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John M.A. DiPippa

University of Arkansas at Little Rock William H. Bowen School of Law, jmdipippa@ualr.edu

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SEARCHING FOR THE FOURTH AMENDMENT

*John M.A. DiPippa**

I. INTRODUCTION

The fourth amendment¹ is unique among the provisions of the Bill of Rights. Unlike other amendments, where the motivation behind their passage is unclear, we know why the fourth amendment was enacted: to restrain judicial power and to prohibit general searches.² The memory of the oppressive writs of assistance in the colonies, and before them the general warrants in England, were still fresh in the minds of the men who participated in the formation of the Constitution and the Bill of Rights.³ The absence of a Bill of Rights and, in particular, a search and seizure provision was a matter of some controversy during the debate over the ratification of the Constitution.⁴

The language the framers chose possesses both "the virtue of brevity and the vice of ambiguity."⁵ The fifty-four words of the amendment

* Assistant Professor of Law, University of Arkansas at Little Rock School of Law; B.A., West Chester University; J.D., Washington and Lee University.

1. U.S. CONST. amend. IV states:

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

2. "The Fourth Amendment . . . was drafted by the framers for the express purpose of providing enforceable safeguards against a recurrence of highhanded search measures" carried out in England and in the colonies. LANDYNSKI, *SEARCH & SEIZURE AND THE SUPREME COURT* 20 (1966) [hereinafter cited as LANDYNSKI]. See also Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 50 (1974) ("The central theme of the amendment is its prohibition against general searches."). The clarity of the Framers' purpose is in marked contrast to the ambiguity surrounding other sections of the Constitution. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (historical background of fourteenth amendment "inconclusive" on its application to public education).

3. LANDYNSKI, *supra* note 2, at 38-42. Luminaries like Patrick Henry and James Madison argued that the potential scope of federal power required a prohibition on general searches. *Id.* at 40-41.

4. Virginia and New York ratified the Constitution but with a call for a Bill of Rights which would include a proscription on unreasonable searches and seizures. North Carolina also proposed a Bill of Rights with a search provision but refused to ratify the Constitution. Although both Pennsylvania and Maryland ratified the Constitution without a call for any amendments there was strong sentiment in both states for a Bill of Rights with two search and seizure provisions. *Id.*

5. *Id.* at 42. James Madison's first draft of what was to become the fourth amendment read: The rights of the people to be secure in their persons, their houses, their papers, and their other property shall not be violated by warrants issued without probable cause,

absolutely proscribe unreasonable searches and seizures while at the same time establish standards for the issuance of search and arrest warrants.⁶ On the other hand, the amendment does not define any of its key terms, and does not explain the relationship of the reasonableness clause to the probable cause and particularity clause.⁷

supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Id. at 41.

The Committee to which the draft was referred altered it so that it read:

The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the places to be searched, or the persons or things to be seized.

Id.

Benson of New York wanted to make the provision stronger by deleting the phrase "by warrants issuing" and substitute the words "and no warrant shall issue" but his motion did not command a majority vote. *Id.* at 41-42. Yet Benson's Committee reported his version to the whole body and it was this version which was adopted and ultimately became the fourth amendment. *Id.* Apparently, Benson, the chairman of the Committee, manipulated the process to report out his defeated version and managed to win approval. N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 101-03 (1937). See also Stelzner, *The Fourth Amendment: The Reasonableness and the Warrant Clauses*, 10 N. M. L. REV. 33, 38-41 (1980).

6. The police have probable cause when: "[T]he facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that [a suspect] had committed or was committing an offense [or that particular items connected with criminal activity are located in a particular place]." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Although the requirement of probable cause applies to all warrants, some administrative warrants are governed by a special probable cause standard. *Camara v. Municipal Court*, 387 U.S. 523 (1967). Probable cause to issue warrants for area searches for housing code compliance exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular building." *Id.* at 538. Warrants must be issued by a "neutral and detached magistrate." *Johnson v. United States*, 333 U.S. 10 (1948). Compare *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Attorney General of State not neutral and detached) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (magistrate who accompanied police in raid on adult bookstore to review obscenity of items seized no longer detached). A magistrate need not be a lawyer or a judge so long as he or she is neutral and detached and is capable of determining probable cause. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). Any warrant issued must particularly describe the place to be searched and the things to be seized. *Marron v. United States*, 275 U.S. 192 (1927). Probable cause is a non-technical, common-sense concept. *Illinois v. Gates*, 462 U.S. 213 (1983). Reviewing courts must defer to a magistrate's determination of probable cause if a "substantial basis" supports it. *Massachusetts v. Upton*, 104 S. Ct. 2085 (1984).

7. LANDYNSKI, *supra* note 2, at 42. Landynski argued that the historical background of the amendment made the relationship between the clauses clear:

The first clause—"The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated"—recognized as already existing a right to freedom from arbitrary governmental invasion of privacy and did not seek to create or confer such a right. It was evidently meant to re-emphasize (and, in some undefined way, strengthen) the requirements for a valid warrant set forth in the second clause. The second, in turn, defines and interprets the first, telling us the kind of search that is

This mixture of clarity and purpose and brevity and ambiguity in expression has generated a complex body of law laden with rules and riddled with exceptions.⁸ At one time, the Supreme Court interpreted the search and seizure clause of the fourth amendment to have independent significance. Warrantless searches were judged by the standard of reasonableness found in the first clause.⁹ In recent years, the Court has eschewed the reasonableness standard for a more mechanical focus: warrantless searches are presumptively unreasonable unless justified by one of several exceptions.¹⁰ Of course, a search conducted pursuant to a warrant must meet the requirements of the second clause of the amendment: probable cause,¹¹ particularity, and a neutral and detached magistrate.¹² If a warrantless search has not fallen within one of the exceptions or if the warrant has not complied with the requirements of the amendment, the evidence obtained as a result of the search has

not "unreasonable," and therefore not forbidden, namely, the one carried out under the safeguards there specified.

Id. at 43.

Landynski concluded that two correct interpretations of the amendment were possible: (1) to be reasonable a search must meet the requirement of the warrant clause or (2) a search which meets those requirements might still be unreasonable. He rejected an interpretation which would find some warrantless searches reasonable. *Id.* at 42-43.

8. A commentator once succinctly declared that "[t]he Fourth Amendment cases are a mess." Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L. J. 329 (1973). Most observers agree that time has not changed the truth of Dworkin's statement.

9. *United States v. Rabbinowitz*, 339 U.S. 56 (1950) (reasonableness of searches to be determined by facts and circumstances of each case). *But see* *Chimel v. California*, 395 U.S. 752 (1969) (*Rabbinowitz* no longer to be followed).

10. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (citing *Katz v. United States*, 389 U.S. 347 (1967)). Although the Court has spoken of a few, well-defined and jealously guarded exceptions, rhetoric does not match reality. There are at least seven exceptions to the warrant requirement: *Chimel v. California*, 395 U.S. 752 (1969) (searches incident to arrest); *Chambers v. Maroney*, 399 U.S. 42, (1970) (automobiles); *Schmerber v. California*, 384 U.S. 757 (1966) (exigent circumstances); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (station-house inventories); *Texas v. Brown*, 460 U.S. 1074 (1983) (plain view); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent searches); *Terry v. Ohio*, 392 U.S. 1 (1968) (protective "frisk"). It can be argued that the exceptions are not few. *See* Haddad, *Well Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & C. 198 (1977).

11. *Illinois v. Gates*, 103 S. Ct. 2317 (1983) (probable cause is a non-technical conception best reviewed by a totality of the circumstances standard). *See also* *U.S. v. Leon*, 104 S. Ct. 3405 (1984) (unless magistrate misled by a false affidavit, abandons his judicial role, or the warrant is so facially deficient that a police officer cannot reasonably presume it to be valid, suppression is not a proper remedy if police in objective good faith rely on warrant even though it may not meet the required standards for probable cause). *See supra* note 6.

12. *United States v. United States Dist. Ct.*, 407 U.S. 297 (1972) (fourth amendment does not contemplate the Executive Officers of the Government as neutral and detached magistrates). *See supra* note 6.

been suppressed.¹³

The exact definition of the term "search" for fourth amendment purposes is much more important under the Court's more recent approach. Under a reasonableness standard, police activity can be justified by reference to the totality of the circumstances. In theory, the Court's recent approach greatly limits the scope of permissible warrantless police activity. If the police activity is not a "search" then the fourth amendment simply does not apply.¹⁴ Neither the probable cause requirement,¹⁵ nor the particularity requirement,¹⁶ nor the warrant requirement,¹⁷ need be met. Nor must the police activity be squeezed within any of the exceptions.¹⁸ For those who follow the crime control model of criminal law,¹⁹ defining such activity outside the fourth amendment has great appeal because of the flexibility it gives the police in fighting crime. For civil libertarians, such a prospect is not well received.²⁰ When police activity is placed outside the confines of the fourth amendment, other limitations are hard to impose. Any restrictions must come from internal police policies,²¹ state constitutions,²² or

13. *Mapp v. Ohio*, 367 U.S. 443 (1961). Compare *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); and *U.S. v. Chadwick*, 433 U.S. 1 (1977). The good faith exception greatly narrows the scope of the exclusionary rule when a search warrant is issued. See *supra* note 11.

14. See, e.g., *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974). See generally Moylan, *The Fourth Amendment Inapplicable v. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. ILL. U. L. J. 75.

15. See *Oliver v. United States*, 104 S. Ct. 3405 (1984).

16. See *Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

17. See *Illinois v. Andreas*, 103 S. Ct. 3319 (1983).

18. See *United States v. Knotts*, 460 U.S. 276 (1983).

19. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

20. I confess that I am a civil libertarian. During my work on this article I have attempted to achieve the much sought after scholarly detachment. Complete detachment is impossible, however. I apologize in advance if my viewpoint unduly colors my analysis.

21. See, e.g., Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974), where Professor Kaplan suggests that exclusion of improperly obtained evidence not proper when the government can show that it published regulations to guide police officers, trained them to alleviate fourth amendment violations, and took disciplinary action when violations occurred. *Id.* at 1050-51. See LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.2(f) n.87 (1978) [hereinafter cited as LAFAYE], for a collection of citations.

22. See, e.g., *People v. Krivda*, 8 Cal. 3d 623, 504 P.2d 457, cert. denied, 412 U.S. 919 (1973) (police violated federal and state constitutions by inspecting defendant's trash). A decision which rests on an adequate and independent state ground cannot be reviewed by the United States Supreme Court. *Michigan v. Long*, 103 S. Ct. 3469 (1983). The state-law ground must be clear from the opinion itself. *Id.* Justice Stevens has begun to campaign for increased reliance by State Courts on their own Constitutions. See, e.g., *Massachusetts v. Upton*, 104 S. Ct. 2085 (1984). Justice Stevens concurred in the judgment and chastised the Supreme Court of Massachusetts for "unwisely and unnecessarily" inviting United States Supreme Court review by not analyzing the case under state law. See generally Linde, *First Things First: Rediscovering the State's Bill of Rights*, 9 U. BALT. L. REV. 379 (1980). See also Note, *Decriminalization: A New Consideration*

other provisions of the United States Constitution.²³ The question of what constitutes a search is the fundamental inquiry in fourth amendment analysis.

During the 1983-84 Term, the United States Supreme Court decided six cases in which the dispositive question was whether or not governmental activity constituted a search. This article will survey the development of the case law on this question prior to the 1983-84 Term and then examine four of the six cases. These four cases greatly narrow the definition of a search and contribute to the conceptual confusion in this area of the law. In addition, these cases revitalize the once-discarded "protected place" theory of the fourth amendment. When the cases cannot be decided by reference to a protected place, the Court silently uses a balancing test.

II. THE EARLY CASES

In an early series of cases the Supreme Court defined a search by reference to property law. Thus, in *Olmstead v. United States*²⁴ the

for *The Fourth Amendment Balance*, 31 ME. L. REV. 375 (1980) where the author argues that civil penalties should be used to enforce the fourth amendment. See generally Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976); Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974).

23. In one early case the Supreme Court suggested that the protections of the fourth and fifth amendments ran together. *Boyd v. United States*, 116 U.S. 616 (1886) (court noted the "intimate relation" of the two amendments). This position has been eroded steadily over the years until its implicit reversal in *Couch v. United States*, 409 U.S. 322 (1973); See Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184 (1977). Given the testimonial requirement for fifth amendment protection, *Schmerber v. California*, 384 U.S. 757 (1966), and the requirement of formal judicial proceedings to invoke the sixth amendment, *Massiah v. United States*, 377 U.S. 201 (1964), the only other constitutional provision which might restrain the police in the investigative stage of a criminal case is the due process clause of the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25 (1949) ("The security of one's privacy against arbitrary intrusion by the police which is at the core of the Fourth Amendment—is basic to a free society."). The violation must be inimical to a scheme of "Ordered Liberty." *Palko v. Connecticut*, 302 U.S. 319 (1937). Such an approach only protects against extremely abusive practices. *Rochin v. California*, 342 U.S. 165 (1952) (police "shock[ed] the conscience" of the court when they illegally entered defendant's home, tried to pry open his mouth, and then forced a doctor to pump his stomach). Presumably, exclusion is the appropriate remedy for evidence obtained in this manner. *Mapp v. Ohio*, 367 U.S. 443 (1961). But cf. *United States v. Leon*, 104 S. Ct. 3405 (1984), (exclusion appropriate when it will deter police conduct). For all practical purposes, once investigative conduct falls outside of the scope of the fourth amendment, the conduct is not bound by any constitutional restrictions.

24. 277 U.S. 438 (1928). Most of these early cases involved wiretapping. This area is now controlled by statute. 18 U.S.C. §§ 2510-2520 (1982). This act is commonly referred to as Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See generally J. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* (1977). The classic work in this area is S. DASH, *THE EAVESDROP-*

Court held that the fourth amendment was not violated by wire-taps on external telephone wires because "there was no entry of the houses or offices of the defendants."²⁵ This principle was applied in *Goldman v. United States*²⁶ where the Court upheld the use of a device which, when placed against a wall, allowed the government to hear conversations in an adjoining room.²⁷ The Court saw "no reasonable or logical distinction" between *Goldman* and *Olmstead*.²⁸

Application of the trespass principle led to suppression of the evidence whenever any physical entry on the defendant's property occurred. In *Silverman v. United States*,²⁹ for example, the police employed a "Spikemike," a microphone with a foot-long spike attached to it.³⁰ When inserted into a wall, the spike picked up conversations in different rooms of the house.³¹ The Court reversed the conviction because the evidence was obtained by means of an unauthorized physical intrusion onto the property.³² The Court noted that the decision did not

PERS (1959).

25. 277 U.S. at 464. The case may also turn on the intangible nature of the thing searched and seized—telephone conversations. The Court said that "[t]he Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceedings lawful is that it must specify the place to be searched and the person or things to be seized." *Id.* The position that the amendment protects only tangible items was reprised by Justice Black. See *Katz v. United States*, 389 U.S. 347 (1967). The suggestion that the particularity requirement gives some meaning to the term "search" was rejected by the Court in *United States v. Karo*, 104 S. Ct. 3296 (1984).

26. 316 U.S. 129 (1940).

27. *Id.* at 996. The Court described this device, known as a "detectaphone," as "having a receiver so delicate as, when placed against the partition wall, to pick up sound waves originating in [the defendant's] office." *Id.* at 944. Ironically, the government agents intended to rely upon a bug placed inside the defendant's office but it did not work. *Id.* The detectaphone was their fail-safe equipment. If the original bug had worked, the evidence would have been suppressed because the agents trespassed during its installation and because a wire ran from the bug into the adjoining room. *Id.* This has led one contemporary authority to say that the legality of the search "depended solely upon the officer's selection of the right equipment and location for overhearing the conversation." J. CARR, *supra* note 24, at 13-14.

28. *Goldman v. United States*, 316 U.S. 129 (1940). The Court also refused to overrule *Olmstead*. *Id.*

29. 365 U.S. 505 (1961).

30. *Id.* at 506.

31. The spike rested against a heating duct which "acted as a very good sounding board." *Id.* This converted the entire heating system into a conductor of sound. *Id.* The Supreme Court approvingly cited the dissenting judge's characterization of the duct as a "giant microphone, running through the entire house." *Id.* at 509 (citing *Silverman v. United States*, 275 F.2d 173, 179 (D.C. Cir. 1960) (Washington, J., dissenting)). Although the unauthorized invasion is usually thought to be the spike's slight intrusion upon the property, comments like the above support the argument that the "intrusion" was the transformation of the heating system into a microphone. In other words, the government "usurped" the heating system. *Id.* at 511. But see *Clinton v. Virginia*, 377 U.S. 158 (1964) (illegal search when device attached to wall by a thumbtack).

32. *Silverman v. United States*, 365 U.S. at 511.

turn on "the technicality of a trespass upon a party wall as a matter of local law."³³ Rather the case turned on "the reality of an actual intrusion into a constitutionally protected area."³⁴

These cases and others came to stand for the rule that unless the police intruded upon a "protected place," no fourth amendment search occurred.³⁵ In response the courts created a catalogue of protected places and prohibited activities.³⁶ The crudeness of the physical intrusion rule and the burgeoning electronic surveillance technology generated much academic and judicial criticism.³⁷ The stage was set for a reexamination of the doctrine. This reexamination came in *Katz v. United States*.³⁸ In *Katz*, F.B.I. agents placed an electronic "bug" on top of a telephone booth to monitor the defendant's conversations.³⁹ The agents knew that the defendant used this particular phone booth at about the same time each day.⁴⁰ They monitored only the defendant's end of the conversation.⁴¹ At trial, transcripts of his conversations were admitted, and they helped convict the defendant of betting by means of an interstate communication facility.⁴²

The court of appeals affirmed his conviction and rejected his fourth amendment claim because "[t]here was no physical entrance" by the government into the phone booth.⁴³ In the Supreme Court, *Katz* argued that a telephone booth was a protected place while the government contended that it was not.⁴⁴

33. *Id.* at 512.

