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REFLECTIONS ON STANDING: CHALLENGES TO SEARCHES AND SEIZURES IN A HIGH TECHNOLOGY WORLD
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REFLECTIONS ON STANDING: CHALLENGES TO SEARCHES AND SEIZURES IN A HIGH TECHNOLOGY WORLD

José Felipe Anderson*

"Those who give up essential liberty, to purchase a temporary Safety, deserve neither Liberty nor Safety." Benjamin Franklin¹

“Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.” Judge Learned Hand²

INTRODUCTION

Among the profound issues that surround constitutional criminal procedure is the obscure often overlooked issue of who has standing to challenge an illegal search, seizure or confes-

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¹ Benjamin Franklin, Reply of the Pennsylvania Assembly to the Governor (Nov. 1755), in POWER QUOTES 106 (Daniel B. Baker, ed., 1992).
sion. Privacy interests are often overlooked because without a legal status that allows a person to complain in court, there is no way to challenge whether one is constitutionally protected from personal invasions. Standing is that procedural barrier often imposed to prevent a person in a case from objecting to improper police conduct because of his or her relationship of ownership, proximity, location, or interest in an item searched or a thing seized. Although rarely penetrating the news headlines, those who work in the day-to-day vineyards of

3 Standing is the manner in which litigants are allowed into the courthouse doors. The Supreme Court has made clear that for a party to qualify to litigate, it must demonstrate "first and foremost an invasion of a legally protected interest." Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

4 The Supreme Court has said that privacy expectations have been explained by "a source outside the Fourth Amendment, either by reference to concepts of real or personal property law . . . ." Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)). Thus, trespassers, for example, would have no reasonable expectation of privacy in land that they might wrongfully occupy. In Amezquita v. Hernandez-Colon, 518 F.2d 8, 11 (1st Cir. 1975), the First Circuit held that squatters had no reasonable expectation of privacy in structures that they constructed on government-owned land. The court explained that "[n]othing in the record suggests that the squatters' entry upon the land was sanctioned in any way by the commonwealth. . . . That fact alone makes ludicrous any claim that they had a reasonable expectation of privacy." Id. Such limitation in privacy protection may even apply when the initial possession of the property is sanctioned. See Laney v. State, 842 A.2d 773 (Md. 2004) (holding that defendant had no reasonable expectation of privacy as a holdover mortgagor in foreclosed property in which a search was performed and explosives were discovered); United States v. Rahme, 813 F.2d 459 (2d. Cir. 1987) ("[W]hen a hotel guest's rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room . . . ."). But see United States v. Kitchens, 114 F.3d 29, 32 (4th Cir. 1997) (stating that privacy expectation may survive if the hotel has a practice of allowing tenants to hold over the check out time without consequence.).

6 See California v. Greenwood, 486 U.S. 35 (1988) (holding that privacy interest was affected by the actual location of trash awaiting pick up outside a private residence). Rights might be affected by whether the trash is located on the private or public portion of the property.


the criminal justice system well know the power of this concept that often is the difference between who may complain about an egregious privacy wrong and who may not. Standing is the keeper of the constitutional gate, and for defense attorneys its presence is not unlike the mythical Cerberus which guards the gates of hell and will require a Herculean effort to overcome.

Newsworthy stories of obviously guilty criminals going free because of the constable's blunder have often lead to cries for sometimes extreme criminal justice reform. But the frequency of such rulings as compared to the political attention they receive does not accurately reflect the difficulty of a defendant prevailing on an issue where the "exclusionary rule" is actually invoked. The concept of standing however plays into not only who can seek the protection of the courts, but how those laws are challenged and interpreted by trial and appellate courts. The procedural doctrine acts as a constitutional gatekeeper that determines who may articulate arguments on the merits of their constitutional privacy claims. Like all procedural tools

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8 Courts simply do not decide every dispute presented to them. Indeed, considerations of judicial efficiency would logically suggest that courts, like any institution, would desire to reduce their workload by imposing administrative tools to filter matters deemed inappropriate.

9 Cerberus, a creature from Greek mythology, was a three headed dog that guarded the entrance to Hades. See ENCYCLOPEDIA BRITANNICA II READY REFERENCE 691 (1976).

10 Hercules, another mythical figure, had to subdue Cerberus as one of his twelve labors. See WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1167 (2d ed. 1957).

11 The oft noted query, whether "[t]he criminal is to go free because the constable has blundered," was formulated by Benjamin Cardozo while a judge on the New York Court of Appeals rejecting adoption of the exclusionary rule. See New York v. Defore, 150 N.E. 585, 586-89 (N.Y. 1926).

12 The exclusionary rule is a judicially created doctrine that prevents evidence from being admitted into court that has been obtained in violation of a defendant's constitutional rights. It has been criticized as barring "probative evidence that the police are judged, often on the sheerest technicality, to have obtained improperly." ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 104 (1996).

their functional value is in providing some efficiency and predictability to the system, so that courts may only resolve disputes properly before them.\textsuperscript{14} Efficiency is an important value, but when the balance between efficiency and protecting fundamental rights tips too far toward strict adherence to process it may well be time to examine whether the rule needs to be modified.\textsuperscript{15}

As we enter the twenty-first century with a notable increase in technology, greater concerns for security brought about by terrorist activity, most notably the tragedy of September 11, 2001, examination of the fundamental doctrine that protects our privacy is necessary.\textsuperscript{16} Assumptions about how well those rules operate in the current climate of emerging technology, high crime, and terrorism concerns should be reexamined. We should be sure that the circumstances of a changing world do not lead to the long term application of legal principles ill-suited to the demands of a new era.\textsuperscript{17}


\textsuperscript{16} The most familiar area of electronic intrusion that courts have addressed is wiretapping. But such surveillance, that is, listening in secret, is an ancient practice. As one court has recently explained:

\begin{quote}
Eavesdropping is an ancient practice which at common law was condemned as a nuisance. At one time the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse. The awkwardness and undignified manner of this method as well as its susceptibility to abuse was immediately recognized. Electricity, however, provided a better vehicle and with the advent of the telegraph surreptitious interception of messages began. As early as 1862[,] California found it necessary to prohibit the practice by statute. During the Civil War general J.E.B. Stewart is reputed to have had his own eavesdropper along with him in the field whose job it was to intercept military communications of the opposing forces. . . . The telephone brought on a new and more modern eavesdropper known as the 'wiretapper.' Interception was made by a connection with a telephone line.
\end{quote}
The purpose of this article is to examine some fundamental principles of standing as they relate to other privacy issues. Many of these concerns have been ignored by contemporary courts as the technology that affects privacy interests has marched forward at a break-neck pace. The rules of standing as currently applied will lead to unduly restrictive access to challenging government conduct effecting privacy interests.

Furthermore, the standing rules as currently applied have lead to the development of faulty doctrine in the area of the exclusionary rule, which affects Fourth Amendment rights in general. Opinions that are both illogical and difficult to apply have resulted from current standing rules, and both defense and prosecution interests have suffered from the poorly crafted jurisprudence that has resulted. The ill-conceived jurispru-


One insightful commentator has recognized that the "advent of widespread use of computer technology ... has altered the way in which individuals view the world. ... Today, lawyers and business professionals must be cognizant of communications law, criminal law, privacy law, and many other subjects that may not have been relevant to their situation only a decade ago." Raymond T. Nimmer, The Law of Computer Technology: Rights, Licenses, Liabilities, III-1 (2d ed. 1992).

The need for courts to impose procedural rules like standing requirements is a continuing reminder that courts are functioning organizations which have their own regulatory concerns. Rules like statutes of limitations and filing deadlines serve to advance goals other than those achieved by deciding a case on its merits.

The Fourth Amendment of the United States Constitution states:

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

U.S. Const. amend IV.


Repealing the so called "exclusionary rule" would not make the police any more effective in their "war" against crime. Despite loud and frequent complaints, the police have not been handcuffed by the rulings of the Warren Court. Except for minor drug offenses, there is no evidence to suggest that policemen make fewer arrests, or that prosecutors secure
idence of standing will clearly continue if broader, more predictable, rules of standing are not developed to meet the challenges of our high technology age. Indeed, it is my belief that the poorly reasoned and outdated Fourth Amendment precedent, combined with the rapid increase in intrusive technology, creates a dangerous lack of checks and balances in privacy protection and the public’s ability to adequately respond.

I propose that standing rules need to be expanded in some areas and clarified in others. Specifically, in a world where video surveillance is increasingly in use, it makes sense to apply liberal standing rules to those circumstances. Furthermore, the concept of standing needs to be clarified as related to the seizure of items from electronic databases to insure proper development of Fourth Amendment law.

Recent attempts by the federal government to assist law enforcement by relaxing requirements for investigating alleged fewer convictions, because of Supreme Court decisions safeguarding the rights of the accused; on the contrary, the evidence runs the other way.

Id. at 201 (footnotes omitted).

22 "In time, given the global movement toward democracy, interactive voice, audio, video data exchange will occur world wide. . . . In addition to fiber optics, dozens of other technological innovations will end our dependency on the electromagnetic spectrum." JONATHAN W. EMORD, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT 308 (1991).

23 In human terms the value of privacy is high but difficult to measure and constantly evolving. "Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. . . . [T]he right to be let alone . . . has grown to comprise every form of possession—intangible, as well as tangible. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890).

24 It is not my goal to make courts the clearinghouse for all personal privacy matters; rather, I suggest that courts are in the best position to evaluate new technology as it emerges.

25 Consider, as an example of intrusion, the use of red light cameras, which has emerged over the last decade. Currently, the surveillance method is so common that we are no longer surprised by the mailed notices capturing our vehicle and often a passenger, the time of violation, and our exact location at a camera equipped intersection.

