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Great Expectations of Privacy: A New Model for Fourth Amendment Protection

Brian J. Serr*

A Party member lives from birth to death under the eye of the Thought Police. Even when he is alone he can never be sure that he is alone. Wherever he may be, asleep or awake, working or resting, in his bath or in bed, he can be inspected without warning and without knowing that he is being inspected. Nothing that he does is indifferent. His friendships, his relaxations, his behavior toward his wife and children, the expression of his face when he is alone, the words he mutters in sleep, even the characteristic movements of his body, are all jealously scrutinized. Not only any actual misdemeanor, but any eccentricity, however small, any change of habits, any nervous mannerism that could possibly be the symptom of an inner struggle, is certain to be detected. He has no freedom of choice in any direction whatever.¹

The preceding passage describes the life of Winston Smith, the main character in George Orwell's *Nineteen Eighty-Four*, a shocking post-World War II vision of a future world where individual privacy and freedom were virtually nonexistent due to the spectre of Big Brother, a nameless face that served as a figurehead for a government that subjected citizens to intrusive, round-the-clock surveillance as a means of ensuring orthodoxy and perpetuating its own power.² Fortunately, to the extent Orwell's chosen title was a prediction, he was grossly premature. His novel remains, however, a thought-provoking excursion into a world without constitutional limitations on government intrusion into intimate realms of personal privacy. In short, Orwell envisioned a society without a fourth amendment to protect citizens against unreasonable government searches and seizures.³

Underlying the fourth amendment's prohibition of unrea-

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1. G. ORWELL, *NINETEEN EIGHTY-FOUR* 211-12 (1949).

2. *See id.*

3. The fourth amendment to the United States Constitution provides:

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,

sonable government searches and seizures is the eternal tension between governmental power and individual rights. In the fourth amendment context, this struggle pits the government's power to detect and redress violations of its laws against an individual's interest in a private life free from government intrusion.⁴ In Orwell's futuristic society, the conflict was resolved entirely in favor of the government at the expense of the individual. The prospect of living in such a world is chilling. Nevertheless, it is equally disturbing to contemplate life in a world where personal freedoms are so limitless that the government is impotent in its efforts to control crime. The Supreme Court's task in interpreting the fourth amendment is to balance these two conflicting interests in a manner that promotes both. In the last decade, however, the Court's means of promoting law enforcement interests has tipped the balance unnecessarily further and further away from individual freedom, significantly diminishing the realm of personal privacy.

The Supreme Court continued this trend in a recent case involving—somewhat humorously, at first glance—government forays into garbage. With the recent declaration of war on drugs, law enforcement authorities have become increasingly interested in the contents of some people's refuse. Identifying the garbage of a particular individual and methodically searching and inventorying its contents can reveal important information about that person's life style, personal habits, and associates.⁵

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

4. The Supreme Court expressly recognized the struggle between governmental authority and individual privacy early in the course of fourth amendment jurisprudence. In 1921, the Court stated:

The Fourth Amendment gives protection against unlawful searches and seizures . . . Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property . . .

Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

5. An analysis of famous celebrities' trash led one writer-reporter to observe: "You are what you throw away." See Wederman, *The Art of Garbage Analysis: You Are What You Throw Away*, *ESQUIRE*, Nov. 1971, at 113, 113; see also Rathje, *Archaeological Ethnography . . . Because Sometimes It Is Better to Give Than to Receive*, in *EXPLORATIONS IN ETHNOARCHAEOLOGY*, 49, 54 (R. Gould ed. 1978) (quoting renowned archaeologist Emil Haury as once saying: "If you want to know what is really going on in a community, look at its garbage.").

Just as trash reveals much about its disposer, the Supreme Court's recent opinion on the fourth amendment implications of systematic government searches of trash—*California v. Greenwood*⁶—speaks volumes about the future scope of the constitutional prohibition against unreasonable searches and seizures. In *Greenwood*, police opened and searched a sealed, opaque plastic garbage bag that the garbage collector had turned over to the police at their request.⁷ The police discovered evidence of criminality in the garbage bag, leading to subsequent searches and the discovery of additional evidence.⁸ The California state courts decided that the police obtained all the evidence in violation of Greenwood's fourth amendment rights and dismissed the prosecution.⁹ The United States Supreme Court reversed, holding that government searches of garbage are not "searches" within the meaning of the fourth amendment,¹⁰ thereby rendering the amendment's protections inapplicable to such investigations. According to the Court, a person has no reasonable expectation of privacy in discarded items, regardless of the intimate nature of the refuse.¹¹

Although Justice Brennan, in dissent, emphatically argued that the Court's holding would shock most American citizens,¹² the outcome is anything but shocking to fourth amendment scholars who have been following the trend of Supreme Court jurisprudence.¹³ Indeed, the Court's holding in *Greenwood* is completely consistent with recent interpretations of the breadth of fourth amendment protection.¹⁴

With the Supreme Court's recent laissez faire attitude toward law enforcement searches and seizures, government investigatory techniques threaten to intrude more and more on the privacies of everyday life. Where we go, who we see, who we call, what we do in our backyards, what we read, and the contents of intimate letters we have thrown away are all in-

6. 108 S. Ct. 1625 (1988).

7. *Id.* at 1627.

8. *Id.*

9. *Id.* at 1628.

10. *Id.* at 1628-29.

11. *See id.*

12. *Id.* at 1632 (Brennan, J., dissenting).

13. *See* Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1294-95, 1298-1329 (1981); Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Promise,* 36 HASTINGS L.J. 645, 648-694 (1985); Wilkins, *Defining the "Reasonable Expectation of Privacy" An Emerging Tripartite Analysis,* 40 VAND. L. REV. 1077, 1086-1107 (1987).

14. *See infra* notes 68-144 and accompanying text.

creasingly subject to unlimited government supervision, unconstrained by constitutional safeguards. Government officials can peek at these aspects of our lives as often as they want, for as long as they want, whenever they want, because the Supreme Court has held that there is no fourth amendment protection whatsoever from such diverse government investigatory techniques as the tracking of vehicles,¹⁵ searching of trash bags,¹⁶ air surveillance of private property,¹⁷ or tracing of phone calls.¹⁸

When the Supreme Court rules that a particular form of governmental surveillance does not implicate the fourth amendment, the result is that the government can use that form of surveillance to gather and record intimate information about anyone, at any time, for as long as the government desires.¹⁹ Each such ruling raises the issue of whether society can trust police and other government officials not to abuse the

15. *United States v. Knotts*, 460 U.S. 276, 285 (1983) (holding that government's use of electronic transmitter to monitor individual's travels does not constitute fourth amendment search). For an extended discussion of *Knotts* and its fourth amendment significance, see *infra* notes 83-95 and accompanying text.

16. *Greenwood*, 108 S. Ct. at 1628-29. For a thorough analysis of the Supreme Court's decision in *Greenwood*, see *infra* notes 145-81 and accompanying text.

17. *California v. Ciraolo*, 476 U.S. 207, 213-15 (1986) (holding that police airplane flight over individual's fenced backyard is not search for fourth amendment purposes). For a complete discussion of *Ciraolo* and its fourth amendment ramifications, see *infra* notes 118-44 and accompanying text.

18. *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (holding that police use of tracing devices to determine whom individuals call and when does not implicate fourth amendment protections). For an extended analysis of *Smith*, see *infra* notes 68-82 and accompanying text.

19. Of course, the practical considerations of time and money effect some limit on intrusive governmental practices. For example, due to excessive expense, if for no other reason, the government's absolute freedom to look through everyone's garbage is unlikely to result in large scale trash searches directed against masses of the population. Nevertheless, the right to be secure from unreasonable government intrusion is an individual right, not just a collective right. Moreover, absent fourth amendment constraints, the government certainly does have the resources available to destroy the privacy of selected persons, although the reasons for choosing a particular person may be discriminatory, vindictive, or completely arbitrary. It was this very distrust of government that led to the adoption of the fourth amendment. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Moreover, the law—particularly interpretations of constitutional rights—must be flexible enough to redress obvious wrongs. Thus, when analyzing the issue of whether any fourth amendment protection should be available for a particular activity, one must recognize that withholding fourth amendment protection is tantamount to telling government officials that the only constraints on their behavior are their own consciences.

new power that the Supreme Court has granted to them.²⁰

This Article will show that the entire course of recent Supreme Court fourth amendment precedent, which has narrowed significantly the scope of individual activities that are protected constitutionally, is misguided and inconsistent with the spirit of the fourth amendment. First, however, it is necessary to clarify the issue. Fourth amendment analysis consists of three basic steps. The first step involves determining whether the government activity at issue constitutes a "search" implicating fourth amendment protection.²¹ Next, taking into consideration the nature of both the governmental conduct and the individual's privacy interest, the Court must determine how much protection is necessary to ensure that the government search in question is "reasonable."²² Finally, given an unreasonable, and thus illegal, search—a search performed in the absence of those protections required in the second step—the Court must decide whether to apply the exclusionary remedy to the fruits of the search.²³

This Article proposes a test that will broaden the scope of citizens' activities that are protected under the first step of fourth amendment analysis. Nevertheless, this proposal will not inevitably tip the balance against law enforcement officials, because the Court can vary the amount of protection for a given search under the second step of the analysis. The fourth amendment has never absolutely precluded government officials from interfering with an individual's privacy interests.²⁴

20. Cf. Comment, *A Privacy Based Analysis for Warrantless Aerial Surveillance Cases*, 75 CALIF. L. REV. 1767, 1781-86 (1987), (describing effect of governmental surveillance).

21. See *Terry v. Ohio*, 392 U.S. 1, 9, 16-20 (1968); *Katz v. United States*, 389 U.S. 347, 352-53 (1967); *Schmerber v. California*, 384 U.S. 757, 766-68 (1966).

22. See *Terry v. Ohio*, 392 U.S. 1, 20-31 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534-39 (1967).

23. The exclusion of illegally obtained evidence is the settled remedy for fourth amendment violations. See *Weeks v. United States*, 232 U.S. 383 (1914) (holding that, in federal prosecutions, fourth amendment bans use of evidence obtained through illegal search and seizure); see also *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that all evidence obtained by searches and seizures in violation of Constitution is inadmissible in state court). The purpose of the exclusionary rule is to deter government violations of individuals' fourth amendment rights by removing the incentive to disregard those rights. *Mapp*, 367 U.S. at 656 (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960)). Whether to apply the exclusionary rule in a particular case implicates issues such as the "good faith exception" and the "fruit of the poisonous tree" doctrine, both of which have received extensive commentary and are outside the scope of this Article.

24. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967). After deciding that

Rather, ruling that the fourth amendment protects an individual in his or her home, backyard, travels, or discarded personal items simply means that governmental investigative activity must be "reasonable,"²⁵ hardly a draconian requirement. The law is replete with the requirement that people act reasonably. For example, unreasonable conduct can lead to civil liability in tort,²⁶ unreasonable medical care can lead to malpractice suits,²⁷ and unreasonable laws may be overturned as unconstitutional.²⁸

In the fourth amendment context, *reasonable* generally means that police must obtain a warrant based on probable cause before conducting a search.²⁹ Supreme Court precedent, however, contains many examples of "reasonable" police investigations performed without a warrant³⁰ or without probable

governmental monitoring of phone conversations was a search implicating fourth amendment protections, the Court held the search unreasonable, and therefore unlawful, only because it was conducted without a warrant. Had the agents obtained a warrant based on probable cause and observed any restrictions that the warrant imposed on them, the "search" of the telephone calls would have been perfectly constitutional. *Id.* at 354-59.

25. The fourth amendment expressly provides: "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV (emphasis added).

26. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 145-49 (4th ed. 1971).

27. See *id.* at 161-66.

28. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1439 (2d ed. 1988) ("The Supreme Court, from its earliest examination of socioeconomic regulation, has considered that equal protection demands reasonableness in legislative and administrative classifications.").

29. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

30. See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 325-26 (1987) (reaffirming "plain view seizure" rule, which allows officers to make warrantless seizure of evidence inadvertently discovered in plain view, so long as there is probable cause to believe that item is subject to seizure); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (holding that warrantless searches are reasonable when individual has consented to search); *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (holding that police may, without first obtaining warrant, undertake full search of arrestee's person for weapons and evidence so long as search is contemporaneous with arrest); *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (holding that it is reasonable for police to make warrantless search of person for weapons through a body frisk if, during lawful encounter with that individual, police have reasonable fear for safety of themselves or others); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (recognizing so-called "exigent circumstances" exception to warrant requirement); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (allowing searches without warrant if officer reasonably believes that delay necessary to secure warrant would result in destruction of evidence sought); *Carroll v. United States*, 267 U.S. 132, 153-55 (1925) (holding

cause.³¹ Thus, a holding that the fourth amendment protects a particular activity does not automatically require that the police obtain a warrant based on probable cause before investigating. The reasonableness requirement is flexible and can accommodate a much broader interpretation of the fourth amendment's scope than that which the Supreme Court currently espouses.

In order to demonstrate how far the current Supreme Court has strayed from a balanced view of governmental power and individual privacy in its recent fourth amendment decisions, Part I of this Article examines the historical roots of the "modern" fourth amendment. After analyzing *Katz v. United States*,³² the case that inaugurated prevailing fourth amendment doctrine, Part I proposes a construction of the *Katz* decision that is consistent with the spirit of the fourth amendment. Part II critiques selected cases in the last decade of Supreme Court fourth amendment jurisprudence in order to demonstrate how the Court consistently has misread and misapplied the rule of *Katz*, undercutting its spirit by denying fourth amendment protections to many aspects of personal life. This criticism of the Court's interpretation of *Katz* includes an explanation of why the diminution of personal realms of privacy is completely unnecessary to serve the Court's goal of promoting effective law enforcement. Finally, Part III proposes a new model for fourth amendment decision making that will not only promote a more accurate and logical interpretation of *Katz*, but will expand the scope of citizens' rights to privacy under the fourth amendment without detracting from legitimate law enforcement efforts to detect and prevent crime.

I. KATZ: THE BIRTH OF THE MODERN FOURTH AMENDMENT

Before *Katz v. United States*,³³ the Supreme Court's view

that search of car, which is necessarily different from search of home, is reasonable without warrant so long as officers correctly determine that there is probable cause to search car); see also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356-67 (1974) (discussing warrantless searches).

31. See, e.g., *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that police may search person for weapons and evidence automatically upon effectuating lawful custodial arrest, regardless of probability of discovering seizable items); *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (upholding officer's frisk of individual for weapons on less than probable cause).

32. 389 U.S. 347 (1967).

33. *Id.*

of whether government activity implicated the fourth amendment was quite simple. Because the relevant constitutional language prohibits "unreasonable searches," the Court applied fourth amendment protections only when the police were "searching," construing that term according to its ordinary dictionary definition.³⁴ This approach led to some absurd results. In *Olmstead v. United States*,³⁵ decided during the prohibition era, federal officers listened to and recorded phone calls for several months using a wiretap. The officers tapped the phones from the basement of an office building and from telephone lines on streets near the suspects' homes.³⁶ The government used the evidence accumulated to convict the suspects of violating the National Prohibition Act.³⁷ The Court in *Olmstead* read the fourth amendment narrowly and literally to require an actual physical searching of places or objects, such as suspects' houses, offices, personal effects, or the suspects themselves.³⁸ Because the government had obtained the evidence not by

34. See *infra* note 38 and accompanying text. *Webster's New Collegiate Dictionary* defines *search* as follows: "to look into or over carefully or thoroughly in an effort to find or discover something." WEBSTER'S NEW COLLEGIATE DICTIONARY 1042 (1973). See also Amsterdam, *supra* note 30, at 356-57 (reviewing fourth amendment analysis before *Katz*); Wilkins, *supra* note 13, at 1081-86 (discussing pre-*Katz* case law).

35. 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 369 U.S. 347 (1967).

36. *Id.* at 456-57.

