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ARTICLES

Interpersonal Privacy and the Fourth Amendment*

ALBERT W. ALSCHULER**

I. INTRODUCTION

In this article, I address in a rudimentary way a question that I knew when I started would prove too difficult to answer: To what extent does the Constitution's prohibition of unreasonable searches and seizures protect the privacy of information or property that one person has shared with another? How large an area of interpersonal sharing is included within the zone of privacy safeguarded by the fourth amendment? To what extent does the amendment protect a form of privacy that can be defined neither as solitude nor as an exclusive power to control—a form that might be called “interpersonal” or “relational” privacy?'

Although the article discusses a variety of substantive questions, its primary thesis is merely that interpersonal privacy deserves to be regarded as a distinct branch of fourth amendment scholarship. Courts and scholars have tended to treat this form of privacy under a variety of headings without clearly recognizing their interrelationship. The result has been a crazy-quilt pattern of protection and nonprotection.

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1. This terminology is inspired partly by Dean Leon Green's demarcation of “injuries to relations” as a distinct field of tort law. *See, e.g.*, L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS & A. SMITH, *CASES ON INJURIES TO RELATIONS* (1968).

The fourth amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

An issue of interpersonal privacy can arise, for example, from a routine bailment of tangible personal property. When does a bailor retain a reasonable expectation of privacy in his property after entrusting this property to a bailee? When does he have a reasonable expectation of privacy, not only in the property, but in the place where his bailee keeps it? Two recent Supreme Court decisions have focused attention on these issues, and after reviewing some basic fourth amendment doctrines that frequently bear upon interpersonal privacy issues, the article examines these "bailment" decisions. Then it turns to situations in which a person has shared information rather than property—in which, for example, he has conveyed financial information to a bank, or personal information to a psychologist, or a telephone number that he has dialed to his local telephone company. When may the government require a person or business entity that has been entrusted with information to record this information and make the resulting record available to the government? Again the Supreme Court has confronted this issue in two recent decisions that the article considers.

The article touches only briefly upon other situations in which the government invades the privacy of relationships. Obviously any governmental electronic surveillance of a conversation between two parties invades interpersonal privacy. So does the use of an undercover agent to infiltrate an existing relationship or to create a new one by deception. When the government requests or coerces an employer, spouse or other "third party" to consent to a conventional search or to consent to some form of electronic surveillance or to serve as an undercover agent himself, an issue of interpersonal privacy is presented.

Indeed, in its concluding section, the article offers a suggestion that may seem a bit bizarre; I admit that I initially found this suggestion somewhat strange myself. Although, so far as I can tell, the simple coercion of one person to reveal confidential information about another has never been regarded as presenting a fourth amendment issue, this conventional view may merit reexamination. On some occasions, coercion of an informant to reveal what he knows about another probably should be regarded as a "search" governed by fourth amendment standards. For fifteen years, the Supreme Court has recognized that the word "search" as used in the amendment is not confined to visual inspections and that it encompasses other governmental investigative activities that intrude upon justifiable expectations of privacy.² Perhaps this recognition should lead courts to assume

2. See *Katz v. United States*, 389 U.S. 347 (1967) (discussed *infra* in text accompanying notes 6-14).

a greater degree of control over the privacy-invading informant system that now is used and abused by the police without significant legal restraint.

Courts and scholars may have regarded the several problem areas that I have listed as more-or-less discrete because they have concentrated more on the medium than on the message. For the most part, the terms used to describe these fourth amendment problem areas (electronic surveillance, third-party consent, the use of undercover agents, and officially required recordkeeping) simply set forth a number of technologies for accomplishing invasions of interpersonal privacy. The judicial treatment of all of these topics might be informed by a clearer concept than we have today of the extent to which the privacy of relationships deserves to be preserved from governmental intrusion. Particular technologies sometimes may make a difference, but a number of other things are likely to make a more substantial difference.

For example, to what extent should the character of the interpersonal relationship be influential? How much should it matter whether the person to whom one gives information is a spouse, live-in lover, roommate who is not a lover, lover who is not a roommate, lawyer, employee, customer, business acquaintance, political associate, stranger, or confederate in crime? Should it matter whether the government accomplishes its invasion of interpersonal privacy by force, by stealth, by fraud or merely by asking one of the parties to the relationship to reveal private information? Should it matter whether an invasion of privacy by force, stealth, fraud or simple request involves a seizure of tangible property, a physical trespass, a visual inspection without a trespass, or a gathering of information that is both nonvisual and nontrespassory? At least a few of these possible considerations (for example, the difference between visual and auditory invasions of privacy) may seem irrelevant to current fourth amendment doctrine. Nevertheless, I believe that all of these considerations have been and remain influential whether or not their influence is recognized and whether or not their articulation could withstand the light of day.

II. TWO BASIC DOCTRINES

As a prelude to this article's discussion of interpersonal privacy, it will be useful to review two basic fourth amendment doctrines. Until recently the first of these doctrines was described by the Supreme Court as the requirement of "standing," and although the Supreme Court unfortunately has abandoned this useful terminology,³ this article

3. In *Rakas v. Illinois*, 439 U.S. 128 (1978) (discussed *infra* in text accom-

adheres to it. In several of the cases that the article will discuss, the issue is not whether the government has violated the fourth amendment but whether a particular individual has "standing" to assert this violation and to secure an exclusion of the resulting evidence from a trial. The basic rule of standing is that a litigant may assert only a violation of his own fourth amendment rights. This requirement has been criticized by commentators⁴ and abandoned by a few state courts in the construction of their state constitutions.⁵ I agree that the doctrine is troublesome, for it is impossible to articulate any purpose of the fourth amendment exclusionary rule that is not undercut to some extent by a requirement of standing.

Nevertheless, at least in some of its applications, I believe that the doctrine makes sense. Imagine, for example, that the police, suspecting that Mr. Big is a cocaine dealer, break into his house to search for this drug. The police do not have probable cause; they do not have a warrant; they do not knock and announce their purpose; and they do not find any cocaine. Instead they find a burglar stealing Mr. Big's silverware. The police arrest this burglar, and when he is brought to trial, he objects that all of the evidence against him was uncovered by a flagrant violation of the fourth amendment. In a sense, the burglar is correct, but I am sympathetic to the customary view that he lacks standing to assert this fourth amendment violation. The police search violated the constitutional rights of Mr. Big, but it did not violate the constitutional rights of the burglar.

panying notes 16-32), the Supreme Court proclaimed that what had been known as the "standing" doctrine would no longer bear that name. The doctrine henceforward would be regarded as a matter of "substantive Fourth Amendment law." *Id.* at 138-40. Prior to *Rakas*, however, the Supreme Court had regarded the standing doctrine in exactly the manner that the *Rakas* opinion suggested, as a matter of substantive fourth amendment law. Contrary to Justice Rehnquist's opinion for the majority in *Rakas*, the Court had not regarded this doctrine as "theoretically separate" from "the extent of a particular defendant's rights." *Compare id.* at 139 with, e.g., *Alderman v. United States*, 394 U.S. 165 (1969).

The price of the Court's rejection of an established and useful shorthand expression was merely linguistic awkwardness. The Court declared, "The inquiry under either approach is the same." *Rakas*, 439 U.S. at 139. *But see infra* text accompanying notes 35-38. *See also* 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3, at 212-19 (Supp. 1984).

4. *E.g.*, J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 73-77 (1966); Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 22 (1950) (now Nw. U.L. REV.); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 347, 349, 358 (1967).

5. *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955); *State v. Roach*, 338 So. 2d 621 (La. 1976).

A second fourth amendment doctrine provides the central test for determining when a police search violates an individual's constitutional rights. In *Katz v. United States*,⁶ F.B.I. agents believed that Katz was taking illegal bets at a public telephone booth. The agents installed electronic equipment on the outside of this booth and turned the equipment on when they saw Katz enter the booth and close the door. The agents overheard only Katz's side of the conversation. Although the agents apparently had probable cause for this investigative activity, they had not obtained a judicial warrant, and the Supreme Court held that the surveillance violated Katz's fourth amendment rights.

The result of *Katz* may not seem surprising, but the case marked a major turnabout in fourth amendment doctrine. Prior to *Katz*, the Supreme Court had articulated an essentially thing-minded view of the fourth amendment. It had held, for example, that governmental wiretapping without any physical intrusion upon a suspect's premises could not violate the amendment, because the word "search" as used in the amendment referred to something that an official did with his eyes, not his ears, and because a conversation could not qualify as a "thing to be seized," to use once again the language of the amendment.⁷ Justice Black adhered to this traditional view in a dissenting opinion in *Katz* that seemed at once archaic and surprisingly powerful;⁸ and in an effort to fit his case within the standard fourth amendment cosmology of fifteen years ago, the defendant in *Katz* framed the issue as whether the F.B.I.'s use of its surveillance equipment had invaded a "constitutionally protected area." The Supreme Court rejected this formulation. "[T]he Fourth Amendment protects people, not places," it said.⁹ "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."¹⁰

To say that the protection of the fourth amendment extends to situations in which the government violates reasonable expectations of privacy often does not tell us very much about what the fourth amendment protects. Our sentiments concerning privacy are *ad hoc*, subjective, changing and culture-bound;¹¹ and in *Katz* the Supreme

6. 389 U.S. 347 (1967).

7. *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

8. *Katz*, 389 U.S. at 364 (Black, J., dissenting).

9. *Id.* at 351.

10. *Id.* at 353.

11. See Alschuler, *A Different View of Privacy*, 49 TEX. L. REV. 872 (1971).

Court decided to look to these general cultural sentiments in determining the scope of the fourth amendment's protection.¹² In part,

Professor Bruno Bettelheim has noted that what one generation could discuss only in the carefully guarded privacy of a darkened psychoanalytic treatment room, another generation sets forth in family magazines and on the screen. *Id.* at 877.

12. This paper does not explore the virtues and defects of the *Katz* test. Instead it simply accepts that test as the established basis for analyzing what governmental activity amounts to a "search" under the fourth amendment. When I presented this paper to faculty study groups at the University of Pennsylvania Law School, the University of Chicago Law School and the Syracuse University Law School, however, discussion quickly focused on *Katz* itself. It therefore may be appropriate to devote a footnote to the aspect of that decision that scholars have found most troublesome.

Katz was in substantial part a lawless ruling—a decision to do without a standard and a decision to tie the constitutional right to privacy to changing cultural expectations of privacy. *Katz* therefore seemed to suggest that whenever cultural expectations of privacy evaporated, the fourth amendment right to privacy would evaporate as well. Once any form of snooping became commonplace, it automatically would become legal. *Katz* apparently endorsed the principle, "No expectation, no right."

The most obvious alternative to *Katz's* culture-bound vision of the fourth amendment would have been a natural-law vision. Rather than effectuate cultural sentiments concerning privacy, courts in fourth amendment cases might have attempted to articulate a consistent, core concept of privacy. They might have read the amendment to incorporate their own best assessments of the privacy that human beings inherently require in order to maintain their individuality and dignity.

One question that the choice between these relativistic and natural-law formulations poses is whether diminutions of privacy through gradual cultural evolution are truly to be regretted. Is privacy appropriately regarded as a natural virtue, or is it merely a social construct—a value useful in differing degrees at differing times and places? Would even the disappearance of privacy through noncoercive social change be unfortunate?

One can envision (or try to) a society whose members would have little or no sense of privacy. It would be a society in which, for example, people might engage in sex or defecation in public without embarrassment and in which people hardly ever would hesitate to voice their thoughts for fear of personal disapproval or censure. The picture that comes to mind when this sort of society is suggested probably is not one of a group of people significantly less happy than the people of a privacy-conscious culture; but it may be one of a relatively primitive society in which a number of human capacities would be less fully developed than they are in our own.

At the same time, a diminution of privacy through changing social sentiment sometimes may seem the mark, not of a primitive society, but of a complex and maturing one. This loss of privacy may indicate either greater toleration of diversity on the part of a society or a newfound psychological strength and self-esteem on the part of those whose privacy is cast aside. When, for example, significant numbers of homosexuals "come out of the closet," this development may reflect both a greater acceptance of unorthodox sexual behavior on the part of society and a greater willingness on the part of the homosexuals themselves to endure the disapproval that remains. Moreover, some nonprimitive societies exhibit near indifference to aspects of privacy that we consider extremely important. See M. SRINIVAS, *THE REMEMBERED VILLAGE* (1977) (India).

this article analyzes current cultural sentiments concerning interpersonal privacy and suggests that the Supreme Court has subordinated

Even if some basic concept of privacy merited recognition as a natural right or virtue, it is doubtful that judges who were part of a society that had lost this virtue could be the ministers of its restoration. It would seem especially difficult to recreate a lost sense of privacy through decisions under the fourth amendment. This amendment is not a comprehensive instrument for the protection of privacy—in part because it restricts only governmental action.

Consider, for example, a judge who in the name of natural justice sought to recreate the sense of privacy that existed prior to the invention of flashlights, telescopes and binoculars and who therefore required police officers to establish probable cause before making use of these sensory aids. Apart from its other defects, this ruling would be unlikely to enhance society's general sense of privacy in a significant way. It would merely deny to governmental officers the use of investigative techniques that remained common in other sectors of society; and so long as those who sought to preserve their privacy sensed a need to be wary of privately owned flashlights and binoculars, the restriction of government officers would seem gratuitous. Moreover, for a judge to elevate his personal visions of privacy above those of the rest of society would be arrogant and inconsistent with appropriate concepts of judicial restraint. A test of constitutional protection that looks to changing cultural sentiments may raise the specter of adjudication by Gallup poll; but idiosyncratic judicial concepts of natural justice—visions, for example, of an inherent human need for privacy at odds with the visions prevalent in society—would have less claim to respect.

In America in 1984, the application of fourth amendment standards to the use of infra-red superscopes would stand on a stronger footing than the application of these standards to the use of binoculars. The difference between superscopes and binoculars, however, is merely one of differing cultural expectations. One privacy-invading technology has become common and accepted in a way that the other (so far) has not. However troublesome it may seem to ground fourth amendment rulings upon the sands of cultural sentiment, a rough judicial assessment of general expectations of privacy seems almost unavoidable as courts confront cases of magnetometers, beepers, flashlights, cameras, low-flying airplanes, parabolic microphones, drug-sniffing dogs and lip-readers.

It does not follow that courts must look to cultural sentiments to determine the applicability of fourth amendment safeguards in every case. Indeed, *Katz* did not suggest that they should. That decision did not propose "reasonable expectation of privacy" as a universal test of fourth amendment protection; the case said explicitly, "[The Fourth] Amendment protects . . . privacy against certain kinds of governmental intrusion, but its protections go further and often have nothing to do with privacy at all." 389 U.S. at 350. Much of the trepidation that scholars have voiced concerning *Katz* may stem from a failure to recognize that *Katz* supplemented earlier visions of fourth amendment protections but did not supplant them.

