ARTICLE

FOURTH AMENDMENT MORALISM

ANNA LVOVSKY†

The Fourth Amendment is generally seen as a procedural provision blind to a defendant's conduct in a given case, distinguished on that very ground from the Supreme Court's frequently moralistic assessment of conduct in its due process privacy caselaw. Yet ever since the Court recentered Fourth Amendment protections around an individual's reasonable expectations of privacy, it has consistently tied those protections to the nature and, specifically, the social value of the activities involved. As in its substantive due process cases, the Court frequently allots Fourth Amendment privacy interests based on its moral evaluation of private acts, privileging conventional social goods like domesticity, romantic relations, and meaningful emotional bonds. And in some cases—most notably those involving aerial surveillance, home visitors, and drug testing—the Court has adopted an expressly retrospective analysis, tying Fourth Amendment rights to a defendant's actual conduct at the time of a search.

This unrecognized strain of moralism in the Fourth Amendment is a troubling development, unmoored from the Amendment's text, hostile to its well-documented history, and obstructive of its practical operation in regulating police abuses. Not least, that moralistic approach upends prevailing understandings of privacy, as a refuge from the pressures and expectations of society. Especially in the electronic age, as digital technologies vastly expand the police's ability to parse categories of private data, the Court must cabin its moralistic turn, restoring a richer view of Fourth Amendment values as encompassing individualistic and unorthodox pursuits. This Article identifies

† Assistant Professor, Harvard Law School. For their generous and helpful comments, I would like to thank Andrew Crespo, Noah Feldman, Andrew Guthrie Ferguson, Marie-Amélie George, Jamal Greene, Elizabeth Papp Kamali, Orin Kerr, Jeremy Kessler, Madhav Khosla, Michael Klarman, Jennifer Laurin, Adi Leibovitch, Henry Monaghan, Luke Norris, David Pozen, Sabeel Rahman, Daphna Renan, Daniel Richman, Greg Schmidt, Matthew Shapiro, David Sklansky, Carol Steiker, Katherine Strandburg, Cass Sunstein, Mark Tushnet, Ryan Williams, and the participants of the Columbia Law School Associates & Fellows Workshop. I am also grateful to Jessica Zhang and to David Peters, Kevin Wynosky, and the editors of the *University of Pennsylvania Law Review* for their outstanding editorial work.

two immediate steps for moving forward: renouncing the Court's privileging of "intimate" over impersonal conduct and reconsidering the controversial binary-search doctrine gleaned from the Court's drug-testing cases. More fundamentally, it joins an ongoing debate about the adequacy of the Court's privacy-based Fourth Amendment framework, suggesting both the importance and the difficulty of restoring a Fourth Amendment attuned to liberal values of individualism and moral autonomy.

Finally, this Article addresses what the surprising rise of Fourth Amendment moralism suggests about constitutional privacy rights more broadly. Belying the value of privacy as a sanctuary from social judgment, the Court's persistently moralistic jurisprudence challenges the extent to which our Constitution has ever protected, and perhaps can ever protect, a robust right of "privacy" as such.

INTRODUCTION

In *Olmstead v. United States*, Justice Brandeis famously defended the "right to be let alone" as a servant of "man's spiritual nature," his "intellect," his "emotions" and "beliefs."[1] The value of privacy, by this view, was a function of a person's moral and intellectual autonomy: his right to live his own life in his own way.[2]

Since then, the Supreme Court's visions of privacy have often diverged from that liberal path. At least in its substantive privacy jurisprudence, the Court in the past five decades has struggled between two conflicting approaches—what may best be seen as diametric conceptions of the relationship between privacy and moral judgment. In one model, embodied in substantive due process and First Amendment cases like *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] and *Stanley v. Georgia*,[4] the Court has envisioned "privacy" as a shield against moral judgment: a zone where individuals may engage in activities considered devoid of value, and thereby subject to regulation in other spheres. In the other, exemplified by cases like *Griswold v. Connecticut*[5] and *Bowers v. Hardwick*,[6] it has envisioned privacy as a privilege bestowed upon certain activities precisely because they are socially valuable: a reward for doing something of established moral worth.

We do not typically think of the Fourth Amendment as part of this debate. A procedural provision curbing the state's power to watch private activities rather than to regulate them,[7] the Fourth Amendment is ostensibly blind to the legality, much less the morality, of a defendant's conduct.[8] A "critical" difference

---

1 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

2 Brandeis's liberal vision is often credited as the bedrock of constitutional privacy rights. *See, e.g.*, Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1357 (crediting Brandeis for establishing the "groundwork" for the right to privacy); William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 772 (1995) ("[T]he origin of modern constitutional privacy law is to be found in a passage Justice Louis Brandeis included in his 1928 dissent in *Olmstead* . . . ."); Mark John Kappelhoff, Bowers v. Hardwick*: Is There A Right to Privacy?*, 37 AM. U. L. REV. 487, 491 (1988) (crediting Brandeis with laying "a firm foundation" for "a constitutionally based right to privacy"); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1296 (2010) (arguing that Brandeis "introduced modern concepts of privacy into constitutional law"); Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1101 (2002) (noting Brandeis's *Olmstead* dissent had a "profound impact" on Fourth Amendment and due process privacy law).

3 505 U.S. 833, 851-52 (1992).

4 394 U.S. 557, 565-66 (1969).

5 381 U.S. 479, 485-86 (1965).

6 478 U.S. 186, 190-91 (1986), *overruled on other grounds by* Lawrence v. Texas, 539 U.S. 558 (2003).

7 *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1666 (1998) (characterizing Fourth Amendment privacy as barring "direct perception of individuals' . . . activities"); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 740 (1989) (arguing that Fourth Amendment privacy limits the state's ability "to gain . . . information" rather than "immunizing certain conduct . . . from state proscription"); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1021-25 (1995) (characterizing Fourth Amendment "privacy" as the right to keep information secret from the government).

8 *See* McDonald v. United States, 335 U.S. 451, 453 (1948) (noting that the Fourth Amendment applies to "the innocent and guilty alike").

between Fourth Amendment and due process privacy, scholars have insisted, is that the Fourth Amendment "make[s] the claimant's substantive conduct irrelevant" to its analysis.[9] This is not to deny that the Fourth Amendment is, in its own way, deeply normative. As a matter of black-letter doctrine, evaluating a defendant's "reasonable" expectations of privacy entails subjective social judgments.[10] Yet this normative analysis is generally seen to address the nature of the state itself: the proper scope of the criminal justice system, or the types of police tactics we wish to sanction in a democracy.[11] In that, it might endorse certain norms of how citizens living in an orderly society interact with agents of the state.[12] But it does not parse how citizens behave by or among themselves.

This Article argues that such conventional readings miss a persistent strain in the Court's Fourth Amendment jurisprudence over the past five decades. Ever since the Court in *Katz v. United States* recentered the Fourth Amendment around an individual's reasonable expectations of privacy,[13] its analysis of Fourth Amendment rights has increasingly come to hang on the nature and, specifically, the social value of a defendant's conduct at the time of a search. Echoing the same moral hierarchy as in its substantive due process cases, the Court has frequently tied Fourth Amendment privacy rights to the activities implicated in a given case, privileging conventional social goods like domesticity, romantic relations, and meaningful interpersonal bonds. And in some cases—most notably those involving aerial surveillance, home visitors, and drug testing—the Court has adopted an expressly retrospective analysis, examining not just the typical uses associated with a space but the defendant's actual conduct during a police search. Granting greater protections to marital embraces than marijuana plants, to social gatherings than business visits, to sexual

9 Rubenfeld, *supra* note 7, at 749; *see also* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1510 (1996) ("Normally, the expectation of privacy . . . must be described without reference to the criminal activity . . . disclosed . . . ."); Jeffrey M. Skopek, *Reasonable Expectations of Anonymity*, 101 VA. L. REV. 691, 704 n.52 (2015) ("[I]t is well established that the type of information at issue in a search is irrelevant to the *Katz* test.").

10 *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974) (identifying the inquiry into Fourth Amendment reasonableness as "plainly" entailing a "value judgment"); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 867 (2014) (characterizing the general command that courts examine social norms, rather than text or history, as a "moral" inquiry); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 28 n.39 (1988) (describing an inquiry into the reasonableness of privacy expectations as a "normative" inquiry).

11 *See, e.g.*, Amsterdam, *supra* note 10, at 403 (describing the normativity of the Fourth Amendment as evaluating surveillance techniques in light of the "aims of a free and open society"); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 769 (2012) (characterizing the Fourth Amendment's "moral" element as balancing police efficiency against individual security); Wasserstrom & Seidman, *supra* note 10, at 89 (grounding the Fourth Amendment's reasonableness inquiry in the "community's moral intuitions" about police action).

12 *See* Bennett Capers, *Criminal Procedure and the Good Citizen*, 188 COLUM. L. REV. 653, 655, 662-70 (2018).

13 389 U.S. 347, 352 (1967).

intimacy than drug use, the Court has measured an individual's privacy interests based on the social value of the particular acts for which privacy is claimed.

There is essentially no commentary on this trend of Fourth Amendment moralism. Scholars have noted that Fourth Amendment doctrine has sometimes privileged middle-class social and domestic arrangements,[14] yet such critiques tend to concern the distributive effects of categorical rules, drawn around broad classes of spaces rather than a defendant's actual activities there. Inversely, some scholars have observed—not without controversy—that the Court sometimes considers the information uncovered by the police in assessing the existence of a search.[15] Yet they typically characterize the Court's analysis not as a matter of moral judgment but as a shorthand for the expectations of privacy test itself: ferreting out information that is "particularly private"[16] or customarily inaccessible to the public.[17] Such scholars accept the Court's retrospective analysis as an intuitive proxy for the *Katz* test, ensuring greater protections for more "private" facts.[18]

This Article shows that the Court's retrospective analysis of the facts disclosed by a police search is more prevalent than commonly recognized—a trend that itself challenges conventional understandings of the Fourth Amendment as blind to a defendant's conduct. But that analysis is not based on a tautological inquiry into which facts are especially private. It reflects the Court's substantive assessments of the *value* of the activities disclosed, based on its views of desirable social arrangements and private pursuits. As it has played out over the past five decades, the Fourth Amendment's guarantee against unreasonable searches has not simply regulated the boundaries of the police state, or secured the individual's private life against state intervention. It has itself functioned as a form of state intervention into private life, endorsing and rewarding citizens' personal life choices.

The rise of Fourth Amendment moralism is deeply troubling, and not just because it exempts broad categories of police conduct from judicial review. The

---

14 *See, e.g.*, Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401 (2003); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270-72 (1999). *See generally* Jeannie Suk, *Is Privacy A Woman?*, 97 GEO. L.J. 485 (2009).

15 *See, e.g.*, Gormley, *supra* note 2, at 1372 (noting the "type of property or activity secreted" as a factor in the Court's analysis); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 512-15 (2007) (discussing a "private facts model" of Fourth Amendment privacy); Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1121-22 (1987) (discussing the "object of surveillance" as among the Court's considerations); *cf.* Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Exist*, 28 CARDOZO L. REV. 1663, 1673 (2007) (noting that Fourth Amendment standing depends on an "ex post" analysis). *But see* Skopek, *supra* note 9, at 706-07 (dismissing this argument as scholarly "confusion").

16 Kerr, *supra* note 15, at 512.

17 *See* Wilkins, *supra* note 15, at 1122-23.

18 Kerr, *supra* note 15, at 513-15; Wilkins, *supra* note 15, at 1080. For other scholars embracing Kerr's approach, see Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1308 n.77 (2012), Amanda M. Rehling, *Fourth Amendment Rights in a Rental Storage Unit Obtained with a Stolen Identity*, 35 OKLA. CITY U. L. REV. 913, 919 (2010), and R. Bruce Wells, *The Fog of Cloud Computing*, 12 U. PA. J. CONST. L. 223, 238 (2009).

Court's moralistic appraisal of an individual's reasonable expectations of privacy squares poorly with any rigorous interpretation of the Fourth Amendment, unmoored from its text, hostile to its well-documented history, and frequently obstructive of its practical operation in regulating police tactics. Not least, the Court's moralistic approach upends prevailing understandings of privacy itself—a value extolled, by Justice Brandeis and by generations since, as a sanctuary from the scrutiny and expectations of the outside world. And it does so for often negligible practical gains, approving police tactics that could be salvaged through narrower means. Neither a natural outgrowth of the Fourth Amendment's historic emphasis on the home, nor even a symptom of *Katz*'s more recent emphasis on privacy in search-and-seizure doctrine, the Court's frequently moralistic reasoning is an extrinsic and gratuitous restriction of Fourth Amendment rights.

Beyond simply recognizing the rise of Fourth Amendment moralism, we must thus push courts to move beyond it, restoring a richer view of the Fourth Amendment as protecting a broad realm of intellectual, expressive, and moral autonomy. Adopting a less discriminating approach is especially urgent today, as digital technologies stand poised to heighten the impact of the Court's moralistic precedent. By expanding the scope and sophistication of police searches—empowering the police to harvest only pre-identified categories of communications, for example, or to sift out only those exchanges that contain evidence of crime—digital technologies threaten to exclude vast new quantities of personal data from Fourth Amendment protection. To mitigate that risk, this Article urges two immediate amendments to the Court's reasonable expectation of privacy doctrine. First, the Court must renounce its emphasis on "intimacy" at the heart of the Fourth Amendment, extending coequal protections to more individualistic or unorthodox pursuits. Second, it must restore Fourth Amendment protection for "binary searches," which ostensibly reveal only criminal guilt but in fact touch on far broader details of private life.

More fundamentally, and speculatively, this Article joins a line of scholars who have questioned the basic adequacy of privacy as the touchstone of Fourth Amendment analysis. Particularly in light of our shifting cultural norms surrounding private data, scholars have urged the Court to abandon its privacy-based framework, proposing alternatives better suited to protecting liberal values of autonomy, self-definition, and expressive freedom in the digital age.[19] The rise of Fourth Amendment moralism provides all the

19 *See, e.g.*, Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 118-19 (2008) (suggesting that we reframe Fourth Amendment protections around "a right of security"); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1113-14 (2014) (proposing to define privacy "as respect for a personal sphere" guarded against "public inspection and regulation"); *see also* Stuntz, *supra* note 7, at 1068 (arguing that the Fourth Amendment is best understood as protecting against police coercion); Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual*

more reason to revisit the doctrine, revealing the extent to which *Katz*'s commitment to protecting individual "privacy" interests has failed on its own terms—even as that development questions the extent to which *Katz*'s failures can be traced to the concept of privacy itself. The Court's frequently moralistic approach to Fourth Amendment privacy suggests both the importance and the profound difficulty of restoring a truly liberal Fourth Amendment.

Before proceeding, two brief clarifications are in order. First, it is worth specifying what I mean by "moralism" or "moral" value. Throughout this Article, my references to moral reasoning essentially invoke the distinction between liberal and communitarian political theories: those legal orders that leave individuals to define their own views of virtue, versus those that endorse substantive visions of human flourishing.[20] Similar to traditional morals regulations, the "moralistic judgment" driving the Court's analysis consists of substantive judgments about how individuals ought to live their lives. What matters here is less the content of any particular judgment—whether, for example, homosexual intimacy is socially valuable—than the underlying premise that such judgments are a proper basis for legal rules.

The line between liberal and communitarian decisionmaking is of course hardly rigid. As Charles Fried has noted, the Court's most individualistic cases may be seen to reflect "the moral fact that a person belongs to himself and not to . . . society."[21] Since liberal orders themselves entail choices among broad principles of political morality, liberalism is not value-neutral[22]; inversely, substantive decisionmaking may endorse voluntarist principles as the basis of the good life.[23] Yet there remains a distinction between systems of governance that seek to impose comprehensive moral judgments about individual lifestyles and those that make an inherently moral choice to leave such decisions to the individual.[24] It is that former model to which this Article refers.

Second, it is important not to overstate the scope of the Fourth Amendment's moralistic turn. This Article argues that the Court has frequently tied Fourth Amendment privacy interests to the moral value of a defendant's

---

Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1777 (1994) (suggesting that we reorient the Fourth Amendment around the principle of "reciprocal trust between the government and its citizens").

20 For an overview of the traditional distinction between liberalism and communitarianism, see MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 8-11 (1996), C. F. Delaney, *Introduction* to THE LIBERALISM-COMMUNITARIANISM DEBATE, at vii-x (C. F. Delaney ed., 1994), and James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509, 513 (1997).

21 Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288 (1977).

22 *See* Alasdair MacIntyre, *The Privatization of Good*, 52 REV. POL. 344, 359 (1990); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 533-32 (1989).

23 *See* Fleming & McClain, *supra* note 20, at 531; Michael S. Moore, *Sandelian Antiliberalism*, 77 CALIF. L. REV. 539, 542-43 (1989).

24 *See* JOHN RAWLS, POLITICAL LIBERALISM 13 (1993); Jean L. Cohen, *Redescribing Privacy*, 3 COLUM. J. GENDER & L. 43, 74-75 (1992); Jeffrey Reiman, *Liberalism and Its Critics*, 6 SOC. PHIL. TODAY 217, 218 (1991).

private conduct. In that, it examines how the Court has approached one particular question—the initial definition of a Fourth Amendment "search"—under one particular framework, the *Katz* reasonable expectations of privacy test. Many Fourth Amendment decisions since *Katz* rely on rules established long before that case injected "privacy" into the heart of the doctrine; in some instances, indeed, the Court's pre-*Katz* trespass-based approach provides a telling contrast against the moralism of the post-*Katz* analysis. Tracing the Court's moralistic assessments of reasonable expectations of privacy, in short, is valuable less for what it tells us about Fourth Amendment caselaw as a whole (which is, in any case, remarkably fragmented and malleable) than for what it reveals about the Court's conception of privacy as a principle of constitutional analysis.

By the same token, I do not suggest that the moral value of a defendant's conduct is a deliberate or even a conscious consideration in the Court's Fourth Amendment cases. To the extent the Court's jurisprudence since the 1960s reflects any overt policy considerations, those motives are likely far more pragmatic: the Court's sympathy for particular police tactics, its desire to circumscribe the exclusionary rule, the difficulties of drawing lines in peripheral Fourth Amendment cases. Moralism is the tool by which the Court achieves these ends, not the end in itself. Yet the instrumental character of the Court's moralistic analysis does not make that trend any less noteworthy, nor less revelatory of the Court's underlying commitments. Where the Court chooses, when forced, to chart the contours of Fourth Amendment privacy tells us a good deal about what the Court sees as the core purpose of the Fourth Amendment—as well as, for that matter, of privacy itself.

Beyond Fourth Amendment doctrine, in this sense, the Court's moralistic approach raises a larger question—one more easily asked than answered in the scope of this Article. Putting the Fourth Amendment in dialogue with the Court's broader jurisprudence of privacy does not simply unearth a counterintuitive wrinkle in the Court's search-and-seizure doctrine. It also demonstrates the sheer pervasiveness of the Court's moralistic visions of privacy, spilling out past its substantive privacy doctrines into procedural provisions like the Fourth Amendment.[25] Belying the fundamental value of privacy as a refuge from social scrutiny, the Court's persistent habit of tying privacy rights to social approval for an individual's actions challenges the extent to which our constitutional system has ever, despite the Court's many proclamations, protected a robust right of privacy.

The remainder of this Article proceeds in five parts. Part I reviews conventional understandings of the Fourth Amendment as a procedural provision blind to the

25 This Article thus takes up the call for greater crossanalysis between the Fourth Amendment and other constitutional provisions. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 200 (1993).

defendant's substantive conduct—one distinguished on that very ground from the Court's often-moralistic reasoning in its substantive privacy cases. Part II begins to question this account. After identifying a core concern of the "reasonable expectation of privacy" test as the social worth of private conduct pursued in a given space, it traces how such conduct came to be evaluated on much the same metric that undergirds the Court's due process jurisprudence: interpersonal intimacy. Culminating this analysis, Part III examines three areas of law where the Court has explicitly tied Fourth Amendment rights to a retrospective analysis of the defendant's activities: aerial surveillance, home visitors, and drug tests.

Part IV turns to the repercussions of Fourth Amendment moralism. Contextualizing this trend against the text, history, and internal operation of the Fourth Amendment, as well as against prevailing understandings of "privacy" as a social good, it critiques the Court's moralistic analysis as a recent and extraneous restriction of Fourth Amendment rights. Part V looks to next steps. After first proposing two amendments to the Court's reasonable expectation of privacy doctrine, it joins a broader debate about the utility of privacy as the touchstone of Fourth Amendment analysis. Finally, the Conclusion reflects briefly on what *Katz*'s moralistic turn tells us about constitutional privacy rights beyond the Fourth Amendment. Despite the Court's frequent exaltation of privacy as "one of the unique values of our civilization,"[26] the Court's pervasively moralistic visions of privacy challenge the extent to which our constitutional system has protected—and perhaps can ever protect—a right of privacy that we would recognize as such.

I. TWO MODELS OF CONSTITUTIONAL PRIVACY

It is hardly novel to discuss the role of morality in the Supreme Court's constitutional privacy cases. From the species of First Amendment privacy recognized in *Stanley v. Georgia*[27] to the marital privilege announced in *Griswold v. Connecticut*,[28] the Court's substantive privacy jurisprudence over the past five decades has featured a struggle over the normative content of constitutional rights: whether any constitutional entitlement of "privacy" protects only conduct "deeply rooted in this Nation's history and tradition"[29] or whether it defends an individual's autonomy *against* moral convention. That struggle has emerged, sometimes more and sometimes less explicitly,

26 McDonald v. United States, 335 U.S. 451, 453 (1948); *see also* Schmerber v. California, 384 U.S. 757, 767 (1966) (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)) ("The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society." (internal quotation marks omitted)); Boyd v. United States, 116 U.S. 616, 630 (1886) (describing the principle of privacy as "affect[ing] the very essence of constitutional liberty and security").

27 394 U.S. 557 (1969).

28 381 U.S. 479 (1965).

29 Bowers v. Hardwick, 478 U.S. 186, 193-94 (1986).

both in the Court's own cases[30] and in the voluminous scholarship critiquing them.[31] Yet that debate has not, by most accounts, touched on the zone of privacy protected by the Fourth Amendment. To the contrary: the Fourth Amendment's moral neutrality is seen as a core difference between its procedural protections and the more substantive privacy rights that have arisen under the Constitution.

This Part maps out this conventional reading of the Fourth Amendment. It begins by surveying the broader struggle over moral judgment in the Court's privacy cases outside the Fourth Amendment, most notably the privacy rights recognized under the First Amendment and the Due Process Clause. It subsequently contrasts this struggle against the ostensible neutrality of an individual's "reasonable expectations of privacy," a standard considered blind to the legality—much less the morality—of a defendant's actions.

A. *Privacy Outside the Fourth Amendment*

It should not be surprising that the Court's substantive privacy jurisprudence since the 1960s has raised extensive debates over the moral content of constitutional rights. Since such substantive rights necessarily attach to specific activities—the right to marry,[32] or to have consensual sex[33]—recognizing any new right among the many claims brought before the bench inevitably requires the Court to consider the nature, and relative worth, of the conduct at issue.[34]

In assessing such conduct, the Court has generally taken one of two approaches. In the first mode, the Court envisions the right of privacy as a shield against the operation of moral judgment, inviting individuals to engage in certain behaviors—watching obscenity, to take one example—regardless of their ostensible social value. In the second, by contrast, it envisions privacy as a reward for morally valued conduct, bestowed precisely in recognition of the fact that an individual's activities—marital intercourse, say, but not gay sodomy—is an established social good.

---

30 *See id.* at 195; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973) (distinguishing due process privacy, reserved for "fundamental" rights, from First Amendment privacy, which encompasses lowly matters like obscenity).

31 *See, e.g.*, JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY 159-60 (2006) (tracing strains of liberalism and republicanism in due process privacy); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66-68 (2006) (arguing that due process features both a "historical" strand based on tradition and a "reasoned judgment" strand based on independent moral reasoning); Sandel, *supra* note 22, at 528 (noting the switch from moralism in *Griswold* to autonomy in *Roe*); Stephen J. Schnably, *Beyond* Griswold*: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861, 861-66 (1991) (describing two alternate approaches to privacy since *Griswold*).

32 Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978).

33 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

34 *See also* Rubenfeld, *supra* note 7, at 749 ("The court has no choice but to look the conduct in its face . . . and take its measure.").

The morally neutral vision is exemplified most obviously in the Supreme Court's 1969 decision in *Stanley v. Georgia*.[35] The Court in that case held that the First Amendment bars the government from criminalizing the possession of obscenity "in the privacy of a person's own home"[36] despite its unquestioned ability to regulate obscenity in other contexts.[37] The Court made no attempts to defend the social value of such materials,[38] nor did it disturb the states' broad discretion to regulate obscenity in public.[39] Rather, it identified the privacy of the home as a narrow zone of immunity from otherwise operable morals regulations: a space where even quintessentially antisocial materials legitimately banned in public are protected by the Constitution.

The Court's due process privacy cases have sometimes taken this same liberal approach—not in terms of *Stanley*'s literal exemption of a particular space from regulation, but in terms of its indifference to moral value. In *Eisenstadt v. Baird*, for example, the Court expanded the right of privacy from an entitlement grounded in the "sacred" intimacies of the marital relationship to one based on the general principle of reproductive autonomy, shielding even single individuals from government intrusion "into matters so fundamental[] . . . as the decision whether to bear or beget a child."[40] Beginning in *Roe v. Wade*, the Court echoed that same individualistic view in upholding the right to obtain an abortion.[41] While consistently stressing the controversial nature of abortion—a practice that, per the Court, contravenes "the moral standards" of many communities,[42] and may even

35 394 U.S. 557.

36 *Id.* at 564.

37 Obscenity has long stood outside the First Amendment as "utterly without redeeming social importance." Roth v. United States, 354 U.S. 476, 484 (1957); *see also* Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1570-76 (1988) (discussing the Warren Court's unique tolerance for speech regulations targeting obscenity because of the justices' estimation of obscenity's uniquely low moral value).

38 *See* Sandel, *supra* note 22, at 536 (noting *Stanley* defended obscenity "wholly independent of [its] value or importance").

39 *Stanley*, 394 U.S. at 568 ("[T]he states retain broad power to regulate obscenity . . . ."). Subsequent bans have been upheld by the Court. *See, e.g.*, United States v. Orito, 413 U.S. 139 (1973) (transporting obscene material by common carrier); United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973) (importing obscene material for private use); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (exhibiting obscene material in places of public accommodation); United States v. Reidel, 402 U.S. 351 (1971) (mailing of obscene material).

40 405 U.S. 438, 453-54 (1972). The Court technically invalidated the law on equal protection grounds, *id.* at 454-55, but its holding relied on an explicit expansion of the right of privacy.

41 *See* 410 U.S. 113, 153 (1973).