26 As a society, if we value privacy, we should not make ourselves vulnerable to rapid technological change that will turn our privacy privilege to a right without a remedy.

27 See MILLER, infra note 184.
terrorism under the Patriot Act have brought the issue of government surveillance to the attention of an anxious nation that wants both freedom and security. Indeed, Congress and the executive branch continue to struggle with what level of intrusion is necessary to insure security. There has also been legislative action on the state level to address the problem of police access to high technology in investigating crime after September 11, 2001. Groups calling for more concern for the protection of privacy have also raised concerns that privacy

28 USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). One federal court had this comment about the law:

The passage of the Patriot Act altered and to some degree muddied the landscape. In October 2001, Congress amended FISA [Foreign Surveillance Intelligence Act] to change "the purpose" language. . . . It also added a provision allowing "Federal Officers who conduct electronic surveillance to acquire foreign intelligence information" to "consult with federal law enforcement officers to coordinate efforts to investigate or protect against" attack or other grave hostile acts, sabotage or international terrorism, or clandestine intelligence activities, by foreign powers or their agents.

In re: Sealed Case Nos. 02-001, 02-002, 310 F.3d 717, 728-29 (2002).

29 See FIONA DOHERTY ET AL., LAWYER'S COMMITTEE FOR HUMAN RIGHTS, A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11, 11 (2002). The Lawyer's Committee for Human Rights has expressed a great deal of concern about changes, announced on May 30, 2002 by Attorney General John Ashcroft, concerning the FBI guidelines on criminal investigations and citizen surveillance. Id.

Under the Attorney General's new guidelines, FBI agents may once again monitor and investigate lawful political and religious activities. FBI agents can now keep records of people who attend places of worship—mosques, synagogues, and churches—as well as those who attend meetings of non-governmental groups. To do this, they may covertly attend political or religious gatherings, surf internet sites, and mine commercial databases. Furthermore, they can do all of this without showing any reason to suspect any criminal activity. . . . In addition, there is no time limit on how long the information may be retained.

Id.

30 See generally id. at 7-12. The USA Patriot Act was passed only a few weeks after the tragedy of September 11, 2001. Accordingly, it did not receive the normal scrutiny as if it had gone through the complete legislative process. Id. at 1-2.

31 The American Civil Liberties Union has been actively involved in examining the provisions of the USA Patriot Act.
rights are being unfairly curtailed.\textsuperscript{32}

The creation of an office of homeland security\textsuperscript{33} and the continuing war on terrorism\textsuperscript{34} have made citizens of the United States acutely aware that notions of privacy are being challenged in ways unknown to prior generations.\textsuperscript{35} By clarifying the role that standing plays in the constitutional equation, we may be able to create a more efficient and predictable system to review the uses of privacy technology.

STANDING AS A CONSTITUTIONAL GATEKEEPER:
CIVIL STANDING AND CIVIL RIGHTS

In order to properly fashion adequate rules of standing in constitutional criminal procedure, it is useful to explore how standing has developed in civil litigation for civil rights.\textsuperscript{36}

\footnotesize
\textsuperscript{32} The Council on American-Islamic Relations Research Center has recently described the problem of civil rights challenges faced by Muslims in a post September 11th world. Reporting a 64 percent increase in anti-Muslim sentiment since the fall of the world trade center, the Council's executive summary explains,

The fallout from September 11 continues to impact Muslim daily life, whether at school, in the workplace or in general public encounters. Mistreatment at the hand of federal government personnel continue to be reported in substantial numbers. FBI agents and other local law enforcement authorities have sometimes responded to hearsay reports, and conducted questionable raids and interrogations. . . . Also, many Muslim homes and businesses were raided and private property seized pending investigation. Moreover, queries by some FBI agents about mosque membership list and media reports about a proposed FBI counting of mosques raised widespread apprehensions among community members who believe they are being scrutinized based on their religious association.


\textsuperscript{33} See John Gibeaut, Winds of Change, 87 A.B.A. J. 32 (Nov. 2001) (discussing the creation of an office of homeland security).

\textsuperscript{34} Id.

\textsuperscript{35} The right to be let alone by government officials unless there exists sufficient cause is protected by the Fourth Amendment. This right is "perhaps the most personal of all legal principles. It is also one of the newest, since only the more sophisticated of societies have the interest and the ability to nurture that subtle and most personal possession of man, his dignity." MORRIS L. ERNST & ALAN U. SCHWARTZ, PRIVACY, THE RIGHT TO BE LET ALONE 1 (1962).

\textsuperscript{36} See generally ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION, CASES AND
There are many analogies between civil rights civil litigation and the assertion of constitutional criminal rights.\textsuperscript{37} For example, each rests largely on the Fourteenth Amendment Due Process Clause to enforce various rights against state governments.\textsuperscript{38} Both are based on concepts of personal freedom and autonomy and individual fundamental rights.\textsuperscript{39} Both types of cases may lead to precedent that apply to large classes of other litigants. Finally, both civil and criminal individual rights claims are based on the notion that government must be just when it uses its power against individuals.\textsuperscript{40} The government may not simply go about its business as a routine law breaker.\textsuperscript{41} To sanction such government behavior would lead to disrespect for the rule of law.\textsuperscript{42} When government becomes a law-breaker, the dissatisfaction of those who are governed sometimes leads to drastic changes like in our own American revolu-
Our system of criminal justice should also re-examine doctrine when new rules will encourage government to advance its goal to protect privacy values which contribute to the quality of life, even though the need for higher security may exist.\textsuperscript{44} The concept that a litigant in court needs an interest in the litigation to challenge the conduct of a party in a suit is not a new concept.\textsuperscript{45} In civil litigation, standing rules prevent courts from deciding issues on behalf of parties that have no stake in a legal dispute.\textsuperscript{46} As a matter of civil procedure, standing rules are crafted to uphold the legal principal that courts are for the purpose of resolving actual, as opposed to hypothetical, disputes.\textsuperscript{47}

Courts do not make themselves available to give advisory opinions on rights and remedies, and standing rules are one of the tools they use to ignore the merits of many disputes.\textsuperscript{48}

\textsuperscript{43} “Advances in science and technology recurrently exert pressure on the scope and meaning of the Fourth Amendment, but the privacy and security protected by the Fourth Amendment should not depend on innovations and technology. . . . During the Framers’ era, the home was the focal point of privacy and personal security.” Tracey Maclin, Katz, Kyllo, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century, 72 MISS. L.J. 51 (2002) (footnotes omitted).

\textsuperscript{44} “When the American Republic was founded, the framers established a libertarian equilibrium among the competing values of privacy, disclosure and surveillance.” ALAN F. WESTIN, PRIVACY AND FREEDOM 67 (1967).

\textsuperscript{45} Standing in civil cases is often based on the injury sustained. In Frothingham v. Mellon, 262 U.S. 447, 488 (1923), the Supreme Court held that a taxpayer who objected to the federal government giving grants to the states to fund a reduction in infant mortality did not have standing to sue. She claimed the grants would increase her tax liability. \textit{Id.} at 486. The Court reasoned that she had no immediate danger or direct injury from the government action. \textit{Id.}

\textsuperscript{46} See Flast v. Cohen, 392 U.S. 83 (1968) (holding that a taxpayer would have standing to oppose the Federal Aid to Education Act on establishment clause grounds if they can show a logical nexus between the status of the taxpayer and the claim; the Court reasoned that the specific constitutional limitation of government support for religion provided a sufficient nexus).

\textsuperscript{47} See Massachusetts v. Mellon, 262 U.S. 447 (1923) (holding that general standing as a citizen does not establish enough direct injury to file suit).

\textsuperscript{48} Generally, the cases and controversies requirement of Article III, Section 2 limits review of hypothetical questions by the court and prohibits the federal court from issuing advisory opinions. Such a rule assures that courts will decide only focused and specific conflicts between adversaries. See United States v.
obvious reason for avoiding such intervention as a routine matter is to preserve the division of governmental responsibility. Courts decide disputes while legislatures craft law. The balance of power dictates that courts should confine their role to the decision-making necessary to keep the peace. Occasionally, a court may render some guidance on such tangential matters, but such opinions are clearly the exception to the general, well-settled rule.

In the context of civil litigation, the doctrine of standing, ripeness, and case and controversy have stood as a barrier to the courts from aggressively making law without benefit of a plaintiff. These rules leave to the legislative and executive branches of government the responsibility of creating desirable policies for addressing societal problems that are not in the adversarial position needed for court based dispute resolution.


49 Resolving disputes peacefully includes the judiciary's interest in reaching a decision which is also final between the parties. See Chicago & S. Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948).

50 The Supreme Court has occasionally reviewed cases when they might otherwise be moot because the issue is "capable of repetition, yet evading review." See, e.g., S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 514 (1911).

51 See United Pub. Workers of Am. v. Mitchell, 330 U.S. 75 (1975) (holding that federal public employees wishing to challenge the Federal Hatch Act, which prohibited certain types of political activity, had no standing because the issue was not yet ripe; the workers did not describe the acts in which they wanted to engage).

52 The case and controversy requirement is a doctrine which courts invoke to avoid deciding certain types of matters describing them as either not ripe or moot. As one scholar has cogently explained:

The mootness doctrine is derived from the Article III prohibition against federal courts issuing advisory or declaratory opinions where no active controversy exists. If there is no longer an active controversy between adverse parties then the case should be found moot. One exception to the mootness doctrine is the voluntary cessation exception. Under this exception, voluntary cessation of the improper behavior by one party will not cause the case to be dismissed if the party is free to return to the behavior at any time.