The fourth amendment does have a "natural law" core, one whose meaning depends neither on evolving cultural sentiments nor on the subjective vision of judges. The text of this amendment reveals almost unmistakably the natural law vision of its framers, one tied to traditional concepts of property. The amendment declares the right of the people to be secure "in their persons, houses, papers and effects against unreasonable searches and seizures"; and courts should read this language to establish an irreducible minimum fourth amendment protection independent of cultural expectations. When the government seizes someone's body or intrudes upon

these sentiments to its desire to restrict application of the fourth amendment exclusionary rule. It concludes that *Katz* may not have been a fourth amendment revolution that happened in 1967; to a considerable extent, *Katz* may be a revolution waiting to happen.¹³

Plainly *Katz* itself was a decision about interpersonal privacy. All of the information that the F.B.I. obtained through electronic surveillance was information that Katz conveyed voluntarily to someone on the other end of a telephone line. From Katz's perspective, this person was apparently no more than a gambler, a casual business associate and a confederate in crime. The Supreme Court did not conclude that the defendant's voluntary sharing of incriminating information with this acquaintance defeated his own reasonable expectations of privacy. Nevertheless the Court recognized that the case would have been different if Katz had spoken to his customer from an unenclosed telephone booth on a crowded street corner. It observed, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."¹⁴ Sharing information with one person, even with a casual acquaintance, is not the same as sharing it with the public; and implicit in *Katz* was the proposition that somewhere at or between these poles is an area of interpersonal sharing that the fourth amendment protects. Nevertheless, far from drawing a presumptive boundary of protection at some point along the spectrum between sharing with one

significant property interests in the course of criminal investigation, an inquiry into cultural expectations is unnecessary. It does not matter how commonplace or how accepted this sort of intrusion might have become; the text of the amendment and the property-based vision of natural justice that it expresses dictate the application of fourth amendment standards. Moreover, the same non-relativistic analysis may be appropriate when government officers attempt to separate the privacy "stick" from the "bundle of rights" traditionally associated with property ownership—when, for example, they use parabolic microphones to eavesdrop on living room conversations without any physical trespass. Only when traditional property interests are absent should judges assume the role of armchair sociologists and attempt to assess cultural expectations of privacy. To safeguard "pure" privacy interests (those unalloyed with property interests) only when they are supported by general social expectations would not risk the evisceration of the fourth amendment's most basic protections. At the same time, a relativistic view of one sphere of fourth amendment protection (a sphere that the framers may not have anticipated at all) would avoid the pretense that whatever privacy is vital today is also an immutable part of natural justice. It would permit a society to abandon some aspects of privacy as these aspects became less important to its members' sense of dignity and self-worth.

13. See Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 540 (the Supreme Court has "failed to pursue the implication of its insight").

14. *Katz*, 389 U.S. at 351.

person and sharing with the public, post-*Katz* Supreme Court decisions have tended to chop at one of the poles. They have argued on some occasions but not others that any voluntary sharing of information or property (especially with a casual associate or confederate in crime) defeats one's justifiable expectations of privacy.

III. THE FOURTH AMENDMENT AND BAILMENTS OF TANGIBLE PROPERTY

Of course, even after *Katz*, a central concern of the fourth amendment is the seizure of tangible property; and a relatively simple form of interpersonal sharing is a bailment, an entrusting of one's property to another. This article's examination of interpersonal privacy therefore begins with the fourth amendment issues raised by bailments—issues that take a relatively tangible and a relatively tractable form. Two recent Supreme Court decisions provide an appropriate vehicle for the effort.¹⁵

In *Rakas v. Illinois*,¹⁶ police officers stopped an automobile, apparently because they suspected that some of the car's occupants had committed an armed robbery earlier in the day. An automobile stop can be justified on the basis of less persuasive evidence than would be required for a search of the automobile's interior,¹⁷ and the legality of the stop in *Rakas* was not challenged.¹⁸ Immediately after the stop, however, the investigating officers searched the interior of the automobile where they found a sawed-off shotgun under the front seat and a box of shotgun shells in the automobile's locked glove compartment.

Two of the four people who had been in the automobile when the police stopped it were charged with armed robbery. They moved to suppress the shotgun and shells, arguing that the police had not had probable cause for their search of the automobile. The Supreme Court held, however, that simply as passengers the defendants lacked

15. *Rakas v. Illinois*, 439 U.S. 128 (1978); *Rawlings v. Kentucky*, 448 U.S. 98 (1980). See *infra* notes 16-50 and accompanying text for a discussion of these and related cases.

16. 439 U.S. 128 (1978).

17. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *Adams v. Williams*, 407 U.S. 143 (1972).

18. On the facts of the case, the legality of the stop seemed doubtful; and if the defendants had challenged this stop, all of the evidence that the police uncovered might have been suppressed as a product of this interference with their freedom of motion. See J. CHOPER, Y. KAMISAR, & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1978-1979*, at 160-61 (1979) (remarks of Professor Kamisar).

standing to challenge the search. Emphasizing that these passengers had claimed ownership neither of the automobile nor of the shotgun and shells, the majority concluded that the defendants had established no reasonable expectation of privacy in the glove compartment or the area under the seat.

I am no admirer of the decision in *Rakas*, but I believe that the five Justices in the majority were correct in their resolution of an issue that both they and the four dissenting Justices regarded as the principal issue in the case. A pre-*Katz* decision, *Jones v. United States*,¹⁹ had held that anyone legitimately on premises searched by law enforcement officers could challenge the legality of the search. The majority opinion by Justice Rehnquist concluded that this formulation could not survive *Katz*, while the dissenters argued that *Katz* dictated reaffirmation of the "legitimate presence" standard. The dissenters chose "legitimate presence" as their battleground.

Jones's recognition of the standing of anyone legitimately on the premises to challenge a search was grounded on the artificiality of using traditional property concepts to determine the scope of the fourth amendment's protection.²⁰ The case held that, despite his lack of a property interest, a person who was a guest in a friend's apartment at the time of a police search could contest the search's legality. In that respect, *Jones* was a precursor of *Katz*. Nevertheless, the reasonable-expectation-of-privacy standard of *Katz* offered a more coherent vision of the fourth amendment than the physical-presence-or-absence standard of *Jones*. Presence or absence is not an appropriate measure of an individual's justifiable expectations of privacy.

The majority in *Rakas* noted that only a year after *Katz* the Supreme Court had failed to emphasize a defendant's "legitimate presence" in a case in which this standard plainly would have conferred standing. Instead, in *Mancusi v. DeForte*,²¹ the Court had said that a defendant would establish his standing if he demonstrated "a reasonable expectation of freedom from governmental intrusion."²² The *Rakas* majority chided lower courts for woodenly applying the "physical presence" standard in the years after *Katz* and *Mancusi* without pausing to reconsider the viability of this doctrine.²³ The majority failed to note that a unanimous Supreme Court—a Court that included all five members of the *Rakas* majority—had committed the same error.

19. 362 U.S. 257 (1960).

20. *Id.* at 265-67.

21. 392 U.S. 364 (1968).

22. *Id.* at 368.

23. *Rakas*, 439 U.S. at 142 n.10.

Six years after *Katz* and five years after *Mancusi*, the Supreme Court decided *Brown v. United States*.²⁴ A gang of thieves had stored over \$100,000 worth of stolen merchandise at a store owned by one of them. After the government conceded that a warrant issued for a search of this store was defective, the trial court granted the store owner's motion to suppress the stolen merchandise from use in evidence. Nevertheless, the trial court permitted the government to use the stolen merchandise against the other thieves, concluding that they lacked standing to challenge the search. The Supreme Court affirmed this ruling. The Court's unanimous opinion by Chief Justice Burger never uttered the words "expectation of privacy". Instead the opinion said:

[I]t is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element . . . , possession of the seized evidence at the time of the contested search and seizure.²⁵

That the Supreme Court, a half-dozen years after *Katz*, was speaking of proprietary and possessory interests and of physical presence rather than of expectations of privacy suggests the staying power of pre-*Katz* visions of the fourth amendment. Nevertheless, *Brown* illustrates the artificiality of some of those visions including the "physical presence" test of *Jones*.

Imagine that when the police arrived to conduct their search, one of the defendants in *Brown* had been shopping for a Christmas present for his mother at the store where he and his co-conspirators had stored their booty. Under *Katz*, a thief who chanced to be standing in the store's checkout line certainly should not have a greater power to contest the search than his fellow thieves. Perhaps this conspirator did have a reasonable expectation that the stolen property would remain secure from unlawful governmental seizure at his co-conspirator's store; but if he did, so did all the others. Physical presence or absence would not be the touchstone of his legitimate expectations of privacy.

Similarly, a person's legitimate presence in an automobile would not establish automatically that he had a justifiable expectation of

24. 411 U.S. 223 (1973).

25. *Id.* at 229. The concluding statement that the defendants were not charged with a possessory offense was designed to show the inapplicability of the "automatic standing" doctrine, a doctrine that the Supreme Court now has abandoned. See *United States v. Salvucci*, 448 U.S. 83 (1980).

privacy in the glove compartment or in the area under the seat. To take an extreme example, imagine that a motorist has given a ride to a hitchhiker who has asked if he may look through the car's glove compartment to find maps to use in planning the next portion of his journey. The motorist has denied permission, saying that he keeps material in the glove compartment that he does not want the hitchhiker to see. Certainly the hitchhiker, despite his legitimate presence in the automobile, would not have a reasonable expectation of privacy in the glove compartment. If, despite the rebuff, the hitchhiker were to give the motorist some money for gasoline; if the motorist were to place this money in the glove compartment; if the police were then to search the glove compartment without probable cause; and if the serial numbers on the bills supplied by the hitchhiker were to prove that the money had been taken in a bank robbery, the hitchhiker should not be allowed to contest the use at trial of the bills found in the glove compartment.

Of course this example is bizarre—an unreal case that only the twisted mind of a law professor could have contrived. Moreover, the difference between this case and *Rakas* is clear. In *Rakas*, the driver of the automobile, who apparently also was its owner, almost certainly had given her passengers permission to use the glove compartment and the area under the seat. In all but the rarest circumstances, a person who stores property in an automobile's locked glove compartment with the automobile owner's permission has a reasonable expectation that the property will remain private in that compartment. Cultural expectations of privacy are changing and uncertain, but not so uncertain as to make a denial of that proposition anything but silly. Nevertheless, it is the owner's permission and not anyone's presence or absence that gives rise to the legitimate expectation of privacy. The emphasis of both the majority and dissenting opinions on the significance of "physical presence" deflected attention from the more important bailment issue.

In *Katz*, the Supreme Court had said, "No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment."²⁶ This recognition of a taxicab passenger's legitimate expectations of privacy led Justice White to ask in his *Rakas* dissent, "Why should Fourth Amendment rights be present when one pays a cabdriver for a ride but be absent when one is given a ride by a friend?"²⁷ The *Rakas* majority indicated that it would have allowed

26. *Katz*, 389 U.S. at 352.

27. *Rakas*, 439 U.S. at 167 (White, J., dissenting).

the owner-driver of the automobile to contest the search,²⁸ and it mentioned more than a half-dozen times the absence of any allegation by the *Rakas* defendants that they owned the automobile or the seized material. The majority thus gave color to the harsh view that Americans tend to make everything—even privacy rights—a matter of money; and the opinion invited the jibe with which Justice White began his dissent, “The Court today holds that the Fourth Amendment protects property, not people”²⁹

The majority said in fact, “One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.”³⁰ Nevertheless, the power to exclude is also the power to include. The Court might have noted that one of the main rights attaching to property is the right to share its shelter, its comfort and its privacy with others. Insofar as *Rakas* limited a property owner’s power to share what was hers, the decision did not elevate property rights over privacy rights so much as it diminished the value of both.

Still, at the time of the *Rakas* decision, it was not entirely clear that an automobile owner’s permission to store property in the glove compartment or under the front seat would fail to establish a reasonable expectation of privacy on the part of a person who had received this permission. To satisfy the *Jones* test of standing, it was enough for the defendants in *Rakas* to establish their legitimate presence in the automobile. If they had testified in addition that they owned the seized property or that the automobile owner had given them permission to conceal incriminating material inside the car, this testimony conceivably might have been used against them for impeachment purposes at trial.³¹ Remarkably, after altering the prevailing test of standing that the defendants had satisfied, the Supreme Court denied their request that they be permitted to demonstrate ownership of the seized property in order to satisfy the Court’s new test;³² and just as the record in *Rakas* did not establish the defendants’ ownership of the shotgun and shells, it did not establish that they had received the automobile owner’s permission to use the glove compartment and

28. *Id.* at 143 n.12.

29. *Id.* at 156 (White, J., dissenting).

30. *Id.* at 143 n.12.

31. Compare *United States v. Kahan*, 415 U.S. 239, 243 (1974), with *New Jersey v. Portash*, 440 U.S. 450 (1979). See J. CHOPER, Y. KAMISAR & L. TRIBE, *supra* note 18, at 163-65 (remarks of Professor Kamisar).

32. See *Rakas*, 439 U.S. at 130 n.1.

the area under the seat. Although the *Rakas* majority emphasized the absence of any allegation of ownership, it did not discuss the possible significance of the defendants' failure to establish the owner's permission. It was unclear whether the Court's analysis was premised on the assumption that this permission had been granted or on the opposite assumption. In other words, the Court did not address the circumstance that, in terms of ordinary cultural expectations, probably should have decided the case. It might have been possible to read *Rakas* merely as a hypertechnical ruling on the state of the record rather than as a denial of cultural expectations that, were it not for the opinion, one would have thought universally recognized.

The possibility of reading *Rakas* in this narrow and technical fashion disappeared, however, when the Court decided *Rawlings v. Kentucky*³³ two years later. In *Rawlings*, the Court assumed that a woman named Cox had given her companion, a drug dealer named Rawlings, permission to store a substantial quantity of drugs in her purse. The Supreme Court ruled that Rawlings could not challenge the apparently unlawful search of the purse that uncovered these drugs.

Rawlings did not hold that a bailor invariably sacrifices the protection of the fourth amendment by entrusting his property to a bailee. Justice Rehnquist's opinion for the Court mentioned several potentially limiting circumstances—that Rawlings and Cox had known each other only two days, that Rawlings had not used Cox's purse before, that Cox had allowed someone to look in her purse for a hairbrush shortly before allowing Rawlings to place his drugs there, that Rawlings did not have authority to exclude other people from Cox's purse, and that Rawlings admitted that he expected the purse to be searched (legally or illegally) by the police. Nevertheless, an analysis of *Rawlings* by Professor Wayne R. LaFave, America's foremost authority on the fourth amendment, has demonstrated the irrelevance or triviality of all of these circumstances;³⁴ there is no need to repeat here LaFave's impressive dissection of the majority opinion. The principal significance of the record in *Rawlings* was simply that it filled both gaps of the record in *Rakas*. Rawlings alleged, first, that he owned the property seized and, second, that he had received the owner's permission to store this property in the place that was searched. The Supreme Court held that neither circumstance established his standing.

The Court responded only briefly to Rawlings' claim that ownership of the property seized should enable him to contest the search:

33. 448 U.S. 98 (1980).

34. 3 W. LAFAVE, *supra* note 3, § 11.3, at 224-31.