34. *Id.*

35. *See, e.g.,* *Lopez v. United States*, 373 U.S. 427 (1963); *Berger v. New York*, 388 U.S. 41 (1966).

36. A house and its curtilage were protected places, *Weeks v. United States*, 232 U.S. 383 (1913), but the open fields were not. *Hester v. United States*, 265 U.S. 57 (1924). *Accord* *Oliver v. United States*, 104 S. Ct. 1735 (1984). *See infra* notes 115-81 and accompanying text.

37. *See, e.g.,* Westin, *Science, Privacy and Freedom*, 66 COLUM. L. REV. 1003 (1966); LANDYNSKI, *supra* note 2; and *Silverman v. United States*, 365 U.S. 505 (1961) (Douglas, J., dissenting); *Goldman v. United States*, 316 U.S. 129 (1940) (Murphy, J., dissenting).

38. 389 U.S. 347 (1967).

39. *Id.* at 348.

40. *Id.* at 354 n.14. The government made six recordings averaging about three minutes each. *Id.*

41. *Id.*

42. 18 U.S.C. § 1084 (1982).

43. *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966). *See supra* text accompanying notes 21-23.

44. 389 U.S. at 351. These contentions sprung from *Katz*' formulation of the issues:

A. Whether a public telephone booth is a constitutionally protected place so that evidence obtained by an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

B. Whether physical penetration of a constitutionally protected area is necessary

Writing for the majority, Justice Stewart criticized the formulation of the issues saying that the correct solution to fourth amendment problems "is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" ⁴⁵ He went on to say that:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.⁴⁶

Even though Katz could be seen through the glass walls of the phone booth, he retained his right to keep the contents of his conversations private.⁴⁷ When Katz entered the booth to use the phone he was entitled to assume that his conversations would not be "broadcast to the world."⁴⁸ Because the government violated the "privacy upon which [Katz] justifiably relied" the electronic eavesdropping was a search within the meaning of the fourth amendment.⁴⁹

The Court rejected the government's argument that *Olmstead v. United States* and *Goldman v. United States* controlled the outcome because there had been no physical penetration of the phone booth.⁵⁰ The Court found that the "premise that property interests control the right of the government to search and seize has been discredited."⁵¹

before a search and seizure can be violative of the Fourth Amendment to the United States Constitution.

Id. at 349-50.

45. *Id.* at 350. Justice Stewart also noted that the "Fourth Amendment cannot be translated into a general right of privacy" because while it preserves privacy against governmental intrusions, it offers both more and less protection than a general right of privacy affords. *Id.* One's fourth amendment rights may be violated in public. *Id.* at n.4. On the other hand, the general right to privacy protects against invasions of privacy by private persons while the fourth amendment does not. Compare *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *Burdeau v. McDowell*, 256 U.S. 465 (1921).

46. *Katz*, 389 U.S. at 351.

47. *Id.* at 352. The government contended that this visibility vitiated any privacy Katz might have in his phone calls. *Id.* The court rejected this position saying that Katz sought to exclude not the "intruding eye" but the "uninvited ear." *Id.* The court limited the reach of the "uninvited ear" notion in *White v. United States*, 401 U.S. 745 (1971), when it held that *Katz* did not bar the warrantless use of bugged informers. See *infra* text accompanying notes 78-99. See also Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activities, Probable Cause and the Warrant Requirement*, 69 J. CRIM. L. & C. 425, 435-38 (1978).

48. *Katz*, 389 U.S. at 352.

49. *Id.* at 353.

50. *Id.* at 352.

51. *Id.* at 353 (citing *Warden v. Hayden*, 387 U.S. 294 (1967)). The full quotation from *Hayden* is: "The premise that property interests control the right of the government to search and

The Court had "departed from the narrow view" on which *Olmstead* rested.⁵²

Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.⁵³

The Court concluded that the "underpinnings" of *Olmstead* and *Goldman* had been so eroded by the Court's decisions that the "trespass doctrine" no longer controlled. Because the eavesdropping constituted a search and because it did not fit within any of the exceptions to the warrant clause,⁵⁴ the search violated the fourth amendment and the

seize has been discredited. (Citations omitted). We have recognized the principal object of the Fourth Amendment is the protection of privacy rather than property, and fictional and procedural barriers rested on property concepts." 389 U.S. at 353. *Hayden* did away with the "mere evidence" rule which limited the government's right to search and seize only items in which it had a superior proprietary interest. See, e.g., *Gouled v. United States*, 255 U.S. 298 (1921) (government may seize instrumentalities or fruits of crime or contraband because interests of government superior to those of defendant). *Hayden* only requires a "nexus—automatically provided in the case of fruits, instrumentalities and contraband—between the item to be seized and criminal behavior." *Warden v. Hayden*, 387 U.S. at 307. But see, Schlesinger & Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225 (1980) where the authors argue for a return to a fourth amendment jurisprudence based on property concepts. These authors do not see the exclusionary rule as based on privacy or deterrence but rather "as an obvious consequence of the government's illegal appropriation of privately owned goods." Professor Loewy used *Hayden* to develop the premise that the government has a right to search for and seize evidence of crime. Loewy, *The Fourth Amendment as a Device to Protect the Innocent*, 81 MICH. L. REV. 1229 (1984). But see White, *Some Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273 (1983). Loewy goes on to establish the related position that the fourth amendment does not protect the right to secret evidence of a crime. Loewy, *supra*, at 1244.

52. *Katz*, 389 U.S. at 352. The Court cited *Silverman v. United States*, 365 U.S. 505 (1961), to show that a violation of the Fourth Amendment could occur "without any technical trespass under . . . local property law." 389 U.S. at 353.

53. *Id.*

54. *Id.* at 359. The government raised three arguments in this regard. First, it claimed that the search was constitutionally reasonable because they did not install the tap until their investigation showed that there was a "strong probability" that *Katz* was breaking the law, the surveillance was limited in both scope and duration, it was limited to the times *Katz* used the booth and then only to his end of the conversation. The Court responded that if this account were true there would be no reason why a magistrate would not have issued a warrant. *Id.* at 354. A warrant would have accommodated the interest of the government and the rights of the individual. *Id.* at 355-56. Second, the government asked that the court retroactively validate the agents' conduct because they had relied on *Olmstead* and *Goldman* and had done no more than they could have done with a warrant. *Id.* at 356. In some ways this argument resembles the newly created good faith exception. *United States v. Leon*, 104 S. Ct. 3405 (1984). See generally Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition?"* 16 CREIGHTON L. REV. 565 (1983); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1978). In any event, the Court rejected this contention

evidence should have been excluded.⁵⁵

Justice Harlan read the holding narrowly in a concurring opinion.⁵⁶ He saw no way to decide how much protection the amendment afforded except by reference to place.⁵⁷ In a concurring opinion stating his understanding of the rule in *Katz*, Justice Harlan said: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁵⁸ This statement became the accepted interpretation of *Katz*⁵⁹ although Justice Harlan had some second thoughts about it.⁶⁰

Katz was hailed immediately as a great achievement.⁶¹ One commentator declared that *Katz* released the fourth amendment from "the moorings of precedent."⁶² Future fourth amendment questions would be decided "by the logic of its central concepts."⁶³ Fourth amendment law was rid of its antiquated focus on property concepts⁶⁴ and could

because without a warrant the only restraint on the agents' conduct was self-imposed. *Katz*, 389 U.S. at 356. *But cf.* *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984) (improper warrant form no bar to evidence when police confine themselves to scope of affidavit). The fourth amendment requires the interposition of a magistrate between the citizens and the police. *Wong Sun v. United States*, 371 U.S. 471 (1963). Finally, the Court rejected the government's request to create a new exception to the warrant clause. *Katz*, 389 U.S. at 358.

55. *Id.* at 359.

56. Justice Harlan read the opinion to hold that 1) a telephone booth is a protected area, 2) electronic invasion of a protected place may violate the amendment, and 3) warrantless searches of protected areas are presumptively unreasonable. *Id.* at 360-61 (Harlan, J., concurring). In his classic article, Professor Amsterdam argued that the proper reading of *Katz* was broader than Justice Harlan's. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 383-86 (1974).

57. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

58. *Id.*

59. *See, e.g., Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978); *United States v. Dionisio*, 410 U.S. 1, 8, 14-15 (1973).

60. *United States v. White*, 401 U.S. 745 (1971) (Harlan, J., dissenting) (formulations of fourth amendment analysis, including *Katz*, have limitations and can lead to the substitution of words for analysis).

61. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133.

62. *Id.*

63. *Id.*

64. This statement is, like most statements concerning so-called legal revolutions, an oversimplification. *See, e.g., Dershowitz and Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L. J. 1198 (1971). Professor Ashdown provides a fuller treatment of the "detailed and complex history" of the shift from property concepts to privacy concepts. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. REV. 1289, 1298-1301 (1981). Ironically, dissatisfaction with the current Supreme Court's handling of privacy issues has spurred a call for a return to a fourth amendment jurisprudence centered on property interests. *See The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 203 (1980) (ownership and possession should be reinstituted as the core of the

now protect citizens from the excesses of modern investigative technology.⁶⁵

Katz has not been without its critics, however. The *Katz* test has been called vague, shifting, and illusory.⁶⁶ One commentator has characterized *Katz* as a "lawless ruling—a decision to do without a standard and a decision to tie the constitutional right to privacy to changing cultural expectations of privacy."⁶⁷ If *Katz* were read to require a warrant for every governmental investigation the process would be trivialized by its use.⁶⁸ Moreover, the almost limitless contours of an expectations analysis has led courts to apply *Katz* in important and not so important cases.⁶⁹

In spite of this criticism, it seems fair to say that *Katz* was meant to expand and not contract the scope of the fourth amendment.⁷⁰ *Katz* invited the Supreme Court to engage in a normative analysis designed to explicate the central tenets of fourth amendment security in a time

protection of privacy); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 180, 182 (1977) (property interests should be recognized as *a priori* reasonable expectations of privacy). Cf. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 16-17 (1983) (*Katz* does not support proposition that property interests are irrelevant to fourth amendment analysis).

65. Cf. *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting). Ironically, cases like *Katz* and *Olmstead* would not arise today because of the passage of Title III of the Omnibus Crime Control Act of 1968, Pub. L. No. 90-351, § 8, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510-2520) (1982) [hereinafter described as Title III]. Title III proscribes wire tapping or bugging unless certain procedural safeguards are met, 18 U.S.C. § 2516(1) (Attorney General must authorize application for an order), and unless prior judicial approval is obtained 18 U.S.C. § 2518 (judge of court of competent jurisdiction can issue order authorizing the procedure with limited scope and duration). Violations of the provisions of Title III can result in criminal penalties, 18 U.S.C. § 2511(1) (willful violations punishable by \$10,000 fine, five years in prison, or both). See, e.g., *United States v. Ross*, 713 F.2d 389 (8th Cir. 1983); *United States v. Goldsmith*, 483 F.2d 441 (5th Cir. 1973); civil liability, 18 U.S.C. § 2520 (authorizes recovery of actual damages or a civil penalty, punitive damages, and costs and fees); or suppression of the evidence in a criminal proceeding, 18 U.S.C. 2518(10)(a) and (b). Although the Supreme Court has not yet considered the constitutionality of Title III, every court save one to consider the question has upheld the Act against constitutional challenges. See J. CARR, *supra* note 24, at 33 n.116-17, for a collection of cases. Finally, even though Title III was designed to bring uniformity to this area of the law, states are allowed to adopt their own laws, 18 U.S.C. § 2516(2). It is conceded, however, that state laws may be more protective of individual rights but not less protective than Title III. S. REP. NO. 1097, reprinted in 1968 U.S. CODE CONG. AND AD. NEWS 2112, 2187. Twenty seven states responded by enacting their own legislation. See C. FISHMAN, *WIRE TAPPING AND EAVESDROPPING* 6 n.14 (1978) for a collection of jurisdictions.

66. *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 202 (1980).

67. Alschuler, *supra* note 64, at 6 n.12.

68. Kitch, *supra* note 61, at 152.

69. See *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 202-03 (1980), citing examples of trivial applications of the *Katz* test.

70. Amsterdam, *supra* note 56, at 385.

of technological change.⁷¹ The Supreme Court has "failed to pursue the implications of its insight," however.⁷² In a series of cases the Supreme Court has greatly narrowed *Katz*.⁷³ Either in reaction to the exclusionary rule,⁷⁴ or as an exercise in "double-think,"⁷⁵ the Court has whittled away at the *Katz* edifice until the case now seems limited to its facts.

In the *Katz* decision, Justice Stewart wrote that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection."⁷⁶ In subsequent cases, the Court has seized upon this "exposure" rule to fashion a doctrine that has completely negated the effect of *Katz*.⁷⁷ The seminal case is *United*

71. *Id.* See also Ashdown, *supra* note 64, at 1321 (*Katz* represents the Supreme Court's response to the new technological intrusiveness of an advanced society).

72. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.J. 518, 540.

73. See *infra* text accompanying notes 77-113.

74. McMillan, *Is There Anything Left of the Fourth Amendment?*, 24 ST. LOUIS U.L.J. 1 (1979).

75. Burkhoff, *When is a Search not a Search? Fourth Amendment Doublethink?* 15 U. TOL. L. REV. 515 (1984).

76. *Katz*, 389 U.S. at 351.

77. The Court has limited *Katz* in other ways, too. Drivers/owners of cars have a reduced expectation of privacy in their vehicles. *United States v. Ross*, 456 U.S. 798 (1982); *United States v. Chadwick*, 433 U.S. 1 (1977); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Texas v. White*, 423 U.S. 67 (1975); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Chambers v. Maroney*, 399 U.S. 42 (1970). The police may conduct a warrantless search of a car if probable cause exists. See generally, Moylan, *The Automobile Exception: What It Is and What It Is Not—A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987 (1976). Containers that might hold seizable items located within an automobile may be searched if they are discovered during a permissible automobile search. *United States v. Ross*, 456 U.S. 798 (1982). In a related context, the Court held that a search incident to a lawful arrest can extend to the entire passenger compartment of the automobile which includes "any object capable of holding another object." *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981). Passengers who can claim no ownership or possessory rights in a vehicle in which they are riding may also be searched. *Rakas v. Illinois*, 439 U.S. 128 (1978) (Person must have a "legally sufficient" interest in place to claim protection of fourth amendment. Defendants "asserted neither a property interest nor a possessory interest" in the automobile or the property seized.). But see *Rawlings v. Kentucky*, 448 U.S. 98 (1980), where ownership of items seized was insufficient to raise any fourth amendment issue. Because these cases discuss the automobile searches as exceptions to the warrant requirement, they are beyond the scope of this article. Nevertheless, their effect on *Katz* is significant because the "lesser expectation of privacy" analysis is an exception to the all or nothing models of *Katz*. For a sharp criticism of the automobile exception in general and the *Ross* case in particular, see *Katz, United States v. Ross: Evolving Standards for Warrantless Searches*, 74 J. CRIM. L. & C. 172 (1983).

Some personal attributes are also beyond the protection of the amendment. *United States v. Dionisio*, 410 U.S. 1 (1973) (forced voice exemplars did not violate fourth amendment); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplars did not violate fourth amendment). It is an open question whether or not finger printing constitutes a search. See *Dionisio*, 410 U.S. 1. But cf. *Davis v. Mississippi*, 394 U.S. 721 (1969) (detention without probable cause which in-

States v. White.⁷⁸ In *White*, government agents sought to testify about conversations between White and a bugged police informant which they had simultaneously monitored. The question of the application of the fourth amendment was critical. If monitoring the conversation was a search then the testimony would have to be suppressed because the government did not have a search warrant and no exception to the warrant clause applied.⁷⁹ The Court held that the electronic monitoring was not a fourth amendment search.⁸⁰ The Court reasoned that *Katz* left undisturbed several prior cases dealing with the use of informants, both bugged and not.⁸¹ Thus, if a police informant:

[m]ay write down for official use his conversations with a defendant and testify concerning them . . . , no different result is required if the agent instead of immediately reporting and transcribing his conversations with the defendant either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez v.*

cluded finger printing violates fourth amendment). Compare *Cupp v. Murphy*, 412 U.S. 291 (1973) (fingernail scrapings constituted a search).

78. 401 U.S. 745 (1971). *White* was a plurality opinion authored by Justice White in which the Chief Justice and Justices Stewart and Blackmun joined. Justice Black concurred in the result. *Id.* at 754. Given Justice Black's position in *Katz*, it is apparent that *White* is a relatively libertarian position. The plurality in *White* is now cited as if it were a majority opinion. Compare *United States v. Karo*, 104 S. Ct. 3296 (1984) (opinion of White, J.); and *United States v. Karo*, 104 S. Ct. 3296 (1984) (O'Connor, J., concurring in part and concurring in the judgment) in which both Justices discuss the meaning of the *White* "rule."

79. 401 U.S. at 750.

80. *Id.* at 754.