53 I do not intend to suggest that legislative role in protecting privacy is not
Such challenges were often faced where litigants attempted to bring actions to court during the civil rights era. Lawyers from the National Association for the Advancement of Colored People constantly faced these barriers when it attempted to bring progressive civil rights reforms to the nation through use of the court system. The need for aggrieved plaintiffs never ended, particularly in cases that would take years, sometimes decades, to resolve in the litigation process.

In the famous case of Brown v. Board of Education for example, the litigation that ultimately lead to the landmark Supreme Court decision was actually several law suits with many plaintiffs from several jurisdictions. The cases were developed simultaneously so that at least one of them would survive to the nation's highest court. The strategy finally worked, but the lawyers lost many litigants along the way.

In other civil rights litigation like NAACP v. Alabama, essential. In the same way courts are likely to address more privacy issues, legislatures should be alert to respond to privacy concerns where there is consensus that such intrusions should be regulated.

During early civil rights litigation, sometimes courts would seek ways to dismiss "separate but equal" claims on any basis possible. In one instance, the legendary Thurgood Marshall, serving as chief counsel for the NAACP during the 1950's, had a case dismissed in South Carolina because the parent of the child who sought school bus services paid his property taxes in a county different from the county where the only available "colored" school was located. RICHARD KLUGER, SIMPLE JUSTICE 3-17 (1976). In planning to file a new case, Marshall announced that he would seek a "firm, unified group of twenty plaintiffs" to prevent dismissal on a technicality based on standing. Id. at 18.

Civil Rights litigation required filing a number of cases in different jurisdictions. In 1951, for example, the NAACP Legal Defense Fund lawyers travelled 72,000 miles litigating Civil Rights cases. See JACK GREENBERG, CRUSADERS IN THE COURTS 81 (1994).

The litigation strategy to overturn the Plessy v. Ferguson, 163 U.S. 537 (1896), separate but equal doctrine required a litigation strategy which took decades to accomplish through a series of Supreme Court cases. See KLUGER, supra note 54.


Id. at 486. Brown was actually a consolidation of five cases from not only Kansas, but also Delaware; South Carolina; Washington, D.C.; and Virginia.

Those who participated in the cases would often be threatened financially with refusal of credit and farm supplies if they filed civil rights suits. See KLUGER, supra note 54.

357 U.S. 449 (1958). In NAACP v. Alabama, the Court held that the civil
issues of standing again confronted the Supreme Court as it struggled to fashion fair rules to permit constitutional rights to be properly determined by the court without the interference of procedural barrier. The Court properly recognized that there is something about civil rights litigation that distinguishes it from ordinary cases and controversies and allows the Court to resolve purely private matters.

**Criminal Standing: Unstable Origins**

From the very beginning of challenges to police conduct on constitutional grounds one of the primary issues has been who gets to complain. In the early 1900's, the Supreme Court resolved a dispute on that issue in *Weeks v. United States.* The Supreme Court recognized the need to establish an exclusionary rule to prohibit illegally seized evidence from being introduced at trial. Although Weeks was not a standing case, it illustrated the direction the litigation on police intrusion would take in the decades to come. Thereafter, the

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61 The barriers to civil rights litigation was not restricted merely to procedural matters, but also extended to threats of violence. "In making trips to southern court houses, there were many close calls. Threats of lynching, assault and murder were routine." CARL ROWAN, DREAM MAKERS, DREAM BREAKERS 7 (1993).

62 However, the Supreme Court has also denied standing based upon minority group status. See Allen v. Wright, 468 U.S. 737 (1984) (parents of black school children who sued the IRS claiming that discriminatory private schools should not receive tax exempt status were denied standing). The Court ruled that such "stigmatizing injury" was not enough to confer status on the parents. Id. at 738. In some instances a civil rights organization should be permitted to serve as a "private attorney general" for purpose of litigating civil rights actions. HARRY KALVEN, JR., THE NEGRO AND THE 1ST AMENDMENT 80 (1965) (quoting Comment, Private Attorneys-General: Group Action in the Fight for Civil Liberties, 58 YALE L.J. 574, 581-89 (1949).

63 Police have always relied on sources of information that they may have come about by practices they could not engage in themselves.

64 232 U.S. 383 (1914).

65 Id. at 392.

66 See T.S.L. Perlman, Due Process and the Admissibility of Evidence, 64
court struggled with the relationship between federal and state criminal justice investigations and how to best conduct them.\textsuperscript{67}

The key issues often centered around the exclusionary rule which had been recognized by the Supreme Court in \textit{Weeks} but had not been adopted in many states.\textsuperscript{68} Thus, in states that did not provide the remedy of exclusion of the evidence, police were free to engage in misconduct without fear that they would loose any evidence at trial.\textsuperscript{69}

It was not until \textit{Wolf v. Colorado}\textsuperscript{70} in 1949 that the Court recognized that illegal state searches may violate the Federal Constitution, but the Court was unwilling at that time to apply the exclusionary rule to the states.\textsuperscript{71} In an opinion by Justice Felix Frankfurter, the Court rejected the adoption of a national exclusionary rule to be applied; instead, the Court suggested that civil law suits and other local checks on police would suffice.\textsuperscript{72} This conclusion was hotly disputed by Justice Murphy in his dissenting opinion.\textsuperscript{73}

This ideological battle over the proper remedy for police violation of the Fourth Amendment has had an enormous impact on the development of principles related to standing.\textsuperscript{74}

\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} Almost two decades after the exclusionary rule had been adopted in \textit{Mapp}, President Ronald Reagan established a commission which recommended it be abolished. In its report, the task force explained:

\begin{quote}
Legislation should be proposed and enacted to abolish the exclusionary rule as it is applied to Fourth Amendment issues.
\end{quote}

\ldots

\begin{quote}
Anyone evaluating the exclusionary rule must constantly keep this basic premise in mind. The Framers of the Constitution did not create the exclusionary rule for violations of the Fourth Amendment. They could have done so.\ldots The exclusionary rule is instead a judicially created rule of procedure that fails to serve the goals it seeks, and fails at a tremendous cost.
\end{quote}

\textsuperscript{70} 338 U.S. 25 (1949).
\textsuperscript{71} \textit{Wolf}, 338 U.S. at 31.
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.} at 42 (Murphy, J., dissenting).
\textsuperscript{74} \textit{Id.}
That is because if reluctance to impose the severe sanction of exclusion is present in a court's analysis of Fourth Amendment claims, then it might be tempted to seek limitations on standing to avoid rendering favorable relief to a criminal defendant.\(^{75}\) When there was no exclusionary rule, there was little need to erect complicated standing principles because there was no fear that evidence would be excluded from consideration.\(^{76}\) The absence of standing cases in the Fourth Amendment arena prior to *Mapp v. Ohio*\(^{77}\) may well be explained by the absence of the exclusionary sanction in state courts.

Prior to *Mapp*, the Supreme Court had little trouble concluding that the government could not use illegal practices against an individual with no standing in order to obtain evidence against another defendant.\(^{78}\) In *McDonald v. United States*,\(^{79}\) the Court held that a co-defendant had the right to

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\(^{75}\) As one scholar has observed:

The rules or "legal technicalities," as they are sometimes called by persons disgusted with a particular outcome, are not devised solely with an eye to ascertaining guilt or punishing the guilty; that could be expeditiously with the thumbscrew and very efficiently and inexpensively in our pharmacological age with one sort of drug or another. . . . The reason for this is not hard to find. The forms of due process may protect the criminal, but, more importantly, they also protect the innocent.


\(^{76}\) It was not until *Weeks v. United States*, 232 U.S. 383 (1914), that the Supreme Court recognized the exclusionary rule in federal trials barring the use of illegally seized evidence. *Weeks*, 232 U.S. at 398.


\(^{78}\) It has long been the case, however, that nearly all claims to enforce constitutional rights may be raised only by those who have "standing" to assert them. The Fourth Amendment is no exception to this principle. That is, a person who makes a motion to suppress evidence that the government intends to use against him at trial must show that he was "a victim of search or seizure . . . directed at someone else."

In short, Fourth Amendment rights are personal. They may not vicariously be asserted.


\(^{79}\) 335 U.S. 451 (1948).
complain about searches of his alleged accomplices. The Supreme Court, however, backed away from McDonald's defendant-friendly principle in Wong Sun v. United States and Alderman v. United States.

Clearly, a plausible explanation for the erosion of the so-called derivative standing rule is the Court's application of the exclusionary principle adopted in Mapp. The controversy that generated from the Court's incorporation of the exclusionary rule led to an inflammatory national debate about the Warren Court's criminal justice jurisprudence.

Limitations on standing merely served to ease the blow of the Mapp decision which was seen as another liberal opinion of a defendant-friendly Supreme Court. Indeed, the criticism of the Warren Court became quite severe by legal scholars.

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80 McDonald, 335 U.S. at 456.
83 See Wong Sun, 371 U.S. at 488 (overruling sub silentio the notion of derivative standing).
84 As early as the 1950's, Chief Justice Earl Warren was criticized for being soft on crime by other members of his profession. "The Conference of State Chief Justices in 1958 went so far as to pass a resolution condemning the Warren Court for its erosion of federalism and its tendency 'to adopt the role of policymaker without proper judicial restraint.'" David M. O'Brien, Storm Center: The Supreme Court in American Politics 306-07 (1986).
85 One commentator poses the question about the effectiveness of the Warren Court in this way:

Did the Warren Court's criminal justice decisions have any real effect on the behavior of police? Some have suggested that the criminal justice decisions were a failure. It has been argued that while some Supreme Court decisions have resulted in allowing concededly guilty defendants to go free, there has been no demonstrable beneficial change in police practices.