While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that "arcane" concepts of property law ought to control the ability to claim the protection of the Fourth Amendment Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy. Prior to *Rakas* [in which the Supreme Court abandoned the traditional "standing" terminology], petitioner might have been given "standing" in such a case to challenge a "search" that netted those drugs but probably would have lost his claim on the merits. After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner.³⁵

Rakas had emphasized the defendants' failure to allege ownership of the property seized, and it had said that an owner of property would "in all likelihood" have standing to challenge its search or seizure "by virtue of [his] right to exclude."³⁶ Accordingly, the defendant in *Rawlings* said to the Supreme Court, "I am the owner." And the Court responded, "Mr. Rawlings, don't be arcane."

This dismissal of the claim based on ownership was astonishing. The Court apparently had gone from an emphasis on property rights in the period before *Katz*, to an emphasis on privacy rights in the *Katz* decision, to renewed emphasis on property rights in *Rakas*, and finally to a remarkable situation in *Rawlings* in which neither property rights nor privacy rights were protected. Nevertheless, the significance of *Rawlings*' ownership of the drugs is a more complex issue than may be immediately apparent.

Analysis can begin with the hypothetical case suggested by Justice Rehnquist—one in which a defendant places his drugs in plain view. Imagine that a sidewalk vendor is sitting on a downtown street corner with his wares before him. These wares are clearly labeled—coke, smack, speed and weed. A police officer approaches and seizes the drugs. Justice Rehnquist was undoubtedly correct that, prior to *Rakas*, the vendor would have had standing to contest the seizure but would have lost on the merits. He would have had standing because, prior to *Rawlings*, the notion that someone might lack standing to contest the seizure of his own property would have been unthinkable. The vendor would have lost on the merits, however, because abundant probable cause supported the seizure and because there was no opportunity to obtain a judicial warrant. Justice Rehnquist also was correct that, after *Rakas*, the question of standing "merges" with

35. *Rawlings*, 448 U.S. at 105-06.

36. *Rakas*, 439 U.S. at 143 n.12.

the question "whether governmental officials violated any legitimate expectations of privacy held by petitioner." In fact, for most purposes, the two inquiries plainly had merged long before *Rakas*.³⁷ Still, the question of standing merges only with the question of protectable expectations of privacy. It is distinct from the questions of probable cause and the need for a warrant. What would doom our sidewalk vendor would not be the absence of any legitimate expectation of privacy but the existence of probable cause and circumstances that would excuse the lack of a warrant.

To demonstrate this proposition it is necessary only to envision a case in which probable cause is lacking. Suppose that after our drug vendor has been jailed, his place on the street corner is taken by a Salvation Army officer with a prayerbook in his hand and a scarf around his neck. A burly police officer approaches and says, "In my official capacity, I have decided that your prayerbook and beautiful scarf might conceivably be useful as evidence in a murder prosecution. Accordingly I will seize them." He grabs the book, wraps the scarf around his neck, and resumes his patrol. Certainly a person should be allowed to contest a seizure of his property without probable cause even when the seizure occurs in a public place. In this case, the analysis offered by the Supreme Court in *Rawlings* would seem either wrong or irrelevant: "Had petitioner placed his [prayerbook and scarf] in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy."

Indeed, the seizure of the prayerbook and scarf illustrates a central defect of the analysis in *Rakas* and *Rawlings*. Even when the Supreme Court seemed to emphasize property values in *Rakas*, it spoke as if the fourth amendment formally protected only privacy values. For example, the majority declared, "[T]he Court has not abandoned altogether use of property concepts in determining the presence or absence of the *privacy interests* protected by [the Fourth] Amendment."³⁸ It was this view that, in the end, the amendment protects only privacy that enabled the Court to make its outrageous suggestion that a person can have no reasonable expectation that his property will remain free from governmental seizure when he exposes this property to the public. Certainly the *Katz* decision offered no support for the view that property interests matter under the fourth amendment only when they tend to support privacy interests. Indeed, *Katz* had said the opposite: "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but

37. *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968).

38. *Rakas*, 439 U.S. at 143 n.12 (emphasis added).

its protections go further and often have nothing to do with privacy at all.”³⁹

The Salvation Army officer whose prayerbook and scarf were seized assuredly did not wish to keep the contents of his prayerbook private, nor was he at all distressed that the removal of his scarf had revealed what was under it. His complaint was that the police officer had stolen his property, not that the officer had invaded his privacy. Unless the Supreme Court truly would deny relief to this Salvation Army officer, it seems apparent that the fourth amendment protects both property and privacy.⁴⁰ A person always should have standing to contest an illegal seizure of his property.⁴¹

This simple proposition may not resolve the issue in *Rawlings*, however. Although the Supreme Court’s opinion offered no hint that the nature of the property seized was significant, perhaps the Court was influenced in part by the illicit character of the seized drugs. Illicit drugs are contraband and in that respect are different from prayerbooks and scarves. A ruling that a person has no protectable interest in contraband and that he can challenge the seizure of prohibited drugs only by establishing a privacy interest in the place that was searched might not seem notably distressing. Nevertheless, a decision by the Supreme Court more than thirty years ago poses a significant obstacle to this ruling. In *United States v. Jeffers*,⁴² the government argued “that no property rights within the meaning of the Fourth Amendment exist in the narcotics seized here, because they are contraband goods in which Congress has declared that ‘no property rights shall exist’.”⁴³ The Court rejected this argument, apparently concluding that prohibited drugs should be treated no differently from other property. If the *Rawlings* opinion had overruled *Jeffers* and had emphasized

39. *Katz*, 389 U.S. at 350.

40. Of course the word privacy is extraordinarily flexible. One variation of the word—a variation that has relatively little to do with controlling access to personal information—is suggested by the term “private property.” (Of course one use of property is to shield personal privacy, but that use is not the only one.) By using the word privacy to encompass two forms of privacy—“informational” privacy and “property” privacy—one might maintain plausibly that the fourth amendment protects only “privacy.” When a defendant asserts an interest in “property” privacy or in ownership, however, it is irrelevant that he has exposed his property to public view. Even if it were assumed, contrary to *Katz*, that the fourth amendment protects only privacy, *Rawlings* would confound two distinct types of privacy.

41. Of course the Salvation Army officer might challenge the police seizure under the fifth amendment “takings” clause as well as under the fourth amendment.

42. 342 U.S. 48 (1951).

43. *Id.* at 52-53.

the contraband nature of the property seized, its dismissal of the claim based on ownership might not have been objectionable.

Even without overruling *Jeffers* on this issue, the Court might have articulated a somewhat more plausible basis for its conclusion that Rawlings' ownership of the drugs was not determinative. Of course a person should be allowed to contest an unlawful seizure of his property, but once Rawlings' drugs came into view, there was probable cause for their seizure. If one assumes that Rawlings had no reasonable expectation of privacy in Cox's purse (if, in other words, one analogizes the purse to a public place so far as Rawlings was concerned), recognition of Rawlings' standing to contest the seizure might not have helped him, for the seizure would have been supported by probable cause. To put the same contention another way, the Court might have held that although the search of Cox's purse was illegal, Rawlings lacked standing to challenge this search; and although Rawlings did have standing to challenge the seizure of his drugs, the seizure of these drugs was proper.

There are, however, at least three difficulties with this theory. First, although the *Jeffers* opinion is a bit murky on the point, it apparently rejected this theory along with the theory that the fourth amendment does not protect property interests in contraband. The Court declared in *Jeffers* that the search and seizure were "incapable of being untied," and it characterized the government's effort to differentiate between them as "a quibbling distinction."⁴⁴ Second, although the seizure of Rawlings' drugs may have been supported by probable cause once they became visible, this seizure apparently had not been authorized by a judicial warrant.⁴⁵ Although the unlawful search of Cox's purse might not have violated any right of Rawlings, a court might hesitate to hold that an unlawful police search could create "exigent circumstances" that would excuse the absence of a warrant.⁴⁶

44. *Id.* at 52.

45. Although the police possessed a warrant authorizing them to search the house in which Cox and Rawlings had been detained, this warrant probably would not have authorized a search of Cox's purse. See *Ybarra v. Illinois*, 444 U.S. 85 (1979).

46. Perhaps, however, unlawful police action that violates the rights of someone other than the objecting party can give rise to the sort of exigency that would excuse a judicial warrant. Imagine, for example, that when the police entered the home of Mr. Big without probable cause and discovered a burglar stealing Mr. Big's silverware, see *supra* text accompanying notes 5-6, the burglar was smoking a marijuana cigarette. I doubt that a court should hold the warrantless seizure of this cigarette a violation of the burglar's fourth amendment rights. If Rawlings lacked standing to challenge the search of Cox's purse, the warrantless seizure of his drugs might have been upheld on the same theory.

The third objection, however, is more telling than the other two. Rawlings so obviously had a reasonable expectation of privacy in Cox's purse that it is difficult even to discuss the possibility of differentiating between the search and the seizure on the facts of the case. If Rawlings' reasonable expectation of privacy in Cox's purse seems at all doubtful, simply transpose the bailed property once again from drugs to less troublesome items. Suppose that the owner of a large purse has given someone else permission to keep his doughnuts, camera, paperback novel, and letters from his grandmother inside. A search of the purse that uncovered the items undoubtedly would invade the bailor's reasonable expectations of privacy (whether or not his property was seized).

What led the Supreme Court to its elaborate efforts to deny the obvious in *Rakas* and *Rawlings*? The principal reason is not difficult to discern. In *Rakas*, Justice Rehnquist wrote for the Court, "Each time the exclusionary rule is applied it exacts a substantial social cost [M]isgivings as to the benefit of enlarging the class of person who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations."⁴⁷ Justice White's dissenting opinion advanced a similar view of the majority's motivation but characterized it less favorably: "If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines"⁴⁸

The Supreme Court's reluctance to recognize the implications of *Katz* in *Rakas* and *Rawlings* may have been understandable; for in cases in which only tangible property has been seized, an unblinking application of the principles of *Katz* might have left intact only a few limitations on the standing of defendants to challenge searches and seizures. In terms of general cultural sentiments concerning privacy, a burglar, automobile thief or other trespasser is very likely to lack standing to challenge a search that uncovers incriminating evidence against him. Nevertheless, someone who entrusts property to a relative, friend or confederate in crime ordinarily has a reasonable expectation of privacy in any private place where the bailee stores this property.

Of course the fourth amendment restricts only governmental action, not the action of private individuals. For that reason, a bailor always must risk betrayal. For example, if a bailee who had agreed to conceal stolen merchandise were to attend a religious meeting, re-

47. *Rakas*, 439 U.S. at 137-38.

48. *Id.* at 157 (White, J., dissenting).

pent his sins, and deliver the incriminating property to the police, the bailor's fourth amendment rights would not be violated.⁴⁹ The bailor also must risk his bailee's negligence and bad judgment; for example, if a bailee were to keep the bailor's property in a department store window or at some other place where the bailee himself lacked a reasonable expectation of privacy, the police ordinarily would not violate anyone's fourth amendment rights by examining it. Nevertheless, recognition that a bailment ordinarily establishes the bailor's reasonable expectation of privacy in whatever private place the bailed property is kept not only would accord with general cultural sentiments but, in cases in which only the seizure of tangible property is at issue, would resolve most issues of standing in favor of permitting challenges to the lawfulness of governmental searches and seizures.

This expansion of fourth amendment standing would seem desirable. For example, it would eliminate the incongruity of permitting a "bad" police officer to search the houses of all suspected members of a conspiracy without probable cause, secure in the knowledge that whatever he found in each house would be admissible against all the suspects who did not live there. Moreover, it would end most incongruities of current standing doctrine without the administrative complexities of a rule that afforded standing to anyone who was a "target" of a governmental search.⁵⁰

Nevertheless, the thought of expanding fourth amendment protections is apparently anathema to today's Supreme Court. Rather than give *Katz* a straightforward reading that might accomplish this result, the Court in *Rakas* and *Rawlings* turned *Katz* on its head and read the case to restrict substantially the ability of individuals to challenge the legality of governmental searches.

IV. REQUIRED RECORDKEEPING AND THE PROTECTION OF SHARED INFORMATION

Were it not for the Supreme Court's efforts to avoid rulings in favor of defendants on search and seizure questions, the issues posed by the bailment of tangible property would not seem difficult. When a person shares information rather than property, however, fourth amendment questions tend to become more complex. The Supreme

49. This point is developed *infra* at text accompanying notes 60-65.

50. For a discussion of the administrative difficulties that might be occasioned by approval of a "target standing" concept, see *Rakas*, 439 U.S. at 136-37; *Alderman v. United States*, 394 U.S. 165, 188-89 (1969) (Harlan, J., concurring and dissenting). *But see White & Greenspan, Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970).

Court considered some of these questions in 1976 in *United States v. Miller*.⁵¹

An obviously misnamed federal statute, the Bank Secrecy Act of 1970,⁵² requires banks to keep copies of checks and of other records of their customers' accounts. Prior to *Miller*, in *California Bankers Association v. Schultz*,⁵³ the Supreme Court had upheld the constitutionality of the Bank Secrecy Act's recordkeeping requirements. The Court had concluded that whether a depositor's fourth amendment rights would be violated by requiring a bank to disclose its records to the government was not a question ripe for adjudication.⁵⁴ In *Miller*, however, this issue was presented. The government had required the disclosure of a bank's records of the account of a suspected bootlegger. The way in which the government had forced disclosure of the records—through a grand jury subpoena—presents some potentially difficult issues that need not detain us.⁵⁵ For the Court resolved *Miller* on a broad-gauged basis that would have been equally applicable had governmental officers broken into the bank without probable cause to seize the records. The Court held that a bank customer has no

51. 425 U.S. 435 (1976).

52. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified in part at 31 U.S.C. §§ 1051-1122 (1976)). Presumably this act was called the Bank Secrecy Act, not because its authors wished to promote bank secrecy, but because they wished to restrict it.

53. 416 U.S. 21 (1974).

54. *Id.* at 52-54.

55. Although the forced production of documents pursuant to a grand jury subpoena qualifies as a seizure of those documents under the fourth amendment (see *Boyd v. United States*, 116 U.S. 616 (1886); *Hale v. Henkel*, 201 U.S. 43 (1906)), this seizure does not require probable cause or even reasonable suspicion as those terms are usually understood. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-09 (1946). For that reason, recognition of a bank customer's reasonable expectation of privacy in the records of his account ordinarily would not pose a significant impediment to the government's efforts to obtain those records through a subpoena. In *Miller*, however, the defendant alleged that the subpoenas had been issued improperly. 425 U.S. at 438-39. A litigant with a protectable privacy interest in bank records probably should be afforded the same opportunity to assert defects in grand jury subpoenas for those records as the bank itself (even when the asserted defects are nonconstitutional in character).

The Supreme Court may not have understood the rather involved context in which the constitutional issue was presented. A footnote to the majority opinion expressed the Court's bafflement concerning the defendant's emphasis on the defective character of the grand jury subpoenas. This footnote declared that the Court would not "limit" its consideration "to the situation in which there is an alleged defect in the subpoena served on the bank." *Miller*, 425 U.S. at 441 n.2. Had the subpoena in *Miller* not been defective, however, the bank customer's standing or lack of standing probably would not have affected the outcome of the case.

reasonable expectation of privacy in the bank's records of his account. Even in a case of forcible seizure, the customer apparently would lack standing to complain.

