The Concept of Privacy and the Fourth Amendment

Steven C. Douse
University of Michigan Law School

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THE CONCEPT OF PRIVACY AND THE FOURTH AMENDMENT

Nothing is more unnerving to those amid the flak on the front lines than to receive commands of constitutional force phrased in unmistakably unclear language.

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.... It falls regularly to the state judges and recurrently to federal judges to expound with common as well as constitutional sense the skywriting that at times dots just enough t’s to cross the eyes, but trails off on the if’s, and’s, and but’s. The loftier the message and the more removed from the local scene, the more difficult it is for the judges on the ground to work out the ground rules. If they fail to transpose the message into earthy language, either because of their own ineptitude or because the message itself defies transposition, it continues to plane in the stratosphere with ill effect to itself as well as to those who are grounded. A rugged constitution, by definition the law of the land, suffers a loss of vitality when it must circle in thin air indefinitely....

The difficulties of interpreting the fourth amendment have been compounded by the lack of clear guidance from the Supreme Court, with a consequent need for lower courts to make up their own ground rules as they go along, resulting in significant inconsistency among the opinions.

Of course, some slippage between the positive law and its actualization in concrete cases is inevitable. Because of the "open-ended" nature of language, a rule of law can never be so confined as to specify every possible contingency, even if such

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2 U.S. Const. amend. IV.
3 Compare, e.g., Cullins v. Wainwright, 328 F.2d 481 (5th Cir. 1964) (fourth amendment violated by removing heating grill in apartment above defendant’s and lowering microphone into heating duct within walls of defendant’s apartment), with Jones v. United States, 339 F.2d 419 (5th Cir. 1964) (fourth amendment not violated by removing heating grill in apartment next to defendant's permitting visual and auditory observation of defendant’s apartment). See also cases cited in note 151 infra.
5 If the state of affairs in which a rule becomes operative is fully specified as to every possible detail, it is applicable to only that one possible fact situation, and represents a unique decision for a unique state of affairs. The more common meaning of “rule,” particularly in the law, refers to a generalized decision, applicable to certain classes or categories of fact situations. In the latter instance applicability is always problematic to
precision were considered desirable. Thus, discretion and flexibility are a part of the process of determining the law's effect in a particular fact situation. There is a point, however, where too much pliability in the application of a rule becomes dysfunctional by fostering inconsistency and uncertainty. This latter type of problem is especially severe in the area of fourth amendment interpretation. If fourth amendment law is ever to be more than unintelligible "skywriting," the problems to which the fourth amendment is addressed must be viewed from new and better perspectives. Currently there are no conceptual frameworks for analyzing search and seizure that are adequate to the task.

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6 A major characteristic of the legal process has always been the tension between formal and substantive justice, i.e., between the "impartial" application of a rule of law and its adjustment to fit the wide variety of the individual cases within its purview. Though by no means resolving this dilemma in favor of rampant discretion, the common law systems have tended to emphasize adaptation of the law to meet evolving exigencies and attempted to avoid the "tyranny of generalities." In this sense, a certain flexibility is not only inherent in the nature of language and of rules, but is also desirable and beneficial.

7 Addressing this problem specifically with regard to the fourth amendment, one author has written:

The importance of distilling a rational and understandable body of rules out of a complex maze of conflicting judicial precedents cannot be overestimated. Regrettably, the ways of enforcing the right to privacy are much too different and even less understood. Too many conflicting decisions, the product of two hundred years of piecemeal application, have spawned a conglomeration of principles that defy analysis by the most astute among us. Through these two hundred years, the problems and demands of society have undergone radical change, and in typical common law fashion we have heaped solution upon solution without troubling ourselves with the task of discovering a basic, understandable theme. . . .

In an atmosphere of uncertainty, apparently no one can be happy, much less secure.


8 "The course of true law pertaining to searches and seizures," Justice Frankfurter once observed, "has not—to put it mildly—run smooth." There are many debated and debatable points concerning search and seizure, but this certainly is not one of them. This field of law, sometimes characterized as a "quagmire," . . . has not been marked by even and steady growth. The Supreme Court has acknowledged that many of its decisions cannot be reconciled, and the same might be said for the decided cases of other courts. No area of the law has so bedeviled the judiciary, from the Justices of the Supreme Court down to the magistrate; "reasonable men simply cannot agree on what is a reasonable search."


Of course it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony. The decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent.

9 See text accompanying note 1 supra.

10 It may well be, as Justice Stewart commented in Coolidge, that there is "no
The following are suggestions for the construction of such a theoretical framework. They attempt at a minimum to offer a common background and frame of reference for defining and comparing myriad facets of the law. If successful, they furnish a model for the integration of these many facets. This inquiry begins with an examination of the proposition that the essence of the fourth amendment is protection of a right of privacy. The concept of privacy is then defined and elaborated, both without and within the constitutional context. These conclusions are further extended in an exploration of mechanisms for defining the invasions and protection of fourth amendment privacy.

I. THE RELATION OF PRIVACY TO THE FOURTH AMENDMENT

Although the fourth amendment is commonly considered to create a right of privacy,\(^\text{11}\) it does not do so explicitly. Privacy is nowhere mentioned in the text of the amendment.\(^\text{12}\) The identification of privacy with the fourth amendment must be explained by a two-step process, establishing first the existence of the right and then its characterization.

A. The Existence of an Affirmative Fourth Amendment Right

The existence of such a right follows logically from the language of the amendment, for a constitutional guarantee such as this may be said to imply two essential elements. The first is the substantive right which is to be protected. This is the quality of life or state of affairs which the constitutional guarantee seeks to promote or defend. The second is the type of act or event which will operate to negate that affirmative right. At least in terms of the dichotomous alternatives which characterize legal decisions, these two elements are mutually exclusive. In any discrete fact situation there are only two possibilities—either the right is fulfilled and not invaded, or invaded and not fulfilled. Therefore, trick of logic” which will make all of the decisions of the Court in this area perfectly consistent. But it is not a trick of logic which is needed, but rather some assurance that the cases are being decided in accordance with a coherent analytical framework.

LaFave, Warrantless Searches and the Supreme Court, supra note 8, at 27.


\(^{12}\) 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.
they must be defined as complementary parts of a unity. The existence of one equals the nonexistence of the other. Choosing between them in a given instance is analogous to flipping a coin, where “heads” is identical to “not-tails,” and “tails” is identical to “not-heads.”

In the fourth amendment, the “right . . . to be secure . . . against unreasonable searches and seizures” expresses the guarantee as a negation, *i.e.*, “searches and seizures” are invasions of the right, but the substantive right itself is expressed essentially as “not-searches and seizures.”13 Searches and seizures are the operative terms; the right to be secure is merely a residual category, equivalent to “not-tails.” But just as “not-tails” must also be “heads,” the prohibition of searches and seizures is also a protection of something else. This something else has been labeled privacy, and the accompanying right to receive such protection which accrues to the citizen-beneficiary is denominated a right of privacy.14 Thus the extrapolation of an affirmative sphere of protection from the terms of the amendment is ineluctable, but in view of its construction, must be done indirectly.

### B. The Characterization of an Affirmative Fourth Amendment Right

Unlike the *existence* of some sort of affirmative right to protection, its *characterization* in terms of “privacy” is not dictated by the internal logic of the amendment. It is simply a usage which has evolved over time and is now firmly entrenched in legal discourse. “Privacy” is presumably employed for its value as a descriptive device, indicating something about the attributes per-

13 The defect [in the usual approach to defining the interests protected by the fourth amendment] is that the right is defined solely by the wrong. Therefore, there is no need to define the right independently. The reach of the right of privacy is no longer than the current catalog of specific governmental wrongs. . . . The result of that fragmented effort has been to blur the right of privacy and, in the context of the Fourth Amendment, to dim the right almost to the point of extinction.


14 The fourth amendment prohibition against unreasonable searches and seizures has had a double-edged effect. Its operative function is exclusionary; it works negatively to keep out the unwelcome agencies of government. It follows logically, however, that where something is to be kept out, that from which it is barred deserves recognition in a positive sense. It is for this reason that the fourth amendment should be looked upon as safeguarding an affirmative right of privacy.

ceived as belonging within the amendment's sphere of protection. This usage may be explained in two ways: by tracing its historical development, and by comparing the scope of the amendment's protections with a general concept of privacy. These inquiries are important because they can indicate not only what the courts mean when they use the word in this context, but also the ways in which this mode of expression might itself shape their conceptualizations.15

1. The Historical Development of Privacy as the Referent of Fourth Amendment Protection—The development of the idea and reality of privacy in society,16 and of its application to searches and seizures,17 was the product of several closely interrelated forces. First, as the culture and values of Americans have changed, so have the types of privacy interests requiring protection. Advances in technology, and concomitant changes in life styles, have increased the ways in which these interests may be violated and produced consequent changes in the legal mechanisms applied in their defense. Finally, the cases in which searches and seizures have been at issue have varied greatly over time, both in terms of quantity and in the nature of their factual content.