81. The Court discussed the pre-*Katz* cases of *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); and *Lopez v. United States*, 373 U.S. 427 (1963). In *Hoffa*, the Court held that the fourth amendment did not prevent the use of an informant's testimony at trial. *Lewis* similarly held that a police undercover officer who misrepresented his identity while purchasing drugs from the defendant did not violate the fourth amendment. *Lopez* held the fourth amendment was not violated by an informant who secretly taped conversations with the defendant. For an incisive critique of these cases, including *White*, see Grano, *supra* note 47, at 432-38. Professor Weinreb has advanced the theory that the fourth amendment protects the "privacy of place" and the "privacy of presence." Weinreb, *supra* note 2, at 69. Privacy of place protects our property; privacy of presence protects our person when we are in a private place. *Id.* Using this theory, Weinreb reconciles *Katz* and *White* saying that the defendant in *Katz* could invoke the privacy of presence in the phone booth but the defendant in *White* couldn't invoke either protection. *Id.* at 69 n.65. He concludes that *Lewis* was wrongly decided. *Id.* at 67. Under Weinreb's analysis, *Lewis* clearly could invoke the privacy of presence because the transaction occurred inside of his house. *Id.*

To the extent that the Supreme Court has created an enhanced zone of privacy when police intrude upon a house, the Court has adopted Professor Weinreb's approach. Compare *Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984) (court reluctant to find circumstances to justify warrantless entry of home); and *United States v. Karo*, 104 S. Ct. 3296 (1984) (warrantless beeper surveillance in a private residence violates fourth amendment). See *infra* text accompanying notes 182-212.

United States; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency.⁸²

In short, the Court fashioned a syllogism for its rule in *White*: Informants could testify to what they were told. Informants could use tape recorders to record what they were told. Therefore, informants could operate as radio transmitters of what they were told. As if to answer criticism of the tautological nature of its rule, the *White* Court immediately cast the case in privacy terms. According to the majority, the critical question in the case was what expectations of privacy were justifiable.⁸³ Because the law allowed a defendant's expectation of privacy to be frustrated by the testimony of informants, it should similarly allow an informant to simultaneously transmit conversations to third parties.⁸⁴ But this formulation was simply the Court's earlier syllogism now dressed in privacy clothes and equally misconceived.⁸⁵

The *White* case introduced two other elements into the search question; the first was a risk analysis. The Court said that "one contemplating illegal activities" takes the risk that his cohorts will be police informers or turn state's evidence. If he doubted their trustworthiness, he would not confide in them. "But if he has no doubts, or allays them, or risks what doubt he has, the risk is his."⁸⁶

It is difficult to see what this analysis adds to the decision.⁸⁷ The court could have been saying that because these risks are inherent in

82. 401 U.S. at 751 (emphasis added).

83. *Id.* at 752.

84. The Court stated:

[T]he law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as authorizing the use of informants in the manner exemplified by *Hoffa* and *Lewis*. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence. . . .

Id.

85. "Once informational privacy is recognized as an appropriate fourth amendment interest, and once this interest is defined vis-a-vis the government, the voluntary disclosure rationale [in *White*] breaks down." Grano, *supra* note 42, at 437. Grano argued that *White* and *Hoffa* were inconsistent with *Katz* and should be overruled. *Id.* He suggested that *Lewis* might be an exception because the police activity did not trench upon any justifiable expectations of privacy. "To ask someone to acknowledge wrongdoing . . . or to commit a crime does not seem to implicate privacy at all. *Id.* But cf. Amsterdam, *supra* note 56 (system that restricts government's ability to physically search a house but not its ability to send spies into a house is irrational).

86. 401 U.S. at 752.

87. Amsterdam, *supra* note 56, "[T]he analysis of [cases like *White*] in terms of voluntary assumption of the risk is wildly beside the point."

illegal activities the defendant could not have had a subjective expectation of privacy.⁸⁸ But in the immediately preceding paragraph the Court dismissed as unimportant any subjective expectation on its way to finding that case law dictates that any expectation in the case was not justifiable.⁸⁹ As a separate rationale, risk analysis threatened to swallow up the fourth amendment. If a criminal defendant were at his risk when confiding in associates or if the risk caused him to lose his privacy, then the fourth amendment would protect only hermits or people who worked alone.⁹⁰

The risk analysis may have been a way to support the Court's holding that any expectation of privacy was not justified because of the risk. But this begs the question.⁹¹ Moreover, the analysis left a number of questions unanswered: How should the risk be measured? Is it the same in each case?⁹² Does the degree of privacy depend on the nature of the risk or, once risked, is all privacy lost?⁹³ In any event, risk analysis will appear in later cases.⁹⁴

Finally, the *White* case indicated the recurrent problem the Court has in keeping its categories straight. The question in *White* was whether or not the police activity was a search or seizure for the purposes of the fourth amendment, not whether the search or seizure was reasonable under the amendment. Yet the Court repeatedly lapsed into a discussion of the reasonableness of the police conduct. It found no difference between the bugged and the unbugged informant, "particularly under the Fourth Amendment which is ruled by fluid concepts of reasonableness."⁹⁵ The Court noted that it should not erect "constitutional" barriers to relevant and probative evidence which is also reliable and that considerations like the accuracy and reliability of the evidence "do not favor the defendant."⁹⁶ Such considerations were immaterial if

88. Cf. LAFAVE, *supra* note 21, at 279.

89. "Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions." 401 U.S. at 751.

90. Justice Harlan raised a more serious concern. He argued that if a person expected that his or her conversations would be recorded "it [would] smother that spontaneity—reflected in frivolous, impetuous, sacrilegious and defiant discourse—that liberates daily life." *Id.* at 787. *But see* Weinreb, *supra* note 2, at 68 (fourth amendment does not necessarily protect casual speech).

91. Dworkin, *supra* note 8.

92. Comment, *Electronic Eavesdropping & The Right to Privacy*, 52 B.U.L. REV. 831, 844 (1972) (suggesting that assuming "patent" risks consistent with *Katz* but not the "latent" risks assumed in *White*).

93. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 254 (1971).

94. *See infra* text accompanying notes 100-13.

95. 401 U.S. at 753.

96. *Id.*

the question is whether or not the police activity is a fourth amendment search.⁹⁷ Finally, the Court resorted to its twice used syllogism but this time it appeared in reasonableness garb:

It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an "unreasonable" and unconstitutional search and seizure.⁹⁸

Considerations of reasonableness do not matter if the police activity is not a search or seizure. As Judge Moylan has pointed out, "noncompliance with a non-existent standard is an immateriality."⁹⁹

These three elements from *White*—its frustration of privacy syllogism, its risk analysis, and its confusion of the threshold definitional question with that of reasonableness—were used by the Court in several later cases. For example, in *United States v. Miller*,¹⁰⁰ the Court held that the defendant had no legitimate expectation of privacy in the contents of his original checks and deposit slips because he "voluntarily conveyed" the information contained in them to his bank.¹⁰¹ Citing *White*, the Court explained that "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed to the Government."¹⁰² Thus, the Court upheld the use of a subpoena to acquire such records.¹⁰³

97. Moylan, *The Fourth Amendment Inapplicable v. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. ILL. U.L.J. 75.

98. 401 U.S. at 753.

99. Moylan, *supra* note 97, at 82. Earlier in his article, Judge Moylan commented that generally, "we fall back upon the moral considerations and seek to inject them into the applicability analysis even where they were utterly immaterial." *Id.* at 76. In a similar fashion, Professor Dershowitz concluded that the question in *White* was "a question of moral justification. Bad people are not morally justified in expecting privacy." Dershowitz, *supra* note 91, at 337. This moral justification still finds its way into cases. Compare *Oliver v. United States*, 104 S. Ct. 1735 (1984) (no societal interest in cultivating marijuana) and *United States v. Jacobsen*, 104 S. Ct. 1652 (1984) (no legitimate expectation of privacy in nature of cocaine when Congress proscribes private possession).

100. 425 U.S. 435 (1976).

101. *Id.* at 443.

102. *Id.*; cf. *Couch v. United States*, 409 U.S. 322 (1973) (no fourth amendment interest in tax records voluntarily conveyed to accountant).

103. *Id.* at 445. The *Miller* decision generated a great deal of criticism. For a sharp criticism of *Miller*, see LAFAYE, *supra* note 21, § 2.7, at 411-17 (*Miller* result is "dead wrong" and its effect "pernicious"). See also Alschuler, *supra* note 64, at 22-23; Ashdown, *supra* note 64, at 1313; Note, *Reasonable Expectations of Privacy in Bank Records: A Reappraisal of U.S. v. Miller and Bank Depositor's Privacy Rights*, 72 J. CRIM. L. & C. 243 (1981). Comment, *A Bank Customer Has No Reasonable Expectation of Privacy of Bank Records: United States v. White* 14 SAN DIEGO L. REV. 414 (1977). Apparently in response to the *Miller* decision, Congress

Similarly in *Smith v. Maryland*,¹⁰⁴ the Court held that the installation of a pen register was not a fourth amendment search because the defendant had no privacy interest in the telephone numbers he dialed.¹⁰⁵ The *White* syllogism returned when the Court reasoned that a telephone user lost his expectation of privacy if he conveyed the number he dialed to a live operator; therefore, no different result occurred when the number was conveyed to electronic switching equipment.¹⁰⁶

These cases reveal the sterility of the *White* syllogism. Risk analysis assumes that an individual has a choice whether or not to engage in certain conduct.¹⁰⁷ Certainly, the defendants in *White*, *Lewis*, and *Hoffa* could realistically choose what and how much to say to their confidants and when to say it.¹⁰⁸ It is unrealistic, however, to assert that people in the twentieth century have a choice whether or not to open a checking account or to use the telephone.¹⁰⁹ Moreover, even if we assume that there is a choice in these situations, however abstract, it is preposterous to assert that one's privacy is totally destroyed because one "conveys" information to the bank teller or to the phone company. In the case of the bank, the bank employees are only interested in the surface validity of the check and the sufficiency of funds in

passed the Right to Financial Privacy Act of 1978 (codified at 12 U.S.C. §§ 3401-3422 (Supp. 1979)). This act requires that notice of any federal subpoena or summons be given to the customer and gives the customer an opportunity to challenge the subpoena or summons before any records are turned over to the government. The *Miller* court implied that the defendant had no reasonable expectation of privacy in his bank record because Congress required banks to keep copies of transactions because of their usefulness in criminal investigations. 425 U.S. at 442-43. This is clearly wrong. Cf. Amsterdam, *supra* note 64, at 384 (government may not destroy right to privacy by announcing pervasive surveillance).

104. 442 U.S. 735 (1979).

105. *Id.* at 745-46.

106. The Court reasoned that:

When the petitioner used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. We [are not inclined to hold that a different constitutional] result is required because the telephone company has decided to automate. . . .

Id. at 744.

107. *Id.* at 749 (Marshall, J., dissenting).

108. LAFAYE, *supra* note 21, § 2.7(c) at 415-16.

109. 442 U.S. 750 (Marshall, J., dissenting); LAFAYE, *supra* note 21, at 412. See also Fishman, *Pen Registers and Privacy: Risks, Expectations, and the Nullification of Congressional Intent*, 29 CATH. U.L. REV. 557, 573 (1980).

the account on which it is drawn.¹¹⁰ It is highly unlikely that bank employees make it a practice to ascertain to whom the check is written and for what purpose, and the sheer volume of their work would make it nearly impossible to later recall any individual transactions.¹¹¹ The same can be said for telephone operators. This contrasts sharply with *White* where the informant engaged in conversations with the defendant for the purpose of later testifying or where the police monitored the conversations for the same purpose. In both instances, it was at least realistic to expect the conversations to be recalled and, thus, plausible that the participants lost any privacy in the conversations. On the other hand, people who write checks realistically expose only a limited amount of information to the bank.¹¹² Thus, their privacy should be vitiated only to the extent to which such information is revealed. Nevertheless, the *Miller* Court concluded that the hypothetical exposure of the check to the banking system vitiated any expectation of privacy the depositor had in it.¹¹³ *White* and *Miller* sowed the seeds of *Katz's* demise. Those seeds bore fruit in several recent cases. The Court resurrected the protected place rationale, destroyed the subjective prong of the *Katz* test, and provided no guidance as to the factors to consider under the objective prong of *Katz*. Underneath this chaos, however, the Court silently used a balancing test to determine the reasonableness of the police conduct.¹¹⁴

III. THE RESURRECTION OF THE PROTECTED PLACE

Although the fourth amendment "protects people, not places,"¹¹⁵ the current Supreme Court seems intent on turning the statement around. Several recent cases create a kind of fourth amendment "super right" in the privacy of a home while denigrating personal privacy under the amendment. *Oliver v. United States*¹¹⁶ is the first example of this approach.

In *Oliver* the Supreme Court reaffirmed the open fields doctrine.

110. Note, *Government Access to Bank Records*, 83 YALE L.J. 1439 (1974).

111. *Id.* (thirty billion checks processed each year).

112. See *California Banker's Ass'n v. Shultz*, 416 U.S. 21 (1974) (Marshall, J., dissenting).

113. The same criticism may be directed at *Smith*. See LAFAYE, *supra* note 21, at 110. See also *Smith v. Maryland*, 442 U.S. at 749. (Marshall, J., dissenting) (those who disclose certain facts to a bank or to a phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes).

114. See *infra* text accompanying notes 318-44.

115. *Katz v. United States*, 389 U.S. at 751.

116. 104 S. Ct. 1735 (1984).

The doctrine had its origins in *Hester v. United States*.¹¹⁷ In *Hester*, revenue agents stationed outside the home of the defendant's father saw the defendant pass a bottle to another person. The defendant and his companion realized the agents were watching and took flight. In the process, both men dropped the bottles.¹¹⁸ The agents examined the broken bottles and found that they contained bootleg liquor.¹¹⁹ In an opinion by Justice Holmes, the Supreme Court held that no fourth amendment search occurred even though the agents had committed a physical trespass. According to the Court, "the special protection accorded by the fourth amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."¹²⁰

Courts interpret the open fields doctrine as a per se exception to the fourth amendment.¹²¹ The critical question was whether or not the area searched was within the curtilage of the dwelling.¹²² If not, the fourth amendment did not apply.¹²³

Katz cast doubt on the continuing vitality of the open fields rule, however.¹²⁴ The *Katz* decision rejected a fourth amendment jurisprudence based on property concepts. Instead, *Katz* called for an inquiry into the nature of the privacy interest and the degree of surveillance.¹²⁵

The *Katz* opinion did not discuss its effect on *Hester*.¹²⁶ Thus, lower courts hearing open fields cases had to decide if *Katz* silently overruled *Hester* or if the open fields doctrine could be defended under the new privacy analysis.¹²⁷ The only post-*Katz* Supreme Court deci-

117. 265 U.S. 57 (1924).

118. *Id.* at 58.

119. *Id.*

120. *Id.* at 59.

121. See, e.g., *Bedell v. State*, 257 Ark. 895, 521 S.W.2d 200 (1975) (fourth amendment does not apply to open fields and forest areas).

122. See, e.g., *United States v. Williams*, 581 F.2d 451 (5th Cir. 1978) (outer limits of curtilage defined by wall of remote outbuildings).

123. See, e.g., *Care v. United States*, 231 F.2d 22, 25 (10th Cir. 1956) (car over 100 yards from house not within curtilage).

124. Comment, *Katz in the Open Fields: United States v. Oliver*, 20 AM. CRIM. L. REV. 485, 489 (1983).

125. LAFAYE, *supra* note 21, § 2.4, at 336 (1978).

126. *Hester* is mentioned twice in *Katz*. That the majority opinion cites it in a footnote indicates that both parties agreed that open fields were not protected places. *Katz*, 389 U.S. at 351 n.8. Justice Harlan, however, cites *Hester* to distinguish an open field from the telephone booth in *Katz* and to support his limited reading of the case's holding. *Id.* at 360.

127. Compare *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974) (defendant argued that *Katz* sounded the "death knell" for open fields doctrine and "sub-silentio" overruled *Hester*) and *State v. Choart*, 91 N.M. 584, 577 P.2d 892 (1978) (open fields cases analyzed pursuant to *Katz*).

sion arguably on point offered little help.¹²⁸ Not surprisingly, the lower courts were divided on this question¹²⁹ until the Supreme Court attempted to resolve the issue. Two such cases, *Oliver v. United States* and *Maine v. Thornton*,¹³⁰ were consolidated for decision.

In *Oliver* two narcotics agents of the Kentucky State Police went to Oliver's farm to investigate reports that marijuana was being raised on the property. The agents drove past Oliver's house until they came to a locked gate with a no trespassing sign on it. They walked around the gate and along a road for several hundred yards. When they passed by a barn and a parked camper, someone shouted at them to stop. They replied that they were state police officers. They approached the camper but no one was present. The officers continued on and eventually found a field of marijuana located over a mile from the main house.¹³¹

The district court granted the defendant's motion to suppress the evidence of the discovery of the fields by relying on a *Katz* privacy analysis. The Sixth Circuit Court of Appeals reversed.¹³² The circuit court found that *Katz* had not overruled the open fields doctrine.¹³³ Moreover, the court noted that the open fields doctrine was compatible with a privacy analysis because human relations that create the need for privacy do not ordinarily take place in open fields and the owner's common-law right of exclusion was insufficiently linked to fourth amendment privacy.¹³⁴

In *Maine v. Thornton*, two police officers responded to an anonymous tip that marijuana was being grown on Thornton's property. They entered the property on a foot path and followed this path until it

128. In *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974), the Court held that a state health inspector did not perform a fourth amendment search when he entered the defendant's company and performed an air pollution test which required him to observe the smoke plumes emanating from the company's chimneys. *Id.* at 865. Although the Court noted that the inspector's conduct fell within the "open fields" exception, it did so in the same paragraph in which it noted that any invasion of privacy in either *Hester* or *Western Alfalfa* was "abstract and theoretical." A privacy analysis is inconsistent with the per se rule of *Hester*. Thus, *Western Alfalfa* can be interpreted to redefine *Hester* in *Katz* terms as easily as it can stand for the continued vitality of a per se open fields exception.

129. Compare *United States v. Freie*, 545 F.2d 1217 (9th Cir. 1976) (*Hester* does not have independent meaning) and *United States v. Brown*, 473 F.2d 952 (5th Cir. 1973) (mechanical application of open fields exception).

130. 104 S. Ct. 1735 (1984).

131. *Id.* at 1738.

