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John M. Junker

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## THE STRUCTURE OF THE FOURTH AMENDMENT: THE SCOPE OF THE PROTECTION\*

JOHN M. JUNKER\*\*

Fourth amendment doctrine consists of three foundational elements: scope, content, and remedy. This essay examines the first of these elements: the scope of the protection against unreasonable searches and seizures under the fourth amendment. Its purpose is to describe and assess the doctrine that determines whether that amendment governs the conduct sought to be remedied.

In its most elementary form, the scope inquiry asks whether the challenged governmental conduct amounted to a "search" or "seizure," but these textual referents are only the starting point for our journey into the doctrinal-political<sup>1</sup> labyrinth of fourth amendment analytics. The textual version of the "content" inquiry is even more cryptic: whether the search or seizure was "reasonable." The "remedy" issue is, in criminal cases (the dominant but not exclusive source of fourth amendment doctrine) whether the product of an unreasonable search or seizure is subject to the exclusionary rule. As many have noted, there is no explicit textual referent to a remedy for such violations.<sup>2</sup>

Each of these elementary descriptions of the three basic structural components of fourth amendment doctrine undergoes two levels of elaboration. Each may be described in terms of a relatively concise set of analytic categories, and those categories themselves

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\*\* Professor of Law, University of Washington School of Law. B.A. 1959, Washington State University; J.D. 1962, University of Chicago. The author gratefully acknowledges the helpful suggestions by his colleagues, Professors Arval A. Morris and Louis E. Wolcher, and by Professors Francis A. Allen and Yale Kamisar, all of whom reviewed and commented upon an earlier draft. The Article was supported in part by research grants from the University of Washington School of Law during the summers of 1985-87.

<sup>1</sup> "Political" refers to the process of determining the official dominance of one value over a competing value.

<sup>2</sup> Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a Principled Basis Rather than an Empirical Proposition?*, 16 CREIGHTON L. REV. 565, 581-597 (1983).

branch into sets of rules that apply to given circumstances or factual settings. For example, whether a particular observation by the police, say from an airplane, is a "search"—that is, within the scope of the fourth amendment—depends on whether that conduct is deemed to have affected the legitimate expectation of privacy of the person who seeks to exclude evidence derived from such an observation. In the case of aerial surveillance, the "legitimacy" of such an expectation turns on whether the observed premises are deemed to be within the officer's "plain view," and that question, in turn, will depend upon the circumstances of the officer's location (whether or not in "public airspace") and the means by which the observation was made (whether by naked eye, enhanced vision or more sophisticated surveillance devices). In short, at the analytic level, "plain view" negates "search;" at the circumstantial level, a legal vantage point and conventional techniques yield a "plain view."<sup>3</sup>

This Article proceeds from a general description of the entire structure and a wide-angle view of fourth amendment doctrine since *Mapp v. Ohio*,<sup>4</sup> to a detailed analysis of the United States Supreme Court's decisions affecting the scope of the fourth amendment.<sup>5</sup>

The structural components of fourth amendment doctrine appear, in a tactical setting, as a series of obstacles to exclusion of the challenged evidence, because each must in turn be hurdled or exclusion will be denied. Only if the conduct by which the police acquired the evidence is within the scope of the fourth amendment does it make sense to ask whether that conduct was "unreasonable." Further, only if one of the rules that comprise the content of the amendment was violated does it make sense to ask whether the product of the violation is subject to exclusion. Logically, therefore, the assessment of fourth amendment issues should be addressed in that order: scope, content, remedy. Because of the vulnerability of the exclusionary rule, however, there are more than a few examples in which the order has been reversed.<sup>6</sup> Analytic confusion between

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<sup>3</sup> This is the official resolution of the aerial surveillance controversy. As we shall see, an alternate analytic route would yield the opposite result.

<sup>4</sup> 367 U.S. 643 (1961).

<sup>5</sup> For historical overviews of the fourth amendment prior to *Mapp v. Ohio* see J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* (1966) and N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

<sup>6</sup> See, e.g., *Illinois v. Gates*, 462 U.S. 213 (1983); *Payton v. New York*, 445 U.S. 573, 620 (1980) (Rehnquist, J., dissenting); *Robbins v. California*, 453 U.S. 420, 437 (1980) (Rehnquist, J., dissenting); *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *Ybarra v. Illinois*, 444 U.S. 85, 96 (1979) (Burger, C.J., dissenting); *Franks v. Delaware*, 438 U.S. 154 (1978); *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Watson*, 423 U.S. 411, 432 (1976) (Powell, J., concurring); *United States v. Peltier*, 422 U.S. 531 (1975); *Coo-*

scope and content issues, though less apparent, is even more common in the Court's decisions, and often occurs, one suspects, in the quest for a particular result.<sup>7</sup>

These same structural components may be viewed as pawns in a political controversy that inheres in organized society: the tension between the individual claim to privacy and autonomy and the collective demand for crime control and security.<sup>8</sup> Every fourth amendment decision chooses, at the margin, which of these opposing values to prefer, and the doctrine reflects and accommodates that choice. The immediate task is to explicate the analytic categories through which that accommodation is expressed.

### I. THE ANALYTIC FRAMEWORK OF PRIVACY

This Article makes two claims for the analytic structure it describes. First, that the analysis applies to any attempt to give legal protection to privacy, regardless of the particular text by which that protection is expressed. State constitutions, such as those of Arizona<sup>9</sup> and Washington,<sup>10</sup> that mention neither searches, seizures, warrants nor probable cause, nonetheless generate doctrines that fit comfortably within the analytic categories.

Second, the components of the analytic framework presented here are comprehensive (although not exclusive). Every fourth amendment issue falls within a particular analytic category, and although the categories overlap, they do so in instructive ways. Of course, these are empty claims unless the analysis also facilitates one's ability to understand, assess and use privacy doctrine. The proof of that is in the analytic scheme.

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idge v. New Hampshire, 403 U.S. 443, 492, 510 (1971)(Burger, C. J., dissenting, Blackmun, J., dissenting); Spinelli v. United States, 393 U.S. 410, 429 (1969)(Black, J., dissenting); Terry v. Ohio, 392 U.S. 1 (1968).

<sup>7</sup> See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 353 (1985)(Brennan, J., dissenting); Hudson v. Palmer, 468 U.S. 517, 537 (1984)(O'Connor, J., concurring); United States v. Villamonte-Marquez, 462 U.S. 579 (1983); United States v. Edwards, 415 U.S. 800, 809 (1974)(Stewart, J., dissenting); Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); United States v. Van Leeuwen, 397 U.S. 249 (1970). See generally La Fave, *Being Frank About the Fourth: On Allen's "Process of Factualization" in the Search and Seizure Cases*, 85 MICH. L. REV. 427, 440 n.77 (1985)(In discussing several "content" issues, the author notes that "[m]any of the activities deemed outside the fourth amendment entirely . . . would be better viewed as inside the amendment but subject to lesser limitations . . .").

<sup>8</sup> Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 438 (1973); Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 3 (1986).

<sup>9</sup> Ariz. Const. art. II, § 8.

<sup>10</sup> Wash. Const. art. I, § 7.

Issues concerning the scope of the protection consist only of the following:

1. whether government conducted, instigated or participated in the challenged activity;<sup>11</sup>
2. whether the challenged activity amounted to a "search" or "seizure;"<sup>12</sup>
3. whether such a search or seizure affected the "reasonable expectation of privacy" of the party challenging the intrusion;<sup>13</sup>
4. whether such a search or seizure affected that party's "person, house, papers or effects;"<sup>14</sup>
5. whether the challenging party's fourth amendment protection has been defeated by abandonment,<sup>15</sup> consent<sup>16</sup> or incarceration;<sup>17</sup>

Thus, to be within the scope of the fourth amendment, the moving party must establish that government agents have engaged in a search or seizure that affected such party's undefeased legitimate expectation of privacy in his or her person, house, papers or effects. If successful, the party is entitled to a hearing on whether the intrusion was "reasonable" under the rules that provide the content of the protection.

The content rules are of two general types, concerning either the predicate for, or the manner of executing, a given search or seizure. Because the Court has, in the past twenty years, been increasingly willing to tailor the predicate required for a search or seizure according to its judgment of the magnitude of the intrusion, the "predicate" requirement has grown increasingly complex.<sup>18</sup> De-

<sup>11</sup> See, e.g., *United States v. Jacobsen*, 466 U.S. 109 (1984); *Walter v. United States*, 447 U.S. 649 (1980).

<sup>12</sup> See, e.g., *Arizona v. Hicks*, 107 S. Ct. 1149 (1987); *United States v. Dunn*, 107 S. Ct. 1134 (1987); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *Maryland v. Macon*, 472 U.S. 463 (1985); *United States v. Karo*, 468 U.S. 705 (1984).

<sup>13</sup> *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring). Because an intrusion that invades a "reasonable expectation of privacy" is therefore a "search" or "seizure," and vice versa, these rubrics are logically redundant. Whether they are also analytically redundant will be determined after further examination of the criteria by which the Court assigns one or the other as its premise or its conclusion.

<sup>14</sup> *Oliver v. United States*, 466 U.S. 170, 176 (1984).

<sup>15</sup> *California v. Greenwood*, 108 S. Ct. 1625 (1988); see also *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting) (where defendants did not seek return of misdelivered films turned over to the FBI until after their indictment on obscenity charges. Justice Blackmun argued that their expectation of privacy "was abandoned by their shunning the property . . . for over 20 months." *Id.* at 665).

<sup>16</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>17</sup> *Hudson v. Palmer*, 468 U.S. 517, 537 (1984) (O'Connor, J., concurring).

<sup>18</sup> See, e.g., *Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987); *New York v. Burger*, 107 S. Ct. 2636 (1987); *Winston v. Lee*, 470 U.S. 753 (1985); *New Jersey v. T.L.O.*, 469 U.S.

spite the occasional emphasis on "bright line" criteria to facilitate enforcement,<sup>19</sup> the Court prefers dim lines where they serve the majority's purpose.<sup>20</sup> Moreover, using the device of a "diminished" expectation of privacy, the Court has on occasion reduced the predicate requirement almost to the vanishing point.<sup>21</sup> Conversely, the Court recently required a predicate more rigorous than probable cause and a warrant for a surgical search,<sup>22</sup> reflecting the "augmented" expectation of privacy in the integrity of one's body.<sup>23</sup> Governmental conduct within the scope of the protection violates the prohibition against unreasonable searches and seizures only if:

1. the government does not possess the predicate required for the kind of activity undertaken, including, for example, probable cause to search or to "associate . . . seized material with criminal activity,"<sup>24</sup> reasonable suspicion to detain persons or things,<sup>25</sup> a judicial warrant or exigent circumstances,<sup>26</sup> administrative or statutory authorization of inspections,<sup>27</sup> and every other pre-intrusion

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325 (1985); *Michigan v. Clifford*, 464 U.S. 287 (1984); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Michigan v. Summers*, 452 U.S. 692 (1981); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Mun. Court*, 387 U.S. 523 (1967). See also LaFave, "Seizures" Typology: *Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 417-19 (1984)(describing the elaboration of categories of seizures of the person).

<sup>19</sup> See, e.g., *New York v. Belton*, 453 U.S. 454 (1981).

<sup>20</sup> See, e.g., *Michigan v. Chesternut*, 108 S. Ct. 1975, 1979 (1988); *United States v. Sharpe*, 470 U.S. 675 (1985); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Illinois v. Gates*, 462 U.S. 213 (1983). See also Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985)(The author compares what he terms the "no lines" and the "bright line" approaches to search and seizure decisions, concluding that the former approach "in most cases . . . reflects the result, though not the reasoning, of current Supreme Courts cases.").

<sup>21</sup> See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Biswell*, 406 U.S. 311 (1972).

<sup>22</sup> *Winston v. Lee*, 470 U.S. 753 (1985).

<sup>23</sup> Notwithstanding this proliferation of individualized predicates for particular intrusions—a phenomenon captured with the term "variable content"—and despite the Court's continued invocation of the old regime—that warrantless searches "are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions," *Thompson v. Louisiana*, 469 U.S. 17, 20 (1984)(*per curiam*), the dichotomy between the predicate for and the execution of searches and seizures expresses the only fundamental difference to be found in the content rules.

<sup>24</sup> *Texas v. Brown*, 460 U.S. 730, 738 (1985).

<sup>25</sup> See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *United States v. Place*, 462 U.S. 696 (1983).

<sup>26</sup> See, e.g., *Thompson v. Louisiana*, 469 U.S. 17 (1984)(*per curiam*); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980).

<sup>27</sup> See, e.g., *New York v. Burger*, 107 S. Ct. 2636, (1987); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v.*

requisite to the legality of the conduct;<sup>28</sup> or

2. the officers executing the intrusion (a) exceed the zone within which the intrusion is permitted, for example the *Chimel*<sup>29</sup>-*Belton*<sup>30</sup> zone limiting searches incident to arrest to the person of the arrestee and the area from which he or she might grab a weapon or evidence, including the passenger compartment of a vehicle, or (b) search more intensely<sup>31</sup> or seize more onerously<sup>32</sup> or for a longer duration<sup>33</sup> than their predicate permits.

Although these latter rules governing the execution of intrusions could also be viewed as cases in which the police lacked the predicate for the action taken, there are analytic advantages to treating such cases as beyond the authority possessed, rather than as a variety of an insufficient predicate. Useful, not maximal, reduction is the analytic objective. Because courts use the predicate-execution dichotomy to describe fourth amendment doctrine,<sup>34</sup> understanding will be better served by assessing rather than by submerging the distinction.

The final component, remedy, is restricted in this essay to the rule excluding the product of an unreasonable search as evidence in a criminal, delinquency, or forfeiture proceeding. Except for the rule in *Stone v. Powell*,<sup>35</sup> precluding federal habeas corpus review of fourth amendment issues following a "full and fair" opportunity to litigate that issue on direct review, the limits on exclusion are not unique to search and seizure cases. Limiting exclusion to evidence derived from the violation—the "fruit of the poisonous tree" limitation<sup>36</sup>—is a logical feature of any exclusionary rule.<sup>37</sup> Similarly, the use of illegally obtained evidence acquired in "good faith,"<sup>38</sup> or to impeach,<sup>39</sup> are exceptions to the exclusionary rule, not to the fourth amendment.

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Biswell, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *Camara v. Mun. Court*, 387 U.S. 523 (1967).

<sup>28</sup> *E.g.*, *Ker v. California*, 374 U.S. 23 (1963)(knock-and-announce requirement).

<sup>29</sup> *Chimel v. California*, 395 U.S. 752 (1969).

<sup>30</sup> *New York v. Belton*, 453 U.S. 454 (1981).

<sup>31</sup> *See, e.g.*, *Arizona v. Hicks*, 107 S. Ct. 1149 (1987); *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Arkansas v. Sanders*, 442 U.S. 753 (1979), *modified*, *United States v. Ross*, 456 U.S. 798 (1982).

<sup>32</sup> *E.g.*, *Dunaway v. New York*, 442 U.S. 200 (1979).

<sup>33</sup> *E.g.*, *United States v. Place*, 462 U.S. 696 (1983).

<sup>34</sup> *E.g.*, *Dunaway*, 442 U.S. at 200.

<sup>35</sup> 428 U.S. 465 (1976).

<sup>36</sup> *Nardone v. United States*, 308 U.S. 338, 341 (1939).

<sup>37</sup> *See, e.g.*, *Nix v. Williams*, 467 U.S. 431, 442-44 (1984).

<sup>38</sup> *United States v. Leon*, 468 U.S. 897 (1984).

<sup>39</sup> *Harris v. New York*, 401 U.S. 222 (1971); *Walder v. United States*, 347 U.S. 62 (1954).

Issues concerning the remedy of exclusion consist only of the following:

1. whether the evidence sought to be excluded was the product of the violation of the moving party's fourth amendment right.<sup>40</sup>

2. whether such evidence is used to establish the elements of the government's case against such party or to impeach his or her credibility as a witness.<sup>41</sup>

3. whether the party challenging admission seeks relief on direct or collateral review.<sup>42</sup>

4. whether the challenged evidence was "obtained by officers acting in reasonable reliance on a search warrant . . . ultimately found to be unsupported by probable cause,"<sup>43</sup> or pursuant to a statute, later found unconstitutional, authorizing a warrantless search.<sup>44</sup>

## II. A NOTE ON REMEDY

It is one of the curiosities of fourth amendment law that its remedy, the exclusionary rule, has consistently upstaged the substantive rules governing the scope and content of constitutionally protected privacy.<sup>45</sup> In part, the prominence of the exclusionary rule derives from the fact that its use always dramatically subordinates the search for truth in favor of the protection of individual privacy and operates to the immediate benefit of an otherwise inculcated criminal defendant.<sup>46</sup> Less obviously, the exclusionary rule and its vessel, *Mapp v. Ohio*,<sup>47</sup> not only generated an explosion of fourth amendment privacy doctrine, but also ushered in a new constitutional era of incorporated Bill of Rights protections for persons charged with a crime in state criminal proceedings.<sup>48</sup>

Although *Gideon v. Wainwright*<sup>49</sup> came two years after *Mapp*, all but a few states had already provided counsel for indigent criminal defendants. When *Mapp* provided a forum—the pretrial motion to

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<sup>40</sup> *Segura v. United States*, 468 U.S. 796 (1984); *United States v. Crews*, 445 U.S. 463 (1980); *Wong Sun v. United States*, 371 U.S. 471 (1963).

<sup>41</sup> *United States v. Havens*, 446 U.S. 620 (1980).

<sup>42</sup> *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>43</sup> *United States v. Leon*, 468 U.S. 897, 900 (1984).

<sup>44</sup> *Illinois v. Krull*, 107 S. Ct. 1160 (1987).

<sup>45</sup> See generally Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24 (1980).

<sup>46</sup> For a review of this conflict see Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987).

<sup>47</sup> 367 U.S. 643 (1961).

<sup>48</sup> See Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982).

<sup>49</sup> 372 U.S. 335 (1963).



suppress—and a potentially conviction-barring remedy, it was predictable that defense counsel would not be slow to assert their clients' right to exclude evidence acquired by unreasonable search or seizure. From this perspective the exclusionary rule emerges as the driving force behind the remarkable elaboration of privacy doctrine following the *Mapp* decision.

Finally, *Mapp*'s place in the history of the "incorporation" debate is not without significance. Although the rights of criminal defendants guaranteed by the fourth, fifth, sixth and eighth amendments could have been selectively incorporated in any order, the dam was in fact broken when the Court in *Mapp* declared the fourth amendment's exclusionary rule binding upon the states. Thus, although *Mapp* had its antecedents, it is accurate to say that the modern era of constitutional protection of the rights of the accused began with the Court's five-four decision in the *Mapp* case.

Because *Wolf v. Colorado*<sup>50</sup> had, twelve years before *Mapp*, expressly declined to "incorporate" the exclusionary rule within the due process "core of the fourth amendment . . . the security of one's privacy against arbitrary intrusion by the police,"<sup>51</sup> the task confronting the *Mapp* majority was to provide a convincing doctrinal and political basis for repudiating *Wolf*. If the most formidable obstacles to exclusion—a natural reluctance to bar reliable evidence of guilt from a criminal trial and a structural reluctance to impose national standards on unwilling states—could be persuasively overcome, the *Wolf* precedent would easily collapse. A durable case for the exclusionary rule, therefore, could only be built upon regard for privacy itself. A society that prized individual privacy enough would willingly sacrifice both the convictions that exclusion might bar and the state autonomy that a uniform rule would compromise. At bottom, no remedy is stronger than the values it protects. To the extent that privacy is deemed appropriately subordinated to crime control, the exclusionary rule cannot, and should not, endure.

Mr. Justice Clark's opinion for the Court in *Mapp* fails so utterly to make the case for individual privacy that one is forced to question the depth of his commitment to the value of that right. Further investigation seems to confirm the suspicion that his true sentiments lay with its natural opponent—the power of law enforcement officers to search and seize at the margin of their constitutional authority. In the six years he remained on the Court following the *Mapp* decision, only in the last fourth amendment criminal case in

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<sup>50</sup> 338 U.S. 25 (1949).

<sup>51</sup> *Id.* at 27.

which he participated did Justice Clark vote in favor of the right of privacy.<sup>52</sup> Even that decision, *Berger v. New York*,<sup>53</sup> may be viewed as a primer addressed to Congress on the essential elements of a constitutional statute authorizing warranted electronic eavesdropping—instructions that Congress was soon to follow in Title II of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>54</sup> Between *Mapp* and *Berger*, Mr. Justice Clark consistently sided with the opponents of privacy and, out of fourteen non-unanimous privacy decisions,<sup>55</sup> four times made a majority to limit privacy over the dissent of his colleagues from the *Mapp* majority.<sup>56</sup>

It is fair to conclude that despite its unequaled significance in the history of fourth amendment doctrine, the values expressed in the opinion in *Mapp v. Ohio*<sup>57</sup> found no home in the heart or mind of its author.

A subtler and more profound change in constitutional doctrine accompanied the shift from *Wolf* to *Mapp*, a change not in the remedies available to criminal defendants but in the nature of the substantive constitutional limitations on state criminal prosecutions. Before *Wolf*, a state criminal defendant was entitled under the due process clause of the fourteenth amendment to a trial that was “fundamentally fair.”<sup>58</sup> A conviction that failed to meet that minimal standard plainly could not stand; the remedy, reversal, entailed no additional judgment.<sup>59</sup> *Wolf* posed two questions about the relationship between constitutionally protected privacy and state prosecutions. Logically anterior to the question of remedy was the question of content: what rules should govern searches and seizures by state

<sup>52</sup> Justice Clark voted with the majority in *Griswold v. Connecticut*, 381 U.S. 479 (1965), a substantive right of privacy decision.

<sup>53</sup> 388 U.S. 41 (1967).

<sup>54</sup> 18 U.S.C. §§ 2510-2521 (1968).

<sup>55</sup> *Osborn v. United States*, 385 U.S. 323 (1966); *Hoffa v. United States*, 385 U.S. 293, 321 (1966)(Clark, J., dissenting); *Lewis v. United States*, 385 U.S. 206 (1966); *Schmerber v. California*, 384 U.S. 757 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965); *United States v. Ventresca*, 380 U.S. 102 (1965); *Beck v. Ohio*, 379 U.S. 89, 92 (1964)(Clark, J., dissenting); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Rugendorf v. United States*, 376 U.S. 528 (1964); *Fahy v. Connecticut*, 375 U.S. 85, 92 (1963)(Clark, J., dissenting); *Ker v. California*, 374 U.S. 23 (1963); *Lopez v. United States*, 373 U.S. 427 (1963); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Lanza v. New York*, 370 U.S. 139 (1962).

<sup>56</sup> *Schmerber*, 384 U.S. 757; *Rugendorf*, 376 U.S. 528; *Ker*, 374 U.S. 23; and *Lanza*, 370 U.S. 139 (4-3 decision).

<sup>57</sup> 367 U.S. 643 (1961).

<sup>58</sup> E.g., *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>59</sup> Thus, it was only after *Mapp* and *Ker* that the Court began to consider whether the denial of a constitutional right could be deemed “harmless.” *Fahy v. Connecticut*, 375 U.S. 85 (1963); see *Chambers v. Maroney*, 399 U.S. 42 (1979).

enforcement agents—"fundamental fairness" or the rules applicable to a "prosecution for violation of a federal law in a court of the United States"?<sup>60</sup>

It is fitting that Justice Frankfurter should express for the Court the judgment of post-World War II America in favor of the right of the individual.