For roughly the first hundred years of this country's existence, its population was basically homogeneous, with a widespread similarity in nationality, background, habits, and tastes.18 There was less need to escape from the observation of others, for the comparatively high consensus and integration of norms and values made individual deviance less likely and retreat from the world less essential.19 In a largely rural country, sheer physical distance between people reduced a person's necessary contacts with others.20 Many of the strains which did develop were eased by the

15 Hyman Gross, in discussing various uses of the term "privacy," has noted a number of "situations in which psychological associations on occasions of word-use affect usage." Gross, The Concept of Privacy, 42 N.Y.U.L. REV. 34, 39 (1967).
17 See generally J. Landynsky, Search and Seizure and the Supreme Court (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937); Stengel, The Background of the Fourth Amendment to the Constitution of the United States, 3 U. Richmond L. Rev. 278 and 4 U. Richmond L. Rev. 60 (1969).
18 O'Connor, supra note 16, at 103.
continuous expansion of the frontier, which provided an abundance of room for an expanding and slowly diversifying population.21

Technology was unsophisticated and communication was largely limited to direct speech or writing. A man's confidences could be penetrated only by the naked eye or ear, and his property invaded only by physical entry or appropriation.22 In this context, the concrete phraseology of the fourth amendment 23 is not surprising, for it was aimed at a particular class of very palatable invasions24 of very tangible possessions.25 Yet these practical strictures were grounded in classical liberal ideals of the integrity of the individual and his property and of limitation of the arbitrary exercise of power by the government.26

References to the fourth amendment during this era reflected its diffuse libertarian background as well as its specific roots in colonial history. In 1833, in his highly influential Commentaries on the Constitution of the United States, Justice Story wrote of the "rights of personal security, personal liberty, and private proper-

21 Id. at 104-05. See generally F. TURNER, THE FRONTIER IN AMERICAN HISTORY (1920).
22 See A. WESTIN, PRIVACY AND FREEDOM 330 (Bodley Head 1970).
23 Chief Justice Taft's opinion in Olmstead v. United States, 277 U.S. 438 (1927), is an example of a "concrete" reading of the amendment. In that case, the fourth amendment was held not to prohibit the tapping of telephone wires. By limiting searches and seizures to their meanings at the time the amendment was adopted, an emphasis on their connotations of physical entry and appropriation was assured. Id. at 465. In this view there must be an "actual entrance into the private quarters of defendant and the taking away of something tangible." Id. at 464. Even a liberal construction of the amendment "can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words 'search and seizure' as to forbid hearing or sight." Id. at 465.
24 Alone among those constitutional provisions which set standards of fair conduct for the apprehension and trial of accused persons, the Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.
J. LANDYNSKI, supra note 17, at 19. The particular invasions of privacy which ultimately generated the constitutional protection were the hated general warrants or writs of assistance by which officials were given blanket authorizations to search and seize according to their unfettered discretion. Id. at 30-38; N. LASSON, supra note 17, at 51-78; Stengel, supra note 17, at 291-98. Concerning the English experience with the writs, see J. LANDYNSKI, supra note 17, at 20-30; Stengel, supra note 17, at 278-91.
25 The enumeration of "persons, houses, papers and effects," even if not taken literally to exhaust the objects of the amendment's protection (see note 23 supra), could nevertheless be read to refer to a fairly limited class of protected areas. Such has not been the case. In the words of Justice Stewart, "the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection." Lanza v. New York, 370 U.S. 139, 143 (1962). By 1967, even the idea of objectively fixed areas of protection was abandoned. Katz v. United States, 389 U.S. 347, 350-53 (1967). But see part I supra infra.
26 A. WESTIN, supra note 22, at 330.
ty, guaranteed by the fourth amendment. This phrase found its way into judicial opinions, and seems to have been the seminal statement of abstract fourth amendment protections. In 1868 Judge Cooley's *Treatise on the Constitutional Limitations* referred to

that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers even against the process of the law, except in a few specified cases. The maxim that "every man's house is his castle" is made a part of our constitutional law in the clause prohibiting unreasonable searches and seizures... At a later point, he refers in passing to invasions of "one's privacy."

In 1886 the Supreme Court decided its first important fourth amendment case, *Boyd v. United States*. In his much quoted opinion, Justice Bradley gave the amendment a very liberal interpretation. Though much of his analysis was questionable, the


28 See, e.g., In re Meador, 16 F. Cas. 1294, 1298 (No. 9375) (C.C.M.D. Ga. 1869).


30 Id. at 305.

31 116 U.S. 616 (1886). The case is discussed in J. Landynski, * supra* note 17, at 49-61. Before *Boyd*, only a handful of search and seizure cases had reached the Supreme Court. See *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); *Den v. Hoboken Land Co*, 59 U.S. (18 How.) 272 (1855); In re Jackson, 96 U.S. 727 (1878). Among the causes of this sparse adjudication were the reluctance of Congress to exercise its criminal jurisdiction and the unavailability of appeals to the Supreme Court in criminal cases. J. Landynski, * supra* note 17, at 49.

32 *Boyd* was a case challenging the validity of a federal statute which required defendants in revenue cases to produce business records demanded by the government or else be taken to admit the government's allegations in the case. Defendants had produced the demanded invoice but challenged the introduction of such evidence at trial. The Court's opinion striking down the statute is notable for three points.

First, although it had consistently been assumed that the fourth amendment did not apply in civil proceedings (see *Den v. Hoboken Land Co.*, 59 U.S. (18 How.) 272, 285 (1855)), the Court was clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. The information, though technically a civil proceeding, is in substance and effect a criminal one.

116 U.S. at 634.

Having passed this hurdle, there was still some question as to whether an order for the production of records should be considered a search or seizure.

It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting; but it accomplishes the substantial object. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or forfeit his property is within the scope of the
case has been immortalized for "the ringing tones of its message and the grandeur of its passages." In looking to the underlying principles rather than to the literal language of the amendment, the case strongly affirmed "the sanctities of a man's home and the privacies of life," and, in an appropriation of the words of Justice Story, "his indefeasible right of personal security, personal liberty and private property."

Even as Bradley's eloquent statement of this era's philosophy of individualism was delivered, however, its cultural and ideological bases were disappearing. The frontier came to an end; industrialization, urbanization, and mass immigration drastically altered the character of American society. Traditional independence and homogeneity were replaced by growing interdependence and heterogeneity among the population. As the society became increasingly "open," the need for effective "closure" (privacy) on the part of the individual increased. A rapidly advancing technology changed the quality of necessary privacy as well, providing new means of communication and new possibilities for their interception, and new opportunities for increasingly subtle invasions of personal privacy.

Superimposed on this demographic, cultural, and technological change was an increasing judicial emphasis on economic laissez-faire and the rights of property at the expense of other personal liberties. This led to what Westin has characterized as a "property privacy" outlook among the Justices. As increasing numbers of fourth amendment issues reached the Court, a trend given

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Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure.

Id. at 622. The object of the proceedings rather than the method employed was thus held to be paramount.

Perhaps the most significant obstacle for the petitioners was the then prevailing common-law rule that competent evidence would be received by the court without regard to the method by which it was acquired. In reaching the conclusion that admission of the invoice had been erroneous and required reversal, the Court found that the compelled production of evidence had violated the fifth as well as the fourth amendment. Thus it was able not only to void the statute authorizing the warrant, but also to find that the procedure had compelled self-incriminating testimony. Therefore, there was no need to develop an exclusionary rule for the fourth amendment. The search was illegal under the fourth amendment and the admission of its fruits was prohibited by the fifth amendment.
great impetus by Prohibition, a bifurcated standard was becoming evident. Business and property interests received a broad and emphatic protection from governmental interference, while personal privacies, particularly in communication, which were not directly associated with the security of property were viewed narrowly and hypertechnically. However, since the bulk of cases coming before the Court involved property rights and the regulation of business, the overall impression was one of opposition to governmental interference in private spheres of life.

The variety of references to fourth amendment protections used in earlier cases and commentaries was continued, with an occasionally greater emphasis on their property aspects. However, changes occurring in the quality of life in America expanded the scope of necessary privacy beyond that which derived from the benefits of a proprietary interest. It was becoming increasingly clear that the types of search and seizure envisioned by the founders did not exhaust the possible means by which the relevant "privacies of life" might be violated. In most respects this propertied privacy ended in the late 1930s, but the adjustment to newly emerging privacy interests was slow.

The process by which these expanded interests were acknowledg-
edged in the courts was marked by an increasing focus on "privacy" as the referent of fourth amendment protections. Beginning with Brandeis's dissent in *Olmstead v. United States,* in which he argued for recognition of a broad, nonproprietary interest in personal integrity, classified under the heading of privacy, references gradually became more standardized. In a sense, some of the more personal libertarian ideals of the earliest era, along with the continued liberal pronouncements during propriety of privacy, were consolidated in a privacy concept and terminology. Its connotations apparently were seen as an increasingly apt reflection of the evolving scope of the fourth amendment. "The right to privacy" was thus a natural choice for judges seeking to verbalize their thoughts concerning the nature of its protections.