Reactions to the decision in *Miller* have been overwhelmingly negative. Congress promptly enacted new legislation limiting the impact of the ruling;⁵⁶ several state supreme courts declined to follow *Miller* in interpreting their state constitutions;⁵⁷ every one of the half-dozen law review comments on the case was critical;⁵⁸ and I have yet to encounter a law student with a kind word to say about the opinion. Most of the criticism has emphasized that bank customers ordinarily do expect banking transactions to remain private. If a local newspaper were to publish a human-interest column titled "News from the First National Bank"—a column that described the most interesting checks that the bank processed during the previous week—the bank's customers might be more than a little offended. Indeed, if a bank officer were to disclose at a cocktail party some of the interesting personal information that he had gathered in his daily work, the affected customers probably would be entitled to damages for a tortious invasion of privacy or for breach of the bank's implied contractual obligations.⁵⁹

56. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205, 90 Stat. 1699 (codified at 26 U.S.C. § 7609 (1976)); Right to Financial Privacy Act of 1978, passed as Title XI of the Financial Institutions Regulatory and Interest Control Act of 1978, Pub. L. No. 95-630, §§ 1100-1122, 92 Stat. 3641, 3697 (codified at 12 U.S.C. §§ 3401-3422 (Supp. V 1981)).

57. *Burrows v. Superior Court of San Bernardino County*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974); *People v. Blair*, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); *Charles v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980); *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979). See *State v. Starke*, 81 Wis. 2d 399, 421, 260 N.W.2d 739, 751-52 (1978) (Abrahamson, J., concurring).

58. Alexander & Spurgeon, *Privacy, Banking Records and the Supreme Court: A Before and After Look at Miller*, 10 Sw. U.L. REV. 13 (1978); Comment, *Government Access to Bank Records in the Aftermath of U.S. v. Miller and the Tax Reform Act of 1976*, 14 HOUS. L. REV. 636 (1977); Note, *United States v. Miller: Without a Right to Informational Privacy, Who Will Watch the Watchers?*, 10 J. MAR. J. PRAC. & PROC. 629 (1977); Note, *No Expectation of Privacy in Bank Records—United States v. Miller*, 26 DE PAUL L. REV. 146 (1976); Comment, *A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: United States v. Miller*, 14 SAN DIEGO L. REV. 414 (1977); Note, *Search and Seizure of Bank Records Under The Bank Secrecy Act*, 51 TUL. L. REV. 723 (1977).

59. See *Milohnich v. First Nat'l Bank*, 224 So. 2d 759 (Fla. Dist. Ct. App. 1969); *Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 367 P.2d 284 (1961); Grano, *Supreme Court Review—Foreword: Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 440 (1978).

Nevertheless, the *Miller* opinion did not deny that bank customers typically expect transactions with their “personal bankers” to remain private. A criminal usually expects his confederates in crime to keep his confidences as well, and the Court said in *Miller*:

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government. . . . This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Governmental authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.⁶⁰

This statement, with its emphasis on a depositor’s assumption of risk, reflects a misconception that has infected a number of Supreme Court rulings on interpersonal privacy. When law students see the words “assume the risk” in a judicial opinion, they usually know to raise a flag. The flag depicts rabbit ears emerging from a top hat, and beneath the hat is the motto, “*Haec propositio circularis est*,” meaning, “This statement begs the question.”⁶¹ To say that a person must assume the risk of some occurrence is usually unhelpful. What risks must we assume; what risks need we not assume; and why?

Nevertheless, the statement often made in fourth amendment opinions that anyone who entrusts information or property to another must assume the risk of betrayal is *not* conclusory. This statement merely reiterates that the fourth amendment, like most other constitutional provisions, restricts governmental action and not the action of private individuals.⁶² So far as the fourth amendment is concerned, a person who trusts another with his secret does run the risk that his confidant will prove untrustworthy. It does not matter how close the personal relationship between these parties may be or what cultural expectations of privacy surround it.⁶³ If Colonel Mustard’s spouse comes to the stationhouse to reveal that he committed the murder with the wrench in the dining room, the fourth amendment

60. *Miller*, 425 U.S. at 443.

61. I am grateful to Professor Nico Keijer of the Free University of Amsterdam for suggesting a Latin motto for my flag.

62. *See, e.g.*, *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

63. Of course legal doctrines other than the fourth amendment sometimes protect the confidentiality of shared information. For example, the common law evidentiary privilege for confidential interspousal communications might prevent any use in court of the information conveyed to the government in the hypothetical case that follows this footnote. *See infra* note 98.

neither forbids her disclosures nor prohibits the police from listening. Moreover, it does not matter whether the betrayal is verbal or visual or involves a seizure of tangible property. If Mrs. Mustard brings the wrench from its hiding place in a small envelope and deposits it before the desk sergeant, the sergeant may receive it.⁶⁴

The limitation of the fourth amendment to governmental action means of course that its protection of interpersonal privacy will always be incomplete. Sharing information or property with other people is a highly risky enterprise; and no expansive construction of the fourth amendment is likely to alter that circumstance. Certainly none of the proposals of this article, however radical they seem, would diminish the risk of private betrayal. The Supreme Court is justified in regarding that risk as "inescapable" so far as the fourth amendment is concerned.

At the same time, the Court's repeated observations that one always must assume the risk of private betrayal have rarely, if ever, been made in cases in which private individuals have violated the trust reposed in them. The statements have been made instead in cases in which the government has employed coercive methods to obtain information from confidants who did prove trustworthy and cases in which the government seemed primarily responsible for the use of deceptive methods to induce an initial sharing of confidences. It is not clear why the fourth amendment requires all of us, whether suspected of criminal activity or not, to assume the risk of this privacy-invading governmental conduct. Although the Court's statements about the risk of private betrayal have been accurate, a student who examines these statements in context should raise his rabbit flag and wave it vigorously.

In *Miller*, the confidence placed in the bank had not been betrayed; the government had forced both the bank's initial record-keeping and its disclosure of the resulting records. The fact that one assumes the risk of betrayal by a private confidant simply had no bearing on the issues in the case.⁶⁵ Although the Supreme Court was

64. Indeed, the desk sergeant may ask Mrs. Mustard for further information about the murder without violating Colonel Mustard's constitutional rights. An invasion of privacy properly can be regarded as the product of private action despite a degree of governmental involvement.

65. Cf. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 406 (1974) ("Analysis of these cases in terms of voluntary assumption of the risk is wildly beside the point.").

I believe that the California Supreme Court erroneously extended constitutional restraints to essentially nongovernmental action in *Burrows v. Superior Court of San Bernardino County*, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974). This

able to cite earlier cases that had committed essentially the same error—treating governmental spying as though it were merely private betrayal⁶⁶—*Miller* compounded their error. In the earlier cases, law enforcement officers had secured confidential information by deception; these cases therefore involved misplaced trust—a phenomenon also found in cases of private betrayal—rather than the forced disclosure of confidential information.

The *Miller* opinion advanced a number of arguments apart from the argument that one who discloses information to another must assume the risk of betrayal:

[T]he documents subpoenaed here are not respondent's "private papers." . . . [R]espondent can assert neither ownership nor possession. Instead, these are the business records of the banks.⁶⁷

. . . .
All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business.⁶⁸

. . . .
By requiring that such records be kept by all banks, the Bank Secrecy Act is not a novel means designed to circumvent established Fourth Amendment rights. It is merely an attempt to facilitate the use of a proper and longstanding law enforcement technique by insuring that records are available when they are needed.⁶⁹

case not only concluded as a matter of state constitutional law that bank customers have reasonable expectations of privacy in bank records; it also ruled that the state constitution precludes banks from supplying these records to the government voluntarily unless the banks themselves claim to be victims of the customers' wrongdoing. The court remarked irrelevantly that a bank could not "validly consent to an invasion of its depositors' rights." *Id.* at 245, 529 P.2d at 594, 118 Cal. Rptr. at 170. Of course I cannot validly consent to an invasion of my friend's rights, but if my friend has trusted me with incriminating information, I can validly turn him in.

Bank officers may comply too readily with governmental requests for information, and the privacy of bank records may be insufficiently protected when these requests are made and granted routinely. Nevertheless, legislation may be necessary to protect against a bank's invasion of its customers' privacy in response to governmental requests. Despite extensive regulation, bank action is not governmental action, and the constitution forbids neither governmental requests for information nor a private entity's betrayal of confidences in response to these requests. *See, e.g., United States v. Matlock*, 415 U.S. 164 (1974).

66. *See Miller*, 425 U.S. at 443 (citing *United States v. White*, 401 U.S. 745, 751-52 (1971); *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *Lopez v. United States*, 373 U.S. 427 (1963)).

67. *Miller*, 425 U.S. at 440.

68. *Id.* at 442.

69. *Id.* at 444.

This article has offered as illustrations a number of bizarre hypothetical cases that never could happen. Here is another. Acting on White House orders, a group of people calling themselves "plumbers" break into a psychiatrist's office without probable cause or a warrant. They go through the psychiatrist's files, find one labeled Ellsberg, take this file and leave. The issue is whether an imaginary patient named Ellsberg, whose confidences are contained in the file, would have standing to contest the plumbers' unlawful seizure.

Virtually all of the Supreme Court's analysis in *Miller* would seem equally applicable to this case. The psychiatrist had merely kept records of transactions to which he himself was a party. Ellsberg had voluntarily conveyed personal information to this psychiatrist and thereby had assumed the risk of betrayal. Moreover, the information was exposed, not only to the psychiatrist, but to employees like the psychiatrist's secretary in the ordinary course of business. If the government had required the psychiatrist to keep these records and disclose them to the government, these requirements would have represented no more than a proper and long-standing law enforcement technique—insuring that records were available when they were needed. Finally, the records were not Ellsberg's private papers. He could claim neither ownership nor possession.

A footnote to the *Miller* opinion seemed to advert to this kind of case. It declared, "We do not address here the question of evidentiary privileges, such as that protecting communications between an attorney and his client."⁷⁰ Nevertheless, many states do not recognize a therapist-patient privilege,⁷¹ and although state law may provide some evidence of prevailing sentiments concerning privacy, it cannot be determinative of federal constitutional rights. The case of a bank customer is obviously distinguishable from the case of a psychiatric patient. Nevertheless, if Ellsberg were afforded standing to challenge the seizure of his psychiatrist's records, neither his voluntary sharing of information, nor his lack of ownership of the seized records, nor any of the other circumstances emphasized in *Miller* could be regarded as decisive.

Indeed, the government might go far toward 1984 simply by extending recordkeeping and reporting requirements to ordinary business relationships whose privacy has never been protected by evidentiary privileges. Just as it may be useful for the government

70. *Id.* at 443 n.4.

71. See Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 547, 617 n.73 (1980); Note, *Privacy in Personal Medical Information: A Diagnosis*, 33 U. FLA. L. REV. 394, 395 n.9 (1981).

to learn what checks a person has written, it may be useful to learn about his other financial transactions and the other aspects of his life. Perhaps this person's secretary should be required to keep a record of the work that the secretary does; perhaps his other employees, the people who perform services in his home, the employer who knows when he misses work, the bartender who knows how much he drinks, the taxicab driver who drives him home after he consumes those drinks in the tavern, and the department store clerk who knows what he buys also should be required to keep records of his comings, goings and doings; and perhaps all of these recordkeepers should be required to make their records available to the government. Unless the Supreme Court were to depart from the analysis offered in *Miller*, the fourth amendment as understood by the Court apparently would say nothing about this regime of almost total surveillance. In every instance, the person asserting a privacy interest would have "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the government."

Of course, as the Supreme Court mentioned in *Miller* and emphasized in *Schultz*, recordkeeping and reporting requirements did not originate with the Bank Secrecy Act of 1970. In the absence of statutory regulations, perhaps customers would expect gun dealers, like bankers, to keep their business transactions confidential. Nevertheless, most people probably are not offended that gun dealers must keep records of the guns that they buy,⁷² nor are they offended that pharmacists must record and report their drug purchases⁷³ and that their employers must tell the Internal Revenue Service how much they have been paid.⁷⁴ Indeed, recordkeeping and reporting requirements sometimes are extended to one highly confidential relationship whose privacy is ordinarily protected by an evidentiary privilege. Doctors sometimes are required to report, among other things, any treatment that they provide for knife and gunshot wounds.⁷⁵ The Supreme Court may have been concerned that contrary results in *Schultz* and *Miller* would bring the downfall of many accepted recordkeeping and reporting requirements.

Nevertheless, plausible lines between and among recordkeeping requirements can be drawn. One basic line is well established in current fourth amendment doctrine—the line between regulatory searches and searches in aid of criminal investigations. A housing inspector

72. See, e.g., COLO. REV. STAT. § 12-26-102 (1978).

73. See, e.g., *id.* §§ 12-22-318, 12-22-320 (Supp. 1982).

74. See Treas. Reg. § 31.6001 *et seq.* (1959).

75. See, e.g., COLO. REV. STAT. § 12-36-135 (Supp. 1982).

need not have particular reason to suspect a violation of the building code before entering a home;⁷⁶ a police officer investigating a crime must have probable cause to believe that relevant evidence or a person to be arrested is within. On a similar theory, recordkeeping and reporting requirements that serve bona fide regulatory purposes might be differentiated from those designed primarily to aid the investigation of crime.⁷⁷

Moreover, stronger expectations of privacy surround some interpersonal relationships than others; there is greater social utility in protecting the privacy of some relationships than others; and there is a stronger governmental need to limit the privacy of some relationships than others. The principal vice of *Miller* was that it disregarded all of these potential distinctions in its rush to speak "in the large" about the risks that a person must assume in virtually every situation in which he shares information with others. The Court seemed to swallow almost all issues of interpersonal privacy in one astonishing gulp.

This view of the breadth of the *Miller* decision was confirmed when the Supreme Court decided *Smith v. Maryland*⁷⁸ three years later. *Smith* involved the use of a device called a pen register—a device that can be attached to a telephone line to record all telephone numbers dialed by a user of that line. *Smith* apparently held that the fourth amendment imposes no restrictions on the government's use of pen registers, for a telephone user has no reasonable expectation of privacy in the numbers that he dials.⁷⁹

Unlike *Miller*, in which a bank customer conveyed financial information to the employees of his bank, *Smith* may not have presented an issue of interpersonal sharing at all. Although most of us realize that long distance numbers are recorded for billing purposes (and although our expectations of privacy concerning the resulting billing records may be roughly comparable to our expectations of privacy concerning bank records⁸⁰) *Smith* involved a local rather than a long distance call. Ordinarily a person who dials a local call does not reveal the numbers that he dials to telephone company employees. These

76. See *Camara v. Municipal Court*, 387 U.S. 523 (1967).

77. But see *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 76-77 (1974).

78. 442 U.S. 735 (1979).

79. *Id.* at 742.

80. Most of us probably would be seriously offended if the telephone company published its billing records in a newspaper or revealed them to any busybody who asked. But we probably also sense that the government sometimes can gain access to the telephone company's long distance records—for example, through the use of a grand jury subpoena.

numbers make electronic impressions on the telephone company's equipment; they serve their purpose when the telephone on the other end of the line rings; and, after that, they proceed into the void. They usually are not recorded for any purpose. The Supreme Court held in *Smith* that a person could sacrifice his expectations of privacy, not only by conveying information to other people, but by conveying information to machines. The Court wrote:

When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed.⁸¹

One wonders whether the Court's next step might be to hold that a person has no reasonable expectation of privacy when he sings in the shower because he voluntarily conveys his song to the soap dish and shower curtain.