37. *Id.* at 455.

38. The Court observed that:

The [Fourth] 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 proceeding lawful, is that it must specify the place to be searched and the person or things to be seized.

* * *

. . . The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

By the invention of the telephone, fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

Id. at 464-65. In other words, it was not a "search" if government officials listened but did not look. Although this is perhaps consistent with *Webster's* definition at note 34, *supra*, it is decidedly underinclusive with respect to the spirit of the fourth amendment as announced in *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). See *supra* note 4.

“searching” but through the officers’ sense of hearing, the Court found no fourth amendment implications in the *Olmstead* surveillance.³⁹

A. THE EXPECTATION OF PRIVACY TEST

The Supreme Court’s first attempt to interpret the fourth amendment according to its spirit rather than its letter occurred in *Katz*. In that case, FBI agents suspected that Katz was using a public telephone illegally to transmit gambling information.⁴⁰ Without getting a warrant—none was required in light of *Olmstead*—the agents placed a listening and recording device on the outside of the phone booth and monitored Katz’s end of the conversations.⁴¹ The judge admitted this evidence at Katz’s trial and the evidence helped convict him.⁴² The Supreme Court reversed his conviction, ruling that the recording device intruded on an interest that the fourth amendment protected.⁴³ Thus, because the FBI agents conducted the “search” without first obtaining a warrant, the search was unlawful and its fruits inadmissible in court.⁴⁴

In determining what constitutes a search under the fourth amendment, the Supreme Court laid to rest the rigid, dictionary definition espoused in *Olmstead*. According to the *Katz* opinion, governmental monitoring of telephone conversations is a “search” for fourth amendment purposes.⁴⁵ The Court also rejected *Olmstead*’s requirement of a trespass onto personal property before fourth amendment rights attach.⁴⁶ Although both parties in *Katz* focused their arguments on whether a public phone booth is a “constitutionally protected area” such as a

39. *Olmstead*, 277 U.S. at 464-65.

40. *Katz v. United States*, 389 U.S. 347, 354 (1967).

41. *Id.* at 348, 354.

42. *Id.* at 348.

43. *Id.* at 353, 359.

44. *Id.* at 355-57.

45. *Id.* at 353. The Court stated:

The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

Id.

46. *Id.* (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)) (“[t]he premise that property interests control the right of the Government to search and seize has been discredited”).

home,⁴⁷ the Supreme Court found that term to be misleading. Justice Stewart, writing for the majority, explained:

[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.⁴⁸

Application of this standard to the facts of *Katz* easily led the Court to rule that the fourth amendment protected the contents of Katz's phone calls from unreasonable government eavesdropping.⁴⁹

The holding in *Katz* forever changed the focus of fourth amendment jurisprudence from whether the police were, in a literal sense, physically "searching" a constitutionally protected area to whether the police were intruding on an individual's expectation of privacy.⁵⁰ Nevertheless, the Court did not rule that governmental monitoring of private telephone conversations was per se unconstitutional, only that the fourth amendment, with its rule of reasonableness, applies to the use of this surveillance technique.⁵¹ Had the FBI obtained a warrant from a neutral and detached magistrate after a showing of probable cause that Katz was using the phone for illegal purposes, the "search" would have been entirely constitutional.⁵²

Justice Harlan, in a concurring opinion, further refined the majority's new "privacy" standard. Reading the majority's test as predominantly subjective—whether an individual has knowingly exposed something to the public or sought to preserve it as private—Justice Harlan proposed a twofold requirement. In

47. *Katz*, 389 U.S. at 349-51.

48. *Id.* at 351 (citations omitted).

49. The Court observed that:

[W]hat [Katz] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. . . . One who occupies [a public telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

Id. at 352.

50. See *California v. Greenwood*, 108 S. Ct. 1625, 1628 (1988); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *United States v. Knotts*, 460 U.S. 276, 280-81 (1983); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *United States v. Miller*, 425 U.S. 435, 440 (1976); *United States v. Mara*, 410 U.S. 19, 21 (1973); *United States v. Dionisio*, 410 U.S. 1, 8 (1973); *United States v. White*, 401 U.S. 745, 748-49, 752 (1971); see also *infra* notes 68-181 and accompanying text (analyzing Court's post-*Katz* jurisprudence).

51. *Katz*, 389 U.S. at 354.

52. See *id.* at 354-56.

order for the Court to accord fourth amendment protection to an activity, "a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation [must] be one that society is prepared to recognize as 'reasonable.'"⁵³

Illustrating his point, Justice Harlan compared two situations in which individuals would not be entitled to fourth amendment protection, one of which fails Justice Harlan's subjective test and one of which fails his objective test. First, a person generally expects privacy at home, "but objects, activities, or statements that [the person] exposes to the 'plain view' of outsiders are not 'protected'" because the person has exhibited no subjective expectation of privacy.⁵⁴ On the other hand, the conversations of people talking openly in a public place are not protected because society would view any expectation of privacy in such a conversation, even if subjectively held, as unreasonable.⁵⁵ Applying his test to the facts of *Katz*, Justice Harlan wrote: "The point is not that the booth is 'accessible to the public' at other times, but that it is a temporarily private place whose momentary occupants' [subjective] expectations of freedom from intrusion are recognized as reasonable."⁵⁶

Justice Harlan's refinement of the test quickly became, and remains, the prevailing view.⁵⁷ The problem that this test presents, however, is how to determine which individual activities society is willing to cloak with a "reasonable expectation of privacy." The specific holding of *Katz* that the fourth amendment protects phone conversations is not helpful, because Justice Harlan's standard essentially calls for a case-by-case analysis. Moreover, Justice Harlan's reasoning is conclusory. Katz's expectations of privacy were "reasonable" from a societal standpoint because Justice Harlan deemed them to be reasonable. In subsequent opinions, the Supreme Court continued to wave Justice Harlan's magic wand without clarifying what it is that makes an expectation of privacy worthy of fourth amendment protection.⁵⁸ Thus, it is difficult to draw conclu-

53. *Id.* at 361 (Harlan, J., concurring).

54. *Id.*

55. *Id.*

56. *Id.* (citation omitted).

57. *See, e.g.,* *California v. Greenwood*, 108 S. Ct. 1625, 1628 (1988); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Oliver v. United States*, 466 U.S. 170, 177 (1984); *United States v. Knotts*, 460 U.S. 276, 280-81 (1983); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

58. *See, e.g.,* *California v. Greenwood*, 108 S. Ct. 1625, 1628-30 (1988); *California v. Ciraolo*, 476 U.S. 207, 211-13 (1986). While continually designating

sions about subsequent Supreme Court faithfulness to *Katz* without first formulating a hypothesis regarding the ingredients of a protectable privacy interest.

B. DEFINING PROTECTABLE PRIVACY INTERESTS UNDER *KATZ*

Because the fourth amendment by its express terms applies to governmental conduct that encroaches on individual privacy and freedom, any attempt to identify the proper scope of the amendment involves a determination of the point at which governmental intrusion into the personal lives of individuals should be regulated. This determination is inevitably a value judgment about which people will disagree. Those people favoring a broad view of individual freedoms will prefer a broad scope of constitutional protection.⁵⁹ Conversely, those who favor broad police power at the cost of some individual liberty will prefer a narrow construction of fourth amendment protection. Judges will make this value judgment according to their own liberal or conservative views.

This intractable problem begs for a more predictable standard, preferably a standard promoting a fourth amendment whose protections do not expand and contract according to the changing political chemistry of the Supreme Court. Professor LaFave, the nation's leading authority on the fourth amendment, has suggested that the ultimate inquiry under *Katz* is whether allowing the police surveillance technique at issue to go unregulated by the fourth amendment would reduce the amount of individual privacy and freedom "to a compass inconsistent with the aims of a free and open society."⁶⁰

Justice Harlan's two-part test as the constitutional standard, the Court has never elaborated what it is that makes a privacy expectation "reasonable" or "legitimate." Rather, after stating Justice Harlan's test, the Court actually applies a different test, discussed *infra* at notes 66, 128-30 and accompanying text.

59. See, e.g., Tomkovicz, *supra* note 13; Wilkins, *supra* note 13.

60. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.2, at 99 (1985) [hereinafter LAFAVE] (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974)).

Professor LaFave's test requires one slight adjustment. Presumably, Professor LaFave did *not* mean that fourth amendment protection is unwarranted if police can be trusted not to abuse a particular surveillance technique. If one assumes such governmental trustworthiness, then police use of surveillance techniques, unhampered by fourth amendment regulation, certainly would not diminish the freedoms that are consistent with the aims of American society. Yet, the history and philosophy underlying the entire Bill of Rights is inconsistent with entrusting individual liberties to an all-powerful government. Because it was distrust of government that led to the adoption of the Bill of

Professor LaFave's inquiry not only captures the essence of the fourth amendment, it also recognizes that a Supreme Court decision that a particular form of governmental surveillance does not implicate the fourth amendment is the legal equivalent of a green light to use that surveillance unreasonably and without limitation. Thus, determining whether there is a reasonable expectation of privacy involves looking at both the nature of the individual privacy interest and the degree of intrusiveness created by the governmental surveillance, rather than simply deciding whether a reasonable person would expect privacy in a particular situation. To illustrate, if two drug dealers conducted an illegal transaction in the middle of the night on a dark street corner in a remote part of town, it would be reasonable for them to expect that the police would not discover their activities.⁶¹ Yet, this is not a "reasonable expectation of privacy" under *Katz* and would not be a "search" for fourth amendment purposes if an officer were to shine a light on them and detect the illegal transaction, even if the officer was walking from corner to corner and, in a dictionary sense, "searching" for narcotics traffickers. Looking at the minimal intrusiveness of the governmental surveillance—illuminating a dark public street corner—and the nature of the individual interest—a street corner transaction—it is difficult to believe that allowing this form of police conduct to go unregulated by the fourth amendment would diminish individual privacy and freedoms to a level inconsistent with the aims of a free society. Does it matter that police can, without limit, walk around illu-

Rights, see *supra* note 19, the framers obviously never meant to have the fox guard the constitutional chicken coop.

Professor LaFave, in enunciating his test, must have meant that fourth amendment protection is desirable whenever an arbitrary or irresponsible use of a government surveillance technique would threaten freedoms upon which our society is based. Thus, in deciding whether the fourth amendment should regulate particular government intrusions, the proper underlying assumption is that of a government which cannot be trusted to use its power responsibly, rather than an assumption of a trustworthy, benevolent government. The Constitution requires nothing less. In this way, the law regarding individual rights remains flexible and capable of application to obvious governmental abuses. The proper inquiry then, adjusted in accordance with this Article, is: whether, if the particular form of surveillance practiced by police is permitted to go unregulated by constitutional restraints, *an arbitrary or unreasonable use of that surveillance technique* would diminish the amount of privacy remaining to citizens to a level inconsistent with the aims of a free and open society.

61. See LAFAVE, *supra* note 60, § 3.2, at 99 (citing Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 983 (1968)).

minating dark street corners, as often as they want, whenever they want? Does society desire to extend fourth amendment protection to street corner transactions?⁶² The questions are rhetorical. It would trivialize the fourth amendment to apply it to this hypothetical situation.

Compare the situation in which a police officer climbs a tree in a city park, a place he has every right to be, and shines a flashlight into an individual's bedroom window.⁶³ Should police, bound by no constitutional restraints, freely be able to peek into bedroom windows? Does society deem bedroom activity worthy of fourth amendment protection? In answer to Professor LaFave's inquiry, allowing this intrusive type of police surveillance to go unregulated, considering the highly private nature of the individual interest,⁶⁴ certainly would

62. See generally Amsterdam, *supra* note 30, at 363, 402 (asking similar value judgment questions).

63. See *id.*

64. In the analysis proposed in the text of this Article, any assessment of the nature of the individual interest must be made in the abstract. That is, the criminal nature of activities performed in a private area should not be considered in determining whether fourth amendment protection should apply. In deciding whether to extend fourth amendment protection to bedroom activity, it is irrelevant whether the individual involved in any particular case is using his bedroom for sleeping, sexual intimacy, or the manufacture of amphetamines. If anyone is to enjoy the assurance of privacy in the bedroom, the fourth amendment's protections must extend to everyone, criminal or innocent. The very reason that fourth amendment protection generally requires a warrant based on a judicial determination of probable cause prior to police intrusion into a protected interest is to guard against overzealous police conduct. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (holding that inferences necessary to any probable cause determination should be drawn by neutral and detached judicial officers rather than police officers "engaged in the often competitive enterprise of ferreting out crime"). If police could justify home intrusions after the fact based on the illicit use to which the home or bedroom was put, police overzealousness would be rewarded and the whole purpose of the warrant requirement, which is to prevent erroneous intrusions, would be defeated. Judicial acquiescence in overzealous, careless, or unreasonable police conduct because the conduct led to the discovery of criminality would increase the risk of intrusion on innocent people.

To illustrate, imagine two individuals, Curt and Ian, whose homes are on opposite sides of town. Curt, the "criminal," uses his bedroom as a drug laboratory; Ian, the "innocent," uses his home and bedroom for the usual intimate, noncriminal activities. In order for the fourth amendment to protect Ian's expectations of privacy, protection also must extend to Curt in his home and bedroom. The risk that some criminality will go undetected is the necessary price for a society which values individual privacy. This is not to say that Curt has a right to engage in illegal activity in his home. He clearly does not. Rather, both Curt and Ian have a right to be free of unreasonable intrusions into their homes. If the police investigate Curt, put their findings in an affidavit, and take it before a magistrate who determines that there is probable cause to be-

diminish individual freedom and privacy to a level inconsistent with common notions of the nature of American society. Once again, this analysis does not mean that the police never can peek into a bedroom window, only that the peeking must be "reasonable." If the police have probable cause to believe that an individual's bedroom contains a drug lab and they convince a neutral and detached magistrate of that fact, the police can obtain a warrant and search the bedroom thoroughly. If the police hear gunshots emanating from a home, they can enter that home and bedroom even in the absence of a warrant, because the intrusion in such an emergency situation is "reasonable" even without a warrant.⁶⁵

This Article adopts Professor LaFave's interpretation of Justice Harlan's test and applies it in Part II to determine whether the fourth amendment should cover the governmental investigatory techniques at issue. Unfortunately, the Supreme Court rarely uses Professor LaFave's suggested approach for defining the interests that the fourth amendment protects. While expressly embracing Justice Harlan's two-part analysis, the Court has made little effort to refine that test; instead, the Court has focused primarily on the "knowingly exposes to the public" language that the *Katz* majority used.⁶⁶ Regrettably,

lieve that evidence of criminality will be discovered in Curt's home, the magistrate may issue a warrant for police to search Curt's home, and the police can use any evidence they find to prosecute him.

Any distinction based on the use to which people put their bedrooms will result in less privacy protection for everyone. If the police may enter Curt's home without complying with the fourth amendment and successfully argue that their fortuitous discovery of criminality renders Curt's privacy interest unprotectable, then arbitrary police decisions will supplant an otherwise uniform standard to which police must adhere for all home intrusions. Police would receive the message: "You might as well search Ian's house, too. If he is a criminal, he cannot argue that his rights have been violated." That Ian can institute a civil suit is no answer. The problems with civil remedies for police illegalities have been well documented. *See Mapp v. Ohio*, 367 U.S. 643, 652-53 (1961). Moreover, the purpose of the fourth amendment is to prevent erroneous intrusions into privacy, not merely to redress them. *See id.* at 650-53. Thus, any withholding of fourth amendment protection based on criminal use of otherwise private areas can lead only to lower standards for police conduct and a concomitant society-wide reduction in privacy and security from governmental intrusion.

In sum, when deciding whether to extend fourth amendment protection to particular items, statements, or activities, the Court must consider the nature of the individual interest in abstract terms, ignoring the criminal use to which an otherwise private area is put.

65. *See Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987).

