

PRIVACY AND THE THIRD HAND: LESSONS FROM THE COMMON LAW OF REASONABLE EXPECTATIONS

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I. INTRODUCTION

The purpose of this Article is to offer some reflections on the Third-Party Doctrine as it has evolved under the Fourth Amendment.¹ This

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1. U.S. CONST. amend. IV. The Amendment protects

doctrine holds that an individual who passes information on to some third party cannot claim any Fourth Amendment protection when the government, with an eye to criminal prosecution, seeks to obtain that information from the third party. The received judicial wisdom is that any person who chooses to reveal information to a third person necessarily forfeits whatever protection the Fourth Amendment provides him. Orin Kerr's formulation captures the breadth of the rule: "By disclosing to a third party, the subject gives up all of his Fourth Amendment rights in the information revealed."² As Kerr notes, the Supreme Court puts the rule in broad terms:

[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.³

In other words, "a person cannot have a reasonable expectation of privacy in information disclosed to a third party."⁴

This conclusion has been widely attacked.⁵ Professor Kerr's recent defense, which sought to bolster the rationales offered by the Supreme Court, has enlivened the debate. My job on this occasion is to review the debate as someone who comes to the problem from outside the field of criminal procedure, but with a strong commitment to the principles of limited government. In dealing with the vexing question of whether a person has a reasonable expectation of privacy in information disclosed to a third party, I do not think it is necessary to come down clearly on one side or the other. It is more important to parse the arguments in order to develop a

[t]he 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.

Id.

2. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009). As stated, the term "information" is intended to cover both oral communication and the transfer of documents, of whatever kind or description. *See generally id.*

3. United States v. Miller, 425 U.S. 435, 443 (1976).

4. Kerr, *supra* note 2, at 563.

5. For a list of the references, *see* Kerr, *supra* note 2, at n.5.

unified approach to this question that can win adherents both within the field and beyond it.

In the current debate, Kerr is quite right to note that it is difficult to defend the current rule on the grounds that the subject of investigation has assumed the risk that the disclosed information will be used as evidence. Thus it surely begs the central point to insist, as the Court has, that “[b]ecause the depositor [in *Miller*] ‘assumed the risk’ of disclosure, . . . it would be unreasonable for him to expect his financial records to remain private.”⁶ Yet at the same time, it is tempting to do so, for Kerr’s own revised justification for the rule turns on the notion of consent that is subject to parallel objections. He writes: “The Supreme Court should have accepted this consent-based formulation of the third-party doctrine So long as a person knows that they are disclosing information to a third party, their choice to do so is voluntary and the consent valid.”⁷

Some support this rule by appealing to the common law distinction between fraud in factum and fraud in the inducement.⁸ The former goes to the nature and quality of the act, and is thus said to vitiate consent, by denying its existence.⁹ The latter takes the opposite tack and assumes that consent has occurred, and then sets it aside against the party who induces it. Since fraud in the inducement still allows for the rescission of the contract, this distinction is immaterial in any dispute between the two parties in ordinary contract law. The difference only manifests itself when third party rights are involved. A holder in due course of a negotiable instrument takes free and clear of the claims of the party who wrote the check if there is only fraud in inducement, but gets no title where there is a fraud in factum, because there is no right to transfer.¹⁰ Under standard doctrine, the consent should not be binding against the party whose fraud induced the revelation.

6. See *Smith v. Maryland*, 442 U.S. 735, 744 (1979).

7. Kerr, *supra* note 2, at 588-89 (discussing *Hoffa v. United States*, 385 U.S. 293 (1966)).

8. Kerr, *supra* note 2, at 588-89; ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 1079 (3d ed. 1982).

9. See MODEL PENAL CODE § 213.1(2)(c) (holding that a type of rape is committed if a male has sexual intercourse with a female when “he knows that she is unaware that a sexual act is being committed upon her . . .”). For more discussion on the role of consent with regards to rape, see PERKINS & BOYCE, *supra* note 8, at 1079-80.

10. See, e.g., UNIF. COMMERCIAL CODE § 3-305(2)(c), cmt. 7 (noting that this section “follows the great majority of the decisions under the original Act [on negotiable instruments] in recognizing the defense of ‘real’ or ‘essential’ fraud, sometimes called fraud in the essence or fraud in the factum, as effective against a holder in due course.”).

In Fourth Amendment cases, this party is the government, so we are back at square one.

Accordingly, in Part II of this Article, I shall examine the twin rationales of assumption of risk and reasonable expectations to assess the extent to which they can afford some basis of understanding the relevant doctrine. In so doing there are two key moves that drive the overall analysis. First, it is necessary to explain why and how the reasonable expectations test should work. It is commonly conceived of as a cross between the subjective and objective understandings of the relevant actors, usually persons who are the subject of a search. Second, I advance an alternative conception from my own work on rights to privacy in connection with the common law tort of invasion of privacy, which avoids the solipsism of identifying reasonable expectations with the position or desires of a single person.¹¹ Instead the central approach is to use the language of reasonable expectations as a way to forge a sensible set of rules that optimizes social welfare with respect to a given kind of problem. In essence the task is finding that set of rules which, when laid down generally, produces the best mix of privacy and security that can be obtained in light of the limited available knowledge, taking into account that the Fourth Amendment protects not only the guilty, but also innocent persons who may have been swept into a search.

Part III of this Article examines how this abstract framework applies to the range of situations, dealing with both documents and words, which are traditionally governed by the third-party rule. In doing so, I address the different types of cases separately in order to make a more precise calibration of the relevant interests. There is no reason why the level of constitutional protection that is attached to documents placed in the hands of third persons for storage should necessarily attach, for example, to the use of secret agents who carry wires. The boundary lines between these various areas are for the most part relatively clear, so that the borderline interpretation issues should not muddy the overall inquiry. This allows us to preserve the ease of application that Kerr, for example, sees in the categorical, if overbroad, rule that holds that all third-party communications lie outside the scope of the Fourth Amendment.¹²

11. See generally Richard A. Epstein, *Deconstructing Privacy: And Putting It Back Together Again*, 17 SOC. PHILO. & POL'Y. 1 (2000); Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003 (2000).

12. See, e.g., *United States v. Miller*, 425 U.S. 435, 443 (1976).

II. TRADITIONAL DOCTRINES

A. ASSUMPTION OF RISK AND CONSENT

One of the great temptations in political theory generally is to see if various claims of rights and duties can be predicated on some bedrock element of individual assumption of risk, or consent. This approach proves to be so durable and attractive because assumption of risk and consent offer the strongest ground on which to base obligations to others: the obligation is accepted by the party to be charged. One central idea in political theory is that autonomous individual agents of full capacity should be entitled to decide which risks to assume and which not.¹³ That position lies at the root of contract law generally, where any individual decision to make a promise or to assume a risk is held binding on the party who made it. After all, if that form of contractual freedom is denied, then individuals will not be able to assume any risk in advance in order to secure greater benefits.

