SOME REASONS FOR OUR AMBIVALENCE ABOUT THE VALUE OF PRIVACY

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I. INTRODUCTION

Many of us are ambivalent[1] about the value of privacy.[2] On the one hand,

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[1] *Ambivalence* narrowly defined will not entirely exhaust the scope of our concerns herein. Sometimes, divisions among persons and groups, rather than true ambivalences, will turn out to be important.

[2] Following several careful studies of this subject, this Article will not attempt a concise yet comprehensive definition of "privacy," even within the limits of Fourth Amendment search and seizure law. For discussions of some definitional complications, see, *e.g.*, DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 1-111 (2008); H. Tristram Engelhardt, Jr., *Privacy and Limited Democracy: The Moral Centrality of Persons*, 17 SOCIAL PHIL. & POL'Y 120, 120 (2000) ("[p]rivacy is ambiguous"); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087 (2002) (seeing Wittgensteinian "family resemblances" among conceptual uses of "privacy," rather than an essential conceptual core, while emphasizing pragmatism, contextualism and instrumental value); Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975) ("[P]erhaps the most striking thing about the right to privacy is that nobody seems to have any very clear idea what it is."); Ferdinand Schoeman, *Privacy: The Philosophical Dimensions*, 21 AM. PHIL. Q. 199, 199 (1984) (listing various distinct families of definitions of "privacy"). *See also* several of the articles reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY (Ferdinand Schoeman ed., 1984). *But cf.* D.N. MacCormick, *Privacy: A Problem of Definition?*, 1 BRIT. J.L. & SOCIETY 75 (1974) (seeking to distinguish

for example, a lack of privacy is typically the stuff of dystopias.[3] But on the other hand, some limitations on privacy, whatever the justification, give rise among many persons to only modest concern, if not to utter indifference.[4] The

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between varied attempts to define "privacy" itself and attempts to delimit a defensible right to privacy). Of course, any substantial difficulties in defining the idea of privacy might well translate into a real or apparent ambivalence as to the value of privacy. For a concise summary of recent contributions from several disciplines to definitional as well as valuational discussions, see Trina J. Magi, *Fourteen Reasons Privacy Matters: A Multidisciplinary Review of Scholarly Literature*, 81 LIBRARY Q. 187 (2011).

[3] *See, e.g.*, GEORGE ORWELL, 1984 (Plume 2009) (1949) ("Big Brother Is Watching You"); Richard Posner, *Orwell versus Huxley: Economics, Technology, Privacy, and Satire*, *in* ON *Nineteen Eighty-Four*: Orwell and Our Future 183, 183-84 (Abbott Gleason, Jack Goldsmith & Martha C. Nussbaum eds., 2005) ("[A] taste for solitude is inimical to totalizing schemes of governance and social organization, whether the utilitarianism of *Brave New World* or the totalitarianism of *Nineteen Eighty-Four*, because when people are alone they are more apt to have wayward thoughts about their community than when they are immersed in it."). For a depiction of Big Brother's youthful sibling, see CORY DOCTOROW, LITTLE BROTHER (2008) (in which a technologically sophisticated "gait recognition" system is ingeniously defeated by the uncomfortable "asymmetrical warfare" expedient of once inserting rocks in one's shoes). For the ancestor of *1984*, see YEVGENY ZAMYATIN, WE 12-13, 19 (Natasha Randall trans. 2006) (1921) (obtaining official permission to lower one's own blinds). For a lack of mental privacy writ large, see *Borg Collective*, MEMORY ALPHA, http://en.memory-alpha.org/wiki/Borg_Collective (last visited May 23, 2012). *See also* the episode Star Trek: The Next Generation: "Q Who?" (CBS television broadcast May 8, 1989) as memorialized at *Borg*, STAR TREK, http://www.startrek.com/database_article/borg (last visited May 23, 2012).

[4] Judge Richard Posner observes that "Americans are not known for reticence or personal modesty. Most of us are quite casual about disclosing personal information to strangers, provided it is not likely to boomerang against us." Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 249 (2008). *See generally*, ROCHELLE GURSTEIN, THE REPEAL OF RETICENCE (1999). For a contemporary collection of largely pro-privacy, but often mixed, survey data, across a number of subject-matter contexts, see *Public Opinion on Privacy*, ELECTRONIC PRIVACY INFORMATION CENTER, http://epic.org/privacy/survey (last visited June 3, 2012).

More specifically, in a numerically precise half-full/half-empty survey result, one public opinion poll from July 2010 found a remarkable mix of results among respondents with a social networking profile. As of that time, 23% of respondents were "very concerned" about their privacy in this particular context; 27% were "concerned;" 29% were "not very concerned;" and 21% were "not concerned at all." *See 7/14: Half of Social Networkers Online Concerned About Privacy*, MARIST POLL, http://maristpoll.marist.edu/714-half-of-social-networkers-online-concerned-about-privacy (last visited June 3, 2012). Social networkers over the age of 60, as well as women in general, tended to exhibit the greatest online privacy concern. *See id.* For some stages in the evolution of Facebook's privacy policies, see LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY 126-28 (2011).

In the distinct context of airport security, see *Gallup Politics: Most U.S. Air Travelers OK Sacrificing Privacy For Security*, GALLUP POLITICS (Nov. 23, 2010), http://www.gallup.com/

particular courts one might expect to be attuned to privacy interests have arguably presided over an erosion of privacy protection.[5]

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poll/144920/air-travelers-sacrificing-privacy-security.aspx (last visited June 3, 2012) ("[T]he large majority (71%) of air travelers who have flown at least twice in the past year say any potential loss of personal privacy from the full-body scans and pat-downs is worth it as a means of preventing acts of terrorism.").

Additionally, as of July 2011, an Associated Press/NORC Poll indicated, with regard to a proposed mandatory universal national identity card, to be carried on one's person and produced on demand, that 31% "strongly favor" such a requirement; 17% "moderately favor" the proposal; 11% "moderately oppose" the idea; and 31% "strongly oppose" the idea. *See Topics at a Glance: Privacy*, ROPER CENTER FOR PUBLIC OPINION RESEARCH, www.ropercenter.uconn.edu/data_access/tag/privacy.html (last visited June 3, 2012).

A generally similar pattern of division or ambivalence has been seen regarding health record privacy, with half the sample professing substantial concern, about 22% in the middle range of concern, and just over a quarter of the survey respondents expressing limited to no concern regarding medical record privacy. *See UPI Poll: Concern on Health Privacy*, ELECTRONIC HEALTH INFORMATION AND PRIVACY (Mar. 8, 2007), http://ehip.blogs.com/ehip/2007/03/upi_poll_concer.html (last visited June 13, 2012).

In the realm of general public visual surveillance, see *Chicago's Big Camera Surveillance Network Gets Bigger,* GOVERNMENT TECHNOLOGY (June 16, 2011), http://www.govtech.com/public-safety/Chicagos-Camera-Surveillance-Network-Bigger.html# www.govtech.com/public-safety (last visited June 3, 2012) ("Chicago's surveillance system has been expanding in recent years.").

Much more generally, consider the (uneven) three-part analytical division of the public, by Professor Alan Westin, into "privacy fundamentalists;" "privacy pragmatists;" and the "privacy unconcerned." For a brief summary of this typology, see Humphrey Taylor, *Harris Poll No. 17: Most People Are "Privacy Pragmatists" Who, While Concerned About Privacy, Will Sometimes Trade It Off For Other Benefits*, HARRIS INTERACTIVE (Mar. 19, 2003), http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Most-People-Are-Privacy-Pragmatists-Who-While-Conc-2003-03.pdf (last visited June 13, 2012). *See also* Professor Westin's prepared congressional testimony at http://energycommerce.house.gov/107/hearings/05082001Hearing209/Westin309.htm (May 8, 2001) (last visited June 13, 2012). For a partial critique of Professor Westin's work, see the range of surveys collected at the Electronic Privacy Information Center (EPIC), *available at* http://epic.org/privacy/survey/default.htmlhttp://privacy/survey (last visited June 2, 2012).

