

Spring 1989

## Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches

Robert C. Power

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Robert C. Power, Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches, 80 J. Crim. L. & Criminology 1 (1989-1990)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

# CRIMINAL LAW

## TECHNOLOGY AND THE FOURTH AMENDMENT: A PROPOSED FORMULATION FOR VISUAL SEARCHES

ROBERT C. POWER\*

### I. INTRODUCTION

Technological developments are increasingly important to criminal investigation. Every modern law enforcement agency needs access to scientific laboratories. Scientific methods of identification, such as fingerprinting, prove both guilt and innocence. With the increasing efficiency of data retrieval and collection and the voluntary sharing of facilities and expertise, law enforcement benefits immensely from progress in the applied sciences, often with resulting gains to society.<sup>1</sup> But technological progress has its dark side, as

---

\* Associate Professor of Law, University of Bridgeport School of Law. J.D., Northwestern University School of Law; A.B. Brown University. The author wishes to express his appreciation to Professors Elizabeth Marsh Alexander M. Meiklejohn and Margaret V. Sachs for their helpful comments on earlier drafts of the Article.

<sup>1</sup> There is a substantial body of literature on technology and the criminal process. See generally E. IMWINKELRIED, *SCIENTIFIC EVIDENCE AND EXPERT EVIDENCE* (2d ed. 1981); A. MOENSSENS, F. INBAU & J. STARRS, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* (3d ed. 1986). This parallels an astonishing increase in the variety and sophistication of visual surveillance devices. See, e.g., Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1004-17 (1966) (analyzing various forms of technology used in physical, data, and psychological surveillance); Note, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?*, 3 HASTINGS CONST. L.Q. 261, 266 (1976) (describing various electronic visual surveillance devices) [hereinafter *Electronic Visual Surveillance*]; Note, *Police Use of CCTV Surveillance: Constitutional Implications and Proposed Regulations*, 13 U. MICH. J.L. REF. 571, 573-75 (1980) (discussing use of closed-circuit cameras for area surveillance). One of the most important recent developments is in the area of genetic tracking: the use of DNA typing to identify suspects from traces of body fluids, skin, and hair. See Moss, *DNA—The New Fingerprints*, 74 A.B.A. J. 66 (1988); Froelich & Leyden, *Genetic Fingerprint Technology May Revolutionize Crime Solving*, Hartford Courant, April 24, 1988, at 1, col. 1; Johnson, *DNA 'Fingerprinting' Tests Becoming a Factor in Courts*, N.Y. Times, Feb. 7, 1988, at 1, col. 4.

even universally recognized achievements in science create harmful byproducts.

The most obvious social cost associated with the use of new technology in law enforcement is the loss of personal privacy that results from the increased ability of police agencies to spy on private conduct.<sup>2</sup> While this problem has existed ever since science first enhanced a human sense, legislatures and courts have only recently begun to address it on a broad scale. While statutes and common law decisions address isolated aspects of the law enforcement/privacy implications of technology,<sup>3</sup> the struggle has focused

---

<sup>2</sup> In 1975, Senator John Tunney noted:

Technological developments are arriving so rapidly and are changing the nature of our society so fundamentally that we are in danger of losing the capacity to shape our own destiny.

This danger is particularly ominous when the new technology is designed for surveillance purposes, for in this case the tight relationship between technology and power is most obvious. Control over the technology of surveillance conveys effective control over our privacy, our freedom and our dignity—in short, control over the most meaningful aspects of our lives as free human beings.

*Hearings on Surveillance Technology Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 1 (1975)*(statement of Sen. Tunney). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 386 (1974)(quoting *Silverman v. United States*, 365 U.S. 505, 509 (1961))("In recent years . . . rapid technological advances and the consequent recognition of the [resulting] 'frightening paraphernalia' . . . have underlined the possibility of worse horrors yet to come."); Fishman, *Electronic Tracking Devices and the Fourth Amendment: Knotts, Karo, and the Questions Still Unanswered*, 34 CATH. U.L. REV. 277, 393-94 (1985)(new technology threatens fourth amendment privacy protections); Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 713 (1985)("Effective and comprehensive visual surveillance and recordation . . . infringe on . . . informational privacy essential to travel, physical mobility and association."); Note, *Electronic Visual Surveillance*, *supra* note 1, at 264 (characterizing the effects of visual electronic surveillance as "far more serious than those of electronic eavesdropping"); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 975 (1968)(describing enhanced observations as "[t]he most odious modern searches," no less intrusive than "the most blatant trespassory invasions") [hereinafter *Private Places*].

Technological intrusion has become a major part of modern fantasy life. It is hard to find a television crime show that does not involve some techno-gimmick such as electronic surveillance, night-scope observation, or beeper monitoring. For instance, David Letterman once teased his viewers by telling them that he had a radio scanner and would be listening to all of their cellular telephone conversations, *Late Night with David Letterman* (NBC television broadcast, Dec. 18, 1987), and one popular song of recent years was "Every Breath You Take," the Police's anthem of an obsessed person watching every movement of a former lover. The Police, *Synchronicity* (A&M Records 1983)(words and music by Sting). The real obsession is ours; the tension between privacy and surveillance is one of the major concerns of the 1980's.

<sup>3</sup> See, e.g., *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)(results of early form of polygraph examination inadmissible under evidence law); Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646, 646-53 (1988)(prohibiting random polygraph testing by private employers); Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968)(regulating electronic eaves-

principally on the interpretation of the fourth amendment's protections against unreasonable searches and seizures.<sup>4</sup> For most of the nation's history, the courts treated that amendment as regulating only "physical" searches and "tangible" seizures.<sup>5</sup> This approach implicated technology only indirectly, such as where a court holds the results of scientific analysis inadmissible under the exclusionary rule because police obtained tested evidence in an unconstitutional search or seizure.<sup>6</sup>

In 1967 the Supreme Court changed its approach to evaluating searches and seizures. In *Katz v. United States*<sup>7</sup> the Court brought electronic surveillance under constitutional control by redefining "searches and seizures" to include constructive intrusions and intangible appropriations.<sup>8</sup> The Court's method was relatively simple and somewhat ironic. *Katz* changed the existing understanding of the fourth amendment as a straightforward proscription of certain unreasonable and unauthorized actions, primarily arrests, physical searches, and confiscations, to a less specific protection of personal privacy. Under the Court's analysis, any governmental action that invades a protected privacy interest is subject to the fourth amendment regardless of the form of the invasion.<sup>9</sup> Because law enforcement use of technology almost invariably diminishes someone's privacy, the Court thereby created a model for regulating the use of technology on a general basis.

The "paradigm" concept explains the significance of *Katz*. As explained by Thomas Kuhn, a paradigm is a theory or model that

---

dropping); W. PROSSER & P. KEETON, *THE LAW OF TORTS*, ch. 20 (5th ed. 1984)(general survey of common law and statutory actions and remedies for privacy invasions).

<sup>4</sup> The fourth amendment states:

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

U.S. CONST. amend. IV.

<sup>5</sup> See *infra* text accompanying notes 16-29.

<sup>6</sup> See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 448, 449-73 (1971)(plurality opinion)(suppressing microscopic analysis of vacuum sweepings obtained in an unconstitutional search of defendant's automobile); *Davis v. Mississippi*, 394 U.S. 721, 723-26 (1969)(suppressing fingerprint evidence obtained as a result of an unlawful arrest); *Rochin v. California*, 342 U.S. 165, 166, 169-74 (1952)(suppressing two morphine capsules obtained by pumping defendant's stomach). Cf. *United States v. Jacobsen*, 466 U.S. 109, 122-26 (1984)(scientific analysis of substance to determine whether it was contraband was neither search nor seizure); *Texas v. Brown*, 460 U.S. 730, 735-44 (1983)(plurality opinion)(testimony as to chemical analysis of substance seized from defendant was properly admitted because seizure was lawful).

<sup>7</sup> 389 U.S. 347 (1967).

<sup>8</sup> *Id.* at 350.

<sup>9</sup> *Id.*

attempts to explain all known relevant principles, but which is open to continuing reappraisal and development.<sup>10</sup> Professor Kuhn's paradigms are breakthrough scientific achievements that attract "an enduring group of adherents . . . [and] leave all sorts of problems"<sup>11</sup> for them to resolve. Legal paradigms are well entrenched rules and principles that provide inspiration and direction for judicial decisionmaking in a variety of related settings. Paradigms may be superceded, however, when they no longer help to resolve difficult or important problems.<sup>12</sup>

The expectations paradigm adopted in *Katz* suffers from several serious defects and should be replaced. While the decision is properly recognized as one of the Warren Court's major achievements in the constitutional law of criminal procedure,<sup>13</sup> it has not had the effect of rewriting fourth amendment principles to monitor all law enforcement activities that implicate privacy. If the main virtue of *Katz* is that it attempted to provide a general framework for analysis in later cases, its main vice lies in the amorphous structure mandated by that ambitious purpose. Courts applying the expectations paradigm to different settings have differed sharply on its impact on various law enforcement practices. While the Supreme Court has labored to unify the law concerning individual techniques, close decisions and shifting majorities have resulted in a crazy melange of rules and principles. Despite the Court's use of impact rather than means to define "search" and "seizure," courts have often found themselves lost in a maze of baffling and self-contradictory precedents that defy consistent analysis. Moreover, the Court's understandable hesitancy to establish immutable rules has encouraged lower courts to emphasize fine and artificial distinctions in various

---

<sup>10</sup> T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-22 (2d ed. 1970). Legal commentators have recognized the application of Professor Kuhn's terminology. See, e.g., Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 394-95 & n.9 (1981)(using the concept to explain two different models of administrative decision-making); Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741, 751 & n.31 (1982). Professor Kuhn also recognized the role of the paradigm concept in legal reasoning, analogizing a scientific paradigm to "an accepted judicial decision in the common law." T. KUHN, *supra*, at 23.