86 Eminent scholars from many fields have commented upon the [Warren Court's] tendency towards over-generalization, the disrespect for precedent, even those of recent vintage, the needless obscurity of opinions, the discouraging lack of candor, the disdain for the fact finding of the lower courts, the tortured reading of statutes, and the seeming absence of neutrality and objectivity.

Milton Handler, The Supreme Court and the Antitrust Laws: A Critic's View Point,
After Mapp, the Gideon v. Wainwright decision was yet to come, imposing the cost of court appointed counsel on the State to enforce these newly recognized constitutional rights. Later in the decade, the Court would again borrow from well-established federal investigative practice and require state police to give warning to criminal suspects in the historic decision of Miranda v. Arizona. Miranda again spurred the national debate about the Warren Court's criminal justice policies.

Three years later, the Supreme Court dealt the first of several severe blows to the Fourth Amendment in Alderman v. State when it held that granting standing to Alderman would "encroach[] upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." As one insightful commentator has noted, "[e]ssentially, the standing requirement is the Supreme Court's declaration that the cost of the exclusionary rule can become too great to bear."

Rather than a mere procedural requirement, Alderman triggered an era where standing became a substantive limitation on the right to assert a violation of personal privacy. At a time when the Court was recognizing new zones of privacy like in Roe v. Wade and Griswold v. Connecticut, the Court was expressing its preference for privacy in broad contexts.

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68 Gideon, 372 U.S. at 342-44.
72 Alderman, 394 U.S. at 175.
73 DRESSLER, supra note 78, at 359.
74 Id. at 301-302.
75 410 U.S. 113 (1973).
76 381 U.S. 479 (1965).
77 See, e.g., id.; Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("Our cases long have recognized that the Constitution em-
Perhaps the most familiar phrase in all Fourth Amendment jurisprudence is the “reasonable expectation of privacy.” 98 Unfortunately, it explains little, leaves many questions unanswered and presents one of the greatest constitutional moving targets of all time. 99 This is particularly true in our high technology age. 100 This is an amazing legacy of a word that has been in the constitutional lexicon for less than four decades. 101

It may be that “reasonable expectation of privacy” is an utterly undeterminable phrase since it requires any interpreter of its provisions to first define the audience to which its words apply. 102 In the midst of this confusion, both the rules of privacy protection under the Fourth Amendment and the doctrine of standing have become hopelessly tangled together. 103

Ironically, it was a case that favored the defendant which began the faulty framework for the standing problem that plagues the current Supreme Court jurisprudence. In *Katz v. United States*, 104 the Court held that the government illegally bodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.”).
intruded on a telephone conversation by attaching an electronic listening and recording device to the outside of a public telephone booth.105

In reaching its conclusion, the Court relied on several circumstances that would be difficult to duplicate today.106 The Court reasoned that the intrusion on the incriminating telephone call was improper because once Katz placed the fee in the phone and closed the door he created a setting where he did not expect to be overheard.107

The majority's opinion written by Justice Potter Stewart rested on the curious and unnecessarily restrictive statement that the "Fourth Amendment protects people, not places."108

105 Katz, 389 U.S. at 348. In Olmstead v. United States, 277 U.S. 438, 466 (1928), the Supreme Court approved wiretapping, concluding that it did not amount to a search and seizure under the Fourth Amendment. In one of the most famous dissenting opinions in American history, Justice Louis Brandeis prophesied:

The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Olmstead, 277 U.S. at 473-74 (Brandeis, J., dissenting).

106 When you consider how technology makes issues obsolete, Katz itself provides an ironic example. At the time of the decision, telephone booths were common. Currently, few people make calls from an enclosed telephone booth.

107 An important aspect of electronic searches is their potential scope. They are not merely limited to information or historical facts, but permit access to discovering future events. As one commentator explained:

The conventional search is limited to a designated thing in being—one of a finite number of things to be found in the place where the search is to be conducted, and ordinarily discoverable in a single brief visit. On the other hand, electronic surveillance is a quest for something which may happen in the future. Its effectiveness normally depends upon a protracted period of lying-in-wait. For however long that may be, the lives and thoughts of many people—not merely the immediate target but all who chance to wander into the web—are exposed to an unknown and undiscriminating intruder. Such a search has no channel and is certain to be far more pervasive and intrusive than a properly conducted search for a specific, tangible object at a defined location.


108 Katz, 389 U.S. at 351.
He also stated that the Fourth Amendment could not be translated into a general constitutional right to privacy.109 Stewart, however, ultimately rested his decision on the proposition that "[w]hat 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 as private, even in an area accessible to the public, may be constitutionally protected."110

However, it was in John Marshall Harlan's concurring opinion that it was first articulated that a person has a "reasonable expectation of privacy" in certain activities.111 He described what he believed were the two components necessary to establish such a privacy right. First, the person must have exhibited an actual subjective expectation of privacy.112 Second, the individual must establish that it was an expectation "society is prepared to recognize as 'reasonable.'"113

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109 See supra note 24 and accompanying text.
110 Katz, 389 U.S. at 351-52 (citation omitted).
111 Id. at 361 (Harlan, J., concurring).
112 Id. What we feel is private from others is based not only on our perception of whether we are in a secure setting, but how interested we believe others may be in what we are doing.
113 Id. One Fourth Amendment historian has explained that the:

Amendment provides that if there be a search and seizure it must be a reasonable one. The only absolute standard that is set is as to the essentials of the warrant when such is necessary, as it is in most cases. The purpose of the latter part of the Amendment of course is to safeguard against the general warrant and it does this in two ways: first, by prescribing the requirement of probable cause, necessarily peculiar to this case; and second by making requisite the description of the particular place to be searched, the person apprehended, and the objects to be seized. These requirements limit the scope of each warrant; they take the decision as to what may not be done out of the hands of the officer who is to execute the warrant, and place it with the more trustworthy and sober judgment of a judicial officer. It is for the latter to pass upon the merits of the allegations and, on the basis of evidence having behind it the responsibility of an oath, to decide whether there is reasonable justification for this exceptional proceeding in invasion of the individual's privacy, and thus to determine what particular actions are justified on the basis of this showing. There is no temptation for the ministerial officer to exceed the authority which the magistrate decides to give him, for he not only thereby subjects himself to civil and criminal liability but
It is difficult to establish Harlan's motivation for crafting such an ambitious and comprehensive search and seizure test. He afforded little justification for his new analysis and did not discuss some basic issues, like the potential impact of future technology on the reasonable expectations of persons seeking to keep a wide range of activities private. Indeed, Harlan's heavy reliance on expectations may have begun the process of lowering the mark of Fourth Amendment protection from a somewhat fixed, stable set of privacy expectations based on property rights into a prohibition against government intrusion that shifts as governments' ability to intrude becomes improved by technology.

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One scholar has noted that the historical analysis of the Fourth Amendment has been somewhat unpredictable.

The Court has at times employed a non-historical analysis to interpret the commands of the Fourth Amendment. It has asserted that law enforcement practices are not "frozen" by those in place at the time the Fourth Amendment was adopted. Hence, interpretation of the Amendment permits modern developments: "Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper." Thus, the court has sometimes asserted that the Amendment's "prohibition against 'unreasonable searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'


The ability of government to intrude electronically increases each day as technology advances. With statutory controls it is likely that fewer areas of our lives can be kept private. One insightful commentator has explained that:

"[E]lectronic surveillance is almost inherently indiscriminate." Interception of a telephone line provides to law enforcement all of the target's communications, whether they are relevant to the investigation or not, raising concerns about compliance with the particularity requirements in the Fourth Amendment and posing the risk of general searches. In addition, electronic surveillance involves an on-going intrusion in a protected sphere, unlike the traditional search warrant, which authorizes only one intrusion, not a series of searches or a continuous surveillance. Officers
The test articulated by Harlan in *Katz* was embraced by the Supreme Court in *Smith v. Maryland* where the Court distinguished the privacy expectation it had protected in the *Katz* telephone booth from that of a telephone company's "pen register." The pen register is the telephone company's device, housed at its facility, which records the dialed telephone numbers of a given telephone. At the behest of the government, the dialed numbers from Smith's telephone were recorded and turned over to the government.

The Court noted that the pen register had a much more limited capacity than the listening device used in *Katz*. The court explained "[a]lthough most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness [from notices in phone books] of one common use: to aid in the identification of persons making annoying or obscene calls." The Court reached the conclusion on little more than loose conjecture that Smith probably did not believe the numbers he dialed were private.

The Court further dispatched the defendant's constitutional

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118 442 U.S. 735 (1979).

117 *Smith*, 442 U.S. at 741-45; see United States v. Thompson, 936 F.2d 1249 (11th Cir. 1991) (holding that information obtained from pen register placed on telephone line is admissible even if order authorizing it did not comply with statutory requirements).

116 442 U.S. at 737.

119 Id. at 742.

120 Id. at 741.

121 Id. at 742.

122 Id. The notion that at the time *Smith* was decided a telephone caller would believe that their dialed number was generally available would be inaccurate.
claim by concluding that the telephone company was a third party to whom the defendant voluntarily exposed the dialed number.\textsuperscript{123} Thus, the Court reasoned, the defendant's expectation of privacy was not reasonable.\textsuperscript{124} This logic, though easy to explain on its face, has many intellectual flaws.