However, these autonomy-based principles do not always control. For instance, in the realm of trade, persons cannot part with their labor or their capital if they are deemed to lack the capacity to do so. Likewise, in the area of medical services, the inability to assume the risk because of incapacity leads to the creation of an “emergency” exception to the general rule of consent so that they can receive the services that they desperately need on the same terms and conditions to which ordinary persons would agree. To facilitate receipt of these services, the universal rule announced in *Schloendorff v. Society of New York Hospital* juxtaposes the autonomy rule with the ubiquitous emergency exception:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages. This is true, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained.¹⁴

The clear negative implication is that the surgery can take place either with consent or when the conditions of necessity relax the rules of property and contract, as they generally do.

13. *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

14. *Id.*

It is also critical to guard against the undue extension of the notion of voluntary consent. The first potential source of abuse is the false equation of knowledge of a risk with the assumption of the risk. Courts began to recognize this distinction in the Industrial Revolution in order to deal with workplace accidents prior to the adoption of the workmen's compensation laws. The cases consistently emphasized the difference between *volenti non fit iniuria* and *scienti non fit iniuria*.¹⁵ The acceptance of a risk does not follow from knowledge of the risk. The difference here is not one of mere words, but of substance. Each day I walk down the street I know that some automobile may hurt me. Yet I do not assume the risk of which I am fully aware. There is no bargain between the random motorist who hits me and myself, and as a result, the entire dispute is resolved by the general principles of tort law that regulate the affairs of strangers.

The same kinds of arguments can apply with respect to workplace injuries. If a worker knows that a dangerous condition has been introduced into the plant, this knowledge will not bar recovery. The standard rule allows the worker time to issue a complaint and applies the assumption of risk doctrine only where the resulting interchange with the employer makes it clear that the complaint has been rejected, and that the worker can keep his position only if he agrees to waive the action in question.¹⁶ The requirement of waiver is critical because it suggests that there is some quid pro quo in the relationship. Knowledge in the absence of consent precludes that possibility, because all the gain goes on one side and all the costs go on the other.

The abuses of the notice principle carry over to other areas as well. For instance, the concept of notice is overextended in cases dealing with the eminent domain power. Thus it is sometimes said that retroactive legislation is constitutional because settled expectations that private arrangements will continue do not condemn such legislation to irrationality,¹⁷ or that some new zoning regulation limiting the right of future construction is valid solely

15. See SIR FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW: TO WHICH IS ADDED THE DRAFT OF A CODE OF CIVIL WRONGS PREPARED FOR THE GOVERNMENT OF INDIA 153 (Stevens & Sons 2d ed. 1895).

16. See, e.g., *Lamson v. Am. Axe & Tool Co.*, 58 N.E. 585, 585 (Mass. 1900).

17. See, e.g., *Usery v. Turner Elkorn Mining Co.*, 428 U.S. 1, 15-17 (1976). In speaking of the black lung disease provisions of the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 932, Justice Marshall wrote: "And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Id.* at 16.

because of the advance notice given by the state. The difficulty here is that the notice argument is so powerful that it leaves nothing to the underlying substantive right at all. The government need only decide to give notice in order to restrict rights of other individuals, and give standing notice to restrict them altogether.¹⁸ However, free options of condemnation that invalidate use rights are utterly inconsistent with a notion of limited government that protects any individual rights in property. Perhaps people ought to be required to mitigate their losses in the face of government notice, but if so, they should recover the costs of mitigation plus the residual loss, which may be smaller than the losses that would be realized if no protective action were taken at all.

These arguments work not only with respect to takings and the Fifth Amendment, but also apply equally well to the analogous searches and seizures under the Fourth Amendment. Thus suppose the government gave notice to the world that it would engage in surveillance of all private activities at will; so draw your curtains, but the government can still peek through. People would have to alter their conduct in order not to assume the risk. No one would accept such unilateral legislative declaration as sufficient to undermine constitutional rights that are intended to limit the scope of permissible government action. Nor can the government eliminate this abuse by offering certain types of quid pro quos in order to obtain the needed consents. The entire doctrine of unconstitutional conditions rests on the implicit assumption that there is something deeply wrong with a state declaration that allows the state to issue licenses for use of the public highway on condition that an individual waive his Fourth Amendment protections against unreasonable searches and seizures.¹⁹

Monopoly power cannot be used to extract rights from all citizens. Rather it should be understood that the government operates much like a common carrier that carries with it the same duty to guarantee access as private carriers holding the same position. Rules of the road that improve the ex ante utility of all persons who use the system are allowable, but extractions that increase state power without an allocative improvement are not. Assumption of risk has no traction in those situations at all.

18. *See, e.g.,* *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986). “Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.” *Id.* (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

19. For discussion of these points, see RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 161-75 (1993).

The same argument runs through many Fourth Amendment cases. The government's stated position is that anytime one individual talks to another, he necessarily assumes the risk that any person with whom he talks will speak to the government.²⁰ The principle has no autonomy-based roots, because the law provides no way for an ordinary person to contract out of the rule. Thus giving the information in confidence with an explicit promise from its recipient that he will not turn it over to the state, or that he will not use a wire that allows a government agent to record the conversation, does not give the target of a criminal investigation an action in damages if the information is released to the government. Nor could that person ever obtain an injunction against turning the information over. The supposed assumption of the risk is forced on individuals by positive law. It is not consensually assumed.

Whatever one thinks of Kerr's conclusions, his analytical approach is wrong for its excessive reliance on consent. It is improper to claim that "[a]lthough the third-party doctrine has been framed in terms of the reasonable expectation privacy test, it is better understood as a consent doctrine."²¹ The entire area of the Fourth Amendment cannot be rendered coherent unless its consensual base is modified. To be sure, there are many cases where the consent of the party searched meets the standard of individualized consent developed in private law settings. But in other cases the nominal consent is presumed on the ground that on balance people are better off from the *ex ante* perspective if they are forced to submit to some searches against their will. Insofar as Kerr shifts away from reasonable expectations to either assumption of risk or to consent, he cannot build an adequate foundation for Fourth Amendment Law. We have to look elsewhere to get a better grasp of the reasonable expectations test that he rejects.

B. REASONABLE EXPECTATIONS

Generally we do look elsewhere when we shift the analysis from assumption of risk to reasonable expectations of privacy in an effort to move the inquiry away from autonomy-based regimes. But to what end and why? One common line of thought treats this approach as an intellectual dead end

20. *See, e.g.*, *Lewis v. United States*, 385 U.S. 206, 208-10 (1966); *Hoffa v. United States*, 385 U.S. 293, 301-02 (1966); *Lopez v. United States*, 373 U.S. 427, 438 (1963); *Lee v. United States*, 343 U.S. 747, 752 (1952).