[5] *See, e.g.*, United States v. Pineda-Moreno, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc), along with the separate concurrence in Chief Judge Kozinski's dissent by Judge Reinhardt, *id.* at 1126, who does not invariably follow Judge Kozinski's lead on culturally fraught constitutional issues. In this case, however, involving law enforcement attachment of a GPS tracking device to the underside of a car parked in the owner's driveway, the two judges were in clear accord. Chief Judge Kozinski argued that "[t]he needs of law enforcement, to which my colleagues seem inclined to refuse nothing, are quickly making personal privacy a distant memory. 1984 may have come a bit later than predicted, but it's here at last." *Id.* at 1121 (Kozinski, C.J., dissenting from denial of rehearing en banc). Contrast the relatively narrow opinion for the Court in *United States v. Jones*, 132 S. Ct. 945 (2012).

Judge Reinhardt observed, more broadly, "I have served on this court for nearly three

This Article argues that ambivalence as to the value of privacy has multiple explanations at different levels. Several of these explanations are more interesting than acknowledging that privacy comes in various kinds and contexts. In addition, these explanations may conflict with other forms of privacy and with non-privacy values of varying importance. Briefly put, ambivalence and division over the value of privacy is not simply a reflection of various privacy tradeoffs.

Most of the sources of division and ambivalence over privacy addressed below are interdisciplinary in character, rather than mere reflections of the privacy case law. Nevertheless, in some respects, the current privacy case law and, particularly, the law of "reasonable expectations of privacy" are crucial to understanding the sources of our ambivalence and division over the value of privacy.

A primary, more fundamental concern involves the degree to which a culture takes privacy seriously, beyond some limited contexts, and the degree to which the culture takes seriously the metaphysics, or the deeper reality, of the person.

II. PRIVACY AND THE APPARENTLY EVAPORATING METAPHYSICS OF THE PERSON

It may be difficult to imagine how something as abstract as the metaphysics—or the reality—of the person could affect attitudes toward privacy. At the very least, many instances will arise where privacy is merely a matter of some economic or physical security interest. A violation of privacy in these cases may result in theft, unemployment, or denial of insurance. We might value privacy in these contexts to avoid these outcomes, without implying any controversial metaphysical claims.

Contexts in which the metaphysics of the person might somehow affect the degree to which we care about privacy also exist. Use of the relevant terms, including dignity,[6] autonomy,[7] and even personhood,[8] in multiple ways, some-

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decades. I regret that over time the courts have gradually but deliberately reduced the protections of the Fourth Amendment to the point at which it scarcely resembles the robust guarantor of our constitutional rights we knew when I joined the bench." *Pineda-Moreno*, 617 F.3d at 1126 (Reinhardt, J., dissenting from denial of rehearing en banc). *See also id.* at 1127 (Reinhardt, J., listing some eleven relevant cases with dissenting opinions by Judge Reinhardt).

[6] For discussions of the admittedly ambiguous idea of dignity, see, *e.g.*, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 43, 46-47 (Mary Gregor trans., Cambridge Univ. Press. 1998) (1785) ("In the Kingdom of Ends, everything has either a price or a dignity. What has a price can be replaced with something else. . . ."); GEORGE KATEB, HUMAN DIGNITY 5 (2011) ("[T]he human species is indeed something special[;] it possesses valuable, commendable uniqueness or distinctiveness that is unlike the uniqueness of any other species. It has a higher dignity than all other species, or a qualitatively different dignity from all of them. The higher dignity is theoretically founded on humanity's partial discontinuity with nature. Humanity is not only natural, whereas all other species are only

times with metaphysical depth, and sometimes without, complicates these contexts. To the extent that we think humans as reducible to hardware and software; to organic machines; to complex robots; or to our status as one mammal among many, the most fundamental logic of privacy may no longer seem applicable. The crucial claim remains that the value of privacy in conspicuous respects will evaporate over time the more we abandon the most fundamental conceptions of dignity, autonomy, and personhood. To the extent we dilute or abandon the most fundamental conceptions of dignity, autonomy, and personhood, the value of privacy, in conspicuous respects, will also tend to evaporate over time.

We consider below a few examples of mainstream, if not dominant, contemporary scientific and philosophical understandings of what it means to be a human being to demonstrate this phenomenon. We then reflect on whether consistent application of such understandings would change the status and value we attribute to personal privacy. The current case law assuredly links privacy to dignity, in one sense of the latter term or another.[9] But not all refer-

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natural."). For a review of Kateb's book, see Nicholas Wolterstorff, *Human Dignity by George Kateb,* 122 ETHICS 602 (2012) (book review). For further relevant discussions of the idea of dignity, see, *e.g.*, MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012); Edward J. Bloustein, *Privacy As an Aspect of Human Dignity*, 39 N.Y.U. L. REV. 962, 971 (1964) (discussing dignity, inviolateness of the person, integrity of the person, independence of the will, and mastery of one's own destiny); Kent Greenawalt, *Personal Privacy and the Law*, 2 WILSON Q. 67, 67 (1978) (emphasis on the right to personal privacy as "related to the . . . belief in personal freedom and the basic dignity and worth of the individual").

[7] Kant uses the idea of autonomy in a metaphysically ambitious sense. *See* KANT, *supra* note 6, at 43 ("*Autonomy* is . . . the ground of the dignity of human nature and of every rational nature.") (emphasis in original). But "autonomy" is also used in a metaphysically thinner sense, in which it may refer to merely something like an absence of some external constraint preventing us from doing as we may happen to prefer. *See* ROSEN, *supra* note 6, at 25.

[8] For arguments linking privacy concerns to the nature and status of persons, see, *e.g.*, Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* NOMOS XIII: PRIVACY 1 (J. Roland Pennock & John W. Chapman eds., 1971); Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968) ("To make clear the necessity of privacy as a context for respect, love, friendship and trust is to bring out also why a threat to privacy seems to threaten our very integrity as persons."). But again, "person" is often used in a less metaphysically ambitious sense, and thus overall remains ambiguous or "rather ill-defined." Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 739, 753 (1989) (linking "personhood" to "some essence of our being," but attributing to the idea "a certain opacity"). For further discussion of privacy and personhood, see Engelhardt, Jr., *supra* note 2; W.A. Parent, *Privacy, Morality, and the Law*, 12 PHIL. & PUB. AFF. 269, 277 (1983); H.J. McCloskey, *Privacy and the Right to Privacy*, 55 PHIL. 17, 29, 36 (1980) (linking privacy to personhood and to respect for personhood).

[9] *See, e.g.*, Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510, 1525, 1527 (2012) (Breyer, J., dissenting) (strip search as a "serious affront to human dignity and to individual privacy"); FAA v. Cooper, 132 S. Ct. 1441, 1456, 1462 (2012) (Sotomayor, J., dissenting)

ences to privacy invoke ambitious metaphysics,[10] and our current case law may well lag behind the logic of scientists and philosophers.