66. *See Katz v. United States*, 389 U.S. 347, 351 (1967); *infra* notes 128-30 and accompanying text.

the Court has severed that language from its context and used it as a talisman, ruling that any objects, statements, or activities exposed to the public—even if exposed only to a very limited degree—do not deserve fourth amendment protection.⁶⁷ This analysis, although perhaps commendable for its simplicity, begs the constitutional question and undercuts the spirit of both *Katz* and the fourth amendment. There is no better illustration of the effect that this analysis has had on the breadth of fourth amendment protection than the last decade of post-*Katz* jurisprudence.

II. SUPREME COURT INTERPRETATIONS OF THE *KATZ* TEST

A. BIG BROTHER: "WHO WAS THAT ON THE PHONE?"

In the decade following the 1967 *Katz* decision, several Supreme Court opinions limited the scope of the fourth amendment.⁶⁸ The most significant damage to fourth amendment protection, however, occurred in a line of cases beginning in 1979 with *Smith v. Maryland*.⁶⁹ *Smith* involved police use of a "pen register" surveillance device.⁷⁰ A pen register records the numbers dialed from a particular telephone and is used by the telephone company for billing purposes.⁷¹ The police in *Smith* wanted a list of the telephone numbers dialed by Smith, whom

67. See, e.g., *California v. Greenwood*, 108 S. Ct. 1625, 1628-29 (1988) (finding no protection for curbside garbage); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (finding no protection from aerial surveillance of curtilage); *United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (finding no protection from governmental use of tracking device to monitor travels).

68. See *United States v. Miller*, 425 U.S. 435, 437 (1976) (holding that bank depositors have no protectable fourth amendment interest in bank records); *United States v. White*, 401 U.S. 745, 752-53 (1971) (holding that government's use of agents wired with recording devices to monitor conversations between defendant and agent does not give rise to fourth amendment protection). That the Court already was setting a course inconsistent with Justice Harlan's two-part test is apparent from Justice Harlan's lengthy dissent in *White*. See 401 U.S. at 768 (Harlan, J., dissenting).

69. 442 U.S. 735 (1979).

70. *Id.* at 737.

71. *Id.* at 736 n.1. As the Court explained:

A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed. . . .

A pen register is "usually installed at a central telephone facility [and] records on a paper tape all numbers dialed from [the] line" to which it is attached.

Id. (citations omitted).

they suspected of both participating in a robbery and subsequently making a number of threatening, obscene telephone calls to the robbery victim. Without first obtaining a warrant, the police requested the telephone company to employ a pen register to record the numbers dialed from Smith's home telephone.⁷² Information from the pen register revealed that Smith called the robbery victim on the first day of the "surveillance." Based on this information, the police obtained a warrant to search Smith's home, where they found further incriminating evidence.⁷³

The Supreme Court held that the government's use of the pen register did not constitute a "search" implicating the fourth amendment.⁷⁴ The Court specifically approved the two-part test that Justice Harlan had propounded in his *Katz* concurrence,⁷⁵ but, in applying that test to the use of pen registers, the Court misinterpreted the "knowingly exposes to the public" language that the *Katz* majority used. According to the Court in *Smith*, people realize from their monthly telephone bills that the telephone company has the equipment for making records of the numbers they dial.⁷⁶ Consequently, when people use their telephones they voluntarily expose to the telephone company the numbers dialed and thereby assume the risk that the telephone company will reveal that information to the police.⁷⁷ Based on this analysis, the Court held that a person has no reasonable expectation of privacy in the numbers dialed from his telephone.⁷⁸

The Supreme Court's reasoning in *Smith*, which has survived unscathed through the Court's recent decision in *California v. Greenwood*,⁷⁹ significantly narrowed the scope of fourth

72. *Id.* at 737.

73. *Id.*

74. *Id.* at 745-46.

75. *Id.* at 740.

76. *Id.* at 742-43 (noting also that most telephone books indicate that telephone company has system that "can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls").

77. *Id.* at 744.

78. *Id.* at 745.

79. 108 S. Ct. 1625, 1629 (1988). In explaining its earlier ruling in *Smith*, the Court stated:

An individual has no legitimate expectation of privacy in the numbers dialed on his telephone, we reasoned, because he voluntarily conveys those numbers to the telephone company when he uses the telephone.

Again, we observed that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."

Id. (quoting *Smith*, 442 U.S. at 743-44).

amendment protection. The theory that emerged in *Smith* provides that if a person exposes any activity, statement, or object—however intimate—to any other member of the public, in any degree, the person assumes the risk that the third party will reveal to the government anything so exposed. No fourth amendment protection therefore exists against police efforts specifically designed to detect such intimate, albeit “exposed” information, even when the police take a much closer look than the limited “public exposure” allows.

The theory in *Smith* rests on a fallacy. While individuals reasonably may expect that the telephone company will preserve and use for billing purposes the numerical information conveyed when a number is dialed, they also expect that the government will not use such information to compile a list of whom they call, when, how often, and for how long. Such governmental snooping smacks of Orwell’s Big Brother, protection from which is the essence of the fourth amendment. Moreover, when the government uses the numbers recorded on a pen register not just as numerical information but as a means of discovering intimate details about a person’s life, such as the identities of acquaintances and the frequency with which the person contacts those acquaintances, the government has intruded far beyond the limited degree to which the person voluntarily has exposed such details to public view. Knowingly exposing numerical information to the telephone company for billing purposes is not coextensive with exposing highly private information of the kind the government may hope to discover through the use of the otherwise unobjectionable pen register.

The appropriate inquiry, which the Court in *Smith* should have employed in determining whether the government’s use of pen registers implicates the fourth amendment, is whether the unregulated governmental use of pen registers would diminish individual freedoms and privacy to an intolerable level.⁸⁰ Should the police or other branches of government be free, with no constitutional restraint, to employ pen registers to make records of whom individuals call, how often, and for what length of time? Or should the judicial branch construe the fourth amendment to require that such governmental surveillance be reasonable? A duty to act reasonably is a minimal burden on legitimate law enforcement activity.

“Reasonableness” does not necessarily require that police surveillance be undertaken only pursuant to a warrant based

80. See *supra* notes 60-65 and accompanying text.

on probable cause.⁸¹ It may mean only that government officials should be limited as to either the length of time they may direct such surveillance at an individual or the uses to which they may put the discovered information. It may simply require police to swear out an affidavit that the subject of the surveillance is a suspect in criminal activity.⁸² Nevertheless, the *Smith* Court bypassed these alternatives. Consequently, after *Smith v. Maryland*, there is no fourth amendment protection for individuals' subjective expectations of privacy regarding whom they call, the frequency of those calls, or their length.

B. BIG BROTHER: "WHERE HAVE YOU BEEN ALL DAY?"

In *United States v. Knotts*,⁸³ without first obtaining a warrant, Minnesota narcotics officers placed a "beeper"—a radio transmitter used as a tracking device—in a large drum of chloroform, a chemical commonly used in the illegal manufacture of drugs.⁸⁴ One of Knotts' co-defendants purchased the drum

81. See *supra* notes 30-31 and accompanying text. The fourth amendment's reasonableness requirement is flexible enough to permit varying degrees of protection depending on the significance of a privacy interest. For example, the privacy interest in the contents of telephone conversations may be greater than the interest in the associated information obtained by the use of pen registers. Accordingly, the government's gathering of this "noncontent" information may deserve less regulation than the highly intrusive surveillance in *Katz*. It is unresponsive to argue that the *amount* of fourth amendment protection should not depend on a value judgment, because a value judgment is exactly what the Court presently exercises in deciding the more significant question of whether fourth amendment protection applies at all. It makes much more sense, and is far less drastic, for the Court to make this value judgment when determining the *amount* of fourth amendment protection that is available, rather than when determining in the first instance whether the fourth amendment provides any protection.

82. Following the *Smith* decision, Congress passed a statute limiting governmental use of pen registers. 18 U.S.C. §§ 3121-3126 (Supp. IV 1986). Under the statute, a law enforcement agency wishing to use a pen register must apply for a court order authorizing the use of the register for a period not to exceed sixty days. *Id.* § 3123(c). The law enforcement officer must certify that information likely to be obtained by the installation and use of the pen register is relevant to an ongoing criminal investigation. *Id.* § 3123(a).

It is ironic that the legislative branch would enact fourth amendment-like protection for the use of pen registers after the Supreme Court had determined—in accordance with Justice Harlan's test—that society does not recognize as reasonable any privacy expectations in the numbers dialed from a telephone. The legislative branch is, after all, the ultimate voice of the people. Congressional enactment of 18 U.S.C. § 3123 is evidence that either the Supreme Court is incorrectly applying Justice Harlan's test or that the Court's notions of societal beliefs are erroneous.

83. 460 U.S. 276 (1983).

84. *Id.* at 277-78.

of chloroform, placed it in his car, and drove away. The narcotics agents, with the aid of the beeper and a police helicopter, followed the automobile's journey from the place of purchase to a secluded cabin.⁸⁵ Based on this observation and information gathered from further surveillance of the cabin, the agents obtained a search warrant and discovered a fully operational drug laboratory in the cabin.⁸⁶ Knotts moved to suppress evidence of the drug laboratory, arguing that the warrantless use of the beeper was an illegal search. The trial court denied his motion and he was convicted.⁸⁷

The Supreme Court decided that the officers' warrantless use of the beeper was legal, ruling that the government's use of a tracking device does not implicate fourth amendment protections.⁸⁸ Reaffirming Justice Harlan's two-part test as determinative, the Court held that an individual has no reasonable expectation of privacy in his travels on public thoroughfares, explaining that travelers voluntarily convey, to anyone who wants to look, their direction, their stops, and their final destination.⁸⁹

In other words, the Court held that public travel is inconsistent with a reasonable expectation of privacy. Although this holding may be superficially appealing, the appeal results from

85. *Id.* at 278. A radio receiver located in the police helicopter monitored and tracked the beeper. The driver apparently detected the police pursuit, because he took evasive maneuvers and the narcotics officers momentarily lost visual surveillance. With the aid of the receiver in the helicopter, however, they located the beeper signal about an hour later. The Court found that the resolution of the case would not have been different had the entire surveillance been visual and unaided by the beeper. *Id.* at 285.

86. *Id.* at 279.

87. *Id.*

88. *Id.* at 285.

89. The Court stated:

The governmental surveillance conducted by means of the beeper in this case amounted principally to the following of an automobile on public streets and highways. . . .

A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When [Knotts' co-defendant] traveled over the public streets he 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 281-82.

Even if the Court had decided that tracking an individual's travels implicates fourth amendment rights, it appears that Knotts had no standing to object to the police tracking of a third party. The Court, however, did not address this issue.

the Court's misinterpretation of *Katz's* "knowingly exposes to the public" language. As in *Smith v. Maryland*, the Court apparently believed that no matter how minimally an individual has exposed an activity to public scrutiny, that individual has completely relinquished fourth amendment protection once the public exposure occurs.⁹⁰

There is a significant distinction between exposure to casual observation and the total relinquishment of privacy expectations. Certainly individuals traveling on public roads know that other members of the public can observe their travel, if only for a limited time. It is extremely unlikely, however, that people along the route have any but a passing interest in particular drivers, where they are going, or whom they are going to visit. In addition, it would be absurd to suggest that those who have observed particular drivers in transit have in any way intruded on the travelers' privacy. Nevertheless, in the unlikely event that everyone in town pooled their collective knowledge of a particular individual's travels and built a daily record of every place the individual went, everyone visited, and the length of each stop, it would be straining common sense to call this behavior unintrusive. In fact, if people expected such nose behavior from others, evasive driving maneuvers might become the norm. Yet, this is precisely the type and character of surveillance that *Knotts* allows the government to undertake without any fourth amendment restraints.⁹¹

In short, when the government engages in continuous surveillance, recording intimate details of individuals' personal lives—where they go, whom they see, when, how often, for how

90. See *supra* notes 75-80 and accompanying text.

91. *Knotts* argued that a holding that beeper surveillance of travels does not implicate the fourth amendment would result in the possibility of twenty-four hour surveillance of any citizen without judicial knowledge or supervision. *Knotts*, 460 U.S. at 283. The Court responded: "But the fact is that the 'reality hardly suggests abuse,' . . . if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 283-84 (citations omitted).

The Court's response misses the point. Indeed, the Court's response admits that in certain circumstances fourth amendment protection should be available. In other words, the individual interest implicated in *Knotts* is worthy of protection from arbitrary and unreasonably extensive governmental intrusions. Yet, the Court's answer that there will be time to adjust its constitutional principles should the government abuse its tracking power is inapposite. The Bill of Rights was based on distrust of governmental power, and any interpretation of the scope of those rights should permit a constitutional flexibility sufficient not only to address, but also to discourage, egregious governmental intrusions. See *supra* notes 19, 60.

long—the government is taking a much closer look than are those disinterested members of the public to whom the individuals have, in a limited, piecemeal fashion, exposed their travels. Simply because individuals have, to a limited degree, exposed an activity to public view, the Court should not conclude that they have completely relinquished all fourth amendment protection. To so interpret *Katz* is to read its language while ignoring its spirit.

Rather, the fundamental inquiry should be whether allowing the unregulated governmental tracking of a person's travels would diminish individual privacy to an intolerable level.⁹² Should the government, limited only by self-restraint, be able to follow an individual for an unlimited amount of time, recording the routes, places stopped, and people visited? Or, is such governmental surveillance sufficiently intrusive that the Court should impose a requirement of reasonableness? Requiring "reasonable" surveillance would not significantly hinder legitimate law enforcement efforts. For example, probable cause existed in *Knotts* prior to the tracking.⁹³ A quick visit to a magistrate for a warrant based on that probable cause would have sufficiently protected any privacy interest of those involved. Moreover, a "search" of public travels may be reasonable on less than probable cause;⁹⁴ or it may be reasonable without a showing of any suspicion as long as it is limited in time.⁹⁵ In this way, by broadly interpreting the scope of the fourth amendment while varying the amount of protection that is reasonable for a particular privacy interest, the Court can achieve its apparent goal of promoting law enforcement without forfeiting the ability to employ the fourth amendment to regulate egregious governmental intrusions into citizens' personal lives.

C. BIG BROTHER: "WHAT WERE YOU DOING IN YOUR BACKYARD?"

Perhaps the ultimate misapplication of *Katz*'s "knowingly

92. See *supra* notes 60-64 and accompanying text.

93. Prior investigation of *Knotts* and his two cohorts, Armstrong and Petschen, strongly supported the narcotics officers' suspicions. A chemical company notified a narcotics officer that Armstrong, a former employee, had been stealing chemicals which could be used to manufacture illicit drugs. Investigation of Armstrong revealed that he also had been purchasing such chemicals from another company. In addition, the officers observed that Armstrong always delivered the chemicals to Petschen. *Knotts*, 460 U.S. at 278.

94. See *supra* notes 30-31 and accompanying text.

95. See *supra* note 82 (discussing federal legislation that imposed time limitations on government's investigative use of pen registers).

exposes to the public" exception to fourth amendment protection occurred in *California v. Ciraolo*,⁹⁶ a 1986 case involving police air surveillance of a fenced backyard. To fully understand the ramifications of *Ciraolo*, however, one first must examine *Oliver v. United States*,⁹⁷ a 1984 opinion distinguishing, for fourth amendment purposes, backyards from "open fields."⁹⁸

In *Oliver*, narcotics agents received a tip that marijuana was being grown on Oliver's farm. Without a warrant and, concededly, without probable cause, the agents drove past Oliver's house to a locked gate with a "No Trespassing" sign.⁹⁹ The agents walked around the gate, searched Oliver's private property, and eventually found a field of marijuana about one mile from the homestead.¹⁰⁰ The trial court suppressed the evidence of the discovery of the marijuana field, but the Sixth Circuit, sitting en banc, reversed.¹⁰¹ The Supreme Court ruled that the evidence was admissible, holding that an individual has no legitimate expectation of privacy in open fields.¹⁰²

To reach its result that there is no legitimate privacy interest in admittedly private property marked with "No Trespassing" signs, the *Oliver* Court reverted, in part, to a pre-*Katz*

96. 476 U.S. 207 (1986).