21. Kerr, *supra* note 2, at 565.

on the ground that the entire exercise turns out to be perfectly circular.²² Once one knows what the law requires, it is possible for individuals to develop reasonable expectations as to how they should behave. The conclusion seems to follow that divining the reasonable expectations needed to frame the legal rule requires knowledge of the legal rule in advance. But the reasonable expectations that flow from knowledge of the law cannot explain how that law should be configured in the first place.

One can observe this point in many substantive contexts. In dealing with product liability law, for example, one question is what expectations a manufacturer should have about how the product user will behave. This involves the aptly named “consumer expectations” test.²³ If the law allows the user to recover only if he makes normal and proper use of the product in accordance with its design specification and instructions, the reasonable expectation is that the product user will in fact comply with the applicable norms for the use of the product, whether they be learned from reading instruction manuals or following the standard practices of the trade. Similarly, Justice Scalia invokes some undifferentiated sense of this term when dealing with land in *Lucas v. South Carolina Coastal Commission* to ask what limitations on the use of land rise to the level of compensable takings:

The answer to this difficult question may lie in how the owner’s reasonable expectations have been shaped by the State’s law of property—i.e., whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.²⁴

Yet this formulation does not escape circularity because it does not explain how the state law of land should define property in the first place. The point matters because the definition of property rights rests heavily on state law: “Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state

22. For my critique, see generally Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993).

23. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) (providing a judicial discussion of the test); *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 454-56 (Cal. 1978) (unraveling the test).

24. 505 U.S. 1003, 1016 n.7 (1992); see Epstein, *supra* note 22 (offering a critique of this case).

law”²⁵ Justice Scalia expresses a similar sentiment with relation to regulations that prevent all use of land: “Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”²⁶ Once again, the question is whether these remarks are idle statements that simply push the inquiry back one level, without explaining why the state law evolved in the manner it did.

An odd thing about these common criticisms is that they have not limited the use of the phrase “reasonable expectations” in any of the contexts in which it arises. In light of this fact, the mere persistence of the term should suggest that it has more content than the circularity provision of the law suggests. And I believe that this is the case.

Return for the moment to our product liability case. There, the economic business problem faced in the sale and manufacture of new products is a coordination problem. The correct approach is to specify those obligations that fall on each party that, if discharged, will maximize the value of the goods sold, i.e. the sum of consumer and producer surplus. Here the tradeoff runs as follows: if the rule chosen is one that allows the user to deviate from proper use without forfeiting the right of recovery, then the manufacturer is put into the position of having to design a product sufficiently able to prevent these deviations from resulting in harm. That enterprise, however, is far from costless, because once the product design features and warnings are incorporated to cope with the deviant user, the product becomes less valuable to the user who is able to follow instructions to a T. In dealing with ordinary consumer products, the users are a diversified class with uneven abilities, so that some tolerance or margin of safety has to be built into the system to prevent innocent mishaps from having dangerous consequences. Users want an extra margin of safety for consumer products like toasters and cars. But by the same token, it does not make sense to force the manufacturer to guard against reckless disregard by consumers or users if this will impair the value of a product for those who can keep their conduct out of the zone of danger. There is surely willful misconduct if someone uses a buzz saw to cut off a mole, just as there is in workers’ compensation cases. But a saw that is intended for softer wood should be durable enough to deal

25. *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972).

26. *Lucas*, 505 U.S. at 1029. Scalia does not further clarify the meaning of the phrase “inhere in the title.”

with harder wood as well. Just which excesses should be guarded against is a tricky problem. The one point of confusion is that an unexamined notion of “foreseeability” is a familiar crutch that unfortunately will not provide the answer. The term only defines the scope of the problem. It does not indicate who should bear which of the foreseeable risks, of which there are many.²⁷

However, consumers strike a different balance of convenience when dealing with goods that are supposed to be used by highly trained specialists. The fact patterns behind two controversial recent decisions give rise to consternation. In *Riegel v. Medtronic, Inc.*, the question was whether a tort action should be allowed against the manufacturer of a balloon angioplasty device that was overinflated by a physician and used on a patient who was not a suitable candidate for the procedure.²⁸ In this case, following the lenient rule for ordinary consumers makes no sense, given the exacting standards for training specialists. To maximize flexibility upstream, downstream professional users should be strictly required to follow rules to a T. Wholly without regard to any issue of federal preemption, the situation is one in which courts should not find tort liability against the device manufacturer, lest the value of the device be reduced.

The same approach should have controlled in *Wyeth v. Levine*, where the defendant drug manufacturer was held responsible for the maladministration of the drug Phenergen by a physician’s assistant in the face of clear warnings about the risk of the procedure.²⁹ Neither the Vermont court nor the Supreme Court discussed the implicit causal premise of the case, which was that tort rules of joint causation allowed a plaintiff to recover from the original drug manufacturer. That rule is not consistent with the proper understanding of reasonable expectations, which allows each party to act on the assumption that the other party knows what it is doing, unless it has actual knowledge of the prior error. That constraint would surely bind a physician that administered a drug known to be defective. Similarly, it would also apply to a manufacturer who sold the drug through outside channels to an improper user. The net effect of this ruling in *Wyeth v. Levine* is to impose

27. See Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105 (1989) (discussing who should bear the foreseeable risk in the allocation of contract losses).

28. 128 S. Ct. 999, 1005 (2008).

29. 129 S. Ct. 1187 (2009), *aff’g* 944 A.2d 179 (Vt. 2006). The Supreme Court decision noted the risks of inadvertent error, but did not allude to the admitted negligence of the physician’s assistant. 129 S. Ct. at 1192. See Brief for the Petitioner at 20, *Wyeth*, 129 S. Ct. 1187 (2009) (No. 06-1249).

on manufacturers inordinate pressures to take defensive steps that reduce the availability of drugs that may be desperately needed. The normal and proper use standard—the very standard that was originally announced in *Escola v. Coca-Cola*,³⁰ only to be forgotten—should have been applied in this case.³¹

The same logic applies to the use of reasonable expectations in the takings area. One common “realist” line is that the standard bundle of rights over a particular object—the rights of possession, use, and disposition—should not be considered unassailable, but rather should be treated as though they were an arbitrary assemblage. But that point misses the reason for the durability of this conception; linking the three incidents of the land together minimizes the transaction costs of getting the asset to its highest value use. Why incur the costs of dealing with holdout issues if the right of possession is lodged in one person, the right of use in another, and the right of disposition in a third? The unity of rights permits a single person to enter into transactions that can create divided interests—lease or mortgage—which will increase the value of the asset without hampering any third party rights. The law goes astray when it takes the position that the loss of the rights to dispose of property should be treated in the same, non-compensable way, as the losses that arise from lawful competition.³² Competition is a positive sum game; land use restrictions reduce value without producing offsetting gains. The idea of reasonable expectations is useful in understanding the traditional configuration of property rights because it maximizes the value of the relevant interests, and thus avoids the charge of circularity that normally dogs this field.