132. 686 F.2d 356, 361 (6th Cir. 1982) (en banc) A panel of the Sixth Circuit had sustained the district court's ruling. *Oliver v. United States*, 657 F.2d 85 (6th Cir. 1981).

133. 686 F.2d at 359.

134. *Id.* at 360.

led them to two pastures of marijuana enclosed by chicken wire. When the officers learned that the marijuana was located on Thornton's property, they obtained a warrant to search the property and to seize the marijuana.¹³⁵

The trial court granted the defendant's motion to suppress and the Maine Supreme Judicial Court affirmed.¹³⁶ The court limited the open fields doctrine to situations where officers were lawfully present on property and saw "open and patent" activity.¹³⁷ Because that was clearly not the case in *Thornton*, the only question to be answered was whether or not the police activity violated "the privacy on which the [defendant] justifiably relied."¹³⁸ Because the defendant made significant efforts to conceal his activity and because the police trespassed upon the defendant's property, the court found that the police activity violated his right to privacy.¹³⁹

The Supreme Court affirmed *Oliver* and reversed *Thornton*. Justice Powell, writing for the majority, advanced two separate arguments to support the holding. First, he relied on the plain language of the amendment to hold that "the government's intrusion into the open fields is not one of those unreasonable searches proscribed by the text of the Amendment."¹⁴⁰ Quoting Justice Holmes in *Hester*, Powell concluded that open fields were not "houses" as described in the amendment.¹⁴¹ Moreover, the Court concluded that open fields were not "effects" within the meaning of the amendment.

Justice Powell advanced a second argument in support of the Court's conclusion. Applying the *Katz* expectation of privacy test, the Court concluded that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers."¹⁴² Open fields do not provide the setting for the "intimate ac-

135. 104 S. Ct. at 1739.

136. *State v. Thornton*, 453 A.2d 489 (Me. 1982).

137. *Id.* at 495.

138. *Id.* at 493.

139. *Id.*

140. 104 S. Ct. at 1744.

141. "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Id.* at 1740 (citing *Hester v. United States*, 265 U.S. at 59). Moreover, the Court concluded that open fields were not effects within the meaning of the amendment. The original draft of the amendment protected houses, papers and other property but the final language contained the "less inclusive" phrase "effects," which the Framers would have understood to be limited to personal but not real property. 104 S. Ct. at 1740 n.7.

142. *Id.* at 1742.

tivities" protected by the amendment.¹⁴³ There is no societal interest in protecting privacy of open fields activities like agriculture.¹⁴⁴ Moreover, open fields are more accessible to the police and to the public than homes or offices,¹⁴⁵ places which are protected by the amendment.

The Court dismissed the defendant's contention that the open fields issue must be adjudicated on a case by case basis saying that "police officers would have to guess before every search" whether land-owners had posted enough signs or had taken steps sufficient to protect their privacy.¹⁴⁶ The result would make it difficult for the police to discern the scope of their authority and create a danger of arbitrary and inequitable enforcement of human rights.¹⁴⁷

Justice Marshall dissented.¹⁴⁸ He argued that reliance on the plain language was inconsistent with *Katz* and its progeny. According to the dissent, a plain language theory dictated a different result in *Katz* because a telephone booth was not a "house" and a telephone conversation was not an "effect."¹⁴⁹ Justice Marshall went on to suggest an analysis that looked at three factors to determine whether any expectation of privacy in open fields activities was reasonable: property rights which arose from positive law, the use to which a place was put, and whether the defendant had taken normal precautions to maintain his privacy.¹⁵⁰ He concluded that although no one factor should predominate, a balanced assessment of all three would lead to an easily applied rule: "Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures."¹⁵¹

In response to Justice Marshall's contention that positive law should play a part in the analysis, the majority noted that the law of trespass and the fourth amendment protect different interests.¹⁵² Whereas trespass protects an owner's right to possession and control

143. *Id.* at 1741. *But see* 104 S. Ct. at 1748 (Marshall, J., dissenting) (open fields and forests can be used for solitary walks, agricultural business, lover's trysts, worship services etc.).

144. *Id.* at 1741.

145. *Id.* Compare *Oliver*, 104 S. Ct. 1735 (1984); and *Payton v. New York*, 445 U.S. 573 (1980) (home); and *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (office).

146. 104 S. Ct. at 1742.

147. *Id.* See LaFave, *Case by Case Adjudication versus Standardized Procedures: The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

148. 104 S. Ct. at 1744. He was joined by Justices Brennan and Stevens.

149. *Id.* at 1745.

150. *Id.* at 1747.

151. *Id.* at 1750.

152. *Id.* at 1744.

the fourth amendment protects the owner's privacy rights.¹⁵³ Trespass goes far beyond the fourth amendment to protect intrusions which have nothing to do with the owner's privacy.¹⁵⁴

Both of the Court's rationales point to a clear rule. Police investigations of the "open fields" are not searches, and therefore do not come within the ambit of the fourth amendment.¹⁵⁵ In drawing this "bright-line" the Court satisfies an on-going criticism of its fourth amendment jurisprudence.¹⁵⁶ Bright line rules are not ends in themselves, however. Bright lines cannot be drawn arbitrarily. They must provide guidance to the police while at the same time advance the protections of the fourth amendment.¹⁵⁷ With so much at stake, the Court must take care in drawing the line so that the results are not "out of all proportion to

153. *Id.*

154. *Id.* But see *Katz v. United States*, 389 U.S. at 350-51, where the Court noted that fourth amendment security often has nothing to do with privacy at all. See also Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173.

155. The Court's reaffirmation of the Open Fields rule does not clarify the serious definitional problems inherent in the doctrine. See LAFAVE, *supra* note 21, § 2.4 at 332 n.6-13 citing examples of expansive reading of the words "open fields." The Court ignored reality in its assertion that the curtilage will be clearly marked, and that the concept is easily understood. 104 S. Ct. at 1742. Cf. Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1, 5 (1971) ("The protection guaranteed citizens 'houses' under the Fourth Amendment must be intended to extend beyond the dimensions of the improvements upon this land. Otherwise, distinctions must be made among closed porches, open porches, terraces, enclosed tennis courts and lawns. . . ."). A full discussion of these issues is beyond the scope of this article, however.

156. See, e.g., LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982); LaFave, *supra* note 146; Dworkin, *supra* note 8 (1973).

157. LaFave, *supra* note 155, at 325-26. To be precise, Professor LaFave would test a "Bright Line" by asking four questions:

(1) Does it have clear and certain boundaries, so that it in fact makes case-by-case evaluation and adjudication unnecessary? (2) Does it produce results approximating those which would be obtained if accurate case-by-case application of the underlying principle were practicable? (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that principle has proved unworkable? (4) Is it not readily subject to manipulation and abuse?

Id. The *Oliver* rule fails on all four counts. First, the amorphous concept of the "curtilage" will keep courts busy for years searching for its boundaries. Second, the facts in *Oliver* and *Thornton* show that proper application of the underlying principle of privacy would produce a different result. Third, there is no apparent need to forego case-by-case analysis in the open field situations that is also not applicable to other fourth amendment situations. Although the *Oliver* Court does not suggest that the whole area of fourth amendment law be transformed into a collection of bright lines, the results in the cases show movement by the Court in that direction. Compare *Hudson v. Palmer*, 104 S. Ct. 3194 (1984) (fourth amendment not applicable in a prison). Too many rules can be as bad as too few. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

the differences between cases lying close on either side. . . ."¹⁵⁸ The placement of the line in *Oliver* seems to be founded more on a desire to convict drug traffickers than on fourth amendment principles.

The Court's plain language rationale is inconsistent with *Katz*. The *Katz* decision rejected a literal interpretation of the amendment.¹⁵⁹ Justice Black gathered no support for his argument that the language of the amendment did not cover a telephone call or a telephone booth.¹⁶⁰ That the *Katz* Court did not try to locate the telephone call or booth within the strict language of the amendment was not accidental given the privacy rationale advanced by the case.

The majority noted that post-*Katz* cases frequently relied on the language of the amendment to delineate its scope.¹⁶¹ Thus, the majority reasoned that *Katz* did not sever fourth amendment doctrine from the amendment language.¹⁶² But this only stated a truism. Without a doubt, structures used as houses are still "houses" under the fourth amendment while items of personal property are still "effects." The cases cited by the Court only reaffirm the basic notion.¹⁶³ When a house or a person is searched the issue of the scope of the fourth amendment coverage is easy. *Katz*, however, was not an easy case. The rule in *Katz* was intended to apply to the easy as well as the hard cases when reliance on the language of the fourth amendment provided little guidance. In these instances, *Katz* required courts to look deeper into the amendment at its core value: Whether, if the surveillance practiced by the police were permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would have been diminished to a compass inconsistent with the aims of

158. Amsterdam, *supra* note 56, at 388.

159. "[W]e have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements. . . ." *Katz*, 385 U.S. at 353. In so holding, the Court rejected the rationale in *Olmstead* that the amendment only protected tangible items.

160. *Katz*, 389 U.S. at 364 (Black, J., dissenting). Justice Black had two objections to the majority opinion. First, he did not believe the words of the amendment could include electronic eavesdropping. *Id.* at 366. He cited *Olmstead* in support of this conclusion. *Id.* at 367. Second, and following from his first point, he did not believe it was the proper role of the Court to "re-write" the Amendment to make it conform to modern technology. *Id.* at 365. Justice Black's unyielding literalism is identical to Justice Powell's literalism in *Oliver*.

161. 104 S. Ct. at 1740 n.6.

162. *Id.*

163. *Id.* The Court cited three cases: *Robbins v. California*, 453 U.S. 420 (1981) (opinion of Stewart, J.) (containers found in car are effects); *Payton v. New York*, 445 U.S. 573 (1980) (warrantless entry of a house improper without probable cause in exigent circumstances); and *Alderman v. United States*, 394 U.S. 165 (1969) (homeowner's rights violated by warrantless entry to install electronic listening device).

a free and open society.¹⁶⁴ In short, *Katz* did not divorce the amendment from its language, nor did it perform a shotgun wedding.

Justice Marshall was probably correct when he predicted that the plain language rationale would have little effect on fourth amendment law.¹⁶⁵ Nevertheless, the ease with which six members of the Court accepted this rationale is disturbing.

The second rationale for the decision advanced by the Court was also flawed. The court ignored the sensitive inquiry called for by *Katz* and simply transformed the per se open fields rule from *Hester* into a per se rule of nonprivacy. The Court began by rephrasing *Hester* in privacy terms. According to the majority, the rule in *Hester* can be seen to stand for the proposition that an individual may not legitimately demand privacy for activities conducted out of doors, except for the area immediately surrounding the home.¹⁶⁶ This squared with the Court's understanding of the intent of the framers to keep certain enclosures, like the home, free from arbitrary governmental invasion.¹⁶⁷ Noting that "open fields do not provide the setting for those intimate activities that the amendment is intended to shelter," the Court concluded that any expectation of privacy in open fields was not an expectation that society recognized as reasonable.¹⁶⁸

The Court found support for its conclusion by comparing the activities protected by the amendment and those which occurred in the open fields.¹⁶⁹ The Court asserted that there was no societal interest in protecting the privacy of activity conducted in open fields, such as the cultivation of crops. No explanation was offered why society would have been willing to protect white-collar businesses but not agriculture.¹⁷⁰

Instead, the Court treated these differences as self-evident. It may be that because agriculture is performed out of doors it is not protected by the fourth amendment. This focus does not address the question, however. It is not solely where an activity takes place but what expectations of privacy about that activity are reasonable. The defendant in *Katz*, for instance, made a call from a public telephone booth. He was

164. Amsterdam, *supra* note 56, at 403.

165. 104 S. Ct. at 1746 n.7. But see Justice White's concurrence in *Oliver*. 104 S. Ct. at 1744 ("however reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a 'house' or an 'effect'").

166. 104 S. Ct. at 1741.

167. *Id.*

168. *Id.*

169. *Id.*

170. Compare *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977).

visible to passersby. Moreover, a casual eavesdropper easily could have overheard his conversations. Neither of these factors are present, of course, when a person makes a phone call from his or her home. But the *Katz* court rejected the government's argument along those lines.¹⁷¹

To further support its distinction between houses (and offices) and open fields, the Court noted that "as a practical matter, the latter are accessible to the public and the police in ways that the former are not."¹⁷² The Court relied on two propositions; first, fences and no trespassing signs do not bar the public from viewing open fields generally, and second, the police may conduct aerial surveillance of open fields.¹⁷³

The Court might have been correct in its first assertion depending on the field. If a marijuana farmer planted his crop in a field along side a road, he could not expect a no trespassing sign (nailed to a tree) and a locust pole fence to prevent a passerby from seeing his field. Indeed, this situation would fall squarely within the *Katz* "knowing exposure" principle.¹⁷⁴ But these images of fields of marijuana openly visible from a country road are in sharp contrast with the facts in *Oliver* and *Thornton*. The marijuana patches were not visible in either case from any land-based point except at the site of the patches.¹⁷⁵ It does not follow that because the police would not have been conducting a search if they had observed a field of marijuana planted near the road, that they will never conduct a search when they go looking for a field planted in an area away from and not visible from the road.¹⁷⁶

The Court's use of the possibility of aerial surveillance¹⁷⁷ to sup-

171. *Katz*, 389 U.S. at 352.

172. 104 S. Ct. at 1741.

173. *Id.*

174. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351.

175. See *infra* text accompanying notes 249-50.

176. A court would not accept an argument that the police could conduct a warrantless search of dwelling absent probable cause and exigent circumstances because the dwelling was located in a high crime area and, therefore, neighborhood residents were not deterred from unlawfully entering the dwelling or that criminal activity could have been seen if it had been conducted near an unshuttered window. Cf. *Amsterdam*, *supra* note 64, at 406-07 (When a car is parked in a high crime area "does that mean government agents can break into [the] car uncontrolled by the Fourth Amendment?").

177. For a general discussion of aerial surveillance and the fourth amendment, see Comment, *Aerial Surveillance: A Plane View of the Fourth Amendment*, 18 GONZ. L. REV. 307 (1983), Comment, *Warrantless Aerial Surveillance: A Constitutional Analysis*, 35 VAND. L. REV. 409 (1982). State and federal courts have adopted several different approaches to resolving the question of the constitutionality of aerial searches. Compare *United States v. DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980) (open fields one factor to consider in evaluating constitutionality of aerial surveillance); *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981) (no subjective expectation of privacy from aerial surveillance in area routine Coast

port the intrusion on the property is similarly flawed. Moreover, it adds a potentially dangerous element to the fourth amendment equation. It is simply not true that because the government has the means to acquire certain information without raising any fourth amendment problems it may therefore use a different means to acquire the same information.¹⁷⁸ Such an exception would swallow the fourth amendment. Moreover, the potential success of a particular investigative technique is immaterial when it is not utilized. What matters is the intrusiveness of the technique used in the context of the particular case at hand.¹⁷⁹ Although the Court's conclusion is quite clear throughout, the analysis is less than convincing. By substituting assertion for analysis the Court leaves the impression that it is more interested in attaining convictions than it is in constitutional rights.¹⁸⁰ As Justice Marshall pointed out in dissent, by creating a per se exception to the fourth amendment the Court "opens the way to investigative activities we would all find repugnant."¹⁸¹ The greatest danger in this course is that the people, once exposed to such activity, will become insensitive to its threat to freedom.¹⁸²

The Court's analysis in *Oliver* was essentially this syllogism: the framers protected houses, this activity occurred outside the house,

Guard flights); and *Dean v. Superior Court for County of Nevada*, 35 Cal. 3d 112, 110 Cal. Rptr. 585 (1973) (common habits of mankind in use of property dictate reasonableness of expectations of privacy; growing contraband not consistent with such common habits). See generally Annot., 56 A.L.R. 2d 772 (1958).

178. For example, the ability of the police to bug a participant in a conversation does not thereby allow the police to bug the place where the conversation occurs or the device over which it is transmitted without the consent of one of the participants. Compare *U.S. v. White*, 401 U.S. 745 (1971) and *Alderman v. United States*, 394 U.S. 165 (1969) (rights of homeowner violated when police make warrantless entry, installation, and monitoring of electronic listening device).

179. Cf. *United States v. Karo*, 104 S. Ct. 3296 (1984).

[We] have never held that potential as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment. A holding to that effect would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on. It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence.

Id. at 3302.

180. "The Burger Court often acts, in its resolution of fourth amendment issues . . . as much like an overzealous police department, as it does like a court. It quite clearly sees its preeminent role in criminal cases as that of insuring that criminals go to jail." Burkhoff, *supra* note 75, at 557 (1984).

181. 104 S. Ct. at 1751 (Marshall, J., dissenting). The due process clause of the fourteenth amendment serves as the ultimate limitation on state police practices but its usefulness is limited. See *supra* note 23.

182. 104 S. Ct. at 1751 (Marshall, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. at 485 (1928) (Brandeis, J., dissenting)).

therefore, the fourth amendment did not protect this activity. This same syllogism undergirds the decision in *United States v. Karo*.¹⁸³ In *Karo*, an agent learned that Karo and two other men had ordered 50 gallons of ether from a government informant. The ether was to be used to extract cocaine from clothing imported into this country. The government received a court order allowing the installation and monitoring of an electronic beeper.¹⁸⁴ With the consent of the informant, the government substituted a can containing the beeper for one of the cans in the intended shipment.¹⁸⁵

Drug Enforcement Agency agents saw Karo pick up the ether and, by using a combination of visual and beeper surveillance, followed Karo to his house. Later, the beeper allowed them to determine that the can was still in the house. Subsequently, beeper surveillance alone allowed the agents to detect the can's movement to and presence within two other houses as well as to two different commercial storage facilities. Finally, the agents observed a defendant and another person removing the cans from the second storage facility.¹⁸⁶

Again using visual and beeper surveillance, DEA agents traced the can to a third house. Because the agents were afraid of being detected, they did not maintain close surveillance of the house. Instead, they later verified the presence of the can in the house by beeper surveillance.¹⁸⁷ Armed with this and other information, the agents sought and received a search warrant for the premises. The warrant was executed, cocaine and laboratory equipment were seized, and the defendants were arrested.¹⁸⁸

The district court granted the defendants' motion to suppress the evidence on the grounds that the initial warrant used to install the beeper was invalid, thus the later warrant to search the house was tainted by this prior illegality.¹⁸⁹ The United States appealed but did not challenge the invalidation of the first warrant. The court of appeals affirmed, holding that a warrant was required for both the installation

183. 104 S. Ct. 3296 (1984).