42 *Id.* at 116; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) (noting moral "disagree[ment]"); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 771 (1986) (recognizing that abortion raises "moral and spiritual questions over which honorable persons can disagree sincerely and profoundly"); *id.* at 797-98 (White, J., dissenting) (emphasizing that *Roe* did not assume that "abortion is a good in itself").

erode the ideal of the robust nuclear family[43]—these decisions nevertheless defend a woman's right to make significant life choices against society's moral censure.[44] The right of privacy, in the often-quoted words of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, entitles a person to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[45] Carving out a space where individuals can make momentous decisions free from the pressures of public judgment, this right stands opposed to the project of morals regulation by the state, providing a type of sanctuary from the operation of collective morality.[46]

Concurrently with this neutral model, however, the Supreme Court has also protected a radically different vision of privacy. Far from shielding an individual's decisions against moral scrutiny, this second model confers privacy upon those precise activities that have been scrutinized and found to have moral value.

This moralistic vision undergirds many of the Court's due process privacy decisions, prominent cases like *Roe* notwithstanding. That approach appeared first in Justice Harlan's influential dissent in *Poe v. Ullman*, which challenged the constitutionality of marital contraceptive bans largely by emphasizing the respectability of the conduct in question.[47] The state's unquestionable right to

---

43 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69-70 (1976); *see also Casey*, 505 U.S. at 975 (Rehnquist, C.J., dissenting) (defending an invalidated abortion restriction as furthering an established interest in the "integrity of marital relationship").

44 *Casey*, 505 U.S. at 850-51 ("Our obligation is to define the liberty of all, not to mandate our own moral code."); *Roe*, 410 U.S. at 153.

45 505 U.S. at 851. As noted, the Court's exaltation of autonomy might itself be seen as grounded in moral reasoning, but this is a moral defense of individual choice over lifestyle, not of a particular lifestyle itself.

The difference between the Court's moralistic and its more autonomy-based cases might also be understood as a difference in levels of generality, shifting from a privacy right to reproduce into a privacy-based right to make reproductive choices, but nevertheless entailing a moral judgment about the human significance of reproductive choices as opposed to, say, the right to commit suicide. Yet while it is certainly possible to conceptualize such rights on a spectrum, I am more interested in how the Court itself conceptualizes and articulates them. There is an identifiable difference between privacy cases that expressly define certain activities as valuable and embraced by society, and those that position themselves as defending individual choice against social opprobrium. *See Thornburgh*, 476 U.S. at 797-98 (White, J., dissenting) (emphasizing that *Roe* did not assume that "abortion is a good in itself").

46 This strain has led some scholars to describe substantive due process as fundamentally nonmoralistic. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1302-12 (2d ed. 1988) (providing a personhood-based theory of privacy); Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275, 339 (2014) (arguing that substantive due process facilitates "authentic self-development"); John P. Safranek & Stephen J. Safranek, *Licensing Liberty: The Self-Contradictions of Substantive Due Process*, 2 TEX. REV. L. & POL. 231, 250-52 (1998) (emphasizing "moral neutrality"); Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 75 (2000) (arguing that due process privacy limits morals legislation); *cf.* David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 838 (1986) (arguing that contraceptives and abortion moved due process in an autonomy-based direction).

47 *See* 367 U.S. 497, 548-55 (1961); *see also* Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y. L. SCH. L. REV. 5, 22 (1991) (noting that Harlan's dissent was not "neutral," but depended on value of marriage); Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 337 (1995) (arguing that Harlan protected only behaviors that "appeal to a

patrol "moral soundness" by banning adultery, fornication, and homosexuality, Justice Harlan insisted, could not extend to sexual intimacy pursued within the sacred "institution of marriage."[48] The majority's opinion in *Griswold* replicated that same moral tenor, concluding that the uniquely "noble" character of marriage entitled the intimacies of husband and wife to heightened protection from the state.[49] Several justices wrote separately to emphasize the "particularly important" nature of the domestic hearth,[50] whose privileged constitutional character "in no way interfere[d] with a State's proper regulation of sexual promiscuity or misconduct" in other contexts.[51] The right to privacy, so understood, did not protect an individual's sexual autonomy. It protected sexual activities pursued within the traditional confines of domestic respectability.[52]

In the coming decades, the Court stretched the right of privacy toward a broader array of "fundamental" liberties, including a panoply of domestic privileges like marriage, reproduction, and childrearing.[53] The Court had long recognized those rights precisely due to their social value,[54] and it reemphasized that basis now. Marriage fell within the right of privacy as "the most important relation in life," without which "there would be neither civilization nor progress."[55] Childrearing and the nucleus of "family relations," including a grandmother's right to reside with her grandchildren, qualified due to the "moral and cultural" significance of biological households in passing down "our most cherished values"[56]—and could easily be separated from less conventional domestic arrangements, such as cohabitation among

longstanding moral tradition"). In parts, Harlan's *Poe* dissent also recalled the space-driven rationale of *Stanley*, decrying any laws that pushed the police into the sacred space of the marital bedroom. 367 U.S. at 548-50 ("I think the sweep of the Court's decisions . . . amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character.").

48 *Id.* at 546, 553.

49 Griswold v. Connecticut, 381 U.S. 479, 486, 482 (1965).

50 *Id.* at 495 (Goldberg, J., concurring).

51 *Id.* at 498-99; *see also id.* at 505 (White, J., concurring) (suggesting the viability of "ban[s] on illicit sexual relationships").

52 *See also* Sandel, *supra* note 22, at 527 (characterizing *Griswold* as "unabashedly teleological[,] . . . affirming and protecting the social institution of marriage"); Schnably, *supra* note 31, at 865 (arguing that *Griswold* protects only "conventional[]" sexual relations).

53 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) (characterizing the "right of personal privacy" as extending to "marriage, procreation, contraception, family relationships, and child rearing and education" (citations omitted)).

54 *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (recognizing marriage and procreation as "civil rights . . . fundamental to the very existence . . . of the race"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing the right of "parents to control the education of their [children]" as "essential to the orderly pursuit of happiness"); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing marriage as a "fundamental freedom").

55 Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (internal quotation marks omitted) (quoting Maynard v. Hill, 125 U.S. 190, 205, 211 (1888)).

56 Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion).

unrelated persons.[57] In some cases, indeed, this moralistic view doubled back to restrict what the Court had initially recognized as autonomy-based rights: because abortion undermined a society's "valid and important interest in encouraging childbirth," for example, the right of privacy did not prevent the state from discriminating against the procedure in its funding programs.[58]

Nowhere has the Court's moralistic approach shone more clearly than in its cases addressing gay rights. In *Bowers v. Hardwick*, the Court declined to extend the right of privacy to homosexual sodomy, deriding the suggestion that such a long-stigmatized practice might be "rooted in this Nation's history and tradition" and defending the states' right to pass "laws representing essentially moral choices" regarding sexual conduct.[59] The dissenters questioned the Court's reliance on traditional morality: the right of privacy, they insisted, protected certain activities not because "they contribute . . . to the general public welfare, but because they form so central a part of an individual's life."[60] Yet when the Court finally overruled *Bowers* in *Lawrence v. Texas*, it took a different tack.[61] Although Justice Kennedy certainly emphasized the Constitution's abiding respect "for the autonomy of the person,"[62] he stressed that homosexual conduct deserved protection not only as a central part of individual identity, but also as a valuable form of human intimacy: "one element in a personal bond that is more enduring."[63] *Lawrence* constitutionalized a right to homosexual sodomy by recharacterizing that conduct as a social good on par with the marital hearth—a meaningful relationship entitled to "respect,"[64] for which additional legal privileges like

57 Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974) (declining to recognize a right of privacy in a case upholding a zoning ordinance that limited the number of unrelated persons sharing a residence).

58 Beal v. Doe, 432 U.S. 438, 446-47 (1977); *see also* Maher v. Roe, 432 U.S. 464, 473-74 (1977) (noting that *Roe* does not bar states from "mak[ing] a value judgment favoring childbirth over abortion"); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 797-98 (1986) (White, J., dissenting) (emphasizing that *Roe* did not assume that "abortion is a good in itself").

59 478 U.S. 186, 193-96 (1986).

60 *Id.* at 204 (Blackmun, J., dissenting); *see also id.* at 217 (Stevens, J., dissenting) (characterizing the right to privacy as an "individual's right to make certain unusually important decisions that will affect his own, or his family's destiny" (internal quotation marks omitted) (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 719-20 (7th Cir. 1975) (Stevens, J.))).

61 539 U.S. 558, 564 (2003). Culminating a gradual shift in the Court's rhetoric, *Lawrence* technically protected that right less in the language of privacy than "liberty." *See* Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 717-18 (2010).

62 *Lawrence*, 539 U.S. at 574 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

63 *Id.* at 567; *see also* MICHAEL J. SANDEL, PUBLIC PHILOSOPHY 142 (2005) (noting that *Lawrence* combined the rhetoric of autonomy with a "substantive" claim that the law "wrongfully demeaned a morally legitimate mode of life"); Linda C. McClain & James E. Fleming, *Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights*, 91 B.U. L. REV. 1311, 1315 (2011) (describing *Lawrence* as reflecting both individualistic and "moral" claims).

64 *Lawrence*, 539 U.S. at 578.

marriage simply offered "further protection and dignity."[65] Unsurprisingly, despite Justice Scalia's warnings that *Lawrence* would open the floodgates to any number of "immoral" sexual practices,[66] lower courts have declined to read the case as creating a broad right of sexual autonomy, upholding laws criminalizing prostitution[67] and the sale of sexual devices.[68]

Lawrence's redemption of homosexual intimacy, like *Bowers*'s earlier rejection of that practice as alien to family life, exemplifies the Court's moralistic approach to privacy since the 1960s. If *Stanley* and *Eisenstadt* had envisioned privacy as a shield against normative social constraints, *Griswold* and most of the cases that followed reserved that privilege for activities that fit within those constraints, defining privacy, in essence, as a reward for participating in established moral goods.[69]

B. *The Myth of Fourth Amendment Neutrality*

This struggle over the role of moral judgment in the Court's privacy jurisprudence is not generally seen to make room for the Fourth Amendment.[70] And understandably so. Unlike the Court's more substantive privacy doctrines, which limit the activities the state may lawfully prohibit, the Fourth Amendment offers a purely procedural safeguard, curbing the means through which the state may investigate even legitimately criminalized conduct.[71] The Fourth Amendment's protections, as the Supreme Court has

65 United States v. Windsor, 133 S. Ct. 2675, 2692 (2013); *accord* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see also* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1400 (2004) (arguing that *Lawrence* protects "geographized and domesticated" sexual freedom); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 820 (2010) (arguing that *Lawrence* protects only sex associated with "emotional intimacy"); Teemu Ruskola, *Gay Rights Versus Queer Theory: What is Left of Sodomy After* Lawrence v. Texas*?*, 23 SOC. TEXT 235, 239 (2005) (arguing that *Lawrence* provides "no justification for protecting less-than-transcendental sex [outside] an ongoing relationship").

66 *Lawrence*, 539 U.S. at 602-05 (Scalia, J., dissenting).

67 *E.g.*, United States v. Palfrey, 499 F. Supp. 2d 34, 40-41 (D.D.C. 2007).

68 *E.g.*, Williams v. Morgan, 478 F.3d 1316, 1322-23 (11th Cir. 2007).

69 This moralistic strain has led some to define substantive due process as intrinsically communitarian. *See* Gey, *supra* note 47, at 336 (noting that the right of privacy "bolster[s] society's dominant mores and lifestyle"); Adam Hickey, *Between Two Spheres: Comparing State and Federal Approaches to the Right to Privacy and Prohibitions Against Sodomy*, 111 YALE L.J. 993, 996 (2002) (arguing that due process privacy protects "valued" activities); Rubenfeld, *supra* note 7, at 747 (concluding that due process cases impose "quintessentially normative judgment[s]" about private lives); Schnably, *supra* note 31, at 867 (reading due process privacy as protecting sexual freedom "within the confines conventionally recognized by society").

70 *See* Rubenfeld, *supra* note 7, at 749 (defining the Fourth Amendment's conduct-neutral application as the "critical" difference between it and due process privacy).

71 *Id.* at 740; *see also* Colb, *supra* note 7, at 1666 (characterizing Fourth Amendment protections as barring "direct perception of individuals' [activities]"); Stuntz, *supra* note 7, at 1021-25 (characterizing Fourth Amendment "privacy" as the right to keep information secret from government).

frequently remarked, apply equally to "the innocent and guilty alike,"[72] to proven "offenders as well as the law abiding."[73]

The conventional wisdom, in context, is that the Fourth Amendment is simply blind to a defendant's actual conduct. As Jed Rubenfeld observes, judges assessing a defendant's reasonable expectations of privacy "must resist the temptation to steal a glance at the claimant's substantive conduct" in any case.[74] It is "well established," echoes Jeffrey Skopek, that "the type of information at issue in a search is irrelevant to the *Katz* test."[75] Even scholars who argue as a matter of policy that the Fourth Amendment should privilege innocent over criminal conduct, providing lesser protections to defendants actually engaged in crime, agree that in practice the Court's jurisprudence brooks no such distinction.[76]

To be sure, the social value of a defendant's conduct may factor into the Fourth Amendment in other ways. Beyond the initial definition of a search, courts assessing the "reasonableness" of a given tactic have long balanced the relative value of an individual's privacy interests against the public utility of the search.[77] The types of activities pursued in one's home versus one's automobile might call for different levels of suspicion to justify similar police tactics. And even the definition of a search, beginning with *Katz*'s defense of the "vital role that the public telephone has come to play in private communication,"[78] has sometimes considered the importance of activities *typically* conducted in a given place. It is this reliance on behavioral norms that has sometimes distributed Fourth Amendment protections, as critics have objected, along cultural and

72 McDonald v. United States, 335 U.S. 451, 453 (1948).

73 United States v. Lefkowitz, 285 U.S. 452, 464 (1932); *accord, e.g.*, Kaufman v. United States, 394 U.S. 217, 229 (1969); Ker v. California, 374 U.S. 23, 33 (1963); Miller v. United States, 357 U.S. 301, 313 (1958).

74 Rubenfeld, *supra* note 7, at 749.

75 Skopek, *supra* note 9, at 704 n.52; *see also* Colb, *supra* note 9, at 1510 (observing that privacy interests "must be described without reference to the criminal activity" disclosed); Aziz Z. Huq, *How the Fourth Amendment and the Separation of Powers Rise (and Fall) Together*, 83 U. CHI. L. REV. 139, 147 (2016) (insisting that the "reasonableness of a search does not depend on its object or what it happens to discover but rather on the manner in which the government behaves").

76 *See* Colb, *supra* note 9, at 1461-64, 1510 (arguing that only the innocent are harmed by warrantless searches but noting that Court generally does not consider defendant's actions); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1229-30 (1983) (proposing a shift from the Court's criminality-blind jurisprudence).

77 *See* Riley v. California, 134 S. Ct. 2473, 2484 (2014). Scholars have commonly urged attention to the value of the inhibited conduct at this stage. *E.g.*, CHRISTOPHER SLOBOGIN, PRIVACY AT RISK (2007) (suggesting a sliding scale of suspicion for digital surveillance based in part on the nature of activities implicated); Andrew D. Selbst, *Contextual Expectations of Privacy*, 35 CARDOZO L. REV. 643, 670-71, 675 (2013) (suggesting that courts assess "reasonableness" by weighing the social value of inhibited activities against the value of the search); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS § 25-4.2(b) (3d ed. 2013) [hereinafter ABA STANDARDS], https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/third_party_access.authcheckdam.pdf [https://perma.cc/X55S-QTJR] (calibrating the level of suspicion needed to justify a police search in part based on the social value of intercepted communications).

78 Katz v. United States, 389 U.S. 347, 352 (1967).

class lines—distinguishing private residences from shared residential spaces, for example, based on the typical domestic arrangements of the middle class. Yet other scholars have embraced such norms as helpful limits on the Fourth Amendment, proposing to limit constitutional protections to spheres that predictably house intimate or domestic activities.[79]

This Article will revisit both the provenance and merits of that activities-based inquiry, as well as the difference between tying it to the "reasonableness" of a search or the definition of a "search" itself. For present purposes, it suffices to observe two things. First, this inquiry draws broad lines around the categories of activities typically associated with certain spaces, protecting homes or garages or telephone booths, for example, as areas commonly used for intimate or personal ends. It does not tie Fourth Amendment protections to a particular defendant's actual conduct, so long as it takes place within that protected space.[80] Second, commentators who urge greater protections for "intimate association" or domestic activities often see that distinction as embedded within the history of the Fourth Amendment, which has long identified the home at the center of its protections.[81] They do not defend a fresh, case-by-case inquiry into the value of a defendant's activities.

More controversially, a number of scholars have suggested that the Court in fact allots Fourth Amendment protections based on the nature of the actual information discovered. As early as 1987, Richard Wilkins proposed that the Court's analysis of reasonable expectations of privacy takes into account "the object or goal of the surveillance," defined retrospectively in light of "the information obtained as a result of the surveillance."[82] More recently, Orin Kerr has argued that the Supreme Court's analysis of privacy expectations under *Katz* sometimes follows a "private facts" approach that assesses whether the "information the government collects . . . is private and worthy of

---

79 *See* Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311, 313 (2013) (arguing for a transconstitutional vision of privacy privileging domestic spaces, intimacy, and sexual activities); *see also* Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1336 (2014) (tracing an emphasis on intimacy to early Fourth Amendment roots and urging protections for "personal curtilage" in "personal or intimate" contexts, including "religious worship, health, family, or romantic activities," but not "professional, political, or overtly public activities"); Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 940 (2010) (suggesting limiting privacy expectations in the home to spaces likely to implicate "domestic life" and "intimate association," but not less domestic spaces); *cf.* Ric Simmons, *From* Katz *to* Kyllo*: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1306 (2002) (arguing the *Katz* test should consider the "type of information" acquired, but defining "result" in terms of spaces intruded rather than actual activities revealed).

80 Selbst, *supra* note 77, at 670-71; Simmons, *supra* note 79, at 1306; Stern, *supra* note 79, at 940. In *Katz* itself, the telephone's significance in interpersonal communications insulated it from the police, regardless of the defendant's use of that space not for intimate banter but for illegal wagering. 389 U.S. at 352; *accord id.* at 361 (Harlan, J., concurring).

81 *See, e.g.*, Ferguson, *supra* note 79, at 1292.

82 Wilkins, *supra* note 15, at 1080, 1105.

constitutional protection," effectively defining a search based on "what information the government collected rather than how it was obtained."[83]

Such scholars have, I believe, undertheorized how precisely the "worth" of such information is assessed. Although initially suggesting that the Court privileges "interpersonal" or "intimate" data, Wilkins ultimately concludes that courts discount information that is "inherently 'public'" or commonly used by public entities, such as car registration data[84]—metrics that come down to an individual's risk of exposure more than the nature of the information revealed. Meanwhile, Kerr identifies a series of principles behind the Court's retrospective analysis, including that it protects "particularly private" or "particularly personal" information, and that it protects disclosures that individuals *experience* as most intrusive—a severe medical condition, for example, but not "a bad hair day."[85] Yet these principles are, if faithful to the Court's own justifications, somewhat tautological, according greater privacy protections to more "private" facts without clarifying which facts raise greater privacy concerns.[86] Unsurprisingly, such scholars have generally embraced the Court's retrospective inquiry as essentially coextensive with the very idea of protecting "privacy" under the Constitution—an intuitive proxy for the *Katz* standard.[87]

In short, while commentators have sometimes noted both the role of social value in Fourth Amendment doctrine and the Court's intermittent attention to the results of a search, they have rarely put those concepts in dialogue. By the conventional view, the reasonable expectation of privacy test either remains blind to a defendant's conduct or, at most, discriminates in favor of uniquely personal data. The concept of a Fourth Amendment privacy right based on the social value of an individual's activities, similar to that in *Griswold* or *Bowers*, has yet to be seriously entertained.

II. THE FOURTH AMENDMENT'S MORALISTIC TURN

The Court's assessment of privacy rights under the Fourth Amendment has more in common with its due process homonym than is typically recognized. Like the Court's analysis of due process privacy rights, the Court's evaluations of an individual's reasonable expectation of privacy have frequently depended on its moral appraisals of the activities at issue in a given case. More than reflecting normative ideals of the criminal justice system—the proper relationship between the individual and the state—Fourth Amendment privacy rights commonly trade

83 Kerr, *supra* note 15, at 512-13.

84 Wilkins, *supra* note 15, at 1106, 1122-23.

85 Kerr, *supra* note 15, at 514, 534.

86 Kerr's suggestion that the Court privileges data that individuals least want revealed also fails to fit the Court's cases, which frequently deny protections for stigmatic facts. *See* discussion *infra* subsection V.A.1.

87 *See* Kerr, *supra* note 15, at 540-43; Wilkins, *supra* note 15, at 1104-05.

in normative judgments about the value of private behaviors. And, like the Due Process Clause once more, those judgments tend to privilege conventionally prized relationships: domestic life, "intimate" conduct, and other meaningful social bonds.

This Part traces how the social value of an individual's private conduct became a core consideration in the Court's definition of a search under *Katz*. It first traces the rise of the reasonable expectation of privacy test as a standard focused on not simply the external characteristics of a given space, but also the social value of an individual's activities there. It then examines how those activities came to be measured on a particular metric: domestic or interpersonal intimacy. The first part of this story will likely be familiar, though I hope to illuminate it as part of a broader doctrinal shift. The second might be more surprising. Hardly a legacy of the Fourth Amendment's traditional preoccupation with the home, the Court's emphasis on intimacy as the touchstone of Fourth Amendment safeguards is a novel inquiry emerging largely from the *Katz* privacy test.

A. *The Moralism of "Reasonable Expectations of Privacy"*

The history of the Fourth Amendment protections in the twentieth century is commonly characterized as a shift from "property" to "privacy," culminating in the Court's 1967 decision in *Katz v. United States*.[88] To be sure, privacy first appeared as an animating principle of the Fourth Amendment long before *Katz*; beginning with *Boyd v. United States* in 1886,[89] the Court has often characterized unreasonable searches as offenses against the fundamental "privacy of persons."[90] Yet in *Katz*, that principle emerged as the undisputed linchpin of search and seizure doctrine, in an opinion that the staunchly textualist Justice Black decried as a willful "rewriting" of the Fourth Amendment.[91]

The defendant in *Katz* was convicted of bookmaking based on a wiretap in a public telephone booth.[92] Katz challenged the recording as an unlawful "search" of his private conversations, and the Court agreed. Disavowing its earlier suggestions that a search required some physical trespass on a defendant's property, the Court held that "the Fourth Amendment protects people, not

88 389 U.S. 347; *see, e.g.*, Wilkins, *supra* note 15, at 1085-86.

89 116 U.S. 616, 630 (condemning government intrusions into "the sanctity of a man's home and the privacies of life").

90 *E.g.*, Flint v. Stone Tracy Co., 220 U.S. 107, 174 (1911); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending "the Fourth Amendment's right of privacy" against the states); Trupiano v. United States, 334 U.S. 699, 709 (1948) (characterizing the Fourth Amendment as protecting a "right of privacy"); Feldman v. United States, 322 U.S. 487, 490 (1944) (recognizing a Fourth Amendment concern with "personal privacy"); United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (interpreting the Fourth Amendment to protect "the right of privacy"); Gouled v. United States, 255 U.S. 298, 305 (1921) (characterizing the Fourth Amendment as protecting the "privacy of the home or office and of the papers of the owner").

91 389 U.S. at 373 (Black, J., dissenting).

92 *Id.* at 348 (majority opinion).

places," and thus may extend to information that a person "seeks to preserve as private, even in an area accessible to the public."[93] In *Katz* itself, the defendant "justifiably" relied on the privacy of the telephone booth due to the social significance of that space—"the vital role that the public telephone has come to play in private communication."[94] Concurring, Justice Harlan characterized that right more systematically: the Fourth Amendment protects an individual from state intrusions whenever he or she "exhibit[s] an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.'"[95]

In subsequent years, the Court adopted Justice Harlan's "reasonable expectation of privacy" rule as its own.[96] Fleshing out Justice Harlan's test with the language of the *Katz* majority, the Court clarified that this inquiry involved two discrete questions: first, whether an individual "exhibited an actual (subjective) expectation of privacy" by "seek[ing] to preserve [something] as private," and second, whether that expectation was "one that society is prepared to recognize as 'reasonable'" because, "viewed objectively, [it] is 'justifiable' under the circumstances."[97]

The "subjective" prong seemed straightforward enough.[98] But how were judges to evaluate whether an individual's expectation of privacy was "objectively" reasonable? The Court has provided no coherent test of reasonableness,[99] and a common criticism of the *Katz* test denigrates it as too open-ended, unpredictable and easily manipulated.[100]

One interpretation is that the second prong simply tests the objective realism of the individual's perceptions: whether, measured from the perspective of a reasonable person, the individual fairly formed her subjective expectation of privacy.[101] That interpretation echoes Justice Harlan's own analysis in *Katz*, which

---

93 *Id.* at 351-53.

94 *Id.* at 352-53.

95 *Id.* at 361.

96 *See* Oliver v. United States, 466 U.S. 170, 177 (1984) ("Since *Katz v. United States*, the touchstone of Fourth Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (citation omitted) (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring))).

97 *E.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979) (second alteration in original) (internal quotation marks omitted) (quoting *Katz*, 389 U.S. at 351, 353, 361).

98 *But see* Orin S. Kerr, Katz *Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113, 127-33 (2015) (questioning the conventional assumption that *Katz*'s first step authorizes inquiry into subjective beliefs).

99 *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (plurality opinion) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.").

100 *See, e.g.*, Amsterdam, *supra* note 10, at 349 ("[T]he law of the fourth amendment is not the Supreme Court's most successful product."); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985); Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of A Patron Saint*, 94 MICH. L. REV. 2553, 2557-58 (1996) (surveying criticisms of declining Fourth Amendment protections under the *Katz* doctrine); Wasserstrom & Seidman, *supra* note 10, at 69 (describing the *Katz* test as "notorious[ly] circular[]").

101 *See, e.g.*, Colb, *supra* note 9, at 1513 (describing the Court's "empirical formulation" of reasonableness); Stephen P. Jones, *Searches, Seizures, and the Concept of Fourth Amendment Standing Room*,

noted, by example, that "conversations in the open would not be protected against being overheard."[102] Over the next decades, the Court appeared to apply such an analysis in numerous cases, holding that an individual has no reasonable expectation of privacy in her financial records because she "voluntarily . . . exposed" them to her bank[103]; or in the records of dialed phone numbers, because a caller "assume[s] the risk that the [phone] company would reveal to police the numbers he dialed"[104]; or in the movements of a car under beeper surveillance, as drivers "voluntarily convey[] to anyone who want[s] to look the fact that [they are] travelling over particular roads."[105] By this reading, *Katz*'s reasonable expectation of privacy test passes no judgments about the type of information it protects, but simply examines the individual's objective risks of public exposure.