Clearly the concept of privacy has come to be in some measure representative of fourth amendment protections and an influential ideal in the mapping out of its particulars in the modern world. To understand the intimate relationship between the concept of privacy and the fourth amendment and its effects on the course of the law requires an inquiry into the nature of the concept itself.

2. The Ideal of Privacy—Like liberty, equality, or justice, the idea of privacy is amorphous, broad in scope, and highly abstract. As with many such concepts it has a "commonly accept-

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50 277 U.S. 438, 471 (1928).
51 See, e.g., United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("The Fourth Amendment... is construed liberally to safeguard the right of privacy."); Nardone v. United States, 302 U.S. 379, 383 (1937) ("the Guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution"); Goldman v. United States, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting) ("One of the great boons secured to the inhabitants of this country by the Bill of Rights is the right of personal privacy guaranteed by the Fourth Amendment."); Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("Corporations can claim no equality with individuals in the enjoyment of a right to privacy" under the fourth amendment.).

> With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy. ... Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy.

53 The concept of privacy is difficult to define because it is exasperatingly vague and evanescent, often meaning strikingly different things to different people. In part this is because privacy is a notion that is emotional in its appeal and embraces a multitude of different "rights," some of which are intertwined, others often seemingly unrelated or inconsistent.

A. Miller, *supra* note 44, at 25 (footnote omitted).
ed core of meaning with an indefinite or variable periphery. Its essential substance both at the core and on the periphery concerns the nature of the relationship between an actor (subject, locus of internal phenomena, point of reference, etc.) who is the beneficiary of privacy, and his or its environment (situation, set of external phenomena, world-at-large, etc.). A variety of issues concerning the autonomy and integrity of the actor vis-à-vis the environment may be subsumed under the privacy rubric. In its most expansive formulations, privacy may be equated with the whole of personal or group autonomy. More commonly it is associated with a limited number of these issues.

There are three primary components of the privacy concept: (1) the nature of the entity entitled to protection, (2) the parts of the environment considered to be relevant objects of protection, and (3) the types of relations between them to be regulated. All three of these constituent elements are variables, whose scope may be expanded or contracted, thus enlarging or narrowing the set of problems considered to be problems of privacy. If we begin with a broad definition of privacy, the manner in which it is narrowed in the constitutional context may be more clearly perceived and evaluated.

Any entity composed of single or multiple human actors will be considered an appropriate subject of privacy. This may include actors only in certain of their capacities (e.g., we may speak of the privacy accruing to a person only in and to the extent he occupies a specific status-role). Each subject, however, must be grounded in a concrete human organism or group of them. Although subsequent references will be made primarily to individual actors, similar considerations of identity and the need for privacy apply

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56 See generally the essays collected in *NOMOS XIII*, supra note 54, for a variety of definitional approaches.
57 This would make groups, organizations, collectivities, institutions, social systems, etc., possible beneficiaries of privacy, but not mere aggregations or classifications of otherwise unrelated persons. The crucial test of "entitvity" is the existence of an interlocking web of roles and norms applicable to the members of the group in their membership capacities, as well as a fundamental commonality of goals and values, all ordered within a common (and at some points group-distinctive) culture.
58 Because privacy is a socially generated and regulated phenomenon (see notes 123–25 and accompanying text infra), it is usually attached to generalized categories rather than specific individuals. Indeed, the classification may be no more distinctive than "citizen," "homeowner," etc.
59 Thus it is not the status-role itself to which privacy is ascribed, but the occupant, i.e., the person in that role.
to collectivities. There are differences between them which a detailed inquiry into privacy might explore, but for present purposes the common treatment does not seriously distort reality.

The boundaries of the protected (private) entity will be those marked out by the actor's self-concept. This includes all aspects and products of human action which are integral parts of the egocentric actor's existence as a distinctive human individual. It represents a complex interfacing of cultural, social, and ecological forces with the personological (personality) and physiological systems of the actor. This "total self" is considered to be the subject (beneficiary) of privacy; its boundaries will constitute the parameters of the projected unit of privacy.

William James, in his seminal and still influential chapter on the self concept, identified four concentric and progressively narrower parts of the self: (1) the material self, (2) the social self, (3) the spiritual self, and (4) the pure ego. These include, respectively: (1) the body, clothes, family, friends, home, and other possessions; (2) the attributes and capacities acquired by the person as a result of interaction with others; (3) the processes of mentation (cognitive, affective, etc.) normally called the personality; and (4) the naked ego or soul which is the locus of pure existence and personal identity.

Taking this description as a model, the privacy unit may be said to consist of a particular personological system (the spiritual self and pure ego), considered within its socio-cultural matrix (the social self), and including that actor's body and possessions—"the class of all those things (words, movements, knowledge, states of mind, material objects, actions) which an individual or group of individuals generates, makes, or acquires through legitimate transactions."

This definition extends beyond what is strictly the "material" self, for it posits a form of property in incorporeal ideas. Clearly,
much of the information which a person generates is inevitably transmitted into the public domain. Of course, the social facts of life preclude isolation of many kinds of intangible possessions. Yet this renders such intangibles no less a part of personal identity. Just as physical property is in many ways an extension of the more intimate self, recognized by society as belonging to the individual actor who makes or acquires it, the incorporeal products of one’s existence are also significant components of the self, and “belong” to their author or recipient.

Privacy consists in the ability of the actor to maintain the integrity of his privacy unit. This is his “domain of autonomous activity” or “space of free movement,” the area within the frontiers of identity which is private insofar as he remains its master. The permeability of its boundaries is crucial to privacy but not synonymous with it. The degree to which a unit is closed (or open) to the environment is a measure of its seclusion or accessibility. The degree to which the actor controls his unit’s closure is a measure of privacy. The distinction is important, for the two concepts are often confused.

A variety of factors limits the potential for both seclusion and privacy in the human actor. There are limits on the maximum degree of seclusion because human systems must engage in certain interchanges with their environments if they are to survive.
In the language of general systems theory, they are "open" rather than "closed" systems. There is a range of possible permeability of their boundaries, violation of which (in the direction either of extreme openness or extreme closure) results in the death of the system as a distinct entity.\textsuperscript{75}

There are also limiting conditions on the exercise of privacy. Those interchanges with the environment which are necessary for the system's survival are effectively excluded from the actor's control, as in a somewhat different sense are those which are simply impossible. There are other interchanges which, though neither inevitable nor impossible, are so firmly dictated by the realities of human existence that they are for all practical purposes entirely removed from the ambit of the actor's discretion.\textsuperscript{76}

On the other hand, no actor can be completely at the mercy of external forces without losing his very identity as a human being. It is only by virtue of the fact that he exercises a certain amount of control over his own behavior that the actor is recognized as a functioning entity. And beyond this essential degree of self-organization, every society recognizes some further matters of autonomy which go beyond the bare subsistence level.\textsuperscript{77} These are the matters in which a man must have some freedom, else "life" is transformed into "mere existence."\textsuperscript{78}

Thus both seclusion and privacy are relative concepts. There are limits beyond which they cannot be applied. Within these

\textsuperscript{75} Extreme openness, which leads to diffusion into the environment, merges the system's identity into that of its surroundings. Extreme closure leads to entropy and death for the living organism.

\textsuperscript{76} Many social norms and cultural taboos may be said to fall into this category.

\textsuperscript{77} The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversation may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account.

\textsuperscript{78} Cf. Fried, supra note 72, at 477-78:

It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. They require a context of privacy or the possibility of privacy for their existence. To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons. To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.
parameters, however, they are fully variable, and do vary widely in fact, both among persons and cultures.  

The ways in which seclusion, and thus privacy, may be violated are many. Two classes of these are particularly relevant to the fourth amendment: (1) the self may be invaded by outside forces which the actor sees as offensive or undesirable, and (2) elements of the self may become known to or be made use of or taken by others in a manner which the actor sees as offensive or undesirable. The first class will herein be referred to as intrusions or invasions, the second as appropriations. Although even highly desirable intrusions or appropriations may technically be said to violate privacy if they were not "invited" (voluntarily approved before the fact) because they were not under the actor's control as they occurred, subsequent approval may be viewed as a sort of ratification. In any event, they are issues about which we need not be concerned. They are eliminated from this definition in order to focus more narrowly on the types of invasions which the actor would want to control and which are thus most important in delimiting his right to privacy.

The difference between intrusion and appropriation is sometimes subtle, but always real. Intrusion refers to the inflow of environmental forces, which are offensive because of their presence within the privacy unit. The power to regulate this inflow may be referred to as selective admittance. Appropriation is concerned with the outflow of elements internal to the self, which events are offensive because of the dispersal and loss to the actor of these elements. The ability to regulate outflow may be re-

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79 See generally Spiro, Privacy in Comparative Perspective, NOMOS XIII, supra note 54, at 121; Roberts & Gregor, Privacy: A Cultural View, NOMOS XIII, supra note 54, at 199; S. Stromholm, Rights of Privacy and Rights of Personality: A Comparative Survey (Upsala Institute of Comparative Jurisprudence 1967).