97. 466 U.S. 170 (1984).

98. See *infra* notes 115-17 and accompanying text.

99. *Oliver*, 466 U.S. at 173 & n.1.

100. *Id.* at 173.

101. See *id.* at 173-74. The trial court found that, by posting "No Trespassing" signs, Oliver had a reasonable expectation that his field would remain private. *Id.* at 173. That analysis misses the point. A low probability of discovery does not determine whether a privacy interest deserves fourth amendment protection. See *supra* notes 60-64 and accompanying text. Rather, the availability of fourth amendment protection depends on whether the privacy interest involved is sufficiently significant, and the government surveillance sufficiently intrusive, that withholding fourth amendment protection would reduce individual privacy and freedom to a level intolerable to society. See *supra* notes 60-62 and accompanying text.

The Sixth Circuit ignored the intrusiveness of the government's conduct, however, finding that an individual's privacy interest in open fields is insufficient to warrant fourth amendment protection. *United States v. Oliver*, 686 F.2d 356, 360 (6th Cir. 1982) (en banc), *aff'd*, 466 U.S. 170 (1984).

102. *Oliver*, 466 U.S. at 179. An "open field" does not have to be either "open" or a "field." *Id.* at 180 n.11. Essentially, any privately-owned property outside the home and curtilage (backyard) is an open field for fourth amendment purposes. See *infra* notes 115-17 and accompanying text. Thus, a heavily forested area can be an open field. *Oliver*, 466 U.S. at 180 n.11. Even a building can be considered an open field. See *United States v. Dunn*, 480 U.S. 294, 303 (1987) (suggesting that fourth amendment may not protect barns that are sufficiently distant from home).

literal approach. According to the Court, the fourth amendment protects people in their "persons, houses, papers, and effects" but makes no mention of open fields.¹⁰³ That the Court rejected such reasoning in *Katz* is beyond dispute.¹⁰⁴ The fourth amendment does not expressly mention telephone conversations, yet the Court in *Katz* specifically extended its protections to such private activity.¹⁰⁵

103. *Oliver*, 466 U.S. at 176-77 ("We conclude . . . that the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment.").

104. See *supra* notes 33-50 and accompanying text (noting transition from literal reading of fourth amendment's language in *Olmstead v. United States*, 277 U.S. 438 (1928), to privacy analysis presented in *Katz v. United States*, 389 U.S. 347 (1967)).

105. See *Katz*, 389 U.S. at 353. Justice Marshall's eloquent dissent in *Oliver* elaborated on the fundamental flaws in the majority's reasoning:

This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the fourth amendment forbids the police without a warrant to eavesdrop on such a conversation.

* * *

Indeed, the Court's reading of the plain language of the Fourth Amendment is incapable of explaining even its own holding in this case. The Court rules that the curtilage, a zone of real property surrounding a dwelling, is entitled to constitutional protection. We are not told, however, whether the curtilage is a "house" or an "effect"—or why, if the curtilage can be incorporated into the list of things and spaces shielded by the Amendment, a field cannot.

The Court's inability to reconcile its parsimonious reading of the phrase "persons, houses, papers, and effects" with our prior decisions or even its own holding is a symptom of a more fundamental infirmity in the Court's reasoning. The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with "precision" permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion. We do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete. Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials.

The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom "from unreasonable government intrusions into . . . legitimate expectations of privacy." That freedom would be incompletely protected if only government conduct that impinged upon a person, house, paper, or effect were subject to constitutional scrutiny. Accordingly, we have repudiated the proposition that the Fourth Amendment applies only to a limited set of locales or kinds of

The Court in *Oliver* attempted to justify its result under *Katz*'s privacy analysis by belittling a person's privacy interest in open fields.¹⁰⁶ Justice Powell, writing for the majority, stated the unremarkable proposition that fields are not very much like a home.¹⁰⁷ From this proposition he concluded that open fields are undeserving of fourth amendment protection.¹⁰⁸ The Court's analysis fails to distinguish between degrees of privacy interests.¹⁰⁹ Simply because people expect more privacy in their homes than elsewhere on their property does not mean that there should be no fourth amendment protection for the latter.

The Court historically has extended fourth amendment protection to places clothed with a lesser expectation of privacy than a home—automobiles, for example.¹¹⁰ A more precise and less drastic means of addressing the differences in privacy expectations is simply to interpret the fourth amendment's reasonableness requirement as providing less protection to those

property. In *Katz v. United States*, we expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it "protects people, not places." Since that time we have consistently adhered to the view that the applicability of the provision depends solely upon "whether the person invoking its protection can claim a 'justifiable,' 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." The Court's contention that, because a field is not a house or effect, it is not covered by the Fourth Amendment is inconsistent with this line of cases and with the understanding of the nature of constitutional adjudication from which it derives.

Oliver v. United States, 466 U.S. 170, 185-88 (1984) (Marshall, J., dissenting) (footnotes and citations omitted).

106. *Oliver*, 466 U.S. at 179.

107. *Id.* Justice Powell wrote:

[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home . . . would not be.

Id.

108. *Id.* at 181.

109. See Tomkovicz, *supra* note 13, at 661-77.

110. See *California v. Carney*, 471 U.S. 386, 392-93 (1985); *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976); *Carroll v. United States*, 267 U.S. 132, 153-54 (1925).

The Court never has ruled that cars are undeserving of fourth amendment protection simply because they are not as "private" as homes. Rather, recognizing the obvious distinction between homes and cars, the Court has found that warrantless automobile searches are "reasonable" so long as there is probable cause to search the car. See *Carney*, 471 U.S. at 390-95.

interests that are less private.¹¹¹ The Court has taken this approach in automobile search cases; searching an automobile requires probable cause, but police can undertake such a search constitutionally without first obtaining a warrant.¹¹² In other words, warrantless searches of automobiles are "reasonable" so long as the police have probable cause. It is precisely because people have a lesser expectation of privacy in their cars that cars receive less fourth amendment protection.¹¹³ Thus, the recognition that open fields are not as connected with intimate personal activities as is a home should not mean that those fields, part of a person's private property, are undeserving of fourth amendment protection. Nevertheless, after *Oliver*, police or other government officials are apparently free, for fourth amendment purposes, to intrude on much of a person's land without reason, at any time, and for any length of time.¹¹⁴

111. See *Amsterdam*, *supra* note 30, at 376, 390-95.

112. See *Carney*, 471 U.S. at 390-95; see also *supra* note 110 (discussing car searches). The justification for allowing warrantless automobile searches must derive, in part, from the Court's lack of concern about erroneous searches of automobiles by overzealous police officers. Because automobiles are viewed as less intimate than homes, it would not make much sense to require that magistrates, rather than police, draw the inferences necessary to a probable cause determination. Moreover, probable cause to search a car usually develops along the roadside subsequent to a traffic stop. It would be inconvenient for both officers and drivers to delay the search until the officers could obtain a warrant.

113. *Carney*, 471 U.S. at 390-92. Originally, warrantless auto searches were upheld as reasonable based on a car's mobility. See *Carroll*, 267 U.S. at 153. The mobility of an automobile apparently created its own emergency exception to the warrant requirement—by the time police secure a warrant, the car may be gone. The mobility of the car is no longer the primary rationale for differentiating the full fourth amendment protection for homes from the lesser protection for automobiles. See *Carney*, 471 U.S. at 391; see also *Texas v. White*, 423 U.S. 67, 68 (1975) (upholding warrantless search of car even after officer had seized car and driven it to police station). The primary modern rationale underlying the automobile exception to the warrant requirement is the lower expectation of privacy associated with automobiles. *Carney*, 471 U.S. at 391.

The Court's approach in the automobile cases is consistent with the approach proposed in this Article for fourth amendment analysis generally. See *supra* notes 66-67 and accompanying text. Recognition of a distinction between homes and other enclosures should not lead automatically to a decision that privacy interests less significant than that of the home are completely unworthy of fourth amendment protection from arbitrary governmental intrusion. The fourth amendment's reasonableness requirement is flexible enough to accommodate varying degrees of privacy interests.

114. The police may, of course, be subject to prosecution for criminal trespass, but prosecutors are unlikely to bring charges. Cf. *Irvine v. California*, 347 U.S. 128, 137 (1954) (noting that police are unlikely to inform on each other after committing illegal searches). Moreover, the Supreme Court long has rec-

That is what it means when the Court withholds fourth amendment protection—the government is not required to act reasonably.

An important distinction emerged in *Oliver* between “open fields” and “curtilage”—the land immediately surrounding and associated with the home.¹¹⁵ According to the Court, the curtilage of a home is sufficiently connected to a home’s intimate activities to be worthy of fourth amendment protection.¹¹⁶ In fact, the Court considered the curtilage “part of the home itself for fourth amendment purposes.”¹¹⁷ This “home outside the home” was relatively shortlived, however, for in *California v. Ciraolo*,¹¹⁸ the Supreme Court effectively rendered expectations of privacy in curtilage meaningless.

In *Ciraolo*, the police in Santa Clara, California, received

ognized that *civil* liability for tortious police conduct, such as trespass, is an ineffective substitute for fourth amendment protection. See *Mapp v. Ohio*, 367 U.S. 643, 652-53 (1961); *Irvine*, 347 U.S. at 137. But see *Wilkins*, *supra* note 13, at 1092-1100.

115. The Supreme Court defined *curtilage* as “the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’” *Oliver*, 466 U.S. at 180 (citations omitted).

116. *Id.*

117. *Id.* The quote reflects the Court’s arbitrary and rigid line drawing. By appending the curtilage to the home, the Court extends to the curtilage full fourth amendment protection. Conversely, open fields, which begin where the curtilage ends, receive no constitutional protection. The distinction takes on even greater significance when one considers how blurred the line between curtilage and open fields really is. In *United States v. Dunn*, 480 U.S. 294 (1987), the Court set out the factors relevant to distinguishing curtilage from open fields:

[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a “correct” answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection.

Id. at 301.

The inherent blurriness of the line magnifies the inaccuracy of the Court’s all-or-nothing approach to fourth amendment regulation of governmental intrusions on privately-owned land. Police may not set foot on the curtilage without meeting the strict requirements for entry into a home, yet a few feet outside the curtilage they may traipse, trample, and tread to their heart’s content without even implicating the fourth amendment.

118. 476 U.S. 207 (1986).

an anonymous tip that marijuana was growing in Ciraolo's backyard, which was enclosed by a ten-foot fence.¹¹⁹ Without obtaining a warrant—probable cause was surely lacking¹²⁰—the police flew over Ciraolo's home and curtilage in an airplane, identifying and photographing marijuana plants. The police used this documentation to obtain a warrant, ultimately leading to the seizure of a large number of marijuana plants.¹²¹ Ciraolo pleaded guilty after the trial judge denied his motion to suppress the evidence.¹²² The Supreme Court held that the trial judge properly denied the motion to suppress, finding that the aerial surveillance did not intrude on any interest protected by the fourth amendment.¹²³ Thus, after *Ciraolo*, it is not a "search" for the government to fly over persons' fenced backyards and look to see what they are doing. Ironically, although *Oliver* ruled that government agents walking through a person's backyard constitutes a "search" implicating fourth amendment protection—on the ground that curtilage is part of the area encompassing the intimate activities associated with the home¹²⁴—*Ciraolo* allows police to observe those intimate activities from above with no restrictions.

The Court's internally inconsistent approach to constitutional protection for curtilage is the product of its superficial view of the *Katz* inquiry. The Court in *Ciraolo* restated the following *Katz* language: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."¹²⁵ The Court then observed that any member of the public flying in the relevant airspace who happened to glance down could have seen the entire back-

119. *Id.* at 209. A six-foot outer fence and a ten-foot inner fence completely enclosed Ciraolo's yard.

120. Police apparently acted only on the strength of an anonymous telephone tip that marijuana was growing in Ciraolo's yard. *See Ciraolo*, 476 U.S. at 209. An anonymous tip, without any supporting evidence indicating its accuracy, falls short of establishing probable cause, even under the flexible approach to probable cause adopted by the Court in *Illinois v. Gates*, 462 U.S. 213, 227 (1983). *Gates* adopted a flexible, totality-of-the-circumstances approach, suggesting that the two factors most relevant to assessing informants' tips are the presence of facts that show how the informants know what they purport to know and facts that establish the veracity or reliability of the informants. *Id.* at 238. Neither factor was mentioned in *Ciraolo*.

121. 476 U.S. at 209-10.

122. *Id.* at 210.

123. *Id.* at 214-15.

124. *See supra* notes 115-17 and accompanying text.

125. *Ciraolo*, 476 U.S. at 213 (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)).

yard.¹²⁶ Thus, the Court concluded, Ciraolo exposed his fenced backyard to public view and, consequently, relinquished any expectation of privacy he had for that yard.¹²⁷

The Court's analysis in *Ciraolo* completely misses the point of *Katz* and misreads the spirit of the fourth amendment. *Katz*'s "public exposure" illustration concerned *subjective* rather than societally acceptable, or objective, expectations of privacy.¹²⁸ The *Katz* language, which the Court now rigidly uses as a talisman, did little more than recognize that a person does not have even a subjective expectation of privacy in things that are knowingly exposed to the public, no matter where that may occur—home, office, or curtilage. That is, the fourth amendment generally protects activities within the home or office because, under Justice Harlan's test, society will recognize privacy expectations in those places as "reasonable" or "legitimate;" but when individuals knowingly expose otherwise private activities to the public, they relinquish constitutional protection because they have not manifested a *subjective* expectation of privacy.

Ironically, while the Court in *Ciraolo* ruled that Ciraolo knowingly exposed his curtilage to public view, it expressly found that he manifested a subjective expectation of privacy by

126. *Id.* at 213-14.

127. *Id.* at 214.

128. *See Katz*, 389 U.S. at 351. The complete context of the Supreme Court's oft repeated phrase is: "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 any area accessible to the public, may be constitutionally protected." *Id.* at 351-52 (citations omitted).

The first phrase indicates that even in areas where society will recognize privacy expectations as reasonable, such as the home or office, a person can relinquish fourth amendment protection by not manifesting a subjective expectation—that is, by knowingly exposing items or activities therein to public view.

On the other hand, what a person seeks to preserve as private (also clearly referring to subjective expectations), even in areas accessible to the public, may be constitutionally protected. Not "must," but "may." Protection is afforded, of course, only where subjective expectations are "reasonable" or worthy of protection.

Even Justice Harlan, who enunciated the allegedly controlling two-part test, believed that the "knowing exposure" language of the majority referred only to the subjective aspect of his test. In explaining the majority's "knowingly exposes to the public" illustration, Justice Harlan wrote: "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Id.* at 361 (Harlan, J., concurring).

fencing in his curtilage.¹²⁹ This internal contradiction is evidence that *Katz* thoroughly confuses the Court; the Court is incorrectly employing the “knowingly exposes to the public” language as the sine qua non of Justice Harlan’s objective test. The Justices in *Katz*, however, never intimated that the mere possibility that someone *might* view an activity, hear a statement, or catch a glimpse of a possession, would render an individual’s subjective expectation of privacy illegitimate or unreasonable. Such a view would turn the inquiry from one of “reasonable expectations of privacy” to “certainty of absolute solitude.”¹³⁰ To so restrict fourth amendment protection is more reminiscent of Big Brother than of a nation founded on individual liberties.