Yet in no ambiguous terms, the Court soon clarified that *Katz*'s second prong also involves a more normative inquiry. Far from reflecting "the mere expectation, however well justified, that certain facts will not come to the attention of the authorities,"[106] the legitimacy of an individual's expectation of privacy depends on "whether the government's intrusion infringes upon the *personal and societal values* protected by the Fourth Amendment."[107] Under the *Katz* test, it thus turned out, the Fourth Amendment protects neither places nor even persons, precisely, but *values*.

Divorcing the "reasonableness" of an individual's privacy expectations from probability levels an individual's Fourth Amendment protections both down and up. It levels down such rights where an individual has a mathematically justifiable expectation of secrecy in circumstances that clearly deserve no constitutional sanction: a burglar breaking into an isolated cabin,[108] or an abuser taking over his victim's home.[109] Yet it also prevents the government from shrinking the public's privacy expectations simply by advertising its intrusive tactics, such as announcing "on nationwide television" a plan to conduct warrantless searches.[110] By this approach, the inquiry into reasonableness seeks

---

27 U. MEM. L. REV. 907, 923-24 (1997) (discussing the Court's assumption of risk analysis); Kerr, *supra* note 15, at 508-12 (identifying "probabilistic" analysis as one of the Court's approaches to *Katz*).

102 389 U.S. at 361 (Harlan, J., concurring).

103 United States v. Miller, 425 U.S. 435, 442 (1976).

104 Smith v. Maryland, 442 U.S. 735, 744 (1979).

105 United States v. Knotts, 460 U.S. 276, 281-82 (1983); *cf., e.g.*, California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (finding that there is no reasonable expectation of privacy on land theoretically exposed to public air traffic).

106 United States v. Jacobsen, 466 U.S. 109, 122 (1984).

107 Oliver v. United States, 466 U.S. 170, 182-83 (1984) (emphasis added); *see also* Cloud, *supra* note 25, at 250 (noting that *Katz*'s second prong asks courts "to define fundamental constitutional values by referring to contemporary social values, goals, and attitudes").

108 *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

109 *See, e.g.*, State v. Dorsey, 762 S.E.2d 584, 592 (W. Va. 2014); State v. Stephenson, 760 N.W.2d 22, 26-27 (Minn. Ct. App. 2009).

110 Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979).

to reflect not only the type of society we have, but also the type we want to live in—the degree of state power we wish to accept in a "free and open society."[111]

In the years since *Katz*, the Court has looked to numerous sources in evaluating that policy question. It has, as discussed, examined whether the information in question was effectively shielded from public scrutiny.[112] It has relied on the text of the Fourth Amendment, both as a constitutional baseline for certain enumerated objects and to illuminate the relative value of others.[113] It has looked to "the intention of the Framers" and to historical understandings of which intrusions were "perceived to be objectionable" at the Amendment's drafting.[114] And it has relied on positive law, from property rights[115] to administrative regulatory regimes,[116] to determine which privacy expectations or which government tactics have received the sanction of local communities.[117] All of these inquiries are essentially objective: they require no fresh value judgments about a given space, but simply assess the prevailing legal and physical expectations that accompany it.

Yet another major component of the Court's approach to "reasonableness" has come to focus precisely on how a given space is typically used—an inquiry that tracks what the Court has sometimes termed "our societal understanding that certain areas deserve the most scrupulous protection."[118] Setting aside the physical parameters of the setting, or the positive laws and entitlements that attach to it, this inquiry assumes that some categories of private conduct simply deserve more constitutional protections than other (entirely legal) activities.

In some cases, an area may deserve especially rigorous protections due to the embarrassing nature of the acts it conceals. Lower courts, for example, frequently

---

111 *Id.* at 750 (Marshall, J., dissenting); *see also* United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (arguing that the reasonableness inquiry must not "merely recite the [individual's] expectations and risks without examining the desirability of saddling them upon society"); Amsterdam, *supra* note 10, at 403 (characterizing the "ultimate question" of the *Katz* test as whether surveillance techniques are consistent with the "aims of a free and open society").

112 *See supra* notes 101–09 and accompanying text.

113 *E.g.*, United States v. Jacobsen, 466 U.S. 109, 114 (1984) (insisting on strong protections for "effects" transported in the mail); Robbins v. California, 453 U.S. 420, 426 (1981) (concluding based on its text that the Fourth Amendment protects all "effects," whether they are "personal" or "impersonal").

114 *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 153 (1978) (Powell, J., concurring) (citing United States v. Chadwick, 433 U.S. 1, 7-9 (1977)).

115 *See, e.g.*, Oliver v. United States, 466 U.S. 170, 183 (1984) (identifying the "existence of a property right" as "one element in determining whether expectations of privacy are legitimate"); *Rakas*, 439 U.S. at 143 n.12 (identifying "reference to concepts of real or personal property law" as a potential basis to identify a legitimate privacy expectation).

116 *See* United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (finding a diminished expectation of privacy in an automobile given state and local motor regulations).

117 *See generally* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821 (2016) (arguing that Fourth Amendment protections should depend on provisions of law generally applicable to private actors).

118 *Oliver*, 466 U.S. at 178; *see also* Stuntz, *supra* note 7, at 1055 (noting the reasonable expectation of privacy test protects only those spaces "likely to contain the sorts of things that many people would prefer be kept private").

extend generous Fourth Amendment rights in public bathrooms, even where those spaces carry significant risk of exposure.[119] Among those cases that have reached the Supreme Court, however, privileged spaces tend to implicate loftier concerns: activities that bear some unique social or emotional significance. Thus, the Court bestows particularly strict protections on the home, the "sacred" sanctum of family life.[120] And it typically protects spaces surrounding the home, such as patios and backyards, as zones harboring "the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'"[121] But it does not protect open fields, which are commonly employed for agricultural pursuits lacking such domestic significance.[122] Similarly, the Court protects public phonebooths due to the social value of telephone conversations, which play a "vital role . . . in private communication."[123] But it does not protect records of telephone numbers, which "do not acquire the *contents* of communications" and thus cannot, per the Court, reveal intimate details about the speakers.[124] And it sometimes does not protect the insides of cars, which "seldom serve[] . . . as the repository of personal effects."[125]

By this logic, certain activities and the sites that house them are simply more important as far as the Fourth Amendment is concerned. The value judgments involved in this inquiry do not address the types of police tactics we want to authorize in our democratic society. They address the types of private activities we want to encourage and protect. The normativity of the reasonable expectation of privacy test, in short, does not just demarcate the ideal scope and nature of the criminal justice system—the risks of overreach we want to accept vis-à-vis the state. It also imposes a hierarchy of communitarian judgments on the value of citizens' private acts.

The sites that the Court deems especially valuable should sound familiar. They are typically sites that touch on conventional forms of interpersonal intimacy: social or domestic spaces that abut, in the Court's own words, on "those intimate activities that the Amendment is *intended to shelter*."[126]

---

119 *E.g.*, State v. Smith, 97 P.3d 567, 570-71 (Mont. 2004) (explaining that occupants of both public and private restrooms have a reasonable expectation of privacy "given the personal and private nature of one's usual activities within a bathroom"); *accord* Kroehler v. Scott, 391 F. Supp. 1114, 1117-18 (E.D. Pa. 1975); State v. Holt, 630 P.2d 854, 857 (Or. 1981); *cf.* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 617 (1989) (noting the unique personal invasiveness of urine test).

120 *E.g.*, Segura v. United States, 468 U.S. 796, 810 (1984).

121 California v. Ciraolo, 476 U.S. 207, 212 (1986) (quoting *Oliver*, 466 U.S. at 180).

122 *See Oliver*, 466 U.S. at 179-81.

123 Katz v. United States, 389 U.S. 347, 352 (1967).

124 Smith v. Maryland, 442 U.S. 735, 741 (1979).

125 United States v. Chadwick, 433 U.S. 1, 12 (1977) (internal quotation marks omitted) (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion)).

126 *Oliver*, 466 U.S. at 179 (emphasis added).

B. *A History of Fourth Amendment Intimacy*

The Court's emphasis on intimacy in allotting Fourth Amendment protections may seem intuitive. Yet it is in fact a relatively recent phenomenon, dating back largely to *Katz*'s recentering of Fourth Amendment rights around privacy rather than property. *Katz*'s inquiry into an individual's reasonable expectations of privacy—defined not as a probabilistic analysis but a deeply normative one, concerned in key part with the activities pursued in a given space—recalibrated the constitutional status of even established Fourth Amendment zones around the intimate nature of the acts conducted there. That transformation may be illuminated by a very brief history of Fourth Amendment protections, focusing on the example of the home.

1. Origins and Early Republic

An individual's home stands at the center of the Fourth Amendment, among the privileged items enumerated in the text and a "first among equals" there.[127] The unpermitted entry into the household, the Court has declared, "is the chief evil against which the wording of the Fourth Amendment is directed."[128] Yet the rationale underlying the home's rarefied status has been neither constant nor self-evident.[129]

As a general matter, the eighteenth-century sentiments against general warrants and writs of assistance that coalesced into the Fourth Amendment defended neither intimacy nor domesticity, but a broader sphere of private life, including expressive, political, and commercial conduct.[130] The highest-profile controversies surrounding general warrants, the cases against John Entick and John Wilkes in England, involved searches of publishers accused of seditious libel[131]—the type of government conduct we currently rein in not through the Fourth Amendment, but through the First.[132] Responding to these altercations,

---

127 Florida v. Jardines, 569 U.S. 1, 6 (2013); *see* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

128 United States v. U.S. Dist. Court, 407 U.S. 297, 316 (1972).

129 *See also* Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 659 (2011) (declaring Fourth Amendment solicitude for the home "undertheorized").

130 *See* Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 994 (2016); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1315-16 (2016).

131 *See* Entick v. Carrington (1765) 95 Eng. Rep. 807; 2 Wils. K. B. 274; Wilkes v. Wood (1763) 98 Eng. Rep. 489; Lofft 1.

132 *See* Donohue, *supra* note 130, at 1259; Donald A. Dripps, *"Dearest Property": Private "Papers" As Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 61-66 (2013); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-404 (1995). The outcry over these cases partly reflected a concern with the substantive crimes targeted, judging the state's

early debates about the proper limits of state searches focused especially on *papers*, including business letters, as man's "dearest property"[133]: windows into an individual's "secret thoughts,"[134] the seizure of which was "least capable of reparation."[135] What could be "more excruciating torture," demanded one widely read pamphleteer, than to have the government intrude upon one's "secret correspondences," whether between a husband and his wife, a "lawyer [and] his clients," or a "merchant . . . and his correspondents"?[136] Beyond the libel cases, the core instances of government intrusion that perturbed the Framers involved intrusions on commercial conduct: searches aimed at uncovering goods smuggled into the colonies without paying appropriate excise taxes.[137] Unsurprising, in context, that the Fourth Amendment's core protections extended not only to homes but also warehouses and businesses, preserving the individual's property, including commercial and other nondomestic goods, beyond the state's reach.[138]

The privileged status of the home itself reflected these broader concerns. From British common law to the taxation debates in the colonies, speakers defined the sanctity of the home not through its domestic nature, but primarily through a man's unique property and sovereignty interests in his own land. Early complaints about writs of assistance, for example, commonly focused on searches of desks, those repositories of personal and commercial correspondence.[139] And the popular aphorism that a "man's home is his castle"[140] signaled one of two things. First, it meant that a man could exercise monopoly over the use of force on his property, entitled to kill or assemble violent crowds in self-defense,[141] and immune from most forms of arrest or

procedures, in essence, based on sympathy for the private behaviors targeted. Donohue, *supra* note 130, at 1208-09; Stuntz, *supra*, at 394. Yet those privileged behaviors were not domestic life, but speech and dissent.

133 *Entick*, 95 Eng. Rep. at 818; 2 Wils. K. B. at 291.

134 *Id.* at 812, 2 Wils. K. B. at 283.

135 *Wilkes*, 98 Eng. Rep. at 490, Lofft at 2; *see also* 16 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 10 (1813) (quoting an argument characterizing "papers" as "dearer to a man than his heart's blood"); Donohue, *supra* note 130, at 1316-17; Dripps, *supra* note 132, at 52.

136 JOHN ALMON, A LETTER CONCERNING LIBELS, WARRANTS, AND THE SEIZURE OF PAPERS 43-44 (2d ed. 1764); *see also Entick*, 95 Eng. Rep. at 807; 2 Wils. K. B. at 283 (decrying intrusions into "a man's private letters of correspondence, family concerns, trade and business").

137 *See* William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 380-84 (1980); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 566-67 (1999).

138 *E.g.*, M.H. SMITH, THE WRITS OF ASSISTANCE CASE 344 (1978) (decrying the state's entrance into "houses, shops, etc., at will"); *see also* Brady, *supra* note 130, at 989-90 (discussing the Fourth Amendment's concern with non-domestic property); Morgan Cloud, *The Fourth Amendment During the* Lochner *Era*, 48 STAN. L. REV. 555, 575 (1996); Donohue, *supra* note 130, at 1185.

139 *See* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT 548 (2009).

140 This maxim is commonly credited as the root of the Fourth Amendment. *See, e.g.*, LEONARD W. LEVY, ORIGINAL MEANING AND THE FRAMERS' CONSTITUTION 222 (1988).

141 *See* Payton v. New York, 445 U.S. 573, 596 n.44 (1980); 3 WILLIAM BLACKSTONE, COMMENTARIES *288.

compunctions of legal authority.[142] Second, it meant that a man's tangible "goods" were secure upon it.[143] These emphases were consistent with the social significance of the homestead in colonial times, both as a deeply hierarchical unit of economic production and as a man's right of entry into the political community.[144]

To be sure, some writers emphasized the home's unique character as the site of domestic activities—a haven, in Samuel Adams's words, of that "domestick security which renders the lives of the most unhappy in some measure agreable."[145] But even writers who recognized the familial value of the home often characterized the chief evil of arbitrary intrusions as an offense against property and sovereignty, rather than intimacy: the affront of "carry[ing] off [a man's] property" from his domicile,[146] or of undermining the home's complete "Fortification," like a castle "defended with a Garrison and Artillery," in which a man justly "takes a Pride."[147] To disrespect a man's authority in his own abode, in the words of John Adams, was to treat him "not like an Englishman . . . but like a slave."[148] This same principle emerged, more obliquely, in the early law of curtilage. The concept of curtilage originated in the British common law in the context of burglary, a traditional property crime, and was defined by its geographical proximity to the main house:

---

142 *See* 2 LEGAL PAPERS OF JOHN ADAMS 125-26 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) ("A man, who is quiet, is as secure in his House, as a Prince in his Castle, not with standing all his Debts, and civil Processes of any kind."); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE AMERICAN UNION 320 n.2 (2d ed. 1871) (quoting Lord Chatham to illustrate that "[t]he poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not."); BLACKSTONE, *supra* note 141, at *288 ("[F]or the most part not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls.").

143 *See, e.g.*, Weeks v. United States, 232 U.S. 383, 390-91 (1914).

144 *See* Davies, *supra* note 137, at 642 n.259 ("[O]wning a house [] was the general standard for membership in the English political community."); *see also* Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 573-75 (1992). *See generally* MARY P. RYAN, CRADLE OF THE MIDDLE CLASS (1981).

145 SAMUEL ADAMS, A STATE OF THE RIGHTS OF THE COLONISTS (1772), *reprinted in* TRACTS OF THE AMERICAN REVOLUTION 233, 243-44 (Merrill Jensen ed., 1967) (historical spellings maintained); *see* A LETTER TO THE INHABITANTS OF THE PROVINCE OF QUEBEC 43 (Philadelphia, William Bradford & Thomas Bradford 1774) (warning against entries into "houses, the scenes of domestic peace and comfort"); 15 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1307 (1813) (quoting William Pitt denouncing excise laws as invading "domestic concerns of every private family"); *see also* Cuddihy & Hardy, *supra* note 137, at 395 (discussing pamphlets defending the "innocent Secrets" and "private Oeconomy [sic]" of the family).

146 ADAMS, *supra* note 145, at 243-44.

147 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 142, at 137; *see also* Cuddihy & Hardy, *supra* note 137, at 396 (quoting a pamphlet warning of government "climb[ing] into our Bed Chambers" as a metaphor for state violence).

148 1 LEGAL PAPERS OF JOHN ADAMS, *supra* note 147, at 137; *see also* 32 LONDON MAG. 254, 256 (1763) (reporting on contemporaneous legal arguments and denouncing home searches for excise enforcement as "a badge of slavery").

by Blackstone's account, the presence of a common fence or wall.[149] Yet while some early American courts echoed the English definition,[150] most found it poorly suited to the architectural landscape of the United States.[151] State courts adjudicating property disputes soon added a purposivist dimension, defining curtilage as land both proximate to the home and—in what might initially seem like a significant change—"used for domestic purposes,"[152] as an "adjunct to the domestic economy of the family."[153] That rhetorical shift partly reflected the evolving economic organization of the nation, as industrialization and urbanization rechristened the family as the sanctum of domestic intimacy rather than a site of production.[154] Crucially, however, lower courts' references to "domestic" use did not conflate the curtilage with intimate family relations. To the contrary, zones recognized as serving habitually "domestic purposes" were often commercial or agricultural, including cowhouses, barns, stables, and fields.[155]

2. Early Supreme Court Precedent

Against this backdrop, the Supreme Court's early Fourth Amendment cases rarely distinguished between personal and impersonal activities. To the contrary, they privileged the same expressive and proprietary interests emphasized by early commentators. Thus, the Court's seminal opinion in *Boyd*, which so resoundingly defended "the sanctity of a man's home and the privacies of life," involved the government's coercion not of domestic artifacts but of a defendant's business records.[156] And it defined a man's sacred "privacies," quite loosely, as his "indefeasible right of personal security, personal liberty, and private property."[157]

Similarly, early Supreme Court opinions lauding the home focused on the security of a man's papers and effects—including those of a commercial nature.

---

149 4 BLACKSTONE, *supra* note 141, at *224-25; *see also* Ferguson, *supra* note 79, at 1313-14 (discussing the historical development of the concept of curtilage); Brendan Peters, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 952-54 (2004).

150 *See, e.g.*, State v. Bugg, 72 P. 236, 237 (Kan. 1903); State v. Hecox, 83 Mo. 531, 536 (1884); People v. Taylor, 2 Mich. 250, 252 (1851).

151 *See* Ferguson, *supra* note 79, at 1315-16.

152 Washington v. State, 2 So. 365, 357 (Ala. 1887). For other cases emphasizing domestic use rather than just proximity, see United States v. Potts, 297 F.2d 68, 69 (6th Cir. 1961), United States v. LaBerge, 267 F. Supp. 686, 692 (D. Md. 1967), Littke v. State, 258 P.2d 211, 213-14 (Okla. Crim. 1953), Fugate v. Commonwealth, 171 S.W.2d 1020, 1022 (Ky. 1943), Appeal of Damon, 13 A. 217, 219-20 (Pa. 1888), and State v. Shaw, 31 Me. 523, 527 (1850).

153 Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956); *see also* United States v. Wolfe, 375 F. Supp. 949, 958 (E.D. Pa. 1974).

154 *See* McMullen, *supra* note 144, at 575-76 (1992); *see also* NANCY F. COTT, THE BONDS OF WOMANHOOD 64-74 (1977). *See generally* RYAN, *supra* note 144.

155 *See Care*, 231 F.2d at 25 (garages, barns, smokehouses, and chicken houses); Cook v. State, 3 So. 849, 850 (Ala. 1888) (gardens, fields, barns, stables, cowhouses, and dairy houses).

156 Boyd v. United States, 116 U.S. 616, 630 (1886).

157 *Id.*

In *Weeks v. United States*, the Court applied the principle that a "man's house is his castle" to defend the privacy of "letters and sealed packages in the mail."[158] The first case to extend Fourth Amendment protections to curtilage, *Amos v. United States*, did so based on a warrantless search of a commercial store on the defendant's property.[159] Subsequent cases simply cited Blackstone's *Commentaries*, with its territorial definition of curtilage as property "within the same common fence" as the main house.[160] Any suggestion that the Fourth Amendment might privilege domestic "intimacies"—either that precise term or the broader concept—appeared only in the opinions of dissenting justices, protesting the majority's more mechanical property-based approach.[161]

Consistent with both colonial rhetoric against government searches and with the early law of curtilage, in short, the Supreme Court's initial Fourth Amendment cases emphasized an individual's interest in his commercial pursuits and personal papers more than his intimate or familial bonds. Echoing the Court's broader rights discourse at the time, these cases reflected an essentially *Lochner*ian hierarchy of goods, placing the protection of property at the heart of constitutional liberty.[162]

3. After *Katz*

Only after *Katz* did intimacy enter the Court's Fourth Amendment analysis—ironically, in some of the very cases typically seen to exemplify a purely exposure-based approach to reasonableness.[163] Thus, one's reasonable expectation of privacy in telephone records under *Smith v. Maryland* depended, in part, on whether such records revealed only anonymous metadata or the "intimate details of a person's life."[164] One's reasonable expectation of privacy in banking records under *United States v. Miller* relied on whether those records "touch[ed] upon intimate areas of an individual's

158 232 U.S. 383, 390-91 (1914).

159 255 U.S. 313, 314 (1921).

160 *See, e.g.*, Hester v. United States, 265 U.S. 57, 59 (1924); *cf.* State v. Foster, 40 S.E. 209, 210 (N.C. 1901) (distinguishing fixtures merely located on "curtilage" and those sufficiently domestic to trigger burglary statute).

161 *See, e.g.*, On Lee v. United States, 343 U.S. 747, 759 (1952) (Frankfurter, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 471-74 (1928) (Brandeis, J., dissenting)); Goldman v. United States, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting); *cf.* Silverman v. United States, 365 U.S. 505, 513 (1961) (Douglas, J., concurring).

162 *See* Amar, *supra* note 25, at 788 (noting *Boyd*'s *Lochner*ian "spirit"); *see also* Cloud, *supra* note 138, at 558-59.

163 *See, e.g.*, Jane Bombauer, *Other People's Papers*, 94 TEX. L. REV. 205, 212-13 (2015) (discussing cases like *Smith* and *Miller* as turning on defendant's exposure of private data); David A. Harris, Riley v. California *and the Beginning of the End for the Third-Party Search Doctrine*, 18 U. PA. J. CONST. L. 895, 904-05 (2016) (describing the third-party doctrine cases as based solely on formalistic exposure).

164 442 U.S. 735, 748 (1979) (Stewart, J., dissenting); *see also id.* at 741 (majority opinion) (distinguishing a pen register "from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications").

personal affairs."[165] Often seen as hinging on the defendants' exposure to third parties, and thus as paradigmatic of the probabilistic approach to reasonableness, cases like *Smith* and *Miller* in fact rehearsed the Court's newfound emphasis on intimacy as a core Fourth Amendment value.

The Court's newfound rhetoric was primarily a matter of leveling up, expanding constitutional protections to novel sites of Fourth Amendment scrutiny not easily resolved by traditional property rules or by the more probabilistic approach. Where, by contrast, an item or space was clearly within the text or other established zone of the Fourth Amendment, the distinction between "personal" and "impersonal" was theoretically less relevant. As the Court insisted in *Robbins v. California*, rejecting the suggestion that the Fourth Amendment encompassed only containers holding "personal effects," the language of the Fourth Amendment protects a person's "effects whether they are 'personal' or 'impersonal.' . . . [A] diary and a dishpan are equally protected."[166]

In practice, however, the Court's valorization of intimacy soon invaded even the most traditional Fourth Amendment zones, including domestic property. In *Oliver v. United States*, for example, the Court revisited its distinction between protected curtilage and mere "open fields," hanging its distinction not on Blackstone's fence but on the intimacy of the activities pursued on each site.[167] Curtilage, the Court explained, is protected as that "area to which extends the intimate activity associated with 'the sanctity of a man's home and the privacies of life.'"[168] By contrast, open fields used for agricultural activities like the "cultivation of crops" simply "do not provide the setting for those intimate activities that the Amendment is intended to shelter."[169] Here the doctrinal switch from defining curtilage around its "domestic purpose" to its "intimate use" came out most clearly: those agricultural activities that *Oliver* defined as beyond family affairs would have been at the heart of the domestic economy of the family in the nineteenth century.[170]

Following *Oliver*, "intimacy" entered the center of curtilage analysis, both among lower courts and at the Supreme Court. In *United States v. Dunn* in 1987, the Court articulated a formal four-part test for identifying protected curtilage, examining not only the area's proximity to the home and the defendant's attempts

---

165 425 U.S. 435, 444 n.6 (1976) (internal quotation marks omitted) (quoting Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring) (suggesting that records revealing data about "a person's activities, associations, and beliefs" would implicate a reasonable expectation of privacy)).

166 453 U.S. 420, 426 (1981) (plurality opinion), *overruled on other grounds by* United States v. Ross, 456 U.S. 798 (1982).

167 466 U.S. 170, 180 (1984).

168 *Id.* (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)); *see also* Peters, *supra* note 149, at 956-57 (arguing that *Oliver* created "modern curtilage doctrine" by supplementing territorial definitions with a focus on intimate activities).

169 *Oliver*, 466 U.S. at 179.

170 *Compare id.*, *with, e.g.*, Cook v. State, 3 So. 849, 850 (Ala. 1888) (cataloging gardens, fields, barns, stables, cowhouses, and dairy houses as usually part of the curtilage).

to keep it hidden, but also the "nature of uses to which the area is put."[171] In that case, the Court concluded, the sound of a running motor and smell of a (legal and multipurpose) chemical emitting from the defendant's barn—indicating that he used the structure not for the "privacies of domestic life" but for more unorthodox activities—was an "especially significant" indication that no curtilage was involved.[172] Even in a space traditionally within the auspices of the Fourth Amendment, the Court's newfound focus on "intimacy" thus limited constitutional protections to conventional domestic or familial pursuits.

* * *

Far from an outgrowth of the Fourth Amendment's history or its early focus on the home, in short, the Court's emphasis on intimacy at the center of Fourth Amendment protections is a fairly recent constitutional innovation, tracing back to *Katz*'s reasonable expectation of privacy test. The Court's assessment of "reasonableness" under *Katz* recalibrated constitutional rights for even traditionally protected zones around a novel inquiry into the nature of the activities pursued within them. By this approach, an individual who engages in conventionally "intimate" acts—typically, those implicating family life or significant interpersonal communications—simply has a greater claim to constitutional privacy than one engaged in other perfectly legal activities, such as chemistry experiments or the cultivation of crops. Echoing the historic trajectory of the Court's substantive due process jurisprudence, which shifted over the twentieth century from protecting economic rights to protecting intimate conduct,[173] the Fourth Amendment recentered its protections from commercial property to interpersonal relations.