III. REASONABLE EXPECTATIONS AND THE FOURTH AMENDMENT

There is then good reason to think that the idea of reasonable expectations could have promise in the Fourth Amendment area. Concerned with “*unreasonable* searches and seizures,” the Fourth Amendment veritably invites use of a reasonable expectations test.³³

30. 150 P.2d 436, 444 (Cal. 1944) (“The manufacturer’s liability should of course be defined in terms of the safety of the product in normal and proper use.”) (Traynor, J., concurring).

31. *Id.* at 440-44.

32. For the devastatingly incorrect articulation of this supposed equivalence, see the decision of Brennan, J. in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978).

33. *See, e.g., Katz v. United States*, 389 U.S. 347, 361 (1967).

The matter is of course massively complicated because of the imperfect integration of the basic prohibition against unreasonable searches and seizures with the warrant clause and its own heightened standard of probable cause. The “and” that links the two clauses represents the most unfortunate use of conjunctions. Making the matter more difficult, the collection of information received by the third party rule extends beyond the “persons, houses, papers and effects”³⁴ that are covered by the Fourth Amendment’s initial guarantee against unreasonable searches and seizures. There are two questions left open by the first clause of the Fourth Amendment. First, to what extent does the Fourth Amendment limit the conduct of police officers (to whom it is not explicitly limited) in public spaces where none of the enumerated elements is obviously implicated, as in cases of routine surveillance? Second, is it possible, under the opening clause, to escape the dilemma between unregulated government conduct and the strict probable cause standard used for breaking into closed spaces that are manifestly covered by the Amendment?

The conceptual problem asks how to address these two difficulties without obliterating the libertarian baseline derived from assumption of risk and consent. This libertarian baseline, when faithful to the private law notions, cannot be the last word because it in effect makes all forms of criminal investigation illegal without the consent of the parties who are investigated. But from John Henry Wigmore forward, virtually everyone has recognized that any sound social system requires the incremental increase of state power even before any conviction is obtained. After all, the standard for getting a warrant is “probable cause” while that for getting a conviction is “beyond a reasonable doubt.” The basic pattern is that in principle, it should take more to convict than it does to arrest, and more to arrest than it does to search, and more to search than it does to investigate. Only if we take this progression seriously can we escape the hard all-or-nothing choices in this area: either probable cause or nothing.

In the end, the only way to formulate a sensible set of constitutional procedures is to be systematic about the introduction of the “reasonable suspicion” standard of *Terry v. Ohio*, which applies to police stops of suspects on the street.³⁵ What follows is an elaboration of that position, starting with the treatment of privacy in the private law of contract, trade secrets, and tort.

34. U.S. CONST. amend. IV.

35. 392 U.S. 1, 30-31 (1968).

A. THE PRIVATE ANALOGIES

My earlier writings on the tort of invasion of property and privacy have real application in the Fourth Amendment setting by offering one way to escape from the libertarian dead end.³⁶

The key analytical insight starts from the assumption that it is never possible for the government to obtain universal consent to introduce a system of criminal investigation. Yet at the same time, it is clear from the ex ante perspective that some greater use of state power puts all people in a better position (even net of costs), because any system that is forced to rely exclusively on decentralized means of private enforcement must ultimately break down.³⁷ A rule that is accepted behind the veil of ignorance that allows the state to search for murder weapons with a warrant will contribute more to the security of all individuals than it will harm their loss of liberty.³⁸ Asking people to display licenses on the back of their cars is a trickier case because in some instances that information can be used for bad purposes as well as good ones. But on average the practice sticks because it offers the police more scope to enforce the law than private wrongdoers to violate it; otherwise, with systematic public abuse, the requirement would have faded a long time ago. Therefore, actions of case-by-case compensation are unnecessary because in the fashion of the Lockean social contract, the gains to each actor from the security of the system will outweigh their private costs. The implicit-in-kind compensation moves folks to a higher level of welfare than they could achieve by working solely through voluntary agreements.³⁹

Just this logic helps explain the emergence of the modern tort of invasion of privacy. It undergirds the *Katz* rule that bars the overhearing of telephone calls without a warrant by relying heavily on reasonable expectations.⁴⁰ The early history of the law of privacy sought to tie the protection of privacy to

36. For a somewhat different attack on the same issue, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699 (1992). That article notes that the interpretive strategies used in constitutional law track point for point those that the Romans used in the explication of their central tort statute, the *Lex Aquilia*. *Id.*

37. As recognized as early as JOHN LOCKE, *A SECOND TREATISE OF GOVERNMENT* (1690).

38. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 63-69 (1993) (discussing the implicit prisoner's dilemma game).

39. See Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, *supra* note 11, at 1012-13 (discussing how this principle works in privacy contexts).

40. See *Katz v. United States*, 389 U.S. 347, 358-59 (1967).

the common law tort of trespass that hinged on a physical entry onto the property of another.⁴¹ If one walked onto the land of another individual to observe their private (even intimate) behavior, the trespass lay in the entry for which the consequential damages resulted from that entry. Thus early cases accepted the rule that there was no recovery for simple mental distress that was unaccompanied by a physical invasion.⁴² But those damages for mental distress did become actionable if “they [arose] out of a trespass upon the plaintiff’s person or possession.”⁴³ From there it was a small step to make the action turn on the improper collection of information consequent on the trespass,⁴⁴ including its subsequent public dissemination.⁴⁵ It may be puzzling that the physical invasion is of no importance in that the real complaint was directed to the parasitic losses derived from the collection and dissemination of the information.⁴⁶ Physical intrusion and private information shared an uneasy harness.

The tension between the two became acute when the same information was collected by a camera with a zoom lens that was used by an individual

41. *See* Daugherty v. Stepp, 18 N.C. 371 (1835) (“[E]very unauthorized [sic], and therefore unlawful entry, into the close of another, is a trespass.”).

42. *See, e.g.*, Mitchell v. Rochester Ry., 45 N.E. 354 (N.Y. 1896) (holding no recovery for mental distress for a pregnant woman who was nearly run over by a team of horses). That decision is widely rejected today for mental distress for persons who are in the zone of danger. *See, e.g.*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

43. Bouillon v. Laclede Gaslight Co., 129 S.W. 401 (Mo. Ct. App. 1910) (holding defendant’s agent, a meter reader, liable for causing plaintiff to have a miscarriage from fright and mental anguish after wrongfully entering plaintiff’s apartment).

44. For an early English case that deals with the interaction of trespass and information, see *Hickman v. Maisey*, (1900) 1 Q.B. 752, 756, where the defendant walked back and forth along a public highway in order to observe how the plaintiff’s racehorses performed on his private land. The technical English doctrine treated the highway as though it were owned to the median strip by each of its abutting owners, so that members of the public enjoyed an easement of safe passage, which did not include within its scope the right to spy on the plaintiff’s activities with an eye toward acquiring information of commercial value. *Id.* The English court found that the defendant’s actions were an actionable trespass. *Id.* But however right the decision was in the individual case, it was insufficient as a matter of principle. *Id.* The same harms arise if the defendant stood a few feet further away from the plaintiff’s land, or if he owned the land on the other side of the highway from which he made the same observations. *Id.*

45. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (upholding liability for publication of pictures obtained by fraudulent entry).