The Court’s confusion is apparent from the illustration it used to support its *Ciraolo* decision. According to the Court, “The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.”¹³¹ The Court does not explain why this statement is true. It is true because there is no *subjective* expectation of privacy in any activity performed in full view of a public road; and, even if such a subjective expectation existed, society would not regard it as reasonable. This example is exactly the type of situation to which the *Katz* Court was referring when it stated that the fourth amendment does not protect things knowingly exposed to public view. Requiring police to look away would be ridiculous indeed. Consequently, courts consistently have held that it is not a search implicating fourth amendment restrictions for an officer merely to look at what is exposed to “plain view.”¹³² Individuals simply have manifested no subjective expectations of privacy in items and activities that police can view so unobtrusively. Thus, when police drive from home to home looking in people’s yards, even though they may be “searching” in a dictionary sense, such activity is not a search for fourth amendment purposes.

A much different situation arises, however, when individuals have taken steps to preserve their curtilage from the intru-

129. *Ciraolo*, 476 U.S. at 213.

130. See *O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring) (stating that fourth amendment protects privacy, not solitude).

131. *Ciraolo*, 476 U.S. at 213.

132. See, e.g., *Colorado v. Bannister*, 449 U.S. 1, 4 (1980) (holding that it is not a “search” for officer issuing speeding ticket to observe those things in driver’s car left in “plain view”).

sion of the public's eye, as *Ciraolo* did. Such individuals have manifested a subjective expectation of privacy. They have not, as the Court believed in *Ciraolo*, exposed their backyard activities to plain public view.¹³³ Police will not need to shield their eyes while driving past; they will be completely unable to observe those intimate backyard activities that were recognized in *Oliver*, because the activities are not in plain view.

Of course, finding that a defendant manifested a subjective expectation of privacy in curtilage does not end the inquiry. A court also must determine whether that subjective expectation is one which society would deem deserving of fourth amendment protection from arbitrary intrusions by the uninvited governmental eye.¹³⁴ This determination has nothing to do with hypothesizing a scenario involving some limited chance of passive public intrusion, physical or visual. Rather, the analysis involves assessing the nature of the individual interest and the degree of governmental intrusion, inquiring whether the unregulated and arbitrary use of this surveillance technique would diminish individual privacy and freedoms to an intolerable degree.¹³⁵ The privacy interest associated with the curtilage of a home is as important in *Ciraolo* as it was in *Oliver*; in fact, the interest is identical.¹³⁶ The only distinction between *Oliver* and *Ciraolo* is the surveillance technique that the police used—actual, physical trespass in *Oliver* and visual intrusion in *Ciraolo*. It is difficult to see how the physical intrusion is more antithetical to the intimate activities associated with the home and the curtilage than is visual surveillance. In *Nineteen Eighty-Four*, the telescreen in Winston Smith's living room destroyed his pri-

133. Some situations do exist in which an individual has displayed no subjective expectation of privacy even with respect to fenced curtilage. For example, if a home is next to a tall building where many people have an unobstructed view of the backyard, the owner has no subjective expectation of privacy that society will regard as worthy of fourth amendment protection. In such a situation, it should not matter whether police look at the backyard from the roof of the building or from an airplane. The police surveillance is not intrusive because of the degree to which the backyard already is exposed to the public. The actual facts in *Ciraolo*, however, bear no resemblance to the preceding illustration.

134. See *supra* notes 53-65 and accompanying text. It would seem that the Court already made this decision in *Oliver* when it equated the curtilage with the home. See *supra* notes 115-17 and accompanying text.

135. See *supra* notes 60-64 and accompanying text; Ashdown, *supra* note 13, at 1298-1310, 1311-29; Wilkins, *supra* note 13, at 1107-28.

136. See Wilkins, *supra* note 13, at 1097-1107 (discussing *Oliver* and *Ciraolo* privacy interests).

vacy as surely as if Big Brother himself had lived there.¹³⁷

Any distinction between actual and constructive governmental presence for fourth amendment purposes is wholly artificial.¹³⁸ For example, consider individuals who use their backyards for swimming and sunbathing in the nude. To ensure privacy, they can either buy land and build a home in a remote rural area or they can encircle their curtilage with a fence higher than eye level.¹³⁹ So long as they do not live adjacent to a high-rise apartment building, or a park filled with trees that children commonly are known to climb, they have in no sense knowingly exposed their curtilage to public view, as the Court used that phrase in *Katz*. Rather, they have manifested, as the *Ciraolo* Court recognized, a subjective expectation of privacy.

Such an expectation is also "legitimate" for fourth amendment purposes. Given the objectively important nature of a privacy interest in curtilage activities, focused governmental aerial surveillance of that area is so intrusive that it should be subject to the fourth amendment's reasonableness requirement. Just as the Supreme Court has extended fourth amendment protection against unreasonable physical intrusions on an individual's curtilage,¹⁴⁰ the Court should interpret the scope of the fourth amendment to extend protection when the intrusion is visual. It is difficult to imagine that nude sunbathers would be significantly less embarrassed by police gliding overhead, taking pic-

137. See G. ORWELL, *supra* note 1, at 6-7. Orwell described the telescreen as follows:

The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.

Id.

138. See *Amsterdam*, *supra* note 30, at 365, 386-93 (discussing equality of governmental presence).

139. The Supreme Court did not intimate in *Oliver* that an individual's curtilage was less worthy of protection in the city than in rural areas. See *Oliver v. United States*, 466 U.S. 170 (1984). Of course, living in crowded areas may require that an individual take more extensive steps to manifest a subjective expectation of privacy in his curtilage—for example, by building a fence.

140. See *Oliver*, 466 U.S. at 180.

tures, than by police officers climbing the fence and looking over, or, without invitation, walking through the swimming and bathing area.

Moreover, even if physical intrusion somehow could be distinguished from visual surveillance, the complete denial of fourth amendment protection for the latter does not follow logically from the slight degree of difference between two very intrusive types of governmental surveillance. If varying degrees of highly intrusive surveillance do exist, the drawing of an arbitrary line between protected activities and unprotected activities is not the most accurate fourth amendment means for recognizing distinctions in various types of surveillance. The "reasonable search" command of the fourth amendment is sufficiently flexible to permit recognition of varying degrees of governmental intrusion.¹⁴¹ Just as a reasonable search of a home requires greater protections than does a reasonable search of a car,¹⁴² the amount of protection required to make a curtilage search reasonable may vary according to whether the governmental intrusion is visual or physical.

The Supreme Court, however, chose to draw an arbitrary line based on its theory that people in commercial aircraft can see into curtilage. Even if such "exposure" were the sine qua non of the objective part of Justice Harlan's test, as the Court mistakenly believes,¹⁴³ it borders on the absurd to suggest that this limited risk of public sighting renders subjective expectations illegitimate and completely unprotectable. Even if nude sunbathers realized that commercial planes might fly overhead, it is unlikely that they would build roofs over their backyards. Uninterested people in planes, who have no information regarding which individual owns any of the hundreds of backyards visible from the air, do not constitute a significant threat to privacy. A quick glimpse of sunbathers from a high altitude reveals none of the intimacies that homeowners seek to preserve by fencing their curtilage. When government agents, however, have identified a backyard as belonging to a particular individual, and consciously glide, fly, or hover over that curti-

141. See *supra* notes 81-82, 94-95, 107-13 and accompanying text.

142. See *supra* notes 110-13 and accompanying text.

143. When the Court concedes that a subjective expectation of privacy may exist but denies fourth amendment protection based on the individual's exposure of an area or activity to the public, the Court superficially employs its overly literal version of the "knowingly exposes to the public" language of *Katz* as the sine qua non of whether expectations of privacy are "reasonable"—that is, deserving of constitutional protection.

lage to monitor activities occurring there, those agents have intruded on privacy expectations to a far greater degree than those few uncaring members of the public to whom sunbathers have "knowingly" exposed a quick glimpse of an unidentifiable person.

In sum, the *Ciraolo* holding means that police can peer down into a person's fenced backyard free of any constitutional restraints. There is no requirement that government agents act reasonably so long as they remain in publicly navigable airspace.¹⁴⁴ Police arbitrarily can direct air surveillance at anyone, whether suspected of a crime or not, for interminable lengths of time without running afoul of constitutional requirements.

D. BIG BROTHER: "WHAT ARE YOU DOING IN YOUR HOME?"

With the decisions in *Oliver* and *Ciraolo*, unregulated governmental surveillance had crossed individuals' property lines, hopped their backyard fences, and stood knocking at their back doors. The Supreme Court answered the door and invited the government inside with its recent decision in *California v. Greenwood*,¹⁴⁵ holding that the fourth amendment does not regulate an official governmental surveillance technique designed solely to reveal those personal activities conducted within the home. The surveillance technique involved in *Greenwood* was, of course, systematic searching through the contents of an individual's garbage.¹⁴⁶ The fact that the searched materials were "throw-aways," however, should not cloud the central fourth amendment inquiry, which focuses on privacy and not on property.¹⁴⁷

144. A fair reading of the opinion in *Ciraolo* indicates that there are at least some limits to the Court's theory. Apparently, if government officials were to descend below publicly navigable airspace, allowing them to view what those at higher altitudes could not see, the Court would recognize this as a search for fourth amendment purposes. Even under the Court's mistaken view of when knowing exposure to the public defeats fourth amendment protection, such low flying would constitute a search.

145. 108 S. Ct. 1625 (1988).

146. *Id.* at 1627.

147. The Supreme Court in *Katz* rejected the idea that property interests are coextensive with the fourth amendment. See *supra* note 46 and accompanying text. According to the Court, a governmental trespass onto property is not a prerequisite for fourth amendment applicability. *Katz*, 389 U.S. at 352-53. Moreover, even when government officials do trespass on private property, the Court has ruled that such an intrusion does not ipso facto constitute a search. *Oliver v. United States*, 466 U.S. 170, 183 (1984). In sum, a trespass to property

In *Greenwood*, criminal informants and complaining neighbors led police to suspect Billy Greenwood of drug violations.¹⁴⁸ One investigator asked the neighborhood's trash collector to pick up and turn in Greenwood's garbage, which Greenwood left in opaque, sealed bags on the curb outside his home.¹⁴⁹ Every week for two months the police searched Greenwood's trash in this manner.¹⁵⁰ On several occasions, the garbage contained evidence of narcotics use.¹⁵¹ The police obtained a search warrant for Greenwood's home, based in part on the items found in Greenwood's garbage, and discovered evidence of narcotics trafficking.¹⁵² The Supreme Court held that the government's warrantless search of Greenwood's garbage was constitutional on the ground that the fourth amendment offers no protection to garbage deposited for collection on the curb of a public street.¹⁵³

Superficially, the Court's ruling that garbage is undeserving of fourth amendment protection is appealing. Garbage, after all, consists of items that the owner has chosen to discard. Since *Katz*, however, the Court has refused to equate property interests with privacy interests.¹⁵⁴ Although people using a public telephone booth clearly do not have a formal property interest in the telephone booth, the Court in *Katz* recognized that the telephone booth is temporarily a private place where conversations deserve constitutional protection.¹⁵⁵ Moreover, when the Supreme Court in *Oliver* decided not to extend any fourth amendment protection to open fields, it could reach this result only by refusing to equate property interests with pri-

is neither necessary nor sufficient to constitute a search; therefore, for fourth amendment purposes, property and privacy interests are not coextensive.

148. *Greenwood*, 108 S. Ct. at 1627. An informant told narcotics agents that a trunk filled with illegal drugs was en route to Greenwood's residence. In addition, Greenwood's neighbor complained to police of heavy vehicular traffic late at night in front of his home. The neighbor stated that the vehicles stayed at the house for only a few minutes. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* Even after he was arrested, Greenwood apparently continued to traffic in narcotics after posting bail. The police, receiving more reports of late night visitors, continued to search his trash and found additional evidence that led to a second warrant to search his home, a second discovery of evidence in the home, and a second arrest. *Id.* at 1627-28.

153. *Id.* at 1629.

154. See *Oliver*, 466 U.S. at 183; *Katz*, 389 U.S. at 352-53; *supra* note 147; see also Wilkins, *supra* note 13, at 1086-91 (discussing Court's abandonment of property-based analysis of privacy interests).

155. *Katz*, 389 U.S. at 352-53; *id.* at 361 (Harlan, J., concurring).

vacy interests.¹⁵⁶ Although an individual may have a legal property interest in open fields, the Court found no privacy interest in lands outside the curtilage sufficient to warrant fourth amendment constraints.¹⁵⁷ In other words, in light of *Katz* and *Oliver*, a property interest is neither necessary nor sufficient to obtain fourth amendment protection. Thus, although many lower courts had been ruling that the fourth amendment does not regulate searches of garbage on the ground that the owner has abandoned that property, the Supreme Court in *Greenwood* appropriately rejected this analysis.¹⁵⁸ The proper test, according to the Court, is Justice Harlan's two-part expectation of privacy analysis.¹⁵⁹

As in *Ciraolo*, the Court conceded that individuals may manifest a subjective expectation of privacy in their garbage, which *Greenwood* did by placing his garbage in opaque, sealed plastic bags.¹⁶⁰ The focal inquiry, according to the Court, is whether society is willing to accept such an expectation as objectively reasonable.¹⁶¹ Given the Court's holding that *Ciraolo's* expectation of privacy in his fenced backyard was objectively unreasonable because people *might* view him from the air, it follows that *Greenwood's* expectations are also unreasonable because a scavenger *might* go through his trash, or the trash collector *might* turn it over to the police. This is, in fact, precisely the rationale for the Court's ruling in *Greenwood*.¹⁶² According to the Court:

[R]espondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public

156. *Oliver*, 466 U.S. at 179-80. See *supra* notes 97-114 and accompanying text.

157. *Id.* at 180-81.

158. The abandoned property argument was made to the Court in *Greenwood*, but the majority did not endorse it. See *Greenwood*, 108 S. Ct. at 1628-31. The dissent seized the opportunity to declare the Court's rejection of the theory. See *id.* at 1634 (Brennan, J., dissenting).

Moreover, the *Greenwood* dissenters pointed to an earlier dissent written by Justice White, the author of the *Greenwood* majority opinion. In *California v. Rooney*, 107 S. Ct. 2852 (1987), Justice White clearly expressed his opinion that a property interest in trash does not resolve the fourth amendment issue. See *Greenwood*, 108 S. Ct. at 1634-35 (Brennan, J., dissenting) (citing *Rooney*, 107 S. Ct. at 2858 (White, J., dissenting)).

159. *Greenwood*, 108 S. Ct. at 1628.

160. *Id.*

161. *Id.*

162. See *id.* at 1628-29. Of course, to the extent that the Court relies on *Ciraolo*, it relies on a faulty premise. See *supra* notes 131-33 and accompanying text.

street are readily accessible to animals, children, scavengers, snoops, and other members of the public. Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, . . . respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.¹⁶³

The Court then overapplied and misconstrued its talisman from *Katz*: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."¹⁶⁴ Once again, this phrase, intended as a simple illustration of when individuals can claim no subjective expectation of privacy, has been perverted by the Court to render subjective expectations "illegitimate" or "unreasonable" whenever the Court can conceive of a scenario under which a member of the public *might* observe that which the targeted individual seeks to keep private.¹⁶⁵ Playing such a speculative game begs the constitutional question of whether society deems a manifested subjective privacy expectation to be worthy of fourth amendment protection from unreasonable governmental intrusion. Indeed, the Court's analysis has no stopping point. If the mere possibility of public observance or intrusion renders subjective privacy expectations illegitimate, the fourth amendment will not protect even the home, unless its occupants take steps to ensure that no other member of the public ever enters. Taking the risk that a home *might* be burglarized, or taking the risk that invited guests *might* catch a glimpse of intimate details of home life, is no less "knowing exposure to public view" than the risks taken by the backyard gardener in *Ciraolo* and the tidy housekeeper in *Greenwood*.¹⁶⁶

Moreover, the Court's speculative analysis proves too much. Even in *Katz*, a risk existed that the recipient of the personal phone call might reveal the call's contents to other members of the public or to the police.¹⁶⁷ Yet, taking that risk did not render unreasonable those subjective expectations of privacy which *Katz* manifested by stepping into the phone booth and pulling the door closed.¹⁶⁸ In essence, the Court has

163. *Greenwood*, 108 S. Ct. at 1628-29 (footnotes and citations omitted).