80 "Intrusion by persons, or animals, or machines, or by any objects under the control of others, violates my privacy, as do noises, odors, images, or communications which others are in duty bound to control when they affect my private domain." Van den Haag, On Privacy, NOMOS XIII, supra note 54, at 149, 152.

81 Mere unauthorized watching of a private realm or activity deprives the watched of his mental property by curtailing the exclusiveness of his access to, or disposal of, his self. . . .

... Utilization of the private realm concerns publications about it, true or false. . . . Such publications violate my privacy . . . because they diminish that control over my image in other people's minds, to which I am entitled by virtue of my exclusive disposal of access to my private domain. Id. at 151-52.

There are few men who would not feel personally annihilated if a life-long construction of their hands or brains—say an entomological collection or an extensive work in manuscript—were suddenly swept away. The miser feels similarly towards his gold, and although it is true that a part of our depression at the loss of possessions is due to our feeling that we must now go without
ferred to as the power of selective dissemination. Although it is possible for an environmental force to appropriate almost any element of the self, as, for example, by defaming the social self or brainwashing the personality, it is retention of possessions with which we are most concerned. Perhaps the most important possession for preservation of privacy is information about the privacy unit. Indeed, “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others,” ⁸² is the most common definition of privacy. ⁸³ This particular type of selective dissemination may be called selective disclosure. In sum, effective control over one’s privacy unit requires that the actor be able to maintain it intact against both incursions from outside and losses of its content. ⁸⁴

In most cases, intrusions and appropriations will occur in a continuous or related series of events. Information not voluntarily disclosed is generally obtained by means of some sort of intrusion, even if it is only the extension of another person’s senses by means of media such as light or sound waves. Conversely, most intrusions significant enough to be considered offensive are likely to produce at least a small harvest of information for the sentient intruder. The extent to which the two types of integrity of the privacy unit are violated may, however, vary greatly between different series of events. It is not the eavesdropper’s intruding ear which is most offensive, but the fact that restricted information has been illicitly appropriated. And while the blundering constable may invade one’s home and learn little of importance, his heavy-handed presence may in itself be highly objectionable.

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⁸² A. Westin, supra note 22, at 7.
⁸³ “Of late,... lawyers and social scientists have been reaching the conclusion that the basic attribute of an effective right of privacy is the individual’s ability to control the circulation of information relating to him,...” A. Miller, supra note 44, at 25.
⁸⁴ A similar definition is offered by Professor Beaney in The Right to Privacy and American Law, 31 Law & Contemp. Prob. 253, 254 (1966): Therefore a right to privacy as a legal concept can be defined as the legally recognized freedom or power of an individual (group, association, class) to determine the extent to which another individual group, class, association, or government) may (a) obtain or make use of his ideas, writings, name, likeness, or other indicia of identity, or (b) obtain or reveal information about him or those for whom he is personally responsible, or (c) intrude physically or in more subtle ways into his life space and his chosen activities.
It becomes apparent that the elements in the environment which are most relevant to the two types of invasions are somewhat different. Nearly anything may accomplish an intrusion, including intangibles such as offensive ideas. These, however, may be identified with the physical stimuli by which they are transmitted to the actor. In practical terms, intrusions are made by sensible empirical phenomena, which may or may not be of human origin. On the other hand, appropriations are primarily made by other human actors. Certainly it is possible for other forces to extract material things from a privacy unit, as, for example, if a flood were to carry away one’s house; but in most cases it is dissemination to other people that is important.

The types of interchange across the boundaries of the self which must be controlled to effectuate privacy may be characterized according to their modality and substance. Modality of an interchange distinguishes between inflow of environmental forces and outflow of internal elements, and between those interchanges which are and are not offensive to the actor. Substance is a residual category containing all other attributes of an event which serve to differentiate it from the universe of events. In short, substance is what has gone in or out, and modality is which way it went and whether the actor liked it or not. Privacy is a function of these plus the actor’s control over the event. This control will vary with both modality and substance. The ways in which it varies will determine the contours of privacy available to any given actor.

II. THE FOURTH AMENDMENT AND THE ENFORCEMENT OF PRIVACY AGAINST SEARCHES AND SEIZURES

The reasons, both historical and definitional, for employing the phrase "right to privacy" in reference to fourth amendment protections should now be a bit clearer. Changing socio-cultural realities have produced changes in the needs for and the nature of personal autonomy. As the Court adapted the regulation of searches and seizures to these emerging needs, it became increasingly obvious that both old and new types of protection fit very nicely within the privacy rubric. It seems intuitively to capture the rationale, the raison d'etre, of the amendment.

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85 See part I B I supra.
86 In a very real sense, the Fourth Amendment embodies a spiritual concept: the belief that to value the privacy of home and person and to afford it constitutional protection against the long reach of government is no less than to value human dignity, and that this privacy must not be disturbed except in
right of the people to be secure in their units of privacy against unreasonable intrusions into them or appropriations of their content shall not be violated," recasts the constitutional language in the broad terminology necessary to understand the proper role of the fourth amendment in modern society. This is all at a fairly superficial level, however. More important is a consideration of what effects this mode of thinking may have had and should have upon the actual administration of the fourth amendment prohibition.

It is at this level that the skywriting has not been broken down satisfactorily. The "pernicious ambiguities" attaching to a concept as natively vague and amorphous as privacy have tended to fuzz and muddle legal thinking and expression on the subject. Courts and commentators have used "privacy" in at least four distinct ways: (1) as a broad, open-ended expression for any or all aspects of personal integrity and autonomy; (2) as an expression of those ideals which are specifically embodied in the fourth amendment, to the exclusion of those other facets of open-ended privacy which are not legally protected, or are protected by other legal devices; (3) as an operational category representing the case of overriding social need, and then only under stringent procedural safeguards.

J. LANDYNISKI, supra note 17, at 47. This idea has been nowhere more eloquently expressed than by Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928):

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

87 Gross, supra note 15, at 35.
88 See id. at 39–40.
89 If anything is absolute with respect to this 'most comprehensive right,' it is that confusion permeates all of its theories. Few concepts are more vague, or less amenable to definition or application." Note, Assault Upon Solitude—A Remedy?, 11 SANTA CLARA LAWYER 109, 110 (1970) (footnote omitted).

This confusion in the law is merely reflective of a similar bemusement on the part of philosophers and social scientists generally. "Most of the work on privacy ... suffer[s], as Hyman Gross has pointed out [supra note 15], from the lack of any understanding of the essential characteristics of privacy." Silber, Masks and Fig Leaves, in NOMOS XII, supra note 54, at 226, 227. "Few values so fundamental to society as privacy have been left so undefined in social theory or have been the subject of such vague and confused writing by social scientists." A. WESTIN, supra note 22, at 7.

90 "Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution." Katz v. United States, 389 U.S. 347, 350 n.5 (1967).
91 "The role of the Fourth Amendment is to protect against invasions of privacy. ..."
types of fact situations in which a court will or should recognize that an intrusion or appropriation constitutes a search or seizure;\textsuperscript{91} and (4) as a second and narrower operational category of fact situations in which a search or seizure, if it occurred, would be constitutionally unreasonable.\textsuperscript{92} The first two kinds of references are to abstract principles, the second one being limited to the values and goals of the fourth amendment. The last two refer to the concrete norms by which those values and goals are to be enforced, the difference being that while invasions of the third sort of privacy may or may not be prohibited (depending upon their characterization as reasonable or not), the fourth refers only to \textit{unreasonable} invasions of the autonomies of life. When it is necessary to distinguish between them, they will be referred to as \textit{general, ideal, recognized, and enforceable}\textsuperscript{93} privacy respectively. Additionally, the first two and the last two may be grouped under the headings of \textit{conceptual} and \textit{functional} privacy. The last three will be designated \textit{fourth amendment} privacy.

Ideal privacy, as the postulated goal of the amendment, is translated into functional rights by decisions as to (a) the types of privacy units to be protected, and (b) the quality of privacy which will be enforced therein, including (i) the modality and substance of relevant violations, (ii) the permissibility of those violations, and (iii) the legal effect of impermissible violations. Theoretically,

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\textsuperscript{91}This represents the empirical counterpart of the second category, \textit{i.e.}, the actual circumstances where the amendment's concept of privacy may be said to exist and in which violations thus rise to the level of constitutional searches or seizures.

\textsuperscript{92}Hence this species of privacy, unlike that in the third category, is not violated by any search or seizure, but only unreasonable ones. \textit{Cf.} Wong Sun v. United States, 371 U.S. 471, 492 (1963): "The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial."