A number of prominent contemporary philosophers and scientists of various sorts express views about nature and the human that impeach the logic of much of our concern for personal privacy. Among the most widely respected contemporary scientists, For example, Stephen Hawking, the widely respected cosmologist flatly declared "[t]he human race is just a chemical scum on a moderate-sized planet."[11]

The word "scum," as applied to humanity, carries a certain negative connotation. But for our purposes, very little turns on the reference to "scum," or even to chemistry or other natural sciences. The neurobiologist Anthony Cashmore echoes Professor Hawking's reference to chemistry when he contends, "as living systems we are nothing more than a bag of chemicals."[12] Francis Crick would shift the focus or level, while maintaining the crucial bottom line conclusion: "'You,' your joys and your sorrows, your memories and your ambitions, your sense of personal identity and free will, are in fact no more than the behavior of a vast assembly of nerve cells and their associated molecules. . . .

("privacy is a dignitary interest"); Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2672 (2011); City of Ontario, Cal. v. Quon, 130 S. Ct. 2619, 2627 (2010); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 613-14 (1989); Florida v. Riley, 488 U.S. 445, 456, 462 (1989) (Brennan, J., dissenting); Winston v. Lee, 470 U.S. 753, 760 (1985); United States v. Leon, 468 U.S. 897, 960, 979 (1984) (Stevens, J., dissenting); Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977); Time, Inc. v. Firestone, 424 U.S. 448, 471, 471 (1976) (Brennan, J., dissenting) (linking at least some invasion of privacy actions to the goal of "ensuring the 'essential dignity and worth of every human being'") (citation omitted); Wiseman v. Massachusetts, 398 U.S. 960, 961, 962 (1970) (Douglas, J., dissenting from denial of certiorari) ("the individual's concern with privacy is the key to the dignity which is the promise of civilized society"); Schmerber v. California, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.").

[10] *See, e.g.*, ROSEN, *supra* note 6, at 25; Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3, 10 (1998) ("[S]ome forms of reticence have a social function, protecting us from one another and from undesirable collisions and hostile reactions."). The idea of a collision is itself physical, if not mechanistic, and thus not necessarily deeply metaphysical. But even then, the reason someone might seek to avoid a "collision" might inescapably refer to values of a more deeply metaphysical character.

[11] *Quoted in* DAVID DEUTSCH, THE FABRIC OF REALITY: THE SCIENCE OF PARALLEL UNIVERSES AND ITS IMPLICATIONS 177-8 (1997) *and* PAUL DAVIS, THE GOLDILOCKS ENIGMA: WHY IS THE UNIVERSE JUST RIGHT FOR LIFE? 222 (reprt. ed. 2008). Davis remarks that "[m]ost physicists and cosmologists would echo Hawking and regard life as a trivial, accidental embellishment to the physical world, of no particular significance in the overall cosmic scheme of things." *Id.*

[12] Anthony R. Cashmore, *The Lucretian Swerve: The Biological Basis of Human Behavior and the Criminal Justice System*, 107 PNAS 4449, 4504 (Mar. 9, 2010), *available at* www.pnas.org/cgi/doi/10.1073/pnas.0915161107 (last visited June 6, 2012).

You're nothing but a pack of neurons."[13]

Regardless of the precise level of their naturalistic analyses, contemporary scientists[14] remove much of the logical ground beneath some of our most basic justifications and motivations for valuing, or even recognizing, privacy. Even if we confidently ignore these scientists' frequent, mainstream denials of both consciousness[15] and of any familiar continuing "self,"[16] we are left with a tenuous logic of privacy.

Generally, it is absurd to assert a privacy interest not just in, but on behalf of, "chemical scum,"[17] a "bag of chemicals,"[18] or a "pack of neurons."[19] Entities of that sort are incapable of bearing privacy interests. Even if chemicals or neurons, at that level, could have desires or interests, it is difficult to see how they could have a particular desire or meaningful interest in privacy. It is correspondingly difficult to imagine how the legal discourse of privacy would proceed in such cases: "You have violated the privacy of this bag of chemicals. . . ." "No, I have properly respected the privacy of that bag of chemicals." In this mainstream naturalistic reduction or elimination of the human, the meaningfulness, coherence, and legal discourse of privacy tends to evaporate.

This inability to fully accommodate the logic of privacy is not at all confined to contemporary scientists. An analogous position is held by many prominent, mainstream, contemporary philosophers, with various specialties. The highly regarded philosopher Daniel Dennett, for example, has argued that "[w]e are each made of mindless robots and nothing else, no non-physical, non-robotic ingredients at all. The differences among people are all due to the way their

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[13] FRANCIS CRICK, THE ASTONISHING HYPOTHESIS: THE SCIENTIFIC SEARCH FOR THE SOUL 3 (1995). For a somewhat more metaphysically ambitious if still rather attenuated account of the human, see, *e.g.*, Joshua D. Greene, *Social Neuroscience and the Soul's Last Stand* (Nov. 2006), http://www.wjh.harvard.edu/~jgreene/GreeneWJH/Greene-Last-Stand.pdf (last visited June 6, 2012).

[14] *See infra* notes 15-16.

[15] *See, e.g.*, NICHOLAS HUMPHREY, SOUL DUST: THE MAGIC OF CONSCIOUSNESS 204 (2011) ("Consciousness is *an impossible fiction*, or, perhaps better said, *a fiction of the impossible*.").

[16] *See, e.g.*, ALEX ROSENBERG, THE ATHEIST'S GUIDE TO REALITY: ENJOYING LIFE WITHOUT ILLUSIONS 19 (2011) (referring to "the illusion of free will [and] the fiction of an enduring self"). *See also* Susan Blackmore, *The Evolution of Meme Machines*, INTERNATIONAL CONGRESS ON ONTOPSYCHOLOGY AND MEMETICS MILAN (May 18-21, 2002), *available at* www.susanblackmore.co.uk/Conferences/Ontopsych.htm (last visited June 7, 2012). For discussion of the work of some of the scientists discussed above and the philosophers addressed below in a different context, see R. George Wright, *Criminal Law and Sentencing: What Goes with Free Will?*, 5 DREXEL L. REV. (forthcoming 2013).

[17] *See supra* note 11 and accompanying text.

[18] *See* Cashmore, *supra* note 12, at 4504.

[19] *See supra* note 13 and accompanying text. *See also* PETER ATKINS, ON BEING: A SCIENTIST'S EXPLORATION OF THE GREAT QUESTIONS OF EXISTENCE xii n.1 (2011) ("I adopt the view that the whole of all there is can be accounted for by matter and its interactions.").

particular robotic teams are put together, over a lifetime of growth and experience."[20] More tersely, and in terms suggestive of Hawking's perspective, the distinguished philosopher John Gray holds that "[f]or Gaia, human life has no more meaning than the life of slime mould."[21]

With similar vividness, the influential pragmatist philosopher Richard Rorty writes, "[e]very speech, thought, theory, poem, composition and philosophy will turn out to be completely predictable in purely naturalistic terms. Some atoms-and-the-void account of micro-processes within individual human beings will permit the prediction of every sound or inscription which will ever be uttered."[22]

Universal physicalism, encompassing all that is human, also arises in the works of the distinguished philosopher Paul M. Churchland.[23] The equally distinguished philosopher David Papineau goes so far as to assert that "[w]e are all physicalists now. It was not always so. . . . This is a profound intellectual shift."[24] Presumably, such a profound shift would tend to influence other logically related dimensions of human culture indirectly over time, including the law and ethics of privacy, as well as the very meaning and value of privacy.

Of course, our traditional, presumably illusory, popular beliefs continue to have practical consequences. The scientist Daniel M. Wegner thus observes,

> [I]t seems to each of us that we have a conscious will. It seems we have selves. It seems we have minds. It seems we are agents. It seems we cause what we do. Although it is sobering and ultimately accurate to call all this an illusion, it is a mistake to conclude that the illusory is trivial. On the contrary, the illusions piled atop apparent mental causation are the building blocks of human psychology and social life.[25]

According to these scientists and philosophers, we find ourselves living by illusion. Whether we can continue to live in perpetuity by what we now recog-

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[20] DANIEL DENNETT, FREEDOM EVOLVES 2-3 (2003).