46. THOMAS ATKINS STREET, *THE FOUNDATIONS OF LEGAL LIABILITY; A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW* 466 (1906) (introducing the phrase “parasitic damages” and defining it as “[a] factor which is today recognized as parasitic will, forsooth, tomorrow be recognized as an independent basis of liability”).

who did not commit any common law trespass. The same interests were invaded, but they could no longer be treated as parasitic on some traditional tort.⁴⁷ They had to stand or fall in their own right. But how? It is relatively easy for people not to snoop with cameras or parabolic microphones in an effort to gather information. Yet it is devilishly difficult to guard against their use. We already know from the cases of physical invasion that a consensus emerged that the loss of privacy should be protected, given the subjective harms that snooping causes to others.⁴⁸ Yet there are crosscurrents here, for at the same time that the expanded law of privacy covers these cases, an expanded newsworthiness privilege under the First Amendment tends to eviscerate it.⁴⁹ This privilege covers the collection of information by trespass, and necessarily it also covers collection without resorting to trespass.⁵⁰ If the original collection is allowed, so too is its subsequent publication by a third person with knowledge that the information has been illegally acquired.⁵¹ It is clear therefore that the calculations do not change just because the information intrusion is separated from the physical entry. To be sure, the First Amendment newsworthiness privilege too often restricts the scope of the privacy interest. But when that issue is put to one side, as it is in most

47. *See, e.g.,* *Howell v. New York Post Co., Inc.*, 612 N.E.2d 699 (N.Y. 1993). In that situation the defendant trespassed on plaintiff's land to take a picture of another resident at the facility, Hedda Nussbaum, who had received massive publicity as the "adoptive" mother of Lisa Steinberg who had died of prolonged child abuse. *Id.* The plaintiff's picture was published over the desperate pleas of the operation of the facility that said it would wreak huge damage on the plaintiff and her family, but the court rejected claims for both intentional infliction of emotional distress and invasion of privacy. *Id.*

The result is wrong because of the exaggerated role that it gives to the newsworthiness privilege under the First Amendment. But for the purposes here, the key point is simply this: if *Howell* had come out the other way in the trespass scenario, the action would have been allowed if the defendant's photographer had used a more powerful telephoto lens from either a public highway or someone else's property. Note too that since the plaintiff could have surely enjoined the entry, it makes no sense to deny him the damage action when the entry has taken place. *But see, e.g.,* *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969).

48. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-94 (1890) (tracing the origins of the right to privacy in the common law torts of trespass, assault and nuisance).

49. *Virgel v. Time Inc.*, 527 F.2d 1122, 1128-29 (9th Cir. 1975) (discussing broad newsworthiness in the Restatement (Second) of Torts, § 652D of constitutional stature).

50. *See, e.g.,* *De May v. Roberts*, 9 N.W. 146 (Mich. 1881) (allowing action against a man who posed as a physician's assistant to gain access to a private home in which the plaintiff had given birth. The fraud vitiated the consent to the entry).

51. *Pearson*, 410 F.2d at 705-06 (holding newspaper publication of information by theft of plaintiff's papers is protected).

Fourth Amendment cases, all the pieces are in line for a general rule that requires all persons to refrain from snooping by these devices in exchange for the like surrender of the right to snoop by other parties.⁵² This conclusion produces across the board gains from the ex ante perspective.

It is also capable of generalization. Consider the social conventions that define reasonable expectations in restaurants. Often these facilities are crowded and people can hear what is said at other tables. Yet it is not good form to lean off and cock one's ear in order to hear everything that other people are saying. It is not that people do not violate this norm. Instead, the implicit rule of proper social conduct does not depend on explicit consent and is regarded as authoritative. It may not be wise to hold top-secret merger negotiations at a public location, but it hardly follows that the rule should be abandoned because some people might do so. At the edges, the social norm improves the overall situation, and so it establishes a powerful custom that is observable and justifiable. We do not have to treat the phrase "reasonable expectations," as an open sesame that opens any and all doors.

The next question that arises is how this term gets carried over to the criminal context. The first observation starts from a modest premise that ultimately proves to be unsustainable: it does not matter who is doing the eavesdropping at the house or the restaurant. The same restrictions apply to government agents as to ordinary individuals. And just what do these restrictions entail? You cannot spy on people with a hidden camera or microphone. However, you can observe who is in attendance, when they arrived, and what their demeanor was. While people may draw curtains and claim privacy in their home, they necessarily forfeit some of that privacy in the social commons for a simple reason: the cost of compliance would be far higher if people have to avert their gaze from whoever is present. Stalking is out, watching is in.⁵³

This first approximation therefore gives us some information of the kind of activities that the police can engage in without the benefit of any special grant of state power (i.e. without a warrant). The police can do what any other individuals can do. Once these ground rules are established, all are bound by them, just as all are bound by traffic rules. Notice of a social convention that works for mutual convenience carries over to the police or

52. *See, e.g.*, *Roach v. Harper*, 105 S.E.2d 564 (W. Va. 1958).

53. *See e.g.*, *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765 (N.Y. 1970).

their agents, and to private individuals who collect information that they then turn over to the public.⁵⁴

Thus in *Terry v. Ohio*, the Supreme Court was correct to indicate that the police were allowed to follow around suspects on public streets to see if they were casing certain locations for holdups.⁵⁵ Once the police found that there were good reasons to believe that the suspects were casing locations, the police could stop and search these persons without a warrant so long as they had reasonable suspicion of wrong doing.⁵⁶ The use of greater power was only justified after the original surveillance furnished additional indicia of wrongful intention that allowed the police to stop a crime before it happened. To get the desirable social result, the “reasonable suspicion” standard operated as a sensible middle ground between a rule that allowed the police to stop and frisk at will and one that required them to demonstrate probable cause for arrest.

B. PEN REGISTERS

The protected zone of behavior makes a difference in certain types of cases, most notably those involving the use of a pen register. A pen register is a device installed at the central switchboard that tracks the phone calls made from certain phones. In *Smith v. Maryland*, the telephone company, at the request of the police, installed a pen register at the home of the defendant who was under suspicion of committing robbery and harassment.⁵⁷ The Supreme Court decided that the use of the pen register did not count as a search by resorting to its extravagant view of the standard assumption of risk doctrine.⁵⁸ Kerr summarizes the situation by arguing that the petitioner voluntarily conveyed numerical information to the telephone company and thereby exposed such information to the telephone company’s equipment in the ordinary course of business.⁵⁹ Doing so implied the assumption of risk that the company might reveal to the police the dialed numbers.⁶⁰ Kerr continued that: “The switching equipment that processed those numbers [was] merely the modern counterpart of the operator who, in an earlier day,

54. *Gouled v. United States*, 255 U.S. 298, 306 (1921) (holding there is a Fourth Amendment protection for information gathered through private snooping and later turned over to the United States).