The Court's initial implication that certain areas deserve more "scrupulous protection"[174] based on the activities they house already introduced a value-based inquiry into the Fourth Amendment. Its clarification that such areas typically house "intimate" activities moved that inquiry explicitly into the realm of communitarian judgment, privileging certain types of private pursuits—specifically, social and domestic relations—over other perfectly legal conduct. And, in practice, it privileged very *particular* social arrangements. In theory, of course, "intimacy" might be seen as a broad category, giving individuals room to choose their preferred types of significant relationships. Yet as invoked by the Court's Fourth Amendment cases, "intimacy" suggests a fairly

171 480 U.S. 294, 301.

172 *Id.* at 302-03.

173 *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 502-03 (1997) (discussing the Court's transition from the economic substantive due process model of *Lochner* to the intimacy-based approach of *Griswold*); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1341 (2001) (same).

174 *Oliver*, 466 U.S. at 178.

narrow and conventional social norm: familial, romantic, or otherwise deep emotional bonds. It is hard to argue that the same Court that exalted "intimate" ties like marriage[175] and enduring sexual relations[176] as constitutionally sacred under the Due Process Clause does not see intimacy as a freighted term: a proxy for uniquely valuable social and sexual arrangements. Recalling the reasoning of moralistic due process cases like *Griswold*, the Court's redefinition of Fourth Amendment protections as "intended to shelter" intimate activities circumscribes privacy rights around its own view of worthwhile private pursuits.

III. EXAMINING ACTUAL CONDUCT

So far, of course, we have largely been dealing with a prospective inquiry, defining the constitutional status of certain spaces based on the typical uses to which they are put. Thus, the home, although perhaps protected due to its association with intimate family life,[177] is shielded from intrusion whether used to cook dinner or to manufacture drugs.[178] And even the Court's definition of "curtilage" based on "the uses to which [an] area is put" has been interpreted to depend on "objective data" obtained prior to a government intrusion.[179] Such rules do not ground individuals' Fourth Amendment rights on their actual activities, but rather on broad social norms attaching to the uses associated with a given space.

With some frequency, however, the Court's assessments of reasonable expectations of privacy have also come to depend on the social value of individual's actual conduct when discovered by the police. Borrowing a retrospective lens commonly identified with its due process privacy cases but generally deemed inconsistent with the Fourth Amendment, the Court has repeatedly measured an individual's privacy interests based not on conventional expectations surrounding a space but on the nature of her

175 *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

176 *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003).

177 *See* Segura v. United States, 468 U.S. 796, 810 (1984) ("[T]he home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within."); *see also* New York v. Harris, 495 U.S. 14, 27 (1990) (Marshall, J., dissenting) (concluding that "[a]n invasion into the home is . . . the worst kind," as it intrudes "on the individual's solitude and on the family's communal bonds").

178 *E.g.*, United States v. Karo, 468 U.S. 705, 716-18 (1984) (holding that a police beeper hidden in cocaine-making supplies stored inside a home violated the Fourth Amendment).

179 United States v. Dunn, 480 U.S. 294, 301-03 (1987). Numerous lower courts have explicitly adopted that requirement. *See, e.g.*, United States v. Johnson, 256 F.3d 895, 903 (9th Cir. 2001) (requiring some "prior objective knowledge of the use of an outbuilding"); Daughenbaugh v. City of Tiffin, 150 F.3d 594, 599 (6th Cir. 1998) (affirming that objective data is required prior to a search); United States v. Swepston, 987 F.2d 1510, 1515 (10th Cir. 1993) (requiring objective data that personal property is not used for intimate activities prior to invasion).

specific acts. [180] This Part tracks this development in three areas of the law: aerial surveillance of curtilage, visitors in the homes, and the detection of drugs.

A. *Aerial Surveillance of Curtilage*

When the Court defined "curtilage" based on, among other things, the uses to which the area is put, that test was subject to two caveats. First, the Court based this inquiry on data obtained prior to a search itself; and second, that test assessed whether a particular area was in fact "curtilage," and thereby entitled to Fourth Amendment protections.[181]

Since then, the Court's curtilage cases have primarily centered on the validity of aerial surveillance and other novel technologies for inspecting domestic land. And that caselaw has deviated in two ways. First, the Court has held that an individual's Fourth Amendment rights depend on the nature of her activities even on land that indisputably qualifies as curtilage. And second, it has tied an individual's privacy expectations to the intimate nature of the actual activities disclosed.

This shift began in *California v. Ciraolo*, in which police officers flying a helicopter over the defendant's home observed marijuana growing in his enclosed backyard.[182] The state court found the surveillance to violate the Fourth Amendment, since the yard, "immediately surrounding and associated with the home," clearly qualified as curtilage.[183] But the Supreme Court reversed. Writing for the Court, Chief Justice Burger agreed that Ciraolo's marijuana plants fell within the curtilage, but he concluded that their exposure to commercial airplanes overhead meant that Ciraolo could harbor no reasonable privacy expectations against *aerial* surveillance of that property.[184] Dissenting, Justice Powell questioned Burger's premise that the land was truly visible to commercial travelers.[185] But he also emphasized a fact he saw as lost within the record: in addition to marijuana plants, Ciraolo's yard featured several domestic improvements, including "a swimming pool and a patio for sunbathing and other private activities."[186] Setting aside

180 This is a qualitatively different move than that traced in the previous section—one that does not concern the metric through which the Court evaluates private conduct, but rather the specificity with which it does so in a given case.

181 *See Dunn*, 480 U.S. at 301.

182 476 U.S. 207, 209 (1986).

183 People v. Ciraolo, 208 Cal. Rptr. 3d 93, 96 (Ct. App. 1984) (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)), *rev'd*, 476 U.S. 207.

184 *Ciraolo*, 476 U.S. at 213-14.

185 *Id.* at 223-24 (Powell, J., dissenting) ("[T]he actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent.").

186 *Id.* at 222 n.7.

Ciraolo's risk of exposure, Justice Powell suggested, the domestic nature of his property should have swayed the outcome of the case.

Justice Powell's suggestion was largely speculative, but the Court's subsequent curtilage decisions have largely borne it out. Issued the same day as *Ciraolo*, the Court's opinion in *Dow Chemical Co. v. United States* presented a foil of sorts to the Court's curtilage cases, holding that the enclosed space surrounding a commercial plant—so-called "industrial curtilage"—deserved reduced protections against aerial photography as a space unrelated to the "intimate activities associated with family privacy."[187] Even on industrial property, however, the Court qualified that aerial surveillance through more sophisticated equipment capable of "revealing . . . intimate details" might yet "raise constitutional concerns."[188] Presumably, the "intimate" details of a chemical plant differed from the intimacies of the domestic hearth, yet *Dow* confirmed that a party's privacy rights against aerial surveillance did not depend simply on the site or nature of the government's tactics. They also depended on the information revealed.

Three years later, the Court extended that discriminating logic to its conclusion. In *Florida v. Riley*, officers flying a helicopter 400 feet over the defendant's yard observed marijuana plants through the roof of a covered greenhouse.[189] Finding that the structure stood within the defendant's curtilage, the state courts held that the surveillance violated Riley's reasonable expectation of privacy.[190] Aerial observation of such domestic spaces, the Florida Supreme Court emphasized, "lays open everything and everyone below—whether marijuana plants, nude sunbathers, or family members relaxing in their lawn chairs."[191]

In a split opinion, the Supreme Court reversed. A plurality led by Justice White reasoned that an individual has no reasonable expectation of privacy against aerial surveillance conducted from legally navigable airspace—in the case of helicopters, essentially any airspace.[192] Justice O'Connor's concurrence and a four-person dissent, cobbling together a technical majority, rejected such positivist reasoning and instead defined the critical inquiry as whether public air travel is "sufficiently *routine*" to raise a genuine risk of exposure.[193] Even the plurality, however, acknowledged certain limits on surveillance from legal airspace. If government agents "interfered with [the owner]'s normal use" of his land, or caused "undue noise, . . . wind, dust, or threat of injury," or if they observed any

187 476 U.S. 227, 236 (1986).

188 *Id.* at 238.

189 488 U.S. 445, 448 (1989) (plurality opinion).

190 *See* State v. Riley, 476 So. 2d 1354, 1355 (Fla. Dist. Ct. App. 1985), *aff'd*, 511 So. 2d 282, 288 (Fla. 1987), *and rev'd*, 488 U.S. 445.

191 *Riley*, 511 So. 2d at 287.

192 *Riley*, 488 U.S. at 451.

193 *Id.* at 453 (O'Connor, J., concurring in the judgment) (emphasis added); *see id.* at 460 (Brennan, J., dissenting) (asking "whether public observation" was "commonplace").

"intimate details connected with the use of the home or curtilage," such surveillance might trigger Fourth Amendment protections.[194]

Justice Brennan's dissent seized on the "intimate details" exception—the only one that did not effectively map onto the common law of property rights. "If the police had observed Riley embracing his wife in the backyard greenhouse," he marveled, "would we then say that his reasonable expectation of privacy had been infringed? Where in the Fourth Amendment or in our cases is there any warrant for imposing a requirement that the activity observed must be 'intimate' in order to be protected by the Constitution?"[195] Yet Justice Brennan's gloss of the Court's precedent was somewhat dated. By the time of *Riley*, the Court had published numerous cases characterizing the Fourth Amendment as "intended to shelter" intimate domestic pursuits.[196] Disinclined to extend Fourth Amendment protections to the defendant's pot-filled greenhouse but also unwilling to sanction all low-altitude surveillance of domestic spaces, the *Riley* plurality echoed those cases in suggesting that more valuable social activities, even in similar areas, give rise to greater privacy rights.

State and lower federal courts have taken Justice White's exceptions seriously. Injecting the *Riley* dicta into the center of their Fourth Amendment analysis, most courts now hold that aerial surveillance is constitutionally permissible only in the absence of certain aggravating factors, including safety hazards, excessive noise or disruption, and, in many cases, exposure of "intimate details."[197] In some jurisdictions, in short, the test derived from the Court's aerial surveillance cases

194 *Id.* at 451-52 (plurality opinion).

195 *Id.* at 463 (Brennan, J., dissenting).

196 *E.g.*, Oliver v. United States, 466 U.S. 170, 179 (1984); *see also* United States v. Dunn, 480 U.S. 294, 301 (1987) (identifying whether an area is "intimately tied to the home" as the "centrally relevant consideration" in assigning Fourth Amendment protection); Segura v. United States, 468 U.S. 796, 810 (1984) ("[T]he home is sacred in Fourth Amendment terms not primarily because of the occupants' possessory interests in the premises, but because of their privacy interests in the activities that take place within.").

197 *E.g.*, United States v. Warford, 439 F.3d 836, 843-44 (8th Cir. 2006) (concluding a property owner did not have a reasonable expectation of privacy in part because the police did not "observe[] intimate details"); United States v. Allerheiligen, Nos. 99-3144 & 99-3154, 2000 WL 1055487, at *4 (10th Cir. 2000) (same); People v. McKim, 263 Cal. Rptr. 21, 25 (Ct. App. 1989); Commonwealth v. Robbins, 647 A.2d 555, 562 (Pa. Super. Ct. 1994); State v. Bryant, 950 A.2d 467, 478 (Vt. 2008) (emphasizing the exposure of "intimate activities").

Depending on the records or parties' arguments, some courts have incorporated the *Riley* aggravating factors into their analysis without discussing intimacy specifically. *E.g.*, Henderson v. People, 879 P.2d 383, 389-90 (Colo. 1994) (en banc) (finding a Fourth Amendment violation due to noise, wind, and interference); State v. Davis, 360 P.3d 1161, 1171 (N.M. 2015) (same); *see also* Doggett v. State, 791 So. 2d 1043, 1056 (Ala. Crim. App. 2000) (discussing noise, wind, and disturbance). Others take a more conservative approach, asking only whether the surveillance occurred at a legally permissible altitude. *See, e.g.*, State v. Little, 918 N.E.2d 230, 238 (Ohio Ct. App. 2009) (finding a Fourth Amendment violation because the police helicopter was "illegally in restricted airspace"); *see also* United States v. Broadhurst, 805 F.2d 849, 855 (9th Cir. 1986); State v. Wilson, 988 P.2d 463, 465 (Wash. App. 1999). Still others ask, per Justice O'Connor's concurrence, whether overhead flights are foreseeable. *See, e.g.*, United States v. Breza, 308 F.3d 430, 434-35 (4th Cir. 2002); Commonwealth v. One 1985 Ford Thunderbird Auto., 624 N.E.2d 547, 551 (Mass. 1993).

holds that intimate activities on even traditionally protected land deserve greater Fourth Amendment protections than less savory or illicit acts. This rule does not examine an individual's activities to decide whether a given space should be *classified* as "curtilage," nor does it distinguish among surveillance tactics more or less likely to uncover intimate acts. Rather, it ties an individual's entitlement to privacy on her domestic land to the value of her conduct there.

The superior status of "intimate" pursuits under the Supreme Court's jurisprudence is borne out by the federal courts' applications of *Dow* and *Riley* beyond the context of curtilage, to technologies reaching into the home itself. The most commonly litigated technology, thermal imaging, reached six circuit courts over the course of the 1990s. Five ultimately approved the practice, and all five explained their holdings at least partly—and in some cases entirely—based on the "intimacy" of the details revealed.[198] Drawing on *Riley* and *Dow*, as well as on ostensibly probabilistic cases like *Smith*, the Fifth and Ninth Circuits explicitly concluded that "the crucial inquiry . . . in any search and seizure analysis" is "whether the technology reveals 'intimate details.'"[199] Thermal imaging did not offend the Fourth Amendment because it revealed no "intimate details of [the defendant's] life"—and especially, the Ninth Circuit went to great lengths to establish, not any *sexual activity* in the home—but only "amorphous 'hot spots.'"[200] Similarly, the Eleventh Circuit cited Supreme Court cases like *Dow* as establishing that "the intimacy of detail [i]s relevant for Fourth Amendment purposes," concluding that thermal imaging raises no constitutional concerns because it is "incapable of revealing the intimacy of detail and activity protected by the Fourth Amendment."[201] Persistently distinguishing between intimate and non-intimate activities, the Supreme Court's precedent has thus led lower courts to withhold

198 *See* United States v. Kyllo, 190 F.3d 1041, 1047 (9th Cir. 1999), *rev'd*, 533 U.S. 27 (2001); United States v. Ishmael, 48 F.3d 850, 856 (5th Cir. 1995); United States v. Myers, 46 F.3d 668, 670 (7th Cir. 1995); United States v. Ford, 34 F.3d 992, 996 (11th Cir. 1994); United States v. Pinson, 24 F.3d 1056, 1058-59 (8th Cir. 1994). The Tenth Circuit initially found thermal imaging to be a search, specifically denying any distinction between "intimate or other[]" activities, but later vacated the opinion en banc. *See* United States v. Cusumano, 67 F.3d 1497, 1502 (1996), *vacated*, 83 F.3d 1247 (1996).

199 *Ishmael*, 48 F.3d at 855 (quoting Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986)); *accord Kyllo*, 190 F.3d at 1046-47 (quoting *Ishmael*, 48 F.3d at 855).

200 *Kyllo*, 190 F.3d at 1047. The first time *Kyllo* reached the Ninth Circuit, the court remanded the case for further factfinding as to whether the device could "detect sexual activity in the bedroom." United States v. Kyllo, 37 F.3d 526, 530 (9th Cir. 1994). The second time *Kyllo* reached the Ninth Circuit, the court found the device to qualify as a search on the grounds that it was sophisticated enough to reveal "two commingled objects emitting heat in a bedroom at night." United States v. Kyllo, 140 F.3d 1249, 1254 (9th Cir. 1998). On rehearing, the court reversed itself in deference to the district court's contrary factual findings. *Kyllo*, 190 F.3d at 1047.

201 *Ford*, 34 F.3d at 996. The remaining circuits, the Seventh and Eighth, primarily held that heat waves were "waste products" creating no privacy interests, but also emphasized that they do not implicate the "intimacy, personal autonomy, and privacy" that "form the basis for" Fourth Amendment protections. *Pinson*, 24 F.3d at 1058-59; *accord Myers*, 46 F.3d at 669-70 (quoting *Pinson*, 24 F.3d at 1058-59).

constitutional protections even in the home—that inner sanctum of the Fourth Amendment—for insufficiently valuable information.

In *Kyllo v. United States* in 2001, the Supreme Court itself rejected that reasoning, in an opinion that conspicuously broke with *Katz*'s privacy framework. Scorning the "circular" and "subjective" nature of the reasonable expectation of privacy test, Justice Scalia insisted that the "minimal expectation of privacy" long established by Fourth Amendment caselaw "draws 'a firm line at the entrance to the house.'"[202] *Kyllo* is often remembered primarily for Justice Scalia's aside about the lady's "daily sauna and bath," so vividly evoking the intimacies of the marital hearth.[203] Yet in fact, Justice Scalia decried lower courts' attempts to distinguish among intimate and impersonal information. "In the home," he insisted, "*all* details are intimate details," from the rug in the vestibule to the can of ether in the hallway, simply because "they [a]re the details of the home."[204] Any rare sense-enhancing technology used to obtain any information "that could not otherwise have been obtained without physical" intrusion of the house, he concluded, constituted a search under the Fourth Amendment.[205]

Against the incursions of the lower courts, in short, *Kyllo* resuscitated the home's protections against thermal imaging based on a deeply property-based construction of the Fourth Amendment. Dismissing the significance of "intimacy" to its constitutional analysis, it reversed the corrosive effects of the reasonable expectation of privacy framework by eschewing that framework in favor of a trespass-based approach. Yet while *Kyllo* has exempted the interior of the home from any Fourth Amendment inquiries into the intimacy of a defendant's activities, it has not overruled or even meaningfully altered the framework that precipitated them: the principle derived from *Doe* and *Riley*, and still commonly applied by lower courts, that an individual's privacy against surveillance on his curtilage depends on the acts for which that right is claimed. In this sense, *Kyllo* does not resolve but casts in clearer relief the doctrinal stakes of the Court's aerial surveillance cases: the suggestion that an individual's privacy interests under the Fourth Amendment reflect the value of the conduct involved.

B. *Visitors in the Home*

In one's own home, the Fourth Amendment draws a "firm line" at the door. And even the formal definition of curtilage evaluates an individual's uses of a given space prospectively.

---

202 Kyllo v. United States, 533 U.S. 27, 34, 37 (2001) (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).

203 *Id.* at 44.

204 *Id.* at 37-38.

205 *Id.* at 34.

In one arena, however, the Court has explicitly recognized that an individual's privacy expectations may depend on how he or she actually uses the setting. As Justice Marshall recognized in an early dissent, the Court looks beyond "the sorts of uses to which a given space is susceptible" and examines how "the person asserting an expectation of privacy . . . [is] in fact employing it" when that individual "lack[s] primary control" over the space: that is, when that individual is a guest on a third party's property.[206] In such cases, the Court since *Katz* has not only sanctioned a retrospective analysis of a visitor's activities in her host's home, but has also explicitly tied her privacy rights to the social value of her visit.

The Court first suggested that reasonable privacy expectations may depend on "the way a person has used a location" in *Rakas v. Illinois*, a 1978 case denying a passenger's Fourth Amendment interests in a friend's vehicle.[207] That case credited the proposition to the 1960 case *Jones v. United States*, which held that a defendant staying overnight at a friend's apartment was "legitimately on premises" and therefore could challenge a warrantless search.[208] Reevaluating *Jones* in light of *Katz*'s privacy framework, the Court in *Rakas* recharacterized the heart of that decision not as the defendant's "legitimate" status but as his authority over the apartment.[209] The defendant in *Jones* had a reasonable expectation of privacy because he possessed a house key and commonly stored belongings in the home, giving him "complete dominion and control over the apartment."[210] Recalling the probabilistic view of *Katz*, Jones's "use" of his friend's apartment bore on his privacy interests simply in the sense that more extended visits justify greater confidence in anticipating seclusion.

When the Court next revisited the Fourth Amendment rights of visitors, it adopted a more normative approach. In *Minnesota v. Olson* in 1990, the Court held that overnight guests share a reasonable expectation of privacy in their host's home based not on the exclusive nature of their visit, but rather on its social importance. [211] Although the Court noted that overnight visitors typically wield some "measure of control" over a home, the Court emphasized that this power is not determinative of their Fourth Amendment rights.[212] Rather, overnight guests have a reasonable expectation of privacy because "[s]taying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society."[213] As the Court elaborated, "[w]e stay in others' homes when we travel to a strange city, when we visit our parents, children, or more distant

206 Oliver v. United States, 466 U.S. 170, 191 n.13 (1984).
207 439 U.S. 128, 153 (Powell, J., concurring).
208 *See id.* at 140-43 (majority opinion) (citing 362 U.S. 257, 259-67).
209 *Id.* at 149.
210 *Id.*
211 495 U.S. 91, 98-99.
212 *Id.* at 99-100.
213 *Id.* at 98.

relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend."[214] A visitor's Fourth Amendment privacy rights in a host's home, in short, reflected the centrality of overnight visits as a social practice.

In subsequent years, lower courts adopted *Olson*'s exaltation of social value at the center of Fourth Amendment protections. Some imported that language directly into the *Katz* privacy test, rewriting *Katz*'s second prong as asking whether an individual's privacy expectation advances "longstanding social customs that serve functions recognized as valuable by society."[215] Others explicitly based Fourth Amendment protections for short-term visitors on the moral value of their visits. The Fourth Circuit, for example, extended *Olson* to an afternoon visitor who commonly ran errands for her neighbor, reasoning that "visiting a neighbor and assisting the elderly" are activities that "establish an expectation of privacy that is 'recognized and permitted by society.'"[216] A California court recognized the privacy rights of a visitor watching a sleeping child, both because babysitters have authority over a home and because "babysitting 'is a longstanding social custom that serves functions recognized as valuable by society.'"[217] By contrast, the D.C. Circuit denied Fourth Amendment protections to a defendant using a friend's apartment to sell drugs, "[q]uite the opposite" of a "longstanding social custom that serves functions recognized as valuable by society."[218]

When the Supreme Court itself examined the Fourth Amendment rights of short-term visitors, it followed that same path. In *Minnesota v. Carter*, the Court denied any reasonable expectation of privacy for two defendants observed bagging cocaine in a recent acquaintance's apartment.[219] Noting that the defendants used the apartment "simply [as] a place to do business," the Court concluded that the "purely commercial nature" of their visit, the "relatively short period of time" they spent there, and "the lack of any previous connection between respondents and the householder" undercut any reasonable privacy interests in the home.[220] Justice Kennedy, the necessary fifth vote, wrote separately to emphasize the narrow contours of the decision. *Carter*, he insisted, preserved Fourth Amendment protections for "most, if not all, social guests," for even assuming that an individual must "establish a

214 *Id.*

215 *E.g.*, State v. Stephenson, 760 N.W.2d 22, 25 (Minn. Ct. App. 2009); *accord* State v. Ortiz, 618 N.W.2d 556, 559 (Iowa 2000).

216 Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996) (quoting *Olson*, 495 U.S. at 100).

217 People v. Moreno, 3 Cal. Rptr. 2d 66, 70 (Ct. App. 1992) (quoting *Olson*, 495 U.S. at 98).

218 United States v. Hicks, 978 F.2d 722, 724 (D.C. Cir. 1992) (internal quotation marks omitted) (quoting *Olson*, 495 U.S. at 98).

219 525 U.S. 83, 85 (1998). In earlier proceedings, the state supreme court had conceded that "society does not recognize as valuable the task of bagging cocaine," but nevertheless found a Fourth Amendment based on a homeowner's broader right "to invite persons into the privacy of their home[]." State v. Carter, 569 N.W.2d 169, 176 (Minn. 1997), *rev'd*, 525 U.S. 83.

220 *Carter*, 525 U.S. at 90-91.

meaningful connection to [a homeowner's] apartment," wide-ranging social customs mean that "as a general rule, social guests will have an expectation of privacy in their host's home."[221] And even in business-related visits, Justice Kennedy suggested, relationships of greater respect and reciprocity—involving "confidential communications" rather than "the mechanical act of chopping and packing"—might merit greater constitutional protections.[222]

As the dissent noted, such distinctions went against the precedent of *Katz* itself, which protected the defendant's privacy in a public phonebooth despite his commercial, illicit conversations there—and despite the fact that *Katz,* too, raised difficult questions of standing on a third party's property.[223] Yet those distinctions should not sound unfamiliar. Perhaps not coincidentally, the types of privacy interests singled out for greater solicitude under *Carter* recall those interpersonal relationships deserving constitutional privacy under the Due Process Clause. As articulated by both the majority and Justice Kennedy, the Fourth Amendment protects visits that reflect some "meaningful connection" among the parties, but not those that are "purely commercial," last a "relatively short period of time," or entail no deeper "connection"[224]—in Justice Kennedy's words, those that are "fleeting," "insubstantial," and devoid of "meaning[]."[225] These limitations map uncannily onto the reasoning behind *Lawrence*'s protections of adult consensual sex, which aimed primarily to safeguard "enduring" bonds[226] and may preclude, for example, constitutional rights for commercial sex of any kind.[227] As in the Court's due process privacy cases, *Carter* attaches constitutional "privacy" only to those relationships that satisfy the Court's view of valuable personal relations.

In the years since *Carter*, state and lower federal courts have consistently extended greater Fourth Amendment protections to social rather than business guests. Some have hewn closely to the Kennedy concurrence, holding that all social guests have a reasonable expectation of privacy in their host's home.[228] Yet most stop short, disaggregating the realm of the social into more and less worthy

---

221 *Id.* at 101 (Kennedy, J., concurring). Between Justice Kennedy and the four dissenters, a majority of the Justices supported that baseline. *See id.* at 109 n.2 (Ginsburg, J., dissenting).

222 *Id.* at 102 (Kennedy, J., concurring).

223 *Id.* at 110-11 (Ginsburg, J., dissenting). Indeed, at least one scholar has argued that *Katz* was animated by concerns about police surveillance of gay cruising in public bathrooms—certainly something that the Court of 1967 did not see as socially valuable activity. *See generally* David Alan Sklansky, *"One Train May Hide Another":* Katz*, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875 (2008).

224 *Carter*, 525 U.S. at 91.

225 Id. at 101-02 (Kennedy, J., concurring).

226 Lawrence v. Texas, 539 U.S. 558, 567 (2003).

227 *See* RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW 587 (1999); Kristian R. Mukoski, *The Constraint of Dignity:* Lawrence v. Texas *and Public Morality*, 89 NOTRE DAME L. REV. 451, 471 (2013).