[21] JOHN GRAY, STRAW DOGS: THOUGHTS ON HUMANS AND OTHER ANIMALS 33 (2007).

[22] RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 387 (1981). One could, assuming the coherence of a purely naturalistic philosophy, adopt naturalism without also endorsing a complete determinism at the level of cultural products.

[23] *See* PAUL M. CHURCHLAND, MATTER AND CONSCIOUSNESS 21 (rev. ed. 1999). Professor Churchland, an "eliminative materialist," argues that "the human species and all of its features are the wholly physical outcome of a purely physical process. . . . Our inner nature differs from that of simpler creatures in degree, but not in kind. . . . . We are creatures of matter." *Id.* Churchland concludes that most, but not all of the "professional community" has adopted some version of materialism. *See id.*

[24] David Papineau, *Physicalism and the Human Sciences* (2008), *available at* www.philosophyol.com/pol/html/19/n-10019.html (last visited June 7, 2012).

[25] DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL 341-42 (2002). *See generally* OWEN FLANAGAN, THE REALLY HARD PROBLEM: MEANING IN A MATERIALIST WORLD (2009).

nize to be an illusion is a difficult question.[26] Would our valuations of privacy really remain unaffected over the long term if we were to be deeply convinced that we lack the capacities required for privacy to be genuinely meaningful?

In some contexts we would value privacy in some rudimentary sense for reasons without much metaphysical depth. We can, for example, accomplish more if our office cubicle is not shared with three other people. We would not want our strategy conversations eavesdropped upon in a business or sports context. We might not want a prospective health insurer to know all the relevant information concerning our genetics or medical conditions.

In other contexts we value privacy for deeper reasons—especially intimate contexts, or where elemental dignity or humiliation and degradation could be at stake. If we believed that we are nothing more than complex, sentient, perhaps programmed machines,[27] would we still be willing to pay much of a price to retain the latter sorts of privacy?

If we were persuaded that we really lack a conscious will,[28] an enduring self,[29] a distinct and irreducible mind,[30] or genuine "freedom and dignity,"[31] why would we want to sacrifice anything of unquestioned value in order to persist in what we recognize as delusional thinking? Under those assumptions, admittedly, it would not be genuinely undignified for us to persist in the illusion that we are capable of dignity. But why persist in valuing the merely delusional when doing so involves any real costs in other values,[32] including

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[26] Perhaps the most sophisticated discussion of the loosely analogous problem of illusion in the areas of free will, moral responsibility, and meaningfulness is SAUL SMILANSKY, FREE WILL AND ILLUSION (2002). *See also* GALEN STRAWSON, FREEDOM AND BELIEF (rev. ed. 2010) (addressing themes raised by his father, Professor P.F. Strawson).

[27] *See supra* notes 11-24 and accompanying text.

[28] *See* WEGNER, *supra* note 25, at 341-42.

[29] *See id.*

[30] *See id.*

[31] *See* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (2002 ed.) (1971).

[32] The argument over what we ought morally to do about privacy is further complicated by parallel debates over the very nature and meaning of morality. If the idea of morality, in a broad sense, itself does not refer to anything real, that might either help or hurt our inclination to value privacy. For introductions to contemporary debates over the meaning of moral talk, see ANDREW FISHER, METAETHICS: AN INTRODUCTION (2011) *and* ALEXANDER MILLER, AN INTRODUCTION TO METAETHICS (2003). For some key contemporary works that in one way or another call into serious question our traditional understandings of the nature and status of moral language, see SIMON BLACKBURN, ESSAYS IN QUASI-REALISM (1993); RICHARD GARNER, BEYOND MORALITY (1993); ALLAN GIBBARD, WISE CHOICES, APT FEELINGS (1990); ALLAN GIBBARD, THINKING HOW TO LIVE (2003); RICHARD M. HARE, FREEDOM AND REASON (1963); GILBERT HARMAN, THE NATURE OF MORALITY (1977); RICHARD JOYCE, THE MYTH OF MORALITY (2007); RICHARD JOYCE, THE EVOLUTION OF MORALITY (2007); MARK ELI KALDERON, MORAL FICTIONALISM (2005); J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977); RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH (1990); WALTER SINNOTT-ARMSTRONG, MORAL SKEPTICISMS (2006); J.O. URMSON, THE EMOTIVE

physical security, sensual pleasure, crime control, or usable wealth?

We can, at this point, glimpse the deepest reason for our current ambivalence about privacy and its value. On the one hand, we tend not to think of "personal" or "intimate" moments as crucially based, even in part, upon recognized illusion. But we may already be indirectly absorbing some versions of the scientific and philosophical arguments that our nature as entirely material beings cannot underwrite our logic of privacy and its value. If personhood or the continuing self are illusions, as we may already half-consciously suspect, so may be the forms of privacy that logically depend upon those illusions.

From this foundational problem for privacy, other important, more jurisprudential sources of ambivalence and division over the value of privacy have arisen. A number of these latter sources are best discussed in the context of current Fourth Amendment privacy law, and the law of reasonable expectations of privacy in particular. We now turn to these sources of our ambivalence over privacy.

III. THE CASE LAW OF REASONABLE EXPECTATIONS OF PRIVACY AND OUR AMBIVALENCE OVER THE VALUE OF PRIVACY

A. *History and the Favorable Pole of Our Ambivalence*

Constitutional originalism and historical practice as of 1791 may not serve as uncontroversial touchstones across all of contemporary constitutional case law,[33] but in the area of Fourth Amendment search and seizure law, original intent and remote historical practice are currently thought to establish a minimum "floor" for the protection of privacy. This constraint was articulated in Justice Scalia's majority opinion for the Court in the *Jones* case;[34] in Justice Alito's concurring opinion,[35] joined by three other Justices in *Jones*;[36] in prior Supreme Court cases;[37] and in subsequent judicial opinions.[38] In the standard formulation of this principle, "[a]t bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth

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THEORY OF ETHICS (1969) (addressing the history of emotivism). For a discussion of the value of metaphysics and philosophy more generally in pursuing a political society respectful of privacy interests, see James Conant, *Rorty and Orwell on Truth*, *in* ON NINETEEN EIGHTY-FOUR: ORWELL AND OUR FUTURE 86 (Abbott Gleason, Jack Goldsmith & Martha C. Nussbaum eds. 2005). A bit more elaborately, see James Conant, *Freedom, Cruelty and Truth: Rorty versus Orwell*, *in* RICHARD RORTY AND HIS CRITICS ch. 12, at 268 (Robert Brandom ed. 2000) (along with Rorty's Response to Conant, *id.* at 342). *See generally* SIMON KIRCHIN, METAETHICS (2012).

[33] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989).

[34] United States v. Jones, 132 S. Ct. 945, 950 (2012).

[35] *See id.* at 957, 958 (Alito, J., concurring).

[36] *See id.* at 957.

[37] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001).

[38] *See, e.g.*, State v. Zahn, 812 N.W.2d 490, 495 (S.D. 2012).