184. "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *United States v. Knotts*, 460 U.S. 276, 277 (1983).

185. 104 S. Ct. at 3300.

186. *Id.*

187. *Id.*

188. *Id.* at 3301. Five defendants were indicted for conspiring to possess cocaine with the intent to distribute and also with the underlying offense in violation of 21 U.S.C. §§ 841(a)(1) and 846. One defendant was indicted only for conspiracy. 104 S. Ct. at 3301.

189. 104 S. Ct. at 3301.

and the monitoring of a beeper.¹⁹⁰

The Supreme Court reversed. In an opinion by Justice White, the Court held that no fourth amendment question was raised by the installation of the beeper because the can into which it was installed was owned by the DEA.¹⁹¹ Moreover, even if the beeper had been installed in a can from the original shipment no fourth amendment interests were implicated because the owner of the shipments consented.¹⁹² The Court reasoned that any infringement of fourth amendment privacy occurred during the monitoring of the beeper. On this point the Court held that the fourth amendment was violated by the warrantless monitoring of the beeper when it was located within a private residence.¹⁹³ Justice White reasoned that private residences are places in which the individual normally expects privacy and that expectation is one that society is prepared to recognize as justifiable.¹⁹⁴ By monitoring the beeper while it was inside a private residence the agents obtained information they could not have obtained by observation from outside the house. This contrasts with *United States v. Knotts* where the information revealed by beeper surveillance was "voluntarily conveyed to anyone who wanted to look. . . ." ¹⁹⁵ In *Karo*, however, the beeper revealed "a critical fact about the interior of the premises that the Government . . . could not have otherwise obtained without a warrant."¹⁹⁶ In spite of this holding, the Supreme Court reversed the court of appeals. After striking all of the improperly obtained information from the affidavit for the second warrant, the court found enough untainted information left to furnish probable cause for the issuance of

190. *United States v. Karo*, 710 F.2d 1433 (8th Cir. 1983).

191. 104 S. Ct. at 3301.

192. *Id.*

193. *Id.* at 3303.

194. *Id.*

195. 460 U.S. 276, 281 (1983). In *Knotts*, government agents placed a beeper in a drum of chloroform, a precursor chemical used to manufacture illegal drugs. By monitoring the beeper after it was purchased, the agents were able to follow the drum to the defendant's house. The Court found that no search occurred because monitoring the beeper did not invade any reasonable expectations of privacy:

A person traveling . . . over the public streets . . . voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Id. at 281-282. The Court relied on *Smith v. Maryland*, 442 U.S. 735, for its conclusion. 460 U.S. at 283. For a discussion critical of the decision in *Knotts* see LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & C. 1171, 1174-78 (1983).

196. 104 S. Ct. at 3304.

the second warrant.¹⁹⁷

The results in *Karo* and *Knotts* cannot be reconciled unless one resurrects the sterile and formalistic concept of protected places. Professor LaFave argues that *Knotts* was wrongly decided because anyone who observed the can in which the beeper was located would not have known what the beeper revealed: that a container purchased in one location was on its way to another location.¹⁹⁸ Only a hypothetical "army of bystanders" located along the route who passed their observations from one to another could have known all that the government knew from its surveillance of the beeper.¹⁹⁹ LaFave concludes that "[t]he Court has thus continued farther down the same path as in *Smith v. Maryland*," significantly the prior decision most relied upon in *Knotts*. By similar analysis, even the facts of the *Katz* case itself could be characterized as not involving a search "because a lipreader or a bystander could detect what was being said."²⁰⁰ Hypothetical observers could also have followed the box in the house had they been present or near enough to a window to see inside.²⁰¹

Justice O'Connor pointed out that the electronic transmission from inside the house did not by itself constitute a search.²⁰² *White* established that either a person assumes a risk that his conversations will be revealed, or that any privacy in the conversation evaporates when one confides in another.²⁰³ Neither of the factors is present when a person

197. *Id.* at 3306-07. Justice O'Connor concurred in part and concurred in the judgment. *Id.* at 3307. She saw the privacy interests implicated by the beeper surveillance to be much narrower than the majority. To her, the "touchstone" would be "the defendant's interest in the container. . . ." If the defendant owned the containers or exercised exclusive dominion and control over them then he would have a privacy interest in their location within his home. But if the defendant allowed someone else's containers to come into his home, then he would surrender any expectation of privacy in their location within his home. *Id.* at 3308-09. Because of this, Justice O'Connor would allow a challenge to beeper evidence only if "the beeper was monitored when visual tracking of the container was not possible" and "the defendant had an interest in the container itself sufficient to empower him to give effective consent to a search of the container." *Id.* at 3310.

Justice Stevens concurred in part and dissented in part. He agreed with the Court's reasoning concerning the in-house monitoring of the beeper but disagreed with the majority's de novo review of the warrant application. *Id.* at 3314.

198. LaFave, *supra* note 194, at 1176.

199. *Id.* at 1176-77.

200. *Id.* at 1177. I would add *Miller* and *White* to Professor LaFave's list even though the Court did not cite it. *Knotts* is a further application of the *White* syllogism. See *supra* text accompanying notes 82-85.

201. Compare *Cohen v. Superior Court*, 5 Cal. App. 3d 429, 85 Cal. Rptr. 354 (1970); and *State v. Clarke*, 242 So. 2d 791 (Fla. App. 1970).

202. 104 S. Ct. at 3307. (O'Connor, J., concurring in part and in the judgment).

203. See *supra* text accompanying notes 86-94.

voluntarily opens his or her house to a closed container.²⁰⁴

The Court distinguished the participant monitoring cases by saying that those cases relied on the consent of one of the parties to the conversation. The risk assumed by the homeowner was that his guest consented to have the conversation taped. The homeowner did not assume the risk of any non-consensual bugging. By the same token, the homeowner did not assume the risk that property brought into the home was bugged.²⁰⁵ Moreover, the Court noted that "[t]here would be nothing left of the fourth amendment right to privacy if anything that a hypothetical government informant might reveal is stripped of constitutional protection."²⁰⁶ Neither of these statements adequately justified the distinction drawn by the Court.

It is not clear that the risks are different enough to justify different results. Indeed, the nature of the intrusion in the participant monitoring cases is qualitatively different than in the beeper case. By bugging another person, the government invades a personal relationship; by monitoring a beeper the government learns the location of an item. The former seems more intrusive on privacy than the latter.²⁰⁷ Moreover, the information gathered by beeper surveillance in a house is not much different than what the police already know.²⁰⁸ Finally, the Court's grand statement about the fourth amendment is inconsistent with *Smith* and *Miller*. The hypothetical telephone operator or bank teller were the bench-marks by which the Court measured the defendant's expectations of privacy.²⁰⁹ Those cases differ from *Karo* in that at some point telephone company switching equipment processed the calls in

204. Cf. 104 S. Ct. at 3308 (O'Connor, J., concurring in part and in the judgment). "When a closed container is moved by permission into a home, the homeowner . . . surrender[s] any expectation of privacy . . . in the movements of the container—unless it is *their* container or under *their* dominion and control." (emphasis in original).

205. 104 S. Ct. at 3304.

206. *Id.*

207. See *United States v. White*, 401 U.S. at 787 (Harlan, J., dissenting) (third party bugging undermines the confidence and sense of security characteristic of individual relationships between citizens in a free society); Cf. *Amsterdam*, *supra* note 56, at 407:

Both [spying and electronic surveillance] tend to repress crime in the same way, by making people distrustful and unwilling to talk to one another. The only difference is that under electronic surveillance you are afraid to talk to anybody in your office or over the phone, while under a spy system you are afraid to talk to anybody at all.

208. If the police can monitor the beeper as it moves about in public, then they will be able to follow it up to the defendant's front door. *United States v. Knotts*, 460 U.S. 276 (1983). At this point, the police know who has the container and the building in which it is located. To follow it anywhere else, they simply need to turn on the monitor whenever someone leaves the building. In *Knotts*, for example, the beeper was followed to several different locations. 460 U.S. at 281.

209. See *supra* text accompanying notes 107-13.

Smith or a bank employee handled the checks in *Miller* but these are distinctions without a difference. In neither *Smith* nor *Miller* could the government point to a person who actually and not hypothetically could recall either the telephone numbers or the information on the checks.

The decision in *Karo* can only be explained by reference to the doctrine of protected places. For example, the syllogism from *Oliver* is applied with alarming simplicity. The beeper could be monitored outside of the defendant's house but could not be monitored once the item which contained the beeper passed the threshold of the house. According to the majority opinion, the Court's fourth amendment search and seizure cases "have not deviated from [the] basic principle" that the expectation of privacy in a private residence is reasonable.²¹⁰ Justice White compared monitoring the beeper to an agent's warrantless entry into the house to verify the precise location of a certain item. The fourth amendment protects people from a warrantless intrusion of this kind. Thus, the result should be the "same where, without a warrant, the government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation outside the curtilage of the house."²¹¹ Because monitoring the beeper revealed a "critical fact about the interior of the premises," it was a search and a warrant was required.²¹²

The reasoning and results in *Knotts* and *Karo* resembled decisions made under a protected place theory.²¹³ Just as in *Silverman* where the spikemike penetrated the wall of the home and thus violated the fourth amendment, the radio waves in *Karo* penetrated the boundaries of the house, similarly invalidating any information acquired. By comparison, *Knotts*, like *Goldman*, defined the police activity as being outside of the amendment when that activity did not break the boundary of the home.

There can be no quarrel with the proposition that an expectation of privacy in a house is reasonable. Some reference to place is inevitable in a fourth amendment analysis. It is when reference to place becomes a talisman that the teaching of *Katz* is ignored. Unfortunately, the Court's decisions this term used place as a talisman. For example, in *Hudson v. Palmer*²¹⁴ the Court ruled that the fourth amendment did

210. *Karo*, 104 S. Ct. at 3303.

211. *Id.*

212. *Id.*

213. The result in *Karo* is consistent with Professor Weinreb's proposed theory of the fourth amendment because in-the-house monitoring of the beeper violates both the "privacy of place" and the "privacy of presence" which the defendant enjoyed. Weinreb, *supra* note 2.

214. 104 S. Ct. 3194, (1984). In two previous cases the Court hinted at this holding. See *Lanza v. New York*, 370 U.S. 139 (1962), where the Court upheld a conviction on other grounds

not apply inside a prison though the "papers and effects" of a prisoner were searched. If the protection of the fourth amendment turned on something other than place, *Hudson* would have been wrong. The decision established that prisons were not protected places.

Palmer, an inmate at the Bland Correctional Center in Bland, Virginia, brought a pro se action in federal district court claiming that Hudson, a corrections officer, conducted an unreasonable "shake down" search of his cell in violation of the fourth amendment.²¹⁵ The district court granted summary judgment in favor of Hudson.²¹⁶ The Fourth Circuit Court of Appeals reversed the district court on the fourth amendment issue holding that an individual prisoner had a limited fourth amendment right to privacy in his cell.²¹⁷ According to the circuit court, shakedown searches were permissible only if "done pursuant to an established program of conducting random searches of single cells or groups of cells reasonably designed to deter or discover the possession of contraband" or upon the reasonable belief that the particular prisoner possessed contraband.²¹⁸

The Supreme Court reversed the court of appeals on this issue. In an opinion by Chief Justice Burger, the Court adopted a "bright line" rule that prisoners had no legitimate expectation of privacy in their individual cells, thus, the fourth amendment was not applicable in a prison context.²¹⁹ The Court balanced the interests of society in the security of its penal institutions against the interest of the prisoner in the privacy of his cell.²²⁰ Because the right to privacy was necessarily circumscribed by the fact of incarceration and because institutional security was central to all of the corrections goals, the Court struck the

but declared that "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Id.* at 143; *Bell v. Wolfish*, 441 U.S. 520 (1979), where the Court assumed a diminished expectation of privacy but upheld shakedown searches, strip searches, and body cavity searches of pre-trial detainees. *See also* *Block v. Rutherford*, 104 S. Ct. 3227 (1984) (random shakedown searches of absent pre-trial detainee's cell do not violate the due process clause of fourteenth amendment). *See generally* Giannelli & Gilligan, *Prison Searches and Seizures: "Locking" the fourth amendment Out of Correctional Facilities*, 62 VA. L. REV. 1045 (1976).

215. *Hudson*, 104 S. Ct. at 3197. Palmer also claimed that Hudson intentionally destroyed items of personal property thereby depriving him of property without due process of law. The Court found that the holding and the rationale of *Parrat v. Taylor*, 451 U.S. 527 (1981) should apply to intentional deprivation of property. 104 S. Ct. at 3197.

216. 104 S. Ct. at 3197.

217. *Palmer v. Hudson*, 697 F.2d 122 (4th Cir. 1983).

218. *Id.* at 1224. The court of appeals affirmed the district court's decision denying Palmer's due process claim. *Id.* at 1223.

219. 104 S. Ct. at 3200.

220. *Id.* at 3200.

balance in favor of institutional security.²²¹

In reaching this conclusion, Chief Justice Burger cited statistics showing the violent nature of prison life.²²² In addition, the Chief Justice noted the problem prison administrators had in stopping the flow of drugs, weapons, and other contraband into prisons. Because the only place where a prisoner could hide contraband was in his cell, the Chief Justice concluded that prison officials must have unfettered access to a prisoner's cell.²²³ The Court went on to say that the uncertainty of random searches was a potent weapon against "the proliferation of knives and guns, illicit drugs, and other contraband."²²⁴ The court of appeals' requirement that random searches be carried out according to some established plan would "seriously undermine the effectiveness of the weapon."²²⁵

Palmer conceded the utility of routine shakedowns but contended that the fourth amendment protected him from searches designed only to harass. Chief Justice Burger recognized the evil of harassment searches but refused to consider the question:

This argument [against harassment searches], which assumes the answer to the predicate question whether a prisoner has a legitimate expectation of privacy in his prison cell at all, is merely a challenge to the reasonableness of the particular search of respondent's cell. Because we conclude that prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition of unreasonable searches does not apply in prison cells, we need not address this issue.²²⁶

The result in *Palmer* can only be explained by reference to the

221. "A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Id.* at 3201.

Justice O'Connor wrote a concurring opinion agreeing substantially with the majority on this issue. *Id.* at 3205. Justice Stevens wrote an opinion dissenting from the majority's fourth amendment holding. *Id.* at 3207. Calling the majority's reasoning "seriously flawed—indeed, internally inconsistent". *Id.* at 3208. Stevens criticized the Court's adoption of a "bright-line rule." *Id.* at 3215.

222. The Chief Justice noted that during 1981 and the first half of 1982, there were over 120 prisoners murdered, 29 riots, and 125 suicides. *Id.* at 3200. *But see* the dissenting opinion of Stevens, J., showing that the homicide rate in prisons is lower than in Miami, New York, and the District of Columbia. *Id.* at 3214. Justice Stevens cautioned that his statistics did not provide a standard for measuring reasonableness but rather showed that the Court's use of statistics was "less than persuasive." *Id.*

223. *Id.* at 3200.

224. *Id.* at 3201.

225. *Id.*

226. *Id.* at 3202.

apparent "super privacy" of the home. A plain language rationale supports Palmer's claim because without a doubt the items searched were "paper or effects." If so, then the fourth amendment should apply. The Court would never so readily countenance a warrantless search of a home. As in *Oliver*, however, because the activity occurs outside the home the defendant is not entitled to any privacy.

The weight which the Court gave to the defendant's interest in its balancing test also indicated the degree to which personal interests are devalued in the Court's "nostalgic devotion to the hearth."²²⁷ The Court described Palmer's privacy interests as necessarily circumscribed by prison life. This is true as a general proposition, yet even a prisoner has a much greater specific, personal interest in protecting the privacy of personal letters and papers.²²⁸ The Court, however, did not take these interests into account in its balancing test and in fact completely rejected any consideration of them.²²⁹ The Court is saying that the fourth amendment protects places, and a prison or an open field or a public highway is not one of those places.²³⁰

IV. DEATH OF THE SUBJECTIVE PRONG OF THE KATZ TEST

The search cases of the 1983-84 term confirmed what had long been suspected: the subjective prong of the *Katz* privacy test was dead.²³¹ That portion of the *Katz* test never was valued highly by the

227. "By focusing on the sanctity of the home rather than on the broader privacy interest, the majority invited speculation that it is motivated more by a nostalgic devotion to the hearth than by a commitment to the Fourth Amendment." *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 187 (1980).

228. See *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982) (reading prisoner's private papers during search for contraband not justified without nexus between papers and government interest in security). Compare *United States v. Savage*, 482 F.2d 1371 (9th Cir. 1973) (court required a showing of governmental interest in monitoring prisoners' mail) and *Sumlin v. State*, 266 Ark. 709, 587 S.W.2d 571 (1979) (detection of escape plans sufficient governmental interest to screen all mail to and from prisoners).