164. *Id.* at 1629 (citing *Katz*, 389 U.S. at 351).

165. Justice Brennan vigorously dissented from this Supreme Court guessing game. See *Greenwood*, 108 S. Ct. at 1636 (Brennan, J., dissenting).

166. See *Greenwood*, 108 S. Ct. at 1636 (Brennan, J., dissenting) (employing burglary illustration to criticize majority's "might've, could've" analysis).

167. *Id.* (recognizing that telephone calls might be overheard and that *Katz* nevertheless extends fourth amendment protection).

168. *Katz*, 389 U.S. at 361. Of course, if the person on the receiving end of

focused narrowly on one sentence in *Katz*, interpreted it inconsistently with its plain original meaning, and created a test that not only ignores the spirit of the fourth amendment but, if applied to *Katz*, would effectively overrule it.¹⁶⁹ The world portended by a continued reading of fourth amendment protections as interpreted in *Ciraolo* and *Greenwood* is a world where individuals must choose either to maintain complete solitude or to extend an open invitation to intrusive Orwellian governmental surveillance.¹⁷⁰ There is no middle ground.

Rather than speculating about whether a member of the public *might* observe an object, activity, or statement, the Court should deny fourth amendment protection only when the unregulated governmental surveillance of a particular location or activity is consistent with the objective privacy interests of a free society.¹⁷¹ Returning to *Greenwood*, the question simply becomes whether personal items that have been thrown away are private enough to warrant some fourth amendment protection from unreasonable governmental intrusions. Certainly when one looks beyond the superficial label of *garbage*—a label connoting the relinquishment of a possessory rather than a privacy interest—it is apparent that garbage bags contain extensive details about the private life led inside the home. By examining garbage, government officials can accumulate information regarding an individual's reading interests, food and beverage consumption, personal expenses and purchases, sex

the conversation decided to tape the call and to turn the contents over to the police, such nongovernmental activity would not implicate the fourth amendment. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *infra* notes 197-211 and accompanying text. In fact, in *United States v. White*, 401 U.S. 745 (1971), the Court held that police intentionally can place an agent in a position to tape a conversation with a suspect without implicating that suspect's rights, on the ground that the suspect takes the risk that persons to whom he makes incriminating statements will report them to the police. *Id.* at 752. In other words, the individual has no reasonable expectation that the contents of the conversation will remain private. The Court's analysis is easily criticized. See *infra* note 194.

The Court in *Greenwood* goes one step further than it did in *White*. Under the Court's theory in *Greenwood*, no one would have a protectable privacy interest in any conversation because the other party to the conversation might reveal the contents to governmental authorities. See *supra* note 167 and accompanying text. Thus, the Court's theory in *Greenwood* effectively would overrule *Katz* itself.

169. See *infra* note 194 and accompanying text.

170. See *Amsterdam*, *supra* note 30, at 402.

171. See *supra* notes 59-67 and accompanying text (discussing analysis that this Article proposes as most in keeping with spirit of fourth amendment).

life, and even personal correspondence.¹⁷² None of the Justices would suggest that the government may open and read our mail prior to our receiving it; yet *Greenwood* allows a similar intrusion to occur, without limitation, once our mail is thrown away. Apparently, after *Greenwood*, individuals will have to keep letters in a shoebox under the bed or buy paper shredders to render their subjective expectations of privacy "legitimate" and deserving of fourth amendment protection.

The Court's analysis in *Greenwood* never refutes the argument that *Greenwood* subjectively expected that his trash would remain private, at least until it was commingled with the trash of others, thereby losing its identity as his.¹⁷³ Under *Katz*, the only question remaining is whether society regards this subjective expectation as "reasonable"—that is, worthy of a modicum of protection from unlimited governmental intrusion. The chance that others might peek at an individual's bagged, tied garbage is totally irrelevant to this inquiry. According to the Court, "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."¹⁷⁴ Although this assertion is true, the search in *Greenwood* did not involve a mere observance of otherwise personal items left in plain view of the public.¹⁷⁵ If *Greenwood* had littered his trash openly about the sidewalk, the Court's comment would apply. In that situation, his trash would have been "knowingly exposed to public view" as the Court used that phrase in *Katz* and, consequently, *Greenwood* would have manifested no subjective expectation of privacy. Similarly, if a member of the public actually had ripped open *Greenwood*'s garbage bag and exposed intimate items to the plain view of any passerby, the fourth amendment would not require police officers to avert their eyes. Scavengers are not government officials; the fourth amendment therefore does not regulate their intrusion into an individual's privacy.¹⁷⁶ Moreover, any subsequent police observance of such previously exposed material is not sufficiently intrusive to require consti-

172. See *Greenwood*, 108 S. Ct. at 1634 (Brennan, J., dissenting).

173. See *id.* at 1628.

174. *Id.* at 1629.

175. The fallacy of the Court's reference to police averting their eyes is a repetition of the Court's fallacious reasoning in *Ciraolo*. See *supra* notes 131-33 and accompanying text.

176. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The fourth amendment limits only *governmental* action. See *infra* notes 197-204 and accompanying text (thoroughly discussing *Burdeau* and its relevance to expectations of privacy).

tutional oversight.¹⁷⁷ None of these situations, however, occurred in *Greenwood*. The Court's concern about requiring police to avert their eyes, therefore, is simply inapposite. What the case actually involved, and what the Court's decision will be used to support, is affirmative police intrusion into personal details identifiable from an individual's refuse.

Finally, even to the extent that one accepts the Court's theory that the placing of garbage bags on the curb for pickup is a knowing exposure of trash to public view, the government intrusion permitted in *Greenwood* far exceeds any conceivable intrusion by scavengers, children, and animals. For example, suppose homeless people commonly climb into an apartment complex dumpster scavenging for recyclable aluminum cans, a discarded but usable pair of shoes, or scraps of food. It is unlikely that the residents of the apartment complex would consider that scavenging to be a significant intrusion on their privacy. The scavenger has no interest in, and no capability for, associating any one piece of garbage with a particular person. On the other hand, a systematic governmental intrusion designed thoroughly to scour discarded items and to detect personal details of a particular individual's home life is a different story. The degree of intrusiveness posed by such a governmental investigation is much greater than that which *might* be undertaken by those members of the public to whom the investigated individual has "knowingly exposed" his trash. Thus, from a societal standpoint, there is a compelling need to require that purposeful governmental intrusions into such privacy be reasonable. Intrusive governmental searches of personal items are what the fourth amendment expressly purports to regulate.

The reasonableness requirement does not mean that a warrant must precede garbage searches.¹⁷⁸ Although this Article concludes that expectations of privacy in discarded personal items deserve some fourth amendment protection, such a conclusion does not mandate treating garbage searches as the equivalent of intrusions into the home. The fourth amendment is sufficiently flexible to allow different levels of protection for

177. See *United States v. Jacobsen*, 466 U.S. 109, 121 (1983). For a complete discussion of *Jacobsen* and its role in fourth amendment analysis, see *infra* notes 205-13 and accompanying text.

178. The Court, even if it chose to recognize a fourth amendment interest in discarded personal effects, probably would uphold searches of those discarded items as "reasonable" without a warrant.

different types of privacy interests.¹⁷⁹ Just as a car receives less protection than a home, so might garbage.¹⁸⁰ Reasonable searches of garbage may require only a time limit preventing indefinite monitoring of an individual's refuse. Or, perhaps, restrictions on the government's use and dissemination of intimate details that are uncovered may make all garbage searches reasonable. Some fourth amendment protection, however, is warranted by the uniquely intimate nature of discarded personal items.

In sum, by defining the scope of the fourth amendment consistently with the spirit of *Katz* and adjusting the degree of available protection according to the relative importance of the privacy interest at stake, the Court could promote its obvious goal of aggressive law enforcement without rendering constitutional safeguards impotent to control excessive and egregious governmental intrusions into individuals' private lives. Instead, the Court in *Greenwood*, as it has consistently done in the last decade, rigidly and unnecessarily drew an absolute line between full fourth amendment protection and no fourth amendment protection. As a result, a person either must take steps to ensure absolute privacy or have no privacy at all. Thus, as a result of *Greenwood*, the government has the green light to search anyone's trash, for any reason, at any time, for any length of time. The only incentive for the government to act reasonably in searching trash is the government's own sense of self-restraint. Yet, relying on the government to restrain itself from unreasonably intruding on privacy is blatantly at odds with both the express guarantee of the fourth amendment and the framers' concern about governmental overreaching.¹⁸¹

III. A NEW MODEL OF FOURTH AMENDMENT PROTECTION: DEGREES OF EXPOSURE

Setting up a new philosophy for analyzing the scope of fourth amendment protection is a two-step process. The first

179. See *supra* notes 30-31, 81-82, 94-95, 110-13 and accompanying text.

180. See *supra* notes 110-13 and accompanying text.

181. Justice Harlan, in a post-*Katz* dissent, left no doubt as to the appropriate approach for deciding whether to extend fourth amendment regulation, in the first instance, to a particular surveillance technique: "[For those] extensive intrusions that significantly jeopardize [an individual's] sense of security . . . more than self-restraint by law enforcement officials is required." *United States v. White*, 401 U.S. 745, 786 (Harlan, J., dissenting) (emphasis added). See also *supra* notes 19, 60 and accompanying text (discussing concern about too-powerful government that motivated drafters of amendment).

step involves recognizing and undoing the current misinterpretation of Justice Harlan's two-part test from *Katz*,¹⁸² a test that the Court repeatedly has identified as the appropriate analytical framework for determining whether a particular investigatory technique falls within the fourth amendment's scope.¹⁸³ The second step requires establishing a standard based on degrees of privacy that is both compatible with the spirit of the fourth amendment and sufficiently flexible to avoid hindering the Supreme Court's apparent goal of aggressive, effective law enforcement. With the current composition of the Court, anything less is a fanciful ideal whose time will not soon arrive.

A. RESTORATION OF THE *KATZ* TEST

The first step toward a more accurate version of fourth amendment protection is for the Court to recognize that the "knowingly exposes to the public" language in *Katz* was merely an illustration concerning subjective expectations of privacy, and was not intended as the sine qua non of fourth amendment protection.¹⁸⁴ The *Katz* language means simply that, at some point, individuals have exposed their statements, possessions, or activities to public view to such a degree that courts easily could infer that these individuals have not manifested a subjective expectation of privacy.¹⁸⁵ As Justice Harlan recognized in his *Katz* concurrence, however, when individuals *do* manifest a subjective expectation of privacy, they are entitled to fourth amendment protection, provided only that society would recognize that expectation as reasonable.¹⁸⁶

The objective part of Justice Harlan's test—societal recognition of reasonable privacy expectations—is necessarily a value judgment.¹⁸⁷ A reasonable or legitimate expectation of privacy is one that society deems worthy of protection. The two primary factors influencing that judgment are the nature of the individual's privacy interest and the degree of intrusiveness of the governmental surveillance.¹⁸⁸ When both of these factors

182. See *supra* notes 58-65 and accompanying text.

183. See, e.g., *California v. Greenwood*, 108 S. Ct. 1625, 1628 (1988); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Oliver v. United States*, 466 U.S. 170, 177 (1984); *United States v. Knotts*, 460 U.S. 276, 280-81 (1983); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

184. See *supra* notes 128-35, 161-69 and accompanying text.

185. See *supra* notes 128-33 and accompanying text.

186. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

187. See *supra* notes 58-65 and accompanying text.

188. For an extensive explanation of how these factors influence Justice

coincide to a high degree, such as when the government employs a highly intrusive surveillance technique that disturbs a significant privacy interest, society will regard subjectively-held expectations as legitimate and worthy of protection. Indeed, some fourth amendment protection must be available in such an instance if the fourth amendment is to have any meaning at all. Otherwise, the government could intrude on individual privacy at will and without constitutional limitation.

The Supreme Court, however, has erased the second—and focal—prong of Justice Harlan's test by ignoring its two primary factors. Instead, the Court has mistakenly used the "knowingly exposes to the public" language as if it were relevant to the objective part of the test and compounded that error by superficially treating such "exposure" as the determinate factor in its test.¹⁸⁹ Thus, even after conceding that the individuals in *Ciraolo* and *Greenwood* manifested subjective privacy expectations by fencing their backyards and putting their trash in sealed, opaque containers, the Court used its *Katz* talisman to rule such expectations societally illegitimate.¹⁹⁰ According to the Court, those privacy expectations were illegitimate because individuals flying in commercial jets overhead *might* see into an unroofed backyard, or scavengers *might* open and rummage through garbage bags.¹⁹¹ In this way, the Court undercuts both the letter and spirit of *Katz* and ignores the two essential factors relevant to determining whether subjective expectations are worthy of some fourth amendment protection—the nature of the individual's privacy interest and the intrusiveness of the governmental surveillance. In *Ciraolo*, for example, both of these factors were present to a high degree. The privacy interest in curtilage was high—"part of the home itself," according to *Oliver*¹⁹²—and the police overflight and observation constituted highly intrusive governmental conduct.¹⁹³ To find obvious subjective expectations of privacy unworthy of protection from such a significant intrusion into a

Harlan's objective expectation of privacy inquiry, see *supra* notes 60-64 and accompanying text.

189. Moreover, the Court's absolute, literal interpretation of the talismanic language undercuts the spirit of the *Katz* opinion. See *supra* notes 164-66 and accompanying text. Thus, if individuals expose activities to the public even in a limited manner, or merely risk such exposure, they have no fourth amendment protection under the Court's current holdings.

190. See *Greenwood*, 108 S. Ct. at 1628-29; *Ciraolo*, 476 U.S. at 211, 215.

191. *Greenwood*, 108 S. Ct. at 1628-29; *Ciraolo*, 476 U.S. at 213-15.

192. See *Oliver v. United States*, 406 U.S. 170, 180 (1984).

193. See *Ciraolo*, 476 U.S. at 225 n.10 (Powell, J., dissenting).

home-like area is to ignore the very essence of the fourth amendment.

That the Court's current interpretation of the fourth amendment's scope is an untenable one is demonstrated by the application of the fourth amendment theory expounded in *Ciraolo* and *Greenwood* to the facts of *Katz*. By conversing with other people on a telephone, individuals expose their statements to public scrutiny and take the risk that the receiver *might* record the call and reveal its contents to others or to the government.¹⁹⁴ Therefore, under the reasoning in *Ciraolo* and *Greenwood*, the government could freely monitor phone conversations without implicating fourth amendment protections. *Katz* held that the fourth amendment does protect such conversations, however, providing strong evidence that the Court's recent interpretations of *Katz* are incorrect. Under the Court's current theory, *Katz* itself would have to be overruled.

B. TOWARD A FOURTH AMENDMENT RENAISSANCE: A NEW MODEL BASED ON DEGREES OF PUBLIC EXPOSURE

Deciding that the Supreme Court repeatedly has misconstrued *Katz* is only half the battle. The "knowingly exposes to the public" language in *Katz* is not without meaning. The remaining question is how the Court should interpret this language in order to create from it a usable guide that is consistent with the spirit of Justice Harlan's test. First, the Court must recognize that the language was intended as an illustration of the subjective aspect of the privacy inquiry.¹⁹⁵ Yet, the *Katz* language is not without relevance to the objective part of the test. When individuals publicly expose otherwise personal aspects of their lives in such a manner or to such a degree that

194. In fact, a plurality of the Supreme Court did conclude that there are no fourth amendment ramifications when police actually persuade one party to a private conversation to record it or to wear a microphone so that the government can listen in. See *United States v. White*, 401 U.S. 745, 749 (1971).