228 *E.g.*, Morton v. United States, 734 A.2d 178, 182 (D.C. 1999); *In re* Welfare of B.R.K., 658 N.W.2d 565, 576 (Minn. 2003); State v. Earl, 92 P.3d 167, 172 (Utah Ct. App. 2004); *cf.* State v. Trecroci, 630 N.W.2d 555, 569-70 (Wis. 2001).

relationships.[229] Those inquiries proceed along roughly two lines. Some courts have resurrected *Jones*'s inquiry into an individual's dominion over a given space, denying even acknowledged social guests Fourth Amendment protections unless they somehow control access to the home.[230] More commonly, courts have evaluated the meaningfulness of a social guest's relationship with the host, considering such factors as her intimacy with the family, the frequency and length of their interactions, and the absence of any illicit or commercial purposes for her visit.[231]

Under this second approach, a visitor's Fourth Amendment rights often depend on a court's assessment of the possibility of meaningful relationships involving illegal or commercial dealings.[232] Take two cases decided roughly within a year of each other: In one, a Tennessee district court concluded that a defendant visiting a friend's apartment to "manufacture and supply methamphetamine" had a reasonable expectation of privacy because he was there not "purely for commercial purposes," but also to serve "a mutual addiction."[233] By contrast, the Iowa Supreme Court denied a Fourth Amendment claim where the defendant and his hostess met repeatedly "to use drugs . . . and to 'hang out,'" eventually engaging in a three-day binge where guests and family members used and bought drugs, "some of which" the defendant provided.[234] The defendant's "substantial" drug sales, the court reasoned, revealed the gathering to be "an ongoing drug transaction" rather than a social gathering.[235] Beyond its inherent subjectivity, the court's analysis reflected some very class-based priors: the presumption that a sale of valuable goods, as opposed to the generosity of a gift, undermines the depth of a personal relationship. If the Court's valorization of "intimate" relations seemed to at least leave room for individuals to pick their

229 Some cases have characterized these distinctions as differentiating among admitted social guests, *e.g.*, United States v. Rose, 613 F. App'x 125, 129-30 (3d Cir. 2015); United States v. Maestas, 639 F.3d 1032, 1035-36 (10th Cir. 2011), while others characterize them as going to the preliminary question of whether a visitor should be termed a "social guest." *E.g.*, United States v. Rhiger, 315 F.3d 1283, 1287 (10th Cir. 2003); State v. Tullous, 692 N.W.2d 790, 794 (S.D. 2005). Regardless, the inquiries are essentially equivalent.

230 *E.g.*, *Rose*, 613 F. App'x at 129-30; City of Champaign v. Torres, 824 N.E.2d 624, 631 (Ill. 2005); State v. Filion, 966 A.2d 405, 408-09 (Me. 2004); State v. Smith, 97 P.3d 567, 570 (Mont. 2004).

231 *E.g.*, United States v. Phillips, 382 F.3d 489, 496 (5th Cir. 2004); United States v. Kuenstler, 325 F.3d 1015, 1020-21 (8th Cir. 2003); *Rhiger*, 315 F.3d at 1287; State v. Lovig, 675 N.W.2d 557, 564 (Iowa 2004); State v. Talkington, 345 P.3d 258, 277 (Kan. 2015); State v. Link, 150 P.3d 610, 615-16 (Wash. Ct. App. 2007).

232 *See Talkington*, 345 P.3d at 277 (emphasizing the commercial nature of a visit in declining to find a reasonable expectation of privacy, despite an established prior friendship with the host); *Earl*, 92 P.3d at 172-73 (same). *Compare, e.g.*, State v. Sefcik, No. 02-1801, 2004 WL 149958, at *4 (Iowa Ct. App. Jan. 28, 2004) (finding a reasonable expectation of privacy where drug use was "incidental" to friendly gathering), *with* United States v. Hicks, 978 F.2d 722, 723 (D.C. Cir. 1992) (denying a reasonable expectation of privacy where the defendant arrived at another's apartment with alcohol and ice, but also sold drugs), *and* State v. Sletten, 664 N.W.2d 870, 877-78 (Minn. Ct. App. 2003) (denying a reasonable expectation of privacy where the defendant bought drugs at another's home, despite "friendly" relations with host).

233 United States v. Smith, No. 01-044, 2001 WL 1898404, at *1-2 (E.D. Tenn. Nov. 20, 2001).

234 State v. Ortiz, 618 N.W.2d 556, 558 (Iowa 2000).

235 *Id.* at 560.

preferred brands of intimacy, such cases exemplify how easily protections may be limited to a narrow class of orthodox, and culturally specific, arrangements.

Similarly, a visitor's reasonable expectations of privacy frequently depend on whether his personal connection to the host conforms to the structures of conventionally prized relationships. Numerous cases devolve into subjective, value-laden inquiries into the point at which a social acquaintance qualifies as "meaningful": years of duration, shared recreational activities, and the like.[236] The subjectivity of that approach, as well as its latent cultural biases, emerges strikingly in cases involving sexual relations. One New York district court, for example, has reasoned that a defendant who repeatedly visited his mistress's hotel room had no reasonable expectations of privacy, since he never spent the night and his visits were not "extended."[237] A Maryland court has held that a visitor present for a sexual encounter had no privacy rights where the sex was offered for money and was not part of an "ongoing 'boyfriend and girlfriend' relationship."[238] When one Wisconsin court held that an ongoing sexual relationship gave the defendant a reasonable expectation of privacy in his lover's home, the dissent protested extending constitutional protections to "occasional sexual contacts" between two persons who are "not married, nor even engaged."[239]

As these cases demonstrate, the constitutional framework that has emerged from the Supreme Court's Fourth Amendment jurisprudence on home visitors is a deeply retrospective and judgmental inquiry. Protecting overnight visitors due to the customary value of their visits, while separating shorter-term visitors into privileged "social" guests or mere business visitors, the Supreme Court has consistently tied individuals' reasonable expectations of privacy to its assessment of the value of their visit. And lower courts have parsed even finer distinctions, debating whether drug sales transform a group gathering from a "social" to a "commercial" transaction, or whether casual sexual encounters, or those involving monetary exchange, qualify as social relations worth protecting. Beginning with *Olson* and culminating in *Carter*, Fourth Amendment rights for visitors have centered on a court's normative appraisals of particular social, commercial, and even romantic arrangements.

---

236 A "years"-long friendship certainly qualifies, *see* United States v. Pollard, 215 F.3d 643, 647 (6th Cir. 2000); Morton v. United States, 734 A.2d 178, 182 (D.C. 1999), as does a foregoing relationship coupled with "social interaction[s]" like "talking and watching television," *In re* Welfare of B.R.K., 658 N.W.2d 565, 574 (Minn. 2003), while mere evidence of watching television together does not. State v. Jones, 845 P.2d 1358, 1361 (Wash. Ct. App. 1993).

237 United States v. Cody, 434 F. Supp. 2d 157, 166 (S.D.N.Y. 2006).

238 Simpson v. State, 708 A.2d 1126, 1135 (Md. Ct. Spec. App. 1998). In notable contrast, California's exaltation of babysitting as a "valuable" social custom did not distinguish between free and paid services. *See supra* text accompanying note 217.

239 State v. Moss, No. 00-3506-CR, 2001 WL 1634442, at *10 (Wis. Ct. App. Dec. 20, 2001) (Roggensack, J.).

C. *Dog Sniffs and Drug Tests*

A general rule of the Fourth Amendment is that courts may draw no distinction between "worthy" and "unworthy" possessions.[240] What a man has hidden from view, whether "in his desk drawer, or in his pocket," must remain free from search.[241] Yet in a series of cases involving drug-sniffing dogs and chemical tests, the Supreme Court has established that individuals have no legitimate expectations in the possession of certain contraband items—even in traditionally protected spaces, and no matter how discreetly they are stored.

The Court first premiered this novel doctrine in *United States v. Place* in 1983.[242] After the defendant challenged the state's use of drug-sniffing dogs in airports, the government asked the Court to recognize canine sniffs as a type of "investigative stop"—a minimal intrusion justifiable based on reasonable suspicion rather than probable cause.[243] The Court ultimately did not need to reach that issue,[244] but in dicta it did the government one better. Because a dog sniff "discloses only the presence or absence of . . . a contraband item" and entails no physical intrusion into one's effects, Justice O'Connor wrote for the majority, it simply does "not constitute a 'search' within the meaning of the Fourth Amendment."[245]

A year later, the Court turned that dicta into holding in *United States v. Jacobsen*, a case that involved not canine sniffs but chemical drug tests.[246] In dismissing the defendant's Fourth Amendment challenge to a chemical test of a mailed package, Justice Stevens conceded that "sealed packages are in the general class of effects" protected by the Fourth Amendment, accessible by police only with a warrant.[247] Yet even as it concerned those protected objects, he concluded, a test "that merely discloses whether or not a particular substance is cocaine" does not trigger the Fourth Amendment.[248] In light of Congress's clear judgment, reflected in the nation's numerous narcotics laws, that any "interest in 'privately' possessing cocaine [i]s illegitimate," an individual simply had no reasonable expectation of privacy in his possession of illicit drugs.[249] *Jacobsen* thus conflated an individual's lack of a legitimate interest in possessing materials under the criminal law with a lack of legitimate interest in the privacy of those materials under the Fourth Amendment.

Justices Brennan and Marshall protested this "startling" vision of Fourth Amendment rights, based on "the nature of the information . . . rather than

240 *See* United States v. Ross, 456 U.S. 798, 822 (1982).
241 Hoffa v. United States, 385 U.S. 293, 301 (1966).
242 462 U.S. 696.
243 *Id.* at 699-700.
244 *Id.* at 709.
245 *Id.* at 707.
246 466 U.S. 109, 111-12 (1984).
247 *Id.* at 114.
248 *Id.* at 123.
249 *Id.*

on the context in which . . . [it] is concealed."[250] While agreeing that tests disclosing only the presence of contraband are "less intrusive" than many other invasions, Justice Brennan cautioned that such selective investigative techniques may nevertheless intrude on spaces guarded by the Fourth Amendment.[251] By the majority's reasoning, after all, even a drug test revealing narcotics inside a home—that most sacred of all Fourth Amendment settings—would steer clear of constitutional challenge.[252]

In the proliferation of state challenges against canine drug sniffs following *Jacobsen*, most courts sided with the dissent. Adjudicating claims brought under the states' search-and-seizure provisions—commonly interpreted to align with their federal counterpart—the vast majority of courts have held that canine sniff tests qualify as searches, either in all cases[253] or at the very least when targeting privileged zones like the home.[254] While acknowledging the minimal invasiveness of dog sniffs, state courts typically incorporate that fact through other means, most typically by subjecting canine sniffs to the lowered standard of "reasonable suspicion" rather than a warrant requirement.[255] And even then, some courts set higher bars for what they see as uniquely invasive applications, such as dog sniffs targeting persons[256] or homes.[257]

Yet the Supreme Court has continued to expand its reasoning in *Jacobsen*. In 2005, the Court in *Illinois v. Caballes* confirmed that police may perform dog sniffs on an individual's car even absent suspicion that the driver is harboring contraband.[258] Because "any interest in possessing contraband cannot be deemed 'legitimate,'" it repeated, "governmental conduct that *only* reveals the possession of contraband" implicates "no legitimate privacy interest."[259] The Court expressly distinguished canine drug tests from the thermal imaging device involved in *Kyllo*. In that case, Justice Scalia had refused to tie Fourth Amendment protections to the "intimate" nature of the data revealed, noting as an aside that intimacy also provided a poor proxy for

250 *Id.* at 137 (Brennan, J., dissenting).

251 *Id.* at 137-38.

252 *Id.* at 138.

253 *E.g.*, Pooley v. State, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985); State v. Pellicci, 580 A.2d 710, 716 (N.H. 1990); Commonwealth v. Rogers, 849 A.2d 1185, 1190 (Pa. 2004). *But see* State v. Waz, 692 A.2d 1217, 1223 (Conn. 1997) (collecting cases holding that canine sniffs in airports are not searches under state constitutions).

254 *E.g.*, State v. Davis, 732 N.W.2d 173, 181-82 (Minn. 2007); People v. Dunn, 564 N.E.2d 1054, 1057-58 (N.Y. 1990); *cf.* State v. Ortiz, 600 N.W.2d 805, 823 (Neb. 1999) (holding that a canine sniff of a home is a "search" under both the state and federal constitutions).

255 *See* Fitzgerald v. State, 864 A.2d 1006, 1022 (Md. 2004) (collecting cases).

256 Commonwealth v. Martin, 626 A.2d 556, 560 (Pa. 1993) (requiring probable cause instead of Pennsylvania's general reasonable suspicion requirement).

257 State v. Dearman, 962 P.2d 850, 853-54 (Wash. Ct. App. 1998) (requiring a warrant).

258 543 U.S. 405, 408-09.

259 *Id.* at 408.

the sophistication of police techniques: a primitive scanner could reveal such details as the "hour [of] night the lady of the house takes her daily sauna and bath" while more advanced devices disclosed no more than a burning lightbulb.[260] In *Caballes*, the Court remembered *Kyllo* somewhat differently. The key to that decision, the majority now insisted, was not neutrality toward the information revealed, nor even the unique sanctity of the home, but "the fact that the device was capable of detecting lawful activity"—"intimate details" like the lady's sauna and bath.[261] By this reasoning, it did not matter that the officers in *Caballes*, as in *Kyllo*, used a rare investigative tool to reveal information that "could not otherwise have been obtained without physical" intrusion.[262] Due to the uniquely unworthy nature of that information, even a traditionally protected space raised no reasonable expectation of privacy.

That same reasoning appears to extend even to the inviolable boundaries of the home. In *Florida v. Jardines*, an unusual coalition of the Court upheld the suppression of evidence obtained through a preliminary dog sniff on a suspect's porch.[263] Justices Kagan, Ginsburg, and Sotomayor would have held that the dog sniff violated the defendant's reasonable expectations of privacy under *Kyllo*,[264] but they could not get two more votes. Instead, the three signed on to an opinion by Justice Scalia that resolved the case purely on trespass grounds: the fact that the police physically entered the defendant's curtilage.[265] The remaining Justices objected that the officers' actions on Jardines's porch were neither a trespass *nor*, per *Caballes*, a violation of any reasonable privacy interests.[266] Even within the home, in short, six justices declined to recognize a reasonable expectation of privacy in the possession of drugs, and four explicitly denied that claim.

Throughout the Court's dog-sniff and drug-test cases, of course, the explicit distinction has been between "contraband" and "non-contraband"—between differing legal rather than moral statuses. Yet there is reason to doubt that such cases revolve purely on that technical distinction. First, it is difficult to disaggregate criminal prohibitions against the private possession of narcotics from quintessential moral judgments, aimed at policing lifestyles rather than protecting public welfare.[267] The history of many such laws, including the

260 Kyllo v. United States, 533 U.S. 27, 38-39 (2001). The *Kyllo* majority rejected the dissent's objection that technology identifying "criminal conduct and nothing else" is not a search. *Id.* at 48 (Stevens, J., dissenting).

261 *Caballes*, 543 U.S. at 409-10 (citing *Kyllo*, 533 U.S. at 38).

262 *Kyllo*, 533 U.S. at 34.

263 569 U.S. 1 (2013).

264 *Id.* at 14-15 (Kagan, J., concurring).

265 *Id.* at 6-9 (majority opinion). Characteristically, Justice Scalia avoided any romantic definitions of curtilage based on "intimate activity," relying instead on its proximity to the home. *Id.* at 6-7.

266 *Id.* at 21-24 (Alito, J., dissenting).

267 *See* Michèle Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations*, 78 UMKC L. REV. 101, 113-14 (2009) ("More than the fear of actual physical

contemporary trends toward decriminalizing marijuana, as well as the nation's short-lived experiment with Prohibition, confirms their tendencies to stand in for the shifting tides of moral opinion.[268]

More to the point, it is difficult to conceive of the Court applying its reasoning in *Jacobsen* to numerous other criminal prohibitions. The possibility is far from fanciful, but take for the time being a thought experiment drawn from the Court's existing cases: Imagine that the police prior to *Griswold* had obtained a radar that scanned neighborhoods and informed them, with perfect accuracy and precision, when a married couple was engaging—or agreeing to engage—in sexual intercourse involving contraceptives.[269] Or that the police prior to *Lawrence* obtained the same device for same-sex sodomy. The radar reveals no other information about the home, nor further details of the intercourse; the data disclosed, in short, is coextensive with the fact of a criminal violation. (Or, to the extent that it does reveal something additional—not just that the couple is violating the law, but also where and when—that surplus knowledge is entirely consistent with *Jacobsen* and *Caballes*.)

Would the Court, in either its current composition or any other, be prepared to say that the radar has not violated a reasonable expectation of privacy? In *Griswold*, the Court concluded that the sacred "privacy" of marital relations prevented the police from investigating a couple's sexual acts even armed with a warrant.[270] Would the Court now hold that police officers who obtain information about a couple's sexual acts in their home *absent a warrant* do not engage in any "search" so long as they learn nothing but the fact (and setting and timing) of the encounter itself?[271]

It may be tempting to reject the premise that such a device reveals "only" the fact of criminality. Defenders of the binary search, after all, emphasize the limited nature of the information disclosed: nothing, they insist, but

damages . . . our obstinacy in [criminalizing drug possession] . . . seems to stem from moral justifications."); Sherryl E. Michaelson, Note, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, 397 (1984) ("Drug laws are often considered a form of morality legislation.").

268 *See also* Albert DiChiara & Jon F. Galliher, *Dissonance and Contradictions in the Origins of Marihuana Decriminalization*, 28 LAW & SOC'Y REV. 41, 44-45 (1994); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 754 (2002) ("As was true at the height of the Temperance Movement, morality has won out over privacy and autonomy in society's current drug war.").

269 *Cf.* Loewy, *supra* note 76, at 1244 (imagining a device that guides police solely to evidence of wrongdoing).

270 *See* Bowers v. Hardwick, 478 U.S. 186, 213 n.7 (1986) (Blackmun, J., dissenting) (identifying as "[o]ne of the reasons" for *Griswold* "the possibility, and repugnancy, of permitting [even warranted] searches to obtain evidence regarding the use of contraceptives").

271 *See* United States v. Kyllo, 140 F.3d 1249, 1254 (9th Cir. 1998) (emphasizing the presumption that sexual activities "take place in private absent a valid warrant legitimizing their observation"), *superseded by* 190 F.3d 1041 (1991), *and rev'd*, 533 U.S. 27 (2001); Cloud, *supra* note 25, at 255 (suggesting that, per Court precedent, *Oliver* might have come out differently if it involved not drugs but "sexual behavior in some open field").

criminal guilt.[272] The mere knowledge that a couple is engaging in contracepted intercourse or same-sex sodomy may seem to open a deeper window into their household, including the fact of their active sexual life, their sexual or romantic preferences, their desire (or lack thereof) for a child. The fact of criminality here touches on more profound components of domestic and sexual life, recognized by the Court to have deep social value.

If the possession of illegal drugs in *Jacobsen* or *Caballes* does not seem to open a similarly sensitive window, however, it is only because we do not consider the possession of drugs an equally valuable or meaningful life choice. Like these other searches, binary drug tests reveal a swath of subsidiary information about the target: what type of narcotics the defendant prefers, where and when he carries them, how he transports them. Any distinction between the scenarios above and *Caballes* essentially comes down to a subjective judgment about the centrality of narcotics to personal identity and fulfillment.[273] Far from simply respecting the formalities of the criminal code, in short, the Court's exemption of "contraband" from the Fourth Amendment reflects the intrinsic valuelessness of the criminalized activity: the Court's assumption that drugs, unlike more intimate conduct, implicate no zone of human existence worth protecting.

* * *

The debate over morality in the Court's constitutional privacy cases, a pervasive theme since the 1960s, may thus not be pervasive enough. In addition to substantive doctrines like due process privacy, the Fourth Amendment—that ostensibly procedural limit on state action—has commonly defined the contours of personal privacy rights around the value of an individual's conduct.

---

272 *See* David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment*, 69 TEMP. L. REV. 1, 43 n.240 (1996) (describing correspondence with Christopher Slobogin suggesting that a device revealing "only contraband" would not constitute a search); Kenneth J. Melilli, *Dog Sniffs, Technology, and the Mythical Constitutional Right to Criminal Privacy*, 41 HASTINGS CONST. L.Q. 357, 376-77 (2014) (noting that the "drug dog simply indicates a 'yes or no' to the question of the presence of illegal drugs"); Lawrence Rosenthal, *Binary Searches and the Central Meaning of the Fourth Amendment*, 22 WM. & MARY BILL RTS. J. 881, 920 (2014) (arguing that the rationale for protecting privacy "loses its force precisely because binary searches disclose no more than the presence of absence of contraband"); *see also* Simmons, *supra* note 79, at 1348 (defining "binary" searches as those "designed in such a way that the only result of the investigation is information about whether contraband or illegal activity is present").

273 Some commentators have thus characterized binary searches not as revealing no "legitimate" data, but rather as "compromis[ing] no interest of law-abiders." Rosenthal, *supra* note 272, at 929; *see also* Harris, *supra* note 272, at 43 n.240 (noting LaFave's argument that binary searches do not intrude on the "innocent," but "have negative consequences only for those" violating a particular prohibition). This reasoning essentially isolates lawbreakers into a separate category of constitutional subjects, categorically entitled to less privacy from the state—akin to the "innocence theory" endorsed by some but never recognized as reflecting Fourth Amendment doctrine. *See, e.g.*, Colb, *supra* note 9, at 1476-85 (proposing that the Fourth Amendment should be "concerned exclusively with protecting the innocent from invasions of privacy"). *See generally* Loewy, *supra* note 76.

From its assessment of "reasonableness" on the basis of the activities housed at a given site, to its identification of "intimacy" as the core value sheltered by the Fourth Amendment, to its explicitly retrospective frameworks surrounding aerial surveillance, home visitors, and drug tests, the Court has repeatedly tied Fourth Amendment privacy rights to the social worth of an individual's actions—not simply the legality but the *morality* of her acts.

This moralistic analysis upends prevailing accounts of the Fourth Amendment as a provision tending solely to the circumstances, not the fruit, of a police intrusion. Far from remaining blind to a defendant's conduct, the Fourth Amendment frequently allots privacy rights by examining the activities involved in any case. And it appraises those activities not by privileging uniquely "private" information, but on the basis of distinctly communitarian judgments about personal and social flourishing—favoring domestic or interpersonal arrangements that are "intimate,"[274] "meaningful,"[275] or otherwise "recognized as valuable by society."[276] The Fourth Amendment's normative commitments, by this view, are not simply a matter of deciding what type of state we want our neighbors to live in. They are a matter of deciding what types of lives we want our neighbors to live.

Scholars in recent years have critiqued the broad enterprise of individual "rights," from property to religious liberty to international human rights, as an ostensibly liberal project that in fact bleeds into a form of social ordering. Individual rights, they argue, frequently endorse desired social arrangements and cultural practices,[277] entrenching dominant economic regimes[278] or imposing prevailing (commonly Christian) views of moral order.[279]

The Court's *Katz* analysis over the past decades furthers that account, demonstrating the regulatory potential of even provisions formally aimed at erecting purely procedural limits on state power—those we would most expect to function as traditional negative liberties free from substantive coercion. In the aftermath of the Court's individualistic reasoning in *Roe*, philosopher Michael Sandel warned that the Court's constitutional privacy jurisprudence was coming to embody a "procedural republic," privileging

274 Oliver v. United States, 466 U.S. 170, 180 (1984).

275 Minnesota v. Carter, 525 U.S. 83, 101 (1998) (Kennedy, J., concurring).

276 Minnesota v. Olson, 495 U.S. 91, 98 (1990).

277 *See* COSTAS DOUZINAS, HUMAN RIGHTS AND EMPIRE (2007); SAMUEL MOYN, CHRISTIAN HUMAN RIGHTS 8-13 (2015) (arguing that "human rights" naturalize dominant socioeconomic and political structures); *see also* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1379-80 (1984) (arguing that any specification of rights entails a choice of social order).

278 *See* Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, *in* THE POLITICS OF LAW, 645, 645-59 (David Kairys ed., 1998) (reviewing literature examining how rights-based protections reinforce capitalist markets).

279 *See* MOYN, *supra* note 277, at 8-12 (arguing that human rights regimes impose Christian values); Saba Mahmood & Peter G. Danchin, *Politics of Religious Freedom*, 113 S. ATLANTIC Q. 1, 4-7 (2014) (reviewing scholarship).

pluralism, moral relativity, and individualism over substantive virtue.[280] The history of Fourth Amendment privacy suggests that the Court is not capable of erecting a procedural republic even in a purely procedural amendment.

IV. AGAINST FOURTH AMENDMENT MORALISM

What should we make of the Court's moralistic approach to reasonable expectations of privacy since *Katz*?

The moral reasoning in the Court's due process privacy jurisprudence has inspired generations of debate.[281] Some scholars denounce that trend, insisting that any "fundamental" rights recognized under an essentially antimajoritarian Constitution must be free from the contours of communitarian approval.[282] Others suggest that the controversial nature of substantive due process, as an unenumerated limit on state power, requires judges to legitimate that doctrine through appeals to prevailing social norms.[283] Others conclude the doctrine inevitably comes down to the court's subjective policy preferences, and so is intrinsically illegitimate.[284]

In practice if not in theory, however, scholars tend to agree that due process privacy requires some normative judgments about the activities involved. Since substantive liberties necessarily attach to particular acts, and since a less discriminating approach would undercut the states' established police powers, due process privacy forces the Court to consider and choose among the precise acts for

---

280 SANDEL, *supra* note 63, at 27-28; *see also id.* at 157.

281 The nonmoralistic zone of privacy announced in *Stanley* has engendered little controversy, comporting with the prevailing view of the First Amendment as safeguarding dissent from majoritarian tyranny. *See, e.g.*, Gey, *supra* note 37, at 1566 (arguing that the First Amendment protects deviant speech "for what it represents in the way of a basic rejection of the moral verities of society"); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982) (theorizing the First Amendment as protecting "self-realization" and "free will").

282 *See, e.g.*, DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 252-54 (1986); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 896 (1st ed. 1978); Rubenfeld, *supra* note 7, at 756; J. Harvie Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 611-13 (1977); *see also* Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1073-74 (1981) (reviewing scholarship).

283 *See, e.g.*, SANDEL, *supra* note 63, at 142; Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage*, 85 GEO. L.J. 1871, 1881, 1919 (1997); Neal Devins, *Reflections on Coercing Privacy*, 40 WM. & MARY L. REV. 795, 799 (1999); Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 932 (2006); Michael Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 726 (1976).

284 *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 273-74 (2d ed. 1997); ROBERT H. BORK, THE TEMPTING OF AMERICA 31-32 (1990); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125; Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 396 (1981); Safranek & Safranek, *supra* note 46, at 247. *See generally* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997).

which it is claimed.[285] The Court's frequent recourse to social approval for the conduct in question—protecting those privileges that are, most commonly, "rooted in the Nation's history and traditions"[286]—attempts to implement both inquiries while avoiding charges of simply enacting the Justices' own policy preferences.

