

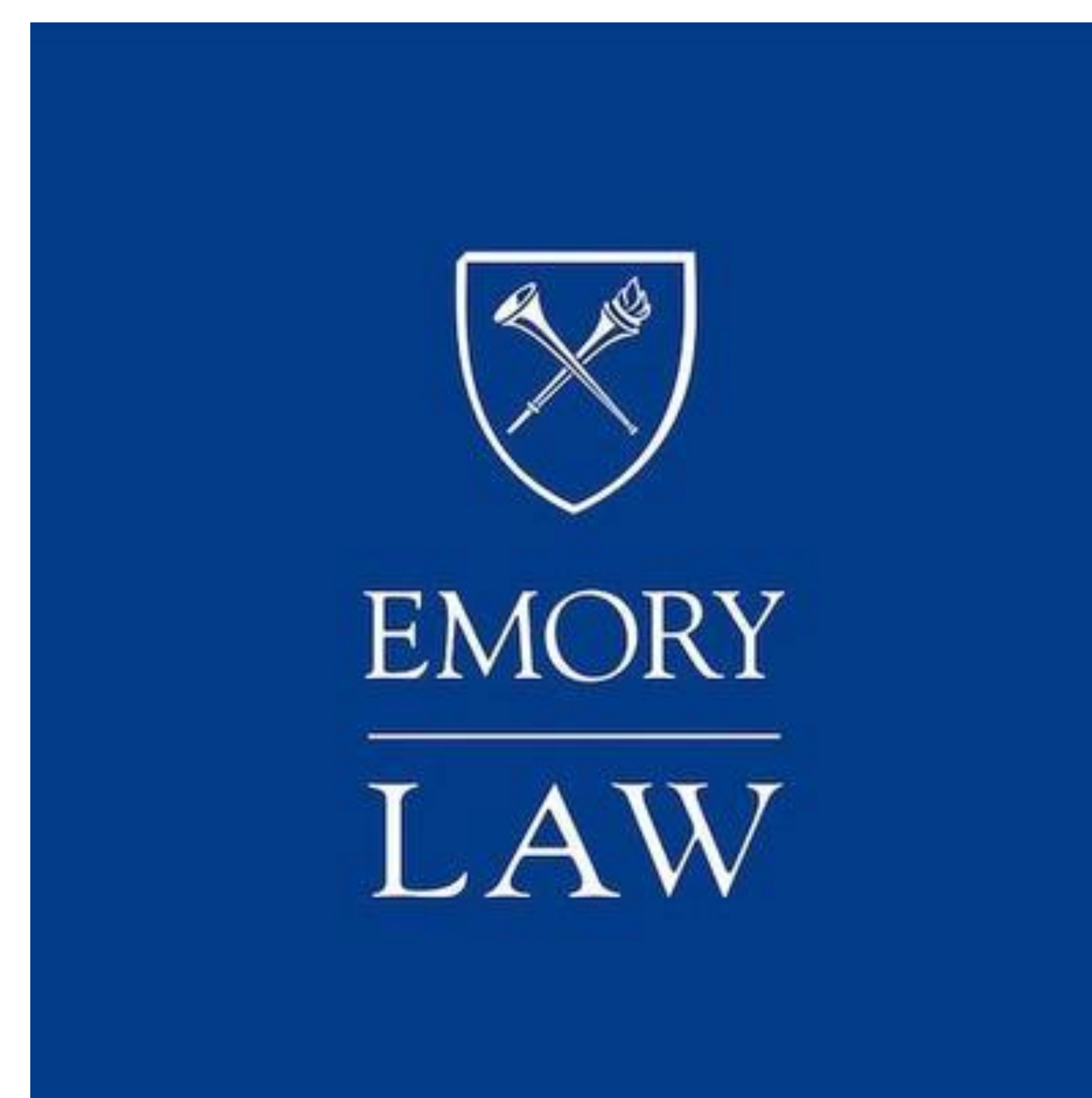
Katz's Imperfect Circle: An Empirical Study of Reasonable Expectations of Privacy

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Under *Katz v. U.S.*, 4th Amendment restricts government actions only when (1) they intrude upon an individual's subjective expectation of privacy, and (2) society recognizes that expectation as reasonable

- Empirical claims re lay REPs = center of 4th Amendment analysis
- Fear of circularity but limited evidence

Slobogin & Schumacher (1993), and subsequent confirming studies, show disconnects between judicial precedent about lay REPs and actual lay REPs

→ Q1: Why the discrepancies? Have they continued? Have they worsened with more permissive SCOTUS precedent? Or collapsed due to circularity?