Amendment was adopted.'"[39]

This historical baseline arguably sets a minimum-protection baseline for privacy on the various judicial tests the courts may impose in particular Fourth Amendment contexts.[40] Whether this historical formulation actually operates in this broadly privacy-protective fashion is open to doubt. This formulation might not be meaningful or coherent in an inescapably high-tech digital information society. We may indeed have privacy-protecting programs and gadgets that could not have been envisioned at the time of the Fourth Amendment's adoption.[41] But there also exists a very practical sense in which our conversations, personal data, characteristics, habits, preferences, genomes, histories, campaign contributions, and Fourth Amendment "effects" are less secure from government awareness than were those of, say, a stereotypical Virginia "gentleman farmer" in the year 1791.[42]

Whether coherent or not, this broad historical privacy "floor" typically reflects our cultural impulse to recognize and protect privacy interests, at least in the Fourth Amendment context. The historical "floor" theory can fairly be associated with the pro-privacy pole of our ambivalence toward the general value of privacy. Other important elements of our current Fourth Amendment case law tend to operate in the opposing direction, as we shall now see.

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[39] *Jones*, 132 S. Ct. at 950 (quoting *Kyllo*, 533 U.S. at 34).

[40] *See id.*

[41] *See, e.g.*, the secure delete application SDelete v.1.6, *available at* http://technet.microsoft.com/en-us/sysinternals/bb897443.aspx (last visited June 10, 2012).

[42] The nonexistence of anything like phone conversations or texting in 1791 raises coherence problems, but one could argue that whatever conversations the proverbial gentleman farmer was able to engage in as of 1791 would typically not have been subject to government documentation, without even raising the question of a government "search." *Cf.* United States v. Flores-Lopez, 670 F.3d 803, 807 (7th Cir. 2012) (Posner, J.) (citing Smith v. Maryland, 442 U.S. 735, 742-43) (1979) (Obtaining a phone number called from the phone "isn't a search because by subscribing to the telephone service the user of the phone is deemed to surrender any privacy interest he may have had in his phone number."). We can imagine legally imputing some sort of vaguely analogous waiver, however dubious, to the gentleman farmer of 1791, but at this point, the attempt to compare legal protections of privacy, in this respect, across two centuries, breaks down into arbitrariness. *See also* Mark Benjamin, *New Patriot Act Controversy: Is Washington Collecting Your Cell Phone Data?*, TIME (June 24, 2011), www.time.com/time/nation/article/0,8599,2079666,00.html; James Bamford, *The NSA Is Building the Country's Biggest Spy Center (Watch What You Say)*, WIRED (March 15, 2012), www.wired.com/threatlevel/2012/03/ff_nsadatacenter/all/1. On the litigation front, see Clapper v. Amnesty Int'l USA, 638 F.3d 118 (2nd Cir. 2011), *cert. granted*, 132 S. Ct. 2431 (2012) No. 11-1025 (standing to seek to have section 1881a of the Foreign Intelligence Surveillance Act (FISA) declared unconstitutional).

B. *Reasonable Expectations and the Less Favorable Pole of Our Ambivalence*

If we can locate the historical "floor" constraint close to the pro-privacy pole of our collective ambivalence toward privacy, we should also recognize countervailing jurisprudential tendencies. The widely-cited "reasonable expectation of privacy" Fourth Amendment test in particular tends to gravitate toward the other, less privacy-protective pole, at which privacy interests are generally less readily recognized and less valued.

This is not to suggest that the "reasonable expectation of privacy" test is consciously intended to subordinate the value of privacy. But the "reasonable expectation of privacy test," as developed and applied, is certainly vulnerable to such outcomes. We can, at this point, briefly articulate the language of the "reasonable expectation of privacy" test, and then illustrate its natural susceptibility to our cultural impulse to devalue privacy and its constitutional protection. Thus while the historical "floor" constraint can be more or less associated with one side of our ambivalence toward privacy and its value, the reasonable expectation test generally can be associated with the other, less protective side of our ambivalence toward the value of privacy.

The standard formulation of the "reasonable expectation of privacy" test asks whether the affected party "has a 'constitutionally protected[43] reasonable expectation of privacy.'"[44] Thus, the Fourth Amendment "does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as 'reasonable.'"[45] Literally, the affected party apparently must first manifest, at the relevant time, an actual and relevant expectation of privacy.[46] The subjective expectation of privacy must then also be judged to be legitimate,[47] reasonable,[48] and societally acceptable as "proper

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[43] This constitutional test's own explicit internal reference to constitutional protection may appear to threaten a logical regression, emptiness, or circularity. The general idea may simply be to emphasize that the test is not intended to validate, for example, the entirely well-founded and realistic expectation of a conscientious late-night burglar of off-season resort cottages that his activities will not likely be observed or officially intruded upon. *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

[44] Oliver v. United States, 466 U.S. 170, 177 (1984) (quoting the seminal case of Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). *See also* United States v. Jones, 132 S. Ct. 945, 950 (2012) (citing cases).

[45] *Oliver*, 466 U.S. at 177 (quoting *Katz*, 389 U.S. at 361) (citing Smith v. Maryland, 442 U.S. 735, 740-41 (1979)).

[46] *See id.* (for cited cases). *See also* O'Connor v. Ortega, 480 U.S. 709, 715 (1987); *Rakas*, 439 U.S. at 715 (at least literally appearing to require an affected person's actual, subjective expectation of privacy).

[47] *See, e.g.*, *Rakas*, 439 U.S. at 142 & 143 n.12 (citing *Katz*, 389 U.S. at 353). Interestingly, what a given surveillee actually expected at the time would seem to primarily be a question for the trier of fact, whereas the societal legitimacy of those expectations would seem to be primarily a question of public policy for the courts to decide as a matter of law.

behavior,"[49] "recognized and permitted by society,"[50] or as justifiable.[51]

Unsurprisingly, the Court has not developed a concise and universally applicable test for this reasonableness or legitimacy of an expectation of privacy.[52] Instead, the Court "has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and the societal understanding that certain areas deserve the most scrupulous protection from government invasion."[53] Depending on how these non-exhaustive factors are interpreted, any or all three could be deployed against a privacy claim in any given case.

As it stands, though, the "reasonable expectation of privacy" test, in some abstract sense, could be considered latently ambiguous, in a way that encourages subordinating privacy interests, or if not deemed ambiguous, then interpretable in a way that promotes the subordination of privacy interests. Let us briefly consider how these alternative interpretations are applied.

First, consider the view that the "reasonable expectation of privacy" test is in some sense ambiguous. What would the two potential interpretations of the basic test then amount to? The first, and logically simplest, interpretation would be that the test, in its bare essentials, can actually be reduced to a single crucial step. Under this interpretation, the court asks whether the affected person, entirely apart from any actual subjective expectation he or she may or may not have held, brings a claim for a violation of a privacy interest that should be judged to be reasonable, legitimate, proper, justified, societally recognized, societally sanctioned, or some synonym thereof.[54] For the sake of simplicity, we may refer to this single step interpretation as the "societally recognized" privacy interest version of the reasonable expectation test.

We shall not stop at this point to consider the implications of this single step "societally recognized" privacy interest test, other than to note the obvious: This test makes the protection of privacy entirely dependent on what "society" happens to recognize as legitimate, whatever the processes that have led society to its current beliefs in that regard. This version of the test is thus largely positivist, or conventional, rather than critical.[55] Why a society does or does

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[48] *See, e.g.*, *Jones*, 132 S. Ct. at 950 (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring)); *O'Connor*, 480 U.S. at 715 (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)); *Oliver*, 466 U.S. at 177.

[49] City of Ontario, Cal. v. Quon, 130 S. Ct. 2619, 2629 (2010).

[50] *Rakas*, 439 U.S. at 143 n.12.

[51] *See* Smith v. Maryland, 442 U.S 735, 740 (1979).

[52] *See O'Connor*, 480 U.S. at 715 ("[W]e have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.").