First, it defies logic to suggest that any one person would publish to the public all the calls he made during the course of his day.\textsuperscript{125} The telephone company at that time was a monopoly for which no reasonable communication options existed. To equate the entity of the telephone company with a careless sharing of information with a friend you should not have trusted is not a fair assessment of anyone's reasonable understanding of privacy.\textsuperscript{126}

As the dissenters appropriately noted, the "prospect of unregulated governmental monitoring . . . [is] disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclo-

\textsuperscript{123} Id. at 743-44.
\textsuperscript{124} Id. at 744.
\textsuperscript{125} If there is any doubt that the government continues to construe Smith with any less than the broadest possible scope, the testimony of Deputy Associate Attorney General Kevin DiGregory during a congressional hearing on government surveillance issues is instructive. DiGregory said:

'[T]he Supreme Court held in Maryland v. Smith [sic], I believe in 1979, that there was no reasonable expectation of privacy in numbers dialed by a telephone because essentially, when someone turns over information to a third party like the telephone company, they should not have either a subjective or an objective reasonable expectation of privacy in that information."


\textsuperscript{126} In United States v. Hoffa, 385 U.S. 293, 303 (1966), the Supreme Court held that the use of a government informant who turned out to be a false friend was not a violation of Hoffa's constitutional rights. The expectation that we must live our life constantly on guard for who we may trust is an unsettling idea that the law should be concerned if our society truly values personal privacy. "The concept of intrusion holds that a protected zone of privacy exists into which governments and others cannot ordinarily and freely intrude for purposes of obtaining information." NIMMER supra note 18, at 16-8.
sure of their personal contacts.\footnote{127} It is difficult to measure the harm to Fourth Amendment jurisprudence done by the unartful opinion in Smith. By using the reasonable expectation of privacy doctrine as the cornerstone of its analysis, it improperly applied both the spirit and the letter of the test as it reached its decision.\footnote{128}

The very nature of the telephone company's pen register technology, as a monopolistic database available to the government without warrant requirement protection for citizens, lowered the analytical fence for a whole generation of new technologies not even dreamed possible by the Supreme Court at the time of the Smith decision.\footnote{129} Today, the pen register has come home in the form of caller ID technology which we now take for granted.\footnote{130} But how many of us would like any-

\footnote{127} Smith, 442 U.S. at 751 (Marshall, J., dissenting).
\footnote{128} "The analogy in personal information focuses more on the value of nondisclosure. Privacy rights apply to information not widely and generally known . . . for which disclosure might cause loss in terms of harassment, embarrassment, or similarly adverse consequences because of the sensitivity of the information to the individual." See Nimmer, supra note 18, at 16-6.
\footnote{129} See Emord, supra note 22.
\footnote{130} Extending the logic of Smith v. Maryland, courts have held that caller identification systems that trap and preserve numbers present no constitutional problem because there is no protected privacy interest in the information. For example, in Southern Bell Telephone & Telegraph Co. v. Hamm, 409 S.E.2d 775, 779-80 (S.C. 1991), the court explained:

The United States Supreme Court has previously held that callers do not have an expectation of privacy in the numbers they dial . . . In light of [this] holding . . . that the telephone number of the equipment from which a call has been placed is entitled to more privacy than the telephone numbers called by someone. The telephone number from which a call which is placed . . . is numerical information passed through the telephone network, voluntarily transmitted as a result of call placement. Caller ID service simply does not violate any right that rises to the level of constitutional protection. No fundamental interest is involved in the anonymity of a telephone number.

One court however, has held that under its state wiretapping law, caller ID without a blocking mechanism violated privacy rights. Barasch v. Pa. Pub. Util. Comm'n, 576 A.2d 79, 89 (Pa. Commw. Ct. 1990). That court reasoned, "telephone service [customers] should not suffer an invasion, erosion or deprivation of their privacy rights to protect the unascertainable number of individuals or groups who receive nuisance, obscene or annoying telephone calls which can already be traced or otherwise dealt with." Id.
one, particularly government officials, to have any-time access to our caller ID box or our cellular telephone bill complete with telephone numbers called and received and our geographical location, and time of both received those who we contacted and those who tried to contact us. \footnote{131}{See United States v. Smith, 978 F.2d 171 (5th Cir. 1992).} Because of the \textit{Smith} decision, any information kept in any communication company database would not be private simply because the third-party vendor collected it on an electronic database. \footnote{132}{The broadest implication of \textit{Smith} would suggest that “[e]fforts to apply general restrictions on government data collection under concepts of constitutional information privacy [will] generally fail.” See \textit{Nimmer}, supra note 18, at 16-24.}

The troubling consequence of the \textit{Smith} opinion is that all feelings that an individual possesses about privacy are subordinated to the fact of the locations where the private information is stored. \footnote{133}{Electronic communication from the privacy of one’s home has clearly been diminished by the \textit{Smith} approach. As one scholar has explained, traditionally, the home enjoyed the greatest degree of constitutional protection:

\begin{quote}
Indeed, one could say that the Framers were particularly sensitive about safeguarding private homes from governmental intrusion, as the constitutional privilege against unreasonable search and seizure “arose from the harsh experience of householders having their doors hammered open by magistrates and writ-bearing agents of the crown. . . . ”
\end{quote}

There is no doubt that the Framers envisioned the home as deserving special protection from governmental intrusion. The common law developed strict rules regarding when an officer could forcibly enter a person’s home to effectuate an arrest or conduct a search. Arrest warrants were generally required to enter a home to make an arrest, and warrants were obligatory if government officers wanted to enter a home to conduct a search. In other words, a warrantless search of a home was out-of bounds, so to speak.\textit{Tracey Maclin, Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged}, 82 B.U. L. Rev. 895, 933-34 (2002).} Critical to the existence of any constitutional right under the \textit{Smith} analysis is the question of “where the information lives?” \footnote{134}{One scholar has suggested that the proper question for purposes of determining whether there has been a constitutional violation of one’s privacy interest is “whether the papers or personal property [is] mine, whether the house is mine, whether the body is mine? If the answer is yes, then one has the right to exclude the government from searching or seizing.” Thomas K. Clancy, \textit{Coping with Technological Change: Kyllo and the Proper Analytical Structure to Measure the Scope of Fourth Amendment Rights}, 72 Miss. L.J. 525, 564 (2002) (suggesting...}
puter hard drive or a distant internet connected database? Under *Smith*, it may not matter because all are accessible to a third party—the custodian of the database.135

In the electronic storage world brought about by the growth of personal computing, network systems and the internet over the past decade,136 the ramifications of *Smith* suggest a world where the responsibility to prove a constitutional right rests with the person who seeks privacy but cannot totally guarantee that all he seeks to keep private is absolutely secure. It would be troubling to believe the Founding Father's would have found such a narrow view of the Fourth Amendment acceptable.137

It is equally troubling to believe that expectations of privacy are dictated solely by the government's ability to intrude with improved technology rather than one's legitimate desire to keep information private.138 Such formulations would leave

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132 The Supreme Court rejected a challenge to a New York central computer databank containing the names and addresses of all persons obtaining drugs by prescription. The Court concluded:

> We are not aware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files . . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. *Whalen v. Roe*, 429 U.S. 589, 605 (1977).

133 Courts have ruled that e-mail and subscriber information is not entitled to Fourth Amendment protection because individuals have no legitimate privacy interest. *See, e.g.*, *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001).

134 One Supreme Court Justice has said:

> [T]he concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them health and strength to carry on. *United States v. White*, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting).

135 A grave concern is that one's expectations are dictated by the government's ability to intrude.

The emphasis on subjective expectations poses a further serious threat to
only the traditional contents of a private home protected.

Automobiles have lost almost all privacy. They can be stopped for even the most trivial of reasons and searched very easily after they are stopped. Drug detection dogs can be brought to the scene of the stops, and guests in the vehicle have little right to object to any intrusion of their movement once the vehicle is pulled over.

**IMPRACTICAL STANDING: AVOIDING WASTED TIME AND OPPORTUNITY**

One of the problems confronted by courts is the temptation to avoid resolving constitutional issues on the basis of the standing doctrine when a good deal of effort has been done to craft the substantive Fourth Amendment issues. Many courts have demonstrated a willingness to avoid reaching the merits of a Fourth Amendment issue even when the answer fills obvious gaps in a dispute in a case involving multiple co-defendants are police search procedures that are likely to

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the vitality of the [F]ourth [A]mendment. Repeated invasions by credit bureaus, employers, and the like can lead persons to discount most expectations as unreasonable; individual fears of a loss of privacy then become self-fulfilling prophecies. In particular, the government can through its actions redefine popular expectations so as to undermine constitutional rights.


139 See Whren v. United States, 517 U.S. 806, 814-815 (1996) (unanimously ruling that the police officer's subjective intent is irrelevant to the constitutional validity of a traffic stop).


141 See, e.g., United States v. Lingenfelter, 997 F.2d 632, 637 (9th Cir. 1993) (dog sniff not a search because individual did not have a reasonable expectation of privacy in contraband stored in his warehouse).

142 See Maclin, *supra* note 140, at 142-43.

recur over and over again.

No case illustrates the temptation to avoid ruling on the constitutional merits more than *Ricks v. State*. In *Ricks*, the Baltimore City Police Department pursued a Baltimore drug investigation which ultimately resulted in the prosecution of three co-defendants. "James A. Ricks, Kevin R. DeShields and Van Allen Lewis [] were identified as part of the narcotics distribution organization." During the course of the investigation the police used "pen registers, physical surveillance, and 'wiretap' orders" to gain information about the suspected drug organization.