Scholars and justices: social science evidence, such as polling and survey data, could usefully anchor 4th Amendment analysis

→ Q2: But could such evidence affect privacy views?
= way to test which Katzian circularity problems actually arise

- I. **Theory:** scholars, judges, justices acknowledge *Katz* is circular, but narrow: scholars focus on judicial influence, judges on government manipulation
→ we show there are *six possible forms of circularity*
- II. **Empirical Questions:** which forms of circularity manifest and why?
→ we conduct a survey and an experiment to test the different forms
- III. **Normative proposal:** various solutions and problems
→ we use social science evidence, such as polling and survey data, to identify REPs and also check for improper influence

I: Six Degrees of Katzian Circularity

1. The judicial self-reflection circularity problem, w 2 aspects:

1a. judges reflect their own expectations/preferences when identifying REPs;

1b. judicial decisions influence the REPs they claim to be reflecting.

2. The government manipulation circularity problem, w 2 aspects:

2a. governments can manipulate societal expectations through more intrusive actions → 4th Amendment rights can be under-protected;

2b. governments can exploit lower individual subjective expectations of particular groups → 4th Amendment rights can be under-protected.

3. The judicial ossification of expectations feedback loop, w 2 aspects:

3a. police responsiveness to crime hampered because court rulings stymie innovation and technological development

→ 4th Amendment rights can be over-protected

3b. police responsiveness to crime hampered because court rulings prevent police use of what becomes common technology

→ 4th Amendment rights can be over-protected.

3 Empirical Questions: which forms of circularity manifest and why?

- a. To what extent do lay privacy views diverge from and/or move into closer alignment with judicial precedent over time?
→ test 1 *judicial reflection & influence*
- b. To what extent are lay privacy views influenced by social science evidence about others' privacy views?
→ test 2 *malleability generally*
- c. Are laypeople especially likely think investigative uses of novel technology violate reasonable privacy expectations?
→ test 3 *ossification*

Methods: We conduct (1) a survey and (2) an experiment:

- U.S. adult mTurk participants (N=118, Mage = 42.17) completed both Study 1 and Study 2, during one session, in that order

Methods: The Survey

Ps reviewed 20 scenarios describing police investigative methods, rating each from 0 (Not At All Intrusive) to 100 (Extremely Intrusive)