The knock at the door, whether by day or night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and basic constitutional documents of English-speaking peoples.<sup>61</sup>

It did not follow, however, as Mr. Justice Murphy's dissent disingenuously asserted, that "the Fourteenth Amendment prohibits activities which are proscribed by the search and seizure clause of the fourth amendment."<sup>62</sup> Instead, *Wolf* incorporated only "the core of the fourth amendment": "the security of one's privacy against arbitrary intrusion by the police . . . is . . . 'implicit in the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."<sup>63</sup> Had *Wolf* not rejected the exclusionary rule, the Court would soon have been called upon to specify the scope and content of this new "core of privacy" right. Instead, the right sought first to complete itself by evolving its missing remedy. Thus, the standard view of the doctrine between *Wolf* and *Mapp* defines the uncertain right in terms of the remedy of exclusion.<sup>64</sup> The morphine capsules pumped from Mr. Rochin's stomach were excluded to deny "brutality the cloak of law,"<sup>65</sup> but the bedroom conversations electronically seized from Mr. Irvine<sup>66</sup> and the blood sample drawn from Mr. Breithaupt's unconscious person<sup>67</sup> remained admissible. As Professor Francis Allen put it at the time, "the discrepancy between right and remedy bedeviled the career of *Wolf* and left this area of due-process doctrine in a state of unstable equilibrium."<sup>68</sup>

The obstacle to equilibrium was not the exclusionary rule; as suggested, exclusion and reversal are natural judicial responses to

<sup>60</sup> *Wolf v. Colorado*, 338 U.S. 26 (1949).

<sup>61</sup> *Id.* at 28.

<sup>62</sup> *Id.* at 41.

<sup>63</sup> *Id.* at 27-28.

<sup>64</sup> I W. LAFAVE, SEARCH AND SEIZURE 11-12 (2d ed. 1987).

<sup>65</sup> *Rochin v. California*, 342 U.S. 165, 173 (1952).

<sup>66</sup> *Irvine v. California*, 347 U.S. 128 (1954).

<sup>67</sup> *Breithaupt v. Abram*, 352 U.S. 432 (1957).

<sup>68</sup> Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 6.

prosecutions procured by means that are not "fundamentally fair."<sup>69</sup> Contrary to the standard view of the *Wolf-Rochin-Irvine* episode, it was the right itself, not the remedy, that "due process" doctrine could not easily absorb. Due process rights, then and now, are always "complete" rights, in that such rights invariably consist of both a "violation" and an intolerable degree of "harm" to the accused. For example, to exclude testimony by an eyewitness on due process grounds requires showing both that the confrontation with the accused was "unnecessarily suggestive" (the violation) and that there was a consequent "substantial likelihood of misidentification" (the harm).<sup>70</sup> Similarly, the prosecution's failure to disclose exculpatory evidence to the defense (the violation) does not offend due process "unless the omission deprived the defendant of a fair trial" (the harm).<sup>71</sup> Privacy rights are wholly different. Even the violation of a right of privacy at the due process "core" of the fourth amendment does not entail the sort of "harm" that makes a conviction "fundamentally unfair."

Yet it is unarguably true that "the security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society."<sup>72</sup> Escape from *Wolf's* dilemma thus lay only in two possible directions: either, (1) the Court could define the privacy right to include only such egregious intrusions that "harm" could be sensed if not demonstrated; or, (2) it could abandon "harm" and rest exclusion solely on the violation of the defendant's right of privacy.

"The *Irvine* case is of critical importance in the history of the *Wolf* doctrine," as Professor Allen early observed,<sup>73</sup> because it signaled rejection of the first option by refusing to extend *Rochin v. California*<sup>74</sup> to non-violent "police measures . . . that . . . flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment."<sup>75</sup>

A constitutional basis for the exclusion of illegally seized evidence in state prosecutions could not be found in "due process"

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<sup>69</sup> *Rochin*, 342 U.S. at 173.

<sup>70</sup> *Neil v. Biggers*, 409 U.S. 188 (1972)

<sup>71</sup> *United States v. Agurs*, 427 U.S. 97 (1976). Thus, in *United States v. Bagley*, 473 U.S. 667 (1985), the Court acknowledged that "the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless error standard." *Id.* at 680 n.9. See also *United States v. Lovasco*, 431 U.S. 783 (1977) (pre-indictment delay violates due process only where delay unnecessary and prejudicial to defendant).

<sup>72</sup> *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (emphasis added).

<sup>73</sup> Allen, *supra* note 68, at 7.

<sup>74</sup> 342 U.S. 165 (1952).

<sup>75</sup> *Irvine v. California*, 347 U.S. 128, 132 (1954).

alone because, as the Court later stated, "the protections of the fourth amendment . . . have nothing whatever to do with the fair ascertainment of truth at a criminal trial."<sup>76</sup> Only by "incorporating" the fourth amendment could exclusion be based, as it was in federal prosecutions, upon the bare violation of the defendant's "right . . . to be secure against unreasonable searches and seizures."<sup>77</sup>

Severing the violation from the harm was a momentous step. It was both the cause and the effect of the extension of the fourth, fifth,<sup>78</sup> sixth<sup>79</sup> and eighth<sup>80</sup> amendments as limitations on state criminal processes. Thus augmented, "due process" was able to embrace respect for individual dignity, equality and privacy in addition to the "fair ascertainment of truth." The exclusionary remedy, however, meant that these values could be assured only by sacrificing reliable evidence of guilt and thus affronting, in the view of its critics, the demand for effective crime control.

*Mapp* thus thrust to the political foreground the tensions inherent in the protection of privacy and exposed the contradiction that *Wolf* had avoided: the enforcement of a right "basic to a free society"<sup>81</sup> that had "nothing whatever to do with the fair ascertainment of truth . . ."<sup>82</sup> Fashioning a rationale that could harmonize these opposing values, override state autonomy and placate law enforcement interests was a task that even a committed spokesman for a Court united behind a single constitutional theory would find challenging. That it was undertaken by a divided Court on a theory that commanded only four votes in an opinion by a Justice whose commitment to privacy was at best halfhearted would seem to have rendered the task impossible had it not been accomplished.

The fragility of *Mapp* was soon apparent. In his remaining ten years on the Court, Justice Black voted in favor of individual privacy in only six<sup>83</sup> of forty-four fourth amendment cases decided by a divided Court. Thus, by the 1964 term, Justices Clark and Black had abandoned the *Mapp* majority and thereafter became increasingly

<sup>76</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973).

<sup>77</sup> *Irvine*, 347 U.S. at 132.

<sup>78</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>79</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>80</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>81</sup> *Mapp*, 367 U.S. at 656.

<sup>82</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973).

<sup>83</sup> See *v. Seattle*, 387 U.S. 541 (1967); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967); *Schmerber v. California*, 384 U.S. 757, 773 (1966)(Black, J., dissenting); *Linkletter v. Walker*, 381 U.S. 618, 640 (1965)(Black, J., dissenting); *Fahy v. Connecticut*, 375 U.S. 85 (1963); *Wong Sun v. United States*, 371 U.S. 471 (1963).

critical of decisions enforcing or enhancing fourth amendment protection.<sup>84</sup> In *Berger v. New York*,<sup>85</sup> Justice Black justified his literalist interpretation of the fourth amendment that words are not things that can be "seized" by arguing that "eavesdroppers are not merely useful, they are frequently a necessity [in dealing] with such specimens of our society [as] bribers, thieves, burglars, robbers, rapists, kidnappers and murderers,"<sup>86</sup> and announced that:

I continue to believe that the exclusionary rule formulated . . . in the *Weeks* case is not rooted in the Fourth Amendment but rests on the supervisory power of this court. [I]n *Mapp* . . . the close interrelationship between the Fourth and Fifth Amendments . . . as they applied to the facts of that case required the exclusion there of the unconstitutionally seized evidence.<sup>87</sup>

In *Davis v. Mississippi*,<sup>88</sup> Justice Black accused the majority of "so widely blowing up the Fourth Amendment's scope that its original authors would be hard put to recognize their creation."<sup>89</sup> Reflecting the same attitudes that had the previous year produced the Omnibus Crime Control and Safe Streets Act of 1968,<sup>90</sup> he announced that:

[I]t is high time this Court, in the interest of the administration of criminal justice made a new appraisal of the language and history of the Fourth Amendment and cut it down to its intended size. Such a judicial action would make our cities a safer place for men, women and children to live.<sup>91</sup>

Thus, on the eve of the Burger Court, amid a rising tide of fear of "crime in the streets," the counter-attack on the exclusionary rule began. Predictably, it focused on *Mapp*'s vulnerable doctrinal foundation and on the price exacted by the exclusion of reliable evidence of guilt. Earlier in the Term, Justice Black had insisted that the rule had "one primary and overriding purpose, the deterrence of unconstitutional searches and seizures by the police."<sup>92</sup> Thereafter, opponents of exclusion would argue, with increasing success, that the rule should not apply when its use could not be shown to yield a significant marginal deterrent effect. "The application of the rule,"

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<sup>84</sup> *Aquilar v. Texas*, 378 U.S. 108 (1964); *Beck v. Ohio*, 379 U.S. 89 (1964).

<sup>85</sup> 388 U.S. 41 (1967).

<sup>86</sup> *Id.* at 73.

<sup>87</sup> *Id.* at 76, n.3.

<sup>88</sup> 394 U.S. 721 (1969).

<sup>89</sup> *Id.* at 729.

<sup>90</sup> Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455 (1969).

<sup>91</sup> *Id.* at 730.

<sup>92</sup> *Kaufman v. United States*, 394 U.S. 217, 238 (1969)(Black, J., dissenting).

the Court said in *United States v. Calandra*<sup>93</sup> “has been restricted to those areas where its remedial objectives are thought most efficaciously served.”

In 1971, Chief Justice Burger, joined by Justices Black and Blackmun, chose the unlikely vehicle of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>94</sup> in which the majority held that a violation of the fourth amendment gave rise to a federal cause of action for damages, to argue in dissent that the “suppression doctrine” should be supplanted by federal and state statutory damage actions.<sup>95</sup> The dissent in *Bivens* marked a new, open phase in the campaign against the exclusionary rule. Thereafter, every remedy case that came before the Court became an occasion to restrict the application of the exclusionary rule,<sup>96</sup> culminating in the “good faith” exception for searches conducted pursuant to a defective warrant or a statute later found to be unconstitutional.<sup>97</sup>

### III. THE TRANSFORMATION AND RETRANSFORMATION OF THE FOURTH AMENDMENT

The liberal vision of the fourth amendment was enacted by three Court decisions during that remarkable era known as The Sixties. *Mapp* began the process of transformation by “incorporating” the exclusionary rule as a due process-mandated remedy for violations of the amendment.<sup>98</sup> In 1963, *Ker v. California*<sup>99</sup> confirmed what *Mapp* had suggested but could not hold: the content of the incorporated right was identical to the rules applicable in a federal prosecution, a result reached with no more judicial finesse than its author, Mr. Justice Clark, had displayed in his opinion in *Mapp*. Completing the structure was the Court’s decision, in 1967, in *Katz v. United States*,<sup>100</sup> which supplied the analytic framework for determining the scope of the amendment. The finished vision thus en-

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<sup>93</sup> 414 U.S. 338, 348 (1974).

<sup>94</sup> 403 U.S. 388 (1971).

<sup>95</sup> *Id.* at 411, 427, 430 (Burger, C.J., dissenting) (Black, J., dissenting) (Blackmun, J., dissenting).

<sup>96</sup> *E.g.* *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Leon*, 468 U.S. 897 (1984); *Cardwell v. Taylor*, 461 U.S. 571 (1983); *Allen v. McCurry*, 449 U.S. 90 (1980); *United States v. Payner*, 447 U.S. 727 (1980); *United States v. Havens*, 446 U.S. 620 (1980); *United States v. Caceres*, 440 U.S. 741 (1979); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>97</sup> *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Illinois v. Krull*, 107 S. Ct. 1160 (1987).

<sup>98</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

<sup>99</sup> 374 U.S. 23 (1963).

<sup>100</sup> 389 U.S. 347 (1967).

compassed any intrusion upon an individual's "reasonable" expectation of privacy, judged such intrusions against the rigorous content rules developed in federal proceedings, and punished any violation by exclusion of the ill-gotten product, both to deter future violations and to assure the integrity of the judicial process. The Court generously bestowed access to the protection by the "standing" rules it announced in *Jones v. United States*<sup>101</sup> in 1960.

The retransformation of the amendment began almost immediately.<sup>102</sup> Opposition to the Court's "liberal" decisions enlarging the rights of persons suspected or accused of crime was a major plank in the 1968 presidential campaign of Richard Nixon. In 1969, Nixon appointed Warren Burger to replace retiring Chief Justice Earl Warren, and Justice Fortas' resignation the following year made room for the appointment of Justice Blackmun. In January, 1972, Justices Powell and Rehnquist joined the Court, replacing Justices Black and Harlan, who had retired following the end of the previous Term.

The Warren Court decisions of the Sixties provided the doctrinal chrysalis for the retransformation of the fourth amendment in the Seventies and Eighties. *Katz* had abandoned "constitutionally protected areas" and embraced "expectation of privacy" as the touchstone for determining whether an act or intrusion by government agents constituted a "search" or "seizure" within the meaning of the fourth amendment. Further, the strength and weakness of that new standard—its ability to accommodate but not to resolve the clash between opposing interests in crime control and privacy—had been eloquently described only a year earlier, in Justice Harlan's dissenting opinion in *United States v. White*.<sup>103</sup> There, responding to the majority's assertion that the defendant had assumed the risk that an undercover agent might secretly transmit their conversation, he said:

Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present. Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.<sup>104</sup>

Moreover, the implications of *Katz* for the "standing" doctrine,

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<sup>101</sup> 362 U.S. 257 (1960).

<sup>102</sup> Amsterdam, *supra* note 8, at 360-62.

<sup>103</sup> 401 U.S. 745 (1971).

<sup>104</sup> *Id.* at 786 (Harlan, J., dissenting).



although not fully articulated until 1978 in *Rakas v. Illinois*,<sup>105</sup> had begun to affect the formulation of the "standing" inquiry: standing depended on whether, as the Court said in *Mancusi v. DeForte*,<sup>106</sup> the defendant had "a reasonable expectation of freedom from governmental intrusion"<sup>107</sup> in the union office from which the records sought to be suppressed were seized.

The doctrine was similarly prepared for the retransformation of the content of the fourth amendment—the rules for determining whether action within its scope was or was not "reasonable"—from a "monolithic" requirement of probable cause and a warrant to a scheme in which the predicate for any particular intrusion varied according to the severity of the intrusion and the relative strength of the opposing law enforcement and privacy interests. After *Camara v. Mun. Court*<sup>108</sup> and *Terry v. Ohio*,<sup>109</sup> neither warrants nor searches and seizures invariably entailed probable cause or even individualized suspicion.

Finally, Chief Justice Burger had, in the October 1971 Term, initiated the attack on the exclusionary rule that would culminate thirteen years later in the so-called "good faith" exception to the exclusionary rule established in *United States v. Leon*<sup>110</sup> and *Massachusetts v. Sheppard*.<sup>111</sup>

The mysterious aspect of judicial doctrine-making is the process by which national values are mediated by the incumbent justices of the Supreme Court. President Nixon undoubtedly expected his appointees to render the Constitution more favorable to the collective interest in crime control and thus to subordinate the privacy and autonomy of the individual where those interests were in conflict. If the Burger Court were so minded, as it convened for the first time in full strength in the winter of 1972, it had the doctrinal tools at hand.

That the Court has increasingly restricted the breadth of the fourth amendment's protection is indisputably evident from the doctrinal record. With a few exceptions,<sup>112</sup> in every decision con-

<sup>105</sup> 439 U.S. 128 (1978).

<sup>106</sup> 392 U.S. 364, 368 (1968).

<sup>107</sup> See Allen, *The Wolf Case: Search and Seizure, Federalism and the Civil Liberties*, 45 U. ILL. L. REV. 1, 22-23 (1950).

<sup>108</sup> 387 U.S. 523 (1967).

<sup>109</sup> 392 U.S. 1 (1968).

<sup>110</sup> 468 U.S. 897 (1984).

<sup>111</sup> 468 U.S. 981. See also *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. at 411 (Burger, C.J., dissenting).

<sup>112</sup> The exceptions are: (1) *Arizona v. Hicks*, 107 S. Ct. 1149 (1987) (moving stereo to observe serial number constituted a "search"); (2) *United States v. Johnson*, 457 U.S.

cerning the scope of the amendment since *Katz v. United States*<sup>113</sup> the Court has found the challenged "intrusion" to be outside the protection because the government activity did not amount to a "search" or "seizure" that "violated" a "protected," "reasonable" or "legitimate" "expectation of privacy" in the "persons, houses, places or effects" of a person with "standing."<sup>114</sup>

The Court's preference for crime control values is less apparent in its decisions affecting the content of the fourth amendment. Of the one hundred and ten such cases decided since *Mapp*, the split is roughly three to two in favor of the power to search and seize. Beneath the raw numbers, however, a powerful and undeniable preference for collective security over individual privacy may be discerned.

A number of the content decisions that opt for privacy at the margin have since been abandoned<sup>115</sup> or drastically limited.<sup>116</sup>

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537 (1982)(applying *Payton v. New York*, 445 U.S. 573 (1980), to cases pending on direct appeal on the date *Payton* was decided, and generally adopting Mr. Justice Harlan's views on the "retroactivity" of the Court's decisions; (3) *Torres v. Puerto Rico*, 442 U.S. 465 (1979)(affirming that the fourth amendment applies to Puerto Rico); (4) *Davis v. Mississippi*, 394 U.S. 721 (1969)(rejecting the doctrinally bizarre notions, apparently unique to Mississippi, that the fourth amendment does not apply to the "investigatory stage" or to "trustworthy" evidence such as fingerprints); (5) *Mancusi v. DeForte*, 392 U.S. 364 (1968)(union official had "standing" to object to the seizure of records in his custody that were seized from an office he shared with other officials); (6) *Bumper v. North Carolina*, 391 U.S. 543 (1968)(acquiescence to a claim of authority to search pursuant to a warrant not sufficient to show voluntary consent).

As this list indicates, questions of retroactivity and consent are treated here as affecting the scope of the fourth amendment, although both exert far less influence on the reach of the amendment than do the more typical "definitional" scope elements of "search," "seizure," and "expectation of privacy." Valid consent to a search or seizure affects the scope of privacy at two levels. It operates to defease the protection the amendment would otherwise provide in the absence of such consent. More generally, the doctrinal criteria for a valid consent operate to contract or expand the scope of the amendment by easing or retarding such defeasance. As *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973), illustrates, those criteria are important to the de facto scope of privacy, and they respond to the same political considerations that actuate the Court's definitional scope decisions.

Retroactivity decisions, although the least significant of the doctrines that restrict the scope of the right, have played an important symbolic role in post-*Mapp* fourth amendment jurisprudence. The device was created (or at least reincarnated), one will recall, to deny application of the exclusionary rule to cases already "final" on the date *Mapp* was decided. *Linkletter v. Walker*, 381 U.S. 618 (1965).

<sup>113</sup> 389 U.S. 347 (1967).

<sup>114</sup> These developments are examined in detail in section IV.

<sup>115</sup> *Preston v. United States*, 376 U.S. 364 (1964) and *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968)(distinguished and abandoned in *Chambers v. Maroney*, 399 U.S. 42 (1970)); *Aquilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969)(explicitly abandoned in *Illinois v. Gates*, 462 U.S. 213 (1983)); *Robbins v. California*, 453 U.S. 420 (1981)(abandoned in *United States v. Ross*, 456 U.S. 798 (1982)).

<sup>116</sup> *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S.

Others simply reaffirm established principles, applying them to relatively uncontroversial fact situations.<sup>117</sup> Several of the Court's content decisions side with privacy values on the merits of the particular dispute, but introduce doctrine that, generally applied, increases the government's power to search and seize legitimately.<sup>118</sup> Although

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753 (1979)(limited by *United States v. Ross*, 456 U.S. 798 (1982) and *United States v. Johns*, 469 U.S. 478 (1985)); *Whiteley v. Warden*, 401 U.S. 560 (1971)(potentially limited by the "good faith" exception of *Leon-Sheppard*); *Sibron v. New York*, 392 U.S. 40 (1968)(limited by *Adams v. Williams*, 407 U.S. 143 (1972)).

<sup>117</sup> *Stanford v. Texas*, 379 U.S. 476 (1965)(general search warrant which does not describe with particularity things to be seized an unconstitutional "general warrant"); *James v. Louisiana*, 382 U.S. 36 (1965)(per curiam)(search of arrestee's home two blocks from scene of arrest beyond the zone lawfully searched incident to arrest); *Sabbath v. United States*, 391 U.S. 585 (1968)(applying knock-and-announce statute to arrest); *Recznik v. City of Lorain*, 393 U.S. 166 (1968)(per curiam)(defendant's home not rendered a "public place" by presence of a large number of persons on the premises); *Connally v. Georgia*, 429 U.S. 245 (1977)(per curiam)(magistrate with financial incentive to grant search warrants not "neutral and detached"); *Lo-Ji Sales Inc. v. New York*, 442 U.S. 319 (1979)(magistrate who participated in execution of general search warrant not neutral and detached; warrant to seize two films and "similarly obscene materials" an unconstitutional general warrant); *Brown v. Texas*, 443 U.S. 47 (1979)(groundless stop violates fourth amendment); *Florida v. Royer*, 460 U.S. 491 (1983)(arrest without probable cause occurred when police seized airline passenger's luggage and passenger was not free to leave interrogation room).

<sup>118</sup> Although *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967), and *See v. Seattle*, 387 U.S. 541 (1967), brought administrative inspections within the scope of the fourth amendment (overruling *Frank v. Maryland*, 359 U.S. 360 (1959), which had deemed non-criminal searches "peripheral" to the concerns of the amendment), the decisions in these cases, together with the stop-and-frisk decisions the following Term, introduce into fourth amendment doctrine the idea of "variable content"—the notion that the predicate for a search or seizure may vary according to the Court's assessment of the degree of intrusiveness it entails. *Camara* and *See*, for example, permit fire, health and housing code inspections pursuant to a warrant issued solely on a showing that the particular inspection falls within a reasonable legislative or administrative program for the periodic inspection of similar premises. Despite Justice Stevens' insistence, in *Marshall v. Barlow's Inc.*, 436 U.S. 307, 325 (1978)(Stevens, J., dissenting), and the "fire scene" cases, *Michigan v. Tyler*, 436 U.S. 499, 512 (1978)(Stevens, J., concurring) and *Michigan v. Clifford*, 464 U.S. 287, 299 (1984)(Stevens, J., concurring), that warrants may only be issued on probable cause, those cases permit occupational safety inspections and fire scene investigations under warrants issued without "individualized suspicion" but solely on a showing of compliance with reasonable legislative or administrative standards.

Similarly, although *Delaware v. Prouse*, 440 U.S. 648 (1979) held that an automobile could not be stopped without "reasonable suspicion" (the *Terry* predicate), its dictum approving roadblock stops of all motorists pursuant to administrative regulations has proved to be the more influential feature of the decision. *See, e.g., Texas v. Brown*, 460 U.S. 730 (1983).

