



By Alex Kozinski  
and Stephanie Grace

# Pulling plug on privacy

How technology helped make the 4th Amendment obsolete

"We are gathered here today to mourn the loss of a dear friend, the Fourth Amendment. Born on the freedom-loving soil of early America, the Fourth Amendment will be remembered as the bulwark of the liberty we once called privacy. For ye, we mourn."

As you can see, we're working on a eulogy for the Fourth Amendment, the part of the Constitution guarding against "unreasonable searches and seizures" — in effect, a privacy provision.

When did the Fourth Amendment die, you ask?

Recently, but it's been sick for a while.

So why haven't you heard about it?

Because you're the murderer. We all are. Our weapon of choice? Most recently, the [smartphone](#), which, with our collective blessing, allows [law enforcement](#) to monitor our real-time geographic location. Although a [bill recently proposed](#) by Sen. Ron Wyden, D-Ore., would require police to obtain a warrant before turning our cellphones into tracking devices, such legislation may come too late to save the Fourth Amendment from this fatal blow.

It started with the supermarket loyalty programs. They seemed innocuous enough — you just scribble down your name, number and address in exchange for a plastic card and a discount on Oreos. The problem, at least constitutionally speaking, is that the Fourth Amendment

protects only what we reasonably expect to keep private. One facet of this rule, known as the third party doctrine, is that we don't have reasonable expectations of privacy in things we've already revealed to other people or the public.

You would, for example, have a reasonable expectation of privacy for a photograph on your nightstand — meaning the police would need probable cause and a warrant before taking a peek. But you lose that expectation of privacy when you tack the souvenir photo from Foamhenge on



Use a smartphone? Forget privacy.



the office bulletin board to make co-workers envious.

Letting stores track our purchases may not appear to be permitting an intensely personal revelation but, as the saying goes, you are what you eat, and we inevitably reveal more than we thought. Have diapers in your cart? You probably have a baby. Tofu? Probably a vegetarian. A case of Muscatel a week? An alcoholic (with

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poor taste, at that). The cards also track the “where” and “when” of our shopping expeditions. Making a late-night run to a convenience store near your ex-girlfriend's house? Buying posters and markers the day before a political rally? If you swiped your card, all that information is now public.

If you think police have turned a blind eye to this wealth of information, guess again. Without the protections of the Fourth Amendment, the police are free to mine the commercial databases storing our personal information without any suspicion whatsoever. Consider the case of Philip Scott Lyons in 2004: Police arrested the firefighter for arson after discovering he purchased a fire starter with his Safeway Club Card. The charges weren't dropped until someone else confessed; not everyone will be so lucky.

These cards were just the beginning. Fast Track passes quickly followed — with their lure of a shorter commute for a little

privacy. Then came eBay and Amazon, which save us from retyping our billing and shipping information, if only we create an account. Before long, convenience became paramount, and electronic tracking became the norm. Nowadays, Google not only collects data on what websites we visit but uses its satellites to take pictures of our homes. GPS manufacturer TomTom has collected — and disclosed to law enforcement — data on where people are speeding, so police could catch them in the act. Indeed, if Mexico's highly anticipated experiment with [iris scanners](#) goes well, we may soon be going through airport security, making ATM withdrawals and buying groceries, quite literally, with the blink of an eye.

With so little left private, the Fourth Amendment is all but obsolete. Where police officers once needed a warrant to search your bookshelf for “Atlas Shrugged,” they can now simply ask Amazon.com if you bought it. Where police needed probable cause before seizing your day planner, they can now piece together your whereabouts from your purchases, cellphone data and car's GPS. Someday soon we'll realize that we've lost everything we once cherished as private. And as we grieve the loss of the Fourth Amendment, we'll be forced to look deep in our hearts—and at the little pieces of plastic dangling from our keychains — and ask ourselves if it was all worth it. R.I.P. ■

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