<sup>11</sup> T. KUHN, *supra* note 10, at 10. "To be accepted as a paradigm, a theory must seem better than its competitors, but it need not, and in fact never does, explain all the facts with which it can be confronted." *Id.* at 17-18.

<sup>12</sup> Professor Kuhn traces the role of paradigms in advancing scientific understanding. *Id.* at 10-11, 17-18, 23-30, 52-65, 92-95, 174-91. He defines scientific revolutions as "those non-cumulative episodes in which an older paradigm is replaced in whole or in part by an incompatible new one." *Id.* at 92. This occurs when the existing paradigm is no longer adequate to explain a problem or concept. *Id.* This is true of *Katz*'s expectations paradigm and the problem of visual searches.

<sup>13</sup> See *infra* note 50.

factual settings. Finally, by manipulating and redefining the threshold privacy interest required for fourth amendment protection, courts have allowed numerous intrusive governmental actions, such as invasions of open private property and some electronic surveillance, to escape constitutional scrutiny.<sup>14</sup>

As a result, the constitutional law of search and seizure is largely indeterminate. This is especially true with respect to governmental observations aided by technological surveillance devices. The judicial assertion of authority in this area has benefited society by creating a legal monitor of some of the ill effects of scientific advancement, but it has done so at the expense of clarity, guidance, and coherence.

This Article addresses legal responses to visual observations by law enforcement officers, most of them using enhancement devices such as binoculars or telescopes. The Supreme Court has not spoken directly on the use of such devices, which is ironic because they have been in common use for many years.<sup>15</sup> Lower courts have regularly considered the use of such visual enhancement devices, but they have moved in a variety of different directions, each supposedly mandated by *Katz*. Part II below analyzes the premises of *Katz* and the different ways courts have applied its teachings to visual surveillance. Part III explains these inconsistent approaches in terms of the incompatible beliefs about privacy and different understandings of *Katz* held by judges. It then argues that the expectations paradigm should be replaced by a more inclusive Intrusion Paradigm. Part IV proposes a model of analysis for visual searches that is premised on four norms—general principles that follow from widely shared notions of personal privacy and law enforcement responsibility. Application of these principles would permit the courts to establish clear and satisfactory guidelines for law enforcement and provide additional protection for personal privacy. They are also sufficiently flexible to permit judicial or legislative refinement in appropriate cases.

---

<sup>14</sup> See *infra* Part II.B.

<sup>15</sup> Individuals have used telescopes regularly since the early 1600's, when Galileo designed the modern refracting telescope. 18 *ENCYCLOPEDIA BRITANNICA MACROPAEDIA* 97 (1978). Binoculars are somewhat more advanced and of more recent origin, but are more widely used by police officers and the general public.

## II. SEARCHES, SEIZURES, AND SIGHTINGS

### A. FOURTH AMENDMENT THEORY

#### 1. *The Expectations Paradigm*

It was once simple to determine whether law enforcement action presented a fourth amendment issue. For many years, the Supreme Court took a formalistic view of the amendment's scope,<sup>16</sup> limiting it to physical searches and seizures of persons, houses, papers, or effects. The constitutional validity of a search or seizure depended on its reasonableness, which in most instances turned on the existence of a warrant issued on probable cause.<sup>17</sup> Property law concepts dominated judicial interpretation of the fourth amendment's words. A search occurred only if there was an actual entry into a "constitutionally protected area,"<sup>18</sup> which included a variety

---

<sup>16</sup> See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977). The author traces developments from *Boyd v. United States*, 116 U.S. 616 (1886), which supported broad protection of personal property consistent with legal formalism, to *Fisher v. United States*, 425 U.S. 391 (1976), and *Andresen v. Maryland*, 427 U.S. 463 (1976), which limited protection using a relativist approach more consistent with prevailing notions of legal realism. The author criticizes *Katz* for abandoning protected enclaves, which the author believes resulted from the Court's "pragmatic-realist premises." Note, *supra*, at 970-71. As shown below, *Katz* has not truly ended protected enclaves. See *infra* notes 132-42 and accompanying text.

<sup>17</sup> The standard doctrine was stated in *Katz*: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357 (footnotes omitted). Seizures, such as arrests, are also subject to the warrant clause. See, e.g., *Payton v. New York*, 445 U.S. 573, 585-86 (1980) (seizures of persons and property are presumptively unreasonable without a warrant, at least if conducted in the home). Although the exceptions may be limited and probable cause is usually required, the bulk of searches and seizures are made without warrants. W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 297 (6th ed. 1986). See also *Amsterdam*, *supra* note 2, at 414 (more searches occur under exceptions than with warrants).

This is the so-called "monolithic model" of the fourth amendment, in which the reasonableness required by the fourth amendment's first clause depends on a warrant valid under the second clause. See 1 W. LAFAVE, *SEARCH & SEIZURE* 315 (2d ed. 1987); C. WHITEBREAD & C. SLOBOGIN, *CRIMINAL PROCEDURE* 136-37 (2d ed. 1986). This approach dominated fourth amendment analysis prior to 1973, when, in Professor Amsterdam's words, the Supreme Court created "the kind of very small hole in the fabric of the fourth amendment which customarily begins the process by which entire tapestries unravel." *Amsterdam*, *supra* note 2, at 374. The case, *Cupp v. Murphy*, 412 U.S. 291 (1973), excused the absence of a warrant for a "very limited search." *Cupp*, 412 U.S. at 296. Since then, many cases have authorized limited searches or seizures without warrants, relying solely on their "reasonableness." See, e.g., *United States v. Ross*, 456 U.S. 798 (1982) (automobile search); *United States v. Ramsey*, 431 U.S. 606 (1977) (opening of international mail); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (seizure for questioning).

<sup>18</sup> *Lanza v. New York*, 370 U.S. 139, 142 (1962). One commentator described this

of locations in which a person had a legally cognizable interest.<sup>19</sup> The Court was unwilling to extend “houses” beyond the curtilage<sup>20</sup> of a home or other protected dwelling, however, and therefore denied fourth amendment protection to invasions of privately owned but open areas, or, as they are usually characterized by the courts, “open fields.”<sup>21</sup> The “actual physical entry” requirement further limited the application of the fourth amendment. Observations and other remote invasions were not subject to the fourth amendment’s requirements even if their effect was to allow agents to perceive something they could not otherwise perceive without entering a protected area.<sup>22</sup> The case that best represents this entry or tres-

---

terminology as both “hasty” and “misleading,” however, because it is not the area, as such, that is protected, but rather the “relationship between the area and the person incriminated by the search that is critical.” *Kitch, Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 136. This is consistent with the treatment of “specially protected objects” under the intrusion paradigm proposed in this Article. See *infra* Part IV.B.1.

<sup>19</sup> See, e.g., *Stoner v. California*, 376 U.S. 483 (1964)(hotel room); *Rios v. United States*, 364 U.S. 253 (1960)(occupied taxi); *Jones v. United States*, 362 U.S. 257 (1960)(apartment); *Taylor v. United States*, 286 U.S. 1 (1932)(garage); *Carroll v. United States*, 267 U.S. 132 (1925)(automobile); *Amos v. United States*, 255 U.S. 313 (1921)(store); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)(business office).

<sup>20</sup> The curtilage is “the area attached to and containing a dwelling-house and its out-buildings.” 2 OXFORD ENGLISH DICTIONARY 1278 (1933). Legal definitions are even less precise, but courts generally limit the definition to the yard and buildings close to the house that are unquestionably part of the home unit. See, e.g., *Care v. United States*, 231 F.2d 22, 25 (10th Cir.), cert. denied, 351 U.S. 932 (1956)(application turns on facts, primarily distance from house, location of enclosures, and building’s “use and enjoyment as an adjunct to the domestic economy of the family”); *State v. Kender*, 60 Haw. 301, 304, 588 P.2d 447, 449 (1979)(“Curtilage is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs.”). In *United States v. Dunn*, 480 U.S. 294 (1987), the Supreme Court stated:

[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

*Id.* at 301. See also *California v. Ciraolo*, 476 U.S. 207, 213 (1986)(curtilage is “where privacy expectations are most heightened”); *Oliver v. United States*, 466 U.S. 170, 180 (1984)(linking the curtilage to “intimate activity” and privacy and suggesting that judicial determinations are guided by “expect[ations] that an area immediately adjacent to the home will remain private”).

<sup>21</sup> *Hester v. United States*, 265 U.S. 57, 59 (1924). Justice Holmes’ opinion for a unanimous Court stated that the distinction between the areas protected by the fourth amendment and open fields is as “old as the common law.” *Id.* This enigmatic comment constitutes the entire analysis.

<sup>22</sup> See, e.g., *United States v. Lee*, 274 U.S. 559, 563 (1927). The Court held that use of a search light was not prohibited by the fourth amendment and suggested in dicta that this was analogous to use of a “field glass,” in modern terms a telescope or binoculars.



pass paradigm is *Olmstead v. United States*,<sup>23</sup> in which the Supreme Court held the fourth amendment inapplicable to wiretapping conducted without trespassing on the defendant's property.<sup>24</sup> Basing its analysis on the intent of the framers, the Court held that the fourth amendment could not be construed to prohibit wiretapping.<sup>25</sup> There was no search because there was no physical intrusion into a protected area and there was no seizure because the evidence was obtained by listening rather than by taking personal property.<sup>26</sup> Despite a strong dissent by Justice Brandeis<sup>27</sup> and later indications that other Justices believed *Olmstead* to present an unduly limited vision of the amendment's scope,<sup>28</sup> the case established

---

*Id.* Courts continue to cite *Lee* as authority that law enforcement use of enhancement devices raises no fourth amendment issue. See *infra* note 82.