*See also* *Walter v. United States*, 447 U.S. 649 (1980), in which the Court found the government's search of misdelivered goods to a third party unreasonable, but planted the suggestion that the fourth amendment would not be implicated if the agents had merely replicated the scope of the private search conducted by the third party, a notion that became the holding of *United States v. Jacobsen*, 466 U.S. 109 (1984); *United States v. Place*, 462 U.S. 696 (1983)(holding that detention of defendant's luggage for 90 min-

some of the remaining twenty cases establish or confirm important limitations on governmental power to invade privacy,<sup>119</sup> they are plainly eddies in a gathering current that flows strongly in the opposite direction.

As the most politically vulnerable component of the protection, the exclusionary remedy has been both directly limited<sup>120</sup> and shamelessly exploited as a basis for limiting the scope,<sup>121</sup> and content<sup>122</sup> of the amendment. Recently, however, the indirect assault

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utes exceeded the authority derived from investigative detention, but reaching out to say that exposing the luggage to a narcotics detection dog was not a "search" within the meaning of the fourth amendment); and *Hayes v. Florida*, 470 U.S. 811 (1985) (re-affirming *Davis v. Mississippi*, 394 U.S. 721 (1969), but suggesting that a warrant to detain for fingerprinting might be based on less than probable cause to arrest and that field detention for fingerprinting on "reasonable suspicion" was supported by case law).

<sup>119</sup> Cases limiting the zone of a search incident to arrest include: *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Vale v. Louisiana*, 399 U.S. 30 (1970); and *Chimel v. California*, 395 U.S. 752 (1969). Cases limiting searches and stops near international borders include: *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Ortiz*, 422 U.S. 891 (1975); and *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). Cases limiting the power to enter a residence to effect an arrest include: *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Steagald v. United States*, 451 U.S. 204 (1981); and *Payton v. New York*, 445 U.S. 573 (1980). Cases limiting entry and search of fire and homicide scene include: *Michigan v. Clifford*, 464 U.S. 287 (1984); *Thompson v. Louisiana*, 469 U.S. 17 (1984) (per curiam); *Michigan v. Tyler*, 436 U.S. 499 (1978); and *Mincey v. Arizona*, 437 U.S. 385 (1978).

*See also* *Winston v. Lee*, 470 U.S. 753 (1985) (predicate beyond probable cause and a warrant required for surgical search of accused); *Tennessee v. Garner*, 471 U.S. 1 (1985) (deadly force may not be used to seize fleeing felon unless probable cause exists to believe that suspect poses threat of great bodily harm to arresting officer or others); *Dunaway v. New York*, 442 U.S. 200 (1979) (probable cause required for detention for custodial interrogation indistinguishable from traditional arrest); *Ybarra v. Illinois*, 444 U.S. 85 (1979) (presence in tavern subject to search warrant not a sufficient predicate for search or frisk of patron); *Franks v. Delaware*, 438 U.S. 154 (1978) (permitting challenge to a facially valid affidavit on a substantial preliminary showing of probable cause based on knowing or reckless false statement); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (requiring an ex parte judicial determination of probable cause as a predicate for post-arrest detention); *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297 (1972) (declining to exempt from the warrant requirement electronic surveillance of domestic organizations ordered by the President on national security grounds).

<sup>120</sup> *Illinois v. Krull*, 107 S. Ct. 1160 (1987); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984); *Cardwell v. Taylor*, 461 U.S. 571 (1983) (per curiam); *Allen v. McCurry*, 449 U.S. 90 (1980); *United States v. Payner*, 447 U.S. 727 (1980); *United States v. Havens*, 446 U.S. 620 (1980); *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>121</sup> *E.g.*, *Rakas v. Illinois*, 439 U.S. 128, 137-38 (1978); *United States v. Peltier*, 422 U.S. 531 (1975), especially Justice Brennan's dissent, *Peltier*, 422 U.S. at 561-62 (Brennan, J., dissenting); *Schneekloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

<sup>122</sup> *Ybarra v. Illinois*, 444 U.S. 85, 97 (1979) (Burger, C.J., dissenting); *Illinois v.*

on the exclusionary rule appears to have been deflated by the success of the direct attack.

Fourth amendment doctrine sometimes appears to be an elaborate structure of jury-rigged accommodations between collective security and individual privacy in which each doctrinal component is constantly in danger of collapsing into an undifferentiated inquiry as to whether the official conduct was "reasonable." The "good faith" exception is an obvious and dramatic example of this tendency of the fourth amendment to slump toward the textual minimum as it absorbs the stresses imposed by the clash between collective and individual "rights."

Whether the Court's decisions in *Gates*, *Leon*, and the "scope" cases examined in this essay simply relieve the stress that actuates this inclination toward more flexible limits on law enforcement or whether, on the other hand, they signal a further and perhaps complete deterioration of the categorical structure of fourth amendment doctrine, will depend on society's commitment to the value of individual privacy. Heightened fear of crime or terrorism or drug use will inevitably reduce the zone of privacy that individuals allow each other, and the fourth amendment cannot protect us from ourselves.

Thus, pursuing the question, for example, of whether *Leon* will remain an "exception" or be so broadly applied that it supplants the "rule" soon transforms the technical assessment of the exclusionary rule into a speculative inquiry that is more political than doctrinal. The legal analyst walks a narrow path in this realm. To fail to recognize the political foundations of the doctrinal choices would give one the distorted view of a pre-Galilean astronomer; but even the right perspective does not entitle one to render cosmic judgments about phenomena beyond one's powers of observation.

My solution is to acknowledge that the doctrine follows a politically centered orbit and to assert that for the past fifteen years the Court's fourth amendment decisions have consistently, though not invariably, favored the state's power to intrude, at the margin of its authority, over the individual's assertion of a right to freedom from such intrusion.

#### IV. THE SCOPE OF THE FOURTH AMENDMENT

The challenge to one who would understand the scope of the fourth amendment lies in solving the puzzle of its analytic redundancy. All of the major concepts from which its scope is formed—

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*Gates*, 462 U.S. 213 (1983); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); see *United States v. Robinson*, 414 U.S. 218 (1973).

search, seizure, legitimate expectation of privacy, consent, and standing—beg the ultimate question of what sorts of official acts are limited by the amendment's "reasonableness" stricture. There are several possible interpretations. First, each of these rubrics may express separate aspects of the inquiry, reflecting the complexity and significance of the Amendment's role in American society. Second, the redundancy may reflect only circumstantial—not political—variations in the scope inquiry. Third, the redundancy may expose the central core of the scope inquiry, yielding a more encompassing and numinous quality from which these rubrics all derive. Finally, the redundant categories may simply reflect a general antipathy toward the protection of individual privacy, because each has been used by the Court as yet another device for constricting the scope of the fourth amendment.

This Article has dwelt long enough on the generalities of the subject. Fourth amendment doctrine is generated to explain or justify the resolution of the endless variety of conflicts between individual privacy and collective security. It is from the study of those practical accommodations that the nature of the fourth amendment will emerge. Because a doctrinal system is built up from successive layers, all of which must be rendered consistent with each additional tier, the present task is best approached by the same route.

By the time of *Katz*, the conceptual apparatus it replaced had already been stretched to the point of transparency. *Silverman v. United States*<sup>123</sup> and *Clinton v. Virginia*<sup>124</sup> had reduced the requirement of "physical penetration" to little more than a metaphor. In these cases and *Wong Sun*<sup>125</sup> the Court had applied the fourth amendment to the seizure of a person's words or statement.

What is remarkable, however, is how little was changed by *Katz's* abandonment of the "trespass" standard of *Olmstead v. United States*<sup>126</sup> and *Goldman v. United States*<sup>127</sup>. True, it changed the result in the electronic surveillance cases. However, it did not bring the use of sense enhancing devices within the scope of the amendment as a general proposition.<sup>128</sup> Moreover, *Katz* had no effect on the scope-narrowing doctrines of "plain view," "consensual encounter," "voluntary transfer," consent or abandonment. Indeed, the

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<sup>123</sup> 365 U.S. 505 (1961).

<sup>124</sup> 377 U.S. 158 (1964)(per curiam).

<sup>125</sup> 371 U.S. 471 (1963).

<sup>126</sup> 277 U.S. 438 (1928).

<sup>127</sup> 316 U.S. 129 (1942)(These cases held wiretapping and electronic eavesdropping to be outside the fourth amendment when accomplished without trespassing on the surveilled premises.)

<sup>128</sup> See, e.g., *United States v. Knotts*, 460 U.S. 276 (1983).

main function of the expectation of privacy rubric minted in *Katz* seems to have been to provide an additional ground for denying fourth amendment protection by refusing "legitimacy" to assertions of privacy in, for example, one's voice and handwriting,<sup>129</sup> bank records,<sup>130</sup> open fields<sup>131</sup> or any "private enclave" visible from public airspace.<sup>132</sup>

"Plain view," although sometimes misperceived as a content issue,<sup>133</sup> in fact serves the extremely significant function of delineating the kinds of observations that are not "searches" and thus are not within the protection of the amendment. When government agents are in an area where they have a right to be, doing what they have a right to do, the acquisition of information in "plain view" does not constitute a "search."<sup>134</sup> Moreover, if that information provides a predicate for a seizure that can be accomplished without engaging in conduct itself subject to protection—such as entering private premises—the content rules allow the immediate seizure of such material.<sup>135</sup>

The "plain view" rule works without complication when the officer is in a public place using his or her unaided senses. When the officer's vantage point is from a private place, a predicate for his or her presence is required. When sense enhancing equipment is used to acquire a "plain view," the analysis shifts to the other side of the equation. Instead of asking whether the official conduct was a search, the question becomes whether that conduct violated a "legitimate expectation of privacy." However this question is answered, the conclusion completes the circle: that there was or was not a "search."

It is invulnerably established by *Berger* and *Katz* that electronic surveillance of conversations, without the consent of any party thereto, constitutes a "search and seizure." It was to bring such conduct within the reach of the fourth amendment that the "expectation of privacy" rubric was coined. Although the Court has not yet faced such a case, surely the same would be true of video

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<sup>129</sup> *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973).

<sup>130</sup> *United States v. Miller*, 425 U.S. 435 (1976).

<sup>131</sup> *Oliver v. United States*, 466 U.S. 170 (1984).

<sup>132</sup> *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>133</sup> *See, e.g., Illinois v. Andreas*, 463 U.S. 765, 778 (1983) (Brennan, J., dissenting).

<sup>134</sup> Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 244 (6th ed. 1986).

<sup>135</sup> Subject to first amendment limitations when books, movies, tapes or other forms of protected expression are involved. *See, e.g., New York v. P. J. Video, Inc.*, 475 U.S. 868, 873 (1986).

surveillance.<sup>136</sup>

Recent attention has focused, however, not on indiscriminate audio or video surveillance, but on devices that yield more limited information about the individual's actions or possessions, including electronic tracking beacons ("beepers") and discrete sensing devices such as drug-sniffing dogs and other tests that reveal only the presence or absence of illegal substances. Because the use of these sorts of devices has an obvious impact on privacy but has, with one empty exception,<sup>137</sup> been ruled to be outside the scope of the fourth amendment, detailed scrutiny of the Court's decisions in this area may illuminate the larger topic.

#### A. THE "BEEPER" CASES

The first of these cases, *United States v. Knotts*<sup>138</sup> presented the issue in its mildest form: whether the use of a beeper to track a five gallon drum of chloroform from its place of purchase to defendant's secluded cabin "violated [his] . . . rights secured by the Fourth Amendment."<sup>139</sup> The beeper—a radio transmitter that emits a periodic signal—was placed in the drum with the consent of the seller and was used to follow defendant's automobile. When visual and electronic contact were lost, it located the drum when it came to rest at defendant's theretofore unknown residence. Because the defendant did not challenge the installation of the beeper or the transfer of the drum containing it, only its use to track and locate the drum was at issue. The Court's response was more confident than convincing. The Court stated that "when [defendant] travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction . . . and the fact of his final destination when he exited from

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<sup>136</sup> *People v. Teicher*, 52 N.Y.2d 638, 422 N.E.2d 506, 439 N.Y.S.2d 846 (1981); see *United States v. Torres*, 751 F.2d 875 (1984), *cert. denied*, 470 U.S. 415 (1985).

<sup>137</sup> *United States v. Karo*, 468 U.S. 705, 714-18 (1984); see *infra* text accompanying notes 165-182.

<sup>138</sup> 460 U.S. 276 (1983).

<sup>139</sup> *Id.* at 277. It is worth emphasizing at the outset that to state the issue in this way confounds scope and content: whether the fourth amendment has been "violated" depends on whether it applies to the challenged conduct, and if so, whether any of the rules governing the predicate for or limits on such conduct have been breached. Where, as here, the "reasonableness" inquiry is forestalled by the conclusion that no "search" or "seizure" occurred, it is analytically superfluous, and subtly misleading, to ask whether the amendment has been "violated." The question, rather, is whether the conduct "implicates" or "affects" fourth amendment interests. As will be discussed, the distinction becomes even more crucial when the scope inquiry turns on the defendant's "standing" to invoke the protection, if any, of the amendment.



public roads onto private property."<sup>140</sup>

Because visual surveillance would have revealed this same information, "scientific enhancement of [that capability] . . . raises no constitutional issues which visual surveillance would not also raise."<sup>141</sup> The public nature of defendant's activities was deemed to put them beyond the protection of the amendment, and the government's use of an electronic device to acquire no more information than the defendant "voluntarily conveyed to anyone who wanted to look" did "not alter the situation."<sup>142</sup>

On several grounds, this conclusion seems too easily reached. In the first place, the beeper did serve a purpose that visual surveillance could not have reproduced: it enabled the officers to locate the drum in defendant's cabin after it was removed from the public streets and from the vehicle in which it was transported. The Court's assertion that "no . . . expectation of privacy extended to the visual observation of [defendant's] . . . automobile arriving on his premises after leaving a public highway, nor to movements of . . . the drum . . . outside the cabin in the 'open fields' "<sup>143</sup> stretches the "plain view" doctrine to include the observations of a hypothetical as well as an actual observer.<sup>144</sup> This idea is utterly inconsistent with the basic fourth amendment principle that an unreasonable search or seizure cannot be rescued by the fact that it *could have been* reasonably conducted, for example, that because a warrant, if sought, would have been granted it was permissible to act without a warrant.<sup>145</sup> The use of a hypothetical observer to remove surveillance by beeper from the scope of the amendment is no more acceptable than the use of a hypothetical warrant to salvage an intrusion that violates its content. It is only less obvious. It has the same capacity to nullify fourth amendment rights, for just as there is a "reasonable" way to conduct every search, there are modes by which all phenomena may be observed without "searching."

Suppose that Mr. Katz had placed his call from an unenclosed public telephone of the sort that are rapidly replacing the classic telephone booth. Because a person standing nearby *could* overhear the user's conversation, does it follow that the government is free to

<sup>140</sup> *Knotts*, 460 U.S. at 281-282.

<sup>141</sup> *Id.* at 285.

<sup>142</sup> *Id.* at 281-82.

<sup>143</sup> *Id.* at 282.

<sup>144</sup> See LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291 (1986), for criticism of the hypothetical observer in *United States v. Knotts* and other "plain view" cases.

<sup>145</sup> See, e.g., *Washington v. Chrisman*, 455 U.S. 1, 14 (1982) (White, J., dissenting); *Katz v. United States*, 389 U.S. 347, 357 (1967).

use an electronic device to do the same thing? The argument for such a result is not as farfetched as it may at first appear. The fact that bystanders or, as in *Knotts*, other highway users, have no interest in the information and have not *in fact* noted the words or route of the defendant is apparently of no consequence. Whether there has been a "search" or "seizure" does not depend, according to *Knotts*, on the behavior of actual auditors or observers. What counts is that the defendant "voluntarily conveyed to anyone who wanted to look" or listen the information that the government has electronically acquired. The fourth amendment confers no right of anonymity: if personal information is exposed to others and no privilege protects it, those others may, and if subpoenaed must, disclose it to government.<sup>146</sup>

The power of the government electronically to acquire information voluntarily exposed to an indifferent public finds support in *Katz* itself. There the Court noted that the defendant "shut the door behind him" to exclude "the uninvited ear . . . not the intruding eye. . . What a person knowingly exposes to the public . . . is not a subject of fourth amendment protection."<sup>147</sup> Therefore, the Court in *Knotts* adds, the government may seize information thus exposed by any such means as "science and technology [may] afford. . . ."<sup>148</sup> However, cannot the user of an unenclosed booth rely upon the fact that there was no one within normal earshot when he or she spoke? Perhaps he or she can. Perhaps also the highway traveller ought to be able to rely on the fact that there were no vehicles in sight for long stretches or when he or she turned onto private premises. However, that is precisely the proposition that *Knotts* rejects without a dissenting vote.

Although one may balk at the application of *Knotts* to surveillance of conversations, the Court's reference to *Smith v. Maryland*<sup>149</sup> adds strength to the conclusion that it is the fact of "voluntary" exposure, not the limited character of the information, that rendered the conduct beyond the scope of the amendment. In *Smith*, the Court denied the legitimacy of the defendant's claimed expectation of privacy in the numbers dialed from his home telephone. As in

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<sup>146</sup> *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979); *Miller*, 425 U.S. at 443 (1976); *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966); *but cf.* *United States v. Karo*, 468 U.S. 705, 716 n.4. (1984) (Mere disclosure to another, however, does not extinguish the right of privacy in the information disclosed because "[t]here would be nothing left of the Fourth Amendment right of privacy if anything that a hypothetical government in power might reveal is stripped of constitutional protection." (Emphasis in original.)).

<sup>147</sup> *Katz v. United States*, 389 U.S. 347, 351, 352 (1967).

<sup>148</sup> *Knotts*, 460 U.S. at 282.

<sup>149</sup> 442 U.S. 735 (1979).

*United States v. Miller*,<sup>150</sup> the defendant's "voluntary conveyance" of the information to a bank or telephone company constituted an "assumption of the risk" that it would be transmitted to the government<sup>151</sup> and "[w]e are not inclined to hold," the Court quoted from *Smith*, "that a different constitutional result is required because the telephone company has decided to automate."<sup>152</sup> The point is not that the monitoring of conversations is indistinguishable from electronic tracking. Instead the point, which will be addressed later,<sup>153</sup> is that whether information has been "knowingly exposed" cannot be determined without at least implicit reference to the rules that specify permissible surveillance techniques.

*United States v. Karo*,<sup>154</sup> decided the following Term, moved several magnitudes further in exempting the use of an electronic tracking beacon from scrutiny under the fourth amendment. The government there obtained a court order authorizing the installation and monitoring of a beeper in a can of ether that was to be sold to the defendants. The District Court later found the order invalid because the government's affidavits contained deliberate misrepresentations. The government did not challenge that ruling on appeal. Thus, suppression of the information acquired by use of the beeper could be avoided only by finding the activity beyond the scope of the amendment—that is, neither a search nor a seizure.

The occasions for finding an intrusion governed by the amendment were several. A search or seizure might have occurred: (1) when the beeper was placed in the can prior to its delivery to defendant; (2) when the encumbered can was transferred to defendant Karo; (3) when the beeper was activated and used to follow Karo from the point of purchase to his home; (4) when it was used to verify that the can remained in Karo's home; (5) when it was used to relocate the can after it had been moved, undetected, to the home of defendant Horton, and, later, at the home of Horton's father; (6) when it was used to discover, the following day, that the can had again been moved; (7) when it was used to locate the can in a commercial storage locker rented by Horton; (8) when it was used to locate the can at another storage facility in a locker rented by defendants Horton and Harley; (9) when it was used to track the can

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<sup>150</sup> 425 U.S. 435 (1976).

<sup>151</sup> *Id.* at 443; *Smith*, 442 U.S. at 744-45.

<sup>152</sup> *Knotts*, 460 U.S. at 283. Very recently, the Court used the same reasoning to deny the existence of a "reasonable . . . expectation of privacy in trash left for collection in an area accessible to the public . . ." *California v. Greenwood*, 108 S. Ct. 1625, 1629 (1988).

<sup>153</sup> See *supra* notes 234-242 and accompanying text.

<sup>154</sup> 468 U.S. 705 (1984).

from the locker to the home of defendant Rhodes; (10) when it was used to track the can from there to the house in Taos, New Mexico, rented by defendants Horton, Harley and Steele, and thereafter (11) to determine that the can was still inside the house.<sup>155</sup>

Following these events, the agents "applied for and obtained a warrant to search the Taos residence based in part on information derived through use of the beeper."<sup>156</sup> The issue on the defendants' motion to suppress the cocaine seized under the warrant was whether the use of the beeper supplied information invalidated the seizure. The *Knotts* rule exempting beeper surveillance that "reveal[s] . . . no information that could not have been obtained through visual surveillance," eliminated from fourth amendment concern the tracking described in items (3), (9) and (10).<sup>157</sup> The remaining occasions may be conveniently discussed in three general categories: the transfer to defendant of the can containing a government-planted beeper; its use to relocate the can in private lockers and residences; and its use to determine the presence or absence of the can in such places.

The Court held that the transfer to Karo of the can containing an unmonitored beeper was neither a search nor a seizure. Its "potential" to invade privacy was not sufficient to constitute a "search" because "a holding to that effect would mean that a policeman walking down the street carrying a parabolic microphone capable of picking up conversations in nearby homes would be engaging in a search even if the microphone were not turned on."<sup>158</sup> Nor was the transfer a "seizure" because:

it cannot be said that anyone's possessory interest was interfered with in a meaningful way. At most there was a technical trespass on the space occupied by the beeper. . . [I]f the presence of a beeper in the can constituted a seizure merely because of its occupation of space, it would follow that the presence of any object, regardless of its nature, would violate the fourth amendment.<sup>159</sup>

That the Court would so glibly dismiss the case for fourth amendment limitations on the government's power to plant electronic tracking devices in private possessions is a discouraging reminder, if one were needed, of the low regard in which individual privacy is now held. A case for the Court's conclusion could perhaps be made on other grounds, including the discrete character of

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<sup>155</sup> *Id.* at 708-710.

<sup>156</sup> *Id.* at 710.

<sup>157</sup> *Id.* at 707.

<sup>158</sup> *Karo*, 468 U.S. at 712.

<sup>159</sup> *Id.* at 712-713.

the information sought (location) or the character of the substance contained in the can (ether) or by more general assessment of “the critical question . . . whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic . . . observer without at least the protection of a [predicate] . . . requirement.”<sup>160</sup>

From this latter perspective, it is not at all self-evident that the Court’s hypothetical officer with a parabolic microphone “capable of picking up conversations in nearby homes” poses a risk irrelevant to the fourth amendment’s concern for individual privacy. It is easy to agree that the hypothetical homeowner has no fourth amendment complaint against the unrealized threat to his or her privacy because the threat is not sufficiently focused to give legal standing to any particular homeowner. But the same cannot be said of a person who receives a container in which government agents have planted an electronic tracking beacon. If the fourth amendment exerts any control over such conduct, the transferee has standing to invoke it. That the amendment does limit the government’s use of beepers is a necessary implication of the Court’s statement that the transferor’s “consent was sufficient to validate the placement of the beeper in the can.”<sup>161</sup> Obviously, the Court’s unstated assumption is that the placing of a beeper—monitored or not—in a private container without consent constitutes a search or seizure and thus falls within the protection of the amendment.