Perhaps, however, the relevant distinction is not between people and machines but between people and machines that lack the capacity to do what people do.⁸² The Supreme Court contended in *Smith* that the telephone company's switching equipment was "merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber."⁸³ This statement seems incorrect. A human operator is capable (although only in theory) of remembering all the telephone numbers that he hears. The equipment to which a telephone user conveys information when he places a local call ordinarily lacks this capacity. The addition of a further piece of equipment—namely, a pen register—is necessary to give the telephone company's equipment the capacity of a human operator, and a person who places a local call ordinarily does not convey information voluntarily to a pen register.⁸⁴

Moreover, even a ruling that one could have no reasonable expectation of privacy in information conveyed to a human operator would be intolerable. Certainly a usual way of sending telegrams is to dictate their contents to an operator; and despite the Supreme Court's declarations in *Smith*, the Court probably would not hold

81. *Smith*, 442 U.S. at 744.

82. Or, to be more precise, it is immaterial that someone conveys information to a machine rather than to a person when he knows that the machine is merely a link in a chain of communication and that it is recording the information for later use by a person.

83. *Smith*, 442 U.S. at 744.

84. *But see id.* at 745.

that the sender of a telegram has no reasonable expectation of privacy in its contents and that, so far as the fourth amendment is concerned, the government may obtain these contents without probable cause or a warrant.

Indeed, a telephone user conveys the contents of his conversations to the telephone company's equipment in precisely the same way that he conveys the numbers that he dials.⁸⁵ The Supreme Court said in *Smith*, "[A] pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications."⁸⁶ Most of us undoubtedly would agree that the contents of our conversations are distinctly more private than the telephone numbers that we dial. Nevertheless, in terms of the consideration that the Court ultimately found determinative—the supposed voluntary sharing of information—telephone numbers do not seem notably different from the contents of conversations that we "expose" to the wires of the telephone company.

The *Smith* opinion generalized the principle that has seemed to inform many recent Supreme Court decisions on interpersonal privacy by saying, "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."⁸⁷ The Court thus denied that the fourth amendment protects interpersonal privacy at all, but of course the Court consistently has held no such thing. As mentioned earlier in this article, *Katz* itself protected the privacy of information that a defendant conveyed voluntarily to a casual associate or confederate in crime.

Indeed, the error of the Court's statement becomes apparent when we consider the fact that most of us do not live alone in our houses. We voluntarily convey to our spouses, children, roommates and guests—and even to the plumber, the landlord, and the person who comes to clean—all sorts of information about our property and the way we live. This voluntary sharing of information does not defeat our reasonable expectation that the information that we have shared

85. The Court emphasized in *Smith* that "petitioner voluntarily conveyed to [the phone company] information that it had facilities for recording and that it was free to record." *Id.* at 745. Surely, however, the phone company has facilities for recording the contents of telephone conversations; and although federal statutes currently restrict the recording of telephone conversations and not the recording of telephone numbers, see *United States v. New York Tel. Co.*, 434 U.S. 159 (1977), these statutes could be changed. Perhaps only Congress' good judgment keeps the Supreme Court from using the analysis of *Smith* to uphold the warrantless governmental recording of telephone conversations.

86. *Smith*, 442 U.S. at 741.

87. *Id.* at 743-44.

inside our houses will remain free from governmental intrusion. From the very beginning, in its core protection of our persons, houses, papers and effects, the fourth amendment has safeguarded our interpersonal privacy.

One year before the sweeping statements of *Smith*, and two years after the sweeping opinion in *Miller*, the Supreme Court decided a case that illustrates the protection routinely afforded interpersonal privacy by the fourth amendment. The issue in *Marshall v. Barlow's, Inc.*⁸⁸ was whether a governmental officer could enter the business premises of an electrical and plumbing contractor without a warrant in order to inspect these premises for compliance with the Occupational Safety and Health Act of 1970 (OSHA). The government's brief suggested that not only did the contractor's employees work in these premises, but outside delivery people were admitted to them regularly.⁸⁹ The Court held that these circumstances neither defeated the contractor's justifiable expectations of privacy nor negated the need for a search warrant. It said:

The critical fact in this case is that entry over Mr. Barlow's objection is being sought by a Government agent. Employees are not prohibited from reporting OSHA violations. What they observe in their daily functions is undoubtedly beyond the employer's reasonable expectations of privacy. The Government inspector, however, is not an employee. Without a warrant he stands in no better position than a member of the public. . . . That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search.⁹⁰

The result of *Barlow's* was incompatible with the statement in *Smith* "that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,"⁹¹ and so was the Supreme Court's suggestion that expectations of freedom from governmental intrusion can be reasonable despite the absence of expectations of privacy against substantial numbers of people unconnected with the government. Indeed, *Barlow's* indicates that the zone of interpersonal privacy protected by the fourth amendment may be

88. 436 U.S. 307 (1978).

89. Appellant's Brief at 29, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). See Grano, *supra* note 59, at 430. My analysis of *Barlow's* draws to a considerable extent on Professor Grano's. Nevertheless, Professor Grano and I occasionally differ. Compare *id.* at 435-36 with *infra* note 94.

90. *Barlow's*, 436 U.S. at 314-15.

91. *Smith*, 442 U.S. at 743-44.

large enough on some occasions to include dozens or hundreds of people.

Plainly expectations of privacy were less intense in *Barlow's* than in *Rakas*, *Rawlings*, *Miller* or *Smith*. In *Smith*, for example, it was doubtful that the defendant had voluntarily shared information with any individual at the telephone company; in *Barlow's*, the number of employees and delivery people afforded access to the information that the government sought was probably large. More importantly, unlike the bank employees in *Miller* or the bailees in *Rakas* and *Rawlings*, the employees in *Barlow's* almost certainly were not expected to keep working conditions (and most other things that they observed while at work) confidential.⁹² In terms of reasonable expectations of privacy, the result of *Barlow's* seemed not only inconsistent with the other cases but backwards. Nevertheless, Professor LaFave's observation that the decisions in *Smith* and *Barlow's* are "irreconcilable"⁹³ seems accurate only in terms of the rhetoric that the Supreme Court employed. A plausible distinction—one resting on pre-*Katz* visions of the fourth amendment rather than on differing expectations of informational privacy—was not mentioned. In *Barlow's*, unlike the other case, the warrantless search, if permitted, would have involved a physical trespass upon an employer's property. This threatened physical trespass was almost certainly decisive.⁹⁴

92. Moreover, if the employer in *Barlow's* had expected his employees to keep whatever they saw confidential, his expectation would not have been supported by general cultural sentiments; in that sense, it would have been "unreasonable."

93. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 311 (1982). See also Grano, *supra* note 59, at 438-44.

94. It might not have been at all offensive for the Court to ground the result in *Barlow's* primarily on the threatened physical trespass. As this article has contended, the fourth amendment protects both property and privacy. See *supra* text accompanying notes 37-41. Indeed, I doubt that the employer in *Barlow's* had an interest in informational privacy that would have merited fourth amendment protection apart from his property interest. Contrary to the Court's suggestion in *Barlow's*, the zone of interpersonal privacy protected by the fourth amendment is not really large enough to accommodate hundreds of people. One can maintain plausibly that expectations of privacy must be evaluated vis-a-vis the government—but only if one recognizes that these expectations themselves are shaped by expectations of privacy vis-a-vis people outside the government. See *supra* note 12. At least in cases in which property interests are uninvolved, the fourth amendment creates no right to share information with all the world save governmental officers. Under *Katz*, the decisive inquiry when traditional property interests are absent is whether recognized cultural sentiments support an expectation that certain information will remain private generally (that is, secure from both accidental discovery and from discovery by a hypothetical

V. THE INFORMANT SYSTEM AND THE FOURTH AMENDMENT

The final portion of this article will indicate what the fourth amendment might look like if the Supreme Court and other courts began to take the *Katz* revolution seriously. The exercise may lead in different and incompatible directions—for some, to greater respect for Justice Black's dissenting opinion in *Katz* and for the view that the fourth amendment protects only against the visual inspection and seizure of tangible property; for others, to a newfound appreciation of *Miller* and other recent cases that have held the line (even if incoherently) against the development of a fourth amendment concept of interpersonal privacy; and for still others, to serious consideration of an interpretation of the fourth amendment that initially might seem strange and futuristic. The article suggests that post-*Katz* fourth amendment doctrine is poised on an untenable edge with slopes that descend sharply in opposite directions. It develops this theme by focusing on a discrete issue—whether the government's coercion of one person (an informant) to reveal confidential information about another person (a suspect) is a "search" governed by fourth amendment standards.

So far as I can tell, this issue has never been litigated. The reported cases do not indicate that any defense attorney has been bold enough or foolhardy enough to argue that the coercion of one person simply to reveal another's secrets has invaded the second person's reasonable expectations of privacy. In some cases, defense attorneys have objected that governmental evidence was derived from an unlawfully obtained confession by a person who implicated the defendant. Nevertheless, they have argued only that the coercion of this confession violated the informant's privilege against self-incrimination, not that it violated the defendant's fourth amendment rights. The courts, applying clearly established doctrine, have held that a defendant lacks standing to object to the violation of another

"nosy stranger" using lawful, generally available and generally accepted investigative techniques).

Although I have argued that the fourth amendment safeguards property as well as privacy, I recognize that judicial decisions have declined to afford fourth amendment protection to minor property interests that are unaccompanied by privacy interests. Most notably, both before and after *Katz*, the Supreme Court has permitted governmental officers to trespass on "open fields" without probable cause and without judicial authorization. *Hester v. United States*, 265 U.S. 57 (1924); *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974). See also *Cardwell v. Lewis*, 417 U.S. 583 (1974) (plurality opinion). Whatever the merits of these decisions, the employer's property interest in *Barlow's* was substantial, and it was alloyed to a limited extent with a privacy interest.

person's fifth amendment privilege.⁹⁵

Analysis of the distinct fourth amendment issue can begin with two cases. In both cases the police suspect, on the basis of little evidence, that Sandra Snort is a cocaine dealer. They do not have probable cause for a search of Sandra's residence, and they do not have a search warrant. In both cases, the police knock on the door of Sandra's residence and discover that only her husband Simon is at home.

In Case One, the police ask Simon to permit a search of the residence, and he refuses. After the police threaten to break both of Simon's knees, however, he relents; and the police discover on Sandra's dresser a jar containing prohibited drugs. Although the officers' coercive threat was directed to Simon, not to Sandra, Sandra clearly has standing to object that Simon's consent was involuntary and the search invalid.⁹⁶ Sandra had a reasonable expectation of privacy in her residence, and a police search that invaded this privacy required affirmative justification. Probable cause coupled with a search warrant would have supplied this justification; and because Simon was a co-owner and occupant of the residence, his voluntary consent would have supplied appropriate justification as well.⁹⁷ Nevertheless, Simon's

95. *E.g.*, *United States v. Burton*, 416 F.2d 310 (8th Cir. 1969), *cert. denied*, 397 U.S. 1014 (1970); *United States v. Howell*, 470 F.2d 1064 (9th Cir. 1972).

96. *See, e.g.*, *Bumpers v. North Carolina*, 391 U.S. 543, 548-49 & n.11 (1968).

97. This, at least, is the conventional explanation. Rather than speak in terms of a third party's consent as justification for a search, however, it might be better simply to emphasize that the fourth amendment is inapplicable to nongovernmental activity. When an invasion of privacy seems primarily the product of betrayal by a private individual, it may not implicate the fourth amendment despite some governmental involvement. *See supra* note 64. Admittedly, however, the level of governmental involvement necessary to implicate the fourth amendment varies with the circumstances. For example, when a private individual lacks "authority" to consent to a search, almost any governmental involvement in a search that this individual has purportedly authorized usually will be sufficient.

Perhaps the Supreme Court has gone astray in interpersonal privacy cases partly because it has focused on expectations of privacy and on the justification for searches when it should have focused on the presence or absence of adequate governmental action. One sentiment appears to run through interpersonal privacy cases in a variety of contexts: So long as an invasion of privacy is primarily the product of private betrayal rather than of intrusive governmental action, it does not violate the fourth amendment. A court might attempt to capture this sentiment in any of three doctrinal propositions:

- 1) *Inadequate governmental action*. Constitutional limitations are inapplicable to an invasion of privacy that, despite some degree of governmental involvement, is primarily the product of betrayal by a private individual who has been entrusted by another private individual with information or

involuntary acquiescence is not consent; it counts for nothing. Sandra has the same power to challenge the search as if the police had entered without asking.

property.

2) *Lack of any reasonable expectation of privacy.* A person who entrusts another with information or property assumes the risk of betrayal and therefore has no reasonable expectation of privacy in the information or property that he has shared. The problem is not that the governmental action is inadequate; rather, it is that the government's action does not amount to a "search" under fourth amendment standards.

3) *"Reasonableness" of the governmental search.* Any significant governmental involvement in a breach of privacy is subject to constitutional limitations; and when a person whose privacy has been invaded had a reasonable expectation that the information acquired by the government would remain private, this governmental action does amount to a "search." Nevertheless, so long as the breach of privacy is primarily the result of private betrayal rather than of forcible, coercive or deceptive action on the part of the government, the "search" is reasonable and does not violate the fourth amendment.

All of these doctrinal formulations seem subject to criticism. As this footnote has noted, the first (focusing on the lack of sufficient governmental action) treats the government's involvement in a breach of privacy as insufficient to invoke constitutional limitations although the same involvement would be sufficient in other contexts. Moreover, in determining the applicability of constitutional limitations, courts ordinarily do not ask whether the government bears "primary" responsibility for an invasion of constitutionally protected interests; instead, they are satisfied with any "significant" government involvement. *E.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Nevertheless, the sense that private betrayal should not violate the fourth amendment despite a degree of governmental involvement appears to be primarily a "governmental action" sentiment, and the doctrinal difficulties posed by this formulation seem less serious than those posed by the alternatives.

This article already has noted the deficiencies of the second formulation—the one most often endorsed by the Supreme Court. *See text supra* at notes 87-88. It is not true that any sharing of information or property that incurs some risk of betrayal marks the end of ordinary cultural expectations of privacy in the information or property. Thus, although the defendant in *Katz* voluntarily shared information with a person who might have betrayed him, the Supreme Court held that the electronic surveillance of his conversation "violated the privacy upon which he justifiably relied." 389 U.S. at 353. Moreover, a person who voluntarily shares information inside his home and thereby incurs some risk of betrayal surely does not lose all reasonable expectation of privacy in this information.

The third formulation (focusing on the "reasonableness" of the government's action) also seems troublesome; it sweeps aside the framework that the fourth amendment establishes for judging the reasonableness of a search. When governmental action is responsible for the defeat of a reasonable expectation of privacy and therefore qualifies as a search, the text of the amendment suggests that the government must have evidentiary justification for the intrusion. In addition, government officers ordinarily must secure judicial approval of this intrusion in advance. Threshold tests

In Case Two, rather than ask Simon to consent to a search, the police ask him directly whether Sandra is a cocaine dealer. Simon again refuses to cooperate until the police threaten to break his knees. Then he admits that Sandra is a dealer and that she keeps her drugs in a jar on the dresser. This information, coupled with some confirmatory detail that Simon provides and with the evidence that the police possessed at the outset, establishes probable cause for a search. The police obtain a search warrant, enter the residence and seize the drugs.