<sup>23</sup> 277 U.S. 438 (1928).

<sup>24</sup> *Id.* at 464.

<sup>25</sup> *Id.* at 465.

<sup>26</sup> *Id.* at 466. The Court's analysis repeatedly stressed these points:

The Amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. . . .

. . . There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

*Id.* at 464. Note, *Electronic Visual Surveillance*, *supra* note 1, at 270-72, contains a good analysis of the entry paradigm. See generally N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937); O'Brien, *Reasonable Expectations of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy*, 13 NEW ENG. L. REV. 662, 673-75 (1978); Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REF. 154, 158-59 (1972)[hereinafter *Concept of Privacy*].(all analyzing the intent of the fourth amendment's framers).

<sup>27</sup> Justice Brandeis focused on privacy rather than property, *Olmstead*, 277 U.S. at 473-79 (Brandeis, J., dissenting), and equated wiretapping with opening sealed letters, *id.* at 475-76 (Brandeis, J., dissenting), a practice the majority recognized as prohibited under the fourth amendment. *Id.* at 464 (finding this "plainly within the words of the amendment"). A compelling statement in support of personal privacy, his dissent emphasized the deleterious effects of changing technology on the values of the Fourth Amendment. See *id.* at 473-76.

<sup>28</sup> See, e.g., *Berger v. New York*, 388 U.S. 41, 51 (1967)(specifically holding that electronic "capture" of conversations constituted a fourth amendment "search"); *Silverman v. United States*, 365 U.S. 505, 508-09, 511-12 (1961)(prohibiting use of spike mike into heating duct in home under the entry paradigm but stressing that the real injury was the indiscriminate secret eavesdropping); *Goldman v. United States*, 316 U.S. 129, 133-35 (1942)(approving eavesdropping of conversations by means of detectaphone outside business office but suggesting that hearing would constitute seizure if it involved the interception of wire communication or resulted from trespass). The *Silverman* Court seemed quite conscious of the implications of modern investigative technology, *Silverman*, 365 U.S. at 508-09, and refused to be bound by the "niceties" of property law. *Id.* at 511. *Berger* also evidenced the Court's concerns about particularly intrusive aspects of modern surveillance technology, *Berger*, 388 U.S. at 46-47, as might be expected since the Court would decide *Katz* only six months later. See also *Lanza v. New York*, 370 U.S. 139, 143 (1962)(emphasizing privacy attributes of constitutionally protected locations).

the parameters of fourth amendment jurisprudence until the final years of the Warren Court.<sup>29</sup>

*Katz v. United States*<sup>30</sup> changed this landscape. Government agents attached an electronic device to the outside of a public telephone booth and eavesdropped on Katz as he made incriminating calls.<sup>31</sup> The Supreme Court overturned the resulting gambling conviction and held that the eavesdropping constituted both a search and a seizure and was unreasonable because it had not been authorized by a warrant.<sup>32</sup> This necessitated overruling *Olmstead* with respect to the requirement of an actual physical intrusion.<sup>33</sup> More significantly, however, the Court used *Katz* as a vehicle to reformulate the scope of the fourth amendment. The majority opinion began by belittling the importance of constitutionally protected areas, noting that “the Fourth Amendment protects people, not places.”<sup>34</sup> Then, after noting that matters “knowingly expose[d] to the public” remain unprotected,<sup>35</sup> the Court suggested a very broad residual area of protection: “[W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally pro-

---

<sup>29</sup> See generally O'Brien, *supra* note 26, at 693 (“until the mid-sixties the Supreme Court legitimated few privacy claims because of its adherence to *Olmstead*'s rigid property analysis”); Comment, *Police Helicopter Surveillance*, 15 ARIZ. L. REV. 145, 160-61 (1973) (discussing *Olmstead* and the trespass doctrine); Note, *supra* note 16, at 961 (suggesting that formalism failed as a satisfactory vehicle for resolving fourth amendment issues because “old categories” of property law were not responsive to technological change represented by wiretapping); Note, *Private Places*, *supra* note 2, at 973 (noting that use of modern electronic surveillance techniques ultimately defeated the viability of the trespass doctrine).

<sup>30</sup> 389 U.S. 347 (1967).

<sup>31</sup> *Id.* at 348.

<sup>32</sup> *Id.* at 353-57.

<sup>33</sup> *Id.* at 353. The Court recognized that it had discarded *Olmstead*'s limitation of “seizures” to the confiscation of tangible items in *Silverman v. United States*, 365 U.S. 505, 511 (1961). *Katz*, 389 U.S. at 353. All in all, *Olmstead* was “probably overripe for extinction.” Kitch, *supra* note 18, at 133.

<sup>34</sup> *Katz*, 389 U.S. at 351. The Court addressed its prior emphasis on “constitutionally protected areas” by admitting that it used the terminology but asserting that it “ha[d] never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.” *Id.* at 351 n.9.

The “people not places” language underscores the major shift in analysis represented by *Katz*. It is both misleading and unclear, however, as a guide to resolving fourth amendment problems, as Justice Harlan recognized in his concurring opinion. *Id.* at 361 (Harlan, J., concurring). See also Note, *Private Places*, *supra* note 2, at 976 (describing the notion as “appealing but ambiguous”). The phrase is reminiscent of “Guns don't kill people, people kill people.” It is true on one level, but erroneously suggests that a very critical factor is of little or no consequence. Cf. *United States v. Fisch*, 474 F.2d 1071, 1076 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973) (phrase “does not tell us what people are protected, when they are protected, or why they are protected”).

<sup>35</sup> *Katz*, 389 U.S. at 351.

tected.”<sup>36</sup> Applying this principle to electronic eavesdropping, the Court reasoned that a person using a public telephone booth “is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.”<sup>37</sup> Because Katz “justifiably relied” on privacy in making his telephone calls, the warrantless eavesdropping violated the fourth amendment.<sup>38</sup>

Justice Harlan’s concurring opinion requires special attention because its restatement of the governing principles has largely replaced the majority opinion’s analysis in the Court’s later decisions.<sup>39</sup> Justice Harlan first postulated that courts must continue to examine “places” because levels of privacy are generally related to location.<sup>40</sup> He then stated what he believed to be the appropriate inquiry: “[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ ”<sup>41</sup> He argued that Katz should prevail and the Court

<sup>36</sup> *Id.* at 351-52.

<sup>37</sup> *Id.* at 352.

<sup>38</sup> *Id.* at 353. The meaning of the phrase “justifiably relied” is central to the failure of the expectations paradigm. See *infra* notes 43-46 and accompanying text and Part II.B.

<sup>39</sup> See, e.g., *California v. Greenwood*, 108 S. Ct. 1625, 1628 (1988)(rummaging through garbage bags); *California v. Ciraolo*, 476 U.S. 207, 211 (1986)(aerial surveillance); *Oliver v. United States*, 466 U.S. 170, 177 (1984)(entry onto open fields); *United States v. Knotts*, 460 U.S. 276, 280-81 (1983)(beeper monitoring); *Smith v. United States*, 442 U.S. 735, 740 (1979)(use of pen register); *Terry v. Ohio*, 392 U.S. 1, 39 (1968)(stop and frisk). Cf. *United States v. Place*, 462 U.S. 696, 706-07 (1983)(concluding that use of narcotics detection dog to sniff luggage does not intrude into privacy interest in personal luggage). Most state and lower federal courts are in accord, regardless of the method of intrusion. See, e.g., *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987)(video camera); *United States v. Whaley*, 779 F.2d 585, 590 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987)(binoculars); *United States v. Tabora*, 635 F.2d 131, 137-38 (2d Cir. 1980)(telescope); *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 638, 108 Cal. Rptr. 585, 587, 511 P.2d 33, 40, (1973)(naked-eye observation); *Commonwealth v. Oglialoro*, 377 Pa. Super. 317, 587 A.2d 387, 389 (1988)(helicopter); *State v. Manly*, 85 Wash. 2d 120, 125, 530 P.2d 306, 307, *cert. denied*, 423 U.S. 855 (1975)(binoculars). See also *infra* note 45.

<sup>40</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>41</sup> *Id.* (Harlan, J., concurring). Although this language has survived as the major statement of the expectations paradigm, it remains controversial. Commentators assert that the Harlan test is tautological, provides insufficient standards, undercuts privacy, and is difficult to apply. See, e.g., Kitch, *supra* note 18, at 152 (finding the test “satisfactory in the context of *Katz*” but providing little help in resolving how to apply the fourth amendment to more difficult situations); Note, *Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment*, 1977 U. ILL. L.F. 1167, 1182 (suggesting that *Katz* does not provide sufficient guidance in observation cases)[hereinafter *Sense-Enhancing Devices*]; Note, *Concept of Privacy*, *supra* note 26, at 178 (“Typically, it is applied *ipse dixit*, without discussion.”); Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 315 (1981)(calling for a “pure concept” of privacy to protect “secrecy and solitude”)[hereinafter *Protecting Privacy*]; Note, *Tracking Katz: Beepers, Privacy, and the Fourth*

should overrule *Olmstead* because at least this use of electronic surveillance defeated an actual and reasonable expectation of privacy.<sup>42</sup>

The entry paradigm was finished as a governing principle. From 1967 to the present, the *Katz* formulation has dictated the scope of the fourth amendment. The Court's ruling provided the groundwork for the expectations paradigm, but it raised many more questions than it answered.

The most fundamental problem arising out of *Katz* concerns the objective aspect of the required expectation of privacy, termed "justifiable" by the majority and "reasonable" by Justice Harlan.<sup>43</sup> Each

---

*Amendment*, 86 YALE L.J. 1461, 1473-74 (1977) ("This use of the Harlan test produces confused and unprincipled judicial decisions.") [hereinafter *Tracking Katz*].