Just who might have standing to assert that protection—as owner or possessor of the container or the premises on which it is located—is a subplot that provoked a lively debate between Justice White and concurring Justice O’Connor.<sup>162</sup> But neither takes the position that the owner or possessor of a beeper-encumbered container lacks standing.<sup>163</sup> The Court’s hypothetical, therefore, serves only to distract attention from the unexamined distinction on which protection depends—the difference between “placing” a beeper in a private container and “receiving” one in which a beeper has already been placed. By manipulating three of the components that affect the “scope” determination, “search,” standing, and consent, the Court is able to withhold fourth amendment protection from the transferee (who seeks it) while granting it to the transferor (who does not) without offering a reasoned justification for the distinction.

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<sup>160</sup> *United States v. White*, 401 U.S. 745, 786 (1971)(Harlan, J., dissenting).

<sup>161</sup> *Karo*, 468 U.S. at 711.

<sup>162</sup> *Id.* at 716 n.4, 722-724.

<sup>163</sup> *Id.*

The Court's conclusion that the transfer of the container was not a "seizure" illustrates another variety of analytic mistake (or tactic, to the cynical observer): that of confounding the scope and the content of the fourth amendment. Justice White's opinion for a six-justice majority on the issue argues that no seizure occurred upon transfer of the can containing the beeper because otherwise "it would follow that the presence of any object, regardless of its nature, would violate the Fourth Amendment."<sup>164</sup> Of course, it seems ludicrous to suggest that the "presence" of any foreign object in a container *violates* the fourth amendment. But it is not extravagant to propose that when government contrives to place a tracking device in a container to be transferred to an unwitting third party, its action may *implicate* fourth amendment concerns sufficient to warrant the Court's serious consideration whether such conduct ought to be entirely free of constitutional restraint. Whether that object of itself or because it is an electronic tracking beacon "violates" the amendment is a content, not a scope, question. By confounding the issue, Justice White's argument diverts attention from the beeper's threat to privacy to the irrelevant proposition that not every unwanted object placed in a container with the transferor's consent "violates" the fourth amendment rights of the transferee.

What gives the majority opinion in *Karo* its apparent logic is the Court's use of the form of analogic reasoning, a mode as familiar as a lullaby to the common law mind. Because an unactivated eavesdropping device on a public street is not a "search," neither is a tracking device placed inside a private container. Because receiving a package in which government agents had placed a stone or a feather would not be a "seizure," neither is receipt of a package containing an electronic locator. The danger in reasoning from hypothetical to actual results is that if the supposed facts are not true to life, the judgment drawn from them will be equally artificial. By the same token, if a particular result is sought, proxy facts sufficient to the task can always be imagined unless limited by the requirement of plausibility.

Perhaps the flawed judgment that transfer of the beeper-encumbered can entailed no search or seizure is rendered inconsequential by the Court's ensuing conclusion that "[T]he monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence."<sup>165</sup> For such a

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<sup>164</sup> *Id.* at 713.

<sup>165</sup> *Id.* at 714.

rule would seem to guarantee, as the government lamented, that “[F]or all practical purposes they will be forced to obtain warrants in every case in which they seek to use a beeper, because they have no way of knowing in advance whether the beeper will be transmitting its signals from inside private premises.”<sup>166</sup>

Although the Court responds that the burden of obtaining warrants when they are required “is hardly a compelling argument against the requirement,”<sup>167</sup> the Court’s holding suggests that the government’s concern may be unfounded. The Court assumes that “prior to its arrival at the second warehouse, the beeper was illegally used to locate the ether in a house or other place in which [some of the defendants] . . . had a justifiable claim to privacy.”<sup>168</sup> It holds that the fourth amendment was violated when “the beeper was used to locate the ether in a specific house in Taos, [New Mexico].”<sup>169</sup> “Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of fourth amendment oversight.”<sup>170</sup>

Thus, exclusion of the evidence can be avoided only if information derived from the *illegal* use of the beeper was not necessary in establishing probable cause for the warrant to search the Taos residence. Tracking the can from defendant Rhodes’ home to “the immediate vicinity of the Taos residence”<sup>171</sup> falls, as we have seen, within the *Knotts*’ no-search ruling, as does the use of the beeper to track the can from the second storage facility to Rhodes’ home.<sup>172</sup> Only two further moves are required to divorce the tainted beeper evidence from the warrant under which the cocaine was seized: first, that the admittedly illegal monitoring prior to the can’s arrival at the second warehouse did not contribute to its discovery there, and, second, that locating the can at the second warehouse was not itself accomplished by illegal monitoring.

Meeting these conditions, however, would seem to be foreclosed by the illegal monitoring that verified that the can was in Karo’s home,<sup>173</sup> relocated it in defendant Horton’s home and, later, Horton’s father’s home,<sup>174</sup> and the illegal monitoring that located

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<sup>166</sup> *Id.* at 718.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 720.

<sup>169</sup> *Id.* at 714.

<sup>170</sup> *Id.* at 716.

<sup>171</sup> *Id.*

<sup>172</sup> Items (10) and (9).

<sup>173</sup> Item (4).

<sup>174</sup> Item (5).

the can in the first storage locker.<sup>175</sup>

The Court's cryptic conclusion to the contrary seems at first reading completely arbitrary: "No prior monitoring of the beeper contributed to [the] . . . discovery . . . that it had been moved to the second storage facility."<sup>176</sup> Although the argument is entirely tacit, the Court's reasoning appears to be as follows: If the beeper had not been activated or monitored prior to its use to locate the can in the second storage locker, obviously no "prior monitoring" could have contributed to that discovery. Therefore, the actual prior monitoring was irrelevant to the monitoring that located the beeper in the second storage facility. The prior monitoring was constitutionally insignificant, this argument concludes, because the beeper would nonetheless have disclosed the can's location at the second storage facility.

Only when the reasoning is made explicit does the defect in the Court's argument become visible. All of the events prior to delivery of the ether from defendant Rhodes' home to the Taos residence took place in the city of Albuquerque, New Mexico.<sup>177</sup> If, after the undetected removal of the can from the first storage facility, it had been moved not to another Albuquerque storage facility, but to Denver, St. Louis, Houston or any other location beyond the range of the apparatus used to monitor the beeper, surveillance of the can would have been permanently lost. Surveillance was again established because the agents knew, from "prior monitoring," that Albuquerque was the place to seek the beeper's signal.<sup>178</sup> Although the range of the detection apparatus is not disclosed, the opinion recites that "using the beeper, agents traced the beeper can to another self-storage facility *three days later*."<sup>179</sup>

The Court's treatment of the remaining issue—whether locating the can in the second storage locker by use of the beeper amounted to illegal monitoring—demonstrates how easily a content rule can be neutered by a scope rule that restricts or subverts its application. The Court reasoned that using the beeper to locate the second storage facility:

informed the agents only that the ether was somewhere in the warehouse; it did not identify the specific locker in which the ether was located. Monitoring the beeper revealed nothing about the contents

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<sup>175</sup> Item (7).

<sup>176</sup> *Id.* at 720.

<sup>177</sup> *United States v. Karo*, 710 F.2d 1433, 1437 (1983).

<sup>178</sup> See Justice Stevens' dissenting opinion in *Karo*, 468 U.S. at 735, n. 11 (Stevens, J., dissenting).

<sup>179</sup> *Karo*, 468 U.S. at 709 (emphasis added).



of the locker that . . . [defendants] had rented and hence was not a search of that locker. The locker was identified only when agents traversing the public parts of the facility found that the smell of ether was coming from a specific locker.<sup>180</sup>

It followed that no illegal monitoring contributed to the government's knowledge that the ether had been delivered to the Taos premises and, the Court further found, that knowledge provided a sufficient, untainted basis for the issuance of the warrant.<sup>181</sup>

The life of a constitutional principle consists of the period between its announcement or "recognition" and its abandonment by formal renunciation or doctrinal subversion. By this measure, *Karo's* principle that electronic tracking of "property that has been withdrawn from public view" is subject to "Fourth Amendment oversight"<sup>182</sup> ranks among the most ephemeral in recent memory, having endured for only the few pages between its proclamation and its application. Tracking by electronic beacon, *Karo* holds, does not amount to a search until the government uses the device to establish that the beeper-encumbered container is located in a particular private place. So long as the government terminates its electronic search at a point where at least one place other than the defendant's house, apartment or locker may be the repository of the container, no "search" within the fourth amendment has occurred. Government agents informed of this limitation should have little difficulty behaving or testifying accordingly.

That the majority did not deign to respond to dissenting Justice Stevens' argument that "[w]ithout the beeper, the agents would have never found the warehouse, and hence would never have set up visual surveillance of the locker containing the can of ether"<sup>183</sup> only strengthens the judgment that fourth amendment protection against electronic tracking is wholly illusory.

#### B. DISCRETE SENSING DEVICES AND THE RE-SEARCH RULE

Like the electronic tracking beacon, a discrete sensing device yields only limited information and is thus potentially distinguishable from the broad spectrum surveillance devices that *Katz* brought within the reach of the fourth amendment. The use of a device to detect only the presence or absence of cocaine or other contraband even in a private place is exempted from fourth amendment scrutiny

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<sup>180</sup> *Id.* at 720-21.

<sup>181</sup> *Id.* at 719.

<sup>182</sup> *Id.* at 716.

<sup>183</sup> *Id.* at 735 n.11.

because, the Court held in *United States v. Jacobsen*,<sup>184</sup> since “Congress has decided . . . to treat the interest in privately’ possessing cocaine as illegitimate,” such an investigative technique “compromises no *legitimate* privacy interest.”<sup>185</sup>

The immense legal and social implications of exempting contraband sensing devices from constitutional oversight are belied by the Court’s cursory, almost offhand announcement of this doctrinally novel proposition. Its genesis in *United States v. Place*<sup>186</sup> was, as dissenting Justice Brennan noted, “unnecessary to the judgment.”<sup>187</sup> There, Drug Enforcement Administration agents seized the luggage of a passenger arriving at LaGuardia Airport on “articulable suspicion” that it contained contraband, informing him that a warrant to search it would be sought. Instead, the agents took the luggage to Kennedy Airport where a dog trained to detect narcotics reacted positively to one of the bags. The Court held that, under *Terry v. Ohio*,<sup>188</sup> luggage may be seized and temporarily detained, but that “the 90-minute detention of respondent’s luggage . . . went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics.”<sup>189</sup>

Wedged between the two halves of the Court’s ruling on the content of the fourth amendment was its dictum concerning the amendment’s scope: “exposure of respondent’s luggage, which was located in a public place, to a trained canine . . . did not constitute a ‘search’ . . . .”<sup>190</sup> The Court offered two reasons (and ignored a third) for its judgment. Standard analysis would have assessed the dog’s use as a sense enhancing technique depending on whether it seemed more like the electronic eavesdropping condemned in *Katz* or the illumination by searchlight the Court held not a “search” in *United States v. Lee*.<sup>191</sup> Although the Court’s decisions provide no satisfactory standard or analytic process for making this distinction, the case law generally excludes from the scope of the amendment ordinary means of enhancing the senses, such as flashlights and binoculars, and includes within it, as the Court recently suggested, “highly sophisticated surveillance equipment not generally available to the public.”<sup>192</sup> Perhaps because the police have long used dogs

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<sup>184</sup> 466 U.S. 109 (1984).

<sup>185</sup> *Id.* at 123 (emphasis added).

<sup>186</sup> 462 U.S. 696 (1983).

<sup>187</sup> *Id.* at 719 (Brennan, J., concurring in result).

<sup>188</sup> 392 U.S. 1 (1968).

<sup>189</sup> *Place*, 462 U.S. at 710.

<sup>190</sup> *Id.* at 707.

<sup>191</sup> 274 U.S. 559, 563 (1927).

<sup>192</sup> *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986).

for security and tracking purposes, most courts held or assumed, prior to *Place*, that the trained canine sniff did not constitute a search.<sup>193</sup>

What *Place* suggested and *Jacobsen* confirmed was that the *Katz-Lee* analysis applied only to broad spectrum sense enhancing devices. Contraband-only sensing devices are per se exempt from fourth amendment regulation because they “compromise . . . no legitimate privacy interest.”<sup>194</sup>

Before addressing the implications of deregulating contraband-only sensing devices, it will prove useful to trace a related doctrinal strand that also culminates in *Jacobsen*—the “re-search rule.” In *Walter v. United States*,<sup>195</sup> decided four years earlier, the question was whether the government’s viewing of pornographic films that had been misdelivered and turned over to the FBI was a “search.” The unwitting recipient had opened the packages and examined the film containers which bore “explicit descriptions of the contents,” but did not view the films.<sup>196</sup> The four dissenting justices believed that the “private search” by the recipient “so fully ascertained the nature of the films . . . that the FBI’s subsequent viewing of the movies . . . was not an additional search subject to the warrant requirement.”<sup>197</sup>

The majority agreed that the judgment should be reversed, but disagreed as to the effect of the private search. Justices Stevens and Stewart argued that “surely the government may not exceed the scope of the private search unless it has the right to make an independent search,”<sup>198</sup> and ducked the question of “whether the government would have been required to obtain a warrant had the private party been the first to view them.”<sup>199</sup> Justices White and Brennan sharply disagreed with “the notion that private searches insulate from Fourth Amendment scrutiny subsequent governmental searches of the same or lesser scope.”<sup>200</sup>

In *United States v. Jacobsen*,<sup>201</sup> Justices Stevens and O’Connor joined the *Walter* dissenters to form a six justice majority adopting precisely that notion. There, employees of a private carrier opened a package damaged by a forklift “to examine its contents pursuant

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<sup>193</sup> 1 W. LAFAYE, *supra* note 64, at 367-68.

<sup>194</sup> *United States v. Jacobsen*, 466 U.S. 109, 123 (1984).

<sup>195</sup> 447 U.S. 649 (1980).

<sup>196</sup> *Id.* at 652.

<sup>197</sup> *Id.* at 663-64.

<sup>198</sup> *Id.* at 657.

<sup>199</sup> *Id.* at 657 n.9.

<sup>200</sup> *Id.* at 660.

<sup>201</sup> 466 U.S. 109 (1984).

to a written company policy regarding insurance claims.”<sup>202</sup> The package—an ordinary cardboard box wrapped in brown paper—contained crumpled newspaper covering a ten inch tube made of silver duct tape. A supervisor cut open the tube and found four plastic bags containing several ounces of white powder. The Drug Enforcement Administration was notified, but before its agents arrived, the employees replaced the plastic bags in the tube and put the tube and the newspapers back in the box. When a DEA agent arrived, he found the box with the top open and the tube exposed. He removed the four bags and conducted a field test that identified the substance as cocaine.<sup>203</sup> As noted, the field test falls outside the scope of the amendment because its ability to detect only the presence or absence of contraband does not affect a “legitimate” privacy interest.<sup>204</sup> Nor did removal of the bags from the tube constitute a “search,” the Court held, because that conduct “enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy . . . .”<sup>205</sup>

The impact of *Jacobsen*'s twin holdings is potentially so destructive of constitutionally protected privacy that one is inclined to accept dissenting Justice Brennan's prediction that “this Court ultimately stands ready to prevent this Orwellian world from coming to pass.”<sup>206</sup> The implications of the re-search rule are disturbingly broad: as concurring Justice White noted, logically extended, the proposition that a prior private search extinguishes the privacy interest in a closed container would seem to include any case in which a private party has knowledge that a container conceals contraband and nothing else whenever, as in *Jacobsen*, the private party has revealed that information to government. Whether the private party's knowledge be derived from a search, as in *Jacobsen*, by observation or “as a result of conversations with [the] . . . owner” of the container,<sup>207</sup> it is equally true that:

[o]nce frustration of the original expectation of privacy occurs—[by revealing that information to the government]—the Fourth Amendment does not prohibit governmental use of the now non-private information. . . and the agent's visual inspection of [the container's] . . contents [would] enable . . . the agent to learn nothing that had not previously been learned during the private . . . [observation] . . . and

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<sup>202</sup> *United States v. Jacobsen*, 466 U.S. at 109, 111 (1984).

<sup>203</sup> *Id.* at 111-112.

<sup>204</sup> *See supra* note 194.

<sup>205</sup> *Id.* at 120.

<sup>206</sup> *Id.* at 138 (Brennan, J., dissenting).

<sup>207</sup> *Id.* at 133 (White, J., concurring in part).

hence was not a 'search' within the meaning of the Fourth Amendment.<sup>208</sup>

The majority's attempt to avoid the logic of these implications appears to rest entirely on the proposition that, in *Jacobsen*, "the governmental conduct was made possible only because private parties had compromised the integrity of this container."<sup>209</sup> Although it is clear that the Court has foresworn extension of the *Jacobsen* logic beyond its "private search" context, one is entitled to wonder about the durability of a limiting principle that seems directly descended from the *Olmstead-Goldman* protection of "constitutionally protected areas" against "physical penetration" that *Katz* explicitly abandoned two decades earlier.

Even more portentous are the implications of the Court's exclusion from the fourth amendment of contraband-only testing devices. Brave new worlds in which all passersby are scanned for drugs and police cruising through residential neighborhoods probe all homes with futuristic devices that disclose only whether the offending substance is present come quickly to mind.<sup>210</sup> In that future, as dissenting Justice Brennan warned, "if the Court stands by the theory it has adopted today, search warrants, probable cause and even 'reasonable suspicion' may very well become notions of the past."<sup>211</sup>

Of course, these implications could be abjured by a Court that wished to avoid them. *Jacobsen*, after all, involved nothing more sinister than a field test of a substance legitimately possessed by government which the Court was virtually certain "would result in a positive finding."<sup>212</sup> "[T]he likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment."<sup>213</sup>

On the other hand, the Court's opinion clearly rests on the broader proposition that "governmental conduct that can reveal whether a substance is cocaine, and no other arguably private fact, compromises no legitimate privacy interest,"<sup>214</sup> and it cites Professor Loewy's unabashed defense of that proposition.<sup>215</sup> Good sense may overcome good logic, however, if the government should seek

<sup>208</sup> *Id.* at 117.

<sup>209</sup> *Id.* at 120 n.17.

<sup>210</sup> *Id.* at 138 (Brennan, J., dissenting).

<sup>211</sup> *Id.* at 138.

<sup>212</sup> *Id.* at 123.

<sup>213</sup> *Id.* at 124.

<sup>214</sup> *Id.* at 123.

<sup>215</sup> *Id.* at 123 n.23 (quoting Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1244-48 (1983)).

to use such devices randomly to monitor private places. Indeed, *Karo's* holding to that effect with respect to electronic tracking beacons is directly on point.

There may, however, be another and more conclusive strategy by which to sever *Jacobsen's* unacceptable implications from its holding. Because the agents had undeniable authority, under *Texas v. Brown*,<sup>216</sup> to seize the white powder with probable cause to believe that it was associated with crime, the issue was whether a chemical test to determine its composition—in the field or later in a laboratory—constituted a “search” for which some predicate was required. There is reason to conclude that the minute examination of lawfully seized materials requires no separate predicate.<sup>217</sup> It would follow that *Jacobsen's* exemption from fourth amendment scrutiny of all contraband-only testing devices is entirely gratuitous and unnecessary to the result in *Jacobsen*. In *United States v. Edwards*<sup>218</sup> respondent was arrested, charged with attempting to break into a post office, and jailed pending arraignment. The following morning, the clothing respondent had been wearing at the time of and since his arrest was seized. “Examination of the clothing revealed paint chips matching the samples”<sup>219</sup> taken from the crime scene. Although the seizure was challenged (and ultimately upheld), neither the respondent nor any court suggested that the examination of the seized material was a “search” within the scope of the fourth amendment.

Similarly, in *Cupp v. Murphy*,<sup>220</sup> the controversy was over whether the seizure of material from a suspect's fingernails was permissible, not whether later analysis of that material (showing it to be tissue, blood and fabric associated with the crime) constituted a search. Nor is there any indication that a warrant was issued to examine the paint scrapings seized in *Cardwell v. Lewis*<sup>221</sup> or the drugs seized in any of dozens of prosecutions involving substances that could be conclusively identified only by chemical or other testing procedures.<sup>222</sup> In short, until *Jacobsen*, the Court's decisions uniformly assumed that lawfully seized material could be minutely ex-

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<sup>216</sup> 460 U.S. 730 (1983).

<sup>217</sup> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

<sup>218</sup> 415 U.S. 800 (1974).

<sup>219</sup> *Id.* at 802.

<sup>220</sup> 412 U.S. 291 (1973).

<sup>221</sup> 417 U.S. 583 (1974).

<sup>222</sup> *See, e.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *Illinois v. Andreas*, 463 U.S. 765 (1983); *Texas v. Brown*, 460 U.S. 730 (1983); *Illinois v. Gates*, 462 U.S. 213 (1983); *Michigan v. Summers*, 452 U.S. 692 (1981); *New York v. Belton*, 453 U.S. 454 (1981); *Colorado v. Bannister*, 449 U.S. 1 (1980).

amined for fingerprints, fibers, narcotic content, and the like without a warrant, subject to a few narrow exceptions.<sup>223</sup> The Court's unexpected ruling that a field test for cocaine of material lawfully seized in plain view constituted a separate search and seizure is illuminated by the scope-content distinction. As noted, prior decisions seem to have assumed that such testing is a permissible incident of the government's lawful possession of the substance to be tested.<sup>224</sup> Thus microscopic, chemical or other scientific examination of seized materials—whether in the field or at the crime lab—were assumed to be “reasonable,” that is, in conformity with the content rules of the fourth amendment.

If, however, as *Jacobsen* holds, scientific testing of lawfully seized material amounts to an independent search and seizure, it follows that a fresh predicate, or escape from the predicate requirement, is called for. *Jacobsen* chooses the former route to justify the seizure and the latter route to validate the search occasioned by the field test: because possession of cocaine is illegal, a discrete test for its presence or absence infringes no “legitimate” expectation of privacy, and because only a minute amount of the material was destroyed, the seizure was *de minimis*. Neither of these doctrinal novelties need have been invented, however, if the Court had invoked the established tacit rule that the power to conduct such tests is conferred by the initial lawful seizure. The existence of this unstated rule is proved not only by its apparent application to a wide variety of seizures but also by its exceptions.

The exceptions possess a common feature that *Jacobsen* lacks: a compelling basis for requiring an additional predicate before permitting a more intensive examination of lawfully seized material. The examination of “books or other materials arguably protected by the First Amendment” that have been seized on the basis of “disapproval of the message contained therein,”<sup>225</sup> for example, requires a warrant despite the government's lawful acquisition of packages containing apparently obscene materials.<sup>226</sup> Similarly, lawful custody of an arrested or charged person is not a sufficient predicate for a surgical or even a hypodermic search of the person in custody.<sup>227</sup> The broadest exception requires a warrant to search

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<sup>223</sup> *Arkansas v. Sanders*, 442 U.S. 753 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977); see *United States v. Johns*, 469 U.S. 478 (1985); *United States v. Ross*, 456 U.S. 798 (1982).

<sup>224</sup> See *supra* notes 219-222 and accompanying text.

<sup>225</sup> *Walter v. United States*, 447 U.S. 649, 655 (1980).

<sup>226</sup> *Id.* at 656.