A constitutional rule that treated these cases differently would be incoherent. In both cases, the police used essentially the same methods to accomplish the same invasion of Sandra's privacy. Nevertheless, in Case Two, it was not the visual search or physical seizure, both of which were supported by probable cause and authorized by a warrant, that violated Sandra's fourth amendment rights. If any fourth amendment violation occurred, it occurred when the police forced Simon to talk. This police action would have defeated Sandra's legitimate expectations of privacy and would have violated the fourth amendment even had the subsequent visual inspection and physical seizure not occurred.⁹⁸

for distinguishing governmental from private action and for distinguishing searches from other governmental action become useful only if, once the thresholds have been crossed, established fourth amendment standards can be used to determine the lawfulness of the government's searches. The model of legality established by the fourth amendment centers on the probable cause and warrant requirements, and these requirements should not be cast aside whenever the government's role seems "reasonable" in the abstract.

I am aware of only one Supreme Court decision that has treated the problem of "third party consent" primarily as a problem of inadequate governmental action. In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court described the issue as whether the defendant's spouse "must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings." *Id.* at 487. Although the court recognized that "there no doubt always exist forces pushing the spouse to cooperate with the police," *id.* at 487-88, it emphasized the absence of any "attempt on [the] part [of the police] to coerce or dominate her, or, for that matter, to direct her actions by the more subtle techniques of suggestion that are available to officials in circumstances like these." *Id.* at 489. Without denying that the defendant had a reasonable expectation of privacy in the clothing that his spouse delivered to the police, the Court concluded that no governmental search or seizure had occurred.

98. Sandra might have a plausible nonconstitutional objection to the admission of the drugs in Case Two—that any physical evidence "derived" from a confidential interspousal communication falls within the common law evidentiary privilege for the communication itself. *Cf. People v. Dubanowski*, 75 Ill. App. 3d 809, 394 N.E.2d 605 (1979) (privilege applies to testimony of third party who overheard one spouse's communication with other spouse's voluntary consent).

The argument that the coercion of Simon violated Sandra's fourth amendment rights can be made in other ways. If, for example, this article has persuaded you that *Miller*, the bank records case, was wrongly decided, you might consider in greater detail the constitutional evil that the case presented. I believe it was nothing more than the coercion of a bank to reveal information that it had received in confidence—the same evil that was presented when the police pressured Simon to talk. Certainly the two cases cannot be distinguished on the ground that expectations of privacy are more intense in the relationship between a bank and its customer than in the relationship between a husband and wife.

Of course one's initial response to *Miller* might be influenced by the fact that the case did involve a seizure of tangible bank records. As the Supreme Court observed, however, these records were not the defendant's property but the bank's. The defendant's claim accordingly rested, not on any governmental abrogation of his property rights, but on a governmental invasion of his privacy. Surely, if a government officer had visited the bank and had required bank officers to allow him to read the records without seizing them, the invasion of the defendant's privacy would have been no less offensive. If the government's seizure of the records in *Miller* had been held to violate the defendant's fourth amendment rights, a visual search of the records undoubtedly would have violated his rights as well. The government might have avoided a visual inspection of the records, however, by forcing a bank officer to read the records aloud; or the government might have forced a bank employee to reveal the information that the records contained without a verbatim reading. In all of these cases, the invasion of the defendant's privacy would have been identical, and *Katz* teaches that it is this invasion of privacy that triggers fourth amendment protections, not whether the invasion has been accomplished by a law enforcement officer's sense of sight or by his sense of hearing. If the Supreme Court had reached a contrary result in *Miller*, it could not, consistently with *Katz*, have stopped short of holding that the coercion of one person to reveal orally information previously given to him in confidence by another does sometimes violate the fourth amendment.

Recognition of this possibly startling fact might lead to some begrudging respect for *Miller* even on the part of people seriously offended by that decision. *Miller* may be incompatible with the ruling in *Barlow's* and with many other decisions; it may depend ultimately upon a transparent confounding of governmental coercion and private betrayal; it may disregard cultural expectations of privacy that seem almost indisputable; and it may authorize a terrifying regime of

surveillance by banks, bartenders, and secretaries who have been impressed into governmental service. Nevertheless, if the Supreme Court were to slide from the untenable edge in the opposite direction, where would the slippery slope reach bottom?

Current law enforcement practices depend heavily on pressuring people to reveal confidential information about others. For example, police officers and prosecutors sometimes insure the pretrial detention of potential informants until they agree to cooperate. These officers commonly threaten informants with conviction and imprisonment on charges that will be abandoned if the informants provide evidence against others. It is not unusual for law enforcement officers to threaten the arrest and prosecution of the informant's friends, relatives, lovers, and associates. Police officers sometimes promise falsely that an informant's statements will be used only for limited purposes or that only limited disclosures will be required. And after an informant has provided some information (and perhaps even when he has not), the officers may threaten to expose his cooperation. Professor Alan M. Dershowitz has offered a dramatic illustration—a case in which police officers and prosecutors employed almost all of these tactics as well as a small threat of murder:

Parola [a police officer] turned away and began to open the trunk of his car. Seigel [a potential informant] watched with anticipation as he removed a shovel. "What are you going to do with that," Seigel asked, "plant a tree for Israel?"

Parola wasn't smiling. "No, you wise-ass prick, we're gonna plant *you* . . . We're gonna do to you what we used to do to pushers when we were in narcotics. How do you think we got them off the street? Not through the courts, you can bet your ass."⁹⁹

The informant system remains a dark corner of law enforcement that is all but immune from judicial control under the Bill of Rights and other constitutional, statutory and judicially created restraints on governmental conduct.¹⁰⁰ Whenever the government seeks evidence from one person for use solely against another, current notions of

99. A. DERSHOWITZ, *THE BEST DEFENSE* 26 (1982).

100. Courts subject the informant system to some minimal, indirect and largely ineffectual control when they rule on such questions as whether an informant's statements supply probable cause for a conventional search, whether an informant's conduct toward a suspect constitutes entrapment, whether an informant has a "law enforcement privilege" to engage in conduct that otherwise would be criminal, and whether an informant's identity is privileged from disclosure at a judicial hearing. See generally Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 *YALE L.J.* 1091 (1951).

substantive fourth amendment protections coupled with current notions of standing seem to say that anything goes.¹⁰¹

Of course the creation of informants and their use to invade privacy often may be necessary; even the unseemly tactics that Der-showitz reported had a critically important law enforcement goal—the exposure of a group of terrorists whose bombings already had killed and whose homicidal activities were continuing. Nevertheless, the same privacy-invading tactics can be used for less compelling reasons. The fourth amendment's prohibition of unreasonable searches is sufficiently flexible to permit a just accommodation of the needs of law enforcement and the protection of individual privacy. This article will indicate some lines that might be drawn. Still, recognition that the fourth amendment sometimes prohibits the government from forcing one person to reveal another's confidences would lead the courts into an uncharted and difficult area, and one therefore may sympathize with cases like *Miller* and *Smith* that view the precipice and say in effect, "We won't go."

As I have noted, a construction of the fourth amendment that would prohibit the coercion of Simon to reveal Sandra's secrets initially may seem strange. Nevertheless, the initial sense of strangeness may dissipate when some reasons for it are examined.

Forced verbal disclosure may not appear to implicate the fourth amendment partly because we have never thought of the coercion of a suspect to reveal his own secrets as a "search." The reason for this conceptualization of the coercion of a suspect's own statements, however, is simple: In this context, we need not face any fourth amendment issue. When law enforcement officers pressure a suspect to talk, the fifth amendment says all that the fourth amendment might say and more. The privilege against self-incrimination is unqualified; unlike the freedom from searches and seizures, it cannot be overcome by demonstrating probable cause for a governmental intrusion. Had our Constitution contained no privilege against self-incrimination (and no "due process" prohibition of coerced confessions), we might have been much quicker to recognize the fourth amendment implications of forced verbal disclosures.¹⁰²

101. See, e.g., *United States v. Payner*, 447 U.S. 727 (1980).

102. In *Boyd v. United States*, 116 U.S. 616, 630, 633 (1886), the Supreme Court said:

[A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [the constitutional] judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Although the fifth amendment's protection of a suspect's privacy is broader than the fourth amendment's in one respect, it is narrower in another. The privilege against self-incrimination never protects interpersonal privacy. It is a privilege not to incriminate oneself, not a privilege to be free of incrimination by others. When a person entrusts information or property to another (even an attorney, spouse, doctor, or priest), the fifth amendment does not prevent the forced disclosure of this shared information or property by the confidant.¹⁰³ The fifth amendment, in other words, frees Sandra from compulsion to incriminate Sandra; it does not restrict the compulsion of Simon to incriminate Sandra. Any constitutional limitation on the government's compulsion of Simon to incriminate Sandra must be sought in the fourth amendment.

Perhaps, however, this limitation cannot be found. A second and more serious objection to a construction of the fourth amendment that would protect Sandra from the privacy-invading coercion of her husband is that this coercion simply does not appear to be what the framers of the fourth amendment had in mind when they used the word "search."

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[The two amendments] throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

See also *Mapp v. Ohio*, 367 U.S. 643, 661 (1961) (Black, J., concurring). But see *Fisher v. United States*, 425 U.S. 391 (1976).

103. See *Fisher v. United States*, 425 U.S. 391 (1976). Controversy about the zone of privacy protected by the fifth amendment tends to focus on a relatively narrow issue—whether information that a person has recorded in a document should be treated in the same manner as information that he has retained in his memory or instead in the same manner as information that he has shared with other people. Indeed, the Supreme Court currently appears to treat the sharing of information with a piece of paper (a personal diary for example) no differently than the sharing of this information with a human being. The fifth amendment sometimes affords a privilege not to produce a voluntarily written document, but only because producing the document would "authenticate" it and thereby reveal incriminating information retained in the memory of the producing party and not recorded in the document itself. See *id.*

Some constitutional law scholars called “noninterpretivists” have declared boldly that their “different experience of life in our polity” entitles them to re-invent constitutional doctrine without significant regard for the text of the Constitution, its history or its objects.¹⁰⁴ It is not necessary to join this band of constitutional Robin Hoods to accept some wisdom that Chief Justice Marshall told “interpretivists” never to forget: “[I]t is a constitution we are expounding.”¹⁰⁵ A penal statute must give precise warning of what it prohibits and must be narrowly construed to reach only the evils that its language unmistakably proscribes, but the fourth amendment is not a penal statute.

The framers of the fourth amendment probably had a specific evil in mind when they prohibited unreasonable searches, and this evil was not the coercion of Simon to talk about Sandra. It was instead the visual inspection of a home or business for goods on which duties had not been paid by a customs officer armed with a document called a writ of assistance. Nevertheless, in proscribing this evil, the framers used broad and general language, and the evil that prompted their action does not mark the limits of constitutional protection. No one would suggest, for example, that the fourth amendment reaches only searches by customs officers.¹⁰⁶

Katz in fact held that the constitutional term “search” is not confined to visual inspections, and I believe that this ruling was correct. Simply as a linguistic matter, the word search commonly is used as a synonym for the word investigate. For example, this article has been engaged in a search for appropriate constitutional principles concerning the protection of interpersonal privacy, and even without a lantern one may search for an honest man. One may regard this usage as metaphorical if he likes, but I believe and the dictionaries confirm¹⁰⁷ that, whatever its origins, the usage now reflects at least a second meaning and perhaps even the primary meaning of the word search. Moreover, this broader use of the word search arose long before the

104. *E.g.*, Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

105. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

106. *See, e.g.*, *Weems v. United States*, 217 U.S. 349, 373 (1910) (“a principle to be vital must be capable of wider application than the mischief which gave it birth”); Amsterdam, *supra* note 65, at 399 (“To suppose [that the framers] meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas seems . . . implausible in the extreme.”).

107. *E.g.*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2257 (2d ed. 1934).

fourth amendment was written. Chaucer said that no man could sufficiently comprehend nor search the Lord God;¹⁰⁸ the King James version of the Bible included the psalm, “O Lord, thou hast searched me and known me”;¹⁰⁹ Shakespeare inquired “if zealous love should go in search of virtue”;¹¹⁰ Milton proclaimed, “Now clear I understand what oft my steadiest thoughts have searched in vain”;¹¹¹ and John Locke spoke of those “who seriously search after . . . truth.”¹¹² Noah Webster’s first dictionary, published in 1828, defined the word search in part as “to inquire, to seek for. [A] quest [or] pursuit.”¹¹³ Samuel Johnson’s earlier, pre-fourth-amendment work had used almost identical language.¹¹⁴ Without contending that the fourth amendment governs all searches for truth and virtue, one may recognize that it encompasses more than visual inspections.

In seeking (or searching for) the meaning of the fourth amendment, one relevant principle of construction is that the framers did not intend this law to be an ass. The process of construing a law in light of its apparent purpose undoubtedly can be misused and sometimes can degenerate into an idle word game. It is fallacious, for example, to assert that because the framers of the Constitution protected privacy in one way or in several ways, they must have intended to protect privacy in other ways.¹¹⁵ Nevertheless, when a proposed construction of the fourth amendment would yield results that almost everyone would find incongruous, that construction probably ought to be avoided. It is reasonable to accord to the framers of the fourth amendment a presumption of sanity.

As Justice Brandeis noted long ago, construing the word “search” in the fourth amendment to refer only to the process of visual inspection would yield manifestly incongruous results.¹¹⁶ Under this construction, a blind police officer could never violate the amendment.

108. G. CHAUCER, *THE CANTERBURY TALES: THE TALE OF MELIBEUS* § 38 (1477), reprinted in 4 *THE COMPLETE WORKS OF CHAUCER* 222 (2d ed. Oxford 1904).

109. *Psalms* 139:1 (King James).

110. W. SHAKESPEARE, *KING JOHN* act III, scene 1, line 428 (1590), reprinted in *THE ARDEN SHAKESPEARE, KING JOHN* 44 (4th ed. 1975).

111. J. MILTON, *PARADISE LOST* book 12, lines 376-77 (2d ed. 1674), reprinted in J. MILTON, *PARADISE LOST* 274 (Elledge ed. 1975).

112. Quoted in annotations to the word “search” in 2 S. JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (London 1755) (unpaginated).

113. 2 N. WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828) (unpaginated).

114. 2 S. JOHNSON, *supra* note 112.

115. *But see* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

116. *Olmstead v. United States*, 277 U.S. 438, 471-79 (1928) (Brandeis, J., dissenting).