This conclusion is suspect for the same reasons that the Court's decisions in *Knotts*, *Ciraolo*, and *Greenwood* are suspect—the individual privacy interest in two-party conversations is high, the governmental intrusiveness is great, and any limited exposure to the public is not of a sufficient degree to defeat subjective expectations of privacy, or to render them unworthy of protection.

The Court's decisions in *Ciraolo* and *Greenwood* go one step further than the plurality in *White*, because *White* actually spoke to a government agent. *White*, 401 U.S. at 746-47. Under the rationale in *Greenwood*, however, there would be no protectable privacy interest in *any* conversation because the party spoken to *might* reveal the contents to government authorities. Such a theory contradicts the *Katz* holding.

195. See *supra* notes 128-35, 161-68, 184-94 and accompanying text.

they do not manifest a subjective expectation of privacy, neither can those individuals have privacy expectations that society would regard as objectively worthy of protection. Any governmental observation of such an exposed activity is not the intrusive type of surveillance that the fourth amendment was designed to regulate. For example, homeowners who grow marijuana in plain view of passersby, albeit within their curtilage, have not manifested a subjective expectation of privacy. Moreover, even in the unusual event that the homeowners do expect privacy, society will not recognize their expectation as reasonable. Any privacy expectations the homeowners have are not worthy of fourth amendment protection because the police can plainly view their curtilage activity in an unintrusive manner. The homeowners have, in both the letter and spirit of *Katz*, knowingly exposed private activities to the public.

In sum, Justice Harlan's subjective and objective tests overlap. Where there is no subjective expectation of privacy there can be no expectation that society would deem objectively worthy of protection.¹⁹⁶ Nevertheless, before ruling that exposure to public view renders expectations unprotectable—on either a subjective or objective level—the Court should make an inquiry into the *degree* of public exposure, not simply the *fact* of public exposure, or worse, the mere *possibility* of public exposure.

1. The Private Party Search Doctrine

The concept of degrees of public exposure has played a substantial role in similar fourth amendment contexts. An instructive case is *Burdeau v. McDowell*,¹⁹⁷ decided more than forty years before *Katz*. In *Burdeau*, individuals wrongfully broke into McDowell's office, safe, and locked desk.¹⁹⁸ Finding incriminating evidence regarding McDowell, the private individuals turned the materials over to an assistant attorney general who sought to use the evidence to secure McDowell's indict-

196. The converse is not true. The case law is replete with examples of persons harboring subjective expectations that society does not recognize as objectively worthy of protection, at least in the Supreme Court's view of society's values. See, e.g., *Greenwood*, 108 S. Ct. at 1628-29; *Ciraolo*, 476 U.S. at 211-15.

197. 256 U.S. 465 (1921).

198. *Id.* at 472-74. McDowell's employer discharged him for alleged unlawful and fraudulent conduct. Agents of the employer took possession of McDowell's office, forced open his desk and personal safe, and took his private papers. *Id.* The Court assumed that the employer's actions in McDowell's office were wrongful. See *id.* at 472-75.

ment and conviction.¹⁹⁹ McDowell argued that the fourth amendment prohibited the government's use of property illegally taken by private third parties. The Court rejected his argument, holding that the fourth amendment offers protection only against governmental action.²⁰⁰ Because no official of the federal government had anything to do with the unlawful seizure in *Burdeau*, the fourth amendment played no role in the case.²⁰¹

This principle became known as the *private party search doctrine*. According to the doctrine, the fourth amendment applies only to searches and seizures conducted by government officials or people acting on behalf of the government.²⁰² Thus, even if a thief breaks into a home, steals items that implicate the homeowner in crime, and turns the items over to the police, the fourth amendment does not apply to the illegal search and seizure unless the thief was acting at the behest and direction of government officials.²⁰³ In the same way, guests in a home,

199. *Id.* at 474.

200. *Id.* at 475. According to the Court:

The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of *individuals* in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal Government. We assume that petitioner has an unquestionable *right of redress* against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned.

Id. (emphasis added).

201. *Id.*

202. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

203. See *Coolidge v. New Hampshire*, 403 U.S. 443, 487-89 (1971). In *Coolidge*, a murder suspect's wife, who was questioned in her home by police about guns and clothing owned by her husband, produced those items, presumably for the purpose of exonerating him. *Id.* at 489. The Court rejected the husband's argument that the police conduct constituted a search. According to the Court: "The test . . . is whether Mrs. Coolidge, in light of all the circum-

spotting items that connect their host to criminality, may report the host to government officials with no fourth amendment ramifications. The fourth amendment is inapplicable, but not because the owner lacks a reasonable expectation of privacy in the home, nor because the owner has, to a limited degree, exposed the home to public view. Rather, no protection is available to the homeowner simply because the fourth amendment does not apply to nongovernmental actions.²⁰⁴

The Supreme Court elaborated on the private party search doctrine in *United States v. Jacobsen*.²⁰⁵ In *Jacobsen*, employees of a private freight carrier discovered a white, powdery substance in a multi-layered package that was damaged by a forklift.²⁰⁶ The employees notified the Drug Enforcement Administration (DEA) and replaced the bags of powder in the layers of packaging, so that the powder could not be seen without reopening the package.²⁰⁷ A DEA agent arrived and reopened the package, revealing the narcotics; after the addressee of the package was charged with a crime, he argued that the search was illegal under the fourth amendment.²⁰⁸ The Supreme Court, after recognizing that letters, packages, and sealed parcels are cloaked with a reasonable expectation of privacy,²⁰⁹ held that the agent's reopening was not a search requiring a warrant or any other fourth amendment protection because the scope of his search did not exceed the scope of the prior private party search.²¹⁰ In other words, when a private party discovers evidence of criminality and turns it over to police, there is no protectable privacy interest from a subsequent governmental intrusion that does not exceed the degree of intrusiveness of the private party's search.²¹¹

The Court's decision in *Jacobsen* is fully consistent with Justice Harlan's two-part test. The Court did not rule that the accidental exposure to public view in *Jacobsen* affected the

stances of the case, must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings." *Id.* at 487.

204. See *Jacobsen*, 466 U.S. at 113.

205. 466 U.S. 109 (1984).

206. *Id.* at 111.

207. *Id.*

208. *Id.* at 111-12.

209. *Id.* at 114.

210. *Id.* at 115-17.

211. According to the Court: "The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.* at 117. And, "[t]he additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115.

package owner's subjective expectation of privacy. Neither did the Court rule that privacy expectations in packages and letters are objectively unreasonable because members of the public *might* open them or *might* see what is inside if those packages open accidentally. Had government agents, prior to the private party intrusion, affirmatively opened packages looking for drugs, there is no doubt that the fourth amendment's reasonableness requirement would have regulated their investigation, requiring a warrant based on probable cause.²¹² In light of the private party search in *Jacobsen*, however, the government's subsequent search was not sufficiently intrusive to require fourth amendment coverage. Moreover, nongovernmental actors already had destroyed any initially legitimate expectations of privacy in the package.²¹³

The private party search cases and the interpretation of *Katz* proposed in this Article indicate that the exposure of personal items to members of the public can deprive individuals of fourth amendment protection in two ways. First, individuals may forfeit fourth amendment protection by knowingly exposing personal items to the public in a manner reflecting the lack of a subjective privacy expectation.²¹⁴ Second, if nongovernmental parties, accidentally or otherwise, discover private information and expose it to government officials, the fourth amendment ceases to protect the formerly private information.²¹⁵ This second type of "exposure" deprives individuals of fourth amendment protection only when the subsequent governmental search is no more intrusive than the search by the private parties.²¹⁶

It would trivialize the fourth amendment to extend its protections to unintrusive government conduct occurring subsequently to either of these two types of "exposure." Nevertheless, the two situations are different—the first is not a search because it does not meet the *Katz* requirements for protectable privacy interests; the second is not a search because nongovernmental parties have destroyed privacy interests that were, until the private party search, worthy of fourth amend-

212. See *id.* at 114 (citing *United States v. Place*, 462 U.S. 696, 701 (1983); *United States v. Ross*, 456 U.S. 798, 809-12 (1982); *Robbins v. California*, 453 U.S. 420, 426 (1981) (plurality opinion); *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979); *United States v. Chadwick*, 433 U.S. 1, 13 & n.8 (1977); *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970)).

213. See *Jacobsen*, 466 U.S. at 117, 119, 121.

214. See *supra* notes 128-33, 164-75, 195-96 and accompanying text.

215. See *supra* notes 197-213 and accompanying text.

216. See *supra* notes 205-13 and accompanying text.

ment protection from unreasonable governmental intrusions. The Supreme Court has confused these two different theories of exposure, however, employing the rationale of the latter to cases concerning the former.

An excellent illustration of this confusion is *Greenwood*, in which the Court stated that the trash collector himself might have sorted through the trash and turned it over to police.²¹⁷ It is true that if *Greenwood's* trash collector, without police encouragement, actually had discovered incriminating items in the garbage and turned them over to the police, the private party search doctrine of *Burdeau* and *Jacobsen* would render fourth amendment protections inapplicable to subsequent police inspection of the garbage, as long as the scope of the police search did not exceed that of the trash collector's search. The mere possibility, however, that a private party *might* search and report should not preclude fourth amendment protection under either the private party search doctrine or, as previously and extensively discussed, the *Katz* formula.²¹⁸ Neither doctrine involves playing such a guessing game.

By the same token, there is an inherent distinction between a nongovernmental airplane passenger who flies over a fenced backyard, spots marijuana, and tells the police, and a government-conducted aerial surveillance targeting that same backyard.²¹⁹ The former is not a search implicating fourth

217. See *California v. Greenwood*, 108 S. Ct. 1625, 1629 (1988).

218. See *supra* notes 165-73, 191-94 and accompanying text.

219. An analogous distinction was argued to the Court in *Ciraolo*, but summarily dismissed. See *California v. Ciraolo*, 476 U.S. 207, 214 n.2 (1986).

The *Ciraolo* Court rejected any distinction between a routine police aerial patrol that inadvertently discloses marijuana and a patrol focused on a particular individual's curtilage. Such a distinction has merit, however. For example, if police are patrolling a highway for speeders and they inadvertently spot drugs on someone's property along the highway, it would be absurd to suggest that such inadvertent discovery is a search implicating fourth amendment protections. A ruling that the fourth amendment applies in that situation might require police to obtain judicial approval prior to "intruding" on those individuals whose curtilage is adjacent to the highway. Moreover, if such police highway surveillance is regular and routine, the people living along the highway probably do not have a subjective expectation of privacy in their curtilage. When police focus on a particular person's land, however, as they did in *Ciraolo*, they take a much closer look at private activities than do commercial passengers on an occasional overflying plane or police officers on routine highway patrol. Thus, although the possibility exists that members of the public or police officers on routine traffic patrol might observe private activities in a manner that does not implicate fourth amendment protection, a *conscious intrusion* by police into an area associated with intimate family activities, such as the curtilage, should trigger the amendment's reasonableness requirement.

amendment protection, according to *Burdeau*; but neither *Burdeau* nor *Katz* render the latter governmental search immune from fourth amendment regulation. In the governmental search, there is no private party involved, and the curtilage owner's subjective expectation of privacy is worthy of protection because of the highly private nature of curtilage activities and the significant intrusiveness of government air surveillance directed at that area.

In sum, when members of the public actually see and report criminal items or activities, subsequent police investigations do not implicate the fourth amendment, so long as the degree of governmental intrusion does not exceed that of the nongovernmental snoop. The mere possibility, however, that members of the public *might* see and report intimate information is irrelevant to the *Burdeau* doctrine. Moreover, such speculation should not preclude fourth amendment protection under *Katz* unless both the risk and degree of public exposure is so great that any police surveillance of those exposed activities becomes too unintrusive to regulate and any individual privacy interest too insignificant to protect.

2. A Proposed Test for Determining the Legitimacy of Privacy Expectations

Although the *Burdeau-Jacobsen* private party search doctrine and the *Katz* formula are distinct issues, the *Jacobsen* case suggests a helpful test for determining when knowing exposure to public view renders personal items unprotected by the fourth amendment under *Katz's* two-part test. The key inquiry should be whether police have intruded on highly personal aspects of an individual's life to a greater degree than those members of the public to whom the individual knowingly has exposed such personal data. If the governmental intrusion is greater, the fourth amendment's reasonableness requirement should regulate that intrusion. All of the *Katz* elements coalesce in such a case. A limited degree of exposure to public view is not inconsistent with an individual's subjective expectation that certain privacies will not be destroyed by governmental intrusions far more extensive than those effected by members of the public to whom there has been a small degree of "exposure." Furthermore, when the degree of governmental intrusion far exceeds the degree to which individuals have exposed personal items and activities to public view, that governmental surveillance is very intrusive, destroying individual privacy interests which survive limited public "exposure." In

other words, exposure of private activities to public view may be completely consistent with subjective expectations of privacy that are objectively worthy of fourth amendment protection. The legitimacy of such privacy expectations depends on several factors related to the "exposure" involved:

- 1) How great is the risk of public exposure?
- 2) How extensive is the public exposure?
- 3) Who are the members of the public to whom the individuals have exposed activities or items, and how close a look at personal activities do the individuals expect the "viewing" members of the public to take?

a. *Risk of Exposure*

The risk of public exposure is particularly relevant to whether an individual harbors a subjective expectation of privacy. Individuals who build fences around their backyards before sunbathing in the nude have risked public exposure to a far smaller degree than those nude sunbathers who have not built enclosures. Only people without fences have knowingly exposed their curtilage activities to public view to such a degree that they have manifested no subjective expectation of privacy; and even if "unfenced" individuals actually expect privacy, society would not recognize that expectation as reasonable or worthy of fourth amendment protection. Although the nature of the privacy interest in curtilage activity is strong, any governmental viewing of that which is completely in the open is not intrusive enough to merit constitutional regulation.

The very language of *Katz*—"knowingly exposes to the public"—connotes an assessment of risk and indicates that taking lesser risks of exposure—reckless, negligent, or accidental exposure—should not absolutely preclude extension of fourth amendment safeguards. Thus, the possibility that a scavenger *might* rummage through an individual's garbage does not justify the conclusion that the individual has not sufficiently sought to preserve the privacy of personal, yet disposable items. That the risk of exposure is slight provides evidence of a subjective expectation of privacy that is worthy of protection, so long as the nature of the individual interest and the degree of governmental intrusion coalesce to make that subjective expectation objectively reasonable. As previously suggested, the often intimate nature of discarded letters, bills, magazines, and prophylactic devices, and the intrusiveness of government monitoring of those materials, demand a conclusion that subjective

expectations of privacy in discarded personal effects are reasonable and therefore entitled to some fourth amendment protection.²²⁰

b. *Extensiveness of Exposure*

The extensiveness of exposure factor recognizes that an individual may expose private items to a limited number of people without forfeiting fourth amendment protection. For example, a hotel room is sufficiently like a home that individuals reasonably can expect privacy there, at least until check-out.²²¹ The nature of the privacy interest in a bedroom—even a temporary bedroom—is significant, and any police entry into that room would be highly intrusive. In other words, it is the type of interest that deserves fourth amendment protection in the form of a warrant based on probable cause prior to any governmental intrusion. Nevertheless, most people realize that during the course of a long hotel stay, housekeeping personnel will enter daily to change the linens and clean the room. Under the Court's recent fourth amendment jurisprudence, this limited "knowing" exposure to members of the public arguably could render all privacy expectations in hotel rooms unprotectable.