<sup>227</sup> *Winston v. Lee*, 470 U.S. 753 (1985); *Schmerber v. California*, 384 U.S. 757 (1966).

opaque, unopened containers lawfully seized by and under the control of government officers, lest the auto exception devour the warrant requirement.<sup>228</sup>

Why then did the Court depart from its tacit rule, lump field testing of material in a transparent package that was obviously contraband with the unrelated exceptions and then invoke novel doctrine to overcome the logical consequences of its reasoning? Several reasons may be suggested. First, the field test was the only feature of the agent's examination that exceeded the scope of the private search, and, from that perspective, it appeared analytically necessary to assess it as a potential "search" not validated by the "re-search rule." *Place*, decided the previous Term, provided a convenient and decisive basis for the result: it "dictated" the conclusion that, up to the point of the field test, no search had occurred.<sup>229</sup> This explanation suggests that *Jacobsen's* exemption of contraband-only testing devices from the fourth amendment was essentially a doctrinal accident. A more cynical observer might suspect that the *Jacobsen* rule grew out of a deliberate scheme to promote the *Place* dictum to the status of a holding. Whatever the motivation, the result appears to be the consequence of two factors: the similarity between the facts of *Jacobsen* and the facts of *Walter* and the government's decision, in *Jacobsen*, to argue for reversal solely in terms of the scope, not the content of the fourth amendment.

In both *Jacobsen* and *Walter* a private search preceded the government's lawful acquisition of the offending material. In both the private search did not conclusively establish that the material was in fact contraband, but clearly did establish probable cause to believe that it was "connected with crime"—thus providing the predicate for a plain view seizure. Neither package could qualify for protection under *Chadwick-Sanders'* requirement that a warrant be obtained to search lawfully seized opaque packages,<sup>230</sup> although for different reasons: The film packages carried explicit descriptions of their contents; the cocaine was in a transparent plastic bag. In both cases, as Justice Stevens said in *Walter v. United States*, the outward appearance of the package was "not sufficient to support a conviction. . . . Further investigation—that is to say, a search of the contents of the films—was necessary in order to obtain the evidence which was to be used at trial."<sup>231</sup>

Does it follow that it was a "search" to conduct a field test for

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<sup>228</sup> See cases cited *supra* note 223.

<sup>229</sup> *United States v. Jacobsen*, 466 U.S. 109, 123 (1984).

<sup>230</sup> See cases cited *supra* note 223.

<sup>231</sup> *Walter*, 447 U.S. at 654.



cocaine of the white powder lawfully seized in plain view in *Jacobsen*? If it was a search, the government argued, "law enforcement officers would have to obtain literally thousands of additional warrants each year."<sup>232</sup> "[A]lthough the results of chemical analyses have been used in countless narcotics prosecutions," the argument continued, "we know of no other court that has ever suggested that the government must have a warrant before it can perform such a test."<sup>233</sup> As previously shown, a warrant may be unnecessary for one of two reasons: either, as asserted in this Article<sup>234</sup>, because the power minutely to examine lawfully seized material inheres in the original lawful seizure, or, as *Jacobsen* holds, because a test that reveals only whether a substance is contraband is not a "search." It is to avoid the Orwellian implications of this latter theory that this Article has examined in such detail the alternative rationale.

The case for the alternative has several strengths. It is compatible with the broadly shared understanding that, ordinarily, lawfully seized material may be scientifically tested without a warrant. Only *Jacobsen* contradicts this consensus, and there the government did not propose nor did the Court consider and reject the alternative. Moreover, the cases on which the government relied for its novel rule support the alternative, not the *Jacobsen*, view.

From the beginning, the government sought reversal solely on a "scope" theory.<sup>235</sup> To remove fourth amendment scrutiny, it proposed the expansive view that "[i]ndividuals simply do not use the molecular structure of a chemical substance as a repository for their secrets."<sup>236</sup> But even if some chemical analyses "search," the gov-

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<sup>232</sup> Brief for United States at 18, *United States v. Jacobsen*, 466 U.S. 109 (1984)(No. 82-1167).

<sup>233</sup> *Id.* at 18-19 (citing *United States v. Barry*, 673 F.2d 912 (6th Cir. 1982), *cert. denied*, 459 U.S. 927 (1982)). *United States v. Russell*, 655 F.2d 1261, 1263-1264 (D.C. Cir. 1981), *modified on other grounds*, 670 F.2d 323, *cert. denied*, 457 U.S. 1108 (1982); *United States v. Jennings*, 653 F.2d 107, 108 (4th Cir. 1981); *United States v. Walther*, 652 F.2d 788, 790 (9th Cir. 1981); *United States v. Williams*, 622 F.2d 830, 834 n.8, 839 (5th Cir. 1980)(en banc), *cert. denied*, 449 U.S. 1127 (1981); *United States v. Andrews*, 618 F.2d 646 (10th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980); *United States v. Bulgier*, 618 F.2d 472, 474 (7th Cir. 1980), *cert. denied*, 449 U.S. 843 (1980); *United States v. Nieves*, 609 F.2d 642, 644, 647-48 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980); *United States v. Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States v. Rodriguez*, 596 F.2d 169, 173-175 (6th Cir. 1979); *United States v. Belle*, 593 F.2d 487, 491, 499-500 (3d Cir. 1979)(en banc), *cert. denied*, 442 U.S. 911 (1979); *United States v. Crabtree*, 545 F.2d 884 (4th Cir. 1976); *United States v. Ford*, 525 F.2d 1308, 1312 (10th Cir. 1975). *See also* *People v. Adler*, 50 N.Y.2d 730, 732 n.4, 409 N.E.2d 888, 891 n.4, 431 N.Y.S.2d 412, 416 n.4, *cert. denied*, 449 U.S. 1014 (1980).

<sup>234</sup> *See supra* text accompanying notes 217-224.

<sup>235</sup> Brief for United States, *supra* note 232, at 7.

<sup>236</sup> *Id.*

ernment's narrower, and winning, position was that contraband-only tests invade no legitimate privacy interest.

None of the fourteen cases cited by the government supports the *Jacobsen* rule.<sup>237</sup> Many of them, like *Jacobsen*, involved a field test performed by a government agent on suspicious material uncovered by a private carrier's search of a package consigned for delivery. In no case was the field test treated as an independent search. Instead, the critical issues were whether the private search had been instigated or participated in by the government to a sufficient extent to constitute "state action," and whether the original seizure was lawful. The testing of material lawfully acquired by transfer from a third party or by the seizure of apparent contraband in plain view is tacitly assumed to be a permissible incident of such acquisition. No defendant in any cited case even thought to challenge the field test on grounds independent of the lawfulness of the original search that exposed the material to be tested. The only cited case to mention what later became the *Jacobsen* rule rejected it. "We will not deny [defendant] a privacy interest solely on the often advanced principle that one can have no legitimate property interest in contraband."<sup>238</sup>

The discovery that the precedent on which the government relied is contrary to the position urged upon and adopted by the Court only deepens the mystery. What accounts for the attraction of an unprecedented, sweeping exclusion of field testing from the protection of the fourth amendment, accomplished with language that would equally exclude far more intrusive monitoring of private places with contraband-only testing devices?

A possible explanation may perhaps be found in the Court's statement that "[i]t is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding . . ."<sup>239</sup> Because this notion violates the fundamental maxim that a search cannot be validated by what it turns up, the Court went on to say that even if the test is negative it "compromises no legitimate privacy interest."<sup>240</sup> Nonetheless, the likelihood of success may also be seen as providing the predicate for a plain view seizure of the material to be tested: it is obviously "connected with crime." However, if only material that appears virtually certain to be contraband may be sub-

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<sup>237</sup> See cases cited *supra* note 233.

<sup>238</sup> *United States v. Barry*, 673 F.2d 912, 918 (6th Cir. 1982), *cert. denied*, 459 U.S. 927 (1982).

<sup>239</sup> *United States v. Jacobsen*, 466 U.S. 109, 123 (1984).

<sup>240</sup> *Id.*

jected to a contraband-only testing procedure, it is the alternative, not the announced, rule that governs.

The Court's decision in *Arizona v. Hicks*<sup>241</sup> may be read to reinforce this more limited view of the *Jacobsen* rule. There the issue was whether police conducted a "search" when a stereo component was moved in order to expose its serial number. Although such a "search" could be said to reveal only whether the component was stolen, "and no other arguably private' fact," and thus did not compromise a "legitimate" privacy interest,<sup>242</sup> this reasoning is nowhere suggested in the Court's opinion. Because there is no apparent difference between a test for stolen-not stolen and one for contraband-not contraband, the distinction must lie elsewhere. One possibility supports the alternative rationale: unlike *Jacobsen*, there was no basis for believing that the equipment was illegally possessed. Had there been, it could have been seized in plain view and, *Hicks* holds,<sup>243</sup> that predicate would also have justified the act of observing the serial number. Another possibility is that *Jacobsen* is the product of, and applies solely to, the enforcement of the anti-drug laws, although the Court has never explicitly endorsed a crime-specific approach to the fourth amendment.<sup>244</sup>

Because the field test entailed the destruction of a minute amount of the substance seized, the Court held that it "did affect respondents' possessory interests protected by the Amendment . . . by . . . convert[ing] what had been only a temporary deprivation . . . into a permanent one."<sup>245</sup> This warrantless "seizure" is immediately deemed "reasonable" because it "could, at most, have only a de minimis impact on any protected property interest."<sup>246</sup> But just as there is no case law making the examination of legally seized materials a "search," nor is there any precedent for the proposition that the destruction of such material during an appropriate test constitutes a "seizure." If, as in *Jacobsen*, the initial seizure of the material tested was lawful, subsequent examination, including field and lab testing, has always been assumed to be within the authority conferred by that seizure and thus not to constitute a further search or seizure for which some predicate or exception, such as de minimis, must be found.

The Court's confusion is the product of its failure to distinguish

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<sup>241</sup> *Arizona v. Hicks*, 107 S. Ct. 1149 (1987).

<sup>242</sup> *Id.* at 1153.

<sup>243</sup> *Id.*

<sup>244</sup> *Kamisar*, *supra* note 46, at 11-20.

<sup>245</sup> *Jacobsen*, 466 U.S. at 124.

<sup>246</sup> *Id.* at 125.

between the initial seizure and the later examination. This is illustrated by its attempt to limit the de minimis exception:

We do not suggest, however, that any seizure of a small amount of material is necessarily reasonable. An agent's arbitrary decision to take the 'white powder' he finds in a neighbor's sugar bowl or his medicine cabinet, and subject it to a field test for cocaine, might well work an unreasonable seizure.<sup>247</sup>

The supposed seizure would be "unreasonable" for the same reason that the initial seizure in *Jacobsen* was not. Seizing the neighbor's powder, under the supposed circumstances, would be arbitrary; seizing the defendant's powder, under the *Jacobsen* circumstances, would not be. If, as *Texas v. Brown*<sup>248</sup> holds, an opaque, tied-off balloon may be seized in plain view because its appearance gave the officer probable cause to believe it was "associated with crime," surely the same is true of the visible white powder seized in *Jacobsen*. The important point, in any event, is that the discussion again confuses scope (whether the field test was a search or seizure) with content (whether the initial seizure or subsequent test was reasonable) causing it to rest its otherwise unobjectionable result on the unnecessary contraband-only exemption, notwithstanding the potential of that idea profoundly to alter the balance between individual privacy and permissible government surveillance.

### C. "OPEN FIELDS"

What the "open fields" cases have in common with the discrete sensing and tracking device decisions is that each entails inquisitive government activity that, non-technically, appears to be a search, but which is deemed by the Court not to be a "search" within the fourth amendment. This exclusion is accomplished under the *Katz* formula simply by regarding as "unreasonable" the defendant's expectation that the government would not or should not engage in such conduct.<sup>249</sup> Apart from this similarity, however, it is obvious that entry onto "open fields" and "visual inspection"—to use the Court's euphemism—of such fields involve a much broader intrusion than the one-dimensional devices already discussed. An examination of the rationale for the exemption from constitutional scrutiny of open fields thus may provide additional clues to the nature of the fourth amendment and the riddle of its analytic redundancy.

Although the *Katz* formula is sufficiently malleable to accommo-

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<sup>247</sup> *Id.* at 125-26 n.28.

<sup>248</sup> 460 U.S. 730 (1983).

<sup>249</sup> See *supra* text accompanying notes 129-132.

date any desired result, that very feature limits its capacity to perform convincingly legal doctrine's essential task: the translation of subjective political judgments into legal judgments ostensibly derived from objective legal principles.

In *Oliver v. United States*,<sup>250</sup> for example, the issue was whether the government's discovery of defendant's secluded marijuana patch by trespassing on defendant's fenced, posted farm was subject to fourth amendment restraint. "The correct inquiry," the Court said, "is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."<sup>251</sup> Having "reject[ed] the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate," the Court had no difficulty in finding "no basis for concluding that a police inspection of open fields accomplishes such an infringement."<sup>252</sup> Perhaps to forestall the impression that open fields had been unceremoniously muscled out of the fourth amendment, the Court relied on an additional, redundant doctrinal basis for its judgment: open fields are not within the text of the amendment's protection of "persons, houses, papers, and effects."<sup>253</sup>

The Court's use of the *Katz* formula in tandem with the textual argument is instructive because it invites comparison between two distinct and apparently opposing approaches to the definition of the scope of the fourth amendment. These modes of thought may be roughly styled physical or mechanical on the one hand, and psychological or conceptual on the other. The former model, exemplified by *Olmstead-Goldman*, defines privacy in terms of places and things and the penetration or acquisition thereof; the latter model, embodied in *Katz*, transcends physicality and seeks to protect the "right" of privacy by safeguarding "people not places." Each approach has its limitations. The mechanical approach was too inflexible to include nontrespassory electronic eavesdropping. The conceptual approach is so transparently malleable that it barely conceals the judicial value judgment. When the strength of each approach is harnessed to the other, however, it yields a doctrinal synergy that appears both to compel and justify the result. Thus, in *Oliver*, the mechanical "open fields" approach serves to rebut the defendant's argument that "the circumstances of a search [of open fields] may indicate that reasonable expectations of privacy were violated."<sup>254</sup>

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<sup>250</sup> 466 U.S. 170 (1984).

<sup>251</sup> *Id.* at 182-83.

<sup>252</sup> *Id.* at 183.

<sup>253</sup> U.S. CONST. amend. IV.

<sup>254</sup> *Jacobsen*, 466 U.S. at 181.

Defendant's proposition—unassailable from *Katz's* conceptual perspective—is peremptorily dismissed. “The language of the Fourth Amendment itself,” the Court trumped, “answers [that] . . . contention.”<sup>255</sup>

The complementary move, bolstering the psychological perspective by reference to the mechanical formula, is accomplished with equal facility:

the rule of *Hester v. United States* . . . that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields . . . . [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance.<sup>256</sup>

The magnitude of *Oliver's* impact on the scope of the constitutional protection of privacy defies overstatement. According to the Court, most of the land mass of the United States —“the many millions of acres that are . . . not close to any structure”—is no longer governed by the command of the fourth amendment.<sup>257</sup> Moreover, “it is clear, that the term ‘open fields’ may include any unoccupied or undeveloped area outside the curtilage. An open field need be neither ‘open’ nor a ‘field’ as those terms are used in common speech.”<sup>258</sup>

That government agents acting without a warrant, probable cause, reasonable suspicion or any predicate whatsoever may enter and search secluded “unoccupied or undeveloped areas” disregarding fences, signs, custom and criminal trespass laws is a result not easily reached under a doctrine that purports to protect any “reasonable” or “justifiable” expectation of privacy. Thus, the “open fields” leg of the majority opinion must provide more than the appearance of doctrinal legitimacy; it must bear as well much of the weight of the substantive legitimacy-in-fact of the *Oliver* result. On examination the Court's two previous “open fields” decisions are clearly inadequate to the task. Although the Court had held sixty years earlier, in a two page opinion in *Hester*,<sup>259</sup> that open fields are not included within the fourth amendment's protection of “persons, houses, papers, and effects,” that sort of doctrinal literalism cannot survive *Katz's* abandonment of the mechanical *Olmstead* standards and their replacement by the “legitimate expectation” formula. More

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<sup>255</sup> *Oliver*, at 181.

<sup>256</sup> *Id.* at 178.

<sup>257</sup> *Id.* at 182 n.12.

<sup>258</sup> *Id.* at 180 n.11.

<sup>259</sup> *Hester v. United States*, 265 U.S. 57 (1924).

pointedly, *Hester* is defective precedent for the *Oliver* result even if one disregards the intervening metamorphosis in fourth amendment analysis.

In *Hester*, revenue officers observed from their hiding place fifty to one hundred yards away an apparent sale of distilled spirits by defendant to a customer who drove up to the house. When warning was given, the defendant took a gallon jug from a nearby car and he and his customer fled. In the ensuing chase, both containers were abandoned and broken; however, the officers later testified that the residue in the jug was "moonshine whiskey."<sup>260</sup> While the officers remained on the premises, other apparent customers arrived by car and were turned away. On these facts it is clear that Mr. Hester's was an "open" open field, enclosed at most by a pasture fence<sup>261</sup> and open in fact to persons who sought to buy whiskey there. Moreover, the officer's observation may not have been made from Mr. Hester's field, "it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact."<sup>262</sup>

Furthermore, the *Hester* Court held that "even if there had been a trespass, the [officer's] . . . testimony was not obtained by an illegal search or seizure. The defendant's own acts . . . disclosed the jug . . . and there was no seizure in the sense of the law when the officers examined [its] contents . . . after it had been abandoned."<sup>263</sup>

Lastly, a careful reading of the *Hester* opinion discloses that it does not rest on the "open fields" exception at all.<sup>264</sup> "The only shadow of a ground for bringing up the case," the Court said, "is drawn from the hypothesis that *the examination of the vessels* took place upon Hester's father's land."<sup>265</sup> A complete answer to this ground is that the officers, having observed the commission of the offense, were entitled to enter defendant's outdoor property to arrest and to examine abandoned evidence of the offense in plain view on such property.<sup>266</sup> It is wholly superfluous to add, as the *Hester* Court did, that "the . . . protection accorded by the Fourth Amendment . . . is not extended to the open fields."<sup>267</sup>

<sup>260</sup> *Id.* at 58.

<sup>261</sup> *Oliver v. United States*, 466 U.S. 170, 194 n.18 (Marshall, J., dissenting).

<sup>262</sup> *Hester*, 265 U.S. at 58.

<sup>263</sup> *Id.* at 58.

<sup>264</sup> Saltzburg, *supra* note 8, at 3.

<sup>265</sup> *Id.* at 59 (emphasis added).

<sup>266</sup> See *Vale v. Louisiana*, 399 U.S. 30, 33-34 (1970)(dicta); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); cf. *United States v. Santana*, 427 U.S. 38 (1976)(entry of building permissible where arrestee retreated indoors at sight of officers.).

<sup>267</sup> *Hester*, 265 U.S. at 59.

*Air Pollution Variance Board v. Western Alfalfa Corp.*,<sup>268</sup> the Court's first post-*Katz* application of the open fields doctrine, is equally flawed support for the *Oliver* result. In *Western Alfalfa* a Colorado Health Department inspector entered a corporation's outdoor premises to determine whether smoke emitted from its chimneys was in compliance with air quality standards. Based on the inspector's observations, the Board issued a cease-and-desist order. On review, the Colorado Court of Appeals held that the inspector's entry and observations constituted an unreasonable search under the fourth amendment and set aside the Board's order. In an opinion by Justice Douglas, the Court unanimously reversed. The inspector, the Court said, "had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke."<sup>269</sup> True, "[t]he field inspector was on respondent's property [,] but we are not advised that he was on premises from which the public was excluded. . . . The invasion of privacy . . . if it can be said to exist, is abstract and theoretical."<sup>270</sup>

Perhaps for these reasons, the Court in *Oliver* neither cited *Katz* nor assessed respondent's claim according to the "expectation of privacy" formula, and, indeed, made only cursory reference to *Hester*. "Fairly read," the *Oliver* dissenters concluded, the Court's "open fields" precedents affirm only the "unremarkable proposition" that "an official may, without a warrant, enter private land from which the public is not excluded and make observations from that vantage point."<sup>271</sup>

That six justices were willing to extend the open fields exemption several magnitudes beyond its previous sphere can only be viewed as a stunning disregard for the right of individual privacy. Because state law cannot, after *Oliver*, bar federal officers from entering, in defiance of state trespass laws, "any unoccupied or undeveloped area outside the curtilage,"<sup>272</sup> even though the officers act "without a warrant or probable cause," the thirty-four states that filed amicus briefs urging the result in *Air Pollution Variance Board* may one day rue what they have wrought.<sup>273</sup>

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<sup>268</sup> 416 U.S. 861 (1974).

<sup>269</sup> *Id.* at 865.

<sup>270</sup> *Id.*

<sup>271</sup> *Oliver*, 466 U.S. at 194.

<sup>272</sup> *Id.* at 180 n.11.

<sup>273</sup> The Court's recent decision in *United States v. Dunn*, 107 S. Ct. 1134, 1139 (1987), extends the "open fields" exception by narrowly confining the "curtilage" to those areas that harbor "intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" and by ruling that non-residential buildings located in "open fields" have no protected buffer zone. Thus, when law enforcement officials entered the



## D. AERIAL SURVEILLANCE

Thus far this Article has sought to extract the nature of the scope of the fourth amendment from an examination of the Court's responses to a variety of investigative techniques, ranging from high tech contraband detectors to entry and inspection of "open fields." In each case, the Court denied protection on the ground that no "legitimate" expectation of privacy had been infringed. Always looming in the background of the Court's decisions have stood the twin peaks of fourth amendment analysis: the scope-negating doctrine of "plain view" and the scope-affirming holding in *Katz* that "justifiable" expectations of privacy cannot be defeated by sense enhancing devices that make perceptible that which was intended to be private.

All of these features are reprised in the Court's decisions in the "aerial surveillance" cases—*California v. Ciraolo*<sup>274</sup> and *Dow Chemical Co. v. United States*.<sup>275</sup> In *Ciraolo*, the police had received an anonymous tip that the defendant was growing marijuana in the backyard of his Santa Clara home. Unable to see over defendant's six-foot perimeter and ten-foot interior fences, police officers observed and photographed marijuana plants growing in defendant's yard as they flew over it at an altitude of 1,000 feet.<sup>276</sup> In *Dow Chemical Co.*, the Environmental Protection Agency employed a commercial aerial photographer who, using a floor-mounted, precision aerial mapping camera, photographed Dow's heavily guarded 2,000 acre chemical manufacturing facility in Midland, Michigan.<sup>277</sup>

The aerial surveillance cases illustrate the most obvious redundancy in the doctrine relating to the scope of the fourth amendment: the relationship between the textual term "search" and the Court-created notion of a "legitimate" or "reasonable" expectation of privacy. If the latter term is merely definitional, the redundancy is intended, as in the statement "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is

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defendant's 200 acre ranch by crossing a perimeter fence, three interior fences and a fence that enclosed the front portion of defendant's barn and conducted a flashlight aided inspection of the interior of the barn while standing under the overhang of the barn, they effected no "search" within the protection of the fourth amendment. "[S]tanding as they were in the open fields," the Court held, "the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn." *Id.* at 1141.

<sup>274</sup> 476 U.S. 207 (1986).

<sup>275</sup> 476 U.S. 227 (1986).

<sup>276</sup> *Ciraolo*, 476 U.S. at 209.

<sup>277</sup> *Dow Chemical Co.*, 476 U.S. at 229.

infringed.”<sup>278</sup>

*Ciraolo* exemplifies this use of the link between “search” and “expectation”: because Mr. Ciraolo’s backyard marijuana plot was visible from public airspace, the Court “readily conclude[d] that respondent’s expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.”<sup>279</sup> Reduced to its analytic components the reasoning is: “plain view” negates “search;” and a non-“search” infringes no “legitimate” expectation of privacy.