If, however, courts recognized that a blind officer could violate the amendment by feeling for a gun or by sniffing for marijuana, it would be difficult for these courts to hold that an officer could never violate the amendment by using his sense of hearing. The Supreme Court declared more than a century ago that the fourth amendment prevents the government from opening and reading letters in the mail without judicial authorization.¹¹⁷ In an era when the telephone has become a more common medium of long distance communication than the mails, it would be incongruous to hold the fourth amendment inapplicable to the interception of telephonic communications. This interception involves, not merely an evil somewhat comparable to that presented by an interception of letters, but the same evil. If the fourth amendment were to permit one and forbid the other, the law would be an ass.¹¹⁸

Although the application of the fourth amendment to wiretapping no longer seems controversial, I have belabored the justification for this interpretation because the same process of construction supports the view that the police violate the fourth amendment when they coerce Simon Snort to reveal his wife's confidences. As noted at the outset of this discussion, it would violate Sandra's fourth amendment rights for the police to force Simon to consent to a visual search of their residence. When the police can avoid the bother of this visual inspection by forcing Simon to reveal exactly the same information about Sandra and the jar on her dresser that the visual inspection would reveal, the same evil is presented. Although Simon's oral evidence might not be of the same quality as the evidence produced by the visual inspection, the police would have gained the same personal information about Sandra—information that, under the fourth amendment, they had no right to discover through an invasion of her privacy in the absence of probable cause. The police would forcibly have substituted Simon's eyes for their own. This point is underscored by the fact that the information that Simon conveys orally can establish probable cause for the visual inspection itself. If the fourth amendment were to block one route to Sandra's dresser but leave the other open, the law would be an ass.

In any event, the die may have been cast when the Supreme Court decided *Katz*. Of course the bridge still may be open if the current Court wishes to retreat. Nevertheless, the Court's goal must be to give the fourth amendment a coherent meaning. The word search can be defined plausibly to refer only to the process of visual inspection. If that definition is rejected, no stopping point short of construing

117. *Ex parte Jackson*, 96 U.S. 727 (1877) (dictum).

118. *See Olmstead*, 277 U.S. at 475-76 (Brandeis, J., dissenting).

the term to encompass all privacy-invading criminal investigations seems apparent. Under this broader definition, the one that *Katz* seemed to endorse, the coercion of Simon to reveal Sandra's confidences apparently qualifies as a "search." To reject this conclusion without overruling *Katz* is to leave fourth amendment law teetering on that untenable edge.

Of course one might be reluctant to endorse a "functionalist" interpretation of the fourth amendment if there were reason to believe that the authors of the amendment would reject it themselves. Unlike wiretapping, the coercion of informants is not the product of a sophisticated technology of which the framers were unaware, for kneecaps were as vulnerable in 1791 as they are today. One might argue that the framers of the fourth amendment would have used different language had they intended to subject the informant system to judicial control.

At the time that the fourth amendment was written, however, the informant system was subject to a stricter judicial control than the application of fourth amendment principles would require. Professional police forces were unknown.¹¹⁹ Even the enforcement of laws against "victimless" crime apparently depended primarily upon private complaints. Today's extensive networks of informants—networks built and maintained by police pressures that sometimes seem limited only by police inventiveness—were not a significantly more important part of the experience of the framers than was wiretapping.¹²⁰

Of course, even in 1791, law enforcement sometimes required the use of evidence and information supplied by criminals. A formal, judicially controlled system for obtaining and using this evidence had

119. See, e.g., R. LANE, *POLICING THE CITY—BOSTON 1822-1885*, at 1 (1967).

120. 2 T. MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND SINCE THE ACCESSION OF GEORGE THE THIRD 1760-1860*, at 275-79 (1899), describes a small number of cases in England just prior to and shortly after the adoption of the fourth amendment that involved the use of undercover agents. The work does not indicate, however, that any of these agents had been subjected to the sort of governmental pressure that this article has argued may violate fourth amendment principles. May introduced his description of these apparently exceptional cases by saying:

Nothing is more revolting to Englishmen than the espionage which forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gayety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. . . .

. . . Our own countrymen have been comparatively exempt from this hateful interference with their moral freedom. Yet we find many traces of a system repugnant to the liberal policy of our laws.

Id. at 275-76.

developed. The origins of this system lay in the early common law practice of approvement. In the early days of the common law, an accused felon might confess his guilt and offer to “appeal”—or bring a private prosecution—against other participants in the crime with which he was charged.¹²¹ A judge then would balance the benefits of the proposed prosecution against the danger of pardoning the accused; for if the defendant were successful in his appeal, he would be entitled automatically to a pardon. Sir Matthew Hale noted that a judge’s decision to accept a defendant’s offer to become an approver was “a matter of grace and discretion.”¹²²

The practice of approvement had fallen into disuse before the adoption of the fourth amendment,¹²³ but judges regarded this practice as “very material”¹²⁴ in shaping a closely related form of bargaining for accomplice testimony that persisted into the late nineteenth century. Informants no longer were required to bring private prosecutions or to secure the judicial condemnation of their confederates, but whenever a felon was permitted to testify against his accomplices, he gained “an equitable title” to an executive pardon.¹²⁵ The courts therefore refused to allow an offender to testify against less culpable accomplices, and they also forbade prosecutors from bargaining for testimony. They said that the power to grant leniency in exchange for information was “by its nature a judicial power.”¹²⁶ In effect, the courts found “probable cause,” or a sufficient law enforcement reason, for every lawful use of an informant; and rather than improvise the leverage that might be used to secure his testimony, they insisted in every case on a formal grant of immunity. This immunity took the form of an executive pardon for a specified past offense. Under the controlled process of securing accomplice testimony that existed in 1791, the government did not supply a *de facto* license to engage in criminal activity in the future; it did not promise to forego the prosecution of friends and relatives; it did not offer false assurances

121. See 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 226-35 (S. Emlyn ed. London 1736). This article’s discussion of the early informant system has been derived with minor modification from Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 14-16 (1979). See also Donnelly, *supra* note 100, at 1091.

122. 2 M. HALE, *supra* note 121, at 226.

123. *Id.*; Rex v. Rudd, 1 Cowp. 331, 334, 98 Eng. Rep. 1114, 1116 (K.B. 1775) (Mansfield, J.).

124. Rex v. Rudd, 1 Cowp. at 335, 98 Eng. Rep. at 1116.

125. *Id.* at 334, 98 Eng. Rep. at 1116; People v. Whipple, 9 Cow. 707, 711 (N.Y. 1827); Camron v. State, 32 Tex. Crim. 180, 22 S.W. 682 (Crim. App. 1893).

126. People v. Whipple, 9 Cow. at 712; see United States v. Lee, 26 F. Cas. 910 (D. Ill. 1846) (No. 15,588); Wight v. Rindskopf, 43 Wis. 344, 348 (1878).

of confidentiality, or false assurances of seeking only limited disclosure, or false assurances of using disclosures only for limited purposes; and it apparently did not threaten the “planting” without trial of people who refused to inform.¹²⁷

Of course it cannot reasonably be maintained that the framers of the Constitution specifically intended the fourth amendment to perpetuate judicial control of the informant system. Equally, however, it cannot fairly be maintained that this use of the amendment would be incompatible with practices that the framers knew and accepted. If the framers had in mind general warrants rather than the coercion of informants when they wrote the fourth amendment, the reason may have been that general warrants had been used to invade privacy without probable cause in a way that informants had not.¹²⁸ Application of the fourth amendment to the coercion of informants might in fact lead to an informant system reminiscent of the one that existed in 1791; it would, however, be a system less restrictive of law enforcement interests.

If the informant system were subjected to judicial control under the fourth amendment, what shape would it take? Could courts avoid a crash landing at the bottom of the slippery slope, or might application of the fourth amendment to the coercion of verbal information mark the end of any effective use of informants? A number of poten-

127. Apart from the procedures described in the text, an antecedent of today's informant system can be found in relatively early English statutes that proscribed new offenses (usually of a commercial nature) and that permitted informants to recover a portion of the fines collected for violation of these statutes. See 4 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 355-58 (2d ed. 1937). Again, the reward that the government provided for information was measured and regulated. Nevertheless, statutory procedures for rewarding informants apparently were abused and resented. See E. COKE, *THIRD INSTITUTE* *194.

128. How at least some of the framers might have viewed today's informant system is suggested by Livingston's speech against the Alien and Sedition Acts in 1789:

The system of espionage thus established, the country will swarm with informers, spies, delators, and all that odious reptile tribe that breed in the sunshine of despotic power; that suck the blood of the unfortunate, and creep into the bosom of sleeping innocence, only to awake it with a burning wound. The hours of the most unsuspecting confidence, the intimacies of friendship, or the recesses of domestic retirement, afford no security. The companion whom you must trust, the friend in whom you must confide, the domestic who waits in your chamber, are all tempted to betray your imprudence or unguarded follies; to misrepresent your words; to convey them, distorted by calumny, to the secret tribunal where jealousy presides—where fear officiates as accuser, and suspicion is the only evidence that is heard.

8 ANNALS OF CONG. 2014 (1798) (5th Cong., 2d Sess.).

tial distinctions merit consideration.

Although the justification for conventional searches almost invariably must be assessed on a case-by-case basis, the informant system presents recurrent situations that might be subjected to different forms of control. For example, when a person is found in possession of unlawful drugs, there is always probable cause to believe that he had a supplier. Probable cause might prove a doubtful question in other situations in which the government wished to "turn" an informant, but different fourth amendment issues would be likely to prove significant in most drug cases.

The critical issue when the police arrest a drug user might be what methods they could use to obtain his disclosures rather than whether probable cause for obtaining these disclosures exists. In conducting a conventional search, the police ordinarily must knock and announce their purpose; and if, without knocking, they drive a bulldozer through the wall, their search becomes unlawful despite the fact that it was supported by probable cause and authorized by a warrant.¹²⁹ Similarly, courts might hold it unlawful for the police to obtain an informant's statements by using a bulldozer. These courts also might draw a line between standardized promises of leniency and threats to prosecute friends and relatives.

Moreover, in some conventional fourth amendment situations, the Supreme Court has indicated that an "area warrant"—a search warrant that authorizes invasions of privacy in a series of cases rather than one—may satisfy the purposes of the amendment.¹³⁰ Rather than require magistrates to pass upon probable cause in innumerable drug cases in which probable cause does not seem likely to be an issue, perhaps courts could issue warrants akin to "area warrants" that would specify permissible police procedures for entire classes of cases. Perhaps, too, statutory determinations of probable cause in certain recurrent situations coupled with statutory specifications of appropriate procedures for these situations could serve the purposes ordinarily served by a judicial warrant.¹³¹

These suggestions indicate the flexibility of the fourth amendment in cases in which courts determine that police activity amounts

129. See *Ker v. California*, 374 U.S. 23 (1963). Similarly, the Supreme Court has indicated that the use of brutal or unreasonable methods to obtain a blood sample might violate the fourth amendment despite the existence of both probable cause and circumstances justifying the lack of a judicial warrant. See *Schmerber v. California*, 384 U.S. 757, 771-72 (1966).

130. See, e.g., *United States v. Ortiz*, 422 U.S. 891, 897 n.3 (1975).

131. See *Donovan v. Dewey*, 452 U.S. 594, 603 (1981).

to a "search." Nevertheless, courts might treat the forced disclosure of confidential information as a "search" in some situations and not in others. A critical issue would be the legitimacy of a suspect's expectations of privacy in his relationship with an informant. When Sandra Snort shared information with her husband, her expectations of privacy plainly were supported by strong cultural sentiments.¹³² Were a drug dealer to share confidential information with a customer whom he had not met five minutes before, a court might conclude that the dealer had no legitimate expectation of privacy.

Of course the classification of many interpersonal relationships might prove difficult. If Sandra and Simon had shared a home for a decade or more but had not been married, would Sandra's expectations of privacy have been significantly less reasonable? If not, could courts effectively distinguish between the long-term relationship of Sandra and Simon and an intimate relationship of lesser duration? Surely a drug dealer should not be invited to "buy" constitutional protection by insisting that his customers have sex with him.

Moreover, if expectations of privacy are sufficiently intense in most friendships to justify constitutional protection, courts might not find it worth the effort to try to distinguish these friendships from mere acquaintanceships. The police are not likely to know the exact relationship between a suspect and an informant at the time that they seek the informant's story. Because only the suspect and the informant may know the history of this relationship in detail, the suspect, the informant or both often might attempt to "color" the character of the relationship after the fact. These considerations might lead the courts either to extend the protection of the fourth amendment broadly to all situations in which the government forces the disclosure of confidential information or to confine this protection narrowly to well-defined relationships of confidentiality (husband and wife, parent and child, therapist and patient, bank and customer, or whatever).¹³³ In

132. These cultural sentiments are indicated, for example, by the long-standing evidentiary privilege for interspousal communications. See 8 WIGMORE ON EVIDENCE §§ 2332-2341 (McNaughton rev. 1961).

133. This article has argued that a person sometimes can retain a reasonable expectation of privacy in information shared with a confidant just as he can retain a reasonable expectation of privacy in property placed inside a container. Elaborate judicial efforts to distinguish certain confidential relationships from others might prove reminiscent of recent efforts to distinguish "worthy" from "unworthy" containers. In one Dickensian effort, a Supreme Court Justice proposed that closed containers be divided into three categories. Containers like personal luggage, he said, are "invariably associated with the expectation of privacy." Containers like plastic cups and grocery sacks invariably lack this association. Finally, containers like cardboard boxes

light of the current failure to protect suspects against the coercion of verbal disclosures by people in whom they have confided, even this narrow protection would mark a significant advance in the safeguarding of interpersonal privacy.

Moreover, application of the fourth amendment to the coercion of verbal disclosures obviously would require courts to draw a line between this coercion and other activities that still would not qualify as "searches." If promises of leniency were held noncoercive, for example, much of today's informant system might remain unaffected by a judicial determination that the fourth amendment sometimes restricts an informant's forced disclosures.

My own view, to be sure, is that promises of leniency are sufficiently coercive to implicate the fourth amendment. Indeed, although this article has borrowed the terminology customarily employed in cases of third-party consent and has spoken of voluntariness and coercion, this language is somewhat misleading. If law enforcement officers were to offer Simon \$10,000 to permit a search of his and Sandra's bedroom, Simon's decision to accept this wealth and to permit the search might not seem involuntary from his perspective. I believe, however, that the search would violate Sandra's fourth amendment rights. The critical issue would not be the voluntariness of Simon's consent but whether the invasion of Sandra's privacy without probable cause was attributable primarily to intrusive governmental action rather than to the betrayal of one spouse by another. Similarly, although courts have held that an offer of leniency in plea bargaining does not render a guilty plea involuntary,¹³⁴ an offer of leniency to an informant might be sufficient to make his disclosures chiefly the product of intrusive governmental action.

Courts might reject these views concerning the significance of promises of leniency and still subject the most offensive aspects of today's informant system to judicial control. A gradual process of judicial inclusion and exclusion could give greater coherency to the fourth amendment's protection of interpersonal privacy than today's inconsistent application of broad rhetoric concerning the risks of two-party relationships.

and laundry bags are "ambiguous containers." When confronted with an "ambiguous container," a court must conduct a hearing on various issues including the container's "size, shape, material, and condition." *Robbins v. California*, 453 U.S. 420, 434 n.3 (1981) (Powell, J., concurring in the judgment). The principal opinion in *Robbins* rejected this approach, as did the Supreme Court decision that overruled *Robbins* one year later. *United States v. Ross*, 456 U.S. 798 (1982).

134. *E.g.*, *Brady v. United States*, 397 U.S. 742 (1970).

