Expectation is Key  
Applications by Mark Csoros



In this article, there won’t be a single application that is completely to do with a court proceeding. Criminal procedure, rightly defined, applies to everything from preventative policing to parole, but only part of criminal procedure should be discussed under this resolution. If you haven’t read the Resolutional Overview yet, I recommend you do so, but here’s the part you really need to know for right now:

“…you have a right to privacy when you have a reasonable expectation of privacy. If you know you’re being observed, or you unreasonably think you aren’t being observed, that right to privacy vanishes.”[[1]](#footnote-1)

This standard for determining when a right to privacy exists was set by Supreme Court Justice John Harlan, in the landmark SCOTUS case *Katz v. U.S.* The two-part privacy test has been a part of privacy jurisprudence for decades and has been used to decide some cases that we’ll view as a part of this resolution.

The reason why I bring it up is that in court, most reasonable expectations of privacy vanish. If the court wants to view something about a criminal case, they subpoena it. You cannot refuse a subpoena, so it would be silly to claim an expectation of privacy after one has been served. Similarly, when presented with a warrant backed by reasonable suspicion of wrongdoing, you can’t merely tell the searching officers to back off, because you expect your privacy. You’ll be handcuffed and put in the backseat of the police cruiser. Now, we will discuss court cases that deal with the admissibility of evidence gathered in violation of privacy rights, but we won’t discuss whether or not it’s allowable to serve warrants or subpoenas.

For our purposes, that means that we’re restricted to applications that occur when a reasonable expectation of privacy exists. When there is no reasonable expectation of privacy, that right to privacy doesn’t exist, and there is no conflict in the example. So, affirmatives, don’t run an application about a criminal who got served with a warrant, got searched, and was convicted. That doesn’t prove conflict. Instead, focus on where a criminal had an expectation of privacy, had that privacy violated, and lives were saved. That does prove conflict, and make negative face up to the application, instead of poking a hole in it and quickly moving on.

# The Exclusionary Rule

The exclusionary rule is one of those applications that can go either way. The basic premise of the exclusionary rule is that any information or evidence found in violation of a defendant’s Constitutional rights has to be excluded (hence the name) from a criminal proceeding. If a police officer searches your home without a warrant and finds incriminating evidence, that evidence cannot be used in court. This is a strong protection for privacy, and a harsh blow to truth-seeking. Justice Benjamin Cardoza, of the New York Court of Appeals, once protested that the exclusionary rule meant that, “The criminal is to go free because the constable blundered.”[[2]](#footnote-2)

Obviously, on affirmative, there is room to protest that the exclusionary rule is a dangerous example of why privacy should be less valued than truth-seeking. On negative, though, you have several decades of jurisprudence to draw from, with all the attendant reasoning about the basis of individual privacy rights. *Weeks v. U.S.*[[3]](#footnote-3), *Mapp v. Ohio*[[4]](#footnote-4), and *Kyllo v. U.S.*[[5]](#footnote-5) are all solid decision that contain a treasure chest of privacy theory and reasoning on individual rights, and I would encourage you to read them and use them.

# Third Party Doctrine

In a nutshell, the third-party doctrine says that we don’t have an expectation of privacy with information that we turn over to a third party. This “third party” term means anyone that you voluntarily turn information over to, like your bank, phone company, or internet service provider (ISP). Two cases set this doctrine, *U.S. v.* *Miller*, and *Smith v. Maryland*. In *Miller,* the Court held that:

“The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government…This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.”*[[6]](#footnote-6)*

Miller was intending to circumvent the U.S. whisky tax and got caught because law enforcement accessed his financial information. In *Smith,* a very bad person was caught and convicted because of proactive policing and a cooperative third party.[[7]](#footnote-7) I won’t give you all the details of that case, but it’s a landmark for modern investigative procedures, so I heartily recommend you read it. The key takeaway, though, is that even trust in third parties doesn’t prevent investigators from seizing that information without a warrant. That idea held firm until this year, when SCOTUS decided *Carpenter v. U.S.*

# *Carpenter v. U.S.*

This case also falls partly under the exclusionary rule but is deserving of special attention because of its recency and because it poses a bit of a challenge to the third party doctrine. This case dealt with cell site location information (CSLI), which can be used to determine the exact location (and location history) of pretty much anyone with a cell phone. The Court held that:

“Having found that the acquisition of Carpenter’s CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records.”

Why? Because every detail of where we’ve been and who we’ve been with is not publicly available information, and therefore requires a warrant to access. Even though CSLI is available to a third party, the severity of the privacy intrusion led the court to decide that a warrant was needed. This decision breaks with the third party doctrine but mirrors some other SCOTUS cases about privacy in a technological age. One of those cases is *Dow Chemical v. U.S.*[[8]](#footnote-8), where the technology in question was a drone that could peer over the walls of a chemical plant.