As if to confirm the definitional redundancy of its conclusion, the Court announced its result in *Dow* in “search” rather than “expectation” terminology, although the reasoning is identical in both cases. In *Dow*, the Court held that “the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.”<sup>280</sup>

The premise for both conclusions, however, is the proposition that the areas observed were within plain view. “Any member of the public,” the Court said in *Ciraolo*, “flying in this airspace who glanced down could have seen everything that these officers observed.”<sup>281</sup> Similarly, in *Dow*, the Court reasoned that “[a]ny person with an airplane and an aerial camera could readily duplicate the photographs taken by the EPA.”<sup>282</sup>

Because the decisions obviously rest on “plain view” reasoning, it is puzzling that neither the Chief Justice’s opinions for the majority<sup>283</sup> nor Justice Powell’s dissenting opinions expressly refer to that well established doctrine.<sup>284</sup> Perhaps the reason lies in the label, not the content, of the doctrine, for while it is technically apt, the phrase “plain view” hardly describes the extraordinary lengths to which the government went to observe Ciraolo’s and Dow’s property.

In any event, the Court avoids the label by relying on the broader proposition that “[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection,”<sup>285</sup> a

<sup>278</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)(cited in *Karo*, 468 U.S. at 712).

<sup>279</sup> *Ciraolo*, 476 U.S. at 213-14.

<sup>280</sup> *Dow Chemical Co.*, 476 U.S. at 239.

<sup>281</sup> *Ciraolo*, 476 U.S. at 214.

<sup>282</sup> *Dow Chemical Co.*, 476 U.S. at 231.

<sup>283</sup> “Plain view” is mentioned only in a quote from Justice Harlan’s concurring opinion in *Katz*. *Ciraolo*, 476 U.S. at 215 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)(Harlan, J., concurring)).

<sup>284</sup> *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

<sup>285</sup> *Ciraolo*, 476 U.S. at 213 (quoting *Katz*, 389 U.S. at 347, 351).

move that yields a variety of consequences. Its effect on the aerial surveillance decisions is to pit *Katz*' holding that justified expectations of privacy will be protected against its opposing dictum that knowing exposure defeats protection. The former is championed by the dissenters, and the latter, as previously noted, by the majority.

Of more significance to the present investigation, the Court's reliance upon "knowing exposure" greatly enlarges the degree to which the redundancy may be explained as definitional: one has no protected expectation of privacy in that which is "knowingly exposed," and its observation therefore entails no "search." This analysis can be straightforwardly applied to a variety of evidence gathering techniques that the Court has ruled beyond the protection of the amendment. Conversations with undercover agents,<sup>286</sup> and observations made with consent or of things in "plain view" or in public places, for example, are all circumstances in which it makes both common and legal sense to say that the information acquired was "knowingly exposed." More difficult cases arise when the exposure occurs through the use of communications media, such as telephone and mail services,<sup>287</sup> or essential utility,<sup>288</sup> financial<sup>289</sup> or social services,<sup>290</sup> where the choice to forego "exposure" is virtually foreclosed.<sup>291</sup> In other situations, knowing exposure is accompanied not by an expectation of privacy, but by an expectation of anonymity,<sup>292</sup> as with trash put out for collection<sup>293</sup> or when one is traveling on the highway.<sup>294</sup>

The aerial surveillance cases present two additional circumstances that call for more than mechanical application of the proposition that the observed activities were "knowingly exposed." The more difficult issue concerns aerial surveillance as such. Does the fourth amendment offer any protection against observations from a technically legal but highly unusual vantage point? Is it significant that, as the dissent notes, "many people build fences around their residential areas, but few build roofs over their backyards"?<sup>295</sup> Is it

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<sup>286</sup> See *infra* text accompanying notes 291-308.

<sup>287</sup> See *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>288</sup> *California v. Greenwood*, 108 S. Ct. 1625 (1988).

<sup>289</sup> See *United States v. Miller*, 425 U.S. 435 (1976).

<sup>290</sup> See *Wyman v. James*, 400 U.S. 309 (1971).

<sup>291</sup> Grano, *Perplexing Questions About Fourth Amendment Issues*, 69 J. CRIM. L. & CRIMINOLOGY 425, 440 (1978).

<sup>292</sup> LaFave, *supra* note 144, at 301-302.

<sup>293</sup> See *California v. Greenwood*, 108 S. Ct. 1625 (1988).

<sup>294</sup> *United States v. Knotts*, 460 U.S. 276 (1983).

<sup>295</sup> *Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting).

sufficient to defeat protection that “[a]ny member of the public flying in this airspace who glanced down *could* have seen everything that these officers observed”?<sup>296</sup> Or is that possibility irrelevant because such passengers “normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass”?<sup>297</sup>

It does not seem overly cynical to suggest that these conflicting views of society’s “expectations” function, and are designed to function, to disguise or avoid the critical value choice: the decision whether, to paraphrase Justice Harlan, “we should impose on our citizens the risks of the [airborne] . . . observer without at least the protection of the warrant requirement.”<sup>298</sup> The Court’s pretense that its judgment is compelled by the “knowing exposure” of every outdoor activity not shielded from aerial monitoring displays both a low regard for fourth amendment values and a trivial view of its own role as keeper of the constitutional balance between government authority and individual privacy.

The other circumstance, present in *Dow* and skirted in *Ciraolo*, concerns the use of photographic equipment to enhance the government’s airborne observation. The majority in *Dow* concedes that:

surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant . . . [however,] [t]he mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.<sup>299</sup>

It is strange that this discussion, seemingly in response to *Katz*’ holding that phenomena made perceptible only by the use of sense enhancing technology are not thereby rendered “knowingly exposed,” makes no reference to the *Katz* decision. The limits on sense enhancement devices are acknowledged, but the rationale for those limits—to safeguard justifiable expectations of privacy—is ignored. Even more ominous is the Court’s tacit invocation of the *Olmstead-Goldman* standard that *Katz* replaced: “[a]n electronic device to *penetrate* walls or windows so as to hear and record confidential discussions. . . would raise very different and far more serious questions . . . .”<sup>300</sup>

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<sup>296</sup> *Id.* at 213-14 (emphasis added).

<sup>297</sup> *Id.* at 223 (Powell, J., dissenting).

<sup>298</sup> *White*, 401 U.S. at 786, (Harlan, J., dissenting).

<sup>299</sup> *Dow Chemical Co.*, 476 U.S. at 238.

<sup>300</sup> *Id.* at 239 (emphasis added).

## E. PRIVACY, ANONYMITY, SECRECY AND "CONSENT"

The Court's decisions defining the scope of the fourth amendment are far more significant than its rulings about the content of the protection or remedies for its violation. In part this is because a decision denying fourth amendment application forecloses consideration of the latter features. Of much greater importance, however, is the fact that such a decision frees every governmental agency, not just the police, from any judicial oversight of the agency's decision to engage in the exempted practice. Moreover, the federal structure exempts federal officers and agencies from state laws restricting such conduct by state officers.<sup>301</sup>

It does not follow, of course, that the Court ought to find any particular practice within the governance of the fourth amendment. However, the importance of the issue, together with the malleability of the *Katz* standard, suggest that the Court's decisions since *Katz* would tend to fall on either side of the line with roughly equal frequency. What accounts, therefore, for the fact that all but one<sup>302</sup> of the Court's twenty-one major "search" decisions have ruled the challenged practice beyond the province of the fourth amendment? At the root of such results must lie a majority that consistently prefers collective over individual values at the constitutional margin, a circumstance the doctrine is powerless to prevent. Because each decision demands doctrinal congruence with the value choice it implements, the resulting constitutional doctrine of necessity tends increasingly to reflect, accommodate and compel such results.

As suggested earlier, the retransformation of the fourth amendment since *Mapp* has rendered it increasingly inhospitable to the value of privacy. Remedies for admitted violations have been sharply curtailed, while the content of the amendment now provides a tailored solution to nearly every law enforcement demand for greater investigative autonomy. Nowhere, however, has the right of privacy been so consistently subordinated as in the Court's decisions governing the scope of the amendment.

In a few of the post-*Katz* cases, the Court denied fourth amendment protection finding that no "search or seizure," in the ordinary meaning of those words, had occurred. Some of these decisions involve perfectly straightforward applications of the text of the amendment. In *Maryland v. Macon*,<sup>303</sup> for example, the purchase by an undercover agent of an allegedly obscene magazine offered for

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<sup>301</sup> U. S. CONST. art. VI.

<sup>302</sup> *Arizona v. Hicks*, 107 S. Ct. 1149 (1987).

<sup>303</sup> 472 U.S. 463, 467 (1985).

sale to the public in the defendant's bookstore was not a "seizure." Similarly, the entry into premises open to the public to serve a subpoena is not a fourth amendment "event" for which a predicate is required.<sup>304</sup> The same was true in *Wyman v. James*,<sup>305</sup> in which the Court held that a welfare caseworker's "home visitation" that "in itself is not forced or compelled" was not a "search." As this case suggests, the determination whether a given governmental action constitutes a "search" or a "seizure" is seldom a purely textual inquiry, because every observation is not a search nor every acquisition a seizure. Thus, the controversy, before and after *Katz*, has centered on whether an admitted entry, observation or acquisition amounts in law to a search or seizure. Because nearly all of the Court's recent decisions have ruled against fourth amendment coverage, it is appropriate to attempt to classify the circumstances that defeat application of the amendment to government conduct that qualifies, linguistically, as a search, seizure or entry.

Many, perhaps most, of these circumstances derive from some variation on the idea of "consent." In its most elementary form, consent denotes an intentional relinquishment of the protection of the amendment. Consent in this explicit sense has several familiar features. Because it effects a "waiver" of the protection against searches and seizures, its use is subject to formal restrictions: the consenting party must have actual authority to waive the protection<sup>306</sup> and consent must be "voluntary."<sup>307</sup> When consent is used as a formal waiver of fourth amendment rights, it is commonly viewed as a freestanding doctrinal instrument rather than, as here, the genus that comprehends a variety of scope-negating devices.

Closely related to consent as waiver is the notion, already encountered, that one has no protected expectation of privacy in that which has been "knowingly exposed to the public."<sup>308</sup> Here, consent is implied rather than formal; attributed rather than discovered; tacit rather than explicit. When consent moves from formal to circumstantial it yields a variety of important doctrinal and practical effects. It is precisely this shift that transforms the analysis from "consent" to "expectation of privacy." Moreover, freed from what the "consenting" party formally intended, implied consent may be defined according to broad categories of circumstances deemed to defeat such an expectation. Every fact, thing or activity shared with

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<sup>304</sup> *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 413 (1984).

<sup>305</sup> 400 U.S. 309, 317 (1971).

<sup>306</sup> *United States v. Matlock*, 415 U.S. 164, 171 (1974).

<sup>307</sup> *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

<sup>308</sup> *Katz*, 389 U.S. at 351.

another and not legally privileged is vulnerable. The doctrinal record since *Katz* presents an unbroken line of rejected exceptions.

The fact that information was intended to be confidential or in reliance upon the friendship or complicity of another does not defeat the imputation of implied consent, as the Court has consistently ruled.<sup>309</sup> The doctrine is expectably rigid, for to bar the undercover informant's revelation would in effect create an intolerably broad privilege for all confidential communications. Because one is deemed to know that unprivileged communications may be freely revealed or compelled by subpoena, the secret shared with another is perforce "knowingly exposed to the public."<sup>310</sup> Accordingly, the controversy has centered on the use of electronic aids to preserve or facilitate the acquisition of such shared information.

It is revealing that the doctrine exempting the wired-for-sound informant is commonly labelled "one party consent." The label refers to the informant's consent as waiver; the speaker's "consent" is tacit and therefore operates to defease not the fourth amendment but the expectation of privacy on which, since *Katz*, its application depends.

Just as a confidential disclosure erects no legal barrier to its acquisition from the auditor, a confidential bailment of goods amounts to a "knowing exposure" of those goods and defeats the bailor's expectation of privacy in them.<sup>311</sup> The same result follows even when the bailee, for example a bank officer or accountant,<sup>312</sup> would commonly be expected to treat the material as confidential, and applies as well even to privileged relationships.<sup>313</sup> It is clear from these examples that exposure need not be to the "public" in the sense of knowledge available to all or most people. On the contrary, "public" as used by the Court seems to include any information not kept entirely secret.

Closely akin to material exposed with an expectation of confidentiality are cases in which the ordinary expectation is either that the material will not be observed or, if it is, that it will not be connected with any particular person. The most obvious examples are trash put out for collection<sup>314</sup> and sewage. The expectation that at-

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<sup>309</sup> See *infra* notes 364-88 and accompanying text.

<sup>310</sup> *Hoffa v. United States*, 385 U.S. 293 (1966).

<sup>311</sup> *Rawlings v. Kentucky*, 448 U.S. 98 (1980); see *California v. Greenwood*, 108 S. Ct. 1625 (1988).

<sup>312</sup> See *Couch v. United States*, 409 U.S. 322, 335 (1973).

<sup>313</sup> *Fisher v. United States*, 425 U.S. 391, 402-05 (1976).

<sup>314</sup> *California v. Greenwood*, 108 S. Ct. 1625 (1988); 1 W. LAFAVE *supra* note 64, at 475-87.

tends one's contributions to these waste streams is not secrecy but anonymity. A similar attitude accompanies our use of the postal<sup>315</sup> and telephone<sup>316</sup> systems: the names and addresses of correspondents and the numbers of those called are of necessity disclosed to the system's employees, but there exists an expectation that this information will be treated as part of an undifferentiated flow. This sense of anonymity extends to observations from public airspace: activities on the ground are not invisible, but individuals expect that they are undifferentiable. That one might feel less invaded by government monitoring of his or her use of water, electricity and other essential services does not imply that one expects focussed attention on consumption records; it reflects knowledge that such records, unlike mail covers and pen registers, are routinely kept and, of greater significance, do not disclose intimate or personal behavior or relationships.

To subsume any or all of these expectations of confidentiality (even in matters not "privileged") and anonymity (even in matters not secret) would entail no stretch of the idea of "privacy" in its ordinary meaning. Further, to subsume any such expectation within the fourth amendment's protection against unregulated searches and seizures would entail, since *Katz*, only the judgment that reliance upon it was "justifiable." As noted, however, it is precisely this judgment that a majority of the Court has consistently rejected, not because the claim of privacy in one's "private affairs" is implausible, but rather, the Court's decisions imply, because any information not legally privileged or kept entirely secret is simply not eligible for protection since it is no longer "private." Several of the Court's recent decisions involving even more limited exposure than the preceding examples vividly display the same attitude: any exposure defeats protection.

#### F. BETWEEN SCOPE AND CONTENT

Up to this point this Article has considered only circumstances in which the "exposure" and the observation were simultaneous: while the activity or information was exposed, the government or its informant observed it. Three of the Court's recent decisions go further, denying protection to activity exposed but not observed and to material once exposed but thereafter withdrawn from "public" view prior to any government observation. The standard rule, of course, is that such exposure does not extinguish an otherwise valid expect-

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<sup>315</sup> 1 W. LAFAVE, *supra* note 64, at 500-03.

<sup>316</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).



tation of privacy in the material or activity.<sup>317</sup>In *United States v. Knotts*,<sup>318</sup> government agents sought to follow the car of a suspected illegal drug manufacturer after he purchased a container of chloroform in which the seller had allowed an electronic tracking beacon to be placed. When both visual and electronic surveillance were lost by the agents, a helicopter equipped with a monitoring device took up the search. “[A]bout one hour later” the helicopter search located the signal, now stationary, at a remote cabin near Shell Lake, Wisconsin.<sup>319</sup> Had the agents maintained visual surveillance on the highway and in the “open fields” outside the cabin, they could have seen what the suspect had “knowingly exposed”—his route and destination—by means not subject to fourth amendment control.<sup>320</sup> On the other hand, as the Court held in *Karo* sixteen months later, the monitoring of a “beeper” inside a private residence constitutes a “search” for fourth amendment purposes.<sup>321</sup>

It is striking that the Court’s decision in *Knotts*, which drew no dissent, resolved the “scope” issue by reference not to what in fact occurred—monitoring that located the device inside a private residence—but to what did not occur—observation (electronic or otherwise) of the suspect’s vehicle en route to the cabin. More striking still, what did not occur was deemed permissible by reference to what could have occurred:

Visual surveillance from public places along . . . [the suspect’s] route or adjoining Knott’s premises would have sufficed to reveal all of these facts to the police. . . . A police car following . . . [the suspect] at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin . . . with the drum of chloroform still in the car.<sup>322</sup>

The Court concluded that because the use of the electronic tracking beacon “raises no constitutional issues which visual surveillance would not also raise . . . monitoring the beeper signals . . . [did not] invade any legitimate expectation of privacy . . .”<sup>323</sup> In short, knowing “exposure” of one’s whereabouts by use of the public highways, even though unobserved, defeats the expectation that one’s location will not be discovered by otherwise constitutionally objectionable surveillance.

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<sup>317</sup> See *Illinois v. Andreas*, 463 U.S. 765, 776-77 (Brennan, J., dissenting).

<sup>318</sup> 460 U.S. 276 (1983).

<sup>319</sup> *Id.* at 278.

<sup>320</sup> *Id.* at 282.

<sup>321</sup> *United States v. Karo*, 468 U.S. 705 (1984).

<sup>322</sup> *Id.* at 282.

<sup>323</sup> *Id.* at 285.

In *Illinois v. Andreas*,<sup>324</sup> customs inspectors found marijuana concealed in a compartment of a table shipped from Calcutta. After tests confirmed the nature of the contraband, the table was repackaged and delivered to the defendant, the addressee. While an officer sought to obtain a search warrant, another maintained surveillance of defendant's apartment. About forty minutes later, before the warrant could be obtained, the defendant emerged from the apartment with the container. Defendant was immediately arrested and the container was seized and taken to the police station where it was "reopened" without a warrant and found to contain the marijuana previously observed.<sup>325</sup> Whether the "reopening" constituted a "search" was crucial to admissibility of the contraband,<sup>326</sup> because the warrantless "search" of such a container is unambiguously barred by the *Chadwick-Sanders* doctrine.

Justice Brennan's dissent declared that the Court had "never held that the physical opening and examination of a container in the possession of an individual was anything other than a search."<sup>327</sup> The Chief Justice reasoned for the majority, however, that:

once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost. Consequently, the subsequent reopening of the container is not a 'search' within the intendment of the Fourth Amendment.<sup>328</sup>

A similar result was reached a year later in *United States v. Jacobsen*,<sup>329</sup> in which Justice Stevens employed nearly identical reasoning to permit "visual inspection" of the contents of a damaged package that a private carrier had already examined and repackaged. Citing *Andreas*, Justice Stevens reasoned that "the precise character of the white powder's visibility to the naked eye is far less significant than the fact . . . that it was virtually certain that it [the package] contained nothing but contraband."<sup>330</sup> Therefore, the Court concluded, the "inspection" "infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment."<sup>331</sup>

Analytically, *Andreas* and *Jacobsen* provide a rare glimpse of the boundary between the content of the fourth amendment and its

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<sup>324</sup> 463 U.S. 765 (1983).

<sup>325</sup> *Id.* at 767-78.

<sup>326</sup> *Id.* at 770.

<sup>327</sup> *Id.* at 774.

<sup>328</sup> *Id.* at 771-72.

<sup>329</sup> 466 U.S. 109 (1984).

<sup>330</sup> *Id.* at 120 n.17.

<sup>331</sup> *Id.* at 120.

scope. The content rules provide that probable cause to believe that a container in official custody holds seizable matter is not itself a sufficient basis to search it. Although the container may be seized, it may not be searched without a warrant.<sup>332</sup> If the probability that the container holds seizable material rises to “virtual certainty,” however, the right of privacy in the contents of the container is “lost”<sup>333</sup> or not “infringed.”<sup>334</sup> Thus, opening the container and examining its contents is not a “search,” and, it follows, no “predicate” is required.

*Andreas* and *Jacobsen* occupy one end of a “probability” spectrum that bridges scope and content. At the other end, decisions such as *United States v. Place*<sup>335</sup> permit the temporary seizure and non-intrusive inspection of containers “reasonably suspected” of harboring contraband. A higher probability—“probable cause”—permits seizure but not search of opaque containers. The highest probability—certainty or virtual certainty—escapes the strictures of the predicate rules entirely by taking the intrusion outside the scope of the fourth amendment. Certainty is tantamount to plain view, and, as previously noted, plain view is simply a predecessor term for “knowing exposure,” which in turn implies “consent,” and consent defeats the expectation of privacy essential to a “search.”

Because they deny that a “search” had occurred, *Andreas* and *Jacobsen* appear to be decisions about the scope of the fourth amendment. Appearances, however, can be deceiving in this analytic borderland, for with a minor shift in perspective *Andreas* and *Jacobsen* appear equally convincingly to be decisions about the content of the amendment. In *United States v. Chadwick*<sup>336</sup> the Court rejected the “extreme view” that the “Warrant Clause protects only interests traditionally identified with the home,” and held unreasonable the warrantless search of a foot locker that officers had lawfully seized and “reduced . . . to their exclusive control.”<sup>337</sup>

Declining the government’s invitation to equate all portable containers with automobiles, the Court instead launched a new body of doctrine relating to container searches that for a time provided greater, not less, protection for containers encountered during arrests or auto searches.<sup>338</sup> Since 1981, however, the Court’s decisions

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<sup>332</sup> See cases cited *supra* note 223.

<sup>333</sup> *Andreas*, 463 U.S. at 772.

<sup>334</sup> *United States v. Jacobsen*, 466 U.S. 109, 120 (1984).

<sup>335</sup> 462 U.S. 696, 706 (1983).

<sup>336</sup> 433 U.S. 1 (1977).

<sup>337</sup> *Id.* at 6, 17.

<sup>338</sup> *Robbins v. California*, 453 U.S. 420 (1981); *Arkansas v. Sanders*, 442 U.S. 753 (1979).

have consistently subordinated the protection for containers when it conflicted with the authority to search without a warrant incident to arrest or incarceration,<sup>339</sup> or during the search of a vehicle at the scene<sup>340</sup> or following its impoundment.<sup>341</sup> In this company, *Andreas* and *Jacobsen* simply add another exception to *Chadwick*: no warrant is required to search a container that the seizing officer is "virtually certain" contains contraband. Although the requirement of "virtual certainty" technically operates to extinguish the possessor's expectation of privacy in the container, in form and function that requirement is indistinguishable from the role of the predicate requirement in legitimating intrusions within the scope of the fourth amendment.

That *Andreas* and *Jacobsen* seem more to resemble content than scope decisions reveals an important shift in the rationale for denying fourth amendment protection. Whereas the preceding cases could all be grouped, more or less comfortably, within the idea of implied consent based on "knowing exposure," the emphasis in *Andreas* and *Jacobsen* is on the "legitimacy," not the fact, of the defendant's expectation of privacy. In these cases, the individual has not, by exposing a secret, relinquished the protection; rather he or she has become disentitled to privacy by virtue of the government's superior claim to the observation. The most extreme example of the shift from consent to disentitlement is *Jacobsen's* other holding: that one has no legitimate expectation of privacy in contraband, even if one has never exposed it, and thus no right to protection against a device that detects only the presence of contraband.