Yet the Court's moralistic turn in its Fourth Amendment analysis is far less inevitable, and it demands greater skepticism. Far from advancing the Fourth Amendment's historic purposes, providing a useful tool in an otherwise vague constitutional framework, or even greasing its operation on the ground, the Court's allocation of Fourth Amendment rights based on moral judgments about the activities involved is deeply illsuited to the guarantee against unreasonable searches. That trend runs against our traditional heuristics in interpreting the Fourth Amendment, including its text, purpose, and practical function as a shield against oppressive police action. And it runs against any robust reading of privacy itself, upending prevailing views of that principle as a critical refuge from, rather than tool of, social scrutiny and expectation. The Court's consistent slippages into the jaws of moralistic reasoning, even in an amendment that seems most suited to a more formalistic and individualist analysis, reveal the very deep roots of the Court's communitarian commitments in constitutional analysis.

A. *Traditional Interpretive Principles*

Most basically, the Court's moralistic approach to the *Katz* reasonable expectations of privacy test conflicts with several traditional tools for interpreting the Fourth Amendment. It departs from any intuitive reading of the text. It clashes with the Amendment's well-documented history and commonly cited purpose.[287] And it obstructs the Fourth Amendment's practical operation in regulating police practices, often undercutting its deterrent effect against police misconduct and preempting its second-stage inquiry into the reasonableness of acknowledged searches.

---

285 *See, e.g.*, Rubenfeld, *supra* note 7, at 749 (arguing that substantive due process analysis requires the Court to assesses the relative significance of the valued conduct); *see also* Cohen, *supra* note 24, at 79; Safranek & Safranek, *supra* note 46, at 241; *cf.* Aaron J. Rappaport, *Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy*, 2001 UTAH L. REV. 441, 450 (noting the need for some "limiting principle").

286 *E.g.*, Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

287 Scholars have of course had their share of disagreements about how best to read the text and origins of the Fourth Amendment. *Compare* Donohue, *supra* note 130, at 1185 (arguing for an original warrant preference), *and* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) (same), *with* Amar, *supra* note 25, at 758 (reading history to require only the looser standard of reasonableness). As discussed below, the Court's moralistic approach departs even from points of relative consensus.

1. Text

First, and briefly, a model of privacy rights that extends greater constitutional protections to intimate or otherwise valued social activities is alien to the text of the Fourth Amendment. That Amendment announces the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"[288]—a guarantee agnostic to the nature of the materials involved, whether business records or diaries.[289] Unlike the Due Process Clause's promise of "liberty" against state deprivation—a broad term that requires some exegesis, especially when used to extrapolate unspecified rights from the Constitution—the Fourth Amendment sets a clear baseline of protections for certain items, including not only homes but also papers and effects.[290] A document or package once belonging to an individual may become sufficiently attenuated from him to cease qualifying as *his* paper or effect—as, for example, in the financial statements provided by customers to their banks in *Miller*.[291] But there is nothing in this guarantee that discriminates among enumerated items based on their intimacy or personal nature,[292] or that provides courts guidance on how such intimacy or personal value may be assessed.[293]

A theory of Fourth Amendment privacy that discriminates among objects based on moral value, in short, is simply a bad proxy for the textual guarantees of that Amendment. Unsurprisingly, the Court's moralistic approach has led to some textually counterintuitive results: an individual may expect more consistent Fourth Amendment protections in the contents of her telephone conversations than in the contents of her effects.[294]

2. Purpose and History

Second, the Court's moralistic emphasis on intimacy sits poorly with the Fourth Amendment's documented history and often-cited purpose in

---

288 U.S. CONST. amend. IV.

289 *E.g.*, Boyd v. United States, 116 U.S. 616, 625-26 (1886) (involving business records).

290 This is the case even though, as Professors Wasserstrom and Seidman point out, the terms "search" and "seizure" are "hardly self-defining." *See* Wasserstrom & Seidman, *supra* note 10, at 27.

291 *See* United States v. Miller, 425 U.S. 435, 440-42 (1976).

292 *See also* Florida v. Riley, 488 U.S. 445, 463 (1989) (Brennan, J., dissenting) ("Where in the Fourth Amendment or in our cases is there any warrant for imposing a requirement that the activity observed must be 'intimate' in order to be protected by the Constitution?"); United States v. Ross, 456 U.S. 798, 821-22 (1982); Robbins v. California, 453 U.S. 420, 426 (1981) (concluding that distinguishing between "personal" and "impersonal" items "has no basis in the language or meaning of the Fourth Amendment").

293 *See* Kyllo v. United States, 533 U.S. 27, 38-39 (2001) (noting the improvidence of "develop[ing] a jurisprudence specifying which home activities are 'intimate' and which are not").

294 *Compare* Katz v. United States, 389 U.S. 347, 352 (1967), *with* United States v. Jacobsen, 466 U.S. 109, 123 (1984).

prohibiting unreasonable searches. It is a truism of sorts that the central aim of the Fourth Amendment is to curb government abuses, regulating the terms on which the state may step into its citizens' lives.[295] The goal of this protection has typically been theorized as preserving personal and political independence: protecting individual thought, self-expression, and private life against the state. Far from simply insulating one's domestic life from interference, by this view, the Fourth Amendment protects a far broader realm of personal autonomy.

Historically, as discussed above, the Fourth Amendment's protections against unreasonable seizure were not seen as protecting anything so narrow as intimacy or domesticity.[296] They were envisioned as a broad bulwark of individual sovereignty, safeguarding an individual's personal property, commercial freedoms, and political beliefs. At the time of the Amendment's enactment, its primary concerns included commercial sites like warehouses and business fronts—as well as, quite centrally, papers, including business records, as uniquely precious windows into a man's secret thoughts.[297] Early understandings of the Fourth Amendment did not aim to protect a right of domesticity or intimate retreat from the state, and certainly not to encourage orthodox behaviors. They protected the individual's right to disagree with political and social orthodoxy.[298]

Echoing this history, scholars today consistently endorse a view of the Fourth Amendment as protecting the autonomy of the individual. The prohibition against unreasonable searches and seizures, by this view, safeguards not only domestic conduct but a far broader sphere of private life, including creative experimentation and unorthodox belief.[299] From David Sklansky to Jed

---

295 *See, e.g.*, Baude & Stern, *supra* note 117, at 1828 (identifying the "great evil toward which [the Fourth Amendment] is directed" as "abuse of government power"); Huq, *supra* note 75, at 144 (arguing the Fourth Amendment constrains the state by precluding prevailing political authorities from "consolidat[ing] state power absolutely"); Maclin, *supra* note 287, at 201 (defining the "central meaning of the Fourth Amendment" as a "distrust of police power and discretion"); Rubenfeld, *supra* note 19, at 119 (describing the Fourth Amendment's core function as "navigating the minefield between too much and too little police power").

296 While some have argued that early search-and-seizure protections excluded actual contraband, thus in some sense discriminating based on the value of the information revealed, *see* Amar, *supra* note 25, at 767, no one has suggested that they privileged intimacy.

297 *See* Cloud, *supra* note 138, at 573-81; Donohue, *supra* note 130, at 1185, 1219, 1316.

298 *See also* Dripps, *supra* note 132, at 61-66 (discussing searches for seditious libel); Huq, *supra* note 75, at 146-48 (defining the aim of Fourth Amendment as protecting political dissent); Stuntz, *supra* note 132, at 402-03 (noting that early protections against government searches privileged political dissidents). This is not to deny any historical precedent for weighing the morality of private conduct. As historians have noted, early critics of general warrants sometimes defended upper-class homes while remaining largely indifferent to poorer households, especially those associated with lowly conduct like gambling, hunting, and transience. *See* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1805-06 (2000) (reviewing scholarship on "[t]he elitism of eighteenth-century search-and-seizure law"). Yet today we recognize that uneven rhetoric as reflecting an insidious strain of classism—not a desirable principle of governance written into the Fourth Amendment.

299 *See, e.g.*, Cloud, *supra* note 25, at 295 ("The fourth amendment enacts a vision of the individual as an autonomous agent, empowered to act and believe and express himself free from government interference."); Michael W. Price, *Rethinking Privacy: Fourth Amendment "Papers" and the Third-Party*

Rubenfeld to Silas Wasserstrom and Louis Michael Seidman, scholars have argued that the zone of liberty charted by the Fourth Amendment protects an individual's right to retreat from the pressures of social convention: to cast off the demands of civic and public life and to attend to one's personal desires and fulfillment.[300] Whether designated as Rubenfeld's "right of security"[301] or Sklansky's zone of "refuge,"[302] the procedural limitation against police searches allows the individual some space where she may exist beyond the specter of public scrutiny.

The Court's moralistic preference for intimate activities as the Fourth Amendment's intended targets departs from this principle of self-sovereignty. In some cases, indeed, it threatens to entirely upend the Fourth Amendment's concern with political independence and dissent—per one suggestion, protecting individuals from government surveillance for our intimate or relational activities, but not our professional or political pursuits.[303] Rewarding individuals for engaging in conventionally valued acts and social arrangements, the rise of Fourth Amendment moralism betrays the Amendment's organizing concern with political and personal autonomy.

3. Function

Finally, there is the pragmatic question of how the Fourth Amendment operates in practice, both on the street and in the courtroom. The Court's trend of appraising Fourth Amendment protections based on the moral value of an individual's conduct poorly serves the internal logic of the guarantee against "unreasonable" police searches, undercutting any deterrent effect against police misconduct and precluding the possibility of productive gradation in the Court's assessments of police tactics in different circumstances.

First, to the extent that the Court's moralistic approach ties Fourth Amendment protections to information discovered only after a police intrusion, it fails to meaningfully deter improper searches by the state. By harnessing the ultimate constitutionality of an investigation to information discovered only after the search, that approach encourages reckless police tactics, rewarding

Doctrine, 8 J. NAT'L SECURITY L. & POL'Y 247, 257-58, 268-69 (2016) ("[A] paramount purpose of the Fourth Amendment was to serve as a guardian of individual liberty and free expression."); Neil M. Richards, *The Information Privacy Law Policy*, 94 GEO. L.J. 1087, 1118-19 (2006); Strandburg, *supra* note 129, at 659; *cf*. Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1152-53 (2002) (arguing that Fourth Amendment privacy extends past intimacy).

300 Sklansky, *supra* note 19, at 1113-15; Rubenfeld, *supra* note 19, at 127-31; Wasserstrom & Seidman, *supra* note 10, at 110; *see also* Laurent Sacharoff, *The Binary Search Doctrine*, 42 HOFSTRA L. REV. 1139, 1139-40 (2014) (articulating Fourth Amendment privacy as "a person's right to solitude or seclusion"); *cf.* Michael Adler, Note, *Cyberspace, General Searches, and Digital Contraband*, 105 YALE L.J. 1093, 1111-12 (1996).

301 Rubenfeld, *supra* note 19, at 128.

302 Sklansky, *supra* note 19, at 1113.

303 *See* Ferguson, *supra* note 79, at 1336 (proposing a theory of "personal curtilage" that would not protect against "[s]urveillance of professional, political, or overtly public activities").

agents who take their chances that the information they uncover during a search will vindicate them after the fact.[304] This risk is especially acute considering that those activities that decrease Fourth Amendment protections—business meetings rather than social ones, impersonal hobbies rather than intimate relations—are, not coincidentally, most likely to overlap with criminal conduct and thus to aid the police. Retroactively immunizing a broad swath of police activities, even when they implicate entirely law-abiding citizens, the Court's moralistic approach undercuts any deterrence against police misconduct.

There is of course a countervailing consideration fueling the Court's moralistic analysis. Having established an exclusionary rule against the use of illicitly obtained evidence, the Court has since tempered the "substantial social costs" of that penalty through a number of doctrinal wrinkles aimed at redeeming questionable evidence.[305] Distinguishing an individual's privacy rights based on the social value of her conduct provides another such wrinkle, preserving evidence obtained through ambiguous investigatory tactics in at least some cases likely to overlap with criminal activity. It is no coincidence that the Court's moralistic approach has emerged most commonly in its analyses of novel technologies, like thermal imaging, that both expand the state's investigative capacities and raise novel questions about the limits of police power. Discriminating among more and less deserving categories of private conduct allows the Court to rein in the police's use of such intrusive tactics without entirely depriving them of useful investigative advances.[306]

Yet the entire rationale behind the exclusionary rule is that this harsh penalty is critical to protecting Fourth Amendment rights. As the Court has grudgingly concluded, because less drastic remedies fail to systematically compel police compliance, the only way to deter violations of the Fourth

304 *See* Minnesota v. Carter, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting) (warning that "Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior"); Kerr, *supra* note 15, at 535 (objecting that tying reasonableness to discovered facts provides insufficient guidance to police); *cf.* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2505 (1996) (noting the Fourth Amendment's standing requirement "limit[s] the scope of exclusion in ways that seem to run counter to the deterrence rationale offered for the [exclusionary] rule").

305 *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1897 (2014) (reviewing how the Court's frequent embrace of exceptions has largely undercut the exclusionary rule); *see also* Sherry F. Colb, *What Is A Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 121 (2002) (noting the "tempt[ation]" for courts to find no Fourth Amendment violation where the exclusionary rule would "suppress[] reliable, incriminating evidence").

306 Scholars who adopt the emphasis on intimacy also tend to do so in discussing novel technologies. *See, e.g.*, Monu Bedi, *Facebook and Interpersonal Privacy: Why the Third Party Doctrine Should Not Apply*, 54 B.C. L. REV. 1, 50-63 (2013) (discussing communications through Facebook); Ferguson, *supra* note 79, at 1336 (discussing panvasive video surveillance).

Amendment is through the exclusion of evidence.[307] If we accept the Court's reasoning that exclusion is necessary to deter unconstitutional police action[308]—or, at the very least, accept that it is now part of our Fourth Amendment doctrine for that purpose[309]—we should question the Court's attempts to limit the negative externalities of the exclusionary rule through substantive holdings that undermine not only its own operation, but also any systemic guidance to police officers about the legality of their investigations.[310]

Beyond the problem of deterrence, the Court's moralistic approach raises a second, more pervasive concern. By placing broad swaths of police tactics beyond the definition of a "search," and thus beyond judicial oversight, that approach prevents judges from drawing more nuanced gradations about which searches qualify as "reasonable." The Fourth Amendment, after all, does not shield individuals against all police searches; it targets only "unreasonable searches and seizures."[311] The permissibility of any given tactic thus involves two separate questions: first, whether the police action qualifies as a search, and second, whether that search is reasonable under the circumstances.[312] That second inquiry often involves a complex balancing of social equities, weighing "the degree to which [the search] intrudes upon an individual's privacy" against its significance to "the promotion of legitimate governmental interests."[313] It is in this second step, measuring an individual's relative privacy interests against the value of the investigation, that scholars have traditionally embraced some normative ranking of the activities likely to be revealed.[314]

In practice, this second inquiry often means that the outcome of a particular case will be the same whether or not a court recognizes the police tactic as a "search." The same intuitions that lead courts to exclude certain intrusions from the definition of a search—that such intrusions are minimally invasive, or that they fail to implicate any truly significant private conduct—also guide courts in setting

---

307 *See* Mapp v. Ohio, 367 U.S. 643, 651-53 (1961) (dismissing other remedies as "worthless and futile"); *see also* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 780-81 (1989) (discussing the Court's inevitable reliance on exclusionary remedies).

308 Even critics who theoretically support limiting the Fourth Amendment's privacy protections to the innocent concede that the exclusionary rule in criminal cases is necessary to safeguard that right. *See* Colb, *supra* note 9, at 1521; Loewy, *supra* note 76, at 1264-65.

309 The exclusionary rule has always had its share of critics, who question both its effectiveness and necessity. *See* Gary S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065, 1065 (1982) (reviewing critiques).

310 Ex ante deterrence is of course less relevant in cases involving binary searches, which search only for disprivileged information, as well as some digital search technologies.

311 U.S. CONST. amend. IV.

312 *See* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 618-19 (1989).

313 Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

314 *See, e.g.*, ABA STANDARDS, *supra* note 77, at 19-20; SLOBOGIN, *supra* note 77; Selbst, *supra* note 77, at 685-68. *But see* Huq, *supra* note 75, at 109 ("[T]he reasonableness of a search does not depend on its object or what it happens to discover but rather on the *manner* in which the government behaves.").

the appropriate procedures necessary to render the intrusions "reasonable." In many cases, the determination that a police tactic is a "search" leads to a general warrant requirement.[315] But in others, courts can demand significantly lower thresholds of suspicion, excusing the lack of an actual warrant, requiring reasonable suspicion rather than probable cause, or even finding the police's techniques per se reasonable based on the broader circumstances at play.[316]

Deferring any moralistic inquiry until this second step does significant doctrinal work, allowing courts precision and nuance in how they handle police tactics. In the case of drug-sniffing dogs, for example, state courts that extend Fourth Amendment protections commonly impose different standards of reasonableness in different situations, demanding probable cause for sniffs targeting homes or persons[317] but only "reasonable suspicion" for automobiles,[318] or assuming per se reasonableness for dog sniffs of luggage at airports.[319] Such variation frees the police to use novel technologies where the public interest is especially high—for example, in locations with high criminal activity or risk of escape—while preserving stricter protections in circumstances posing lesser public risk or greater offense to the suspect.

The Court's moralistic approach obviates this second reasonableness inquiry. Rather than allowing gradation in the levels of suspicion demanded of the police, it creates a flat rule carving out certain police tactics from judicial oversight altogether. It thus deprives the courts of a chance to assess the reasonableness of even broad categories of police investigations, or to recognize that different applications might warrant different findings of reasonableness. And it does so largely to protect police practices that could be salvaged regardless—exacting a high cost to individual privacy for only a minimal gain for the police.

* * *

The Supreme Court's moralistic definition of a Fourth Amendment "search" since *Katz*, in short, finds little support in the core heuristics of the Fourth Amendment. That approach is hard to square with the Amendment's enumeration of protected objects. It belies its original concern with

315 *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (noting that the "reasonableness" of a Fourth Amendment search "generally requires the obtaining of a judicial warrant").

316 *See, e.g.*, *Skinner*, 489 U.S. at 619.

317 Commonwealth v. Rogers, 849 A.2d 1185, 1190-91 (Pa. 2004) (person); State v. Dearman, 962 P.2d 850, 853 (Wash. Ct. App. 1998) (home).

318 People v. Cox, 739 N.E.2d 1066, 1070 (Ill. App. Ct. 2000); State v. Pellicci, 580 A.2d 710, 716-17 (N.H. 1990); *cf.* Commonwealth v. Johnston, 530 A.2d 74, 79 (Pa. 1987) (imposing a reasonable suspicion standard for searching a storage facility).

319 *See* State v. Morrison, 500 N.W.2d 547, 554 (Neb. 1993) (finding a canine sniff at airport did not constitute a search); State v. Pellicci, 580 A.2d 710, 715-16 (N.H. 1990) (collecting cases).

intellectual and personal autonomy. And it poorly serves the Fourth Amendment's practical operation as a check on unreasonable police tactics.

B. *The Value of Privacy*

Of course, one may not feel bound by the history or even the text of the Fourth Amendment. The Supreme Court's opinion in *Katz*, after all, formally recentered search-and-seizure doctrine around the notion of "privacy," a concept long prized by the Fourth Amendment as "one of the unique values of our civilization."[320] What might we learn from the concept of privacy itself?

As philosophers, anthropologists, and legal scholars have long acknowledged, privacy is notoriously difficult to define.[321] Over the past decades, scholars have offered dozens of competing definitions, ranging from Justice Brandeis's broad "right to be let alone"[322] to Tom Gerety's more specific prerogative of "control over the intimacies of personal identity."[323] The ongoing debate has led some to conclude that privacy is simply irreducible to a single definition.[324] It may thus be more illuminating to focus not on where privacy begins and ends, but rather on what it *does*: what function privacy serves in society that entitles it to social and legal solicitude.

With few exceptions, scholars tend to agree that privacy derives its worth not as an intrinsic value but due to the other values it supports.[325] Those values tend to cluster around five categories: mental wellbeing, intimacy or interpersonal relationships, autonomy, personhood, and dignity.[326]

---

320 McDonald v. United States, 335 U.S. 451, 453 (1948); *see also* Schmerber v. California, 384 U.S. 757, 767 (1966) (describing privacy protections as "basic to a free society"); Boyd v. United States, 116 U.S. 616, 630 (1886).

321 *See* Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.–C.L. L. REV. 233, 236 (1977); Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 34 (1967); John M. Roberts & Thomas Gregor, *Privacy: A Cultural View*, *in* PRIVACY & PERSONALITY 199, 199 (J. Roland Pennock & John W. Chapman eds., 1971); Arthur Schafer, *Privacy: A Philosophical Overview*, *in* ASPECTS OF PRIVACY LAW 1, 4 (Dale Gibson ed., 1980); Sklansky, *supra* note 19, at 1076-85; Solove, *supra* note 299, at 1088; Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975).

322 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

323 Gerety, *supra* note 321, at 236. For a range of additional definitions, see generally ALAN F. WESTIN, PRIVACY AND FREEDOM (1967); Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980); Gross, *supra* note 321, at 36; Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

324 *See* David E. Pozen, *Privacy–Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 225-27 (2016); Solove, *supra* note 299, at 1090 (arguing that we should stop defining privacy "in terms of necessary and sufficient" characteristics and proposing a broader taxonomy).

325 *See, e.g.*, H. J. McCloskey, *Privacy and the Right to Privacy*, 55 PHIL. 17, 31 (1980) ("[I]n so far as there is a right to privacy, it is a derivative right, derived from concern for other values and rights . . . .").

326 Some have suggested antitotalitarianism as an additional defense, *see* Rubenfeld, *supra* note 7, but this theory largely reduces to the personhood-based approach. *See, e.g.*, Gormley, *supra* note 2, at 1407 (arguing that an antitotalitarian approach cannot "escape eventual collapse into a form of personhood").

First, privacy is defended as a buttress for an individual's mental and psychological health.[327] In a world that perpetually besieges its inhabitants with demands on their time, behaviors, and beliefs, privacy invites us to "release [our] emotions [] and . . . relax from the pressure of social role playing."[328] It alleviates the anxious mind, assuring individuals that certain activities, habits, or information that they do not wish to share will remain unknown.[329] Privacy, as psychologist Sidney Jourard explains, provides a much-needed opportunity to "get away, to meditate, to experiment 'offstage' . . . , or simply to live daily life without the pressures . . . [of our] pathogenic life style." [330]

Second, privacy is commonly defended as a precondition for intimate friendships and other valuable relationships. Initially proposed by Charles Fried, this view suggests that the condition of privacy facilitates necessary gradients among our many social relations, allowing us to "reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world," and thus constitutes the very concept of "close" friendships through the possibility of deeper and shallower acquaintances.[331] And even beyond the case of intimate relationships, privacy allows us to maintain a full spectrum of social relations, compartmentalizing our differing personas in different settings and thus balancing the diverse spheres of our daily lives.[332]

Third, privacy is prized as the bedrock of individual autonomy, the key to an individual's emergence as a "unique and self-determining being."[333] By separating the individual from society—that perpetual system of public instructions, duties, and rewards—privacy encourages the individual to become both an independent actor and an independent moral thinker: one who acts not based on the threat of disapproval, but in accordance with his own personal

---

327 *See* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 738-39 (1999); Gavison, *supra* note 323, at 448-49; Melody Torbati, *The Right of Intimate Sexual Relations: Normative and Social Bases for According It "Fundamental Right" Status*, 70 S. CAL. L. REV. 1805, 1822-23 (1997).

328 Schafer, *supra* note 321, at 15.

329 WESTIN, *supra* note 323, at 33-34.

330 Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROBS. 307, 316 (1966).

331 JEFFREY ROSEN, THE UNWANTED GAZE 11 (2000) (describing privacy as "necessary for the formation of intimate relationships"); *see also* Judith Wagner DeCew, *Privacy*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 584, 585 (Andrei Marmor ed., 2012) (arguing that privacy "gives one the ability to determine one's distance from others"); Fried, *supra* note 323, at 483-86.

332 James Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFFS. 323, 326-31 (1975) (defining privacy as central to "our ability to create and maintain different sorts of social relationships with different people"); *see also* Richard Wasserstrom, *Privacy: Some Arguments and Assumptions*, *in* PHILOSOPHICAL LAW 148 (Richard Bronoaugh ed., 1978).

333 Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964); *see also* BEATE RÖSSLER, THE VALUE OF PRIVACY 17-18 (R. D. V. Glasgow trans., 2005); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 34 (1976).

values.[334] Privacy, in the words of Jeffrey Reiman, is the "social ritual by means of which an individual's moral title to his existence is conferred."[335] Only through that experience does the individual come into his own as an "autonomous and self-defining, rather than [a] socially imbedded" being.[336]

Fourth, and by far most common in the American tradition, privacy is valued as a precondition of *personhood*: the development of one's unique opinions, interests, preferences, and beliefs.[337] Privacy as personhood finds one of its seminal proponents in John Stuart Mill, who urged that human beings reach perfection "not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth."[338] Privacy provides a necessary space for such self-realization, inviting us to experiment with unorthodox ideas, tastes, and beliefs without fear of ridicule or judgment.[339] "Without privacy," psychologist Leontine Young has written, "there is no individuality," for who "know[s] what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings."[340] More than allowing the individual to realize that he exists beyond society, privacy allows him to define *who* he is: to unearth unique identity and personality.

Finally, privacy has been defended as a safeguard of human dignity. By this view, privacy derives its value by allowing individuals "to control [their] public image," shielding the public from displays of weakness, eccentricity, or vulnerability that would embarrass us or otherwise corrode our social standing.[341] It also fosters productive social interactions, hiding information

---

334 RICHARDS, *supra* note 282, at 243-44; Gavison, *supra* note 323, at 449-50 (arguing that "[a]utonomy requires the capacity to make an independent moral judgment").

335 Reiman, *supra* note 333, at 39 (emphasis removed).

336 Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2095 (2001).

337 *See* Cohen, *supra* note 24, at 78; Rubenfeld, *supra* note 7, at 753. Personhood and autonomy are interrelated, and the terms are sometimes used interchangeably by scholars. I define autonomy as the recognition of one's moral worth as an independent decisionmaker and personhood as the development of an individual's unique personality. I group scholars according to the substance of their definition, rather than their terminology.