\textsuperscript{93}The proscription of unreasonable searches and seizures is not \textit{actually enforced} in every instance where it may be \textit{potentially enforceable}. This results from certain restrictions on the scope of the exclusionary rule, such as the standing requirement (\textit{see}, \textit{e.g.}, Jones v. United States, 362 U.S. 257 (1960); Alderman v. United States, 394 U.S. 165 (1969)), discovery of evidence through an independent source (\textit{see} Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)), dissipation of "taint" through attenuation (\textit{see} Nardone v. United States, 308 U.S. 338 (1939)), use of evidence for impeachment purposes (\textit{see} Walder v. United States, 347 U.S. 62 (1954)), and the doctrine of harmless error (\textit{see} Fahy v. Connecticut, 375 U.S. 85 (1963); Chapman v. California, 386 U.S. 18 (1967).
these decisions may be separated into three stages. First, in each case a threshold determination must be made on whether the given fact situation is within the scope of the amendment, i.e., a decision as to the applicability of its provisions to the particular circumstances. This requires a finding of whether a constitutionally recognized right of privacy has been violated (decisions (a) and (b)(i)). If so, this violation is a search or seizure, and it must be tested for its adherence to prescribed ("reasonable") standards of conduct, that is, actual application of the amendment to determine the permissibility of the search or seizure (decision (b)(ii)). The final step is for the court to apply those rules which specify the legal effect of an impermissible search or seizure, i.e., ultimate enforcement of the amendment.

The last two stages represent the transformation of recognized privacy into enforceable privacy. Although the procedures in these areas are only slightly less confused than at the first stage, it is in assessing applicability that there is the greatest lack of theoretic perspective, and it is there that conceptual privacy is most important. For these reasons, this suggested analytical framework will be limited to questions of applicability.

To ascertain when the constitutional strictures are applicable
the court must determine whether recognized privacy has been violated, or stated differently, whether a search or seizure has occurred. The factors affecting this decision are of two sorts. The first consists of those conditions which are necessary to the existence of a search or seizure. Applying the previously constructed paradigm for general privacy, these are: (1) a privacy unit, (2) an environmental agency, and (3) an intrusive or appropriative act of (2) against (1). In the fourth amendment context each of these is given a specialized definition of limited scope.

Even when these definitions are met, however, applicability is not assured. Inquiry into two other elements is required to determine if they will prove sufficient: (4) the kind of control over his privacy unit which the occupant was entitled to have exercised, and (5) the extent to which such control was in fact exercised. Factors (1) through (3) "set the stage," as it were, by defining the relevant framework for fourth amendment privacy, while (4) and (5) specify the conditions and quality of seclusion which will be recognized within those parameters.

A. Necessary Elements

1. Private Areas and Private Affairs—At the outset, it is essential to distinguish between the content and the boundaries of the relevant privacy units. Their content—that which may be appropriated or which may suffer an intrusion—may be tangible or intangible. Information as well as physical objects may be private and protected. A person's consciousness may be invaded as well as his house. However, no content of a person's privacy unit, no part of his self, is recognized as private under the fourth amendment unless its physical manifestations are contained within a private place. The boundaries of a privacy unit must be physi-

99 This is the position taken explicitly by Justice Harlan, concurring in Katz v. United States:

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, . . . a person has a constitutionally protected reasonable expectation of privacy; [and] (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment . . . . As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place."

389 U.S. at 360–61.

This should not be taken to mean that a private place is necessarily a material enclosure. The point is that privacy is not protected in the abstract, by saying, for example, that certain types of conversations are always inviolate; rather the question of whether or not
cal, i.e., specifically locatable in space-time. Conversations in open, public areas do not create constitutionally private possessions in their content, even though they may be as much a part of the speaker's extended self as words whispered in the closet. The crucial difference is that the latter originate within the boundaries of a private place, while the former do not. The spatial-temporal coordinates of an actor's privacy unit, which mark the physical parameters of its protection, will be termed private areas. The contents of a privacy unit which are protected within a private area will be referred to as private affairs.

The physical dimension of functional fourth amendment privacy is a practical necessity, a recognition that, at least as regards searches and seizures, there is no other viable dividing line between what will be protected as private and what will not. It would be simply impossible to recognize a person's right to demand that the courts enforce a cloud of seclusion enveloping all the affairs of his life. Nevertheless, this has been a point of some confusion, stemming largely from Justice Stewart's rather loose use of language in *Katz v. United States.* That case rejected the then prevailing doctrine of "constitutionally protected areas," substituting the oft-quoted aphorism that "the Fourth Amendment protects people, not places." Of course people are the beneficiaries of its protection, and this may include even intangible parts of the extended self; but as long as the focus is upon prohibited actions, the mechanics of applying the fourth amendment must of necessity be concerned with protecting private protection should be granted is determined by the surrounding circumstances, and these circumstances necessarily involve the physical manifestations and situation of whatever element of the self is to be protected.

Determination as to whether the area in question is or is not constitutionally protected is necessary. It is a mistake to view *Katz* as eliminating the latter possibility—all *Katz* dispensed with was slavish adherence to the technicalities of state trespass law. Comment, Criminal Law: Unreasonable Visual Observation Held to Violate Fourth Amendment, 55 MINN. L. REV. 1255, 1263 (1971) (footnotes omitted). See also Note, supra note 14, at 982-87; Hendricks, Eavesdropping, Wiretapping, and the Law of Search and Seizure—Some Implications of the Katz Decision, 9 ARIZ. L. REV. 428, 434 (1968).

In fact it is nearly impossible to discuss privacy in this context without considering where an element of the self was located when intruded upon or appropriated. *See, e.g.*, Kitch, *Katz v. United States: The Limits of the Fourth Amendment,* 1968 SUP. CT. REV. 133, 136-40, where the author notes the ambiguity of the *Katz* opinion regarding the scope of fourth amendment protections and hints that it might allow expansion beyond areal concepts. But his discussion is framed almost entirely to take account of the places where private affairs exist or occur. Even the opinion of the Court in *Katz* was unable to formulate its test of protection without referring to an area: "[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351-52.

100 389 U.S. 347 (1967).

101 Id. at 351.
places. One simply cannot pretend at will that the rest of the world does not exist and then enforce this pretension in court. Reality is, in such matters, quite unyielding. And the courts, despite contrary assertions, have uniformly continued to treat searches and seizures as violations of private places. What have changed are the standards for determining private areas, as well as those for determining private affairs.

A private area may be created by any element of the self which manifests physical attributes, though its existence is not entirely dependent upon corporeal occupation or enclosure of the area. All material possessions may constitute private areas. However, unenclosed space, such as that over a plot of land, may also be a private area. In certain cases these will be “supporting spaces” around certain protected objects.¹⁰²

The existence and extent of private areas are determined by the nature of the relationship of the actor and of society to the place in question.¹⁰³ No area is inherently private. Rather, it is protected because it falls within the actor’s unit of privacy and concurrently outside the “space of free movement” of society in general. Only when his interest in the area is sufficient to differentiate him from every other person, by virtue of some distinctive connection between person and place, will he be accorded protection therein. This is a largely self-evident principle; for if the individual had no greater interest in a place than the general public, there could be no basis for preferring his claim to privacy over that of any other person. It is the nature of this relationship and more particularly the sort of interest which suffices to produce it which identify a place as private.¹⁰⁴

¹⁰² The prime example of this is the common-law concept of curtilage, which the courts have adapted and continued to enforce as a protected area surrounding one’s house. See, e.g., United States v. Molkenbur, 430 F.2d 563 (8th Cir. 1970), cert. denied 400 U.S. 952 (1970).

Although humans, along with most animals, require and customarily mark off and enforce a personal space around the body, entry into which is socially and sometimes physically restricted (see R. Ardrey, THE TERRITORIAL IMPERATIVE (1966)), the courts do not seem to have enforced its boundaries, perhaps because, unlike the curtilage, it is not an area in which one has a proprietary interest. The outer boundaries of the body seem to be drawn at the limits of one’s clothing. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968).

¹⁰³ “It is not the nature of the area... but the relationship between the area and the person incriminated by the search that is critical.” Kitch, supra note 99, at 136.

¹⁰⁴ Much of the law on this issue has been developed as a result of the need of defendants to show standing to avail themselves of the exclusionary rule. Following the introduction of the exclusionary rule into the federal courts in 1914 (Weeks v. United States, 232 U.S. 383 (1914)), the lower courts immediately began to limit its operation. The concept of fourth amendment privacy as a “personal privilege” was first applied in Haywood v. United States, 268 F. 795 (7th Cir. 1920). J. Landynski, supra note 17, at 74. Broadly stated, it requires that the movant (for suppression) have had a personal privacy interest in the area searched or seized. The fact of an encroachment upon someone
It is apparent that property law, which formalizes an extensive network of person-place relationships, will greatly influence the nature of privacy interests. To the extent that it accurately reflects a societal ordering of claims upon the use of an area, it will be dispositive. However, it has proven exceedingly inadequate in certain aspects, especially in dealing with casual and permissive arrangements. Nevertheless, for many years it was the only standard. Privacy was in effect little more than a property right, generated as much by one's estate in land as by the Constitution.