On June 8, 1984, Baltimore City Circuit Court Judge Milton B. Allen issued an order authorizing the use of an electronic listening and recording devices at 2500 Edgecomb Circle North Apartment I. Prior to becoming a judge, Milton Allen

In a 22-page order, Judge Allen concluded that there was probable cause to believe that the controlled dangerous substances laws were being violated by individuals using the subject apartment; that the use of the audio and video devices was necessary and essential to gain evidence leading to the solution of these crimes and the prosecution of all individuals therewith connected. The order specified that evidence could not be otherwise obtained since alternate investigative methods had been tried and failed and will not succeed in the future, or were too dangerous to undertake.


Id. at 1138.

Id.

Id.

Id.

Pursuant to Judge Allen's order, officers entered the air ducts of the apartment through the roof, shaved away part of the dry wall and implanted a miniature camera, focused on the dining room of the apartment. After several weeks of observation and twenty-five hours of recorded video tape, a search warrant was issued to search the apartment on August 7, 1984. Both heroin and cocaine were seized. The appellants Ricks and DeShields were arrested within the apartment. Appellant Van Allen Lewis was also present in the apartment during the raid; he fled and was captured shortly thereafter.

*Ricks*, 537 A.2d at 615.
was the first African-American State's Attorney in Baltimore City when elected in 1971. Before that time he had spent a long, noteworthy career as a criminal defense attorney.\textsuperscript{160}

According to investigation records, the apartment was suspected of being a "processing house" or "cut house" for diluting and packaging drugs for street sale.\textsuperscript{151} The men were charged with and convicted of possession with the intent to manufacture or distribute heroin and cocaine.\textsuperscript{152} An appeal was taken to the State's intermediate appellate court, the Court of Special Appeals. That court refused to reach the merits of appellant's Fourth Amendment search and seizure claim.\textsuperscript{153}

The court appeared to treat the case as one of first impression in the nation where police obtained a warrant for video surveillance in a private residence prior to using wiretaps or listening devices being used prior to secret video recording.\textsuperscript{154} Although the court noted that other issues in the case were "eclipsed by the magnitude of the video surveillance question,"\textsuperscript{155} it quickly rejected the defendants' claims. The court held that the defendants did not demonstrate "a legitimate expectation of privacy in the searched premises and none of their Fourth Amendment rights were violated."\textsuperscript{156}

Relying on the Supreme Court's decision in \textit{Rakas v. Illi-}

\textsuperscript{150} See Gilbert Ware, \textit{From the Black Bar: Voices for Equal Justice} 110-130 (1976).
\textsuperscript{151} Ricks, 520 A.2d at 1138.
\textsuperscript{152} Id.
\textsuperscript{153} In their appeal, the appellants argued that the "warrant purporting to authorize the surreptitious video surveillance in a private place was invalid under Maryland law since the general assembly clearly intended to place controls on all manner of secret, electronically aided surveillance by law enforcement in areas not in plain view." Id. (court omitted citation).
\textsuperscript{154} See id. On earlier occasions in its history, the Supreme Court has upheld other intrusive surveillance technologies. See Goldman v. United States, 316 U.S. 129, 135 (1942) (using detectaphone, which captures sound waves placed against the wall of an office was not an unconstitutional intrusion because there was no trespass).
\textsuperscript{155} Ricks, 520 A.2d at 1138.
\textsuperscript{156} Id. at 1140.
the court reasoned in its decision that the defendants "admitted that they had no proprietary interest" in the apartment, but claimed only to be "invited" there. The court concluded that merely being invited into a residence was not enough to challenge the observation and taping of their images inside.

The defendants appealed that decision to the state's highest court, the Maryland Court of Appeals. The court acknowledged that the threshold issue was standing. The court, however, examined the facts in greater detail than did the court of special appeals. The opinion of Chief Judge Murphy pointed out that at least one of the co-defendants, Ricks, had a key to the apartment.

Rather than making a definitive ruling that any of the defendants had standing, the court merely "assume[d], without deciding, that the appellants had Fourth Amendment standing to challenge the search and seizure in this case."

The court, however, rejected the defendants Fourth Amendment claims, holding that the State did not need to use a less intrusive means of investigation prior to using the highly intrusive video recording cameras. Although the Fourth

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158 Ricks, 520 A.2d at 1140.
159 Id.
160 Id. The storing of visual images, in general, raises many concerns in society. "Video Surveillance cameras quietly scan many workplaces. Neighborhood retailers now stock hardware that used to be the stuff of spy novels." Richard Lacayo, Nowhere to Hide, TIME, Nov. 11, 1991, at 34.
161 Ricks, 537 A.2d 612.
162 Id. at 612.
163 Id. at 619.
164 Id. at 620.
165 Id. at 621-22. In examining the appellants' Fourth Amendment claim, the court of appeals took more care than the intermediate appellate court in detailing the nature of the drug investigation and the techniques used prior to seeking the video camera. It explained that:

Pen registers were utilized; long-distance telephone tolls and criminal history records were monitored; various forms of mobile and fixed surveillance were undertaken, as was use of contact and bumper beepers, attempts to obtain codefendant cooperation, to infiltrate the organization, to conduct a grand jury investigation, to the issuance of search warrants,
Amendment claims offered by the defendants did not prevail, that decision was not the most troubling part of this case.\textsuperscript{166} Even though state and federal officials were willing to treat the defendants as having a right to challenge the searches of the apartment, the tentative nature of their approach left open a disturbing possibility.

Should the courts of law be permitted to avoid examining the propriety of new technology after long investigations merely by relying on the technical objection of standing?\textsuperscript{167} It appears

\begin{flushright}
\textit{and other investigative methods.}
\end{flushright}

\textit{Id. at 614, n.4.}

The Court further related the alleged justifications for the more intrusive video surveillance technique:

\textit{Notwithstanding the extensive and lengthy investigation . . . which utilized or considered utilizing all manner and means of conventional and innovative techniques, the application recited that the police were unable to determine the organization's method of interstate supply and the location of other places where the illegal drugs were stored before distribution. The application explained that the organization's members were so disciplined in their speech as possibly to result in failure of interception of oral communications by audio devices; and that authority was therefore necessary to install a video tape camera within the apartment to observe the various aspects of the illegal enterprise. The application recited that a single surreptitious entry to install both electronic devices was essential to avoid detection and to minimize the danger to those authorized to enter the apartment to install the video camera and bugging device.}

\textit{According to the affiants, additional evidence was needed to demonstrate sufficient probable cause to arrest the high echelon members of the organization, who were the primary targets of their surveillance . . . . [T]he affiants related that an authorized search of the apartment would not reveal the source or method of the organization's drugs and distribution, nor would it reveal sufficient information to destroy the organization; moreover, an authorized search of the subject apartment at that time would make it impossible to locate other of the organization's stash houses.}

\textit{Id. at 614-15 (footnote omitted).}

\textsuperscript{166} See Thomas M. Messana, Note, Ricks v. State: Big Brother has Arrived in Maryland, 48 MD. L. REV. 435 (1989) (discussing concerns about the Ricks opinions).

\textsuperscript{167} In United States v. SCRAP, 412 U.S. 669, 676 (1973), an environmental group sued to keep railroad freight charges low which it believed would reduce the amount of litter in national parks because train traffic promoted more recycling. It claimed that its group members "breathe[d] the air" and "used" the
that even the two state court opinions, acknowledging the important constitutional questions raised, did not deter a half-hearted approach to deciding the question. The courts should have fully embraced their responsibility to get the question answered so that other relevant privacy stakeholders could respond to the outcome.\(^{168}\)

In cases where new technology is confronted in the courts, the substantive issues need to be immediately addressed so that the court process can be completed and the legislature can respond if it chooses. Failure of the courts to make clear that they will reach the merits of cases involving new technology leaves the legal path to address privacy issues exceedingly unclear.\(^{169}\)

Such uncertainty creates an atmosphere where more intrusive technology can be developed without adequate privacy safeguards. *Ricks* presents a constitutional close call. Although the court of appeals reached the privacy claim, its hesitation could be interpreted as a signal by other courts that avoiding

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\(^{168}\) Id. at 678, 682. The Court concluded this group did have standing because it would mean that some “widespread government actions would be questioned by nobody.” *Id.* at 688.

\(^{169}\) As technology increases the ease of intrusion, courts should be more willing rather than less willing to reach the merits of search and seizure questions not only in our homes but everywhere. “As society has evolved and our lives have become more mobile, as we spend more and more of our waking hours away from home, there may be even more reason to prize our right to preserve secrecy outside dwellings and to be concerned with novel perils generated by scientific and technological progress.” See James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 Miss. L.J. 317, 425 n.386 (2002).

An unresolved issue in the evolution of privacy law is when government data systems should be protected as a private recourse and when they should be treated as a public location in respect to individual privacy interests.

Against what interest does the property right fail? . . . Thus, for example, in applying for services, credit, or government benefits, privacy interests typically do not permit the individual to elect not to disclose information pertinent to the person making the decision about eligibility for such items.

the privacy merits by relying on standing is an acceptable alternative. The procedural tool of standing cannot be used to avoid the court's role as a first responder in the constitutional structure to protect us from new, intrusive and sometimes secret search and seizure technology.

**STANDING ON LOGICAL SOLUTIONS**

Many critics of the Warren court and its liberal Fourth Amendment jurisprudence have also embraced the adoption of stringent standing rules. The all or nothing exclusionary rule sanction has encouraged courts to use any device to avoid imposing its strict requirements. Concern about national security and awareness of increasing terrorist activity in the United States will likely make police investigative conduct seen as more reasonable. The catastrophe of September 11, 2001 has made our nation painfully aware of the risks inherent in free society.