55. *See* 392 U.S. 1, 30 (1968).

56. *Id.*

57. 442 U.S. 735, 736 (1979).

58. *Id.* at 749.

59. Kerr, *supra* note 2, at 570.

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

personally completed calls for the subscriber.”⁶¹ The Court held that the third-party doctrine applied even though “the telephone company ha[d] decided to automate.”⁶²

The same result is achievable without resorting to the assumption of risk doctrine. The key point here is that the telephone company monitored only the connections.⁶³ It did not actually examine the content of the phone messages, which would have been a form of snooping. In one sense this case is an extension beyond the usual surveillance case because not every individual is in a position to monitor phone calls, while anyone can follow someone down the public street. But the information that can be gained by tracking connections in pen registers can prove of great benefit without revealing the content of the message. The pen register accommodation consequently counts as a clear line in a workable place. The decision to write down the information only improves its reliability after the fact. It does not increase the nature of the intrusion, but only serves as a protection for innocent persons that might otherwise be drawn into the web of surveillance, by reducing the risk of mistaken identification. It is both possible and desirable to defend the result without allowing the police the option to snoop on the calls themselves.

This point has urgent bite in the age of telecommunications. Much of the intelligence activity of the government involves a modern update of watching the connections that are made between various phone lines. There may be some questions of presidential power, that is, whether the Foreign Intelligence Surveillance Act authorizes the president to undertake those actions unilaterally in his role as commander-in-chief, which I do not believe to be the case.⁶⁴ But it does not implicate concerns with the Fourth Amendment, even if it were otherwise to apply, say, in the case of full Congressional authorization. The reasonable expectations test, carried over from the privacy setting, works in both directions. *Smith v. Maryland* is not like *Katz*, which it expressly distinguished, since the government in *Katz* had in fact overheard the *contents* of the phone calls. This qualifies *Katz* as a pure snooping case without the trespass.⁶⁵ On the strength of the approach taken

61. *Id.*

62. *Id.* at 745.

63. *Id.* at 741.

64. See generally Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317 (2005).

65. See *Katz v. United States*, 389 U.S. 347, 351-59 (1967); see also *Smith*, 442 U.S. at 739.

here, the difference is clear. *Katz* would count as an invasion of privacy if done by a private person. Its tortious nature therefore is what renders the conduct unjustifiable from, as the case put it, “an objective” point of view.⁶⁶ The proposition that *Katz* was entitled to rely on the privacy of the phone booth stems from precisely those calculations that brand private snooping wrong, as the balance of convenience shifts given the reasonable expectation of privacy.⁶⁷ So long as private parties are not in a position to snoop, the government needs a warrant. The restrictions of the common law of trespass are no greater obstacle in dealing with constitutional searches than with private actions for the invasion of privacy.

C. FOURTH AMENDMENT PROTECTION FOR ORAL EVIDENCE

As noted earlier, the Fourth Amendment has been held applicable to some oral communications, and it is useful to sort out the various scenarios. These cover information that is revealed in ordinary conversation, information that is obtained by eavesdropping on private conversation, and information collected in public places.

The first scenario involves persons who reveal information to others during the ordinary course of conversation, sometimes in confidence and sometimes not. This issue was set up by the Supreme Court’s decision in *Silverman v. United States*,⁶⁸ which extended the reach of the Fourth Amendment to any government recording of oral statements that was accomplished without committing a trespass at common law. The actual listening to the remarks is like the eavesdropping that was condemned in *Blackstone*.⁶⁹ The use of the device to make the information more reliable does not, of course, remove the original taint on the source of the collection.

66. *Katz*, 389 U.S. at 353, 358.

67. *See id.* at 361 (“The critical fact in this case is that ‘(o)ne who occupies it, (a telephone booth) shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume’ that his conversation is not being intercepted.”) (Harlan, J., concurring).

68. 365 U.S. 505 (1961).

69. The Supreme Court remarked,

Eaves-droppers, or such as listen under walls or windows, or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet: or are indictable as the sessions, and punishable by a fine and finding securities for good behavior.

Berger v. New York, 388 US 41, 45 (1967) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 169 (1769)).

The decision does not stand in real tension with the text of the Fourth Amendment, as the right of “the people to be secure in their . . . houses” is broad enough to protect the activities undertaken there, as well as the house itself.⁷⁰ In addition, the term “search” is broad enough to cover any intrusion into a particular area, even if there is no manipulation of the physical objects that are located there. The government searches an individual’s open documents by reading their contents, even if it does not turn the pages (or lets the blowing wind do it). Similarly, a searchlight is used, well, for searching, even if it does not touch any object. Any intrusion into a protected space has a very different resonance than surveillance on the public streets where the reasonable expectations run in the opposite direction, on the strength of the private law analogies.

The situation becomes much more difficult when the information is collected in other circumstances where the usual understanding of privacy is attenuated. This is particularly true for conversations in public places. On this point, Kerr defends the rule that admits the evidence in order to force the criminal to substitute less efficient means of execution to achieve his illegal result.⁷¹ Kerr’s point here is that the threat of disclosure will reduce the frequency of crimes by making them more costly, so that most of the benefits will never be observed in handling cases brought within the criminal system.⁷²

In making this argument, Kerr taps into a long criminal law tradition that deals with various restraints on cooperation through, for example, the law of conspiracy, complicity, and the like.⁷³ It is, however, vital to recognize that Kerr’s argument is a two-edged sword. The usual approach to contract supports voluntary agreements for two reasons. First, they produce gains between the parties; second, they generate positive third party effects, by creating increased opportunities for trade. However, when the systematic externalities from contracting turn negative and exceed the gains to the contracting parties, it is important to stamp out the voluntary transaction.

70. U.S. CONST. amend. IV.

71. Kerr, *supra* note 2, at 564 (“Without the third-party doctrine, savvy wrongdoers could use third-party services in a tactical way to enshroud the entirety of their crimes in zones of Fourth Amendment protection.”).

72. *Id.* at 564-65 (noting the weakening of general deterrence effect from abandoning the third party rule, owing in part to the greater clarity of the rule).

73. See MODEL PENAL CODE §§ 2.06, 5.02, 5.03. The intuition behind these sections is clear enough. Agreements produce gains between the parties, but when those come at the expense of the life, liberty, and property of third persons, they have to be blocked, because the gains from trade between the parties are negatively correlated with social welfare.

Cooperation thus becomes conspiracy to commit robbery or murder, or, closer to the line, conspiracy to fix prices. The larger the potential private gains, the larger the social losses, leading to the reversal in social response. The same argument holds true with the sale of goods. It is socially beneficial when the sale is of legal goods, and it is a form of trafficking when it is the sale of contraband or stolen goods.