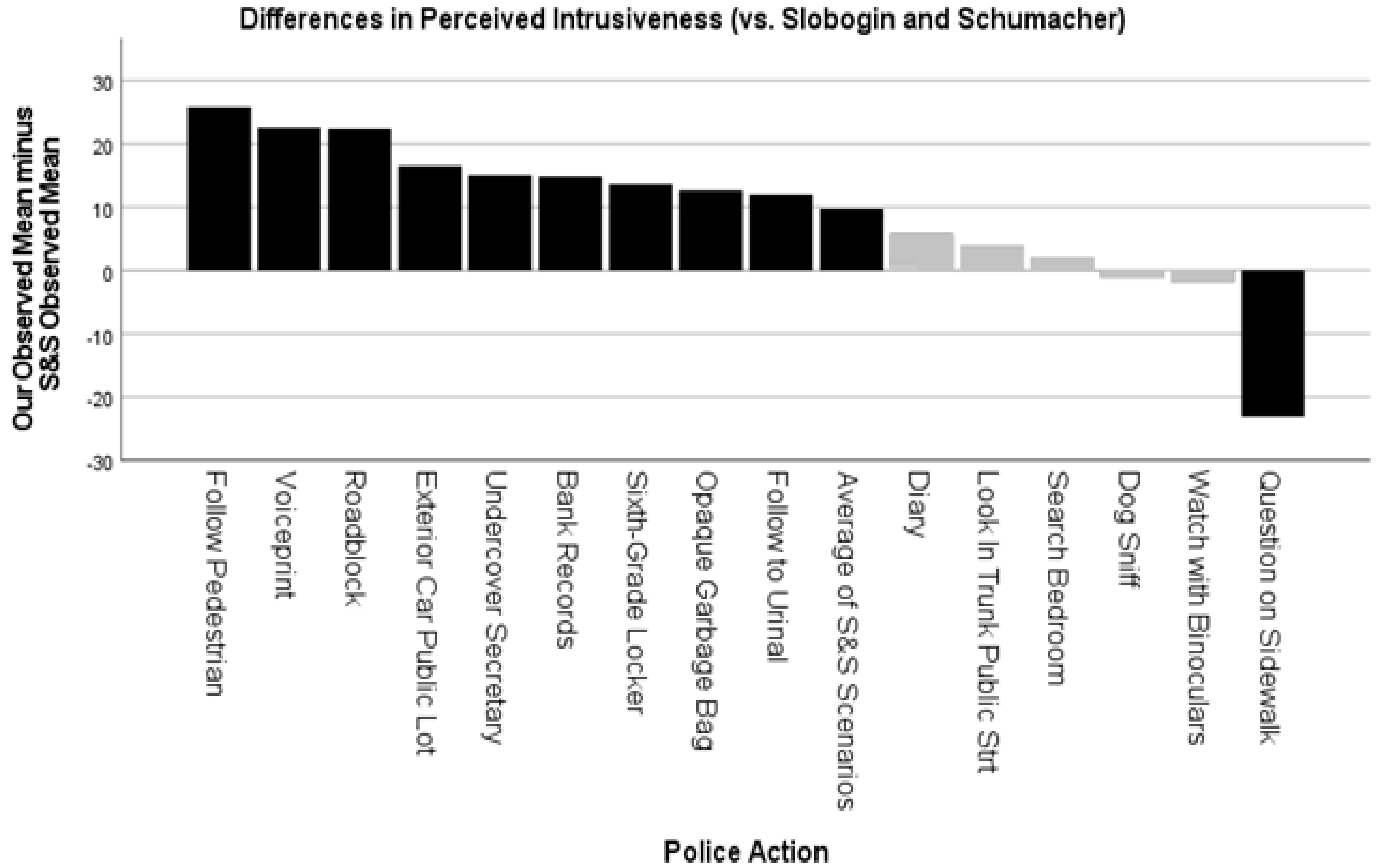
- 15 “SS Scenarios” involve police methods about which judicial precedent has not changed materially since 1993
- 5 new “JJ Scenarios” that involve novel technology

Lay Expectations

	Scenario: Police	JJ Mean (SD)[Rank]	SS Mean (SD) [Rank]
SS	inspect car exterior in public	36.0 (30.8) [15]	19.5 (22.0) [15]
SS	question person on public sidewalk for 10 minutes	46.4 (28.3) [14]	69.5 (33.2) [5]
SS	dog sniffs person's body	57.1 (26.9) [13]	58.3 (31.6) [10]
SS	go through garbage in opaque bags	57.7 (30.5) [12]	45.0 (30.9) [12]
SS	tail pedestrian in police car	58.5 (25.8) [11]	32.7 (39.9) [14]
SS	stop drivers at roadblock to view occupants	59.5 (27.1) [10]	37.1 (29.6) [13]
SS	watch person in yard from afar w/ binoculars	66.8 (28.1) [9]	68.6 (24.3) [7]
SS	obtain person's voiceprint	70.8 (27.2) [8]	48.2 (31.7) [11]
SS	look in car trunk on public street	71.2 (22.0) [7]	67.2 (31.8) [8]
SS	search a 6 th -grader's locker	73.9 (24.1) [6]	60.3 (28.3) [9]
SS	use workplace secretary as undercover agent	84.0 (17.9) [5]	69.0 (32.3) [6]
SS	follow person to urinal & listen	84.5 (20.1) [4]	72.5 (26.4) [3]
SS	peruse bank records	86.4 (17.5) [3]	71.6 (24.8) [4]
SS	search person's bedroom	87.3 (16.4) [2]	85.2 (18.5) [2]
SS	read person's personal diary	91.3 (14.9) [1]	85.6 (20.7) [1]
JJ	wear "smart glasses" than check person's ID w/ facial rec. software	60.9 (31.6)	
JJ	fingerprint w/ portable scanner	63.4 (28.1)	
JJ	check retinas w/ portable scanner	78.6 (23.2)	
JJ	fly drone w/ camera 400 yds above person's back yard	80.6 (21.9)	
JJ	place small electronic "bug" on person's office desk	89.0 (17.3)	