Characterizing Justice Harlan's opinion as establishing the expectations paradigm raises additional problems. It was a concurrence by a single justice, and Justice Harlan insisted that his analysis "emerged from prior decisions" outside of the wiretapping area. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). If *Katz* constituted a major break with the past, as later decisions and commentators seem to agree, Justice Harlan's analysis should represent a defeated view of a more limited fourth amendment. Some commentators take this view. See, e.g., Amsterdam, *supra* note 2, at 383 ("I believe that it destroys the spirit of *Katz* and most of *Katz*'s substance"); Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 567-68 (1988) (suggesting that Justice Harlan "missed the central holding of the majority's opinion"); Note, *Tracking Katz*, *supra*, at 1471 (stressing that it was an attempt to limit the holding and was inconsistent with views of the majority). These arguments are moot in substance because later majorities have repeatedly adopted his terminology. See *supra* note 39. They may have misunderstood the majority's holding in *Katz*, but if so, they recreated it using Justice Harlan's image in later decisions that are equally authoritative. More importantly, perhaps, the meaning of Justice Harlan's approach is ultimately no less ambiguous than that of the majority; its plastic make-up allows courts to change its shape to fit their own predilections, no less than to fit the facts of individual cases.

<sup>42</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>43</sup> Justice Powell later weighed in with "legitimate." *Couch v. United States*, 409 U.S. 322, 336 (1973). "Reasonable" is most often associated with a likelihood emphasis, while "justifiable" and "legitimate" seem to have a normative connotation. See, e.g., Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 WASH. L. REV. 191, 195-97 (1988) (noting that the meanings of the terms are different and use of "reasonable" has resulted in an unduly rigid inquiry focused on physical location). It is a mistake, however, to conclude that the choice of any particular term is of much importance. See *Dow Chemical Co. v. United States*, 476 U.S. 227, 248 n.9 (1986) (Powell, J., dissenting) ("Our decisions often use the words 'reasonable' and 'legitimate' interchangeably to describe a privacy interest entitled to Fourth Amendment protection."); *United States v. Jacobsen*, 466 U.S. 109, 122-23 n.22 (1984) (using various combinations of such terms, all apparently intended to mean the same thing).

The *Katz* majority stressed the value of protecting the privacy of telephone conversations, thereby suggesting a normative approach, but the brevity of its analysis and its refusal to protect exposed conduct suggests a likelihood approach. *Katz*, 389 U.S. at 352. Justice Harlan was equally ambiguous. His reference to the protected expectation as "one that society is prepared to recognize as 'reasonable,'" *id.* at 361 (Harlan, J. concurring), seems to concern what is deserving of privacy, but his examples focus on what one expects is likely to remain private. *Id.* at 360-61 (Harlan, J., concurring).

term is ambiguous and can be characterized as meaning either what society deems to be deserving of privacy or what most people expect is likely to remain private. Most commentators unhesitatingly opt for the normative view,<sup>44</sup> but the courts have been less consistent. Courts describing the protected privacy interest tend to use language supporting the "deserving of privacy" approach, but their analysis more often opts for the "likelihood" approach.<sup>45</sup> Perhaps the problem is that both are relevant, but neither is dispositive, as recognized by the California Supreme Court: "[R]easonable ex-

---

<sup>44</sup> See, e.g., 1 W. LAFAVE, *supra* note 17, at 311-14, 360 (seeing the inquiry as focusing on value judgments concerning privacy, freedom, and law enforcement needs); Amsterdam, *supra* note 2, at 384 (*Katz* and the fourth amendment do not "ask . . . what we expect of government[,] [t]hey tell us what we should demand of government."); Tomkovicz, *supra* note 2, at 687-90, 699-700 (preferring legitimate to reasonable; seeing *Katz* as protecting rights to privacy rather than probabilities of privacy); Note, *Sense-Enhancing Devices*, *supra* note 41, at 1171 (the test determines "the level of surveillance that a free society should tolerate without the safeguard of a warrant"); Note, *Concept of Privacy*, *supra* note 26, at 185 (appropriate inquiry concerns norms and values of society); Comment, *supra* note 43, at 210-11 (test should be premised on social norms of privacy). Other commentators see both aspects as pertinent, e.g., Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1614 (1987) (the inquiry is "not purely empirical" but "also rests on a normative judgment"), or emphasize likelihood factors, e.g., Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63, 79 (1974) (favoring the objective likelihood structure) [hereinafter *Katz and the Fourth Amendment*]; Note, *Aerial Surveillance: Overlooking the Fourth Amendment*, 50 FORDHAM L. REV. 271, 280-90 (1981) (proposing a multi-factor analysis that emphasizes the realistic likelihood of casual observation by members of the public) [hereinafter *Aerial Surveillance*].

<sup>45</sup> See *infra* note 115. See generally *infra* Parts II.A.2. and II.B. The Supreme Court's recent "garbage bag" case, *California v. Greenwood*, 108 S. Ct. 1625 (1988), provides an example of the judicial schizophrenia on this issue. The Court upheld two warrantless police seizures and searches through opaque garbage bags. *Id.* at 1627-28. The majority seemed to describe the appropriate standard in "value" terms, noting that "certain areas deserve the most scrupulous protection from government invasion." *Id.* at 1630 (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)). Still, the thrust of the Court's analysis focused on likelihood. Garbage bags are simply too accessible to human and animal snoops for persons to reasonably expect to retain privacy in their contents. *Id.* at 1628-29. The dissent began by asserting that "[s]crutiny of another's trash is contrary to commonly accepted notions of civilized behavior," *id.* at 1632 (Brennan, J., dissenting), and emphasized the deeply private nature of many items disposed of in garbage bags, *id.* at 1634-35, 1637 (Brennan, J., dissenting). Still, the dissent analyzed the likelihood that trash would be examined in determining the protected expectation of privacy. *Id.* at 1632-33, 1635-37 (Brennan, J., dissenting). See also *Florida v. Riley*, 109 S. Ct. 693, 696-97, 698, 701, 705 (1989) (majority, concurring, and dissenting opinions all evaluating the likelihood of observation from helicopters as central to resolving the issue).

Approximately three-quarters of the visual observation cases analyzed in this Article use the term "reasonable expectation of privacy." Fewer than ten percent use the term "legitimate expectation of privacy;" very few use the term "justifiable expectation of privacy," and slightly fewer than fifteen percent cover their bets by using two or more terms. The use of terminology appears to have little relation to the court's choice of a societal value or likelihood approach to the problem.

pection' possesses two meanings, one predictive, the other prescriptive."<sup>46</sup>

Two additional problems involve the extent to which *Katz* modified long established fourth amendment doctrines. "Location" seemed largely irrelevant under the majority's analysis, yet would often be dispositive under Justice Harlan's analysis. Similarly, common law property notions would be less important under the expectations paradigm, but even the majority disavowed the existence of a general constitutional right to privacy divorced from traditional fourth amendment notions.<sup>47</sup> The continued vitality of the open fields doctrine turned on the resolution of such problems, as that doctrine denied constitutional protection to a search of an "area accessible to the public" and a seizure from an open field of an item a person "seeks to preserve as private."<sup>48</sup> Finally, *Katz* jeopardized the principle that observations by government agents present no fourth amendment issues. By recognizing that constructive invasions may be searches and by seeming to exclude from protection only matters "knowingly expose[d] to the public," the Court left open the firm possibility that unauthorized observations constitute searches or seizures<sup>49</sup> and would now be prohibited in the absence

---

<sup>46</sup> *People v. Cook*, 41 Cal. 3d 373, 376, 221 Cal. Rptr. 499, 501, 710 P.2d 299, 301 (1985). California courts also restate the *Katz* inquiry as follows: "[W]hether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has been violated by unreasonable governmental intrusion." *People v. Edwards*, 71 Cal. 2d 1096, 1100, 458 P.2d 713, 715, 80 Cal. Rptr. 633, 635 (1969).

<sup>47</sup> *Katz*, 389 U.S. at 350-51. The Court noted that the creation of such general privacy rights is more properly a matter of state law. *Id.* at 351. Still, one commentator has characterized *Katz* as the "jurisprudential basis for the modern Court's liberal construction of an abstract [constitutional] right of privacy." O'Brien, *supra* note 26, at 712. It is, perhaps, not coincidental that the Court decided *Katz* only two years after *Griswold v. Connecticut*, 381 U.S. 479 (1965), during a period in which the Court was grappling with the source and nature of constitutional aspects of privacy largely unrelated to search and seizure.

<sup>48</sup> *Katz*, 389 U.S. at 351. See *supra* note 21 and accompanying text (recognition of open fields doctrine). Justice Harlan saw the open fields doctrine as continuing to exist after *Katz* because the fourth amendment would rarely, if ever, have application to such areas: "[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." *Id.* at 361 (Harlan, J., concurring). The Supreme Court has reaffirmed the open fields doctrine. See *infra* notes 57-59 and accompanying text. The doctrine remains a critical aspect of visual search cases. See *infra* Part II.B.2.