This analysis presupposes that consumers can categorize the nature of each transaction, and thus can give a definitive answer to the sign of its externality. Unfortunately, when dealing with criminal processes, that sign is not as readily apparent because the substance of the underlying transaction is unknown. If people knew in advance that all these conversations were part and parcel of some illegal scheme, then why not admit whatever evidence the prosecutor can assemble? But if there is an invasion of privacy that turns up no evidence of illegal conduct, the social calculus is a lot closer. Coming up with the right answer is now hard because we cannot determine in the abstract whether the substitution away from a particular mode of doing business is a good or a bad thing. Kerr is right to insist that it is socially desirable to force the criminal to adopt less efficient means. But by the same token, the substitution effect will be socially undesirable for all innocent individuals who want to steer clear of the law. The full accounting has to include those social losses as well as the social gains. But how do we get the measure of the trade-off?

One approach to this problem begins by dividing the world into two kinds of cases: cases involving casually acquired information and cases involving government agents who are sent to spy. In cases of the first kind, the government is taking advantage of information that it casually acquires from some third party who has happened to have some interaction with the accused. The key point about these situations is that there is *no* prearrangement between the government and the third person whose testimony is sought. At this point, it is not possible to insist that the government make any kind of a showing before a neutral public official that it is appropriate to conduct this investigation through a third person. Either the evidence is admitted or it is excluded.

In general, I would admit virtually all evidence of this sort in a criminal trial, for the simple reason that, empirically, the scenario does not point to any abuse of government power that should be restricted from the ex ante perspective. It should not matter, as was held in *Miller*, that the disclosures to the third person were made in confidence. There are in all private law settings various levels of confidences and secrets. At one level we can declare privately that we think that something is conveyed in confidence or something is held in secret. But does the simple designation of something as

a trade secret make it so, or is there some additional requirement that has to be satisfied in order to obtain that preferred status? This is not an easy question because the standard definitions of trade secrets are stunningly evasive on this point. The early definition from 1939 limits the scope of trade secret protection to:

[A]ny formula, pattern, device or compilation of information that is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.⁷⁴

This definition of trade secrets cabins the concept into discrete categories. In contrast, a 1995 definition extends the scope of trade secrets by eliminating the earlier enumeration: "A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."⁷⁵

Consider the case where a suspect's conversation with a stranger contains incriminating evidence. It is clear that this kind of talk does not fit within the first definition of a trade secret. Probably, but not certainly, it does not fall within the second definition either. At this point, it appears that by most accounts the recipient of that information could reveal it to third parties without suffering legal sanctions, even though that decision would generate a lot of social pushback. No one likes snitches or tattle-tales. Accordingly these cases lie in that gray zone where social obligations have not been promoted to legal ones. There is little doubt that this information would be admitted, if relevant, into a civil trial, at which point the reasonable expectations theory points toward its admissibility in criminal prosecutions. It is one thing to ask for protection against third party snoops. It is another to demand legal protection when you have the power to pick the person with whom you deal.

But what should be done if this information has been given to the third person in confidence? The Supreme Court's formulation of the rule in *Miller* regards this fact as irrelevant to the legal situation, and that conclusion has to be right as well, for otherwise the ability to use oral information from a

74. RESTATEMENT OF TORTS §757 cmt. b (1939).

75. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995).

subject is lost.⁷⁶ If information imparted in confidence to a random person is not available to the government, everyone with an illegal purpose will declare that he is supplying information in confidence. That defensive application of the autonomy position marks the end of all criminal investigations, for even if the condition were not stated, under orthodox contract it should be implied on the grounds that it works to the mutual benefit of both parties to the communication in situations where the government cannot credibly claim to be a third-party beneficiary.

In this situation, however, the reasonable expectation test, in contrast to *Katz*, does not expand the sphere of protected activities. Rather, it narrows it on the ground that no one (or no two people) can conceal evidence from criminal prosecution by their joint declaration alone. All this information is admissible in civil cases, and the same rule applies in criminal contexts. Put otherwise, the only confidences that matter are those that are externally validated by law: the lawyer-client relationship, work product and the like. These are regarded as exceptions to the well-established norm that the law is entitled to the evidence of every person, and it is hard to think of a criminal system that could survive a new-found ability of every person to bind the state by contracting out of the third party rules.

The second set of cases does not involve random third persons, but rather government agents who are sent to spy. At this point, the calculus is surely closer because the risk of government abuse is greater. The disclosure of valuable information is likely to have been induced by fraud, sometimes tacit, but often overt. On this issue the private law analogies cut both ways. The private law is filled with cases where a seller conceals a latent defect in the product sold,⁷⁷ or the buyer does not reveal to the seller that he is buying a particular plot of land in order to assemble a large factory.⁷⁸ The law usually requires the disclosure of the latent defect, but in general is wary of forcing the buyer to reveal his lands, lest the forced disclosure of that information blunt the buyer's willingness to form his plan in the first place.⁷⁹ In similar fashion, restaurant reviewers never reveal their identity in order to acquire an accurate assessment of the food and service.

76. *United States v. Miller*, 425 U.S. 435, 443 (1976).

77. RESTATEMENT (SECOND) OF TORTS § 551 (1965) (discussing the basic rule of nondisclosure and its long list of exceptions including that it applies to "facts basic to the transaction").

78. *Guar. Safe Deposit & Trust Co. v. Liebold*, 56 A. 951 (Pa. 1904).

79. Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 13-16 (1978).

As such, these fraud cases land right on the cusp in private law, and so too in criminal law. Entrapment by a secret government agent vitiates the consent, but the defense is generally narrowly construed, so that the agent must induce a crime that would not otherwise be committed. It is not sufficient to offer an opportunity that the suspect seizes on his own initiative.⁸⁰ Without that distinction, all undercover work is off-limits. The causal refinements are not elegant, but again, I am hard-pressed to see whether any other legal regime works better on the entrapment cases.

At other extreme, it hardly follows that the government can plant moles, with or without wires, on agents without any showing at all. In these situations there are few pressing emergencies, so it should be possible to have some neutral oversight of the process. Trying to run this case through the standard warrant requirements, however, is a hopeless task because there is no probable cause and no ability of “particularly describing the place to be searched, and the person or things to be seized.” Those requirements make sense when the investigation of a particular offense has led to a particular place. But the secret agent is placed on spec, as it were, without any particular person, place or thing in mind. It is the information that is acquired that leads in the desired direction.