1. Scenarios in bold have been deemed by the SCOTUS to involve no/lowered REP — still no correlation to laypersons' views
2. No significant decrease in rank order or absolute size between SS 1993 and JJ 2023
3. Except for stops on the street — considered less intrusive

Change in REPs over Time



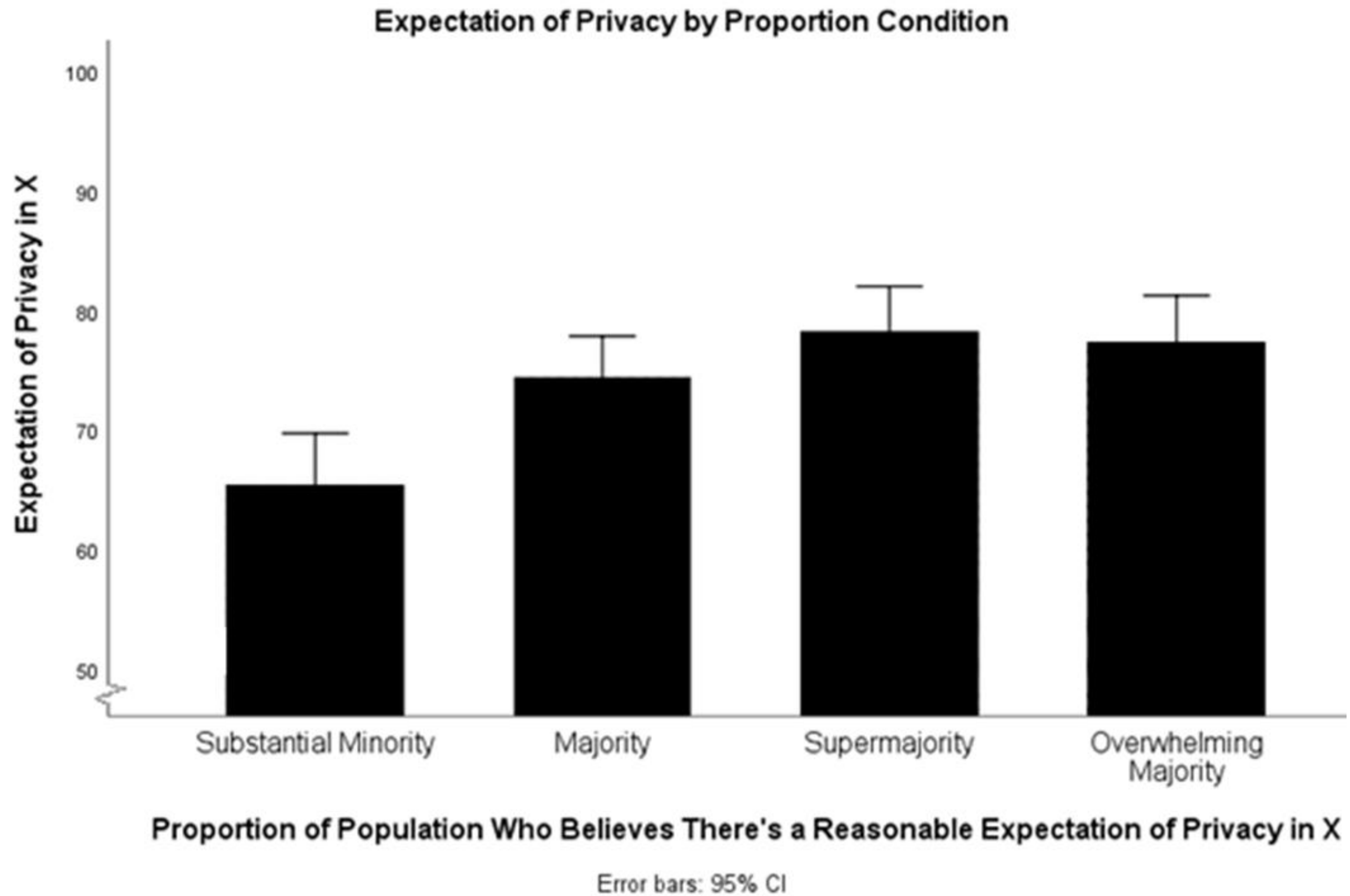
1. Ratings of SS Scenarios today are correlated tightly with those in 1993
 $r = .77$ (p 's $< .001$)
2. no correlation between ratings of SS Scenarios and SCOTUS precedent
 $r = -.28$ ($p = .32$)
→ still strong evidence of 1a *judicial self-reflection*
3. Ps rated JJ Scenarios as more intrusive than SS Scenarios
 $t(117) = 4.82$ ($p < .001$)
→ evidence of 3a/3b *judicial ossification*
4. Only significant change between SS 1993 and JJ 2023 were *increases*
→ no evidence of 1b, 2a or 2b
5. Except for stops on the street = *less* intrusive
→ effect of *Terry* or police action → 1b, 2a or 2b in extreme cases only