#### G. CONSENT, DISENTITLEMENT AND EXPECTATION OF PRIVACY

From this perspective, it is possible to discern a continuum that runs from actual consent at one pole, through the varieties of implied consent, and finally, as the bases for implying consent become increasingly fictive, to legal disentitlement at the other. Abandoned property clearly falls near the consent pole, because it is a knowing relinquishment of privacy not only to the government but also to the world.<sup>342</sup> Incarceration clearly falls near the disentitlement pole. In *Hudson v. Palmer*, the Court held that "society is not prepared to recognize as legitimate any subjective expectation of pri-

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<sup>339</sup> *Illinois v. Lafayette*, 462 U.S. 640 (1983); *New York v. Belton*, 453 U.S. 454 (1981).

<sup>340</sup> *United States v. Ross*, 456 U.S. 798 (1982).

<sup>341</sup> *United States v. Johns*, 469 U.S. 478 (1985).

<sup>342</sup> 1 W. LAFAVE, *supra* note 64, at 463-75.

vacy that a prisoner might have in his prison cell.”<sup>343</sup>

Justice O’Connor’s emphatic concurrence confirms both that the rationale is disentitlement and, in concluding that therefore cell searches are “reasonable,” the resemblance between disentitling the defendant, a scope issue, and entitling the government to search or seize, the content issue.<sup>344</sup> “The fact of arrest and incarceration abates all privacy and possessory interest in personal effects. . . and therefore all searches and seizures of the contents of an inmate’s cell are reasonable.”<sup>345</sup> As with the container cases, the defeasement of the right of privacy upon incarceration finds close kin among the content decisions that permit searches and seizures of arrested and incarcerated persons.<sup>346</sup>

Thus, the “expectation of privacy” rubric comprehends two quite different notions: (1) “consent” in its various forms, derived from the interplay between the individual’s conduct and the rules governing privilege and publicity; and (2) “disentitlement,” derived from the strength of the government’s authority over the place, thing or person observed or inspected. Although establishing the authority to disentitle is very similar to establishing the predicate that makes a search or seizure “reasonable,” its function is to deny that a “search or seizure,” within the meaning of the fourth amendment, has even occurred.

Legal doctrine tends to cluster around value antinomies that are natural features of organized society. The doctrines relating to the criminal process, whether derived from constitution, statute or rule, are designed to regulate one of the most important of these—the ongoing competition between individual freedom and autonomy and its natural opponent collective security and crime control. The central norm in this scheme is the fourth amendment’s prohibition against unreasonable searches and seizures.

Because legal doctrine can never “resolve” the tension that generated it, a successful doctrinal component must always straddle the value antinomy in a way that recognizes the validity of each opposing pole. It would not do to ban all searches and seizures, nor to allow even unreasonable ones. Perhaps the most elegant and succinct example of a successful doctrinal device was the pre-incorpora-

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<sup>343</sup> 468 U.S. 517, 526 (1984).

<sup>344</sup> *Id.* at 537 (O’Connor, J., concurring).

<sup>345</sup> *Id.* at 538 (citations omitted).

<sup>346</sup> *Illinois v. Lafayette*, 462 U.S. 640 (1983); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Edwards*, 415 U.S. 800 (1974); *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

tion standard for a violation of due process, which judged state action according to its congruence with a scheme of "ordered liberty."<sup>347</sup>

Although the two clauses of the fourth amendment provide a suitably ambivalent doctrinal rubric for evaluating conflicts over the content of the prohibition, the scope of the protection—limited to "searches and seizures"—requires further doctrinal elaboration. Such elaborated doctrine must not only bridge the opposing value conflict, to be useful it must also be comprised of roughly equal parts of definitional and judgmental elements. The fourth amendment accomplishes this task by linking a judgmental content rule ("unreasonable") to definitional scope terms ("searches" and "seizures"). When the political pressure generated by the exclusionary remedy focused attention on the scope of the protection, however, a more sophisticated doctrinal instrument inevitably developed: one that would accommodate both judgment and definition while recognizing the legitimacy of both crime control and individual privacy.

The *Olmstead-Goldman* solution seemed to emphasize definition with its references to physical "penetration" and tangible "things," but it left room for judgment in the question-begging phrase "constitutionally protected area."<sup>348</sup> The *Katz* standard, in contrast, seemed to be all judgment with its references to a "reasonable" or "justifiable" "expectation of privacy." The definitional gap was filled, however, by the textual references to "searches and seizures," since the text can only be supplemented, not supplanted. *Katz*' scope formula spanned the value antinomy by promising to protect an "expectation of privacy" that is "justifiable" or "legitimate."

Ironically, the most troubling element in the *Katz* formulation, the idea of an "expectation" of privacy, is not to be found in Justice Stewart's majority opinion; it is the invention of Justice Harlan expressing his "understanding of the rule that has emerged [not from the majority opinion but] from prior decisions."<sup>349</sup> Justice Stewart spoke only of "the privacy upon which [Katz] justifiably relied while using the telephone booth," the invasion of which "thus constituted a search and seizure' . . ."<sup>350</sup>

Unfortunately, Justice Harlan's formulation has long since become the orthodox version of the *Katz* rule, perpetuating the misleading implications of the idea of an "expectation" of privacy. Its

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<sup>347</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1935).

<sup>348</sup> *Silverman v. United States*, 365 U.S. 505, 512 (1961).

<sup>349</sup> *Katz*, 389 U.S. at 353 (Harlan, J., concurring).

<sup>350</sup> *Id.* at 353. See *Amsterdam, supra* note 8, at 384.

defects are several. In the first place, as Professor Amsterdam noted,<sup>351</sup> a person's subjective belief can neither confer nor debase fourth amendment protection. The paranoid and the Pollyanna are entitled to the protection the amendment secures to them, no less and no more. Moreover, even if "expectation" is viewed in a more general sense as comprehending a societal sense of privacy, serious problems remain. What is the nature of the relevant "expectation"—that the information or material shall remain a secret from the world, or only from government? Further, since the government is entitled to invade privacy, to search and seize, when its compliance with the content rules makes such an invasion "reasonable," the material "expectation" must consist of the belief, individual or societal, that a particular intrusion is subject to fourth amendment constraints, because that is all that "privacy" entails. However, an "expectation" about the scope of the amendment that is different from the protection it actually confers cannot expand or diminish the application of the amendment. Thus, "expectations" are only relevant when they are identical to the technical judgments about the scope of the protection, which is equivalent to saying that "expectations" are not relevant at all. Expectations of privacy derive from the rules governing the scope and content of the fourth amendment, not, as Harlan's formula would suggest, vice versa.

#### H. BEYOND DOCTRINE

The scope of the fourth amendment is thus the inescapable responsibility of the Justices and will necessarily reflect both their attitudes about the value antinomy over which it presides and their sense of the relationship between the fourth amendment and other bodies of legal doctrine—relating to, for example, ownership, the power to exclude, consent, "public" property, privilege, and the like—that imply or affect privacy.

Each of the Justices brings to the resolution of fourth amendment controversies a set of attitudes and beliefs concerning the fundamental tension that underlies such disputes: the clash between individual privacy and collective security. The doctrine will reflect both the dominant view of the Court and the strength with which that view is held or rejected by individual Justices.

A few simple measures reveal the attitude of the present Court. Of 125 fourth amendment decisions from the beginning of the 1971 term through the end of the 1986 term, twenty were decided by a

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<sup>351</sup> Amsterdam, *supra* note 8, at 384.

unanimous Court.<sup>352</sup> Given the polarized views of the Justices, it seems safe to conclude that these decisions raised no issue at the doctrinal-political margin. It is significant, however, that 16% of the privacy cases that reach the tip of the judicial pyramid can be resolved according to principles on which the Justices unanimously agree. The results, moreover, are not one-sided: ten such cases sided with collective security<sup>353</sup> while ten held in favor of individual privacy.<sup>354</sup>

The cases that divided the Court, on the other hand, reveal a strong bias toward collective security. Nearly 80% (seventy-eight cases) of the ninety-eight non-unanimous fourth amendment decisions found in favor of law enforcement over individual privacy at the disputed margin.

A slightly less crude measure of the Justices' predispositions toward the relative dominance of collective and individual values can be generated by positing a bias for each Justice and measuring the frequency with which he or she votes against the predicted bias. A completely unbiased Justice would presumably vote as often against as for any posited preference. Table 1 shows the results of these calculations for each of the twelve Justices on the Court during the period.

These rough data expose the attitudes that fuel the doctrinal engine: a majority of the Justices prefer, at the margin, collective

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<sup>352</sup> Including cases in which some Justices concurred to emphasize variant but compatible views.

<sup>353</sup> *United States v. Hensley*, 105 S. Ct. 675 (1985) (Brennan, J. concurred); *Donovan v. Lone Steer, Inc.*, 104 S. Ct. 769 (1984); *Illinois v. LaFayette*, 462 U.S. 640 (1983) (Marshall, J. concurred in the judgment); *United States v. Knotts*, 460 U.S. 276 (1983) (Justices Brennan, Marshall, Blackmun and Stevens concurred in the judgment); *United States v. Cortez*, 449 U.S. 411 (1981); *Colorado v. Bannister*, 449 U.S. 1 (1980) (per curiam); *United States v. Crews*, 445 U.S. 463 (1980) (Justices Powell and Blackmun concurred; Chief Justice Burger and Justices White and Rehnquist concurred in the result; Justice Marshall did not participate); *Air Pollution Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974); *Brown v. United States*, 411 U.S. 223 (1973); *Shadwick v. Tampa*, 407 U.S. 345 (1972).

<sup>354</sup> *Hayes v. Florida*, 105 S. Ct. 1643 (1985) (Justices Brennan, Marshall and Blackmun concurred in the judgment; Justice Powell did not participate); *Winston v. Lee*, 105 S. Ct. 1611 (1985) (Burger, C.J. concurred and Justices Blackmun and Rehnquist concurred in the judgment); *Thompson v. Louisiana*, 105 S. Ct. 409 (1984) (per curiam); *United States v. Place*, 462 U.S. 696 (1983) (Justices Brennan, Marshall and Blackmun concurred in the result); *Brown v. Texas*, 443 U.S. 47 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979) (Justices Brennan, Stewart, Marshall and Blackmun concurred in the judgment); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Connaly v. Georgia*, 429 U.S. 244 (1977) (per curiam); *United States v. Ortiz*, 422 U.S. 891 (1975) (Justice Rehnquist concurred; Chief Justice Burger and Justices White and Blackmun concurred in the judgment); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (Justices Stewart, Douglas, Brennan and Marshall concurred).



**TABLE I**  
**NON-UNANIMOUS FOURTH AMENDMENT**  
**DECISIONS DURING 1971-1986 TERMS**

<u>JUSTICES</u>	<u>PREDICTED BIAS</u>	<u>VOTES AGAINST PREDICTED BIAS</u>	<u>%</u>
Rehnquist	Collective Security	0/97	0
O'Connor	"	3/43	7
Burger	"	7/90	8
Scalia	"	1/8	13
Powell	"	18/96	19
Blackmun	"	19/97	20
White	"	24/98	25
Stewart	"	24/55	44
Stevens	Individual Privacy	32/80	40
Marshall	"	4/97	4
Brennan	"	2/95	2
Douglas	"	0/15	0

security over individual privacy in 75-80% of the disputed cases, without regard to any of the details of the controversy. The analyst's task is to examine the role of the doctrine in directing and limiting the effect of those attitudes.

As suggested above, to understand how the scope of the fourth amendment is determined, it is useful to isolate two alternative approaches. On the one hand, the right of privacy (or its absence) may be viewed as simply the product of other bodies of doctrine relating to property rights, powers of consent, privileged communications, and similar rules that provide the legal matrix for privacy. According to this rule-dominated approach, a "search" or "seizure" consists only of the infringement of an otherwise legally protected right or privilege. The converse is also true: government action that does not invade such a right or privilege falls outside the protection of the fourth amendment.

The alternative, concept-based, approach views privacy more abstractly. The legal matrix influences the scope of the protection, but neither wholly defines nor limits it. Under this approach, the idea of privacy rests on its own foundation and generates its own sphere of entitlement and disentitlement. In rough outline, the *Olmstead-Goldman* doctrine limiting the fourth amendment to physical trespass on a constitutionally protected area exemplifies the rule-dominated approach, whereas the *Katz* formula illustrates the con-

cept-based approach. Of greater significance is the fact that the concept-based approach does not supplant the rule-dominated approach; it absorbs it. The existence of a legally protected right may, under *Katz*, yield a protected "expectation of privacy," and its absence may negate such an expectation. The concept-based approach also embraces the opposite results: government action that infringes no otherwise protected legal right may nonetheless violate an expectation of privacy protected by the fourth amendment, and conduct that violates a legally protected right or privilege may not infringe such an expectation.

The *Katz* formula is commonly perceived to be a doctrine that favors individual privacy. After all, it unseated *Olmstead*, enabled the fourth amendment to keep pace with "[t]he progress of science in furnishing the Government with means of espionage,"<sup>355</sup> and drew the affirmative votes of liberal Justices Douglas, Brennan and Fortas. Moreover, the *Katz* standard seems designed to enhance, rather than restrict, the scope of the amendment; it appears receptive to every "expectation" of privacy, provided only that it be a "reasonable" one.

In truth, however, the majority has fashioned *Katz*' "expectation" test into its primary instrument for withholding or diminishing the embrace of the amendment. At its most blunt, the Court, using the *Katz* formula, simply refused to deem "reasonable" the expectation that the government will not probe one's possessions with a contraband-only sensing device.<sup>356</sup> As we have seen, *Katz* also provides the doctrinal basis for denying protection to any materials or information "knowingly exposed."<sup>357</sup> At its most subtle, the Court has used the *Katz* standard, applied according to the "standing" rules announced in *Rakas* and *Rawlings*, to disentitle persons whose claim to protection rests on an otherwise legally protected right or privilege.<sup>358</sup>

A solution to the riddle of the redundant limits on the scope of the fourth amendment now seems near at hand. Each of the interpretations suggested earlier appears to play some part in the explanation. The doctrinal categories of "search" and "seizure," "expectation of privacy" and the "reasonableness" or "legitimacy" of such expectations express three distinct limits on fourth amend-

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<sup>355</sup> *Olmstead v. United States*, 277 U.S. 438, 474 (1928)(Brandeis, J., dissenting).

<sup>356</sup> *United States v. Jacobsen*, 466 U.S. 109 (1984).

<sup>357</sup> See *supra* text accompanying notes 308-316.

<sup>358</sup> *United States v. Dunn*, 107 S. Ct. 1134 (1987); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *United States v. Karo*, 468 U.S. 705 (1984).

ment protection, which the Article terms, respectively, the definitional aspect, varieties of consent, and disentanglement.

By definition, a "consensual encounter" with a law enforcement officer does not amount to a "seizure" of the person encountered.<sup>359</sup> Similarly, a voluntary transfer<sup>360</sup> or sale<sup>361</sup> to a police officer of incriminating material falls outside the ordinary as well as the doctrinal definition of "seizure." In the same way, the term "search" operates to exclude a variety of observations or other acquisitions of information from the scope of the amendment, preeminently those phenomena within the "plain perception" of a legally situated officer's senses.

In one sense, all of the decisions delimiting the scope of the fourth amendment are "definitional," because all must ultimately be related to the text, and the Amendment speaks only of "searches and seizures" of "persons, houses, papers and effects."<sup>362</sup> By ignoring the confusion generated by the Court's natural tendency to present its judgments as ineluctably drawn from the text, however, it is possible to bring into focus other doctrinal and political influences on the scope of the protection against unreasonable government conduct.

Notions of consent and implied consent seem to underlie many of the Court's decisions denying the existence of an "expectation of privacy" protected by the amendment.<sup>363</sup> These range from actual, informed and voluntary consent, at one extreme, to conduct that is so public that no actual expectation of privacy is imaginable, to carefully limited exposures of private information deemed in law not to support a "reasonable" expectation of privacy, to, at the other extreme, categorical forfeitures of any "legitimate" expectation of privacy in certain information or under certain circumstances. It is at this latter extreme, at least, that it becomes more descriptive to term the limitation a "disentanglement," because there is no feasible course of action by which the individual's claim to privacy can be preserved.

#### I. *KATZ* REVISITED: THE PARTICIPANT MONITOR

This Article has already explored some of the cases that fall in the middle of the spectrum, noting that protection is denied to information exposed in confidence, with an expectation of anonymity,

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<sup>359</sup> *Colorado v. Bannister*, 449 U.S. 1 (1980); *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *Florida v. Rodriguez*, 469 U.S. 1 (1984).

<sup>360</sup> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

<sup>361</sup> *Maryland v. Macon*, 472 U.S. 463 (1985).

<sup>362</sup> U.S. CONST. amend IV.

<sup>363</sup> See *supra* text accompanying notes 306-316.

or to procure essential financial or municipal services.<sup>364</sup> This result is deemed to follow from the Court's consistent line of decisions, beginning with *On Lee v. United States*,<sup>365</sup> withholding fourth amendment protection from information "revealed to a third party."<sup>366</sup> Because to hold otherwise would create, in effect, an impossibly broad constitutional privilege for "confidential" communications and jeopardize all undercover police activities, no Justice<sup>367</sup> has suggested that the fourth amendment bars the government from providing, enlisting or even "planting" such a "confidant" in an otherwise protected place. In *United States v. White*,<sup>368</sup> this principle was tested and reaffirmed in light of *Katz*'s reconceptualization of the amendment as a device to protect the "privacy" of "persons not places."

The question posed by *White* had bedeviled the Court for twenty years: whether the fourth amendment governed the surreptitious recording or transmission of a suspect's statements to an undercover agent. Prior to *Katz*, defendants sought to characterize such statements as the product of a "trespass," arguing that consent to enter their business or residential premises was vitiated by the agent's fraudulent misrepresentation of his or her status or purpose. Such a theory does not depend upon the agent's use of any electronic apparatus; its effect, therefore, would be to restrict undercover activity to public places. The Court has consistently rejected this trespass theory.<sup>369</sup>

The *White* case involved a typical narcotics investigation. A "government informant" equipped with a hidden radio transmitter engaged the defendant in conversations in a variety of locations, including the latter's home, automobile and place of business. Testimony by government agents who overheard those conversations was admitted at defendant's trial on narcotics charges and he was convicted and sentenced to twenty-five years' imprisonment.<sup>370</sup> A panel of the Court of Appeals for the Seventh Circuit reversed on the strength of *Katz* and, on rehearing en banc, a six to three major-

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<sup>364</sup> See *supra* text accompanying notes 285-294.

<sup>365</sup> 343 U.S. 747 (1952).

<sup>366</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976).

<sup>367</sup> With the possible exception of Justice Douglas, whose dissent in *Osborn v. United States*, 396 U.S. 1015 (1970), urged that "[e]ntering another's home in disguise to obtain evidence is a 'search' that should bring into play all the protective features of the fourth amendment."

<sup>368</sup> 401 U.S. 745 (1971).

<sup>369</sup> See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966):

<sup>370</sup> *White*, 401 U.S. at 746-47.

ity adhered to that decision.<sup>371</sup> A five to four majority of the Supreme Court reversed. What was at stake in *White* was nothing less than the soul of *Katz*. Had the *Katz* decision broken the hold of the rule-dominated conception of the scope of the Amendment? Was *Katz* to usher in an era in which the effect of government actions on the individual's "right of privacy," as such, became the measure of the Constitution's protection? If so, how far would such protection extend? To all conversations intended to be "private," or only to those "intercepted" by electronic means or transmitted to third party auditors?

Judge Swygert's opinion for the Court of Appeals' majority leaned in the direction of a broad protection for any conversation the individual "justifiably expected . . . to be private," without regard to "the trespass doctrine . . . which . . . was squarely discarded by the Court in *Katz*."<sup>372</sup> That some of the conversations occurred in the informant's residence is irrelevant to this view of the sweep of *Katz*. What matters is that the defendant's expectation of conversational privacy was confirmed both by "the well-laid plans of the Government agents . . . [which] recognized that the defendant sought to exclude their uninvited ears," and "the locations chosen for the private conversations indicat[ing] that the defendant took reasonable steps to protect against government intrusion."<sup>373</sup>

However, faced with the need to reconcile its reasoning with the Supreme Court's decisions in *Hoffa v. United States*,<sup>374</sup> *Rathbun v. United States*<sup>375</sup> and *Lopez v. United States*,<sup>376</sup> the Seventh Circuit's grand structure swiftly collapsed. *Hoffa* took the reasonably foreseeable "risk that his intended listener [might] . . . subsequently testify as to the contents of the conversation . . . and thus [his] objection thereto is waived."<sup>377</sup> "[O]ne who places a telephone call takes the risk that an extension on the other end of the line may be picked up by an uninvited third party with or without the complicity of the intended listener."<sup>378</sup> "*Lopez* goes no further than to hold that . . . a recording of . . . conversation [with an informant] . . . is admissible for the limited purpose of corroboration."<sup>379</sup>

What remains in the realm of protected privacy following this

<sup>371</sup> *United States v. White*, 405 F.2d 838 (7th Cir. 1969).

<sup>372</sup> *Id.* at 843 (citations omitted).

<sup>373</sup> *Id.* at 846.

<sup>374</sup> 385 U.S. 293 (1966).

<sup>375</sup> 355 U.S. 107 (1957).

<sup>376</sup> 373 U.S. 427 (1963).

<sup>377</sup> *White*, 405 F.2d at 845.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 847.

set of accommodations is an apparently puny holding: that electronic transmission, but not taping, of "private conversations," even with the consent of the transmitting party, is subject to constitutional regulation under the fourth amendment.<sup>380</sup> This remnant is sufficient, however, to demonstrate that the reach of the fourth amendment is not simply the by-product of other bodies of legal doctrine relating to property rights, privilege and the competency of witnesses. Given such a right of privacy, freed from the doctrine that affects privacy but does not necessarily define it, the Court might deem "legitimate" the expectation against aerial surveillance of one's home and curtilage or against trespass on one's remote open fields. It might find "protectible" one's expectation of confidentiality or at least anonymity in financial and utility records. It would not, in short, assume that anything "revealed . . . to another"<sup>381</sup> was therefore outside the realm of the fourth amendment.

For the Supreme Court plurality in *White*, however, *Katz* changed nothing. If "the activities and reports of the [undercover] police agent himself" are permissible, "it is thus untenable to . . . view the same agent with a recorder or transmitter as conducting an . . . unconstitutional search and seizure."<sup>382</sup> Accordingly, the plurality saw "no indication in *Katz* that the Court meant to . . . disturb the result reached in the *On Lee* case, nor are we now inclined to overturn this view of the Fourth Amendment."<sup>383</sup>

Justice Harlan's dissent rejected the plurality's argument that "it is irrelevant whether secrets are revealed by the mere tattletale or the transistor . . ."<sup>384</sup> Whether the unprotected risk of the former should entail the latter risk as well could only be decided by addressing "[t]he critical question . . . whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risk of the electronic listener or observer without at least the protection of a warrant requirement."<sup>385</sup> That question, for Harlan, called for an assessment of the impact of electronic monitoring "on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."<sup>386</sup> "I am now persuaded that such an approach misconceives the basic issue, focusing, as it does, on the interests of a particular individual rather

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<sup>380</sup> *Id.* at 847-48.

<sup>381</sup> *E.g.*, *United States v. Miller*, 425 U.S. 435, 443 (1976).

<sup>382</sup> *United State v. White*, 401 U.S. 745, 753 (1971).