Of course, housekeeping personnel who actually see items tying the occupant of the room to criminality may freely report their discovery to the police. The fourth amendment does not regulate such observation of the occupant's private articles because it is a private party search under *Burdeau*.²²² Moreover, if the police search the room immediately on the heels of such a private party search and do not exceed the scope of that earlier search, the police investigation does not implicate the fourth amendment, according to *Jacobsen*.²²³

220. See *supra* notes 171-81 and accompanying text.

221. See *United States v. Parizo*, 514 F.2d 52, 54 (2d Cir. 1975); LAFAYE, *supra* note 60, § 3.2, at 102 (stating that "unconsented police entry into a . . . house, apartment, or hotel or motel room, constitutes a search under *Katz*"); see also *Stoner v. California*, 376 U.S. 483, 489-90 (1964) (finding pre-*Katz* case in that guest in hotel room is entitled to fourth amendment protection).

222. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

223. See *United States v. Jacobsen*, 466 U.S. 109, 115-16 (1984). Even if the police do not exceed the scope of the earlier "intrusion" by housekeeping personnel, however, an argument exists that the officers' subsequent search implicates the fourth amendment. Unlike *Jacobsen*, where the subsequent governmental search of the already opened packages of white powder uncovered no private information not revealed by the initial private party search, any entry into a hotel room after the housekeeper has left can be viewed as a completely distinct intrusion threatening as yet undestroyed privacy interests.

Nevertheless, it would be an absurd bootstrap to suggest that the mere *possibility* of private party crimesolving renders government-initiated intrusions into a highly private area immune from fourth amendment regulation. The result would be a significant diminution of privacy in hotel rooms. Because all hotel guests knowingly expose their rooms to housekeeping personnel, the police would be able to intrude into hotel rooms without any constitutional limitations. Such a result would be blatantly inconsistent with the spirit of *Katz* and the essence of the fourth amendment. The reasoning underlying the Supreme Court's recent holdings, however, supports the view that individuals must maintain absolute solitude in private places if those individuals are to receive even a modicum of fourth amendment protection. Such a superficial approach threatens even the privacies of the home.

Exposure of private areas and activities to limited numbers of people is not inconsistent with a subjective expectation of privacy that society would deem worthy of protection. A Supreme Court imposed mandate of absolute solitude threatens individual freedoms as much as its alternative—unlimited, arbitrary governmental intrusions on privacy. At best, the Court's current approach exalts form over substance; at worst, it threatens to reduce individual privacy to an intolerable level.

Exposure of privacies to limited, chosen members of the public should not preclude fourth amendment protection if governmental actions intrude to a greater degree than those members of the public to whom such privacies knowingly have been exposed. When individuals expose items or activities to limited numbers of the public, subsequent governmental intrusion can exceed the scope of the prior "intrusion" in both a quantitative and qualitative sense. To use the hotel illustration, knowing exposure of the room to housekeeping personnel should not defeat fourth amendment expectations under *Katz*. Any subsequent police intrusion is obviously greater quantitatively, because more than one person now has viewed a private area. By the same token, inviting guests into a home should not render privacy expectations in that home unworthy of protection from subsequent, arbitrary governmental intrusions be-

For example, sometime after the room has been cleaned, the occupants presumably will return to the hotel room and engage in any number of intimate activities. The occupants' privacy expectations concerning these intimate activities have not been destroyed by the cleaning of the room. Thus, any subsequent entry by government officials could—and should—be viewed as a new intrusion rather than—as in *Jacobsen*—merely a repetitious intrusion.

cause the degree of governmental intrusion exceeds, in a quantitative sense, the degree to which those individuals have chosen to expose their home life.

Far more important, however, is the qualitative degree to which subsequent governmental intrusion into home or hotel room exceeds the prior, limited public exposure. First, it is difficult to view invited guests or hotel employees as "intruders." When individuals have control over who will share their privacies, it makes no sense to say that those individuals have relinquished their privacy expectations by exercising that control, unless *privacy* really does mean "absolute solitude." The ordinary American usage of *privacy* plainly contradicts such a connotation. *Private parties, private conversations, private meetings, and private clubs* all connote the presence of several people. One of the essential components of privacy in any of these settings is not solitude but the ability to choose those with whom to share business or personal intimacies. Therefore, it is not the voluntary exposure of intimacies to chosen members of the public that destroys privacy; rather, it is uninvited governmental intrusion that destroys privacy by destroying that freedom of choice.

Moreover, governmental intrusions subsequent to limited "knowing exposures" are qualitatively more significant in a temporal sense. At the time housekeeping personnel clean the room, the occupants are not present in a state of undress, passion, or other intimacy. The same cannot be said at times after the room has been cleaned; and these subsequent temporal expectations of privacy deserve fourth amendment protection from unreasonable governmental intrusion. In other words, knowingly exposing one's room to a housekeeper in the afternoon certainly should not render illegitimate those privacy expectations that exist later in the evening. The same is true regarding guests invited into a home. Even if one could say that the hosts have relinquished a degree of privacy by inviting friends into their home, the expectation of privacy regarding intimacies commonly shared in the home which existed before the guests' arrival continues, in the same degree, after the guests depart.

Thus, the Court should not interpret limited public exposures as wholly depriving individuals of fourth amendment protection. Rather, the Court should assess whether and to what extent the intrusiveness of governmental surveillance exceeds the observations of those limited members of the public to whom an individual knowingly has exposed private activities or

enclaves. Certainly, at some point, the exposure of privacies to the public can be so extensive that society will cease to deem privacy expectations reasonable, and any subsequent governmental action will be unintrusive. The ultimate question is whether, given the nature, degree, and extent of public exposure, society would consider an individual's expectation of privacy worthy of protection from arbitrary, unlimited governmental intrusions of the type involved.

c. *Who and How Close?*

This aspect of the proposed "degrees of exposure" analysis is the one most often ignored by the Supreme Court in its recent fourth amendment decisions.²²⁴ In determining whether knowing exposure to public view renders privacy expectations unprotectable, the Court exalts form over substance when it ignores the identity of those to whom the knowing exposure is made and how closely they may be expected to look at the privacies so exposed. There are some people whose observations of life's privacies are too unintrusive to protect against. Their view is out of focus. They simply will not look at those intimacies in a way that defeats the nature of the privacy expected by the average individual. Governmental surveillance subsequent to such limited exposure is therefore often highly intrusive, threatening significant privacy interests. The cases of *Smith*, *Knotts*, and *Greenwood* are excellent examples.

The individual in *Smith* knowingly exposed the numbers dialed from his telephone only to people who were going to use those numbers for billing purposes,²²⁵ hardly a relinquishment of any significant privacy interests. Smith's expectation of privacy regarding the names and faces of the people he called is completely consistent with his knowing exposure of the sterile numbers to the telephone company. This type of limited exposure does not undercut either aspect of Justice Harlan's *Katz* test and should not result in a relinquishment of fourth amendment protection. The subsequent governmental intrusion, however, far exceeded the limited exposure of the numbers and destroyed the only type of privacy Smith cared about when he dialed the telephone—the privacy associated with the identities of the people called and the frequency of those calls. The sig-

224. See *supra* notes 76-80, 89-91 and accompanying text; *infra* notes 225-28 and accompanying text.

225. See *Smith v. Maryland*, 442 U.S. 735 (1979). For a complete discussion and critique of *Smith*, see *supra* notes 69-82 and accompanying text.

nificant nature of the privacy interest—the names rather than the numbers—and the intrusiveness of the governmental surveillance coalesce to suggest that the privacy interest in *Smith* is one which society would deem deserving of some fourth amendment protection from unreasonable governmental intrusions.

In *Knotts*, the individual knowingly exposed only tiny segments of his travels to members of the public who neither knew him nor cared where he was going.²²⁶ This public observation did not defeat any expectations of privacy regarding destinations, meetings, or acquaintances—the type of privacy that people care about when traveling from place to place. Thus, the relevant privacy interest was unexposed until the government, using beeper surveillance, intruded on the individual's privacy interest and destroyed it. The government intruded to a far greater degree than those members of the public to whom the individual exposed small portions of his trip. The difference between the public's view of personal travels and the government's view in *Knotts* parallels the difference between a single film frame and an entire motion picture. The nature of the privacy interest in *Knotts* and the high degree of governmental intrusion strongly suggest a situation to which the fourth amendment should apply, requiring the government to act reasonably.

Most recently, in *Greenwood*, an individual knowingly exposed his trash only to members of the public scavenging for recyclable cans or looking for clothing or scraps of food.²²⁷ Such a limited public observation does not intrude on the privacy expected by the average individual—an expectation that goes far beyond freedom from indiscriminate rummaging. Because scavengers do not view personal items in a way that defeats privacy interests, their observation is not sufficiently intrusive for individuals to guard against. On the other hand, a systematic governmental exploration of trash, not for recyclable cans or needed clothing, but for intimate details about an individual's life inside his home, involves a much greater degree of intrusion than the scavengers' observation. Thus, it is not the risk of limited and unfocused public observation by scavengers that destroys the type of privacy that individuals reason-

226. See *United States v. Knotts*, 460 U.S. 276 (1983). For a complete discussion and critique of *Knotts*, see *supra* notes 83-95 and accompanying text.

227. See *California v. Greenwood*, 108 S. Ct. 1625 (1988). For a complete discussion and critique of *Greenwood*, see *supra* notes 145-81.

ably expect, but rather the actual, highly intrusive governmental search. The speculative "exposure" of garbage to scavengers is simply irrelevant to the *Katz* analysis. Indeed, in light of the type of privacy expected—freedom from discovery of, and association of the individual with, the intimate details present in refuse—any knowing exposure to scavengers neither defeats that subjective expectation of privacy nor renders it unworthy of protection from unreasonable governmental searches. Given the significant intrusiveness of governmental searches of trash and the importance of privacy expectations concerning activities in the home, garbage searches belong to the class of searches that the fourth amendment was designed to regulate.

It is true that the scavenger who actually finds evidence of criminality may freely turn it over to the police. The scavenger's view is not one that the fourth amendment regulates—it is a private party search under *Burdeau*.²²⁸ Nevertheless, the mere possibility that a scavenger *might* search an individual's trash is irrelevant to *Burdeau* and should be irrelevant to the *Katz* inquiry into whether expectations of privacy deserve protection from unreasonable governmental surveillance.

In *Smith*, *Knotts*, and *Greenwood*, the nature of the privacy interest was significant and the type of privacy expected remained intact despite limited exposure to the public. In each case, the degree of governmental intrusion far exceeded the degree of the individuals' knowing public exposure of privacies. In view of the type of privacy expected, the limited knowing exposures to the public were not inconsistent with subjective expectations of privacy that society would deem objectively worthy of protection. These cases illustrate that it is only after identifying the type of privacy expected that the Court can determine whether an individual knowingly has exposed items to public view in a manner that defeats the privacy interest and removes fourth amendment protection. If—like the individuals in *Smith*, *Knotts*, and *Greenwood*—an individual has not so exposed personal items, any subsequent governmental surveillance that intrudes on an important intact privacy expectation demands fourth amendment control if the constitutional right to be free from unreasonable searches and seizures is to have any meaning at all.

228. See *Burdeau v. McDowell*, 256 U.S. 465 (1921); *supra* notes 197-213 and accompanying text.

Conclusion

In *Katz v. United States*,²²⁹ the Supreme Court redirected the course of fourth amendment law. By focusing on privacy interests rather than property interests, the Court construed fourth amendment protections in a manner that gave individuals protection against the government's use of modern technology in criminal investigations. The last decade of fourth amendment law, however, demonstrates that the Supreme Court has drifted further and further away from *Katz*, both in law and philosophy. As advancing technology continually increases the ability of the government to intrude into individuals' personal lives, the Court has not correspondingly adjusted the scope of fourth amendment protection to regulate governmental intrusions. Rather, the Court has decreased the scope of the fourth amendment and with it the realm of privacy available to American citizens. With its decision in *California v. Greenwood*,²³⁰ the Court finally has invited the government into citizens' homes by withholding fourth amendment protection from discarded personal effects that reveal extensive information about the private life carried on inside the home.

The most disturbing aspect of the Court's recent fourth amendment voyage toward a new world of little privacy is its perverse use of *Katz* to chart that course. By pulling one phrase from *Katz* out of context, and interpreting the phrase literally, without regard as to its original meaning, the Court has rewritten fourth amendment law in a way that casts doubt even on the continued validity of its seminal case. The Court has interpreted *Katz* strictly according to its letter, but in complete contradiction to its spirit. The current state of the law, after *Greenwood*, is that the fourth amendment does not protect any item or enclave which individuals have "exposed" in such a way that members of the public "might" view it. Such an approach, of course, completely neglects the two factors that courts must consider if the fourth amendment is to be a living right—the nature of the privacy interest implicated by the governmental surveillance and the intrusiveness of that surveillance. When these two factors sufficiently coalesce—for example, highly intrusive governmental surveillance of an important individual privacy interest—the fourth amendment, with its requirement of reasonableness, must regulate that governmental conduct. To find otherwise is to render the fourth

229. 389 U.S. 347 (1967).

230. 108 S. Ct. 1625 (1988).

amendment meaningless in an age when the government, through the use of modern technology, has the capacity to destroy personal privacy.

The key question in modern fourth amendment jurisprudence should be whether an individual has exposed items and private activities to the public in a manner that renders privacy interests unworthy of protection. Rather than exalting form over substance by superficially looking to the *fact* of exposure, or worse, the mere *possibility* of exposure, the Court should adopt a more exacting approach that weighs the *nature and degree* of the exposure. Such an approach should focus on the factors discussed in this Article, including: the degree of risk that the public may view intimacies; the extensiveness of public exposure; the identity of the viewing members of the public; and the nature of the public's intrusion. The Court's current mechanical, literal approach to *Katz* ignores these factors, resulting in an application of *Katz* that undercuts the spirit of the fourth amendment.

Adopting the new model proposed in this Article will ensure that fourth amendment regulation is available to address egregious abuses of governmental power. Instead, the Court has chosen to interpret the fourth amendment to provide no controls over intrusive forms of police surveillance such as tracking a person's travels, tracing telephone calls, flying over backyards with cameras, and even sorting through discarded bills, letters, reading materials, and contraceptive devices. It is no answer for the Court to respond that it can broaden the scope of the fourth amendment in the event that arbitrary and flagrant governmental intrusions become the future norm. Such a judicial response not only begs the constitutional question, it reverses the presumption that motivated the framers to include a Bill of Rights. The framers added the Bill of Rights to the Constitution because they distrusted governmental power. To interpret constitutional protections as existing only subsequent to clear indications that the government cannot police itself is to rewrite history and reverse the founding fathers' presumption.

Individual freedoms are the foundation of American society and it is the Court's role to tend that foundation, repairing and rebuilding it to prevent the erosion of existing liberties, and even expanding it when necessary to meet the needs of the future. When the Court neglects this role, it upsets the delicate balance between the government's power to enforce its laws and society's interest in private enclaves free from governmen-

tal intrusion. Waiting for Big Brother to arrive before interpreting the Constitution to protect citizens from him risks sacrificing the time-honored individual privacy interests that distinguish this nation from others.

Finally, the Court can implement the broader construction of fourth amendment rights proposed in this Article at little cost to legitimate law enforcement activities. Just as individuals may expose aspects of their personal lives to the public in varying degrees, so may courts apportion the protections supplied by the fourth amendment's reasonableness requirement in varying degrees. All the restrictions necessary to make searches of homes reasonable may not be necessary to constitute reasonable air surveillance, reasonable telephone call tracing, or reasonable garbage searching. Thus, when the Court concludes that a particular privacy interest is not as significant as the privacy interest in a home, the most accurate constitutional response is less fourth amendment protection rather than no protection at all.

In conclusion, the Court's current fourth amendment analysis is based on simplistic and logically incorrect theories of public exposure. The time has come for the Court to take a more intellectually demanding approach when delineating the scope of protection from unreasonable governmental searches. The importance of personal privacy in the structure of our society's freedom demands no less. The model proposed in this Article is a beginning—a means of interpreting and applying *Katz* consistently with both the spirit of that venerable decision and the essence of the fourth amendment.