Methods

P's reviewed 8 scenarios in which police accessed information stored by a **novel technology**, rating each scenario from 0 (Clearly No Expectation of Privacy) to 100 (Clear Expectation of Privacy)

- For each scenario, P's saw social science evidence that some (variable) proportion of society believed that people have a reasonable expectation of privacy in the relevant information
- Varying by size and if verbal or numerical description:
 - 23%, or a significant minority;
 - 51%, or a majority;
 - 74%, or a supermajority;
 - 89%, or an overwhelming majority.

Impact of Others' REPs



Study 2 Key Results

1. Proportion of REP reported in social science evidence affects Ps privacy expectations ($p < .001$)
2. Framing (linguistic vs. numeric) of proportion had no effect
3. Ps reported greater REPs for scenarios in Majority, Supermajority, and Overwhelming Majority conditions vs Substantial Minority (all p 's $< .003$) (pairwise comparisons)
4. Ps expectations did not differ among the three majority conditions (all p 's $> .30$)

Overall Findings Discussion

Disconnects between judicial precedent about privacy and lay privacy views have not closed over the past 30 years

→ consistent with Circularity 1a *judicial self-reflection*

In fact, those disconnects have mostly increased

→ suggests that Circularity 1b, 2a, & 2b, *influence* of precedent & routine police practice, are overstated

Sole exception: questioning on a public sidewalk for 10 minutes = significantly *less* intrusive than SS

— extraordinary cultural and media attention paid to stop-and-frisk policing

→ may be evidence of Circularity 1b, *judicial influence*: effect of *Terry v. Ohio*

→ or may be evidence of 2a or 2b, *Govt influence*: inured by Govt action

— further research required to differentiate

New technology JJ Scenarios considered more intrusive than SS older/no tech Scenarios

→ consistent with Circularity 3a & 3b, *judicial ossification*

Social science evidence influences lay expectations of privacy : Ps reported greater REPs when told that a majority of others expected privacy

Possible Solutions — & their limits:

1. Trespass — cannot avoid *REP analysis* e.g. *FL v. Jardines*
2. Common-law principles — cannot avoid *judicial self-reflection*
3. State and federal legislation — cannot avoid *government manipulation*
4. Juries instead of judges —
 - similar irrationalities e.g. hindsight bias & knowledge bias
 - geographic variation
 - no precedent value
5. Use social science
 - a. Arguments against: dangers are overstated e.g. geographic variation
 - b. Courts are already doing it, selectively e.g. *Samia v. U.S.*
 - c. Especially beneficial for identifying expectations → esp. 1a; including changes due to manipulation → 3a & 3b

Questions & Comments