[53] *Id.* (quoting *Oliver*, 466 U.S. at 178). *Oliver* in turn cites prior cases, separately for each of these three non-exhaustive factors. *See Oliver*, 466 U.S. at 178.

[54] *See supra* notes 47-51 and the accompanying text (explaining the various required normative characterizations of the interest in question).

[55] It is possible that as this version of the reasonable expectation test could be further

not recognize a particular privacy claim as legitimate or reasonable is irrelevant. This version of the reasonable expectation test can thus be broadly accommodating of those forces and tendencies, within our overall ambivalence, by which we are led, by any causal path, to minimize the value of privacy.

But this single stage "societally recognized" version is not the standard, mainstream interpretation of the reasonable expectation test, at least according to courts' literal analysis. The literal logic of most courts seems to involve a two-stage[56] reasonable expectation test, with the above-discussed "societally recognized" element remaining intact, but as only the second stage of a conjunctive, or logical "and," two-part test. The conjunctive nature of the two required stages means that this latter, two-part version of the reasonable expectation test inherits all of the positivism, conventionalism, insignificance, and openness toward any inclination to devalue privacy of the above single-stage version.

Under the judicially more orthodox two-stage version of the reasonable expectation test, the typically first required stage asks for some sort of showing, if only by a casual inference, that the affected person actually entertained or manifested, at the relevant time and in the relevant respect, some actual subjective expectation of privacy. As we have seen,[57] the affected person's actual expectation of privacy may not also be considered to be judicially legitimate, as in the case of the highly conscientious home burglar.[58] The possibility of illegitimate or unreasonable, even if well-calculated, subjective expectations of privacy seems, then, to motivate the accompanying second-stage requirement that the actual expectation of privacy also be "societally recognized."[59]

The crucial thing about this two-stage version is not merely that it inherits the "societally recognized" version's conventionalism, insignificance, and openness to any societal inclination to devalue a privacy interest.[60] The added initial subjective stage merely compounds the yielding problem. Courts may sensibly focus on the illegitimacy of a burglar's statistically well-founded expectation of privacy while discreetly ransacking a currently unoccupied cot-

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developed, one or more of the factors listed might be deployed in such a way as to temper the uncritical conventionalism of the basic formulation of this version of the test. *Supra* note 53 and accompanying text.

[56] *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 211 (1986) (two-part inquiry under *Katz* as first asking whether "the individual manifested a subjective expectation of privacy in the object of the challenged search"); Katz v. United States, 389 U.S. at 347, 353 (1967) (referring to the privacy on which "[the petitioner] justifiably relied while using the telephone booth"); United States v. Segura-Baltazar, 448 F.3d 1281, 1286 (11th Cir. 2006); United States v. Hanna, No. 11-20678-CR, 2012 WL 279435, at *4 (S.D. Fla. Jan. 30, 2012).

[57] *See supra* notes 43-44 and accompanying text.

[58] *See supra* note 43.

[59] *See supra* notes 54-55 and accompanying text.

[60] *See supra* note 56 and accompanying text.

tage.[61] But there can also be deeply disturbing reasons why a person, in some other scenario, formed no genuine subjective expectation of privacy, in whatever context. This may be because a government, or perhaps a government in conjunction with private actors, has made entirely clear that the affected person can expect intensive surveillance or data collection and analysis in that context. This condition can be made to seem "natural." Dystopia, typically, lacks subjective expectations of privacy.[62]

Thus, not all expected lack of privacy reflects conflicts with other important and fully morally justified government priorities. A lack of subjective privacy expectations may also reflect entirely unforeseen consequences of various policies, government policy mistakes, sheer power relationships and disparities, discrimination and bias of various sorts, market failures, unjustified fears, or other objectionable causal bases. These consequences might lead to the extreme case of the inculcated lack of actual, subjective expectations of privacy typical of classic dystopias.

Under the standard two-stage version of the reasonable expectation test, the absence of an actual, subjective expectation of privacy—however objectionably that state of mind might have been caused—is by itself enough to sink the constitutional privacy claim. There is typically no critical, detached further inquiry into how or why the affected person had no subjective expectation of privacy, even where an expectation of privacy would, all things considered,[63] be fully justified. Again, the tendency of both versions of the reasonable expectation test to accommodate our ambivalent inclination to de-prioritize privacy claims is clear.

Certainly, the reasonable expectation test might also overprotect, as well as under-protect, particular privacy interests, largely because of its uncritical conventionalism. Societal willingness or unwillingness to recognize[64] and endorse an expectation of privacy may partly reflect patterns of cultural group dominance and subordination. For example, if "society" limits the realistic protection of battered women, out of a concern for the "privacy" of the home, we might well suspect that the reference to "societal" recognition of the "reasonableness" of the privacy interest in question masks a conflict of interest between segments of that society.[65]

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[61] *See supra* note 43.

[62] *See supra* note 3 (references providing examples of dystopias involving a minimization of the value of privacy).

[63] Among the things to be considered, if not chief among them, would be the fundamental dignitary interests dismissed or minimized by the various scientists and philosophers referred to in Section II.

[64] For the language of societal recognition, see, *e.g.*, California v. Ciraolo, 476 U.S. 207 (1986).

[65] *See, e.g.*, Judith DeCew, *Privacy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/privacy (revised September, 2006). In abuse cases, ideas of basic personal dignity may more cogently support appropriate limits on "privacy" than a more

The underlying problem of a conventionalist, non-critical, only supposedly neutral test of "societal" approval is, however, more commonly reflected in an under-protection of privacy. Certainly, not all instances of "societal" de-emphasis of the value of privacy hold up well under reasonable critical examination. In broad terms, consider the political philosopher George Kateb's recognition that

> The individual's status can sometimes be attacked—injured and insulted—painlessly, without suffering. People can be manipulated, controlled, or conditioned softly and subtly, even invisibly, and not feel that they have been degraded or even wronged. . . . They may even find pleasure or numerous benefits in their situation, and feel grateful to those who rule them paternalistically or in such a narrowly regimented way as to withhold from them the contrasts and range of experience needed to create awareness of their dignity.[66]

Professor Kateb's general observation may apply as well to various groups' endorsement, or lack of endorsement, of the legitimacy of any particular privacy interest.

Thus, at its second stage, the "reasonable expectation of privacy" test apparently takes societal beliefs, however those beliefs were generated, maintained, and judicially ascertained, as fixed and unquestioned points, even in a constitutional context. On the test's own logic, the affected person is disabled from arguing, for example, that the society's rejection of a privacy interest was in any way illicitly imposed, engineered, or otherwise improperly reached. The test evidently does not permit meaningful questioning of a presumed societal consensus against recognizing a privacy interest. Apparently, all the affected person can do is argue, however plausibly or implausibly, that "society" does in fact currently recognize and endorse the privacy interest in question.[67]

The reasonable expectation test's overall tilt toward de-emphasizing the value of privacy is certainly not always a matter of any conscious intent or manipulation of public opinion. A society, or its most politically significant groups, may instead be largely unaware, at a direct or empathetic level, of the

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absolutist regime of privacy. *See also infra* notes 68-69 and accompanying text (discussing potential economic class conflicts.).

[66] GEORGE KATEB, HUMAN DIGNITY 19 (2011). *See also* Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, *in* NOMOS XIIXIIXIII: PRIVACY 1, 10 (J. Roland Pennock & John W. Chapman eds. 1971); H.J. McCloskey, *Privacy and the Right to Privacy*, 55 PHIL. 17, 28 (1980) (totalitarian regimes as undermining the possibility of outrage, or of shame or humiliation, over privacy invasions).