Consistently, though, the Court has held that technological improvements in surveillance methods still require warrants to use, since most technologies reveal details that aren’t accessible by the general populace. The interesting thing to note is that Carpenter was a really bad dude. He was in a group of men who went around robbing electronics stores at gunpoint and was later found to be guilty of several charges, which earned him a sentence of 116 years in prison. The decision to invade Carpenter’s privacy helped us catch and try an objectively guilty and dangerous criminal. Truth-seeking at the expense of privacy helps take criminals off the street.

# Exceptions to the Rule

Now, there are times where a warrantless search can be conducted. These are powerful examples for affirmative, as they demonstrate how we’re willing to sacrifice privacy when truth-seeking is necessary for the community. Justia, an online legal information site, lists six exceptions to the warrant requirement:

* **Consent.**Police may conduct a search without a search warrant if they obtain consent. Consent must be freely and voluntarily given by a person with a reasonable expectation of privacy in the area or property to be searched.
* **Plain View.** An officer may seize evidence without a warrant if an officer is on the premises lawfully and the evidence is found in plain view.
* **Search incident to arrest.** While conducting a lawful arrest, an officer may search an individual's person and their immediate surroundings for weapons or other items that may harm the officer. If a person is arrested in or near a vehicle, the officer has the right to search the passenger compartment of that vehicle.
* **Exigent Circumstances.** Police are not required to obtain a search warrant if they reasonably believe that evidence may be destroyed or others may be placed in danger in the time it would take to secure the warrant.
* **Automobile Exception.** An officer may search a vehicle if they have a reasonable belief that contraband is contained inside the vehicle.
* **Hot Pursuit.** Police may enter a private dwelling if they are in "hot pursuit" of a fleeing criminal. Once inside a dwelling, police may search the entire area without first obtaining a search warrant.[[9]](#footnote-9)

In any of these scenarios, the need to seek out truth comes before the privacy rights of individuals. Of course, reasonable belief is a broad and unclear standard, and evidence is often banned from trial (suppressed, in legal parlance) because a search was based on an unreasonable expectation. But, our law has mechanisms to allow for quick and efficient searches when the public safety requires it.

# Conclusion

You might be wondering why I spent so much time going over Supreme Court cases and 4th Amendment particulars. That’s a great question, and to answer it I’m going to use yet another excerpt from yet another Supreme Court case.

“The basic purpose of the Fourth Amendment, which is enforceable against the States through the Fourteenth, through its prohibition of "unreasonable" searches and seizures is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”[[10]](#footnote-10)

That was from *Camara v. Municipal Court of City and County of San Francisco*, a 1967 case that allowed a resident to deny access to building inspector who didn’t obtain a warrant. The reason why I quoted it was to emphasize that in the U.S. we define privacy rights through the Fourth Amendment. If you know Fourth Amendment jurisprudence inside and out, you will never lack for an application this year. Every single SCOTUS case that deals with the Fourth Amendment is a real-life example of the privacy vs truth-seeking debate playing out in the highest echelons of constitutional and philosophical thought.

I know I’ve given you a lot to research and a lot of leads to track down, so I recommend you make a list of key cases and concepts to help you remember the details. Also, don’t forget that the dissents have value as well. Dissenting judges may be in the minority, but they often bring up good points that you can co-opt or quote.

Have fun this year, do your research with diligence, and I wish you the best of luck.

1. Csoros, Mark. “Seeking Truth, Ethically”; Monument Publishing 2018. [↑](#footnote-ref-1)
2. *People v. Defore* [1962] 242 N.Y. 13; 150 N.E. 585 (Court of Appeals of New York). [↑](#footnote-ref-2)
3. “*Weeks v. United States*, 232 U.S. 383 (1914).” *Justia Law*, supreme.justia.com/cases/federal/us/232/383/case.html. [↑](#footnote-ref-3)
4. “*Mapp v. Ohio,* 367 U.S. 643 (1961).” *Justia Law, supreme.justia.com/cases/federal/us/367/643/case.html.*  [↑](#footnote-ref-4)
5. “*Kyllo v. United States*, 533 U.S. 27 (2001).” *Justia Law*, supreme.justia.com/cases/federal/us/533/27/case.html. [↑](#footnote-ref-5)
6. *“United States v. Miller”* 425 U.S. 435 (1976) Legal Information Institute, www.law.cornell.edu/supremecourt/text/425/435. [↑](#footnote-ref-6)
7. “*Smith v. Maryland”* 442 U.S. 735 (1979) https://supreme.justia.com/cases/federal/us/442/735/ [↑](#footnote-ref-7)
8. *“Dow Chemical Co. v. United States,* 476 U.S. 227 (1986).” *Justia Law*, supreme.justia.com/cases/federal/us/476/227/case.html. [↑](#footnote-ref-8)
9. “Criminal Law.” *Justia*, www.justia.com/criminal/docs/search-seizure-faq/. [↑](#footnote-ref-9)
10. “*Camara v. Municipal Court*, 387 U.S. 523 (1967).” *Justia Law*, supreme.justia.com/cases/federal/us/387/523/case.html. [↑](#footnote-ref-10)