229. See *supra* note 225 and accompanying text.

230. I am not arguing that prison searches should be subject to strict fourth amendment requirements. Prison searches differ in quality from other searches if for no other reason than that they occur in prison where the inmate's liberty is greatly circumscribed and the government's interest in security is great. Balancing these interests is a difficult task. See LAFAYE, *supra* note 21, § 10.9. My complaint about *Hudson* is that the Court casually dismissed the fourth amendment claim without any recognition of the complexity of the question. The Court's analysis is so superficial that, in my view, it is nothing more than a simplistic protected place rationale.

231. I am not the first person to reach this conclusion. Burkoff, *supra* note 75, at 528; Note, *Protecting Privacy under the Fourth Amendment*, 91 YALE L.J. 313, 328 (1981); Note, *A Reconsideration of the Katz Test*, 76 MICH. L. REV. 154, 162 (1977); Cf. *Amsterdam*, *supra* note 56, 384 (1974). But cf. Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV.

Court²³² and in recent years was often dropped from the citation of the expectation of privacy test.²³³ During this same period of time, however, other cases reverted to the classic two-pronged *Katz* test.²³⁴ The most recent cases should put the subjective prong to rest for good.

From the beginning, the subjective prong created problems for fourth amendment analysis. In the first place, the formulation of the test was in Justice Harlan's concurring opinion in *Katz*, an opinion which he later repudiated.²³⁵ It was difficult to determine the proper scope of the subjective prong. Professor Amsterdam pointed out that if a subjective expectation of privacy were a necessary condition to fourth amendment privacy, then the protections of the fourth amendment would evaporate with the government's announcement of pervasive surveillance.²³⁶ On the other hand, a subjective expectation of privacy could not be a sufficient condition, for then every warrantless search not covered by an existing exception would be defeated by the defen-

335, 361 (1978), suggesting that the Court looks for the actual expectations of contemporary Americans. Professor Yackle criticized this approach because it would allow fourth amendment protection to vary "with the ebb and flow of public opinion." *Id.* Later cases, however, indicated that the actual expectations of privacy held by Americans was immaterial. Only the expectations of five Supreme Court justices mattered. *Cf. Ashdown, supra* note 72.

232. Compare *United States v. Miller*, 425 U.S. 435 (1976), where the Court did not discuss the bank depositor's subjective expectation of privacy in his bank records and *Burrows v. Superior Court*, 13 Cal. 3d 238, 243, 118 Cal. Rptr. 166, 169, 529 P.2d 590, 593 (1974), where the California Supreme Court used the defendant's expectation of privacy in bank records as the fourth amendment standard.

233. See, e.g., *Illinois v. Andreas*, 463 U.S. 765, 103 S. Ct. 3319, 3323 (1980) ("The Fourth Amendment protects legitimate expectations of privacy."); *United States v. Salvucci*, 448 U.S. 83, 93 (1980) (illegal search only violates the rights of those who have a legitimate expectation of privacy in the invaded place).

234. See, e.g., *United States v. Knotts*, 460 U.S. 276 (1983); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Smith v. Maryland*, 442 U.S. 735, 740-43 (1979).

235. In his dissenting opinion to *United States v. White*, 401 U.S. 245, Justice Harlan said fourth amendment analysis must "transcend the search for subjective expectations. . . ." 401 U.S. at 786.

236. "An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the Fourth Amendment protects. It can neither add to, nor can its absence detract from, an individual's claim to Fourth Amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance."

Amsterdam, *supra* note 56, at 384. But see *United States v. Miller*, 425 U.S. 435 (1976), where the Court held that the Bank Secrecy Act created no legitimate expectation of privacy because financial records are useful in criminal investigations. *Cf. Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (Congress has broad authority to fashion standards of reasonableness for searches and seizures in industries with long histories of pervasive regulation); *United States v. Biswell*, 406 U.S. 311, (1972) (inspection for compliance with Gun Control Act a limited threat to privacy because of dealer's knowledge of pervasive governmental regulation).

dant's assertion that he expected to keep private what the government seized.

The Court rarely addressed the question of the relationship of the two prongs to each other. In *Smith v. Maryland*,²³⁷ however, Justice Blackmun analyzed at some length the subjective claim of privacy. In *Smith*, the Court held that a pen register which recorded the numbers dialed by the defendant was not a search for fourth amendment purposes. In the first part of the opinion the Court discussed the defendant's claim of subjective privacy. Justice Blackmun noted that the defendant's expectation of privacy could extend only to the contents of his calls and not to the numbers he dialed.²³⁸ He concluded that telephone users knew they conveyed the numbers they dialed to the telephone company because their calls had to be transmitted through telephone company switching equipment.²³⁹ In addition, users knew the phone company recorded these numbers because they received a list of calls in their monthly bills. Finally, telephone users knew that the phone company recorded these numbers for a variety of business purposes.²⁴⁰ The Court concluded that it was "too much to believe" that telephone users in general had any expectation of privacy in the numbers they dialed.²⁴¹ The Court went on to reject the defendant's claim that his privacy was enhanced because he made the telephone calls in question from his home. "[T]he site of the call is immaterial for purposes of analysis in the case. . . . Regardless of his location, petitioner had to convey that number to the telephone company in precisely the same way. . . ." ²⁴²

The exact rationale for this holding is unclear. At one level, the Court seemed to mount an attack on the credibility of the defendant's claim of a subjective expectation of privacy.²⁴³ On the other hand, the Court seemed to be measuring the defendant's actual expectation of privacy by reference to an objective standard.²⁴⁴

237. 442 U.S. 735 (1979).

238. *Id.* at 742.

239. *Id.*

240. *Id.* at 743.

241. *Id.*

242. *Id.*

243. "Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret." *Id.*

244. The Court seemed to conclude that Smith had no subjective expectation of privacy because "[t]elephone users . . . typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information. . . ." *Id.* See also Burkhoff, *supra* note 75.

This latter reading of *Smith* was inconsistent with *Katz* because *Katz* asked whether the defendant had an "actual" expectation of privacy or, as the majority put it, whether the individual sought "to preserve something as private."²⁴⁵ *Katz* did not measure the defendant's expectations of privacy against any general user profile. The better reading of *Smith* was the former. Of course, this did little to clarify the significance of the subjective prong. The Court proceeded to an analysis of the objective prong of the *Katz* test—whether society viewed the claimed privacy as reasonable. The discussion seems unnecessary if a subjective expectation is a necessary condition to fourth amendment protection. If a defendant has no expectation of privacy then it matters little whether or not society views a hypothetical claim as reasonable. By proceeding to this discussion, the Court devalued the importance of the subjective prong. This should have produced "a single inquiry, i.e., is the assertion of constitutionally protected rights one . . . that reflects 'well-recognized Fourth Amendment freedoms' or that should reflect such freedoms upon 'normative inquiry?'"²⁴⁶ Indeed, the *Smith* court indicated that absent a subjective expectation of privacy "a normative inquiry would be proper."²⁴⁷ Inexplicably, however, the Court did not pursue any normative inquiry in *Smith*.

The full effect of this shift to a single inquiry can be seen in the recent cases. In these cases, the Court did not follow the two-pronged analysis in either form or substance. For example, only in *United States v. Karo*²⁴⁸ was the individual's expectation of privacy highlighted, and even there, the extent of the defendant's expectation was measured by reference to the place within which the search occurred. In the other cases, the notion that a subjective inquiry had any importance is devalued and ultimately rejected. Moreover, unlike *Smith*, none of the cases discussed the credibility of the defendant's claimed expectations. Instead, the discussions in the cases assumed a subjective expectation of privacy and then proceeded to show how any expectation was unreasonable.²⁴⁹

*Oliver v. United States*²⁵⁰ is a good example of this approach. In *Oliver* and its companion case, *Maine v. Thornton*, the defendants posted no trespassing signs, and located the fields of marijuana on re-

245. *Katz*, 389 U.S. at 588.

246. Burkhoff, *supra* note 75, at 528.

247. 442 U.S. at 740-41 n.5.

248. 104 S. Ct. 3296 (1984).

249. This is not a new trick. See Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L. J. 313, 328 (1981).

250. 104 S. Ct. 1735 (1984).

mote parts of their land. The marijuana patches were hidden from view by woods, fences, or embankments and were not visible from any point on adjacent land. Given these facts, the Maine Supreme Court in *Thornton* concluded that "a person would have had to search to find the patches" and granted the defendant's motion to suppress. The Sixth Circuit Court of Appeals reached the opposite conclusion. The Supreme Court rejected the contention that these precautions could legitimize the defendant's expectation of privacy. The correct focus was "whether the government's intrusion infringes on the personal and societal values protected by the Fourth Amendment."²⁵¹ In other words, it did not matter what the defendants thought about their privacy or what they did to protect it so long as the objective (and abstract) boundary of the fourth amendment was not crossed.

The Court proceeded at a level of generality in which subjective facts were immaterial. The Court's "plain language" rationale rendered subjective factors meaningless. The focus was on the words of the amendment and not the expectations of the defendant. No precautions undertaken to protect one's privacy could transform a "field" into a "house." No belief that one's land was protected from intrusion even if supported by civil and criminal trespass laws would make fields into "persons" or "effects" or "papers." If the item or area searched were within one of the defined areas, the fourth amendment protected it. If not, the fourth amendment was not applicable.

The Court's second rationale also illustrates this point. The Court contrasted open fields against those enclosures of privacy protected by the amendment. Open fields did not provide a setting for protected "intimate activities." Moreover there was no societal interest in protecting activities conducted in the open fields. Open fields were accessible in ways that homes or offices were not.²⁵²

This might have been true of open fields in general but it had little application to the facts in the case before the Court. The landowner who planted marijuana in a field alongside a public road could not insulate his activity by posting a single no trespassing sign to a tree or building or three feet high fence. This was not the situation in either *Oliver* or *Thornton*. Both defendants took precautions to shut out the casual observer. The family out for a drive in the country or the policeman out on patrol could not stumble upon the fields any more than they could stumble into a house with the doors locked but with the

251. 104 S. Ct. at 1743.

252. *Id.* at 1741.

windows unbarred. In order to find the fields the police were forced to engage in purposeful behavior.²⁵³ In short, they had to and did look for marijuana patches. If a subjective inquiry had any place here these factors would have been important but the court looked at the open fields in the abstract, and, thus, made the particular facts immaterial.

The same level of abstraction was used in *Hudson v. Palmer*.²⁵⁴ In this case Chief Justice Burger's opinion spoke in the most general terms about balancing the "interests of society" in the security of its penal institutions "against" the interest of the prisoner in privacy within his cell. Because the security interests in general outweigh the privacy interests in general, the Chief Justice concluded that prisoners could have no legitimate expectation of privacy in their cells. In support of his conclusions, the Chief Justice cited statistics purporting to show the high incidence of violent crime in prisons and the need for tight security. There was no indication, however, that such concerns were behind the "shakedown" search of Hudson's cell. More to the point was the Court's rejection of Hudson's claim that the fourth amendment protected prisoners from searches designed solely to harass. The Chief Justice would not even consider the issue because it was merely a challenge to the reasonableness of the *particular* search of Hudson's cell. In its haste to draw a bright-line rule the Court created the anomalous possibility of an unreasonable search never being a search at all.²⁵⁵

*United States v. Jacobsen*²⁵⁶ provided the final example. The Court's holding that the inadvertent discovery of the cocaine by the private third party vitiated the defendants' expectation of privacy entirely removed from the fourth amendment any inquiry into the subjective expectation of privacy. Without a doubt when the defendants

253. Compare *Marshall v. Barlow's*, 436 U.S. 307 (1978) (warrantless OSHA inspection violated the fourth amendment when inspection went beyond public area); and *Donovan v. Lone Star, Inc.*, 104 S. Ct. 769 (1984) (no fourth amendment activity when administrative subpoena delivered in public lobby). See Grano, *supra* note 47, at 436 ("[W]hat the employer [in *Barlow's*] found offensive was not mere presence, but presence for the purpose of seeking out information.").

254. 104 S. Ct. 3194 (1984).

255. It would bend the word beyond recognition to say that a bad-faith search of a prisoner's letters was reasonable. The *Hudson* Court avoided this semantic nonsense with its own nonsense that harassment searches did not raise any fourth amendment issue because, in general, prison searches were not covered by the fourth amendment. To be sure, fourth amendment law has not flinched in the past from terming reasonable police conduct an unreasonable search. See, e.g., *Katz*, 389 U.S. 347 (1967); Alschuler, *supra* note 156, at 233. But Cf. *United States v. Leon*, 104 S. Ct. 3405 (1984) (exclusionary rule not applied if police act in good faith reliance on search warrant).

256. 104 S. Ct. 1652 (1984).

placed their package with Federal Express they did not expect the government to search it.²⁵⁷ This expectation did not change when the package was damaged and then inspected by the courier. The Court reasoned, however, that these actions did not intrude upon any legitimate expectations of privacy the defendants may have had in the package. Thus, the protections of the fourth amendment turned on the actions of the third party and not on any change in the defendants' expectation of privacy.

Justice White pursued this point. He claimed that the majority "ignore[d] an individual's subjective expectations" by appraising the reasonableness of an invasion of privacy "on the basis of the facts as they existed at the time that the invasion occurred."²⁵⁸ He noted that the *Jacobsen* holding could not "rest on the proposition that the owner no longer [had] a subjective expectation of privacy" because, as Justice Stevens observed in *Walter v. United States*, "a person's expectation of privacy cannot be altered by subsequent events of which he was unaware."²⁵⁹

V. CRITERIA FOR DETERMINING A LEGITIMATE OR REASONABLE EXPECTATION OF PRIVACY

Without a subjective prong, the Court's privacy test boils down to one question: What expectations of privacy would society recognize as reasonable? This formulation is internally inconsistent. A test that measures the legitimacy of the defendant's expectations has no context if the defendant's actual expectations are not taken into account. The better question to ask, and the one which the Court appears to be answering is, what interests does the fourth amendment protect?²⁶⁰

257. In its discussion of the legality of the field test the Court drew a distinction between a legitimate expectation of privacy and a "subjective expectation of not being discovered." 104 S. Ct. at 1661 n.22 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). This distinction is simply the difference between what privacy one expects and what privacy society recognizes. By emphasizing this distinction the Court unnecessarily narrows the scope of the privacy protected by the fourth amendment. See Posner, *supra* note 153 (Privacy includes both secrecy and solitude. Neither aspect has fared well in the Burger Court.).

258. 104 S. Ct. at 1667.

259. 447 U.S. at 659 n.12.

260. Amsterdam, *supra* note 56, at 385 ("The key to the Amendment is the question of what interest it protects."); See also Burkhoff, *supra* note 75, at 528. ("[I]s the assertion of constitutionally protected privacy right one . . . that reflects 'well-recognized Fourth Amendment freedom?'"); Posner, *supra* note 153, at 188 (reasonable expectation of privacy formulation is circular because whether or not a defendant has such an expectation depends on what the legal rule is). In an attempt to reconcile the expectation language with the fourth amendment one commentator suggested that the fourth amendment does not simply protect expectations of privacy rather, it

The precise contours of this inquiry have never been outlined, however. In general, judges and commentators have agreed that the focus must be outside the amendment.²⁶¹ Justice Harlan suggested that the analysis focus on an assessment of "the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."²⁶² For Professor Amsterdam,

[T]he ultimate question . . . is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.²⁶³

Justice Rehnquist indicated that "legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment. . . ."²⁶⁴

All of these formulations are normative. Their details must be filled in through application in particular cases and the line-drawing inevitable in judicial decision.²⁶⁵ In this process, however, a court needs a set of criteria to inform its judgment. If the question concerns the interests protected by the amendment then courts must precisely identify the interests implicated by the particular police activity. Moreover, in assessing these interests the Court must justify its decision by reference to some value inherent in the fourth amendment.²⁶⁶ Otherwise, decisions on the reasonableness of privacy interests would reflect only the subjective preferences of five Supreme Court justices.²⁶⁷ Moreover,

protects the right to have certain expectations of privacy. Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 155-56 (1977). This is simply another way of asking what the fourth amendment protects.

261. See generally, Loewy, *Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C.L. REV. 329 (1984); Alschuler, *supra* note 64; Bacigal, *The Jury as a Source of Reasonable Search and Seizure Law*, 1980 B.Y.U. L. REV. 739.

262. *United States v. White*, 401 U.S. at 786 (Harlan, J., dissenting). But see Amsterdam, *supra* note 56, at 375 ("[I]f the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity is not restrained, then we shall have a Fourth Amendment with all the character and consistency of a Rorschach blot.").

263. Amsterdam, *supra* note 56 at 403. Immediately after asking this grand question, Professor Amsterdam admitted that it was "a perfectly impossible question for the Supreme Court to put forth as a test of Fourth Amendment coverage." *Id.*

264. *Rakas v. Illinois*, 439 U.S. at 143-44 n.12. But see Posner, *supra* note 153, at 188 n.41 (statement incompatible with holdings in the participant monitoring cases).

265. Amsterdam, *supra* note 56, at 408-09.

266. Ashdown, *supra* note 64, at 1302.

267. Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50

without clear criteria for decision, a court would be tempted to provide a post hoc justification for the search of an obviously guilty person.²⁶⁸ Prior to the 1983-84 term the Supreme Court never specifically detailed its criteria. In *Smith v. Maryland*, for example, Justice Blackmun indicated that when a defendant had no subjective expectation of privacy "a normative inquiry would be proper" but he did not outline the factors a court should consider in making the inquiry.²⁶⁹

The Court's treatment of property interests were indicative of the murkiness in this area. In two cases the Court seemed to hold that ownership was a necessary and sufficient condition to invoke fourth amendment protection.²⁷⁰ In *Rawlings v. Kentucky*, however, the Court held that a defendant had no legitimate expectation of privacy when drugs for which he claimed ownership were found in his companion's purse.²⁷¹ Because arcane concepts of property law no longer were dispositive of the issue, the Court in *Rawlings* looked at all of the circumstances surrounding the search to determine if any expectation of privacy was reasonable.²⁷² One wonders what was so arcane about ownership that the Court in *Rawlings* would reject it totally. It would seem that at the very least the fourth amendment protected a citizen's interest in his or her property.²⁷³ After *Rawlings* it was not clear whether ownership was a protected fourth amendment interest at all or whether it was one minor factor for a court to consider.²⁷⁴

The most recent cases do not provide any more guidance. In *Oliver*, Justice Powell got off to a promising start by outlining three factors

TENN. L. REV. 231, 235, n.14, (1983) (determination of when an expectation of privacy exists is a subjective exercise the outcome of which is unpredictable: it depends upon who does the determination).