<sup>49</sup> Conversely, the decision left open the possibility that actual physical invasions would no longer be protected by the fourth amendment in the absence of a reasonable expectation of privacy from such entries. See Note, *Katz and the Fourth Amendment*, *supra* note 44, at 67. A continuing debate concerns whether the *Katz* inquiry replaced the traditional property approach, which is a possible result, or merely supplemented that approach, thereby retaining the traditional protection for property interests. Two "ten year retrospectives" on *Katz* bemoaned the failure of the courts to resolve this question. Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 172-73

of a warrant.<sup>50</sup>

## 2. *The Supreme Court and the Expectations Paradigm*

The Supreme Court soon began testing the nature and limits of the new paradigm. Two 1968 decisions suggest that *Katz* was both less and more a break from past practice than one might infer from

---

(1977)[hereinafter *A Reconsideration of Katz*]; Comment, *The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States*, 38 OHIO ST. L.J. 708, 732-33 (1977)[hereinafter *Trespass and Fourth Amendment Protection*]. The succeeding years have provided no more assistance in this regard, unless one views the Court's revitalization of the open fields doctrine as supporting the notion that *Katz* only added to prior fourth amendment coverage. See Note, *A Reconsideration of Katz*, *supra*, at 173 (suggesting this even before the Supreme Court's more specific rulings on open fields). Resolution of this issue could be of immense importance in resolving observation cases. If "old" protected areas are inherently protected even in the absence of a reasonable expectation of privacy, then arguably defendants need not prove their actual expectations and precautions to ensure privacy in such places. *Id.* Cf. Note, *A Reconsideration of Katz*, *supra*, at 181 (the property approach should be retained as it "defines a set of expectations that, because people are entitled to hold them, receive protection regardless of governmental manipulation of actual expectations or judicial assessment of the adequacy of precaution"); *Tracking Katz*, *supra* note 41, at 1477-78 (suggesting the use of the privacy approach only if fourth amendment protection cannot be based on traditional property concepts). This is, in part, the underlying theory behind the "honored" expectation of privacy approach and the special protection for the home approach. See *infra* notes 113-16 and 132-41 and accompanying text. A fair reading of *Katz* is that the majority intended to expand fourth amendment coverage, Comment, *Trespass and Fourth Amendment Protection*, *supra*, at 732-33, and that the Court designed its analysis primarily to make clear that one could have a protected privacy interest even in the absence of a property interest. The use of *Katz* as a replacement vehicle for fourth amendment analysis seems largely the result of later reliance on Justice Harlan's two-part inquiry to solve all questions of the fourth amendment's scope, which is doubly ironic because he believed it to be a distillation of prior decisions. See *supra* note 41.

<sup>50</sup> Most responses to *Katz* were favorable and recognized its importance. Professor Edmund Kitch wrote that the Court was "moving toward a redefinition of the scope of the Fourth Amendment" which would "release [it] from the moorings of precedent and determine its scope by the logic of its central concepts." Kitch, *supra* note 18, at 133. See also Tomkovicz, *supra* note 2, at 467 ("*Katz* merely began the revolution" of making the fourth amendment protective of individual rights.). See generally, Note, *Katz and the Fourth Amendment*, *supra* note 44, at 66 nn.32-34, 36 (citing articles noting a strong positive reaction to the decision). Courts have suggested the importance of *Katz* in various ways. The decision is sometimes cited as ending the old era of fourth amendment analysis, e.g., *State v. Stanton*, 7 Or. App. 286, 293, 490 P.2d 1274, 1277 (1971)(the change from emphasis on property law "culminated in *Katz*"); for beginning the new era, e.g., *United States v. Christensen*, 524 F. Supp. 344, 346 (N.D. Ill. 1981)(*Katz* is the starting point); *People v. Agee*, 200 Cal. Rptr. 827, 829 (Cal. Ct. App. 1984)(*Katz* is "[t]he seminal authority on privacy and technology."); and for guiding fourth amendment analysis, e.g., *Oliver v. United States*, 466 U.S. 170, 177 (1984)(*Katz* inquiry "is the touchstone of Fourth Amendment analysis"); *Smith v. Maryland*, 442 U.S. 735, 739 (1979)(*Katz* is "our lodestar"); *United States v. Paulino*, 850 F.2d 93, 95 (2d Cir. 1988)("The cornerstone of current Fourth Amendment analysis is *Katz* . . ."); *United States v. Jackson*, 588 F.2d 1046, 1050 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979)("The scope of the Fourth Amendment's protection of personal privacy is delineated in *Katz* . . .").

the majority opinion's language. In *Harris v. United States*,<sup>51</sup> the Court reaffirmed the "plain view" doctrine by holding that an agent who is lawfully in a private location may seize items in his or her view without a warrant.<sup>52</sup> By thus excluding plain view observations from fourth amendment coverage, *Harris* effectively rebutted arguments based on *Katz* that all observations are searches subject to the warrant requirement. In *Terry v. Ohio*,<sup>53</sup> the Court addressed the constitutionality of a "stop-and-frisk" without probable cause, let alone a warrant. The Court insisted that such police conduct is subject to the fourth amendment, but permitted it on a general showing of reasonableness under the circumstances.<sup>54</sup> By applying the fourth amendment to such routine and often transitory police practices, the Court reaffirmed the *Katz* principle that the amendment regulates governmental actions less intrusive than arrests or physical entries.<sup>55</sup> The Court's willingness to tolerate such intrusions under a reasonableness standard, however, undercut the warrant and probable cause requirements by endorsing the notion that courts may examine fourth amendment searches and seizures under

---

<sup>51</sup> 390 U.S. 234 (1968).

<sup>52</sup> *Id.* at 236. "Plain view" and "open view" are technically distinct concepts, although the line between them is not always clear. An explanation of the difference is found in *Scales v. State*, 13 Md. App. 474, 284 A.2d 45 (1971). In *Scales* Judge Charles Moylan, a respected fourth amendment scholar, stated that the plain view doctrine refers exclusively to the legal justification—the reasonableness—for the seizure of evidence which has not been particularly described in a warrant and which is inadvertently spotted in the course of a constitutional search already in progress or in the course of an otherwise justifiable intrusion into a constitutionally protected area. It has no applicability when the vantage point from which the "plain view" is made is not within a constitutionally protected area.

*Id.* at 477 n.1, 284 A.2d at 47 n.1.

The plain view doctrine allows seizure of an object "when an officer's access to an object has some prior justification under the Fourth Amendment." *Texas v. Brown*, 460 U.S. 730, 738 (1983). The Court distinguished this from "an officer's mere observation of an item left in plain view," which it found "involve[d] no Fourth Amendment search." *Id.* at 738 n.4. The latter is in "open view."

<sup>53</sup> 392 U.S. 1 (1968).

<sup>54</sup> *Id.* at 27. The factual background of *Terry* shows its roots in routine police-citizen confrontations. An experienced police officer observed several persons acting in a manner that suggested to him that they were likely to commit a theft. *Id.* at 5-6. The officer approached them, asked their names, and patted down Terry's outer clothing, in which he found a firearm. *Id.* at 7. The Court suggested that the officer's action was a permissible limited intrusion, based on a reasonable suspicion of criminal conduct and a reasonable concern for personal safety. *Id.* at 22-27. Later decisions have expanded the officer's authority in this setting, but have continued to emphasize the twin requirements of reasonable justification and a limited search. See *Pennsylvania v. Mimms*, 434 U.S. 106, 110-12 (1977)(an officer may order driver of lawfully-stopped vehicle to get out of car and may frisk driver for weapons if circumstances reasonably suggest the possibility that driver is armed); *Adams v. Williams*, 407 U.S. 143, 144-48 (1972)(information from an informant, only a limited search permitted in absence of probable cause).

<sup>55</sup> *Terry*, 392 U.S. at 10.



some sliding scale of justification.<sup>56</sup>

The Court entered the 1970s trying to give shape to this broader but more fluid concept of protected fourth amendment interests. Perhaps the clearest principle to emerge was that the open fields doctrine survived *Katz*.<sup>57</sup> The Court in 1984 held that "the

---

<sup>56</sup> One cannot steam past the *Terry* siren without taking a closer look to investigate its allure. Fourth amendment analysis modeled on *Terry* is inevitably attractive because it allows courts to assert constitutional control over the police action but also allows courts to jettison the warrant and probable cause requirements if they seem inappropriate under the circumstances. Professor Amsterdam suggests that *Terry* "might support a general fourth amendment theory that increasing degrees of intrusiveness require increasing degrees of justification and increasingly stringent procedures for the establishment of that justification." Amsterdam, *supra* note 2, at 390. For example, if officers intrude but only at the edge of a curtilage, summons several persons to appear in a lineup, or engage in naked-ear eavesdropping, perhaps only a reasonable basis for the action is necessary rather than a warrant based on probable cause. *Id.* at 391-93. Use of a sliding scale would certainly ease the pressures on the boundaries of the fourth amendment's scope; courts would not have to decide between "in or out" in close cases, but could instead design compromise approaches.

Another commentator also sees *Terry* as a "crack in the monolithic model" of the fourth amendment and proposes a different approach for its use in this area. Note, *Sense-Enhancing Devices*, *supra* note 41, at 1171. "Courts could regulate police use of sense-enhancing devices that are not intrusive enough to require probable cause and a warrant by imposing an objective evidentiary standard to ensure the reasonableness of the intrusion." *Id.* at 1203-04. The standard would be that the officer must be "aware of specific and articulable facts that would lead a reasonable man to believe that a crime had been or was being committed." *Id.* at 1204. This would not constitute a sliding scale; the same requirement would apply to all enhanced observations, which the author calls "subsearches." *Id.*

Despite his dalliance with these semi-search models, Professor Amsterdam concludes that sole reliance on the reasonableness clause would be unwise because it is "too amorphous either to guide or to regulate." Amsterdam, *supra* note 2, at 414. He mixes metaphors well: A graduated fourth amendment would be both "one immense Rohrschach blot," *id.* at 393, and a "monstrous abyss," *id.* at 415. See also Note, *Concept of Privacy*, *supra* note 26, at 155 (suggesting that "too much pliability in the application of a rule becomes dysfunctional by fostering inconsistency and uncertainty").

*Terry* is, perhaps, a true but dangerous friend of the fourth amendment. It is a useful tool for cutting an escape from an unduly rigid fourth amendment labyrinth, but it is also a tool that the courts must carefully supervise because it may not know precisely when to stop cutting.