338 JOHN STUART MILL, ON LIBERTY 109 (Edward Alexander ed., Broadview Literary Texts 1999) (1859).

339 *See* ROSEN, *supra* note 331, at 217 ("[I]ndividuals need refuge not merely from their families and colleagues but also from the overwhelming pressures toward social conformity."); WESTIN, *supra* note 323, at 34 (describing privacy as "vital to the development of individuality and consciousness of individual choice in life"); *see also* HELEN NISSENBAUM, PRIVACY IN CONTEXT 75 (2009); Bloustein, *supra* note 333, at 1003; C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 23-24 (1983); W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUBLIC AFFS. 269, 276 (1983). *But see* Sklansky, *supra* note 19, at 1097 (noting a lack of conclusive evidence that surveillance breeds conformity).

340 LEONTINE YOUNG, LIFE AMONG THE GIANTS 130 (1966).

341 James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161-62 (2004) (describing privacy as "a form of protection of a right to respect and personal dignity"); *see also* FERDINAND DAVID SCHOEMAN, PRIVACY AND SOCIAL FREEDOM 17 (1992) ("[P]rivacy norms express respect for human dignity by protecting us from public association with the beastly, the unclean."); TRIBE, *supra* note 282, at 888 (arguing that privacy allows one "to be master of the identity one creates in

that would harm our reputation or has no legitimate bearing on our public identity.[342] The dignitary theory is more widely embraced in Europe than in the United States, but it has some intuitive applications here as well.[343] One may speak, for example, of seeking "privacy" to change one's clothes, or of granting "privacy" to a bereaved family in its time of grief.[344]

These discrete value-functions of privacy are deeply socially embedded. From intimacy to autonomy to personhood, defenses of privacy come down to particular views of human flourishing: value-laden theories about how individuals should act or find fulfillment.[345] Accordingly, privacy has sometimes been defended precisely as a tool of social norms, situating individuals in a network of prescribed identities.[346] The dignitary view, for example, envisions the individual as defined by her role in the public order; privacy allows her to fulfill extrinsic expectations.[347] Similarly, privacy as a precondition for personal relationships bolsters the individual's ability to embody social expectation, authentically performing a variety of social roles.[348] Even privacy as the bedrock of intimate relationships may be valued to the extent that it buttresses pre-approved arrangements: relationships of love, trust, and friendship that society deems uniquely valuable. Consistent with this approach, philosopher Michael Sandel has lauded substantive due process cases like *Lawrence* for demarcating privacy rights around the social merits of the intimacy conduct at issue.[349]

The prevailing view, however, tends to resist valorizing privacy as a servant of social convention. As Silas Wasserstrom and Louis Michael Seidman object, viewing privacy as a facilitator of public norms "seriously distort[s] the meaning

---

the world"); WESTIN, *supra* note 323, at 36; Post, *supra* note 334, at 2092 (noting that an "invasion of privacy can constitute an intrinsic offense against dignity"). Although Edward Bloustein is commonly associated with a dignity-based view due to his article, *Privacy as an Aspect of Human Dignity*, *supra* note 333, his argument falls closer to the personhood-based defense. *See supra* text accompanying note 333.

342 *See* Rachels, *supra* note 332, at 331.

343 *See* Whitman, *supra* note 341, at 1160-63.

344 The dignitary defense also abuts on the zones of experimentation and relaxation discussed above, which allow individuals to hide private thoughts that do not fit their public image.

345 *See* Joseph Kupfer, *Privacy, Autonomy, and Self-Concept*, 24 AM. PHIL. Q. 81, 82 (1987) (noting that autonomy, as a goal animating privacy protections, depends on specific "social practices" and may not be a value shared by all societies); Rubenfeld, *supra* note 7, at 761 (noting that the personhood defense assumes "individualist understanding of human self-definition"); Schafer, *supra* note 321, at 13 (noting that "the specific content of [privacy] norms found in various societies differs widely"); W.L. Weinstein, *The Private and the Free*, *in* PRIVACY & PERSONALITY, *supra* note 321, at 27, 28 (stating that "spheres of the private exist . . . as parts of the community's ways of thought").

346 *See* SCHOEMAN, *supra* note 341, at 15 (conceptualizing privacy as protecting either self-expression or "behavior carried on in private [that] is rigidly defined by social norms").

347 *See* Post, *supra* note 336, at 2092-93 (noting that the dignitarian theory "presupposes persons who are socially embedded, whose identity and self-worth depend upon the performance of social norms"); *see also* Whitman, *supra* note 341, at 1161-62.

348 *See* SCHOEMAN, *supra* note 341, at 7 (arguing that privacy does not shield individuals from but rather compartmentalizes social pressures); Rachels, *supra* note 332, at 327-28, 331.

349 SANDEL, *supra* note 63, at 93-94.

most of us attach to privacy," not as a stepping stone toward but as a "refuge from the obligations of citizenship."[350] Privacy as a thing of value, by this account, does not facilitate an individual's performance of the roles demanded of him by society. To the contrary, it entails an *escape* from such normative social expectations: a sanctuary from the scrutiny and pressures of the public sphere.[351]

This morally neutral view is implicit, in some measure, in each of the five defenses. Privacy as a bridge toward personhood, for example, posits that the individual discovers her own preferences and beliefs by cultivating some sanctuary beyond the pull of social expectation. Privacy shields her "every need, thought, desire, fancy or gratification . . . [from] public scrutiny,"[352] and thus allows her to "define [herself] in contradistinction to the values of the society in which [she] happen[s] to live."[353] Similarly, privacy as the bedrock of autonomy affirms the individual's control over his own conduct and moral judgments,[354] constituting the individual as an independent moral actor outside the "coercive force" of his society—the type of self-direction that is the "very essence of morality."[355] Privacy as a precondition to mental wellbeing provides a respite from pressures of society: a temporary "relief" from "the variety of roles that life demands" of the individual.[356] The defense of privacy based on intimacy, while in one sense facilitating privileged relationships, also depends on the individual's ability to distance herself from social expectation, relaxing in front of trusted acquaintances without fear of judgment.[357] Even the dignitary view

350 Wasserstrom & Seidman, *supra* note 10, at 110; *see also* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 754 (1999) ("[P]rivacy means more than that others should let me alone to be the best darn African-American, Methodist, suburban wife and mother I can be. Privacy is also a matter of freedom to escape, reject, and modify such identities.").

351 *See, e.g.*, TRIBE, *supra* note 46, at 1302 ("[P]rivacy is nothing less than society's limiting principle."); Weinstein, *supra* note 345, at 54 (describing privacy as "opting out of society"); Clinton Rossiter, *The Pattern of Liberty*, *in* ASPECTS OF LIBERTY 15, 17 (Milton R. Konvitz & Clinton Rossiter eds., 1958) (characterizing privacy "as an attempt to secure autonomy . . . in defiance of all the pressures of modern society"); *cf.* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 96-102 (1987) ("Conceptually, the private is hermetic. It means that which is inaccessible to, unaccountable to, unconstructed by anything beyond itself.").

352 Bloustein, *supra* note 333, at 1003.

353 Rubenfeld, *supra* note 7, at 761; *see also* AMITAI ETZIONI, THE LIMITS OF PRIVACY 210 (1999) (noting that privacy allows men "to individuate without activating legal . . . or moral (communal) pressure—a respite from the social"); NISSENBAUM, *supra* note 339, at 75 (noting that privacy allows individuals to act without fear of "tangible and intangible reprisals, such as ridicule, loss of a job, or denial of benefits"); Arnold Simmel, *Privacy is Not an Isolated Freedom*, *in* PRIVACY, *supra* note 321, at 71, 82-83 (defining privacy as "territory that gets to be 'our own' in an uneasy truce between our selves and society").

354 Post, *supra* note 334, at 2095 (recognizing privacy as respecting individuals as autonomous beings free from social input and scrutiny); *see also* Fried, *supra* note 24, at 288.

355 J. Roland Pennock, *Introduction*, *in* PRIVACY & PERSONALITY, *supra* note 321, at xi, xii-xiii.

356 WESTIN, *supra* note 323, at 35; *see also* Jourard, *supra* note 330, at 308 (valuing privacy as a reprieve from an individual's obligations within "various social systems").

357 If privacy provides a fertile ground for intimate relationships, it is not through the intrinsic intimacy of seclusion but through the unique levels of trust that develop away from outside scrutiny. *See supra* notes 331–332 and accompanying text.

assumes that the individual should get some measure of reprieve from social norms: that she simply cannot always fulfill society's demands of her, and therefore should be able to indulge in weaknesses and foibles without scrutiny.[358]

The very project of valorizing a "right" to privacy, in short, assumes a highly liberal political theory.[359] Inherent in the conventional defenses of privacy as a value worth protecting is the significance of the individual's right to exit society, to take refuge in a space free from the scrutiny, pressures, and expectations of the world. Privacy is a zone where the individual exists and acts without the weight of scrutiny and judgment. It is a socially recognized space where individuals may exist outside social recognition.

And if, in a core sense, privacy is a retreat from social scrutiny, then it is intrinsically incompatible with a precondition of social approval for the actions for which privacy is sought.[360] Because the value of privacy derives from shielding the individual from the operations of public judgment—providing some zone to engage in even socially disdained activities—privacy must, if it means anything, encompass both activities that the community encourages and those that it rejects. Prized as an escape from the pressures of social expectations, privacy as a concept most of us would recognize stands at odds with an individual "right of privacy" tied to the normative value of the conduct it protects.

* * *

It is thus fairly difficult to find support for the moralistic strain that has pervaded the Court's assessments of "reasonable" privacy expectations since *Katz*. That moralistic approach is a poor proxy for the Fourth Amendment's text, conflicts with that Amendment's historic emphasis on personal and intellectual autonomy, and hinders its practical operation in regulating overbearing police action. Not least, that approach conflicts with any robust view of "privacy" itself, contravening the core value of privacy as a refuge from social judgment. Unlike the Court's normative analysis of due process privacy, an arguably inevitable trend that sustains the Due Process Clause's operation as a source of substantive rights, the Court's moralistic turn seems particularly illsuited to its Fourth Amendment analysis.

---

358 *See* Whitman, *supra* note 341, at 1161-62 (exploring privacy as a right to avoid public revelation of conduct that endangers "our public dignity").

359 *See also* RÖESSLER, *supra* note 333, at 10 (identifying respect for privacy as constitutive of a liberal order); Rubenfeld, *supra* note 7, at 761 (concluding that personhood theory assumes an "individualist understanding of human self-definition").

360 *See* Hickey, *supra* note 69, at 1006 (decrying a right of privacy that exists "only under the approving gaze of the judge" as "paradoxical," as it "requires observation and judgment of exactly what you want to hide from view"); *cf.* Colb, *supra* note 7, at 1646 (arguing that the right to privacy prevents the state not only "from incarcerating people for the exercise of their rights," but also "from observing their exercise").

V. BEYOND FOURTH AMENDMENT MORALISM

The rise of Fourth Amendment moralism challenges the familiar view of the Fourth Amendment as a purely procedural limitation on police conduct. More than simply regulating overbearing state action, the Fourth Amendment in the past decades has lent itself to a highly substantive approach to individual rights, recognizing and rewarding privileged categories of private conduct. Rubbing against the text, structure, and history of that provision, as well as against any robust view of "privacy" itself, this moralistic strain has consistently eroded the individual's protections against unreasonable searches.

The Court's moralistic approach is especially salient to a growing issue in Fourth Amendment doctrine: the digital search. As both our growing reliance on electronic communications and the advancing sophistication of digital search algorithms expand the scope and precision of police investigations, the Court's moralistic definition of a "search" threatens to throw a broad swath of personal data beyond Fourth Amendment oversight. The heightened risks posed by Fourth Amendment moralism in the digital age call for two immediate amendments to the reasonable expectations of privacy doctrine. First, the Court must renounce its emphasis on "intimacy," restoring a broader view of Fourth Amendment values as encompassing more individualistic and unorthodox private pursuits. Second, the Court must abandon the binary-search doctrine derived from cases like *Jacobsen* and *Caballes*, especially in light of the breadth of personal information that such searches can reveal in the digital age.

Ultimately, however, recognizing the persistent moralism of the *Katz* framework might be less salient to the project of rehabilitating Fourth Amendment privacy than of moving past it altogether. Over past decades, numerous critics have decried the conceptual and pragmatic limitations of "privacy" as a touchstone of Fourth Amendment analysis. Especially given the shifting cultural and technological norms surrounding private data, many urge replacing privacy with a doctrinal framework better suited to upholding individual autonomy, self-definition, and expressive freedom in the digital age. The Court's deeply moralistic assessment of Fourth Amendment rights supports this reformist project, demonstrating the extent to which *Katz*'s privacy-based framework has failed on its own terms. Yet by that same token, it also challenges the extent to which *Katz*'s limitations can be traced to privacy itself—and in that, the viability of the alternatives proposed by critics. Demonstrating the Court's resistance to vindicating liberal values of retreat and self-determination even in a Fourth Amendment framework deeply sympathetic to those principles, the Court's moralistic analysis suggests both the importance and the profound difficulty of reviving a liberal Fourth Amendment.

A. *Revisiting Fourth Amendment Doctrine*

The moralistic strain that has invaded the reasonable expectation of privacy inquiry calls for an urgent reassessment of several developments in the Court's Fourth Amendment jurisprudence since *Katz*. These developments include, most notably, the Court's emphasis on intimacy as that value that the Fourth Amendment is "intended to shelter," as well as the Court's demarcation of certain investigative tactics as purely binary searches revealing no legitimate facts about a defendant's private life.

These moralistic precedents are longstanding, having spent decades among the Court's Fourth Amendment caselaw without, one may argue, any catastrophic effects. Yet they demand particular attention today, in light of the shifting terrain of both digital communications and digital search technologies. The lives of Americans are lived increasingly on the web. We use email, text messaging, and social networking sites to make social plans, discuss politics and hobbies, and share personal details with intimates. We shop for major purchases and daily conveniences, read articles and books, and stream audio and visual entertainment. We meet romantic partners, forge friendships based on recreational interests, and play games with strangers. We have anonymous discussions about health, politics, religion, sex, and any number of controversial or embarrassing topics.

The third-party doctrine inherited from cases like *Miller* and *Smith*, suggesting that data shared with corporate entities cannot raise a reasonable expectation of privacy, has traditionally been seen to put digital communications beyond the Fourth Amendment.[361] Yet in recent years, the third-party doctrine has shown signs of erosion. At least one circuit court has held that individuals harbor a reasonable expectation of privacy in the content of their emails.[362] The Supreme Court, too, has demonstrated a growing sensitivity to the significance of personal information stored by cellphone companies and cloud storage providers.[363]

---

361 *See* United States v. Jones, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) (presuming, and critiquing, the applicability of the third-party doctrine to electronic communications in the digital age); *see also* Bambauer, *supra* note 163, at 212-14; Harris, *supra* note 163, at 898; Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 573 (2009); Solove, *supra* note 299, at 1085. *But see* Strandburg, *supra* note 129, at 622 (questioning the strength of third-party doctrine in the Court's recent jurisprudence). Instead, digital searches are regulated primarily by a set of federal statutes, which allow the police to obtain the content of many digital communications on far less than a warrant. For an overview, see generally Gabriel R. Schlabach, Note, *Privacy in the Cloud: The Mosaic Theory and the Stored Communications Act*, 67 STAN. L. REV. 677 (2015).

362 *See* United States v. Warshak, 631 F.3d 266, 285-86 (6th Cir. 2010).

363 *See* Riley v. California, 134 S. Ct. 2473, 2491 (2014); *see also* City of Ontario v. Quon, 560 U.S. 746, 759-60 (2010). The Supreme Court's grant of certiorari in *Carpenter v. United States*, 137 S. Ct. 2211 (2017), addressing whether individuals may have a reasonable expectation of privacy in their cell phone location data, confirms the Court's ongoing interest in this topic, although any decision in *Carpenter* is unlikely to resolve the many implications raised by Fourth Amendment moralism in the digital sphere.

The prospect of extending Fourth Amendment protections to electronic communications has been welcomed by many commentators, promising to align Fourth Amendment doctrine with a modern world that requires some threshold of data-sharing as the price of entry into public life.[364] Yet the novel possibilities of electronic data storage—and specifically of electronic searches—also promise to accelerate the Fourth Amendment's moralistic turn since *Katz*. The sophisticated, aggregative capacity of digital search software dramatically improves the state's ability to limit its investigations to preselected categories of information, blurring the line between searches likely to reveal privileged activities and those that do so in retrospect. And such technology expands the scope of the ostensibly sui generis binary-search doctrine,[365] handing the police a range of new investigative tools that reveal only—supposedly—the overt traces of crime.

The corrosive effects of Fourth Amendment moralism, especially in the digital age, call for at least two amendments to the Court's reasonable expectations of privacy doctrine.

1. Looking Past Intimacy

First, the Court must redress its recent and often deeply exclusionary emphasis on intimacy as the core target of Fourth Amendment protections.

Most basically, this move would require the Court to revisit those doctrines that invite judges to retrospectively analyze a defendant's conduct in a given case: the aerial surveillance cases, which urge stricter protections for "intimate" conduct than lowlier activities on one's curtilage, and *Carter*, which ties a guest's Fourth Amendment protections to the social nature of her visit.[366] These doctrines entail a fundamentally communitarian assessment of a defendant's private conduct, presuming that certain relationships or personal activities are simply worthier of procedural protections than others. And they have inspired the lower courts to restrict Fourth Amendment protections in often troubling ways. Prior to *Kyllo*, after all, lower courts applied curtilage cases like *Dow* and *Riley* to authorize thermal surveillance of the home, an intrusion later denounced by the Court itself.[367] Even since *Kyllo*, lower courts have continued to privilege "intimate" over

364 *See, e.g.*, Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens*, 72 GEO. WASH. L. REV. 1375, 1436 (2004); Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1592 (2004); Price, *supra* note 299, at 249. For comprehensive critiques, see also Bombauer, *supra* note 163, at 212-15, Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985, 992-996 (2016), Erin Murphy, *The Case Against the Case for Third-Party Doctrine*, 24 BERKELEY TECH. L.J. 1239, 1239 (2009), and Andrew E. Taslitz, *Cybersurveillance Without Restraint?*, 103 J. CRIM. L. & CRIMINOLOGY 839, 849-50 (2013). *But see* Kerr, *supra* note 361, at 564-65 (defending the third-party doctrine as providing predictability and clarity).

365 United States v. Place, 462 U.S. 696, 707 (1983).

366 *See* discussion *supra* Sections III.A–B.

367 *See supra* notes 198–201 and accompanying text.

lesser details in non-home settings,[368] or to deny Fourth Amendment protections for new police tools that reveal no "intimate" details.[369] In far stronger terms than it did in *Kyllo*, the Court must reject such moralistic discrimination, correcting its suggestion that a police "search" may depend on the intimacy of the data revealed.

More broadly, the Court should reconsider even those Fourth Amendment doctrines that prospectively value intimate spaces over sites housing more individualistic or unorthodox activities. The definition of curtilage espoused in *Dunn*, for example, attaches stronger Fourth Amendment protections to domestic or intimate uses of one's personal property than to more recreational or commercial pursuits.[370] *Dunn* involved a barn apparently used for chemical or scientific experimentation; that same analysis would seem to extend directly to, say, welding, wood cutting, or gardening.[371] Nothing in the Fourth Amendment's text, purpose, or history suggests such a selective view of valued conduct. Particularly within traditionally protected spaces, the Court must adopt a richer view of individual fulfillment, recognizing an individual's entitlement to privacy whether he chooses to use the property for marital embraces or less common recreational activities.

It is especially important to renounce such moralistic reasoning in the digital sphere. For despite some scholars' eagerness to bury the third-party doctrine wholesale,[372] courts are unlikely to extend full-fledged Fourth Amendment protections to all digital communications, opting instead for some limiting principle that would preserve the police's ability to use especially useful investigative technologies.[373] Scholars have proposed numerous such principles, from the voluntariness of a given disclosure[374] to the exclusivity of an online forum[375] to the individualized nature of the

368 *E.g.*, United States v. Parrilla, No. 13-360, 2014 WL 2111680, at *9 (S.D.N.Y. May 13, 2014) (allowing canine sniffs in "nonresidential commercial places").

369 *E.g.*, Kee v. City of Rowlett, 247 F.3d 206, 217 (5th Cir. 2001) (audio surveillance); People v. Stanley, 86 Cal. Rptr. 2d 89, 93 (Ct. App. 1999) (surveillance of electricity meter).

370 United States v. Dunn, 480 U.S. 294, 302-03 (1987).

371 *Id.*; *cf.* Florida v. Riley, 488 U.S. 445, 452 (1989) (distinguishing the cultivation of plants in a greenhouse from more "intimate" domestic activities); Oliver v. United States, 466 U.S. 170, 179 (1984) (discounting the "cultivation of crops").

372 *See* sources cited *supra* note 364.

373 *See* ABA STANDARDS, *supra* note 77, at 66 (predicting courts would not extend the warrant requirement to all third-party records since doing so would "unduly cripple law enforcement"); Solove, *supra* note 299, at 1089; *see also* Stephen E. Henderson, *Expectations of Privacy in Social Media*, 31 MISS. C. L. REV. 227, 238 (2012) (defending more selective protections).

374 *See, e.g.*, Murphy, *supra* note 364, at 1253 (suggesting a "heightened standard for what constitutes 'voluntary' disclosure of information held by third parties"); Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 331 (2008) (proposing protections for "inadvertent[]" disclosures).

375 *See, e.g.*, Saby Ghoshray, *Privacy Distortion Rationale for Reinterpreting the Third-Party Doctrine of the Fourth Amendment*, 13 FLA. COASTAL L. REV. 33, 67-68 (2011) (urging a distinction between data shared through more selective online channels and that posted to public forums); Henderson, *supra* note 373, at 238-40, 247; Issacharoff & Wirshba, *supra* note 361, at 1003-04; Strandburg, *supra* note 129, at 675.

data.[376] Some even suggest tying protections to the nature of the intercepted information—defining that swath of protection broadly, as encompassing not just intimacy but also individualistic values of self-expression, intellectual experimentation, and recreation.[377] Numerous justices on the Court have, indeed, revealed themselves sympathetic to this broad view.[378]

Yet the Court's Fourth Amendment precedent since *Katz* suggests a narrower approach: privileging electronic communications that touch on conventionally valued activities, most notably intimacy and interpersonal relationships. Cases like *Riley*, *Carter*, and *Dunn* would support extending constitutional protections to personal emails but not professional or commercial exchanges[379]; messages that advance social or romantic bonds but not more recreational pursuits[380]; communications within ongoing relationships but not more recent or short-lived acquaintances.[381]

As in the analog world, these distinctions would deny judicial protections to online spaces generally associated with less privileged communications—recognizing Fourth Amendment "searches" of dating sites, for example, but not gaming sites or fan boards. Yet the sophistication of digital technology means that the courts need not rely on such prospective or categorical rules, but may also look directly to the content of communications sought in any given case. Technologies in use today for analyzing and aggregating digital data could ascertain with significant accuracy the nature of any specific communication sought by the police: whether the parties to an exchange are family members or recent acquaintances; whether an email falls within a commercial or purely social transaction; whether a given conversation pertains to one's family, recreational interests, romantic plans, or professional partnerships.[382] Such technology blurs

376 *See* Slobogin, *supra* note 374, at 331, 337; Solove, *supra* note 299, at 1156 (suggesting that protections for data attached directly to the individual, rather than to broader aggregates or social groups).

377 *See* Price, *supra* note 299, at 249 (arguing that "papers" should encompass "expressive and associational data, regardless of its form, how it is created, or where it is located"); Richards, *supra* note 299, at 1118-19 (proposing that privacy protection ought to encompass any records of an individual's "private intellectual exploration"); Solove, *supra* note 299, at 1152-53; Strandburg, *supra* note 129, at 659-63. Echoing this broader view, the American Bar Association has urged solicitude for exchanges that implicate not only intimacy or socially valued acts, but also "freedom of speech" and data "likely to cause embarrassment or stigma." ABA STANDARDS, *supra* note 77, at 19-20.

378 *See* Riley v. California, 134 S. Ct. 2473, 2489 (2014) (noting the privacy implications of searching a cellphone, by which "[t]he sum of an individual's private life can be reconstructed"); City of Ontario v. Quon, 560 U.S. 746, 760 (2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."); *see also* United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

379 *Cf.* Minnesota v. Carter, 525 U.S. 83, 90-91 (1998).

380 *Cf.* United States v. Dunn, 480 U.S. 294, 302 (1987).

381 *Cf. Carter*, 525 U.S. at 91.

382 Any of these searches could be run by technology like Palantir, an algorithm currently used, among other things, to detect cyberfraud and terrorist cells operating on the Internet. *See Palantir Gotham*, PALANTIR (2018), http://www.palantir.com/palantir-gotham/ [https://perma.cc/F4TX-VZDW]. For

the difference between protecting certain spaces because they are *associated* with more valuable activities (and thus, as in *Katz*, preserving some Fourth Amendment rights regardless of actual conduct) and protecting individuals who *in fact* engage in more valuable activities (thus, as in *Carter*, tying Fourth Amendment rights directly to the implicated conduct). If, in the analog world, the direct impact of cases like *Carter* is limited by the reality that the police cannot know ahead of time what they will uncover,[383] the digital search eliminates that residual deterrent effect, freeing the police to collect vast amount of data with confidence that their actions lie outside constitutional scrutiny. The unprecedented capacity of electronic searches to collect and parse personal data makes it all the more important for the Court to peel back its narrow emphasis on intimacy as the heart of the Fourth Amendment, restoring a richer view of Fourth Amendment values as guarding not only meaningful relationships but also intellectual, creative, and recreational autonomy.

Foreswearing such moralistic distinctions, of course, will not necessarily lead to greater Fourth Amendment protections for defendants. To the extent that the Court's current approach is problematically discriminatory—privileging certain private activities and pursuits over others—the Court could as easily resolve that inequity by leveling down as leveling up: stripping social guests of their standing in a third-party's home, or exposing broad categories of personal data to digital search. Nevertheless, forcing the Court to grapple with the broader panoply of activities implicated by a given tactic will lead to more equal rules defining Fourth Amendment searches: ones that distribute both the benefits and costs of the Court's linedrawing more uniformly upon all defendants. And in practice, the Court's repeated reliance on moralism to scale back Fourth Amendment rights in previously protected zones, as well as its frequent asides exempting intimate conduct from otherwise restrictive rules, suggests that a broader lens will lead to more expansive constitutional protections.

2. Recognizing Binary Searches

Second, in light of its fundamentally moralistic foundation, the Court and lower court judges must cabin, if not renounce, the binary-search doctrine: the principle that investigative techniques revealing only the presence or absence of contraband fail to qualify as "searches."[384] Criticized by scholars on multiple grounds, from the Fourth Amendment's general antipathy to

further discussion of the software's capabilities, see generally Quentin Hardy, *Unlocking Secrets, If Not Its Own Value*, N.Y. TIMES (May 31, 2014), https://www.nytimes.com/2014/06/01/business/unlocking-secrets-if-not-its-own-value.html [https://perma.cc/4JB6-WMMD], and Shane Harris, *Killer App*, WASHINGTONIAN (Jan. 31, 2012), https://www.washingtonian.com/2012/01/31/killer-app/ [https://perma.cc/X4QF-T52J].