268. Cf. Burkhoff, *supra* note 75, at 557.

269. 442 U.S. 735, 740-41 n.5 (1979).

270. Cf. *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, (1969) (houseowner has standing to challenge placement of electronic bug even if none of his conversations overheard); and *Rakas v. Illinois*, 439 U.S. 128 (1978) (no fourth amendment claim where passengers had no ownership or possessory interest in the car in which they were riding).

271. 448 U.S. 98 (1980).

272. *Id.* at 104-06. These included the length of time *Rawlings* knew his companion; the infrequency with which he used her purse; his inability to prevent others from gaining access to the purse; that another person looked in the purse several hours earlier; that he had not taken normal precautions to protect the privacy of his property; and his admitted belief that the purse was going to be searched. For a particularly devastating analysis of *Rawlings*, see LAFAYE, *supra* note 21, at 224-28.

273. Ashdown, *supra* note 64, at 1329; Note, *A Reconsideration of the Katz Test*, *supra* note 64, at 180-82; Note, *The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States*, 38 OHIO ST. L. J. 709 (1977); Alschuler, *supra* note 64, at 6-8 n.12 (1983).

274. Ashdown, *supra* note 64, at 1325, 1327.

which a court should consider: the intention of the Framers, the uses to which a location is put, and our "societal understanding that certain areas deserve the most scrupulous protection from governmental invasion."²⁷⁵ In spite of the delineation, it was not clear from the opinion how the analysis should proceed. The Court found that the language of the amendment indicated the Framers' intent to carry forward the common-law distinction between fields and houses into the fourth amendment.²⁷⁶ Ascertaining the Framers' interest was a legitimate source of fourth amendment law, but the Court's approach in *Oliver* proved too much and too little. For example, the Framers surely were aware that the offensive writs of assistance authorized general searches of their commercial premises as well as their dwellings. Yet the language of the amendment does not mention commercial establishments. By the logic of *Oliver*, this should evidence the intent of the Framers to exclude commercial establishments, but the Court had previously held that offices and other places of business were within the ambit of the fourth amendment.²⁷⁷ On the other hand, the facts in *Oliver* indicated extensive governmental intrusion upon a person's property. This activity is not governed by any of the requirements of the fourth amendment and may only be bounded by the vague contours of the due process clause.

The Court "misperceives the level of generality" with which a fourth amendment analysis proceeds.²⁷⁸ Unlike other provisions of the Bill of Rights, the motivation behind the passage of the fourth amendment was clear: to prohibit general searches. If this were its purpose, then it would be reasonable to conclude that the Framers wanted to regulate a kind of governmental activity and not necessarily to strictly define the limits of the amendment's scope. Seen in this light, the correct focus must then be on the conduct of the police: the degree to which such conduct resembles a general search. The more this conduct approaches a general search, the more reasonable a person's expectation of privacy becomes. This cannot be the sole criterion for decision, however. Professor Amsterdam has pointed out the dangers of too strict an adherence to this posture.²⁷⁹ Nevertheless, courts should be particularly sensitive when police activity becomes indiscriminate and wide-ranging.

275. 104 S. Ct. at 1741.

276. *Id.*

277. *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

278. *Oliver v. United States*, 104 S. Ct. at 1748 (Marshall, J., dissenting).

279. Amsterdam, *supra* note 56, at 361-66.

The Court did little with the second factor. The Court simply asserted that "there is no societal interest in protecting the privacy" of activities that occur in the open field. Because open fields are not the setting for intimate activities and because they are more accessible than homes or offices any expectation of privacy asserted in them is not reasonable.²⁸⁰ But the fourth amendment does not only protect those activities which the government considers important. Rather, it protects that "sense of security" fundamental to a free society. That sense of security can be violated by governmental snooping on silly, unimportant, or impractical activities.²⁸¹

While Justice Powell's approach was too narrow, Justice Marshall's was too broad. In his dissent he stated that the "inquiry requires analysis of the sorts of uses to which a given space is susceptible."²⁸² Thus, he discussed how some people use remote areas for a whole range of activities, including solitary walks, lover's trysts, and farming.²⁸³ Taken to its limit, this approach renders a use analysis meaningless for almost any area could be put to almost any hypothetical use. Looking at the uses of property is really part of the question of accessibility. It is unreasonable for a person to plant marijuana in a public park or for a couple to have sex in the lobby of a hotel, not because those areas are not susceptible to those uses but because those areas are used by and accessible to other people. If that same couple moved upstairs to a room in the hotel their expectation of privacy would then be reasonable because the rest of the world would then be excluded.

Perhaps the danger in analyzing the uses to which the property is put is the ease with which a court can assert that an expectation of privacy is not reasonable because the defendant was engaged in an illegal activity. In several cases the Court seemed to be heading in this direction. The ease with which Justice Powell rejected any societal interest in the cultivation of crops seemed to rest on the illegality of the particular crop in *Oliver*. In *Jacobsen*, the Court held that a chemical test which only revealed whether or not a particular substance was cocaine did not compromise any legitimate interest in privacy. Because Congress outlawed "private" possession of cocaine, governmental conduct which revealed whether a substance was cocaine, and no other arguably private fact, compromised no legitimate expectation of

280. 104 S. Ct. at 1741.

281. *United States v. White*, 401 U.S. at 787 (Harlan, J., dissenting).

282. 104 S. Ct. at 1748.

283. *Id.*

privacy.²⁸⁴

This seems at odds with *Katz*. In *Katz*, the use of the phone to transmit wagering information was a crime. The content of the daily conversations *Katz* had were illegal. To the *Katz* Court, the important question was not whether the act was a crime but whether the defendant could rely on any privacy in the context of his admittedly illegal activity. In *Jacobsen*, however, any expectation of privacy in the nature of the powder was unreasonable because its possession was illegal. It could be that these cases signal the adoption of Professor Loewy's thesis that the protection of the fourth amendment does not include the right to be secure from the government's discovery of evidence of a crime.²⁸⁵

The final factor in *Oliver*—that certain enclosures receive enhanced constitutional protection—followed from *Payton v. New York*.²⁸⁶ In that case, the Court held that the fourth amendment prohibited a warrantless entry into a suspect's home to make a routine felony arrest. The Court noted that the "physical entry into the home was the chief evil against which the wording of the fourth amendment was directed."²⁸⁷ Thus, the warrant requirement protects "the very core of the amendment: the right of a [person] to retreat into his home and there be free from unreasonable governmental intrusion."²⁸⁸ As we have seen, this principle was applied in several other cases.²⁸⁹ Moreover, it appears that location is the most important, if not the only, factor in judging the reasonableness of an expectation of privacy. At the very least, a warrantless intrusion into the home is presumed unreasonable while warrantless activity outside the home is presumptively reasonable.

VI. THE NEW REASONABLENESS

By bringing back the protected place theory, removing the subjective prong of the *Katz* test, and providing precious little clarity for the remaining prong, the Court has undermined the continuing vitality of *Katz*. Its central premises are no longer tenable. Indeed, if *Katz* were

284. 104 S. Ct. at 1662.

285. Loewy, *The Fourth Amendment as a Device For Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

286. 445 U.S. 573 (1980). See generally Evans, *Constitutional Restraints on Residential Warrantless Arrests: More Protection for Privacy Interest on the Home*, 10 AM. J. CRIM. L. 1 (1982).

287. 445 U.S. at 1379.

288. *Id.*

289. See *supra* notes 115-229.

decided today the result could very well be different. This process has been underway for some time, however. During this time, the slow death of *Katz* has caused a good deal of analytical tension and doctrinal confusion. The Court has sought to alleviate the tension by silently using a balancing test in many of these cases. Its refusal to acknowledge this test has only enhanced the confusion. *United States v. Jacobsen*²⁹⁰ is the most recent example of this approach.

In *Jacobsen*, employees of the Federal Express office at the Minneapolis-St. Paul Airport examined a package which had been damaged by a forklift. Inside the package they found five or six pieces of crumpled newspaper covering a tube about 10 inches long. The employees cut open the tube and found a series of four ziplock plastic bags. They discovered approximately six and one-half ounces of white powder in the inner-most bag. They called the Drug Enforcement Administration, but before the agents arrived, the Federal Express employees repacked the package. When the agent arrived he repeated the previous inspection of the package. He removed a trace of powder and conducted a chemical field test. The test indicated that the substance was cocaine. Other agents arrived later, conducted a second chemical test, rewrapped the package, obtained a search warrant, made a controlled delivery, and then arrested the defendants.²⁹¹ The Eighth Circuit Court of Appeals reversed the district court's denial of the motion to suppress.²⁹² It held that the validity of the search warrant depended on the validity of the warrantless chemical test. Because the test was a significant expansion of the earlier private search, the DEA agents should have obtained search warrants before performing the test.²⁹³ The Supreme Court granted certiorari because the decision conflicted with a decision of the Sixth Circuit²⁹⁴ and because chemical field tests for drugs had

290. 104 S. Ct. 1652 (1984).

291. *Id.* at 1655. Controlled deliveries of contraband occur most often when a common carrier discovers contraband in freight or luggage it is transporting. Upon notification of the authorities, the contraband is returned to its original container and delivered to its destination. When the person to whom it is delivered accepts the package, he is arrested and the package is seized and searched by the police. *Illinois v. Andreas*, 463 U.S. 765 (1983) (citing *United States v. Bulgier*, 618 F.2d 472, 476 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980)). The possibility of a fourth amendment challenge to the search subsequent to the controlled delivery was foreclosed by *Illinois v. Andreas* which held that unless there was a substantial likelihood that the contents of the package had been changed there was no legitimate expectation of privacy in its previously revealed contents.

292. *Jacobsen v. United States*, 683 F.2d 296 (8th Cir. 1982).

293. *Id.* at 299.

294. *United States v. Barry*, 673 F.2d 912 (6th Cir. 1982), *cert. denied*, 459 U.S. 927 (1982). The facts in *Barry* are similar to the facts in *Jacobsen*. The Sixth Circuit Court of Appeals, in somewhat backward fashion, held that the government violated the fourth amendment by

played an important role in the enforcement of narcotics laws.²⁹⁵

The Court approached the case in two steps. First, the Court focused on the police conduct beginning with the inspection of the package up to and including the removal of the powder needed to conduct the test. Second, the Court looked at the legality of the chemical test. To address the first issue the Court had to apply the legal standard announced in *Walter v. United States*.²⁹⁶ In that case, F.B.I. agents viewed obscene films after receiving them from a private party to whom they were mistakenly sent.²⁹⁷ The private party read the suggestive labels on the containers, took out the films and held a few frames up to the light. After ascertaining their nature, they turned the films over to the F.B.I. The F.B.I. screened the films after holding them for several months.²⁹⁸ The defendants were indicted on obscenity charges based on the interstate transportation of some of the films and the Fifth Circuit

seizing the drugs without a warrant but that the exclusionary rule did not apply because the defendant did not have a reasonable expectation of privacy in the contents of the package. *Id.* at 918-19. The court reasoned that the defendants took the risk of exposure by giving the package over to the carrier. *Id.* at 919. By failing to take adequate precautions to disguise the appearance of the contraband the defendant could not claim a reasonable expectation of privacy. *Id.* The court analogized its holding to *Rawlings v. Kentucky* where the Supreme Court held that a defendant who had voluntarily placed contraband in a companion's purse no longer had any reasonable expectation of privacy in the contraband. *Id.* at 919. Finally, the *Barry* court distinguished *Walter v. United States*, 447 U.S. 649 (1980) on the basis of the first amendment interest present, because the owner of the films still maintained a privacy interest in them when they were seized, and because viewing the films was not perfunctory in nature. 673 F.2d at 919-20. For a discussion of *Barry* and the Eighth Circuit opinion in *Jacobsen*, see Comment, *The Fourth Amendment Following Private Searches: Is There a Privacy Interest To Protect*, 52 U. CIN. L. REV. 172 (1983). Other Courts faced similar fact patterns with equally divided results. See, e.g., *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980) (warrantless field test upheld without discussion); *People v. Adler*, 50 N.Y.2d 730, 409 N.E.2d 888, 431 N.Y.S.2d 412, cert. denied, 449 U.S. 1014 (1980) (warrantless field test unconstitutional).

295. 104 S. Ct. at 1656.

296. 447 U.S. 649 (1980). It is axiomatic that the fourth amendment does not apply to private searches. *Burdeau v. McDowell*, 256 U.S. 465 (1921). See generally Burkhoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627 (1981). Thus, it is immaterial if the private party conducted a search that would have been impermissible if performed by the government. 104 S. Ct. at 1658. The reasonableness of the government's conduct "must be appraised on the basis of the facts as they existed at the time" the governmental activity took place. *Id.* In *Jacobsen* then, the focus was on the DEA agents' inspection of the package upon their arrival. *Id.* at 1657.

297. Employees of "L'Eggs Products, Inc." received a shipment of 871 boxes of 8-millimeter film depicting homosexual activity addressed to "Leggs, Inc." 447 U.S. at 651. Although there was no "Leggs, Inc.," Leggs was the nickname of a woman in the employ of one of the defendant's companies. *Id.* at 651 n.1. Justice Stevens termed the facts in *Walter* "bizarre." *Id.* at 651.

298. *Id.* at 651-52. The exact date of the screening is not clear but at least one film was not viewed until more than two months after the F.B.I. had taken possession. *Id.* at 652.

affirmed the district court's denial of the motion to suppress.²⁹⁹ The Supreme Court reversed. Justice Stevens announced the judgment of the Court and delivered an opinion in which he was joined by Justice Stewart. The Stevens opinion held that the unauthorized screening of the films by the F.B.I. was an illegal search because it was a significant expansion of the private party's search.³⁰⁰ Although four justices dissented, they were in substantial agreement as to the legal standard to be applied but disagreed on its specific application.³⁰¹

The fragmentation of the *Walter* Court made it difficult to interpret the case. It could be read for the rule that only those items left in plain view by the private party may be searched by the government.³⁰² According to this reasoning, because the films were not in plain view when the agents arrived, the subsequent screening violated the fourth amendment. On the other hand, the case could be read for the proposition that the police may go beyond the literal scope of the private search when the defendant's expectation of privacy was completely frustrated and the contents of a container were obvious from the nature of the package.³⁰³

299. *Walter v. United States*, 592 F.2d 788 (1979).

300. 447 U.S. at 657. The Court reasoned that the scope of an official search is limited to the terms of its authorization. *Id.* at 656. This principle also applies whenever the government seeks to make use of a "private party's invasion of another person's privacy." *Id.* at 657. Thus, the government may not exceed the scope of the private search unless it has the right to make an independent search. *Id.* The projection of the films was a search because, prior to their screening "one could only draw an inference" about their content. *Id.* Screening the films was a significant expansion of the search presumably because it provided information not already available to the authorities. *Cf.* *United States v. Knotts*, 460 U.S. 276 (1984) (warrantless in-home monitoring of beeper unconstitutional because it revealed previously unknown information).

301. Justice Blackmun wrote the dissenting opinion. 447 U.S. at 662. He was joined by the Chief Justice and Justices Powell and Rehnquist. Justice Blackmun would have upheld the convictions because by the time the F.B.I. received the films, the defendants had no remaining expectation of privacy. *Id.* at 463. He disagreed with Justice Stevens that the screening was an expansion of the private search because the containers "clearly revealed the nature of the contents," and the F.B.I. received the films only after the labels had been "exposed to the public." *Id.* at 663. Justices White and Brennan concurred in part and in the judgment. *Id.* at 660. Although they agreed that the screening was a search, they did not agree that the government would duplicate a private search without raising fourth amendment issues. *Id.* at 660-61. Their position is farther from Justice Stevens than the dissent's. Justice Marshall provided the fifth vote for reversal by concurring in the judgment. *Id.* at 660. He did not write an opinion, however.

302. Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's re-examination of the materials, surely the government may not exceed the scope of the private search unless it has a right to make an independent search. *Id.* at 657. *See Illinois v. Andreas*, 463 U.S. 765 (1983) where the court commented that its holding was supported by the reasoning underlying the "plain view" doctrine.

303. 447 U.S. at 658 n.12 (consigner's expectation of privacy measured by condition of package at time of shipment because private search in *Walter* only partially frustrated expectation of

Jacobsen followed the latter reading. The Court held that the inspection by the DEA agent was not a search for purposes of the fourth amendment because "[t]he agent's viewing of what a private party has freely made available for his inspection did not violate the fourth amendment."³⁰⁴ The defendants lost any expectation of privacy in the contents of the box when the Federal Express employees discovered the cocaine.³⁰⁵ When that happened, "the Fourth Amendment [did] not prohibit governmental use of the now-non-private information."³⁰⁶

The Court cited the *White* line of cases in support of this interpretation of *Walter*. There is a critical difference between the two, however. In the voluntary disclosure cases, the individual decided whether or not to reveal information to a third party and how much he should reveal. This element of control was an important factor in the holding of these cases. In *Couch v. United States*, the Court rejected the defendant's fourth amendment claim because "there can be little expectation of privacy where records are handed to an accountant, *knowing* that mandatory disclosure of much of the information contained therein is required in an income tax return."³⁰⁷ To the same effect was *United States v. Miller* where the Court found no fourth amendment interest in personal financial records being held by a bank because they contained "only information *voluntarily* conveyed to the banks and exposed to their employees in the ordinary course of business."³⁰⁸ The risk of these cases was controlled by the defendant. In *Jacobsen*, the defendant did not voluntarily reveal any information to a third party. The risk of disclosure came about because of the actions of a third party over which they had no control.