The benefit of a free society demands careful attention to the rule of law. Furthermore, if we are to continue to have an exclusionary rule, consistency and clarity in its application are absolutely critical in our high technology world. The jurisprudence reasonable expectation of privacy as it has currently been formulated by the Supreme Court is inadequate to address the current search and seizure landscape.

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170 For example, the Supreme Court has held that a court is required to inquire whether the police action was in fact a seizure before determining whether there was a Fourth Amendment violation. See Wyoming v. Houghton, 526 U.S. 295 (1999).

171 The Supreme Court has already demonstrated a willingness to allow technology such as tracking devices to evade constitutional scrutiny. See United States v. Knotts, 460 U.S. 276, 285 (1983) (holding that placing a beeper type location device without a warrant in a barrel of contraband is not a search under the Fourth Amendment).

172 See, e.g., O'BRiEN, supra note 84, at 164-69 (discussing the Warren Court's standing requirements).

173 See BORK, supra note 12, at 104.

174 See Gibeaut, supra note 33, at 35.

175 Id. at 32.

176 See Dempsey, supra note 115, at 88-89.

177 One critic of broad government surveillance asserts that:
A change in substantive Fourth Amendment doctrine is not the so much the issue as is the question of how will emerging new surveillance technology be evaluated as reasonable or unreasonable under traditional Fourth Amendment doctrine.\textsuperscript{178}

Fortunately, a few adjustments to the current approach to standing will provide an opportunity for clear judicial guidance by removing barriers to ruling on the Fourth Amendment merits in selected cases in certain high technology areas.\textsuperscript{179}

The history of intelligence in this country is dominated by a systematic invention, usurpation, and abuse of the power to engage in it. In American public life we almost invariably reduce power conflicts to issues of due process, of individual rights; the one is typically abstract, and the other more accessible because it is specific and "human." . . .

But one can hardly sweep under the rug the wealth of evidence that intelligence in this country has emerged and spread into a formidable instrument of control simply as the result of a series of power grabs. For more than three decades J. Edgar Hoover claimed that the FBI had been entrusted by a presidential directive of September 1939 with an open-ended intelligence mission unrelated to law enforcement.


\textsuperscript{178} "The Fourth Amendment's touchstone is reasonableness, and a search's reasonableness is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." United States v. Knights, 534 U.S. 112, 113 (2001) (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

\textsuperscript{179} Professor Arthur Miller, in a prophetic statement about a quarter of a century ago, framed the challenge of the courts' role in privacy protection and the challenges that courts and society would face as we anticipated the promise of the high technology age. He wrote:

The notion that the courts will recognize a general principle requiring data handlers to treat personal information as confidential or will declare that file keepers owe a fiduciary duty to file subjects seems to be wishful thinking. Nor is it realistic to think that a pledge of confidentiality can be secured on a contractual basis. In most situations involving data extraction, the individual is in no position to demand a promise to this effect. Of course, the courts may change their attitude when the potentialities of the computer become apparent. But to wait for the courts to create common-law obligations and impose them on information extractors, processors, transmitters, and users for the benefit of data subjects will require the patience of Job and may prove to be no more fruitful than agitating for the expansion of the common-law privacy action. Time is a luxury personal privacy cannot afford and the glacial
First, the concept of automatic standing,\textsuperscript{180} once abandoned needs to be revisited for searches involving the capture of a person's image by any means—electronic, photographic or digital.\textsuperscript{181} It should not matter how the image was obtained, because it would defy logic to suggest a person does not have an interest in the interception, recording, or storing of their image by a government entity.\textsuperscript{182} Such interest in recorded image has long been taken for granted in tort law.\textsuperscript{183} Actions for invasion of privacy and actions for commercial use of one's private image have been recognized even prior to the age of high technology surveillance.

The concept of reasonable expectation of privacy will still by applied by considering the degree to which a person has knowingly exposed themselves to the public.\textsuperscript{184} The objective test that has traditionally been applied to such government searches need not be abandoned. For example, most public travel in open spaces easily would be constitutionally permitted because of courts' traditional "open fields" analysis.\textsuperscript{185}

\begin{footnotesize}
\begin{itemize}
  \item Some states have adopted automatic standing rules in order to make challenging searches and seizures less burdensome. \textit{See, e.g.}, State v. Alston, 440 A.2d 1311, 1320 (N.J. 1981).
  \item New forms of surveillance technology that actually record facial images and compare features to other persons located in computer databases have been increasingly used by law enforcement. \textit{See} Christopher S. Milligan, Note, \textit{Facial Recognition Technology, Video Surveillance, and Privacy}, 9 S. CAL. INTERDISC. L.J. 295, 303-08 (1999) (describing digital and biometrics technology).
  \item However, when one goes out in public the interest in that privacy is also diminished in tort claims. \textit{See} William L. Prosser, \textit{Privacy}, 48 CAL. L. REV. 383, 391-92 (1960) (stating that the tort of invasion of privacy is not implicated when a photograph of a person is taken in public "since this amounts to nothing more than making a record, not differing essentially from a full description, of a public sight which any one present would be free to see").
  \item \textit{See} \textit{Legitimate Expectations}, supra note 138, at 203.
  \item Hester v. United States, 265 U.S. 57 (1924) (holding unanimously that revenue agents who observed illegal liquor trafficking from an open field violated
\end{itemize}
\end{footnotesize}
It is my view, however, that the discussion of standing that sometimes arises from search and seizure matters involving recording a person's image may obscure or eliminate court's analysis of the reasonableness of the government's surveillance technique that led to one's recorded image. Such an adjustment would not unduly hamper the efforts of law enforcement to "ferret out crime"\textsuperscript{186} with improved surveillance technology. It would, however, require accountability when new technology is used, because courts would be encouraged by the automatic standing rule to reach the merits in these alleged intrusion cases.\textsuperscript{187}

It is obvious that technology will always be created far faster than society's ability to evaluate or regulate it with legislation or by court rule. This being the case, it is desirable that courts should confront the new enforcement tool on a case-by-case basis and are in a peculiarly good position to be gatekeepers of the reasonableness of these technologies.

If courts are encouraged to rule on each and every matter by applying an automatic standing approach, government law enforcement agencies will be required to describe the use of new, more invasive technology if they intend to introduce its fruit as evidence.\textsuperscript{188} The legislature may respond with appropriate legislation after it is made aware by court proceedings that new technology has been utilized. If the legislature does not respond, courts will continue to formulate policy as to reasonableness and use traditional application of precedent and

\textsuperscript{186} Illinois v. Lidster, 540 U.S. 419 (2004).


\textsuperscript{188} One scholar has gone so far as to suggest that, "[i]n this area of rapid technological change, the freedom to be unnoticed in public, and its associated benefits, will disappear unless a right to public anonymity is recognized and enforced." Christopher Slobogin, Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity, 72 Miss. L.J. 214, 217, 314-15 (2002) (arguing that the Fourth Amendment should be construed to recognize a right to public anonymity as a part of privacy expectations because "government surveillance of our innocent public activities that are not meant for public consumption is neither expected nor to be condoned").
stare decisis as courts examine the propriety of government intrusion.¹⁸⁹

A practice that encourages, rather than discourage, these emerging technologies to be submitted to judicial evaluation better serves the orderly development of the law. Applying an automatic standing rule regarding such searches is both logical and practical. Some states have already imposed automatic standing rules through the legislative process.¹⁹⁰ It may be that even due process would require that standing be granted to support meaningful review of the means by which the government obtained a person's image. To do otherwise might allow privacy rights to be violated by supporting the rights without meaningful remedies.

**Smith v. Maryland: Outdated Before Its Time**

The application of *Smith v. Maryland*¹⁹¹ to modern technology needs to be carefully reexamined. It was a flawed decision from the day it was announced, but as time and technology have advanced, it has become abundantly clear that the Supreme Court's heavy reliance on third party access to databases as undermining the expectation of privacy has created a major gap in privacy protection.¹⁹² At a minimum, automatic stand-

¹⁸⁹ Someone must be the monitor of first instance as new, more intrusive, technology is used by law enforcement; but do courts have any real impact on how government agents intrude? "Some suggest that the police will always find their own ways to evade constitutional rules; others maintain that even in the best of circumstances the Supreme Court is just too distant from the day-to-day decisions of the policeman . . . to have any systematic effect on police behavior." See Horwitz, supra note 85, at 96.

¹⁹⁰ See, e.g., State v. Culotta, 343 So. 2d 977 (La. 1976) ("Any person adversely affected by a search or seizure . . . shall have standing to raise its legality in the appropriate court." (quoting LA. CONST. art. I, § 5)).


¹⁹² "Although the conflicting interests involved are compelling, the paramount function of national security is to vigilantly protect the ideals embodied by the very same Amendment that the standard violates. Those ideals cannot be whittled away in today's desire to defend the very same values that provide for our security." David Hardin, The Fuss Over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment, 71 GEO. WASH. L. REV. 291, 345 (2003).
ing to challenge evidence collected by the government in remote information databases needs to be recognized.

The modern era of easy information storage and retrieval has created a privacy crisis in which it is impossible to know who has the power to transmit or store information that a person might seek to keep private. The government has a responsibility to investigate crime and protect citizens. Obviously, the government must legitimately invade private matters and collect that information from diverse sources, but increased capability to intrude requires increased accountability. If the facts support their investigative needs, they should not fear an impartial magistrate’s review.

Emergency situations involving terrorism, hostages, or circumstances of imminent danger would obviously create a need to intrude on a wide range of records, but there is no need to prevent those whose records have been obtained from electronic storage from litigating the government’s justification and process for obtaining the data.