[67] The affected person might try to change the focus by seeking to manipulate the level of generality at which the relevant privacy interest is stated, generally by formulating the privacy interest at a higher and more general level. But this familiar "move" is likely to evoke predictable critique. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (for the arguments of Justices Scalia and Brennan).

nature of some particular privacy interests. For example, a society's key decision-makers may typically secure their vehicles in underground garages, or in gated communities.[68] To many such persons, an expectation of privacy in a car parked in an easily accessible driveway, or perhaps even on the public street directly in front of the home, may seem doubtful, unrealistic, poorly founded, or somehow insignificant.[69]

More broadly, a general problem of negative externalities[70] may exist in the form of privacy costs imposed on non-consenting third parties to any given transaction. Consider, for example, how privacy-invasive technology may come to seem pervasive and inevitable through barely noticed increments in adoption. Privacy-invasive technologies may well come "in[to] general . . . use,"[71] regardless of anyone's objection or principled resistance, through many voluntary market exchanges, such as purchasing vehicles with built-in GPS systems, or the latest cell-phone technology.

A voluntary market exchange between a willing buyer and seller may seem generally unobjectionable. But such individual, incremental transactions, when aggregated into the millions, inevitably change the broader culture and may have unintended and even unforeseen consequences for transacting parties in particular. At some point, the instantaneous locating and precise tracking of vehicles over periods of time, perhaps by government agencies, comes, for constitutional privacy purposes, "in[to] general . . . use."[72]

As any such technology comes into general use, the technology tends to become familiar, commonplace, reasonable, legitimate, and "societally recognized." Users and non-users of the particular technology, even if they are fully aware of all of the potentially significant privacy implications, may gradually become desensitized to, and even develop fatalistic attitudes toward,[73] the potential for privacy invasions.

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[68] *See* United States v. Pineda-Moreno, 617 F.3d 1120, 1121, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing en banc) (GPS device attached by police to car parked in home driveway).

[69] *See id.*

[70] *See* Richard A. Posner, *Orwell versus Huxley: Economics, Technology, Privacy, and Satire*, *in* ON NINETEEN EIGHTY-FOUR: ORWELL AND OUR FUTURE 183, 185 (Abbott Gleason, Jack Goldsmith & Martha C. Nussbaum eds. 2005); Frank H. Knight, *Ethics and Economic Reform*, *in* FREEDOM AND REFORM: ESSAYS IN ECONOMICS AND SOCIAL PHILOSOPHY 55, 83 (Liberty Press 1982 ed.) (1939). Of course, there are also positive externalities in the privacy realm, as when one is able to ride free on one's neighbors' costly efforts to safeguard the security and privacy of their homes. We also set aside any issues of "deforming" the process by which anyone develops or maintains a "taste" for privacy.

[71] Kyllo v. United States, 533 U.S. 27, 34 (2001) (discreet use of sense-enhancing thermal imagery technology to measure heat differentials radiating from a home).

[72] *Id.*

[73] For a classic expression of what one might call technological fatalism, *see* JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY (John Wilkinson trans., 1967) (1954). On the process

Crucially, though, recognizing that a privacy-restrictive practice has come into general use, and is in that sense reasonable and legitimate, means that it is precisely the loss of privacy, and not the privacy interest, that is now reflected in societal expectations[74] under the second stage of the reasonable expectation test for searches and seizures.[75] Here again, the reasonable expectation test tends to steer constitutional decision-making toward the inclination to de-emphasize the value of privacy interests.

C. *Further Sources of De-Emphasizing Privacy Under the Reasonable Expectation Test*

The general tendency to de-emphasize privacy interests may well be strengthened by two additional factors. First, the incremental, aggregative, cumulative nature of the relevant technological changes may produce, over time, what are referred to as discontinuous or "emergent"[76] cultural phenomena, without ever crossing any obvious cultural boundary line or conspicuously violating any recognized cultural principle. The society may then, more or less by default, validate a loss of privacy associated with whatever benefits may accrue from the technology in question.

Consider, as a low-tech example, that a police officer's merely random, fleeting, unmotivated and unsuspicious glance through partially opened house curtains, while passing by briskly on a public sidewalk. This glance would hardly count, for most of us, as a constitutional "search." But consider some incremental changes to this scenario. If we make the police officer's search gradually more intrusive, more frequent, and more lingering, and multiply these instances vastly, over time, the eventual result might be a significant shift in societal expectations of privacy, even if no dramatic qualitative change or breach of any principle was required at any stage.[77]

Less hypothetically, consider the difference between happening to look down on a residence while passing overhead in an airplane, and deliberately hovering, in person, or via surveillance drone technology, over a suspect property, perhaps for protracted periods of time. The Supreme Court, recognizing that happening to look down from a passing airplane on an otherwise privacy-protected yard is not a "search," and seeing no relevant, principled distinction, has

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of habituation to privacy loss, see Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 249 (2008).

[74] *See supra* note 59 and accompanying text.

[75] *See supra* notes 56-63 and accompanying text.

[76] *See, e.g.*, Timothy O'Connor & Hong Yu Wong, *Emergent Properties*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/properties-emergent (last revised Feb. 28, 2012).

[77] For theoretical background, see, *e.g.*, Dominic Hyde, *Sorites Paradox*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/sorites-paradox (last revised Dec. 6, 2011) (no single additional grain of sand turns a collection of grains of sand into a "heap" of sand, but a heap nevertheless inevitably arises).

held that repeated circling of a suspect property from a helicopter at 400 feet, while deliberately looking down with the unaided eye, also does not constitute a constitutional search.[78] Given enough additional, inconspicuous, incremental steps, would, say, a small mechanical drone's hovering silently but continuously over the property, with greater visual acuity but from a greater height, similarly not constitute a search, whether reasonable or unreasonable?[79] The problem of gradual and inconspicuous technological change thus threatens to unintentionally dilute the Fourth Amendment law of privacy.

The second development strengthening the reasonable expectation test's tendency to reinforce our impulse to subordinate privacy is more judicial, and more readily alterable. This development might be called the "privacy waiver over-extension problem."

This problem arises from the fact that some objects or transactions we might wish to invest with substantial privacy protection must, realistically, be shared with at least one other party. If we wish to do meaningful business with a bank; a telephone or Internet service provider; an employer; an educational institution; or a life, health, or disability insurer, we unavoidably must provide information that we might not also wish to share with other private enterprises, the government or a specific government agency, current or prospective employers, a gossip website, or spam e-mailers.

Worse, we can easily imagine holistic or "gestalt" effects, in which we reveal an apparently harmless bit of personal information to entity A, and a different but apparently also harmless item of personal information to entity B, where entities A and B, perhaps even with our unwitting consent, sell the two items of personal information to entity C, which is able to combine the two items of information, as in a chemical reaction, with devastating results to our privacy interests. Entities A and B may each be utterly unaware of any potential for embarrassment. And yet, this scenario in some ways resembles a Sherlock Holmes induction scenario, in which the great detective may arrive at a humiliating inference based largely on observing, say, publicly exposed clothing.

So again, a principled line may be difficult to draw. Many of us may prefer that a website share certain items of information about us with third parties, if that means (solely) that the advertising messages we inescapably receive are targeted to our specific needs and interests. Thus not all further sharing of personal information will strike us as objectionable.

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[78] *See* Florida v. Riley, 488 U.S. 445, 448-49 (1989). The lack of any clear and conspicuous qualitative difference may also help account for the current Supreme Court rule that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." Minnesota v. Carter, 525 U.S. 83, 90 (1998).