<sup>57</sup> This was not the immediate reading of *Katz*, despite Justice Harlan's assertion that the open fields doctrine remained viable. *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring). "After *Katz*, many courts found the curtilage and open fields doctrines to be archaic and unnecessary, or simply ignored them." Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 737 (1985). See also 1 W. LAFAVE, SEARCH & SEIZURE 336 (1st ed. 1978)("[A] direct and unthinking application of the *Hester* 'open fields' doctrine will on occasion produce a result which is offensive to the theory underlying *Katz* [which] . . . in the last analysis, calls for the making of an important value judgment . . ."); Hendricks, *Eavesdropping, Wiretapping and the Law of Search and Seizure—Some Implications of the Katz Decision*, 9 ARIZ. L. REV. 428, 435 (1968)("Under *Katz*, even activities carried on in an open field might be the subject of fourth amendment protections if the parties reasonably rely on the fact that such activities will remain private."); Tomkovicz, *supra* note 2, at 720 (calling for protection of

government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment."<sup>58</sup> Law enforcement officers thus may enter a person's property, presumably to just outside the curtilage, without raising fourth amendment issues.<sup>59</sup> As the Court has repeatedly stated that a person's residence is entitled to special protection under the fourth amendment,<sup>60</sup> this revitalized open fields doctrine may to

---

open fields to promote and safeguard property values). Numerous courts concluded that reasonable expectations analysis necessarily replaced curtilage/open fields analysis after *Katz*. See, e.g., *United States v. DeBacker*, 493 F. Supp. 1078, 1080-81 (W.D. Mich. 1980)(disagreeing with courts concluding that the fourth amendment automatically does not apply to searches in open fields); *United States ex rel. Gedko v. Heer*, 406 F. Supp. 609, 614-15 (W.D. Wis. 1975), *vacated*, 588 F.2d 840 (7th Cir. 1978)(*Katz* "abolish[ed] reliance upon common law property concepts which would include 'open fields' and 'curtilage,' in search and seizure cases."); *Phelan v. Superior Court*, 90 Cal. App. 3d 1005, 1010-11, 153 Cal. Rptr. 738, 741-42 (1979)(concluding that *Hester* was abandoned); *State v. Brady*, 406 So. 2d 1093, 1095 (Fla. 1981), *vacated*, 467 U.S. 1201 (1984)(no longer a *carte blanche* for warrantless intrusions merely because neither home nor curtilage is searched); *People v. Stanton*, 7 Or. App. 286, 294, 490 P.2d 1274, 1278 (1971)(finding open fields doctrine to be inconsistent with much of the analysis in *Katz*).

<sup>58</sup> *Oliver v. United States*, 466 U.S. 170, 177 (1984). *Oliver* involved two cases in which law enforcement agents located marijuana patches on private property marked with "No Trespassing" signs. *Id.* at 173-75. The Court relied on the plain language of the fourth amendment, concluding that open fields are neither houses nor effects. *Id.* at 176-77. One commentator has harshly criticized *Oliver* for overlooking significant facts in the cases, for erroneously reading common law doctrines, and for leaving open the possibility that many non-residential buildings are no longer protected by the fourth amendment. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 6-19 (1986). While *Oliver* is a strong and broadly written opinion, the decision was not unanticipated. In 1974 the Court unanimously upheld a warrantless air quality inspection conducted on outdoor industrial property. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 866 (1974). The Court there described "open fields" as an "exception to the Fourth Amendment." *Id.* at 865. *Air Pollution* can be distinguished from most criminal cases, however. First, it involved an administrative search subject to less burdensome fourth amendment restrictions than are traditional law enforcement activities. See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 605-06 (1981)(warrantless administrative searches are permissible in various situations); *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967)(while administrative searches require warrants, the standard for issuance is reasonableness rather than probable cause). Second, despite the trespass onto the company's property, the Court stressed that the inspector "sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke"—and that the record did not indicate "that he was on premises from which the public was excluded." *Air Pollution*, 461 U.S. at 865.

<sup>59</sup> The Court's most recent sally into open fields supports this notion. In *United States v. Dunn*, 480 U.S. 294 (1987), the Court reviewed a warrantless intrusion onto a ranch. *Id.* at 297. It concluded that there was no fourth amendment search because no agent entered the curtilage of the house. *Id.* at 301-05.

<sup>60</sup> See, e.g., *Payton v. New York*, 445 U.S. 573, 589 (1980)(quoting U.S. CONST. amend. IV)("In [no setting] . . . is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific terms: 'The right of the people to be secure in their

some extent overrule the expectations paradigm and reestablish the entry paradigm with respect to actual physical invasions.

The Supreme Court has found it far more difficult to draw such bright lines when dealing with remote intrusions. While it has continued to rely on *Katz*, it has failed to set forth any consistent method of evaluating the relationship between people's expectations and intrusive governmental actions. Several lines of analysis have emerged.

First, the Court upheld the warrantless use of a pen register, a device that identifies the numbers dialed on a telephone without intercepting or recording any conversations.<sup>61</sup> It concluded that people do not reasonably believe that the numbers they dial are confidential because standard telephone company billing and recordkeeping practices in this regard are known to the public.<sup>62</sup> A somewhat different analysis convinced the Court to declare that it is not a search for police to use trained narcotics detection dogs to sniff luggage in public places.<sup>63</sup> The "technique is much less intrusive than a typical search[,] . . . discloses only the presence or absence of narcotics, . . . [and] ensures that the owner of the property is not subjected to the embarrassment and inconvenience" of more traditional law enforcement methods.<sup>64</sup> Where this action requires the detention of luggage, however, it constitutes a fourth amendment seizure subject to a *Terry*-like evaluation of its reasonableness.<sup>65</sup>

---

. . . houses . . . shall not be violated.'"). See also *Welsh v. Wisconsin*, 466 U.S. 740, 748-54 (1984)(relying on the principle in disapproving a warrantless arrest at a person's home even under exigent circumstances); *Steagald v. United States*, 451 U.S. 204, 221 (1981)(arresting officers must have search warrant as well as arrest warrant when person arrested is in someone else's home). Cf. *Alderman v. United States*, 394 U.S. 165, 171 (1969)(homeowner has standing to challenge search of home even without any interest in items seized).

<sup>61</sup> *Smith v. Maryland*, 442 U.S. 735, 736 n.1 (1979).

<sup>62</sup> *Id.* at 741-45. Thus, regardless of Smith's actual expectations, it was objectively unreasonable for him to rely on the privacy of the numbers he dialed, and, therefore, the fourth amendment had no application. *Id.* at 743-46. The Court necessarily paid special attention to an analytical problem inherent in the *Katz* inquiry: the relationship between subjective and objective expectations of privacy. It emphasized that even if the defendant had a subjective expectation of privacy, it was unavailing because society did not recognize it as "reasonable." The Court cited precedents for denying a reasonable expectation of privacy for items turned over to third parties, and suggested that the defendant simply assumed the risk that the information he provided would be given to the police. *Id.* at 744-45.

<sup>63</sup> *United States v. Place*, 462 U.S. 696, 707 (1983).

<sup>64</sup> *Id.* at 707.

<sup>65</sup> *Id.* at 703-06. The agents detained Place's luggage for ninety minutes. *Id.* at 699. The Court concluded that this constituted an unreasonable seizure. *Id.* at 709-10. Other fourth amendment settings in which reasonableness is emphasized include admin-

The Supreme Court has seemingly taken a third line of analysis in two decisions dealing with "beepers," radio transmitters that are secreted in a car or other personal property and emit signals picked up by police receivers. Monitoring a beeper is unregulated as long as the beeper remains in public areas because there is no reasonable expectation of privacy from visual observation in public.<sup>66</sup> Monitoring a beeper in a private location, on the other hand, requires a warrant because it breaches the "justifiable interest in the privacy of the residence."<sup>67</sup> This suggests that beeper law largely tracks the house and curtilage/open fields dichotomy.

The Court's "aerial search" cases, *California v. Ciraolo*,<sup>68</sup> *Dow Chemical Co. v. United States*,<sup>69</sup> and *Florida v. Riley*,<sup>70</sup> at once adhere to this distinction and suggest its ephemeral nature for technologically aided observations. *Ciraolo* and *Dow* involved governmental use of airplanes to observe and photograph areas that could not lawfully be entered without a warrant or, apparently, observed in any detail without reliance on aerial surveillance.<sup>71</sup> The Supreme Court held that there had been no search in *Dow* because the industrial complex was "open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area

---

istrative searches, *see infra* note 152, examination of international mail, *see United States v. Ramsey*, 431 U.S. 606 (1977), border detentions, *see United States v. Montoya De Hernandez*, 473 U.S. 531 (1985), and searches of student belongings at a public school, *see New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>66</sup> *United States v. Knotts*, 460 U.S. 276, 280-85 (1983).

<sup>67</sup> *United States v. Karo*, 468 U.S. 705, 714 (1984). The Court referred to such monitoring as "a search of a house." *Id.* at 718. The analysis stressed that use of a beeper is not particularly intrusive, "but it does reveal a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant." *Id.* at 715. While the Court required a warrant, it specifically declined to address the appropriate standard for issuance. *Id.* at 718 n.5. *Knotts* and *Karo* together may have the practical effect of requiring warrants for all monitoring, as the item containing the beeper may be moved into a house or other protected area and monitored before the agents are aware that this has occurred. *Cf. Fishman, supra* note 2, at 345 (identifying the line as a form of "Fourth Amendment Roulette"). This may eliminate some of the confusion concerning the many issues the Court avoided in these cases, such as the application of the fourth amendment to the installation and conduct of monitoring as well as the required showing for issuance of a beeper warrant. *See generally* 1 W. LAFAVE, *supra* note 17, at 530-31.