The Supreme Court indicated as early as 1920 that enforcement of the fourth amendment was not restricted to remedies available at common law, but it was not until 1960, in Jones v. United States, that the Court reached a similar conclusion regarding its substantive coverage. And even then the process of deemphasizing the property law influence advanced rather slowly. As late as 1967, in Warden v. Hayden, the Court felt compelled to reassert vigorously its abandonment of criteria based solely on property interests. It was not immediately clear, else's privacy is considered to be irrelevant to the movant's case. See Alderman v. United States, 394 U.S. 165 (1967). The practical result was a line of cases seeking to delineate the nature of a privacy interest.

Prior to 1960, with minor variations, a proprietary or present possessory interest was a sine qua non for standing to assert the exclusionary rule. Those without substantial property rights—guests, invitees, employees, trespassers—were similarly without fourth amendment protection. See, e.g., cases cited and discussion in Jones v. United States, 362 U.S. 257, 265–66 (1960); Annot., Interest in Property Seized, 96 L. Ed. 66 (1951); Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw. U.L. Rev. 471 (1952). The reliance on property law is equally evident in such practices as limiting protection to the curtilage of a dwelling and to physical trespasses against property (see note 102 supra).

In Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), the Court reversed a contempt citation issued for refusal to produce certain books and papers because the subpoena was drawn upon information illegally obtained. Gouled v. United States, 255 U.S. 298 (1921), recognized that unlawfully seized papers could be suppressed at trial despite the acquiesced-in denial of defendant's pre-trial motion for their return. As noted in Warden v. Hayden, 387 U.S. 294, 304–05 (1967), the remedies in these cases go well beyond what would have been possible at common law, i.e., an action in trespass or replevin.

We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Distinctions such as those between "lessee," "licensee," "invitee" and "guest," often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.

Id. at 266.

The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unrea-
however, just what form the replacement would take. *Katz v. United States,*\(^1\) written later in 1967, drew a distinction between what a person knowingly exposes to the public and what he seeks to preserve as private;\(^1\) but it is obvious that one might still seek privacy in inappropriate places.

A subsequent formulation, based upon a suggestion in Justice Harlan’s concurring opinion in *Katz,*\(^2\) asserts that the right to privacy exists wherever an individual may harbor an expectation of privacy which society is prepared to recognize as reasonable. The Court, in subsequent cases, has adopted “reasonable expectations” as the test of a private area,\(^3\) and this formulation now appears firmly entrenched. Yet despite its obvious importance, very little attention has been given, either in cases or commentary, to explaining this standard or defining its essential elements.\(^4\) Typically, it is applied *ipse dixit,* without discussion of the court’s reasons for considering the defendant’s expectations of privacy to be reasonable or not.\(^5\)

The meaning of reasonableness which clearly emerges from its use in this context is a specification of something which is deemed

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sonable” within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.

*Id.* at 304.

\(^{11}\) *389 U.S. 347 (1967).*

\(^{12}\) What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve private, even in an area accessible to the public, may be constitutionally protected.

*Id.* at 351-52.

\(^{13}\) My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as “reasonable.”

*Id.* at 361. The subjective element of this test translates as a question of whether or not the actor has consented to the violation in question, either explicitly or implicitly. Note, however, that both an objectively private area and nonconsent to violation are essential to finding enforceable privacy, but nonconsent is not essential to a finding of recognized privacy.


\(^{15}\) The criticism of the court’s opinion in *State v. Bryant,* 287 Minn. 205, 177 N.W.2d 800 (1970), made in Comment, *supra* note 99, at 1263, is applicable to most cases in the area:

The *Bryant* court arrived at the correct conclusion for the correct reasons, but avoided the opportunity, if not the responsibility, to define a more workable rule for delineating a protected zone of privacy. The court seems carefully to avoid specifying any test or standard beyond the skeletal and ambiguous criteria specified in *Katz* to determine whether a person has or should have a “reasonable expectation of privacy.”

\(^{16}\) See, e.g., *United States v. Jackson,* 448 F.2d 963, 971 (9th Cir. 1971).
rational, proper, acceptable, or permissible in a given situation. It refers to something, here an expectation, which is valid or makes sense in its particular circumstances. This usage of reasonableness is very similar to its meaning in the substantive criminal law.\textsuperscript{117} This is also very close to the test of the reasonable man in tort law, where reasonableness equals behavior which is in accord with community standards for acceptable conduct.\textsuperscript{118}

This must be distinguished from the reasonableness of an accomplished search or seizure, by which the search or seizure is tested for its adherence to the requirements of the fourth amendment. Instead of applying either actual or ideal standards of conduct which are part of the fabric of social and cultural patterns of life in the community, that test requires a balancing of the interests and rights involved in order to reach what is seen as an optimal accommodation of the competing interests of personal privacy and law enforcement.\textsuperscript{119} In this latter case there is no specific requirement that community preferences (as opposed to the community’s best interests) be consulted. The crucial question, though, concerns the authority by which such judgments are made. Who determines what is reasonable? “We have to look for the answer to this question in the structure of society, the patterns of interaction, the web of norms and values.”\textsuperscript{120} Two factors strongly indicate the actor’s social milieu as the proper source for expectations of privacy. Beginning with Justice Harlan’s assertion in \textit{Katz} that the standard should be what “society is prepared to recognize as ‘reasonable,’”\textsuperscript{121} courts, when they have considered the matter, seem to have drawn upon the customs and sensibilities of the populace in determining what expectations of privacy are constitutionally reasonable.\textsuperscript{122} Secondly, the realization of privacy

\textsuperscript{117}“An act is reasonable in law when it is such as a man of ordinary care, skill, and prudence would do under similar circumstances.” Howard, \textit{The Reasonableness of Mistake in the Criminal Law}, 4 U. of QueensLanD L.J. 45 (1961).


\textsuperscript{119}Camara v. Municipal Court, 387 U.S. 523 (1967).

\textsuperscript{120}Simmel, \textit{Privacy is not an Isolated Freedom}, in Nomos XIII, supra note 54, at 71, 84.

\textsuperscript{121}389 U.S. at 361 (emphasis supplied).

\textsuperscript{122}[T]he teaching of \textit{Katz v. United States} . . . [is] that the interest protected by the Fourth Amendment is reasonable expectation of privacy. Thus to ascertain what constitutes an unreasonable search the court must evaluate a person’s efforts to insure the privacy of an area or activity in view of both contemporary norms of social conduct and the imperatives of a viable democratic society.

\ldots{} [U]nder \textit{Katz}, an agent is permitted the same license to intrude as a reasonably respectful citizen would take. Therefore, the nature of the premises inspected—\textit{e.g.}, whether residential, commercial, inhabited or aban-
is itself very much a product of life in a human community, made possible through the operation of socialization and social controls. The quantity and quality of seclusion available to an individual or group are socially and culturally determined, and in that sense society and culture may be said to dictate what sorts of privacy one may reasonably expect, at least in social situations. Thus the appropriate frame of reference is a collective one. The criteria for reasonable expectations must be abstracted from the flow of life, and it is the judge's task to find and articulate those societal standards.

2. Agents of Intrusion and Appropriation—Burdeau v. McDowell, decided in 1921, was the Supreme Court's first and only consideration of the issue of who might effect a constitutionally prohibited search or seizure. The Court concluded that the fourth amendment's protection applies [only] to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies.

Lower courts have, with only isolated exceptions, adhered to

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123 Simmel, supra note 120, at 77-78, 80.
124 See Note, supra note 14, at 984; D. Madgwick, supra note 72, at 5-6.
125 256 U.S. 465 (1921).
126 Id. at 475.
this policy,\textsuperscript{129} and despite continued criticism\textsuperscript{130} the \textit{Burdeau} rule is still good law. The practical issues in this area revolve not around the rule’s viability, for it seems unlikely that it will soon be overruled, but around its scope.

It has been generally recognized that the government may act through persons other than its formally designated officers and employees.\textsuperscript{131} The difficulty has usually been in specifying what sort of relationship between a person and the government is sufficient to render him its agent for purposes of the fourth amendment. The basic idea is that a person who acts for the government should be considered its agent. “Acting for” in this sense does not mean that either the private party or the government officers must have a subjective understanding that the act is to be done for the government’s benefit, though personal expectations are certainly important; rather it must appear that there was an actual and foreseeable cause and effect relationship between a clearly governmental action and a private search or seizure.\textsuperscript{132}

Direct participation of persons who are unquestionably governmental agents may also operate to bring an otherwise private violation of privacy within the amendment.\textsuperscript{133} If governmental participation is evident throughout the transaction, it will be characterized as a “joint activity” and subjected to constitutional scrutiny.\textsuperscript{134} Even where the police do not directly aid in an appropriation, but only supervise, observe, permit, or acquiesce in one by a private person, they may nevertheless be held accountable for it.\textsuperscript{135} This is the case whenever the private activity constitutes


\textsuperscript{131} See Annot., 36 A.L.R.3d 553, 590 (1971).


\textsuperscript{133} An extensive discussion and illustration of both forms of governmental involvement (by agency and direct participation) may be found in Corngold \textit{v. United States}, 367 F.2d 1 (9th Cir. 1966).