In contrast, however, there is no reason why the *Terry* reasonable suspicion standard could not be imported into this situation. To be sure, in *Terry* the reasonable suspicion standard was used to authorize a warrantless search for otherwise the suspect would be gone and so too the opportunity of apprehension prior to the commission of the harm.⁸¹ But which way does that cut? Once there is the opportunity to survey the situation, the reasonable suspicion standard can be used to let a third person examine the evidence, ex parte of course, to see whether there are reasonable grounds to go further. The use of secret agents on an emergency basis could be allowed under reasoning analogous to *Terry*.⁸² In the large number of cases, however, the same magistrates that issue warrants on probable cause could exercise oversight of this process, using a somewhat lower standard of proof, given the nature of the inchoate, but important, information to be sorted. Since this proposal builds off present institutional arrangements, it should be capable of orderly implementation. The modest restriction on police ability

80. *See, e.g.*, *Jacobson v. United States*, 503 U.S. 540, 548 (1992) (holding on facts that the government agents induced the commission of this crime).

81. *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

82. *Id.* at 20-22.

to use secret agents should increase public confidence in the procedures, and offer a better balance in the chronic debate between liberty and security.

D. DOCUMENTS

The next question is what rule should apply to the government's ability to search or seize documents that are stored with third persons. As with oral testimony, the legal system faces the same double-edged sword problem on the substitution effect from the law. By transferring information or files to third persons, the criminal makes these documents available to search while making it harder for the criminal to execute his scheme. But by the same token, ordinary people, anxious to preserve their informational privacy, will be reluctant to put documents into the hands of third persons if they know the government can now sift through them at will. In this situation, it is thus common that many documents are just transferred for safe-keeping, where the recipient is not supposed to look at their contents.

At this point, we are not faced with the common situation of oral testimony from random third persons. Rather, in this situation, the sensible approach parallels the approach used with secret agents. More specifically, the first concern in all document cases is to make sure that the documents are kept available to public authorities as needed in the course of a criminal prosecution. The proper way to achieve this result is to let the government obtain an *ex parte* order that these documents should not be returned to their owner or destroyed pending some judicial review of the matter. That stabilization order eliminates the risk of third party misconduct and buys time to see whether the requested disclosure to the government should be authorized.

The next stage in the proceedings goes to the question of whether the government can gain access to the contents of these materials. In dealing with this problem, it seems evident in many contexts that private decisions on where and how to store the information look far less dramatic in execution than those to share information with another person. Thus it seems odd in the extreme that the government could go through these records at will if they were stored on some Google cloud, but could only gain access to them on a showing of probable cause if they were located securely on that person's own hard drive, where they could easily be treated as a techno-version of "papers" that receive the full measure of Fourth Amendment protection. On this issue, moreover, the reasonable expectations test cuts firmly in favor of the ordinary individual who does not regard either a warehouse or an on-line storage facility as a trusted confederate or partner.

The hard question that remains is whether there exist situations where the government's ability to search should be governed by a reasonable

suspicion and not a probable cause standard. That point comes up because many investigations, especially in the context of national security, are not intended to solve crimes that were already committed, but to prevent the occurrence of crimes for which there is no judicial remedy. The difference between general surveillance and criminal investigations should not be lost in these cases, and the release of information to the government on the reasonable suspicion standard seems appropriate. At this point, the protection for ordinary individuals whose phone calls or billing information is collected does not lie in the inability of the government to access the information, but in the types of use the government can make of that information once access has been obtained. The easy case covers a flat prohibition against any political or other collateral use of the information. In my view, President George W. Bush was able to survive charges for impeachment because the information collected in his FISA-type searches was not used to advance those particular ends—in sharp contrast to the use of the Nixon Watergate tapes. It does, however, seem more doubtful that a rule could be devised in all cases that kept that information from use in criminal trials. Some such separation regime was contemplated by the original FISA statute,⁸³ but it might be quite difficult to apply in ordinary criminal contexts where the criminal safeguards come in the articulation of the substantive crimes and in the applicable standards of proof. At that point, however, the results are identical to those in *Terry*, which seems to have worked tolerably well over the past 40 years.

Like all trade-offs between liberty and security, the distinction between national security surveillance and criminal investigations has its inelegances. But, again, in light of the weighty objectives on both sides of the line, it may well be harder to develop a better regime. There is only so much that rules under the Fourth Amendment can do to deal with system-wide government mistakes. For certain types of serious police and investigative misconduct, other institutional arrangements, including police review boards, and, if need be, criminal prosecutions may be required. In other cases, the release of information by third parties, such as phone companies, should be accompanied by various protections that regulate, and probably insulate them

83. See The Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1806(b) (2006). Section 1806(b) states: “No information acquired pursuant to this subchapter shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.” *Id.*

from civil liability from customers who claim that their cooperation with government officials facilitates an invasion of privacy.

IV. CONCLUSION

It is thus apparent that the Fourth Amendment cannot be the only tool that is used to deal with the manifold issues associated with third party searches. But even in the narrow Fourth Amendment context, these issues present challenges that are easy to state but hard to resolve. The simple solutions all fail because an autonomy-based system that deals with consent and assumption of risk misses the key point that public necessity could easily require an abandonment of those rules, just as it does in ordinary cases. At this point it is necessary to think about reasonable expectations as an optimization process that plays such an annoyingly persistent role in this analysis. It is a common characteristic that all optimization games share. It is easy to identify some clean cases where we are confident that the rule is correct. *Katz* looks like such a case. But the greater the refinements, the more likely it is that the next round of cases will come closer to the line, and so too with each successive iteration. In virtually all settings we shall eventually come close to the point of equipoise. That is why, for example, the art of implying a term that leads to business efficiency in the law of contract can take the analysis so far, but no further. And it is why the use of reasonable expectations leads to such close decisions for and against protection of privacy interests against various kinds of intrusion.

Those difficulties in the private law set up a warning system, for there is no magic approach that avoids these problems in public law settings. Public lawyers do not have available a novel set of tools that are unavailable in the simpler contexts of private law. If those tools lead quickly to honest differences of opinion in private law settings, then they will do so in public law settings as well.

In this connection, Orin Kerr has done us a great service in pointing out the substitution effects that come from a rule that exposes to government action documents and words that are entrusted to third persons. But by the same token his insight cuts in both directions, so that the inability to substitute creates social inefficiencies with respect to lawful conduct that people naturally wish to keep from the prying eye of the state. Thus, the problem of the third hand becomes a familiar problem of minimizing the sum of two kinds of error. At that point, we can be quite precise in identifying the relative conflicts, but very cautious in asserting dogmatic conclusions. It is for just that reason that relying on an expanded application of the *Terry* reasonable suspicion standard offers some help, particularly

because in many cases of proactive government action it suggests a set of public procedures that can contain, without destroying, various police and surveillance techniques. Yet at the end of the day, some profound disagreements will still persist. And for those we have to take comfort in the Humean injunction that for some problems “carelessness and inattention alone can afford us any remedy.”⁸⁴

84. DAVID HUME, *THE TREATISE OF HUMAN NATURE* 218 (L.A. Selby-Bigge ed. & Peter Nidditch, rev., Oxford: Clarendon Press 1978).