<sup>383</sup> *Id.* at 750.

<sup>384</sup> *Id.* at 787 (Harlan, J., dissenting).

<sup>385</sup> *Id.* at 786 (Harlan, J., dissenting).

<sup>386</sup> *Id.*

than evaluating the impact of a practice on the sense of security that is the true concern of the Fourth Amendment's protection of privacy."<sup>387</sup>

Unregulated electronic monitoring, he concluded, would:

undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society . . . [I]t might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious and defiant discourse—that liberates daily life. . . . All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.<sup>388</sup>

These views did not prevail and have not since attracted a majority of the justices to a conception of the fourth amendment that “transcend[s] the search for subjective expectations or legal attribution of assumptions of risk.”<sup>389</sup> Instead, constitutionally protected privacy is conceived to be wholly the product of the interplay of subsidiary doctrine governing property and privilege relationships. Indeed, as the “open fields” exclusion and the “standing” cases, next to be examined, demonstrate, a property right may be a necessary but not a sufficient basis for the assertion of a fourth amendment right. Because the “standing” limitation seems only to be used as a residual device for defeating an otherwise invulnerable claim to constitutional protection, it exemplifies the role of “disentitlement” as a limit on the scope of the constitutional protection of privacy.

#### J. A NOTE ON STANDING

The rules governing “standing” to assert a violation of the fourth amendment and, if successful, to reap the reward of exclusion, magnify the effect of changes in the relative value accorded to privacy and its natural competitor, collective security. In the Term preceding *Mapp* it was a “standing” case, *Jones v. United States*,<sup>390</sup> that foretold the shift toward privacy. Similarly, *Mancusi v. DeForte*,<sup>391</sup> illustrated the capacity of the Court to use the “expectation of privacy” formula to enlarge “standing” during the last stage of the Warren Court. Ten years later, in *Rakas v. Illinois*<sup>392</sup>, the four Nixon appointed justices, joined by Justice Stewart, used the same formula to drastically shrink the class of persons protected against unreason-

<sup>387</sup> *Id.* at 788, n.24 (Harlan, J., dissenting).

<sup>388</sup> *Id.* at 787-89 (Harlan, J., dissenting).

<sup>389</sup> *Id.* at 786 (Harlan, J., dissenting).

<sup>390</sup> 362 U.S. 257 (1960).

<sup>391</sup> 392 U.S. 364 (1968).

<sup>392</sup> 439 U.S. 128 (1978).

able searches and seizures.<sup>393</sup>

Under *Jones* a defendant could establish standing (1) by asserting ownership or possession of the place searched or the thing seized; (2) by his "lawful presence" on the premises searched; or (3) automatically, as a person charged with the crime of possessing the thing seized.<sup>394</sup> None of these grounds has survived application of the new standing doctrine announced in *Rakas v. Illinois*<sup>395</sup>, *United States v. Salvucci*<sup>396</sup> and *Rawlings v. Kentucky*.<sup>397</sup>

"Standing" in the sense that "the party seeking relief must have an adversary interest in the outcome" is, as Professor Wayne LaFave has noted, always satisfied in criminal cases, because the defendant's "interest in avoiding conviction gives him a very significant personal stake in the ruling upon his motion to suppress."<sup>398</sup> Further restriction on the class of persons entitled to litigate the constitutionality of the means by which the government obtained its evidence follows from the maxim that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted."<sup>399</sup> Logically, however, this limitation necessarily excludes only the person whose sole connection to the fourth amendment "event" is that it produced the evidence offered against him or her. Whether any additional connection to that event suffices to establish a "personal" rather than a "vicarious" right, entails a value judgment that is governed by the same influences that have shaped the scope of the fourth amendment.<sup>400</sup> Not surprisingly, the metamorphosis of "standing" from a limitation on the remedy of exclusion, in *Jones v. United States*, to a limit on the right itself, in *Rakas*, has dramatically constricted the boundaries of constitutionally protected privacy.

*Rakas* accomplished this transformation of the standing limitation in two ways. First, the test for standing was rendered far more abstract, and thus more malleable, by discarding *Jones*' "legitimately on premises" rule as "too broad a gauge" and substituting *Katz*' "expectation of privacy" formula.<sup>401</sup> In place of *Jones*' "bright line" excluding only trespassers, *Rakas* drew a "dim line" that tested the

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<sup>393</sup> *Rakas v. Illinois*, 439 U.S. 128 (1978); *United State v. Salvucci*, 448 U.S. 83 (1980); *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

<sup>394</sup> *Jones v. United States*, 362 U.S. 257 (1960).

<sup>395</sup> 439 U.S. at 128.

<sup>396</sup> 448 U.S. 83 (1980).

<sup>397</sup> 448 U.S. 98 (1980).

<sup>398</sup> 4 W. LAFAVE, *supra* note 64, at 299-380.

<sup>399</sup> *Rakas*, 439 U.S. at 133-34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

<sup>400</sup> Allen, *supra* note 107, at 23.

<sup>401</sup> *Rakas*, 439 U.S. at 142.



rights of persons legitimately present according to the duration of their presence and their proximity to the area searched.<sup>402</sup> A visitor in the kitchen, Justice Rehnquist said, "would have absolutely no interest or legitimate expectation of privacy in the basement . . . a casual visitor who walks into a house one minute before a search . . . commences and leaves one minute after the search ends . . . would have none in the house . . ."<sup>403</sup> This dictum was reinforced by the Court's holding that passengers in the back seat of a car stopped and searched by the police had no "legitimate expectation of privacy in the glove compartment or area under the seat of the car . . . [because] these are areas in which a passenger qua passenger simply would not normally have a legitimate expectation of privacy."<sup>404</sup>

Of perhaps greater significance than *Rakas*' reformulation of the doctrine was the rigor and particularity with which the new formula was applied. Whereas prior to *Rakas*, any of the *Jones* grounds entitled the defendant to object to the "search and seizure,"<sup>405</sup> after *Rakas* the moving party was required to show that his "expectation of privacy" had been "violated" by the particular fourth amendment "event"—entry, search or seizure—that yielded the materials or information sought to be suppressed.

*Rakas*, *Salvucci* and *Rawlings* involved challenges to the search for, not the seizure of, the items taken. Each held that the defendant's relationship to the place searched was not sufficient to establish an expectation of privacy in the place searched: the front seat and glove compartment of the car in which defendant was a backseat passenger;<sup>406</sup> an apartment rented to defendant's mother,<sup>407</sup> and the purse of defendant's companion.<sup>408</sup> Obviously, the defendant had a closer relationship to the things seized: a rifle and ammunition;<sup>409</sup> stolen mail;<sup>410</sup> and illegal drugs.<sup>411</sup> Yet in none of the cases did defendant claim that the *seizure* of his goods endowed him with standing to contest the legality of the *seizure*; each challenged only the *search*.

In *Rakas*, Justice Rehnquist appends a misleading footnote to

<sup>402</sup> *Id.* at 148-49.

<sup>403</sup> *Id.* at 142.

<sup>404</sup> *Id.* at 148-49.

<sup>405</sup> See *Rawlings v. Kentucky*, 448 U.S. 98, 117-18 (1980)(Marshall, J., dissenting); *United States v. Jeffers*, 342 U.S. 48 (1951).

<sup>406</sup> *Rakas*, 439 U.S. 128.

<sup>407</sup> *United State v. Salvucci*, 448 U.S.83 (1980).

<sup>408</sup> *Rawlings*, 448 U.S. 98.

<sup>409</sup> *Rakas*, 439 U.S. 128.

<sup>410</sup> *Salvucci*, 448 U.S. 83.

<sup>411</sup> *Rawlings*, 448 U.S. 98.

his discussion of the disentitled “casual visitor”: “This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search.”<sup>412</sup>

In *Rawlings*, however, the notion that defendant “should be entitled to challenge the search . . . because he claimed ownership of the drugs in [his companion’s] . . . purse”<sup>413</sup> was dismissed as an “arcane” property concept irrelevant to “the ability to claim the protections of the Fourth Amendment.”<sup>414</sup> This judgment became the foundation in *Salvucci* for the Court’s overruling, on the same day, of Jones’ grant of automatic standing in possession cases.<sup>415</sup> “We . . . decline to use possession of a seized good as a substitute for a factual finding that the owner of the goods had a legitimate expectation of privacy in the area searched.”<sup>416</sup>

The legality of a seizure may be challenged either because it was the product of an unlawful entry or search or because the seizure itself was improper. The content of the fourth amendment, however, offers little hope of success for the latter challenge. Defendant’s bow has only one string: that the government had an insufficient basis for believing that the goods were “associated with crime.”<sup>417</sup> The nature of the property seized in *Rakas*, *Rawlings*, and *Salvucci* was so apparently within this standard that the defendants forwent the option to challenge the seizure.

Thus goods found during a search the defendant is not entitled to challenge become goods in “plain view.” Justice Rehnquist is correct in saying, in *Rawlings*, that

[h]ad petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy. Prior to *Rakas*, petitioner might have been given standing<sup>7</sup> in such a case to challenge a ‘search’ that netted those drugs but probably would have lost his claim on the merits.<sup>418</sup>

Unfortunately, his description of the post-*Rakas* result gratuitously confounds the scope of the amendment with its content. “After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner.”<sup>419</sup>

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<sup>412</sup> *Rakas*, 439 U.S. at 142, n.11 (emphasis added).

<sup>413</sup> *Rawlings*, 448 U.S. at 105.

<sup>414</sup> *Id.*

<sup>415</sup> *Salvucci*, 448 U.S. at 185.

<sup>416</sup> *Id.* at 92.

<sup>417</sup> *Texas v. Brown*, 460 U.S. 730, 738 (1985).

<sup>418</sup> *Rawlings*, 448 U.S. at 106.

<sup>419</sup> *Id.*

Similar statements in *Rakas*<sup>420</sup> and *Salvucci*<sup>421</sup> needlessly sow confusion by blurring the distinction between entitlement to a hearing (the standing or, after *Rakas*, preliminary scope issue) and success at the hearing (the content issue). When the Court viewed "standing" as a limitation on the remedy of exclusion, it was natural to find or assume a violation of the fourth amendment before reaching the question of whether a right of the party seeking to suppress its product had been "violated." After *Rakas*, however, that formulation yields the nonsense rule that only those defendants whose rights have been violated are entitled to a hearing to determine whether their rights were violated.

## V. CONCLUSION

It is time to ask whether the analytic threads this Article has traced are all part of a larger fabric. The pattern is complex. As with an Escher drawing in which fish are transformed into birds, "searches" and "seizures" become "expectations," and fourth amendment protection becomes more a matter of judgment than description. Close examination, as with the drawing, reveals the strokes by which the transformation of the doctrine was accomplished.

*Katz* is the doctrinal linchpin. Thereafter, every intrusion by government into the private affairs of its citizens became eligible for inclusion within—or exclusion from, the protective mantle of the fourth amendment. When the *Katz* formula is superimposed on the established search-negating doctrines of "plain view," consent and "misplaced reliance," or on the seizure-negating notions of "consensual encounter" and "voluntary transfer," the fish and the bird are identical. There has been no search or seizure because there can be no expectation of privacy in such circumstances, and vice versa. The new creature begins to emerge in decisions that deem certain expectations "unreasonable." The transformation is complete—background becomes foreground—in decisions that deny the "legitimacy" of expectations against intrusions that are, by any other measure, searches and seizures.<sup>422</sup>

*Katz*' weakness, however, is also its strength. It bends in both directions. To accommodate the Court's preference for crime control, therefore, it is necessary to reinforce *Katz* with doctrinal and

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<sup>420</sup> 439 U.S. at 140.

<sup>421</sup> 448 U.S. at 95.

<sup>422</sup> *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Jacobsen*, 466 U.S. 109 (1984); *Illinois v. Andreas*, 463 U.S. 765 (1983).

analytic devices that make it receptive to the majority's values and which undermine or deflect *Katz*'s promise to protect any justifiable expectation of privacy. Chief among these devices is the Court's use of a rule-dominated approach to determine the meaning of *Katz*, enabling it to defeat any assertion of privacy that is not based upon an otherwise legally protected right or privilege.<sup>423</sup> Moreover, when that approach is linked to its closest doctrinal kin, the standing rules announced in *Rakas*, *Salvucci* and *Rawlings*, even the expectations of occupants, possessors and owners of the place searched or thing seized may be dismissed as "unreasonable."

The final component in the majority's anti-privacy arsenal is designed to control the remaining variable in the decisional matrix: the facts. When the actual facts seem to demand fourth amendment protection, the Court deflects that result by substituting proxy facts, hypothetical circumstances that appear similar to the case at hand but which carry an opposite doctrinal charge. *Knotts*, for example, invokes a hypothetical observer to validate the use of an electronic tracking beacon,<sup>424</sup> and *Karo* carries the technique to (or beyond) the limits of plausibility<sup>425</sup>: "any object" is substituted for the beacon;<sup>426</sup> an officer "walking down the street carrying a parabolic microphone" is substituted for the receipt of the beacon-encumbered package;<sup>427</sup> and the absence of monitoring is substituted for extensive monitoring of the device while the package was located in a number of private residences.<sup>428</sup> Similarly, *Jacobsen*'s "re-search" rule is based on what the private searchers "could have" testified to;<sup>429</sup> the aerial surveillance decisions are based on what private pilots or passengers "could" see from public airspace,<sup>430</sup> or what a "power company repair mechanic on a pole overlooking the yard" could have observed;<sup>431</sup> and in *Rakas v. United States* "standing" by a

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<sup>423</sup> When the rule-dominated approach would have yielded a privacy-enhancing result contrary to the majority's predilection, as in the warrantless entry onto private property by government agents to observe conditions not accessible from off the premises, the Court trumped that result by invoking the text of the Constitution: "open fields," it announced, are not "persons, houses, papers, or effects." See *supra* notes 249-254 and accompanying text. Similarly, in *Greenwood*, the Court denied effect to defendant's state law right of privacy in his garbage, deeming that argument "no less than a suggestion that concepts of privacy under the laws of each state are to determine the reach of the Fourth Amendment." *California v. Greenwood*, 108 S. Ct. 1625, 1631 (1988).

<sup>424</sup> *Knotts*, 460 U.S. at 282.

<sup>425</sup> *Karo*, 468 U.S. 705

<sup>426</sup> *Id.* at 713.

<sup>427</sup> *Id.* at 712.

<sup>428</sup> *Id.* at 720.

<sup>429</sup> *United States v. Jacobsen*, 466 U.S. 109, 118-19 (1984).

<sup>430</sup> *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986).

<sup>431</sup> *Id.* at 215.

passenger in his ex-wife's automobile was defeated by reference to a "casual visitor" in the kitchen of the searched premises.<sup>432</sup>

For one who believes, as this essay suggests, that individual privacy has been unduly subordinated to law enforcement interests, it is tempting to blame the doctrine, to find the genesis of the Court's anti-privacy decisions in the conceptual and analytic apparatus that monitors the scope of the protection. However, any scheme for deriving the reach of the fourth amendment will entail definitional elements (what is a "search" or "seizure"?), judgmental elements (what kinds of government observations and acquisitions are within the prohibition?), and issues at the margin will always arise. For example, there is no reason to believe that the result in any case would be changed by the use of the majority standard in *Katz v. United States*—"privacy upon which . . . [one has] justifiably relied"<sup>433</sup>—in place of Justice Harlan's "reasonable expectation of privacy" formula.<sup>434</sup> Indeed, the *Olmstead-Goldman* standard, which restricted the amendment's protection to intrusions that "penetrate" a "constitutionally protected area" could, with effort, embrace all of the post-*Katz* results. Each standard necessarily permits judgment and doctrine is the consequence, not the cause, of its exercise.

The structure of the fourth amendment may suggest an appropriate approach to and limits on the exercise of that authority. The terms with which the scope of the amendment is described—"searches and seizures"—seem to call for definition, whereas the term that encapsules the content rules—"unreasonable"—could not more plainly call for judgment. Further, although only causal analysis would seem necessary to application of the exclusionary remedy, its political vulnerability has attracted far more than its share of anti-privacy sentiment. Thus conduct found within the protection of the amendment remains subject to two judgmental stages at which the privacy-crime control balance can be struck. Such "balancing" is the essence of a standard that forbids "unreasonable" conduct, and it is inescapable in the application of a controversial remedy that confers a windfall benefit on a criminal defendant as a byproduct of its intended deterrent effect. It seems structurally appropriate, therefore, to minimize the judgmental component in determining the scope of the amendment. In seeking to define "searches and seizures," the use of balancing is inappropriate. A fish cannot be

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<sup>432</sup> *Rakas*, 439 U.S. at 142.

<sup>433</sup> *Katz*, 389 U.S. at 353.

<sup>434</sup> *Id.* at 361 (Harlan, J., concurring).

defined as a bird simply because, on balance, there is a need for more birds.

In several ways, however, reasoning appropriate to molding the content of the prohibition against unreasonable searches and seizures has been indiscriminately applied to the very different task of defining what constitutes a search or seizure in the first place. An almost subliminal manifestation of this tendency is seen when the Court invokes the content term "reasonable" in announcing a decision relating to the scope of the amendment. In *Jacobsen*, for example, in which the Court ruled that a field test was not a "search" but that the destruction of a small amount of the suspected powder in performing the test was a "seizure," the Court "conclude[d] that both actions were *reasonable* for essentially the same reason."<sup>435</sup> Similarly, in *United States v. Dionisio*,<sup>436</sup> in which the Court held that a grand jury summons and order to provide a voice exemplar did not "infringe . . . upon any interest protected by the Fourth Amendment."<sup>437</sup> the Court announced that "*Dionisio's* compulsory appearance before the grand jury was not an *unreasonable* seizure."<sup>438</sup>

In fashioning the predicate for a particular variety of search or seizure, the Court appropriately seeks to "balance the nature and quality of the intrusion on the individual's fourth amendment interests against the importance of the governmental interests alleged to justify the intrusion."<sup>439</sup> One such governmental interest is the need for a "workable standard," a so-called "bright line" to guide police conduct.<sup>440</sup> Neither "balancing" nor the preference for "bright lines," however, has any proper application to the determination of whether such conduct amounts to a search or seizure. A search cannot be deemed a non-search because the government needs the information sought or because a contrary rule would tax the officer's ability to understand the scope of the fourth amendment.

Perhaps the most glaring example of the misuse of "balancing" analysis occurred in the Court's decision in *Schnecklock v. Bustamonte*,<sup>441</sup> in which the issue was whether knowledge of the right to withhold consent was essential to its valid exercise. Because "a search authorized by a valid consent may be the only means of ob-

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<sup>435</sup> *Jacobsen*, 466 U.S. at 118 (emphasis added).

<sup>436</sup> 410 U.S. 1 (1973).

<sup>437</sup> *Id.* at 15.

<sup>438</sup> *Id.* at 13 (emphasis added). For other examples see *United States v. Dunn*, 107 S. Ct. 1134, 1141 (1987); *United States v. Karo*, 468 U.S. 705, 715-716 (1984).

<sup>439</sup> *United States v. Place*, 462 U.S. 696, 703 (1983).

<sup>440</sup> See Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).

<sup>441</sup> 412 U.S. 218 (1973).

taining important and reliable evidence,” the Court reasoned, “the legitimate need for such searches and the equally important requirement of assuring the absence of coercion . . . must be accommodated in determining the meaning of a voluntary’ consent.”<sup>442</sup> Weighed on these scales, the Court found ignorant consent, and the relinquishment of fourth amendment protection it effects, constitutional.

“Balancing” can also be used, in theory, to expand the scope of the amendment, as Justice Harlan unsuccessfully urged in his dissent in *United States v. White*.<sup>443</sup> Whether “we should impose on our citizens the risks of the electronic listener . . .” must, he argued, “be answered by assessing . . . the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement.”<sup>444</sup>

When the scope issue is framed not as an attempt to define the terms “search” or “seizure” but rather as an assessment of “whether an expectation of privacy is ‘legitimate’ or ‘reasonable’ . . .” it seems, as the Court said in *Hudson v. Palmer*, “necessarily [to] entail . . . a balancing of interests.”<sup>445</sup> In determining the role of the fourth amendment in prisons, it seems particularly appropriate to consider “the interest of society in the security of its penal institutions and the interest of the prisoner in the privacy within his cell.”<sup>446</sup> The surface appeal of balancing analysis in this context, however, simply reflects the malleability of the *Katz* formula in conjunction with well-founded doubts concerning whether prisoners, as opposed to society at large, have any claim to privacy within the prison. If that claim is at all plausible, it cannot be set aside simply because, on balance, the government needs to search.

The preference for “bright lines” may be appropriate in devising “reasonable” rules for conducting searches and seizures. Recently, however, the Court has applied similar reasoning to the dissimilar task of defining what amounts to a search or seizure. In *Oliver v. United States*,<sup>447</sup> the defendant argued that in some situations the circumstances might warrant a “reasonable” expectation of privacy in one’s “open fields,” based, for example on fencing and posting of the property, its remote location, the absence of air traffic, and the like. The Court rejected this case-by-case approach be-

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<sup>442</sup> *Id.* at 227.

<sup>443</sup> 401 U.S. 745 (1971)(Harlan, J., dissenting).

<sup>444</sup> *Id.* at 786 (Harlan, J., dissenting).

<sup>445</sup> *Hudson v. Palmer*, 468 U.S. 517, 527 (1984).

<sup>446</sup> *Id.*

<sup>447</sup> 466 U.S. 170.

cause it would not “provide a workable accommodation between the needs [essentially, the need for a “bright line”] of law enforcement and the interests protected by the Fourth Amendment.”<sup>448</sup>

Fourth amendment doctrine is driven by society’s attitudes and beliefs about the relative value of autonomy and security. In this continuing struggle between the individual and the collective there is only one rule: neither may utterly dominate the other—chaos and tyranny are equally to be avoided. How any society strikes the balance will reflect its history, traditions and institutions as well as the current ratio of fear and hope among its citizens. The fourth amendment embodies both the commitment of American society to “the security of one’s privacy against arbitrary intrusion by the police,”<sup>449</sup> and the larger commitment to a written constitution as the essential guardian of that freedom. Both commitments imply limits on the power of the Court: “privacy” may not be defined away; and analysis must observe the purpose and the structure of the amendment.

The doctrinal record during the twenty years since *Katz* reveals a Court hostile to privacy and, of greater concern, willing to ignore or subvert the constraints of language and structure in its quest for the favored result. Although these results undoubtedly reflect dominant public sentiment, there is no shortage of public and private institutions devoted to absorbing and recycling popular attitudes. The Court’s unique role is to preserve and translate the terms of the social contract embodied in the Constitution. As monitor of the fourth amendment boundary between public authority and private autonomy, the Court commands extraordinary authority to influence the nature of American society. The proper exercise of that power, as Justice Stewart saw must transcend the passions and fashions of the day.

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear ‘unrealistic or extravagant’ to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own, they won by legal and constitutional means in England, and by revolution on this continent a right of personal security against arbitrary intrusions by official power. If times have changed, reducing every man’s scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.<sup>450</sup>

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<sup>448</sup> *Id.* at 181. See also *Illinois v. Andreas*, 463 U.S. 765, 777 (1983)(Court justified its ruling that the search of table known to contain contraband was outside scope of the amendment because result yielded a “workable standard.”).

<sup>449</sup> *Wolf*, 338 U.S. at 27.



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<sup>450</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).