\textsuperscript{134} Stapleton \textit{v. Superior Court}, 70 Cal. 2d 97, 100, 447 P.2d 967, 969, 73 Cal. Rptr. 575, 577 (1968).

an illegal act which the police have a duty to prevent and they are in a position to do so but deliberately refrain from acting. It is only when a person obtains evidence solely upon his own initiative and without governmental assistance that the government’s acceptance and use of it will be unobjectionable.\textsuperscript{136}

3. Characterizing Violations of Privacy—Searches and Seizures—The fourth amendment admits of two ways in which recognized privacy may be violated—searches and seizures. They represent, respectively, intrusion into a private area and appropriation of private areas or affairs. A search is offensive and violates privacy because of the undesired presence of the intruder.\textsuperscript{137} Any impingement upon a private area which is capable of recognition by the occupant may constitute a search. A seizure is offensive because of a complete or partial transfer of a recognized private possession outside the occupant’s control. Whenever an agency causes such a transfer to be made, it has seized the possession thereby transferred. This applies, of course, to both tangible and intangible possessions.\textsuperscript{138}

a. Searches—Searches may be described as falling along a continuum running from significant and obvious corporeal intrusions to invasions by intangibles. The former include the most common situation in which a person, usually a police officer, enters a private area wholly (\textit{e.g.}, walking into a house) or in part (\textit{e.g.}, reaching into a pocket). This would also include entry of other material objects under governmental control, such as a microphone or camera. Their presence would be per se objectionable wholly apart from any information-gathering activities.

Invasion by intangibles is represented by the “presence” of one who has “entered” the area with his senses and can thus perceive some or all of what exists or transpires within. Certainly the more

\textsuperscript{136} The only case which seems to have indicated any substantial doubts about this rule is Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968), implying that a person’s intent to aid the government, coupled with the latter’s knowing acceptance and approval of illegally obtained evidence, is adequate grounds for exclusion. However the facts of this case were presented in a manner which was sufficiently ambiguous to admit of the possibility that a more conventional agency relationship did in fact exist. See Note, 44 N.Y.U.L. Rev. 206 (1969).

\textsuperscript{137} Cf. Ker v. California, 374 U.S. 23, 57 (1963) (Brennan, J., separate opinion) (footnote omitted): “Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion.”

\textsuperscript{138} “The protections of the fourth amendment are surely not limited to tangibles, but can extend as well to oral statements.” Hoffa v. United States, 385 U.S. 293, 301 (1966); Berger v. New York, 388 U.S. 41, 52 (1967); Wong Sun v. United States, 371 U.S. 471, 485 (1963).

We adhere to the established view in this Court that the right to be secure in one’s house against unauthorized intrusion is not limited to protection against a policeman viewing or seizing tangible property. . . .

important part of such a violation is in the appropriation of information accomplished by this intrusion. Nevertheless, the "intruding ear," for example, is generally recognized as a very real presence when within a private area, and its entry is thus recognized as a search.\textsuperscript{139}

Of course, this characterization of searches does not emphasize the purposive connotations of the word "search," while nearly all of the courts which have attempted an explicit definition of the term have relied upon these connotations.\textsuperscript{140} This is not surprising, for as a practical matter most of the relevant intrusions into private areas are "exploratory investigations,"\textsuperscript{141} seeking to find something, whether object or information, which may then be appropriated for use by the government in the criminal process. There are difficulties with limiting the definition of "search" to such instances, however. The offensiveness of the intrusion, and the extent to which privacy is violated, are not dependent upon the intruder's state of mind. The values represented by ideal privacy\textsuperscript{142} are as much impaired by intrusions not directed at obtaining evidence as by those which are, and it is widely admitted that many governmental invasions of privacy are in fact undertaken primarily for purposes other than gathering evidence.\textsuperscript{143}

The Supreme Court's recognition that the amendment implies a federal cause of action for damages for its violation quite apart from the remedy provided by the exclusionary rule\textsuperscript{144} also indicates that its application cannot be limited to those instances of intrusion which are intuitively suggested by the word "search."

\textsuperscript{139} See, e.g., Berger v. New York, 388 U.S. 41 (1967). Goldman v. United States, 316 U.S. 129 [1942] ... had held that electronic surveillance accomplished without the physical penetration of petitioner's premises by a tangible object did not violate the Fourth Amendment ... Its limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.


\textsuperscript{140} "[T]he word 'search' denotes an intention to find, and absent such an intention there simply is no search." United States v. Lodahl, 264 F. Supp. 927, 928 (D. Mont. 1967) (footnote omitted). "A search is a probing or exploration for something that is concealed or hidden from the searcher ..." United States v. Haden, 397 F.2d 460, 465 (7th Cir. 1968).


\textsuperscript{142} See note 86 supra.

\textsuperscript{143} See generally J. Skolnick, Justice Without Trial (1966): P. Chevigny, Police Power (1969); W. LaFave, Arrest: The Decision to Take a Suspect into Custody (1965). This point is often cited by critics of the exclusionary rule, contending that exclusion of evidence is not an effective deterrent to many forms of police misconduct which are not directed toward securing evidence and thereby a conviction, but are undertaken for other reasons (harrassment, enforcement of respect, etc.). See, e.g., Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 720-24 (1970) and sources cited therein.

\textsuperscript{144} Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
b. Seizures—A seizure represents the appropriation of a private affair or of an entire private area; it may be of a tangible or an intangible possession. A possession whose physical manifestations are sufficiently significant to classify it as tangible will, if it is private at all, constitute a distinct private area. An intangible possession, however, cannot of itself be a private area; it must depend upon its presence within a private area for its protection. Thus there are two distinct classes of possessions subject to seizure: those which are tangible and constitute a private area, and those which are intangible and are located within a private area. The criteria for determining whether an appropriation equals a seizure are somewhat different in the two cases.

The seizure of a tangible possession may be accomplished by any act which operates to diminish the amount of control which the occupant would have exercised over the area in question absent the government’s action, and concomitantly to increase the amount of control exercised by the government over that area. In the most obvious cases, the transfer of dominion will be complete. A seizure may also be effected when the government exercises less than absolute control over the area, as, for example, by denying the occupant access to his house or automobile, even if it is not moved, its interior is not invaded, and no other seizures are made within it.145

An intangible possession, in order to qualify as a protected private affair, must be “within” a private area. Not all appropriations of private affairs are seizures, however. Just as the amendment protects privacy only in places where it may be reasonably expected, it protects against the interception of private information only in places and by means which would not be reasonably expected.146 It seems fairly certain that the positioning of the receiver of information within a private area of the sender at the time of interception is quite sufficient to render the appropriation a seizure. The means employed in such cases are irrelevant.

145 See, e.g., Chambers v. Maroney, 399 U.S. 42 (1970), where the immobilization of a car was considered to be no less a violation of privacy than a search of its interior. Compare Justice Harlan’s opinion, in which he also recognizes immobilization as a seizure, but regards it as a “lesser” violation of privacy than a search of the interior. Id. at 62–65. On the possibility of impounding houses, see Note, Police Practices and the Threatened Destruction of Tangible Evidence, 84 Harv. L. Rev. 1465, 1474–89 (1971).

146 See Comment, supra note 99, at 1263–65, where the author lists the factors which may affect reasonable expectations of privacy under two headings—characteristics of the area and the nature of the police conduct. See also Note, supra note 14, at 982–97. For an application of the reasonable expectations test to governmental conduct, see, e.g., People v. Colvin, 19 Cal. App. 3d 14, 19–21, 96 Cal. Rptr. 397, 400–02 (1971) (considering whether officer’s aural and visual observation of bathroom from public driveway was violation of reasonable expectations of privacy).
When the receiver is outside a private area, however, the place and manner of the observation are both important.\textsuperscript{147} Often these factors will tend to run together, as, for example, when a policeman views a toilet stall through a ceiling vent\textsuperscript{148} or climbs the side of a house to look in an upper-story window. The place of interception would be emphasized in situations such as looking into a room from a fire escape,\textsuperscript{149} while the use of "artificial" extensions of the senses, such as electronic eavesdropping equipment, would focus attention on the means employed. As a rule of thumb, it may be said that the appropriation of private affairs will escape constitutional prohibition only if "the defendant should have reasonably anticipated that such observations could be made by others in the normal pursuit of their daily activities."\textsuperscript{150} As with private areas, the criteria for assessing reasonable expectations must be drawn from the norms and values of the community.\textsuperscript{151}