[79] For an account of drone surveillance in public places, with a suggestion of "inevitability," see, *e.g.*, *Is the NYPD Experimenting with Drones Over the City? Evidence Points to Yes*, CBSLocal.com (Jan. 23, 2012), http://cbslocal.com/2012/01/23/is-the-NYPD-experimenting (visited June 15, 2012).

But there should be no broad constitutional presumption that once we voluntarily disclose any personal information, for any purpose, to any impersonal entity, we thereby intend, or can be fairly held, to waive any further privacy interest in that information, absent a meaningful contractual agreement to the contrary.[80] Our privacy interests may vary not only with the information disclosed, but also with the nature of the entity to whom such information is disclosed and for what purpose the entity uses the information, including any dissemination to further parties.

Admittedly, by loose analogy, a plaintiff at common law who gave one defendant a release from liability might have been held—perhaps to the plaintiff's surprise—to have thereby given a release as well to all other co-defendants.[81] But it is arbitrary at best to widely assume that a waiver of privacy as to one entity should, in the absence of a meaningful contract or other evidence, also operate as a privacy waiver as to other known or unknown entities in a tightly digitally integrated, complex and unpredictable cyber-society.

Unfortunately, a sense of a broadly extended waiver rule exists in some of the contemporary police search cases. Thus, for example, Judge Richard Posner recently wrote that a telephone service provider knows a phone's number as soon as the call is connected to the telephone network, and obtaining that information from the phone company isn't a search because by subscribing to the telephone service the user of the phone is deemed to surrender any privacy interest he may have had in his phone number.[82]

We may or may not think that even a practically unavoidable disclosure of personal information to any entity should extinguish any privacy interest as to any other entities utilizing that information for any legitimate purpose. Our point is merely that the remarkably broad current waiver of privacy rule, under

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[80] For discussion of the fact that few persons read typical online "acceptance" agreements before clicking through, see Brandon T. Crowther, *(Un)Reasonable Expectation of Digital Privacy*, 2012 B.Y.U. L. REV. 343, 353-55 (2012). *See also id.* at 364 (arguing for a more empirical or investigative approach to determining societal expectations in matters of privacy). For discussion of the far greater practical, convenient, low cost, immediate retrievability of disclosed personal information under digital, as opposed to traditional paper, technologies, see Posner, *supra* note 73, at 248. For relevant judicial discussion, see *infra* notes 96-99 and accompanying text.

[81] For background and some distinctions, see, *e.g.*, Burson v. Kincaid, 3 Pen. & W. 57 (Pa. 1831); Baldwin v. Ely, 193 A. 299, 300-01 (Pa. 1937). A sort of "extended waiver" theory may underlie evidentiary rules recognizing that testimony on a particular subject or alluding to a particular fact may thereby "open the door" to further, adverse, otherwise impermissible inquiries by the opposing party. *See, e.g.*, People v. Mateo, 811 N.E.2d 1053, 1079 n.26 (N.Y. 2004).

[82] United States v. Flores-Lopez, 670 F.3d 803, 807 (7th Cir. 2012) (citing Smith v. Maryland, 442 U.S. 735, 742-43 (1979)). For brief relevant discussion, see David Cole, *Privacy 2.0*, THE NATION, Dec. 5, 2011, at 6.

the Fourth Amendment reasonable expectation test, tends to further reinforce our ambivalent inclination to de-emphasize privacy interests.

D. *The Contributions of Justice Sotomayor's Perspective in* Jones

Much of the distinct value of Justice Sotomayor's concurring opinion in the *Jones* case[83] lies in her elaboration of several of the above concerns. Justice Sotomayor notes in particular that vehicle GPS surveillance—presumably through attachment, or through the use of the vehicle's built-in system—is inexpensive and therefore less likely to be realistically limited than traditional, more expensive police surveillance techniques.[84] Such technology is not visually conspicuous.[85] And GPS technology generates a "precise, comprehensive record"[86] that can be readily stored[87] and combined with other data, for whatever legitimate purpose, for years into the future.[88]

Most pointedly, Justice Sotomayor, without relying on the "emergent" effects problem,[89] asks about public expectations as to privacy, even when those expectations are based on clear understanding of the phenomena in question, which may not be widely available, particularly given the typically unread[90] waiver forms of cyberspace.[91] In Justice Sotomayor's words: "I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political[92] and religious beliefs, sexual habits, and so on."[93]

Particularly with a distinctly polarized electorate,[94] and with the increasing capacity to intelligently sort, analyze, and creatively synthesize massive quanti-

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[83] United States v. Jones, 132 S. Ct. 945, 954 (2012) (Sotomayor, J., concurring).

[84] *See id.* at 956 (Sotomayor, J., concurring). None of this, of course, is to deny the considerable benefits of a vehicle GPS system, or of GPS units more generally.

[85] *See id.* (Sotomayor, J., concurring).

[86] *Id.* at 955 (Sotomayor, J., concurring).

[87] *See id.* at 955-56 (Sotomayor, J., concurring).

[88] *See id.* (Sotomayor, J., concurring).

[89] *See supra* text accompanying notes 79-80.

[90] *See* Crowther, *supra* note 80, at 353-55.

[91] *See Jones*, 132 S. Ct. at 954, 956 (Sotomayor, J., concurring).

[92] Political campaign contribution records, increasingly convenient and available to anyone for any purpose, are a source of privacy concern for some persons, especially when such records are combined with other readily available data. *See, e.g.*, Tom Bartlett, *Hey, Here's Who Your Neighbors Gave Money To. Sincerely, Harvard*, PERCOLATOR BLOG (May 31, 2012, 11:39 AM), http://chronicle.com/blogs/percolator.

[93] *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring).

[94] *See, e.g.*, R. George Wright, *Self-Censorship and the Constriction of Thought and Discussion Under Modern Communications Technologies*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 123 (2011).

ties of raw data,[95] the potential for damaging detected or undetected invasions of privacy will similarly increase. On these grounds, Justice Sotomayor sensibly concludes that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."[96] Here, Justice Sotomayor expands upon what we have referred to as the "privacy waiver over-extension problem."[97]

Justice Sotomayor rightly observes that in an intensive digital environment, inevitably "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[98] On reflection, we do not view all third parties as relevantly alike. Justice Sotomayor indicates that she "would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."[99] Given the resolvability of the *Jones* case on other grounds,[100] Justice Sotomayor had no occasion to go further than this initial observation,[101] particularly given the complexity[102] of the further, more contextual issues.

When the courts take up such further privacy issues, as seems inevitable, they should bear in mind both the increasing questionability[103] of our deepest justifications for valuing privacy, and the ways in which law and culture interact to steer our ambivalence about privacy toward, more often than not, a devaluation of search and seizure privacy interests.[104]

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[95] This is again not to deny the various social benefits that could accrue from such capacities.

[96] *Jones*, 132 S. Ct. at 954, 957 (Sotomayor, J., concurring).

[97] *See supra* notes 79-82 and accompanying text.

[98] *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring). For a sense of the current state of the personal data collection and refining art, see Natasha Singer, *You For Sale: Mapping, and Sharing, the Consumer Genome*, N.Y. TIMES, June 17, 2012, at BU1, *available at* http://www.nytimes.com/2012/06/17/technology/acxiom-the-quiet-giant-of-consumer-database-marketing.html?pagewanted=all&_moc.semityn.www (focusing on the Axciom Corporation's integrated, "360 degree" personal information database collection and marketing activities).

[99] *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

[100] *See id.* (Sotomayor, J., concurring).

[101] *See id.* (Sotomayor, J., concurring).

[102] *See id.* (Sotomayor, J., concurring).

[103] *See supra* Section II.

[104] *See supra* Section III.