<sup>68</sup> 476 U.S. 207 (1986).

<sup>69</sup> 476 U.S. 227 (1986).

<sup>70</sup> 109 S. Ct. 693 (1989).

<sup>71</sup> *Dow*, 476 U.S. at 229 ("At all times, Dow has maintained elaborate security around the perimeter of the complex barring ground-level public views of these areas."); *Ciraolo*, 476 U.S. at 209 ("Police were unable to observe the contents of respondent's yard from ground level because of a 6-foot outer fence and a 10-foot inner fence completely enclosing the yard.").

for the reach of cameras.”<sup>72</sup> The Court came to the same conclusion in *Ciraolo* even though the surveillance observed marijuana growing within the curtilage of the defendant’s residence.<sup>73</sup> In *Riley* the Court upheld observations into a private greenhouse from a helicopter circling over the curtilage of a residence at an altitude of 400 feet.<sup>74</sup> The fourth amendment played no role in any of these cases because officers were able to “enter” the property without any physical invasion.

A similar rationale would have upheld the electronic surveillance in *Katz*, yet it is difficult to believe that the Supreme Court would now declare electronic eavesdropping exempt from the fourth amendment’s proscriptions. The problem is that the expectations paradigm does not present a satisfactory method for evaluating the role of technological aids or other forms of sense-enhancement in determining whether governmental action constitutes a search or seizure. Indeed, the Supreme Court simply failed to recognize that airplanes and helicopters are technological aids to surveillance not unlike wiretapping equipment.<sup>75</sup> If there is a coherent approach to analyzing technologically-enhanced government observations, one can discover it only after re-examining the premises of *Katz* in light of the broader concept of the visual search.

### 3. *Logical Applications of Katz to Visual Searches*

The Supreme Court could have invalidated warrantless electronic surveillance in *Katz* without examining the meaning of the

---

<sup>72</sup> *Dow*, 476 U.S. at 238. The Court characterized the complex as “fall[ing] somewhere between ‘open fields’ and curtilage, but lacking some of the critical characteristics of both.” *Id.* at 236.

<sup>73</sup> *Ciraolo*, 476 U.S. at 213-14. The Court determined that any expectation of privacy was unreasonable because of the public’s unobstructed line of sight from the air. *Id.*

<sup>74</sup> *Riley*, 109 S. Ct. at 695-97. A plurality of the Court seemed to rely most heavily on the fact that the helicopter was at a lawful altitude. *Id.* at 696-97. Concurring Justice O’Connor and the two dissenting justices, with whom two justices concurred, seemed to conclude that the critical factor was the likelihood of casual observation from helicopters at that altitude. *Id.* at 698 (O’Connor, J., concurring); *id.* at 701 (Brennan, J., dissenting); *id.* at 705 (Blackmun, J., dissenting).

<sup>75</sup> A technological surveillance aid or enhancement device is anything that allows a person to perceive something he or she could not perceive lawfully through unaided senses. Wiretapping is a technological aid because it allows listeners to hear something they could not hear with the naked ear. Binoculars and telescopes, the main devices discussed in this Article, are aids because they allow observers to see what they could not see with the naked eye. Airplanes and helicopters are technological aids not unlike binoculars; the difference is that they allow their passengers to see what they could not see from the ground while binoculars improve the vision from the ground. Not all technological aids are man-made. Dogs trained to sniff drugs or to track a human scent “enhance” the human sense of smell by replacing it with their own far superior olfactory sense.

term "search" by simply declaring that a governmental interception of spoken words constitutes a fourth amendment seizure.<sup>76</sup> It is therefore fair to assume that the majority truly intended to create a new model for fourth amendment analysis. The critical aspect of that new model is its shift from an emphasis on governmental trespasses to an emphasis on the nature and extent of the privacy interest invaded. The necessary implication of this framework is that fourth amendment analysis turns on beliefs and attitudes about privacy rather than on the government's methods. Accordingly, the courts should subject governmental observations to the fourth amendment if they invade an area where an individual has a sufficient expectation of privacy.<sup>77</sup> There is no logical difference be-

---

<sup>76</sup> The Court readily concluded in *Katz* that electronic interception constitutes a seizure. *Katz*, 389 U.S. at 353. See *supra* note 33. The only additional step that the Court had to take was to hold that the fourth amendment applies to electronic surveillance because agents "seize" conversations. This option may not have occurred to the Court, perhaps because the parties structured their arguments around the "constitutionally protected places" theory. *Id.* at 349-51. Another possibility is that the Court was concerned that fourth amendment protection of spoken words in the absence of a search would reopen an issue that the Court had found to be particularly troubling, the legitimacy of consent monitoring by undercover agents and informants. This issue had closely divided the Court in a number of decisions over the previous fifteen years, although a majority had always upheld the government's action. See, e.g., *Osborn v. United States*, 385 U.S. 323, 326 (1966) (permitting an informant to tape conversations with an attorney attempting to obstruct justice); *Lopez v. United States*, 373 U.S. 427, 430-31, 437-39 (1963) (permitting an agent to record conversations with the target of a criminal investigation); *On Lee v. United States*, 343 U.S. 747, 749-51 (1952) (permitting use of an informant carrying a concealed radio transmitter). These cases are certainly distinguishable from *Katz*, as a plurality of the Court later concluded in *White v. United States*, 401 U.S. 745, 748-50 (1971). *White* upheld radio monitoring of an informant's conversations with a suspect even though only the informer had given consent. *Id.* at 746-47, 750. Justice Brennan concurred, but only on the ground that *Katz* did not apply to *White* under the retroactivity doctrine, *id.* at 755-56 (Brennan, J., concurring), and Justices Douglas, Harlan, and Marshall joined in dissent, concluding that the practice violated the fourth amendment, *id.* at 756-96 (Douglas, J., dissenting). Justice Black provided a fifth vote approving consent monitoring, but did so only because he adhered to his view that *Katz* was wrongly decided. *Id.* at 754 (Black, J., concurring). Given the somewhat different make-up of the Court in 1967 and the fact that *Osborn* and two companion cases were decided only one year before, it seems likely that a simple "seizure of conversations means fourth amendment protection" holding would have resulted in a splattered majority or worse in *Katz*, rather than the strong holding supported by seven of the eight participating justices. Nevertheless, commentators have criticized the Court's apparent inconsistency in *Katz* and the consent monitoring cases. See Kitch, *supra* note 18, at 141-42, 152 (arguing that there is no principled distinction between the electronic eavesdropping in *Katz* and the use of secret agents); Note, *Telescopic Surveillance as a Violation of the Fourth Amendment*, 63 IOWA L. REV. 708, 710 (1978) (suggesting that *Katz*'s protection of reasonable expectations of privacy is inconsistent with the Court's casual dismissal of similar arguments in *On Lee*) [hereinafter *Telescopic Surveillance*].

<sup>77</sup> Professor Amsterdam notes that *Katz* required courts to rethink the traditional view that observations into the home were not searches even if aided by electronic or

tween "hearing" that invades a reasonable expectation of privacy and "seeing" that does the same thing.

The fact that this was not immediately and obviously recognized may have had more to do with common perception than with logical dictate. Ironically, the conventional wisdom is that seeing is more intrusive than listening:

Unfortunately, although visual stimuli come to the eye in the same manner as sound waves enter the ear, our use of language makes it difficult to view the two modes of perception as comparable. We look "into," "at," or "through," but couch our aural perception in passive terms. Language has a significant influence on our views of reality: our eyes can search without entering, our ears merely listen. Yet it should be clear that these forms of sensory perception are indeed comparable; both are passive in the physical sense, but both may be tools of the probing, acquisitive mind.<sup>78</sup>

Under this analysis, enhanced viewing would be treated like electronic eavesdropping—necessarily subject to the probable cause and warrant requirements after *Katz*, perhaps even more so if courts share the common misperception that vision is "active" while hearing is "passive."

This may, however, be one of those areas in which experience trumps logic. It may be wholly inappropriate to impose the same analytical construct on observations and eavesdropping. *Katz* itself contains several seeds of such a counter argument. In refuting the government's intrusion-based argument that *Katz* was visible in the telephone booth, the majority stated: "But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen."<sup>79</sup> This

---

other visual enhancement devices. Amsterdam, *supra* note 2, at 356-57. His own view, which certainly includes visual searches, is that "a 'search' is anything that invades interests protected by the amendment." *Id.* at 383. Another broad view is the following: "[A]ny apperception of information, acts, or words which the original possessor or actor did not intend to publicize might constitute a search and seizure within the meaning of the fourth amendment." Note, *Private Places*, *supra* note 2, at 976.

<sup>78</sup> Note, *Private Places*, *supra* note 2, at 974-75. Courts rarely discuss scientific principles in fourth amendment cases. Justice Harlan did note in his *Katz* concurrence that the failure to treat wiretapping as a search was "bad physics as well as bad law." *Katz*, 389 U.S. at 362 (Harlan, J., concurring). Judge Jasen of the New York Court of Appeals relied on science in dissent in *People v. Smith*, 42 N.Y.2d 961, 367 N.E.2d 648, 398 N.Y.S.2d 142 (1977), concerning a police officer's use of a flashlight, noting that virtually all observations occur only because light from some source is reflected off the object. *Id.* at 963, 367 N.E.2d at 649, 398 N.Y.S.2d at 143, (Jasen, J., dissenting). He concluded that the assistance of a flashlight at night is no different from the assistance of the sun during the day and neither turns an observation into a search. *Id.* (Jasen, J., dissenting).