The complexity of these issues might lead one to hesitate before endorsing even a limited use of the fourth amendment to control the informant system. Indeed, one might conclude that the hero of this article is not Justice Stewart, the author of the Supreme Court's opinion in *Katz v. United States*, but Justice Black, the sole dissenter in that case. Justice Black was eighty-one at the time that *Katz* was decided, and some had begun to wonder whether the great civil libertarian had strayed from the path. Subsequent developments surely suggest the virtue of Justice Black's simpler view of the fourth amendment even if it now seems nearly impossible to return to that view.

I have indicated, moreover, that this article might lead to at least some begrudging respect for the decisions in *Rakas*, *Rawlings*, *Miller* and *Smith*. Whatever their defects, these decisions resisted a potentially far-reaching transformation of the fourth amendment, a transformation whose ramifications could not easily be foreseen.

From my perspective, however, Justice Stewart and the Supreme Court majority had the better position in *Katz*; and even if the implications of contrary rulings might prove far reaching, *Rakas*, *Rawlings*, *Miller* and *Smith* were wrongly decided. Our sense of privacy is enhanced when we retain the power to make information public little by little rather than all at once; when we can test, experiment and grow in interaction with a few without being plunged into interaction with many; when we can share information about ourselves selectively with those whom we trust; when we can experience friendship and intimacy; in short, when we have security within a zone of interpersonal privacy. For these reasons, we may sense a significant threat to privacy in decisions that treat dialing a telephone number no differently from publishing it in a newspaper—and that view placing property in a friend's purse with the friend's permission no differently from abandoning it on a street corner. Whatever the merits of the doctrinal criticisms and suggestions that this article has offered, the protection of interpersonal privacy deserves more careful attention than it has received.

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AFTERWORD: APPLICATION OF THE FOURTH AMENDMENT
TO THE COERCION OF A PERSON TO SERVE AS AN
UNDERCOVER AGENT

This article has considered whether governmental officers might violate a suspect's fourth amendment rights by coercing another person to reveal information that he has received in confidence from the suspect. This afterword addresses a related issue—whether it might violate the fourth amendment for the government to coerce a person

to serve as an undercover agent in obtaining verbal disclosures from a suspect. Should an initial obtaining of confidences by a person who has been coerced to obtain them be treated in the same manner as a coerced disclosure of past confidences? Analysis of this issue will focus, not on any special relationship of confidentiality, but simply on the relationship between a suspect and a confederate in crime. This analysis may indicate more clearly than the article's discussion of bailments, required recordkeeping and the informant system how tangled and confused the courts' treatment of interpersonal privacy has tended to be.

Just as the fourth amendment issues raised by the coercion of an informant to reveal a suspect's confidences apparently have never been litigated, no criminal defendant seems to have argued that the coercion of someone else to gather confidential verbal information from him has, without more, violated his fourth amendment rights. The issue has been litigated in reported decisions only when defendants have alleged that informants were coerced to employ electronic surveillance equipment in their undercover activities.

Nevertheless, in cases presenting no issues of coercion, the Supreme Court has endorsed both the constitutional propriety of using undercover agents to gather information by deception and the propriety of secretly tape recording conversations in which these agents participate. The leading case is probably *United States v. White*,¹³⁵ a post-*Katz* decision that reaffirmed some pre-*Katz* law. Even in the absence of probable cause and judicial authorization, it is permissible for a government undercover agent to misrepresent his identity and purpose and thereby obtain confidential disclosures from a suspect.¹³⁶ Moreover, the plurality opinion in *White* declared:

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them. . . . For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is

135. 401 U.S. 745 (1971).

136. Although the Supreme Court has not had occasion to clarify the issue, most commentators have read the Court's decisions to authorize only certain forms of deception by undercover agents. Dishonest claims to be an addict in need of a fix are permissible even when they lead a suspect to "consent" to a physical trespass by the undercover agent, but dishonest claims to be a gas company employee seeking a meter reading probably are impermissible. See, e.g., White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 228-31; Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 151-52; Grano, *supra* note 59, at 437-38.

carrying on his person . . . (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. . . . If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.¹³⁷

Although the issue merits more extended discussion than I can provide here, the Supreme Court's refusal to differentiate between undercover agents with tape recorders and undercover agents without them was probably correct. The principal constitutional issue presented by the use of undercover agents is the propriety of governmental spying, and the technology that agents may employ to accomplish this spying is a secondary consideration at best. Indeed, defendants and defense attorneys sometimes may have more cogent objections when undercover agents have failed to use tape recorders than when they have used them. Law enforcement should not depend on a swearing match between an undercover agent and a defendant when more authoritative evidence could have been obtained. Accordingly, law enforcement agencies probably should be encouraged to "wire their agents for sound" whenever it would not endanger the agents to do so. The fact that electronic surveillance tends to obtain more complete and accurate evidence than governmental spying without this electronic assistance is basically a virtue rather than a vice. This afterword will indicate shortly the relevance of this conclusion to the issue of undercover activity without electronic assistance by an agent who has been coerced to assume the undercover role.

Despite the impression conveyed by television heroes, undercover police agents often are not full-time law enforcement officers; instead they are criminals who have been subjected to substantial pressure to "get the goods" on other criminals. That was apparently the situation in *White*;¹³⁸ even more clearly it was the situation in *Hoffa v. United States*,¹³⁹ an earlier case upon which *White* primarily relied. Issues of coercion lurk in many undercover agent cases. Why have these issues never been presented? Perhaps at first glance the answer seems obvious. The invasion of a suspect's privacy is unaffected by whether the agent who accomplishes this invasion is a public-spirited volunteer or a person impressed into police service by coercive govern-

137. *White*, 401 U.S. at 751.

138. *Id.* at 747 n.1.

139. 385 U.S. 293 (1966).

mental threats. It does not matter to a suspect why an undercover agent who obtains evidence against him has agreed to aid the police; all that matters is that he has. Although the government's coercion of the agent may have violated the agent's rights, the target of his investigative activity may lack standing to complain.

On occasion, however, fourth amendment decisions differentiate between enthusiastic volunteers and dragooned draftees. An invasion of privacy by a draftee may be unconstitutional when an invasion of privacy by a volunteer would not; and under the fourth amendment, the person whose privacy has been invaded may be allowed to challenge the voluntariness of this third-party's consent. A series of variations on *Katz* may help unfold the issue.

Variation One is a straightforward case of wiretapping. Rather than place electronic bugging equipment in or on a telephone booth that they expect *Katz* to use, law enforcement officers place a tap on a telephone line and overhear both sides of the conversation between *Katz* and his customer. The law governing this case is clear. The wiretap violates the reasonable expectations of privacy of both *Katz* and his customer, and both have standing to complain.¹⁴⁰ In the absence of probable cause and judicial authorization, the wiretap violates *Katz*'s fourth amendment rights.

In Variation Two, law enforcement officers know the identity of *Katz*'s customer. They ask him to help them gather evidence against *Katz* by placing a recording device on the customer's telephone. Without a hint of pressure and simply because he repents his sins and wishes to atone for them, the customer agrees. Again the law is clear. Wiretapping with the consent of one of the parties to a conversation does not violate the other party's justifiable expectations of privacy.¹⁴¹ A party to a telephone conversation assumes the risk that the person to whom he speaks will consent to governmental wiretapping.¹⁴²

In Variation Three, *Katz*'s customer does not permit the installation of a recording device on his telephone until law enforcement of-

140. *Alderman v. United States*, 394 U.S. 165 (1969).

141. *See, e.g., United States v. Hodge*, 539 F.2d 898 (6th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

142. Again, one might analyze this case simply in terms of the fourth amendment's basic requirement of governmental action. The government might have asked *Katz*'s customer to consent to the wiretapping and might have supplied the necessary electronic equipment. Nevertheless, so long as the customer assented to the government's proposal without significant inducement or pressure, the invasion of *Katz*'s privacy can be seen primarily as a product of the customer's betrayal rather than of intrusive governmental action. *See supra* notes 64 & 97 and *infra* note 145.

ficers threaten to break both of his knees. The coercive threat is directed to the customer, not to Katz. Does Katz have standing to complain?

The cases have recognized that he does.¹⁴³ This variation is similar to a situation already considered in this article—one in which the police coerce one resident of a dwelling to consent to a search that uncovers evidence against another.¹⁴⁴ Variation One, a case of nonconsensual wiretapping, established that Katz has a reasonable expectation of privacy in his telephone conversations and that governmental invasion of this privacy requires affirmative justification. This justification may consist of probable cause coupled with a judicial warrant; but, as Variation Two established, it also may consist of the voluntary consent of a customer whom Katz agreed to trust.¹⁴⁵ In Variation Three, affirmative justification in any form is lacking. Coerced consent is no justification at all. Variation Three, a case of coerced consent, therefore is indistinguishable from Variation One, a case of nonconsensual wiretapping.

In Variation Four, a magician or a law professor appears and snatches away the telephone wire. Law enforcement officers hide a microphone in a gambler's lapel and direct him to seek incriminating disclosures from Katz in a face-to-face conversation. Again they threaten to break the gambler's knees unless he does so. Surely the invasion of Katz's privacy is unaffected by the fact that the conversation now occurs on a street corner rather than over the telephone, and judicial decisions have recognized that Katz has standing to litigate the voluntariness of his customer's consent.¹⁴⁶

Finally, in Variation Five, our magician or law professor waves his wand, and the microphone in the customer's lapel disappears. Law

143. *E.g.*, *United States v. Glickman*, 604 F.2d 625, 629 (9th Cir. 1979); *United States v. Llinas*, 603 F.2d 506, 507-08 (5th Cir. 1979).

144. *See supra* text accompanying notes 86-97.

145. Once again, I regard this conventional explanation of the courts' rulings as somewhat misleading and would prefer to view the issue primarily as one of marking a boundary between governmental and private action. *See supra* notes 64, 97 & 142. If, for example, the government had offered Katz's customer \$10,000 to consent to electronic surveillance, the invasion of Katz's privacy would seem primarily a product of governmental action rather than of private betrayal. *See supra* text accompanying notes 133-34. In the absence of probable cause and judicial authorization, this surveillance probably should be held unconstitutional. Discussion of the "voluntariness" of the customer's consent, of Katz's assumption or nonassumption of the risk, or of the customer's consent as "justification" for the search might prove more misleading than helpful.

146. *E.g.*, *United States v. Horton*, 601 F.2d 319, 321-23 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979); *United States v. Fuentes*, 563 F.2d 527, 533 (2d Cir. 1977).

enforcement officers direct the customer to obtain incriminating disclosures from Katz in a face-to-face transaction. Perhaps they also give the customer marked money with which to place his bets and ask him to give them the betting slips that he receives. Once again, they back their gentle request with a not-very-gentle threat to the integrity of the customer's kneecaps. Does Katz have standing to complain?

Of course this case is the one with which we began—the case in which Katz's lack of standing apparently seemed so clear that no defense attorney had forced litigation of the issue in a reported decision. But can the presence or absence of a microphone make a critical difference? In *White*, the Supreme Court accepted the government's argument that, to borrow a nice phrase of Justice Harlan's dissenting opinion, it is constitutionally immaterial whether the invasion of a suspect's privacy is accomplished by a tattle-tale or by a tattle-tale with a transistor.¹⁴⁷ Surely it would be unconscionable for the Court now to reject that argument only because it is advanced by a defendant rather than the government.

This analysis suggests that any distinction between nonconsensual wiretapping (Variation One) and the coercion of an informant to seek incriminating disclosures without the aid of electronic gimmickry (Variation Five) would not rest on differing expectations of conversational privacy. A line between these practices would reflect instead a confounding of the medium with the message.

Nevertheless, courts seem to treat each of the variations on *Katz* that I have suggested in a slightly different manner from each of the others. I have noted, for example, that when one party to a conversation permits the government to attach either a recording device to his telephone or a microphone to his lapel, the other party to the conversation may challenge the voluntariness of the consent. Nevertheless, the courts' recognition of this doctrine has seemed more theoretical than real. Although an informant's consent to electronic surveillance may have been the product of extreme governmental pressure, courts have routinely found it voluntary.¹⁴⁸

Several United States Courts of Appeals have been honest enough to declare that they uphold a person's consent to electronic surveillance in circumstances in which they would find his consent to a visual

147. See *White*, 401 U.S. at 787 (Harlan, J., dissenting).

148. *E.g.*, *United States v. Brandon*, 633 F.2d 773, 775-77 (9th Cir. 1980); *United States v. Franks*, 511 F.2d 25, 30-31 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Ryan*, 548 F.2d 782, 788-91 (9th Cir. 1976); *Kerr v. State*, 256 Ark. 738, 512 S.W.2d 13, *cert. denied*, 410 U.S. 1110 (1974).

search or to a seizure of tangible property involuntary.¹⁴⁹ The only reason that they have advanced for this distinction seems unpersuasive. It is that the “consenting” party may benefit from his acceptance of the “deal” that the government has offered.¹⁵⁰ Of course a spouse, employer or other “third party” also may profit by yielding to coercive pressure to permit the visual search of a home or work place. More importantly, the courts’ concern under the fourth amendment ought to be, not the welfare of the “consenting” party, but whether the government has produced an unreasonable invasion of the privacy of the nonconsenting party, the party who has challenged the government’s action.¹⁵¹ Perhaps, despite *Katz* and other decisions that seemed to equate electronic surveillance with more conventional searches, courts are still captivated to some extent by physical images of the fourth amendment. The Jungian past of the amendment may persist in perverse, altered forms.

Wiretapping usually does not involve a trespass upon a suspect’s property, but it usually involves some interference with tangible property—a wire—in which the parties to a telephone conversation might be thought to have a metaphysical interest. A microphone in an undercover agent’s lapel does not involve physical interference with property, but an invasion of privacy aided by this microphone is likely to seem, not more severe, but vaguely more physical than the same invasion of privacy without it. If fourth amendment decisions were to yield to these sentiments, they would deserve to be charged with incoherence. These physical images are not the crisp, historically grounded images of Justice Black’s dissent in *Katz*; they seem closer to the strangely altered images of a drug trip. Any line, for example, between Variation One (wiretapping with no consent) and Variation Three (wiretapping with coerced consent); or between Variation Three (wiretapping with coerced consent) and Variation Four (face-to-face electronic surveillance with coerced consent); or between Variation Four (face-to-face electronic surveillance with coerced consent) and Variation Five (coerced face-to-face surveillance without electronic assistance) would seem substantially more artificial than the property notions re-

149. *United States v. Glickman*, 604 F.2d 625, 633-34 (9th Cir. 1979); *United States v. Horton*, 601 F.2d 319, 321-22 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979); *United States v. Bonnano*, 487 F.2d 654, 658 (2d Cir. 1973).

150. *See* the cases cited *supra* note 149.

151. Consider once again a case in which a government officer gives a large sum of money to an informant in exchange for his permission to engage in electronic surveillance. Although the payment undoubtedly would seem beneficial to the informant, I do not understand how it could make the invasion of the suspect’s privacy more reasonable.

jected in *Katz*. Nevertheless, courts may respond in some degree to these sentiments. I mentioned at the outset, did I not, that the area of interpersonal privacy was too difficult for me to fathom?