I do not suggest that improving investigative capability is

193 It has been argued that a “good society must have its hiding places-its protected crannies for the soul. Under the pitiless eye of safety the soul will wither.” Charles A. Reich, Police Questioning of Law Abiding Citizens, 75 YALE L.J. 1161, 1172 (1966).


195 In Camara v. Municipal Court, 387 U.S. 523, 529 (1967), the Supreme Court said:

The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

The key is to insert a disinterested magistrate between the government official and the citizen to give the right against unreasonable search and seizure meaning.

Id. at 532-33.

196 See Milligan, supra note 181, at 297.
a constitutional evil. I do not wish to be misunderstood to desire fashioning rules that benefit defendants simply because of the conservative leanings of the Rehnquist Court or to recapture the nostalgia of the often defense-friendly Warren Court. Law enforcement should be permitted to do its job based on articulable facts and reasonable need. Emerging technology requires that government be prepared to articulate their need to intrude as their ability to intrude increases.

Privacy issues, particularly as they relate to stored electronic data bases, need to be examined by legislatures for adequate controls. In the meantime, the Supreme Court should place responsibility for advances in more intrusive technology on the government that seeks to use it. The court should not apply the reasonable expectation of privacy approach to electronic databases in the same manner as it is applied to the protection of abandoned trash. Medical, genetic, and financial data should be afforded greater care from

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197 See generally Craig M. Bradley, Criminal Procedure in the Rehnquist Court: Has the Rehnquisation Begun?, 62 IND. L.J. 273 (1987) (discussing Justice Rehnquist's views and the effect he will have on the Court).

198 See generally Fred Gilbert Bennett, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 UCLA L. REV. 1129 (1973) (discussing the Warren Court's exclusionary rule and arguing for its expansion).

199 One insightful commentator has noted that "technological advances pose the challenges that always beset the constitutional enterprise—those involved with trying to create fixed rules, or at least a workable rule of law, for a changing world." Susan Bandes, Power, Privacy, and Thermal Imaging, 86 MINN. L. REV. 1379, 1383 (2002).

200 See Doherty, supra note 29, at 51-52.

201 See Greenwood, 486 U.S. at 39-40 (holding that one does not have a reasonable expectation of privacy in abandoned trash placed at the curb).


203 See Richard C. Turkington, Medical Record Confidentiality Law, Scientific Research and Data Collection in the Information Age, 25 J.L. MED. & ETHICS 113 (1997).

204 United States v. Miller, 425 U.S. 435, 443 (1976) (finding no reasonable expectation of privacy in financial information contained at the defendant's bank because a "depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the [g]overnment." (citing United States v. White, 401 U.S. 745, 751-52 (1971))).
government scrutiny and the presumptions for warrants to access information should be respected.

The everyday use of cellular telephone communication\textsuperscript{205}, e-mail and other information sharing and communication technology in an increasingly paperless world requires that we constantly monitor new forms of intrusion.\textsuperscript{206} The recent use of the Federal Bureau of Investigation's Carnivore program for reading e-mail is an interesting example.\textsuperscript{207} The technology for reading e-mail is actually physically attached to the information service provider's equipment.\textsuperscript{208} This technology was not even on the congressional radar screen until after it had long been in investigative use.\textsuperscript{209} Automatic standing rules would have engaged court review of the technology as soon as the government would have attempted to use the evidence obtained against any one in any court.\textsuperscript{210} Assuring more prompt litigation of the reasonableness of the use of such technology will promote public confidence that law enforcement will

\textsuperscript{205} Cellular telephones have less constitutional protection than a standard telephone that was contemplated in \textit{Katz}. See, \textit{e.g.}, United States v. Smith, 978 F.2d 171 (5th Cir. 1992).

\textsuperscript{206} The explosion of data collection on individual, he said gloomily, has reached the point where it is very difficult for us even to begin to establish any kind of control over our privacy. . . . The hazard is multiplied when information on individuals that is collected for one purpose turns up being used for some other purpose. This inevitably happens when you get a pooling of data from agencies, with multi-access terminals.


\textsuperscript{207} "Carnivore is '\textit{essentially a personal computer stuffed with specialized software, [which] represents a new twist in the federal government's fight to sustain its snooping powers in the Internet age.}' The \textit{Wall Street Journal} also reported that Carnivore 'can scan millions of e-mails a second. . . . ' Trenton C. Haas, \textit{Carnivore and the Fourth Amendment}, 34 CONN. L. REV. 261 (2001) (alteration in original) (footnote omitted) (quoting Neil King, Jr. \& Ted Bridis, \textit{FBI's Wiretaps to Scan E-mail Spark Concern}, WALL ST. J., July 11, 2000, at A3).

\textsuperscript{208} "The Federal Bureau of Investigation . . . asserts that Carnivore represents the FBI's latest effort to keep abreast of the rapidly changing demands of law enforcement. . . . It stresses that Carnivore does not collect all of the data traveling over a network." \textit{Id.} at 262 (footnote omitted).

\textsuperscript{209} \textit{See supra} note 128, at 31.

\textsuperscript{210} \textit{See, e.g.}, Culotta, 343 So. 2d at 981-82.
abide by its dual responsibility to investigate crime and respect constitutional rights guaranteed in the Bill of Rights.\textsuperscript{211} The spirit of the Founding Fathers requires no less.\textsuperscript{212}

**CONCLUSION**

Concerns over national security as we enter the new century have caused us to reconsider our crime fighting techniques. The rapid increase of technology has created uncertainty about what constitutional protection citizens really possess.\textsuperscript{213} Innovative use of automatic standing rules will help unclutter the Fourth Amendment jurisprudence. It will also help ease the confusion created by the Supreme Court's short-sighted precedent in *Smith v. Maryland*. The rapid growth of technology at a pace that state and federal legislatures could not hope to ever


\textsuperscript{212} Professor Lawrence Tribe reminds us:

\begin{quote}
As Sophocles said, nobody has a more sacred obligation to obey the law than those who make and enforce it.
\end{quote}

\[\ldots\]

\begin{quote}
[T]hose who wrote the Constitution's limitations on how suspects may be pursued obviously knew that taking those limits seriously—that is, obeying them rather than flouting them—would necessarily prevent some guilty people from being apprehended and convicted.
\end{quote}

LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 8 (1985).

\textsuperscript{213} On commentator has explained that:

\begin{quote}
For a number of reasons, discernment of the relationship between technology and the threshold of the Fourth Amendment is an exceedingly difficult undertaking. The novel, sometimes ingenious, devices that give rise to constitutional questions that were unknown to and unanticipated by those who drafted the Constitution. The conduct these mechanisms make possible often bears little or no ostensible resemblance to the physical intrusions that troubled our ancestors. Nonetheless, the dramatic increases in human capacities they afford can threaten the very same privacy interests that are violated by physical intrusions. Moreover, technological tools sometimes pose novel threats to privacy by enabling officials to gain access to potentially confidential information that was wholly unreachable in an earlier age.
\end{quote}

keep pace with is a problem that becomes a greater concern with each passing day. A reasonable balance should be struck between law enforcement's effective use of new technology to investigate crime and the right against unreasonable searches and seizures. Of course, law enforcement should have available the best tools of technology to stop crime.

Accountability, however, for the use of those tools needs to be maintained. Safety and security are a greater concern than ever before. We should always be mindful of the need to be secure from both terrorism and more traditional types of criminal behavior.

Law enforcement needs the best tools to investigate crime. Their power, however, is not unlimited, nor should it...

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215 The use of drug testing technology, for example, has reached into the nation's high schools. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (validating drug testing in high schools even without suspicion).

216 The serious consequences of error in a world dominated by high technology law enforcement cannot be overstated. In the very common example of police record checks during vehicle stops, the person stopped has no choice but to rely on the accuracy of the information contained in the police database. One court considered the importance of deterring even innocent neglect of inaccurate information that leads to arrests. *People v. Joseph*, 470 N.E.2d 1303, 1305-06 (Ill. App. Ct. 1984). In refusing to extend a good faith exception to faulty information in a computer search relied on by police, the Illinois Supreme Court explained:

The situation in the instant case reflects a matter within the responsibility and control of police authorities who failed to update their records to accurately reflect defendant's current status. In this age of computerization, we do not believe it would be appropriate to sanction the arrest here, thereby allowing law enforcement authorities to rely on an error of their own making. Moreover, it is our opinion that the good-faith reliance of the arresting officer in acting upon information provided to him through police channels, cannot overcome the intrusion made upon defendant's [F]ourth [A]mendment rights.

*Id.* at 1306 (citation omitted); see also *Ott v. State*, 600 A.2d 111, 118-19 (1992) (finding that the State failed to establish that a delay of seven days over a weekend and holiday in removing outstanding arrest warrant from police computer records was reasonable).

217 The Supreme Court has, in some circumstances, approved certain law enforcement techniques involving technological advances to aid police in crime control. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (approving high-tech police observation of a residence from an airplane under the plain view doctrine).
be unchecked.218 The courts have a responsibility to understand its role as the first stop on the road to clarification of the law which guards our privacy and our precious way of life. Clarification of our approach to standing is one of the important ways we can maintain a proper security and privacy balance in a high technology age.

218 Professor Yale Kamisar correctly observes:

[T]he Fourth Amendment may plausibly be viewed as the centerpiece of a free, democratic society. All other freedoms presuppose that lawless police action have been restrained. What good is freedom of speech or freedom of religion or any other freedom if law enforcement officers have unfettered power to violate a person's privacy and liberty when he sits in his home or drives his car or walks the streets?