\textbf{B. Qualifications Upon the Exercise of Privacy—Tests of Sufficiency}

As noted earlier,\textsuperscript{152} the right of privacy is the right to control the access of others to a private area and its contents. The fourth amendment does not, however, give rise to an unqualified right to enforce absolute seclusion. In many cases several persons will have concurrent rights of privacy within a single private area. Each occupant's potential seclusion will be qualified by that of every other. In most cases this fact would by itself be irrelevant to the law of search and seizure because these co-occupants are

\begin{itemize}
\item \textsuperscript{147} See, e.g., People v. Berutko, 71 Cal. 2d 84, 91–93, 453 P.2d 721, 724–26, 77 Cal. Rptr. 217, 220–22 (1969), where the court weighed both factors and concluded that the observation in that case was made from a place where the officer had a right to be and in a proper manner.
\item \textsuperscript{148} See State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970).
\item \textsuperscript{150} J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL: CONSTITUTIONAL LIMITATIONS 93 (1971) [hereinafter cited as NUTSHELL].
\item \textsuperscript{151} Note however that courts have approved, at least in certain circumstances, a variety of surreptitious activities whose validity would be somewhat questionable if measured by community folkways and mores, e.g., peering in windows (see cases cited in People v. Alexander, 253 Cal. App. 2d 691, 61 Cal. Rptr. 814 (1967), but see Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968)), secret observation of restrooms (see Smaida v. United States, 352 F.2d 251 (9th Cir. 1965), but see Bielicki v. Superior Court, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962)), eavesdropping at the door of an apartment (see United States v. Llanes, 398 F.2d 880 (2d Cir. 1968), but see United States v. Case, 435 F.2d 766 (7th Cir. 1970)), and rummaging through a person's trash (see United States v. Dzialak, 441 F.2d 212 (9th Cir. 1971), but see People v. Edwards, 71 Cal.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969)). The trend since Katz, however, seems to be toward giving such activities greater scrutiny. See NUTSHELL, supra note 150, at 93–94.
\item \textsuperscript{152} See note 72 and accompanying text supra.
\end{itemize}
unlikely to be governmental agents, and their intrusion into the area or appropriation of it or its contents would not be proscribed under the fourth amendment. The relative rights that co-occupants may have in an area become important, however, in two situations: where one acts as a government agent, or where one consents to a governmental search or seizure. This latter case arises because an occupant of a private area always has the option of exercising his control over access to that area permissively, that is, he may consent to intrusions and appropriations, thereby waiving in part his right to seclusion.

A government agent may, therefore, legitimately acquire access to a private area or its contents in two ways: (1) by qualifying as an occupant of that area by virtue of his relationship to it, without regard to the desires of other occupants, or (2) by the consent of an occupant. Although the justification for any given violation of a private area may involve several interrelated steps under both categories, it is most convenient to analyze each category separately.

1. The Rights of Co-occupants—a. Selective Admittance—All rights of occupancy may be limited in extent (quantitatively) and scope (qualitatively). The former limitations concern exactly who may exercise them, and where and when they apply. The latter specify the type of activities permitted and the purposes for which or circumstances in which these activities may be undertaken.

The scope of an occupant’s rights may range from the relative completeness of fee simple ownership to those which accompany very narrowly specified roles, such as maid, janitor, or repairman. In the case of closely circumscribed rights of entry, the possessor may do only what is reasonably expected to fall within the performance of his particular role, both as to the overt acts involved and the purposes for which they are permitted. Thus a maid may not remove cigarettes from a hotel room which she would not remove in the ordinary course of cleaning, and she

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153 The law does not prohibit every entry, without a warrant, into a hotel room. Circumstances might make exceptions and certainly implied or express permission is given to such persons as maids, janitors, or repairmen in the performance of their duties. United States v. Jeffers, 342 U.S. 48, 51 (1951).

154 See, e.g., United States v. Small, 297 F. Supp. 582 (D. Mass. 1969), where opening the door of a coin locker and observing its contents were held to fall within an employee’s normal and reasonable duties, but changing its lock was not.

155 See, e.g., Chapman v. United States, 365 U.S. 610 (1961), where, even though a landlord apparently had authority to enter demised premises to “view waste,” his entry along with police for the purpose of searching for distilling equipment was outside the scope of his authority and invalid.
may not enter for the purpose of so doing. When a desk is given over to an employee for his exclusive use, the employer may retain a right to enter it in the course of business, as, for example, when looking for “official property needed for official use.” Presumably this would not encompass a search for evidence unrelated to the business or an inspection prompted merely by idle curiosity.

Reasonable expectations in this matter will be primarily affected by the nature of (1) the area itself, (2) the occupant’s relation to the area, and (3) the relationship of multiple occupants to each other. An area such as a hotel room is normally subjected to intrusions by maids and others for various cleaning and maintenance purposes. These must be reasonably expected by the lodger. A landlord may retain an interest in rented premises which would permit his entry for inspection purposes. Again, this particular class of intrusions is reasonably to be expected. Parents are generally held to stand in a relationship to their minor children which gives them special rights of access into the child’s privacy unit. School officials may be held to act in loco parentis in certain matters and thereby be entitled to certain rights of entry based on that relationship. The existence of any of these factors may be evidenced by explicit statements, such as in institutional regulations, though these are not necessarily conclusive.

b. Selective Dissemination—The standards for appropriation of tangible possessions are highly uncertain, because nearly all such questions arise in a context of explicit third-party consent and because courts often tend to pay little attention to the validity

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158 Her superiors could not reasonably search the desk for her purse, her personal letters, or anything else that did not belong to the government and had no connection with the work of the office.

Id.
159 See note 153 supra.
160 See note 155 supra.
164 See, e.g., Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971).
of a seizure if it was not preceded by a search or was preceded by a valid search. It would seem, however, that as concerns tangible possessions, the standards for determining rights to disseminate should be similar to those just discussed for determining rights of admittance. Intangibles, on the other hand, are treated rather differently. For while the dissemination of tangibles may be limited not only in extent but also in scope, possession of intangibles (information) can be limited only by the circumstances of initial accessibility. Once obtained it may be further disclosed without fourth amendment restriction.165 Whenever a co-occupant is entitled to enter and observe an area or is otherwise legitimately privy to information, it may be further disseminated at the receiver’s discretion. The fourth amendment, then, does not limit the scope of appropriations of intangibles.

2. Consent to Encroachments on Seclusion: The Permissive Exercise of Privacy—Consent to what would otherwise be unconstitutional searches and seizures is based conceptually on the notion that privacy is a type of control, and the exercise of that control may work to reduce as well as to maintain the actor’s seclusion.166 In the law, these ideas find expression in the doctrines pertaining to the waiver of constitutional rights.167

Consent to intrusions may be limited as to both the extent and scope of the right of entry granted. These limitations can be equal to or more restrictive than the grantor’s rights but may not be more expansive. Whenever the occupant’s privacy interest is limited in space, time, circumstances, or purpose, any right of entry conferred on another must fall within those limits.168 Consent to appropriations, on the other hand, cannot be so flexible in scope. Once an occupant gives consent to an appropriation, either of a tangible169 or of an intangible,170 the fourth amendment does not limit the permissible scope of dissemination.

165 See note 170 infra.
166 See notes 72 and 73 and accompanying text supra.
168 Compare United States v. Brown, 300 F. Supp. 1285 (D.N.H. 1969) (consent by owner of apartment to police search could not extend to friend’s suitcases and attache case left on premises), and United States v. Poole, 307 F. Supp. 1185, 1189 (E.D. La. 1969) (“If X leaves his closed suit case, in Y’s apartment, this is no authorization to Y to open the suitcase or for Y to allow others to open it.”), with Frazier v. Cupp, 394 U.S. 731 (1969) (cousin’s consent to search of defendant’s duffel bag on cousin’s premises was effective where he was a joint user of the bag).
169 See C. v. Brown, 437 Pa. 1, 261 A.2d 879 (1970) (policeman offered to help sell gun but instead ran ballistics test on it); Graves v. Beto, 424 F.2d 524 (5th Cir. 1970) (blood sample given police on representation it was to be tested for alcohol content but instead matched with blood found at scene of rape).
III. Conclusion

The elusive contours of the fourth amendment right of privacy reflect the confusion and contradiction which have marked its existence. Certainly no "trick of logic" can weave its disparate strands into a coherent whole. Yet it is not a perfectly integrated body of law which is needed, but rather the conceptual tools for making some sense out of the chaotic body of law which presently exists. The purpose of this note has been to suggest a theoretic perspective which might serve as a framework for the orderly articulation and analysis of fourth amendment issues. Drawing upon the idea of privacy in general, certain principles were derived by which any question involving the privacy concept might be approached. Consistency among legal rules and their application may be a chimera, but consistency in their formulation and interpretation is essential if they are ever to be commonly understood.

—Steven C. Douse

Several cases have reached similar results on the mistaken assumption that valid third-party consent to a search of the premises is sufficient to justify the seizure of other persons' private possessions located therein. United States v. Vilhotti, 323 F. Supp. 425 (S.D.N.Y. 1971); United States ex rel. Perry v. Russell, 315 F. Supp. 65 (W.D. Pa. 1970). They seem to have considered the possessions to be protected only derivatively, by virtue of their presence within another private area. Once admittance was legitimately gained thereto, they seemed to find no need to consider separately the seizure of contents, or even to recognize that the search and the seizure constituted two separate events.

Privacy, defined as "control over information about ourselves," would [as commonly understood] include control over both the extent to [which] personal information will be acquired by others, and control over the extent to which a known recipient of information will pass it on to a third person . . . . [Yet] the Court has consistently refused to find any fourth amendment protection against divulgence.