383 This deterrent effect is arguably minimal, considering the paucity of civil remedies for Fourth Amendment violations. *See* Stuntz, *supra* note 307, at 780 (noting that damages are only available for Fourth Amendment violations in cases of "fairly egregious police error").

384 *See* discussion *supra* Section III.C.

retrospective analysis to the antidemocratic nature of an omniscient state,[385] that doctrine is defended largely based on the limited information it reveals—only, its proponents insist, the fact of criminality.[386]

The binary-search doctrine first arose surrounding the practice of drug-sniffing dogs,[387] and has since largely remained limited to the domain of drug testing: chemical drug tests,[388] or bloodwork in labs.[389] As such, it might be easily dismissed as something of an exception to the Fourth Amendment, a marginal wrinkle resolving a limited category of cases.

Yet the electronic search stands to dramatically expand the doctrine's scope. By analyzing, aggregating, and comparing datasets ranging from personal emails to public records, digital technology gives the police a newfound capacity to pinpoint only those documents or transactions that disclose some illicit activity. Common examples in use today include "hash" programs that search private computers for known images of child pornography, or programs that scan user data for pirated media or hacked software.[390] But there is also a growing body of smart technology, which does not search for specific files but decodes and interprets the content of unknown documents: image recognition software that identifies subjects depicted in photographs,[391] or software that reads and aggregates data to conclude whether a particular message was sent in furtherance of a criminal scheme, from wire fraud to terrorism.[392] The increasing volume of personal interaction occurring on digital platforms,

---

385 *E.g.*, Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. MEM. L. REV. 299, 353 (2010) (warning of the risk of "a surveillance state coming into being through the contraband exception"); Melilli, *supra* note 272, at 366-67. Binary searches have also been critiqued for intruding on the individual's zone of refuge, *see* Sacharoff, *supra* note 300, at 1139-40; Adler, *supra* note 300, at 1111, neglecting the individual's privacy expectations in a given location rather than object, *see* Harris, *supra* note 272, at 40-41, and categorically removing policing tactics from judicial oversight. *See id.* at 39.

386 *See supra* note 272 and accompanying text.

387 *See* United States v. Place, 462 U.S. 696, 707 (1983) (characterizing the practice of dog-sniff searches as "sui generis").

388 United States v. Jacobsen, 466 U.S. 109, 125-26 (1984).

389 State v. Price, 270 P.3d 527, 531 (Utah 2012).

390 *See* Orin S. Kerr, *The Fourth Amendment and the Global Internet*, 67 STAN. L. REV. 285, 321-22 (2015) (describing potential future implications); Sacharoff, *supra* note 300, at 1182-84 (describing the software and its use). These are currently used largely by private entities. Kerr, *supra*, at 321-22; *cf.* Ben Gilbert, *Windows 10 Automatically Scans your Computer for Pirated Software, But That's a Good Thing*, BUS. INSIDER (Aug. 21, 2015, 12:06 PM), http://www.businessinsider.com/why-windows-10-scans-for-pirated-games-2015-8 [https://perma.cc/3QNF-AHEY].

391 *See* Christian Szegedy, *Building a Deeper Understanding of Images*, GOOGLE RES. BLOG (Sept. 5, 2014), http://research.googleblog.com/2014/09/building-deeper-understanding-of-images [https://perma.cc/YX6G-G8EX]; Ken Weiner, *Why Image Recognition is About to Transform Business*, TECHCRUNCH (Apr. 30, 2016), https://techcrunch.com/2016/04/30/why-image-recognition-is-about-to-transform-business/ [https://perma.cc/Z2GP-47RF].

392 *See supra* note 382 and accompanying text. To the extent that such technology reveals not physical contraband but rather evidence of a crime, that is of course all "contraband" is to begin with.

coupled with our advancing technologies for searching those communications, pushes many more police investigations into the realm of the "binary search."

Such technology might not rankle our intuitions when used to capture child pornography or to uncover terrorist cells.[393] But it is easy to imagine any number of harder cases: images of individuals using drugs, or text discussions related to drug purchases; exchanges revealing a sexual relationship with a minor, including consensual sexting among teenagers in many jurisdictions; references to bigamous or polygamous marriages, or the purchase of outlawed sexual devices; emails discussing the status or employment of undocumented immigrants. These searches, too, may be run to alert investigators to nothing but the presence of criminal evidence in a given document. Yet in such cases, it seems far more intuitive that these searches do not reveal only the fact of criminality, but also delve into far broader features of our social, intellectual, and personal lives, from romantic entanglements to sexual preferences to family origins.[394]

A firm application of the binary-search doctrine would exclude all such investigative activities from the purview of the Fourth Amendment. The precedent established by *Caballes* and *Jacobsen*—cases grounded on the Court's specific view that the possession of narcotics reveals no legitimate facts about the defendants[395]—would thus create a carte blanche for the police to run any number of searches that implicate substantial details about our personal and private lives.

Alternately, the digital sphere may invite courts to temper the binary-search doctrine through the example of the Court's more overtly moralistic cases like *Riley* and *Carter*. Privileging interpersonal and intimate activities even in circumstances where lowlier conduct gets no protection, such cases would urge judges to distinguish among more or less offensive binary searches—approving investigations of fraud or drug dealing, for example, while holding that searches revealing consensual sexting among teenagers or the purchase of sexual devices intrude on a protected realm of interpersonal intimacy. In this case, there would be little doubt that the limits of a Fourth Amendment search are defined not by the legality of a defendant's conduct, but by its relative social significance.

Regardless of which approach courts choose, the possibilities of digital technology greatly expand the corrosive effects of the binary-search doctrine, revealing the extent to which even "binary" searches step on any number of

393 For defenses of such uses, see Sacharoff, *supra* note 300, at 1182, Simmons, *supra* note 79, at 1352, and also United States v. Stevenson, No. 3:12-cr-00005, 2012 WL 12895560 (S.D. Iowa June 20, 2012, which questions if hash programs identifying child pornography are searches, and Ashlee Vance & Brad Stone, *Palantir, the War on Terror's Secret Weapon*, BLOOMBERG BUSINESSWEEK (Nov. 22, 2011, 3:56 PM), https://www.bloomberg.com/news/articles/2011-11-22/palantir-the-war-on-terrors-secret-weapon [https://perma.cc/NlW5-58AQ], which details software used to uncover terrorist cells.

394 *See* Riley v. California, 134 S. Ct. 2473, 2490 (2014) (acknowledging that information regarding recreational interests, addictions, health, and romance infringes on one's personal life).

395 *See supra* notes 246–66 and accompanying text.

legitimate aspects of one's life. In light of both the moralistic nature of the binary-search doctrine and the broad swath of data revealed by such searches in the digital age, the Court must curtail the doctrine, recognizing that police tactics designed to pinpoint only traces of a crime may nevertheless qualify as "searches." Bringing ostensibly binary searches within the ambit of the Fourth Amendment will allow the courts to exercise some oversight over a broad and powerful new tool of police investigation.

And, crucially, it will not deny police officers the use of any especially valuable search functions. Since even acknowledged searches remain subject to the Fourth Amendment's reasonableness inquiry, many new technologies, such as hash searches for child pornography or drug-sniffing dogs at airports, can still be deemed categorically valid under that second prong. Discarding the binary-search doctrine will simply restore some threshold of judicial review to a growing sphere of police investigation, protecting the individual's privacy expectations in less urgent, more sensitive cases.[396]

B. *Revisiting Fourth Amendment Privacy*

Beyond these doctrinal remedies, the Court's moralistic approach to assessing reasonable expectations of privacy under *Katz* adds a new wrinkle to a broader debate: the search for an alternative to "privacy" as the organizing principle of Fourth Amendment jurisprudence. The moralism that has invaded the Court's Fourth Amendment analysis since *Katz* reveals the Court's deep-seated resistance to vindicating liberal values of individual autonomy and unorthodoxy, even in a procedural amendment ostensibly blind to a defendant's private conduct, and in a conceptual framework fundamentally opposed to communitarian judgment. As scholars question the viability of Fourth Amendment "privacy" in the digital age, the rise of Fourth Amendment moralism demonstrates both the importance and the profound

396 The rise of Fourth Amendment moralism may also weigh in favor of the Court's recent revival of the trespass test as a type of Fourth Amendment floor for police tactics that entail some form of physical entry. *See* United States v. Jones, 565 U.S. 400, 406-07 (2012). Scholars have debated the merits of that development, decrying the trespass test for perpetuating outdated theories of property, *see* Erin Murphy, *Back to the Future: The Curious Case of* United States v. Jones, 10 OHIO ST. J. CRIM. L. 325, 327 (2012), arguing that a split analysis exacerbates the Court's already muddled definition of a search, *see* Sklansky, *supra* note 19, at 1072-73, Murphy, *supra*, at 327-28, and disputing whether the trespass test makes a difference in the courts' analysis, *see* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 94. The moralism that has invaded the Court's *Katz* analysis suggests that the trespass test indeed makes a difference, providing a morally neutral backstop to that standard—and that it may frequently expand a defendant's Fourth Amendment rights. *See, e.g.*, Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013) (finding a Fourth Amendment violation using the trespass approach despite the lack of privacy interests in marijuana); Kyllo v. United States, 533 U.S. 27, 37-38 (2001) (relying on a property-based analysis to reverse the lower courts' intimacy-based defense of thermal imaging); United States v. Ackerman, 831 F.3d 1292, 1307-08 (10th Cir. 2016) (Gorsuch, J.) (speculating that *Jacobsen* would have turned out differently under a trespass-based analysis).

difficulty of restoring a Fourth Amendment doctrine capable of protecting liberal individualism.

The Court's reliance on privacy as the touchstone of the Fourth Amendment has drawn its share of controversy. From the beginning, there has been Justice Black's textualist objection that "privacy" finds no mention in the Fourth Amendment—an objection echoed by prominent critics since.[397] And there is the persistent idea that the test is circular, allowing the reality of police practices to define their legality, though that criticism is fairly directly addressed by the Court's own caselaw.[398]

Beyond its origins or administrability, some critics have questioned the basic premise of the reasonable expectations of privacy test—the extent to which protecting "privacy" gives the Court traction in upholding the values at the core of the Fourth Amendment. Commentators dispute whether it is truly possible to agree on the limits of privacy.[399] They protest that the shifting social norms of the digital age, frequently requiring us to entrust our most intimate details to corporations and strangers alike, have undercut any colorable expectations of privacy from the state.[400] They object that the Court's privacy-centric precedent has left it indifferent to more pressing categories of police misconduct: violence in effectuating searches or seizures,[401] pretextual stops targeting marginalized groups,[402] and the epidemic of discriminatory investigation and enforcement.[403] To the extent privacy even deserves legal protection, they debate whether courts or legislatures are best suited to that task.[404]

---

397 Katz v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting); Rubenfeld, *supra* note 19, at 104 ("The Fourth Amendment does not guarantee a right of privacy. It guarantees—if its actual words mean anything—a right of *security*.").

398 *See* Rubenfeld, *supra* note 19, at 106-07 (noting that privacy expectations can reflect "widespread social norms drawn from outside the Fourth Amendment"); *supra* text accompanying notes 106–107.

399 *See* Pozen, *supra* note 324, at 225; Sklansky, *supra* note 19, at 1077-79; Solove, *supra* note 299, at 1088.

400 *E.g.*, JAMES B. RULE, PRIVACY IN PERIL 8-9 (2007); SLOBOGIN, *supra* note 77, at 3, 10; Sklansky, *supra* note 19, at 1085-86 ("By its very nature, our [online life] leaves a digital record, typically one with multiple copies scattered across a series of computer servers"); *see also* Rubenfeld, *supra* note 19, at 118 ("[The Fourth Amendment] will see its role inevitably shrinking as information technology expands."). In light of the growing power of corporations holding individual data, many question whether our most pressing risks to privacy still come from the state. *See* JULIE E. COHEN, CONFIGURING THE NETWORKED SELF 107 (2012); ETZIONI, *supra* note 353, at 10-11; Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1140 (2002).

401 *See* Stuntz, *supra* note 7, at 1068.

402 Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 719-30 (1998).

403 Sacharoff, *supra* note 300, at 1180. Scholars have also noted an inconsistency between the Fourth Amendment's concern with privacy and the vast scope of government intrusions sanctioned by the regulatory state, *see* Stuntz, *supra* note 7, at 1017, and our national security apparatus, *see* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1937-41 (2013).

404 *See* Harris, *supra* note 163, at 931; Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 488-90 (2013). *See generally* Baude & Stern, *supra* note 117.

In light of these shortcomings, many have suggested that the "reasonable expectations of privacy" framework is best retired in favor of a new alternative. Bill Stuntz famously urged courts to recalibrate the Fourth Amendment around the problem of police violence, focusing primarily on the threat of intimidation or coercion by the state.[405] Scott Sundby has proposed that Fourth Amendment rules reflect a principle of mutual trust between government and citizen: the presumption that individuals voluntarily behave in a lawful fashion.[406] These suggestions have their own drawbacks, whether in terms of their administrability[407] or their ability to rein in the full range of police misconduct—especially today, when many troubling state intrusions are accomplished without violence of any kind.[408] Accordingly, some commentators have sought a more generalizable principle, aimed especially at preserving Fourth Amendment protections in the digital age. Adopting different terminologies but a similar Millian philosophy, Jed Rubenfeld and David Sklansky have argued that the Fourth Amendment is best seen as protecting some site of personal autonomy: a right of "personal security"[409] or a "zone of refuge,"[410] where individuals can retreat from public scrutiny and indulge in uninhibited personal, intellectual, and creative growth. Protecting an intrinsic right to a life away from public scrutiny—and recalling the Fourth Amendment's origins as a safeguard of political dissent—these principles aim to provide a more resilient limitation against state intrusion in a world of shifting interpersonal norms.

The moralistic strain that has invaded the *Katz* framework over the past decades provides an additional reason to revisit the doctrine. The contrarian nature of the Court's privacy-based Fourth Amendment analysis, frequently departing from our publicly held understandings of privacy itself, reveals the extent to which the Court's privacy doctrine has failed on its own terms. As rights-restrictive cases like *Riley*, *Carter*, and *Jacobsen* suggest, the limitations of the Court's Fourth Amendment caselaw in the past decades do not simply reflect the Court's choice of privacy over more trenchant categories of analysis, or the increasingly vulnerable status of privacy norms in the digital age. They also reflect the paucity of the Court's underlying vision of privacy: its failure to theorize privacy consistently with our shared cultural understandings of that term, as a retreat from the pressures of communitarian judgment. This paucity goes beyond a disagreement over the

405 *See* Stuntz, *supra* note 7.

406 *See* Sundby, *supra* note 19.

407 For instance, Sundby's suggestion that a government action would qualify as a search whenever it is "inconsistent with trusting the citizenry to behave in a lawful and responsible fashion," *id.* at 1791, would seem to encompass all investigative acts undertaken by the state, beyond perhaps spotting evidence in plain view.

408 Published over twenty years ago, Stuntz's proposal—while certainly pinpointing a core category of police abuses—is essentially blind to the growing problems of government surveillance and data collection at the heart of many difficult Fourth Amendment questions today.

409 Rubenfeld, *supra* note 19, at 128.

410 Sklansky, *supra* note 19, at 1115-16.

proper definition of privacy—the Court's penchant for, say, emphasizing "informational" privacy over a more dignitarian approach. It reveals a basic blindness to the underlying value of privacy, informational or otherwise. And that paucity is not, despite the acute stresses of the digital age, a recent development, reflecting the Court's failure to update its privacy norms to our novel technological terrain. It is a longstanding feature of the Court's reasonable expectations of privacy jurisprudence. The weaknesses of the Court's privacy-based Fourth Amendment over the past decades, in short, are both broader and deeper than typically acknowledged—and they have often arisen despite, not because, of the Court's the choice of "privacy" as the touchstone of Fourth Amendment analysis.

If the Court's impoverished vision of Fourth Amendment privacy exacerbates the limitations of that conceptual framework, however, it also casts a shadow over the alternative principles proposed by commentators in recent years—especially those who hope to resurrect the Fourth Amendment as a safeguard of individuality and expressive freedom. Recognizing the contrarian vision of privacy at the heart of the Court's Fourth Amendment doctrine suggests that the Court's current departure from a liberal, rights-expansive jurisprudence is hardly inherent in the concept of privacy itself. Privacy, including informational privacy, is far from agnostic to the importance of moral autonomy, unorthodoxy, and retreat. If the Court in the past decades has sometimes seemed to compromise such values, protecting not the individual's right to break from social convention but only to indulge in conventionally valued acts, it is not because the Court has lacked a conceptual framework that embraces those principles. It is because the Court has simply not shown itself interested in protecting them.

There may thus be something optimistic in suggesting that the Court recenter its Fourth Amendment doctrine around a more intrinsically individualistic or autonomy-based framework, whether security, refuge, or anything else. If the Court has frequently failed to respect liberal values in allotting individual entitlements to privacy, it unclear why it would take a more expansive approach in protecting these latter principles—principles that are, as Sklansky notes, better envisioned as metonyms for than alternatives to privacy itself.[411] This is not to suggest that we should abandon all hope of reforming the Court's Fourth Amendment jurisprudence to embrace a more expansive view of private life. But it is to suggest that reform will entail a heavier lift, not only replacing Fourth Amendment privacy with a framework grounded in classically liberal values of self-definition and retreat, but also redressing the underlying moral commitments that have sometimes pushed the Court against those values.

411 *See* Sklansky, *supra* note 19, at 1113. Notably, Rubenfeld himself imagines courts applying his security-based framework—ostensibly concerned with protecting the right of autonomy and self-definition—through overtly subjective judgments about which activities, in his view, make "personal life . . . imaginable." Rubenfeld, *supra* note 19, at 132.

These comments represent only some preliminary speculation for such a project, and this Article certainly cannot pretend to resolve the nuances of crafting such a framework. To some, the rise of Fourth Amendment moralism might support conceptual paradigms that exclude considerations of private life altogether—something analogous to Stuntz's emphasis on violence, with its focus on the inherent pathologies of police conduct.[412] To others, it may simply call for greater diligence in guarding the liberal heart of the Fourth Amendment, erecting a Fourth Amendment framework that is not only rhetorically suffused with liberal values of unorthodoxy and individualism, but that imbeds those values into the doctrinal inquiry itself.

Regardless, any attempts to retheorize the Fourth Amendment around the principles of unorthodoxy, self-definition, and retreat must take into account the Court's demonstrable resistance, over the past five decades, to vindicating these liberal values—even where we might most expect it do so, in a procedural provision ostensibly blind to an individual's conduct, that protects the "innocent and guilty alike." To the extent that we are ready to take up the larger project of rethinking the Fourth Amendment for an increasingly public age, the under-recognized moralism of the *Katz* reasonable expectations of privacy test identifies an additional consideration to bear in mind: the urgency, and difficulty, of adopting a framework that truly holds the Court accountable to classically liberal or individualist ideals.

CONCLUSION: HAS THERE BEEN A RIGHT TO PRIVACY?

Typically seen as a procedural provision blind to a defendant's conduct in any case, the Fourth Amendment over the past five decades has in fact developed a deeply substantive dimension. Ever since the Court recentered Fourth Amendment protections around one's "reasonable expectation of privacy," it has consistently tied Fourth Amendment rights to its moral appraisal of the defendant's conduct at the time of the search. As in its substantive privacy jurisprudence under the Due Process Clause, the Court has afforded greater Fourth Amendment protections to individuals engaged in conventionally valued social activities, privileging domesticity and other "intimate" relationships over more individualistic or unorthodox pursuits. And in some cases, it has sanctioned an explicitly retrospective analysis of the actions for which Fourth Amendment privacy is claimed.

The Court's moralistic assessment of Fourth Amendment privacy rights is a vexing development, departing from the Fourth Amendment's text, clashing with its history and purposes, and obstructing its practical operation as a shield against unreasonable police tactics. And that development flies against prevailing understandings of privacy, as a necessary zone of refuge from the

412 *Cf. supra* text accompanying note 406.

pressures and expectations of mainstream society. Especially in the electronic age, as digital technologies vastly expand the police's ability to parse categories of personal data, the Court must take steps to cabin its moralistic privacy-based jurisprudence, restoring a richer view of the Fourth Amendment as protecting more individualist forms of intellectual, creative, and expressive autonomy.

Beyond the question of Fourth Amendment doctrine, the Court's moralistic assessment of reasonable expectations of privacy also invites us to consider a broader question—an adequate answer to which, once more, is beyond the scope of this Article. For more than simply highlighting the Fourth Amendment's underappreciated contiguities with the Due Process Clause, the rise of Fourth Amendment moralism demonstrates the sheer pervasiveness of the Court's moralistic vision of privacy, spilling past substantive due process and invading even a quintessentially procedural safeguard against the state.

Starting in the 1960s, the story goes, the Supreme Court infused multiple doctrinal frameworks with the rhetoric of "privacy"—a value defended in those same years as a retreat from the judgment, pressures, and expectations of society. Yet the Court's privacy doctrines have rarely worked to shield the individual against the weight of social judgment. To be sure, there is the species of First Amendment privacy recognized in *Stanley*, as well as the liberal strand of substantive due process embodied in *Roe* and *Eisenstadt*, which shield individuals' sexual desires or procreative decisions against the moral condemnation of the state. Most of the Court's privacy cases, however, have taken a far thinner view, recognizing and rewarding the Court's own views of desirable social arrangements. Thus, the right of domestic privacy does not protect an individual's autonomy in assembling her household, but only the established value of the family.[413] The sexual privacy emerging from *Griswold* and *Lawrence* does not defend an individual's preferred modes of sexual fulfillment, but only her right to pursue "enduring bonds."[414] And even the private zone protected by the Fourth Amendment—that last, procedural bastion of individual liberty—frequently privileges spaces housing "intimate" or otherwise "valuable" social customs. One may claim a legitimate expectation of privacy for meaningful social visits, but not for commercial exchanges; for domestic pursuits, but not the mixing of chemicals or the use of drugs; for "intimate" interpersonal activities, but not the cultivation of crops or personal hobbies.

This is a vision of privacy less as a shield from communitarian judgment than as the consequence of that judgment. The zone it demarcates may certainly be "private," in the sense that it is removed from direct scrutiny or interference

413 *Compare* Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974) (upholding an ordinance limiting the number of unrelated individuals who may live together in a home), *with* Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977) (invalidating an ordinance limiting cohabitation by non-nuclear family members).

414 *Compare* Bowers v. Hardwick, 478 U.S. 186, 189 (1986), *with* Lawrence v. Texas, 539 U.S. 558, 567 (2003).

by the state. But it has little to do with what most of us would see as the *value* of privacy. Certainly, it is far afield from the intellectual and spiritual autonomy Justice Brandeis extolled as "the right most valued by civilized men."[415]

Like the Court's moralistic analysis, the contemporary debate about the value of privacy extends far beyond the question of Fourth Amendment doctrine. Whether discussing the state's growing incursions on private data[416] or the proper trade-off between privacy and security,[417] corporations' duties of privacy to their consumers[418] or their duties to cooperate with law enforcement,[419] the use of personal data by advertisers,[420] protections for employees' private activities,[421] or the public's appetite for the disclosure of intimate personal details as a mode of entertainment,[422] we are surrounded by delicate and often difficult disputes about the proper boundaries between personal and public life.

As we continue to debate the extent to which our legal system can and should protect privacy—the extent, in essence, that we value privacy as a society—it might be troubling to recognize that our Constitution has never, truly, protected a right of privacy that we would recognize as such. Acknowledging the paucity of those protections might diminish our commitment to privacy, encouraging or justifying us in embracing privacy losses in exchange for other public interests. Or it might push to double our commitment to privacy as an axis of our democratic society—and to do a better job of protecting it going forward. If,

---

415 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

416 *See, e.g.*, Richards, *supra* note 404, at 1936-41; Solove, *supra* note 299, at 1084; Peter P. Swire, *Proportionality for High-Tech Searches*, 6 OHIO ST. J. CRIM. L. 751, 759-60 (2009).

417 *See, e.g.*, Lee Rainie & Shiva Maniam, *Americans Feel the Tensions Between Privacy and Security Concerns*, PEW RES. CTR. (Feb. 19, 2016), http://www.pewresearch.org/fact-tank/2016/02/19/americans-feel-the-tensions-between-privacy-and-security-concerns/ [https://perma.cc/653C-MTNX].

418 *See, e.g.*, Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1221 (2016); Eric W. Orts & Amy Sepinwall, *Privacy and Organizational Persons*, 99 MINN. L. REV. 2275, 2320-21 (2015).

419 *See, e.g.*, Justin Hurwitz, *Encryption Mod*, 30 HARV. J.L. & TECH. 355, 359 (2017); Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism*, 8 HARV. NAT'L SECURITY J. 53, 56-57 (2017); *More Support for Justice Department than for Apple in Dispute over Unlocking iPhone*, PEW RES. CTR. (Feb. 22, 2016), http://www.people-press.org/2016/02/22/more-support-for-justice-department-than-for-apple-in-dispute-over-unlocking-iphone [https://perma.cc/799N-3JSL].

420 *See, e.g.*, JOSEPH TUROW, THE AISLES HAVE EYES (2017); Rebecca Lipman, *Online Privacy and the Invisible Market for Our Data*, 120 PA. ST. L. REV. 777, 778-79 (2016).

421 *See, e.g.*, Lothar Determann & Robert Sprague, *Intrusive Monitoring*, 26 BERKELEY TECH. L.J. 979, 981 (2011); Patricia Sánchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 95 (2012); Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277, 278 (2012); *Discrimination Laws Regarding Off-Duty Conduct*, NAT'L CONF. ST. LEGISLATURES (Oct. 18. 2010), http://www.ncsl.org/documents/employ/off-dutyconductdiscrimination.pdf [https://perma.cc/EE3Y-2HWW].

422 *See, e.g.*, Todd Leopold, *Privacy? Forget It, We're All Celebrities Online Now*, CNN (Jun. 12, 2013), http://www.cnn.com/2013/06/12/tech/social-media/internet-privacy-divide [https://perma.cc/R2PC-XB3R]; Emily Nussbaum, *Say Everything*, N.Y. MAG. (Feb. 12, 2007), http://nymag.com/news/features/27341/ [https://perma.cc/2JDD-KVZX].

echoing the Court's own rhetoric of the past century, we embrace privacy as a "unique value[] of our civilization,"[423] then we should demand some genuine protection for that sacred zone: a freedom that is not conditioned on but allows some reprieve from the weight of social judgment.

423 McDonald v. United States, 335 U.S. 451, 453 (1948).