendment*, 58 Minn. L. Rev. 349, 384 (1974).

difficult to imagine in a modern democracy, clearly the same effect can be achieved in more subtle yet pervasive ways.

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."[32] This can be done by elected officials, including the President and Congress, but also by corporations and countless other factors that constantly shift our expectations of privacy. Events such as the September 11th attacks provide another example of how malleable our collective expectation of privacy can be.

The reasonable expectation of privacy standard is further 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 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 recent new 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.[33] And, it has been well documented that Facebook is monitored by intelligence and law enforcement agencies.[34]

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[32] Shuan B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 San Diego L. Rev. 843, 844 (2002).

[33] 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/.

[34] Etzioni 2014, p. 422.

Some legal scholars find some support for a transformative view of *Katz*, evidenced by the *United States v. Jones* decision protecting "a defendant's Fourth Amendment rights in public movements."[35] However, the majority in *Jones* held that the attaching the GPS device to a 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.[36] Justice Alito's concurrence, backed by three other justices, criticizes Scalia's application of "18th-century tort law" as unsuited to "21st-century surveillance." He also criticizes *Katz*, including its "circularity," its subjectivity, and especially the erosion of privacy expectations in the face of technology.[37] Justice Sotomayor's concurrence attacks the third-party doctrine as "ill-suited to the digital age." Important questions exist about the contours of the right to privacy, and the future of Fourth Amendment jurisprudence, especially in regards to modern technology. And along comes *Carpenter v. United States.*

*Carpenter v. United States*

This case could arguably be the most important privacy case in the digital age. *Carpenter v. United States*, was argued November 29, 2017 and a decision is expected this June. 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. Carpenter conspired with others to rob six RadioShack and T-Mobile stores, stealing $10,000 to $30,000 worth of new phones. The ringleader, Michael Green then sold the phones, until he was

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35 Daniel T. Pesciotta, Note, *I'm Not Dead Yet: Katz, Jones, and the Fourth Amendment in the 21st Century*, 63 Case W. Res. L. Rev. 187, 230 (2012) noting that the Court took a "more than ten-year hiatus from deciding a Fourth Amendment case involving technology."

36 Ibid.

37 Jones, 132 S. Ct. at 962 (Alito, J., concurring).

arrested in 2011. At that point, Green told police about the others involved in the robberies and entered into a plea deal.

Armed with Carpenter's cellphone number, federal prosecutors applied for a court order under the 1986 Stored Communications Act which requires only 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 and 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.

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 said. 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.

His phone was tracked through cell site location information, data that is 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. It is worth noting that the location data is 12,500 times less accurate than GPS,

according to the government. The government supports their claim by arguing that the data did not let the FBI agents reconstruct his travel in detail.

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 and five of the six firearms charges and sentenced to 116 years in prison. On appeal, Carpenter again raised his challenge to the use of cell-tower evidence. The 6th Circuit Court of Appeals held that Carpenter lacked any property interest or reasonable expectation of privacy. The 6th Circuit panel acknowledged that in *United States v. 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 "involves business records obtained from a third party." The argument is that those records are closer to the landline call records that the high court had held were not entitled to Fourth Amendment protection in *Smith v. Maryland*. "Cell-site data—like mailing addresses, phone numbers and IP addresses—are information that facilitate personal communications, rather than part of the content of those communications themselves," the 6th Circuit said. "The government's collection of business records containing these data therefore is not a search." The government argues that, "Cellphone users voluntarily reveal to their providers information about their proximity to cell towers, so the providers can connect their calls," U.S. Solicitor General Noel J. Francisco argued in the federal government's brief. "Users cannot reasonably expect that the providers will not reveal that business information to the government."

During oral argument, several of the justices seemed unpersuaded that *Smith* is the controlling precedent. Justice Elena Kagan questioned the governments attorney about distinguishing *United States v. Jones,* in which five justices agreed that society did not expect the

government to track a suspect's every movement for an extended period of time. The governments attorney responded that *Jones* involved direct surveillance by the government, while Carpenter's case involves business records from the cellphone provider. But Kagan appeared unpersuaded, pointing to what she described as an "obvious similarity" between the two cases: reliance on new technology that allows for 24/7 surveillance. Justice Roberts suggested that the government's argument is inconsistent with the decision in *Riley v. California* that police must get a warrant before they can search the cellphone of someone who has been arrested. He repeated his point that people don't really have a choice about whether to have a cellphone.

Justice Anthony Kennedy seemed to focus on the subjective expectation of privacy asking Carpenter's attorney whether most people realize that their cellphone providers do have their data. "If I know it, everybody does," Kennedy said. Justice Sonia Sotomayor tried to remind the court of the stakes in the case. Although this case is only about the historical cell-site records, which indicate where a cellphone connected with a tower, she stressed, technology is now far more advanced than it was even a few years ago, when Carpenter was arrested.

As Orin S. Kerr recognizes, "[t]his case is going to determine the limits on the government's surveillance power at the state and federal level in new technologies for years to come. I think the justices know that." Jeffery Rosen, the president of the National Constitution Center and author of *The Unwanted Gaze* has said, "If the court squarely recognizes what it's been suggesting in recent cases, namely that we do have an expectation of privacy in our digital data and public movements and the Fourth Amendment prohibits the government from tracking us door to door for weeks in public, that would be an occasion for dancing in the streets." "If the court holds that we don't have an expectation of privacy in public except when there is some sort

of physical trespass involved, that could be a huge setback for privacy." It's not clear what the court will do.

**Conclusion**

It has taken many years and many cases to define the contours of the right to privacy. Yet, 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 has a tendency to blur the line between public and private. 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.

It has been reported on the SCOTUS blog that during oral arguments in *Carpenter* this past November, the Court seemed sympathetic, although many of the justices seemed uncertain about exactly what to do. As Justice Stephen Breyer put it at one point, "This is an open box. We know not where we go." Hopefully the Supreme Court will recognize that in the 21st century, you really can't go about your daily life without creating records and find that they are protected by the search warrant requirement.

> As technology races ahead with ever increasing speed, our subjective expectations of privacy may be unconsciously altered … our legal rights to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry.[38]

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[38] *State of Washington v. Robert Alan Young, 123 Wash.2d 173, 867 P.2d 593 (1994)*. In this case police used infrared thermal detection devices without a search warrant and without notification to the homeowner. The court ruled against the police, finding that the use of such technology constitutes an invasion of the home and contravenes the Washington State Constitution and Fourth Amendment protections of privacy unless accompanied by a duly authorized search warrant. The Washington Supreme Court affirmed the reasonable expectation of privacy in one's own home and held that this reasonable expectation is violated by warrantless infrared surveillance.

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