The participant monitoring cases like *White* present the same analytical distinction. In the typical bugged informant case the defendant controlled the flow of information.³⁰⁹ He took the risk of disclosure and could not later elevate his misplaced trust into a constitutional issue.³¹⁰ The risk assumed by the *Jacobsens* did not arise until the package was damaged. Because the *Jacobsens* were unaware of the damage to the

privacy).

304. 104 S. Ct. at 1660.

305. *Id.*

306. *Id.* at 1658.

307. 409 U.S. 322 (1973).

308. 425 U.S. 435, 443 (1976).

309. *See, e.g., Lewis v. U.S.*, 385 U.S. 206 (1966), where the defendant drug dealer invited the police informant to his house and encouraged a continuing commercial relationship.

310. *United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966).

package, it was illogical to cast the case in risk terms when they had no knowledge of the risk they had assumed and did not voluntarily reveal any information to a third party.³¹¹

Justice White criticized the majority's reading of *Walter* in an opinion concurring in part and in the judgment.³¹² He noted that *Walter* left open the question whether or not the F.B.I. would have needed a warrant if the private parties had screened the films.³¹³ In his view neither *Walter* nor any other previous case supported the Court's holding that the government "may proceed to conduct [its] own search of the same or lesser scope as the private search without first obtaining a warrant."³¹⁴ Justice White pursued what he saw as the "logical implications" of the majority opinion. He found he would be:

[H]ard-pressed to distinguish this case, which involves a private search, from (1) one in which the private party's knowledge, later communicated to the government, that a particular container concealed contraband and nothing else arose from his presence at the time the container was sealed; (2) one in which the private party learned that a container concealed contraband and nothing else when it was previously opened in his presence; or (3) one in which the private party knew to a certainty that a container concealed contraband and nothing else as a result of conversations with its owner. In each of these cases, the approach adopted by the Court today would seem to suggest that the owner of the container has no legitimate expectation of privacy in its contents and that government agents opening that container without a warrant on the strength of information provided by the private party would not violate the Fourth Amendment.³¹⁵

A close reading of *Jacobsen* proves Justice White's fears to be exaggerated. The case should be limited to those situations where the police were lawfully in possession of the container in which the contraband was located and where it was a virtual certainty that the

311. The Court's conclusion is not surprising because neither the voluntary disclosure cases nor the participant monitoring cases have much to do with privacy. Posner, *supra* note 153, at 213. Judge Posner argues that the fourth amendment protects both traditional property interest and more general interests in bodily integrity, mental tranquility, and freedom of movement as well as the privacy of information but that it does not protect a criminal's interest in avoiding punishment. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 51. Thus, he would enforce the amendment not through the exclusion of illegally seized evidence but through damage actions against the offending officers. *Id.* at 53.

312. 104 S. Ct. at 1663.

313. *Id.* at 1666.

314. *Id.*

315. *Id.* at 1667.

container concealed contraband.³¹⁶ This interpretation is supported by the rationale of the "plain view doctrine." The government had prior lawful access to the container, expectations of privacy had been diminished, and probable cause was established by the condition of the container.³¹⁷ All of Justice White's hypotheticals fall outside this interpretation of *Jacobsen*. Thus, any search of the containers would have to be justified in conventional fashion. This test realistically protects the fourth amendment rights of the owner while at the same time allows the police to investigate drug offenses. By requiring the presence of contraband to be shown to a virtual certainty *Jacobsen* prevents routine warrantless inspections of packages but does not restrain the police in the exceptional case when a third party presents a package to them in such condition that its contents are obvious. Requiring a warrant in the latter case would exalt form over substance, but requiring a warrant in the former is protective of fourth amendment values.

Reading *Jacobsen* to require the police to have a virtual certainty that contraband is in a container still begs the question of the privacy interest of the defendant. Even a virtual certainty that a house contains contraband may not be sufficient to justify a warrantless entry.³¹⁸ In-

316. "[T]he precise character of the white powder's visibility to the naked eye is far less significant than the facts that the container could no longer support any expectation of privacy, and that it was virtually certain that it contained nothing but contraband." 104 S. Ct. at 1660 n.17. See also *Illinois v. Andreas*, 463 U.S. 765 (1983) (owner loses privacy interest once certainty that container conceals contraband is found).

317. The condition of the container from which the virtual certainty of contraband is deduced can be analogized to the opaque party balloon in *Texas v. Brown*, 460 U.S. 730 (1983), which the plurality noted "spoke volumes as to its contents." *Id.* at 743. This reading of *Jacobsen* also reconciles it with *Walter* and *Andreas*. Compare *Walter v. United States*, 447 U.S. 649 (1980) (government could only draw inferences of content of films prior to screening) and *Illinois v. Andreas*, 463 U.S. 765 (1983) (once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects within the plain view of police).

A narrow reading of *Jacobsen* is supported by the Court's protected place cases. Suppose a dinner guest leaves the table and, unnoticed by the host, rummages through the host's dresser drawers. The guest finds contraband. The next day the guest (who will never be invited to dinner again) relays news of his discovery to the police. Can the police enter the house without a warrant and duplicate the dinner guest's actions? *Jacobsen* would seem to allow this activity. Once the guest discovered the contraband the owner lost any legitimate expectation of privacy in it. When the police duplicated the private search they did not intrude upon any legitimate privacy expectations.

Cases like *Karo*, however, argue against this result. They create a zone of privacy in and immediately surrounding a house. Even though the host above would have lost any expectation of privacy in the information about his possession of cocaine, he retains an expectation of privacy in the place the cocaine is located. By the same token, this reading of *Jacobsen* confirms the Court's resurrection of the protected place theory. See *supra* text accompanying notes 115-229.

318. Although the full permissible scope of warrantless entries into a house has not yet been determined, *United States v. Watson*, 423 U.S. 411 (1976), it is generally accepted that such

deed, absent the private search, which revealed the contents of the box in *Jacobsen*, the government could not have searched the package without a warrant even if they were certain that it contained contraband.³¹⁹

The virtual certainty reading of *Jacobsen* shows that the underlying basis for the Court's holding was the reasonableness of the government's action under all the circumstances. The Court has relied on a reasonableness analysis in other cases. In *Camara v. Municipal Court*, the Court established an analytical basis for future decisions based on what it called the "constitutional mandate of reasonableness."³²⁰ In such cases, courts must balance "the need to search against the invasion which the search entails."³²¹ In *Terry v. Ohio*, the court applied the *Camara* balancing principle to uphold a police officer's brief detention and subsequent "frisk" of a suspect.³²² The Court found that the case dealt with: "an entire rubric of police conduct—necessarily swift action predicated upon on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure."³²³ Given this unique situation the case had to be tested under the reasonableness clause of the fourth amendment and the balancing of the need to search against the intrusion was the correct legal standard.³²⁴ The Court rejected an "all or nothing model of justification and regulation" because it would provide insufficient constitutional regulation of the scope of police conduct while at the same time diverting attention "from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."³²⁵

Katz, however, set up an all or nothing model when the question was whether or not police activity was a search. The strictness of this

entries are permissible only if exigent circumstances exist. *Compare* *Warden v. Hayden*, 387 U.S. 294 (1967) (warrantless entry search in pursuit of suspects justified when delay would endanger lives); *United States v. Santana*, 427 U.S. 38 (1976) (warrantless entry into home justified when suspect retreated from doorway to avoid police); and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (*Hayden* supports exigency requirement by "negative implication").

319. *Cf.* *United States v. Chadwick*, 433 U.S. 1 (1977) (warrantless search of footlocker invalid even though its owner matched a drug trafficker profile, unusually heavy for its size, leaked a substance used to mask odor of marijuana, and produced a positive alert to a dog sniff).

320. 387 U.S. 523, 534 (1967).

321. *Id.* at 534.

322. 392 U.S. 1 (1968). *See generally* LaFare, "Street Encounters" and the Constitution: *Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 40 (1968).

323. 392 U.S. at 20.

324. *Id.* at 21.

325. *Id.* at 17-19.

model may explain why the privacy discussion in cases like *Jacobsen* is so sterile. To avoid the semantic nonsense of terming a reasonable search an illegal one, courts have strained to squeeze the case within the contours of the *Katz* test.³²⁶

The Court in *Jacobsen* appeared to substitute an analysis of the reasonableness of the government conduct for a true *Katz* privacy inquiry. The virtual certainty rule was in essence a balancing test. As in *Terry*, "effective crime prevention and detection" provided a significant basis for an on-the-spot inspection of the package. This was balanced against the slight interest in privacy left in the container and the illegal nature of the substance. Under these circumstances, the slight intrusion on the defendant's privacy—"brushing aside a crumpled newspaper and picking up the tube"—was reasonable.

This conclusion was supported by the Court's inability to maintain the tension between the threshold definitional issue and its balancing approach. At several points, the language in the opinion lapsed from the former issue to the latter. When discussing the private search doctrine, the Court stated that the "reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred."³²⁷ At this stage, however, the reasonableness of police conduct begs the question; the pertinent question is whether or not the fourth amendment applies. Later in the opinion, the Court indicated that both the agent's initial inspection of the package and the chemical field test "were reasonable for essentially the same reason."³²⁸

Although such lapses could be the result of carelessness, the Court's treatment of the field test issue indicated that such was not the case. The Court began by phrasing the question in definitional terms: "We must first determine whether this [chemical test] can be considered a 'search' subject to the Fourth Amendment—did it infringe an expectation of privacy that society is prepared to consider reasonable?"³²⁹ The Court concluded that the field test was not a search because no arguably private fact could be revealed by the test. Congress chose to treat the interest in privately possessing cocaine as illegitimate. Thus, a defendant had no legitimate privacy interest in preventing the disclosure of the contraband nature of cocaine or other drugs.³³⁰ But

326. Cf. LAFAYE, *supra* note 21, § 2.2.

327. 104 S. Ct. at 1657.

328. *Id.* at 1659.

329. *Id.* at 1661.

330. *Id.* at 1662.

this is another tautology. The Court was saying the defendant's privacy interest was illegitimate because it was illegitimate. Surely the Court cannot mean that a defendant can never have a privacy interest in contraband. A good deal of fourth amendment law would be implicitly overruled. Instead, the Court balanced the limited scope of the field test against the importance (or lack of importance) of the privacy interest asserted.³³¹

Finally, a comparison of the Court's treatment of the seizure questions with its treatment of the search questions reveals the reasonableness foundation lurking under the latter. The Court applied a balancing test to justify both the seizure of the box for its initial inspection by the agents and the subsequent seizure of a small amount of the cocaine to conduct the field test. The Court noted that it was "apparent" that the box contained contraband and that it was virtually certain the substance was cocaine. In addition, the intrusion was extremely limited in scope in both instances.³³² Thus the seizure was reasonable because of the limited information which it revealed and the minimal impact it had on any protected interest—an analysis that virtually tracks the analysis of the search issues.

The Court would alleviate much confusion if it openly admitted its use of a reasonableness approach. *Jacobsen* demonstrates how the Court in fact pursued the question of reasonableness while still using the form of the *Katz* test. A model of the fourth amendment that focuses on the reasonableness of police conduct is not without its problems.³³³ As Professor Amsterdam put it, a view of the fourth

331. It's probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases no legitimate interest has been compromised.

Id. The Court relied on *U.S. v. Place*, 103 S. Ct. 2637 (1983). In *Place*, the Court held that no search occurred when a trained narcotics detection dog sniffed a suspect's luggage:

A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening of the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.

Id. The *Jacobsen* Court noted that *Place* applied because the likelihood that the government's conduct would actually invade any legitimate privacy interest was "too remote to characterize the testing as a search subject to the Fourth Amendment." 104 S. Ct. at 1662.

332. *Id.* at 1662-63.

333. The most precise judicial criticism of a balancing test came from Justice Brennan in *Dunaway v. New York*, 442 U.S. 200 (1979) when he said:

[T]he protections intended by the Framers could all too easily disappear in the consid-

amendment which is sensitive to every nuance would resemble a Rorschach test instead of a constitutional doctrine.³³⁴ Nevertheless, a reasonableness test would quickly get content from its application in particular cases. Moreover, a frank adoption of such a test would provide more protection for fourth amendment interest than the now gutted *Katz* test. Currently, the Court uses a reasonableness inquiry to examine cases like *Jacobsen* which, while not egregious violations of fourth amendment privacy, nevertheless implicate fourth amendment interests. Once the Court decides, however, that a case is not egregious, it is constrained by the all or nothing model of *Katz* to declare that the police activity is not a search and is without any fourth amendment protection.

A more flexible standard would allow courts to regulate police conduct without unduly interfering with legitimate law enforcement activities. In *Hudson v. Palmer*, for example, an analysis which focused on the reasonableness of the prison searches would more adequately protect a prisoner's legitimate interest in being free from harassment searches. Under this approach, the prisoner's interests would be entitled to greater weight. At the same time, the security of the prison would not be harmed because random, shakedown searches would be reasonable. Clearly the governmental interests in security would outweigh the personal interest in such searches. The *Hudson* Court's actual analysis sacrifices all legitimate fourth amendment interests prisoners have to the interest of security. Such a result betrays the values for which the fourth amendment stands.

Finally, by applying a balancing test *sub silentio* the Court risks losing all fourth amendment protection to technological advances. Technological advances are providing the government with better and more efficient investigative tools. Electronic beepers and field tests for drugs are two examples but there are many others.³³⁵ By woodenly ap-

eration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 16 (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the special circumstances they confront . . . [T]he requisite 'balancing' has been performed in centuries of precedent. . . .

442 U.S. at 213-14.

334. *Amsterdam*, *supra* note 56, at 375. See also *United States v. Martinez-Fuente*, 428 U.S. 543, 570 (1976) (Brennan, J., dissenting) (balancing becomes a way to condone unconstitutional governmental conduct); Burkhoff, *The Court That Devoured the Fourth Amendment: The Triumph of An Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 190-92 (1979).

335. See, e.g., Note, *As Interactive Cable Enters, Does Privacy Go Out the Window*, 4

plying its diluted version of *Katz* the Court only makes it possible for technology to reduce our privacy.³³⁶ Instead of a bulwark, the fourth amendment guarantee will become a sieve as better means to detect crimes are invented.³³⁷ To prevent this from happening the Court must either redefine the notion of the fourth amendment privacy to take technological advances into account or openly admit that it employs a multifactor balancing test to determine the reasonableness of governmental investigative activity. A multifactor test would give the Court more flexibility. This flexibility is vital in an age when technological change occurs rapidly. Justice Brennan outlined such an approach in his dissent.³³⁸ He argued that the *Jacobsen* rule "rendered irrelevant the circumstances surrounding the use of the technique, the accuracy of the technique, and the privacy interest upon which it intrudes."³³⁹ If the virtual certainty reading of *Jacobsen* is correct, then the majority did take these three factors into account.³⁴⁰ The problem with the majority opinion was not the factors upon which it relied but its refusal to acknowledge that it was employing a balancing test.

Justice Brennan went on to point out a more serious deficiency in the majority's analysis when he noted that the decision left "no room to consider whether the surveillance technique is employed randomly or selectively. . . ."³⁴¹ He would employ a *Camara* balancing test in situations like *Jacobsen* taking into account the limited nature of the intrusion and the circumstances surrounding its use.³⁴²

Justice Brennan's approach, although not significantly different from the majority's, should be adopted by the Court. It makes clear

COMM. ENT. L. J. 781 (1983).

336. Cf. LAFAYE, *supra* note 21, § 2.2.; Landever, *Electronic Surveillance, Computers, and the Fourth Amendment—The New Telecommunications Environment Calls for Reexamination of Doctrine*, 15 U. TOL. L. REV. 597 (1984) (fourth amendment concepts of risk and choice inappropriate for modern technological environment).

337. Justice Brandeis stated in his often-quoted dissenting opinion in *Olmstead v. United States*:

The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in Court and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.

277 U.S. at 474. For a discussion of modern devices which partially fulfill Brandeis' prophecy, see *supra* note 335.

338. 104 S. Ct. at 1671.

339. *Id.*

340. See *supra* notes 315-327.

341. 104 S. Ct. at 1671.

342. *Id.*

what factors courts should consider when faced with unique situations, an occurrence that will become more likely as technological advances take place.³⁴³ More importantly, it would bring a range of surveillance and investigative activity under the aegis of the fourth amendment.³⁴⁴ Otherwise, modern technology can only subtract from fourth amendment protection.³⁴⁵

VII. CONCLUSION

The Supreme Court has not been faithful to the *Katz* test. As this article demonstrated, the Court has removed the subjective prong of the *Katz* test. At the same time, it has not provided any criteria by which to determine the objective reasonableness of an expectation of privacy.

Moreover, the factors the Court has considered have led to results inconsistent with *Katz*. Thus, the *Katz* test is a moribund principle of fourth amendment law. In place of *Katz*, the Court has substituted a revised version of the protected place theory. In cases where this theory is inapplicable however, the Court has *sub silentio* employed a balancing test to determine the reasonableness of the government's conduct. Because of the confusion this has caused, the Court should openly adopt the balancing test outlined by Justice Brennan in his dissent in *Jacobsen*. Brennan's test is clearer and more protective of fourth amendment values.

343. See Landever, *supra* note 335.

344. 104 S. Ct. at 1671.

345. LAFAYE, *supra* note 21, at 87; See also Burkhoff, *supra* note 75, at 540; Yackle, *supra* note 230, at 363 n.201.