<sup>79</sup> *Katz*, 389 U.S. at 352. The Court went on to note that a person using a public

suggests a certain minimum dichotomy in the realm of the senses—in certain circumstances one may have a reasonable expectation of privacy from eavesdropping but not from observation. The majority's citation of *United States v. Lee*<sup>80</sup> for the proposition that the fourth amendment is inapplicable to matters "knowingly expose[d] to the public" is more troubling.<sup>81</sup> So limited, the reference does not necessarily require different standards for visual and aural searches, but *Lee* seems to suggest a wide if not unlimited authority for visual intrusions and many courts after *Katz* have seen *Lee* in this light.<sup>82</sup> There is also the Supreme Court's post-*Katz* jurisprudence

---

telephone booth "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* It seems evident that the Court had no difficulty with the agent seeing *Katz* in the telephone booth.

The contemporary design of public telephones suggests that the expectations paradigm may no longer protect some conversations. Most public telephones are not enclosed but are instead open to the elements and the naked ear, no less than the eye, of the casual passerby. Since an outside observer can now hear as well as observe conversations over such devices, users may no longer have a reasonable expectation of privacy in their conversations under the *Katz* paradigm. While Title III of the Omnibus Crime & Safe Streets Act of 1968, Pub. L. No. 90-351, 86 Stat. 197 (1968), probably still prohibits the interception of the portion of the conversation traveling over wire, see 18 U.S.C. § 2511 (1982), there may be nothing to prevent the police from placing an electronic listening and recording device outside the telephone and intercepting the user's end of the conversation. This would be consistent with at least some views of the reasonable expectation of privacy limitations on visual surveillance. See *infra* notes 92-100 and accompanying text and note 157.

<sup>80</sup> 274 U.S. 559 (1927). For a description of *Lee*, see *supra* note 22.

<sup>81</sup> *Katz*, 389 U.S. at 351.

<sup>82</sup> See, e.g., *United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)(use of binoculars is permitted); *Commonwealth v. Ortiz*, 376 Mass. 349, 353, 380 N.E.2d 669, 672 (1978)(use of binoculars is approved); *State v. Bennett*, 205 Mont. 117, 119, 666 P.2d 747, 750 (1983)(something that can be seen by a spotting scope is knowingly exposed and not the object of a search); *State v. Lee*, 633 P.2d 48, 51 (Utah), *cert. denied*, 454 U.S. 1057 (1981)(use of a flashlight is not a search); *State v. Manly*, 85 Wash. 2d 120, 122, 530 P.2d 306, 307, *cert. denied*, 423 U.S. 855 (1975)(noting that *Lee* "approved, at least inferentially" the use of binoculars). *Lee* held that coast guardsmen did not engage in a search when they used a searchlight to help them see cases of liquor on the deck of a boat. *Lee*, 274 U.S. at 563. Accordingly, it is direct authority for visual enhancement devices that illuminate rather than magnify. Still, Justice Brandeis for the Court analogized this action to "use of a marine glass or a field glass." *Id.* See also *On Lee v. United States*, 343 U.S. 747, 766-67 (1952)(analogizing the use of a radio transmitter to the use of binoculars). See *supra* note 76. The change in governing paradigms in the sixty years since *Lee* was decided necessarily weakens the holding. See, Note, *Telescopes, Binoculars, and the Fourth Amendment*, 67 CORNELL L. REV. 379, 385 (1982)(noting that *Lee* was decided in the trespass era). Nevertheless, since Justice Brandeis dissented so strenuously only one year later in *Olmstead v. United States*, 277 U.S. 438 (1928), see *supra* note 27, it is evident that he recognized substantial distinctions between wiretapping and enhanced visual surveillance. Nor was *Katz* the last example of Supreme Court reliance on *Lee*. See *United States v. Dunn*, 480 U.S. 294, 305 (1987)(use of a flashlight does "not transform observations into an unreasonable search").



to consider. By and large the decisions acquiesce in or only lightly regulate a broad range of constructive intrusions.<sup>83</sup> Finally, there is a prevalent if not universal belief that electronic eavesdropping is a more intrusive and ultimately more demeaning investigative technique than are most methods of visual surveillance.<sup>84</sup>

These various strands have worked together to create an amorphous tangle of doctrine applicable to both enhanced and unenhanced visual surveillance. This problem, one "at the fringes of fourth amendment law,"<sup>85</sup> is becoming more complex as the sophistication and use of enhancement devices appears to be increasing. Perhaps for that reason, one answer lies in a close examination of the simplest, oldest, and most common aid—the visual enhancement device, a category that includes items ranging from simple eyeglasses to airplanes, from binoculars to infra-red nightscopes.

#### B. THE REASONABLE EXPECTATION OF PRIVACY FROM OBSERVATION

The expectations paradigm applies the fourth amendment in cases in which the government has invaded a protected privacy interest. In the area of visual surveillance, this requires courts to evaluate the relationship among three factors: the government agent (observer), the person or thing seen (object), and the person whose expectations are at issue (target). The critical issue is whether the observer has invaded the target's actual and reasonable expectation of privacy (REOP) with respect to the object. There are several different models of applying the expectations paradigm to visual observations. Courts strictly adhering to the *Katz* analysis follow one

---

<sup>83</sup> See *supra* text accompanying notes 51-74.

<sup>84</sup> A typical statement of this principle is:

[T]he notion here is that in assigning values to various privacy interests in our society, there is more reason to protect the expectation that one can converse in private where no one else is in hearing range than there is to protect the expectation that public conduct will be unobserved when no one is within range to see it with the naked eye.

1 W. LAFAYE, *supra* note 17, at 360. See also Note, *Sense-Enhancing Devices*, *supra* note 41, at 1202 (seeing electronic eavesdropping as "much more far-reaching and sinister in its implications than are most of the other sense enhancing aids"). Still, at least when sophisticated visual enhancement devices are at issue, the intrusion can be very substantial. One commentator notes that "[t]he seizure of one's physical actions conducted in private is an extreme intrusion upon one's right of privacy, especially since careful preparatory steps to ensure privacy cannot close out the unwanted electronic eye from observing and recording the most intimate activities for others to examine in detail." Comment, *Electronic Visual Surveillance and the Right of Privacy: When is Electronic Observation Reasonable*, 35 WASH. & LEE L. REV. 1043, 1049 (1978)(footnote omitted). As discussed below, the variety of visual enhancement devices and the fact that some are routinely used by private individuals suggests that no single categorical evaluation of the impact of their use on "reasonable" expectations of privacy is possible. See *infra* Part IV.B.2.

<sup>85</sup> Note, *Sense-Enhancing Devices*, *supra* note 41, at 1167.

of several "pure" REOP approaches in which the observer's method is irrelevant.<sup>86</sup> While such approaches are consistent with *Katz* in an abstract sense, the reality of enhanced observation renders them an incomplete model for fourth amendment analysis. Accordingly, many courts return to pre-*Katz* notions based on the locations of the observer or the object, while others find the government's methods of observation relevant to determining whether a fourth amendment issue is presented. These approaches are not totally inconsistent; some are in fact specific applications of other, more general, theories. More importantly, each model attempts to apply the *Katz* paradigm, and each fails to present a coherent and generally applicable solution. The following sections analyze the "pure" REOP, location, and technological approaches.

### 1. Pure REOP Approaches

The various pure REOP approaches agree that the appropriate judicial course is to evaluate the target's actual expectation of privacy and then determine whether that expectation is "sufficient" for fourth amendment protections to attach.<sup>87</sup> The *Katz* facts provide a classic example of such expectations—a person conversing over a

---

<sup>86</sup> Analysis concerning methods of observation seems alien to the underlying theory because the analytical construct relies on the target's state of mind. A key problem is that courts should not expect people to anticipate all possible enhanced visual observations. Some courts require only that people protect themselves from naked-eye intrusions, at least in certain settings. See *United States v. Taborda*, 635 F.2d 131, 138-40 (2d Cir. 1980)(enhanced viewing into the home intrudes on a REOP); *People v. Arno*, 90 Cal. App. 3d 505, 511, 153 Cal. Rptr. 624, 627 (1979)(enhancement is permitted only if the object could be identified by a naked eye). Others weigh various aspects of the intrusiveness of the government's methods; this is particularly common in cases analyzing aerial surveillance. See *infra* note 166. Other courts have upheld binocular observations while noting that more intrusive devices might not be allowed. See *State v. Stachler*, 58 Haw. 412, 421, 570 P.2d 1323, 1329 (1977)(distinguishing between binoculars and "sophisticated electronic surveillance techniques"). Finally, courts have sometimes upheld warrantless enhancement on a theory that the particular method involves only a minimal intrusion. See *United States v. Solis*, 536 F.2d 880, 882 (9th Cir. 1976)(a dog sniff constitutes a "reasonably tolerable" invasion).

The Supreme Court in *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986), allowed fairly intrusive aerial surveillance of private property but left open whether it would similarly permit the use of "highly sophisticated surveillance equipment not generally available to the public." *Id.* at 238. The dissenting justices found any distinction based on method to be at odds with the Court's prior decisions. *Id.* at 251 & n.13 (Powell, J., dissenting). This close division underscores the tension between the logical theory of the expectations paradigm and the way many people actually determine their privacy expectations.

<sup>87</sup> As might be expected, there are major disagreements concerning the nature and level of "sufficiency." This Article uses "sufficient" to express only that the court finds the expectations paradigm satisfied and not as setting any particular or meaningful standard.

public telephone has a sufficient expectation that no outsider can hear the conversation.<sup>88</sup> The courts have had little difficulty evaluating actual expectations of privacy. While courts have denied some fourth amendment claims because the target had no true expectation of privacy,<sup>89</sup> courts rarely analyze this issue closely. Instead, they usually accept that the target believed, however foolishly, that law enforcement officers could not see the object.<sup>90</sup> The result is that the "actual expectation of privacy" requirement is largely disregarded as a potentially dispositive factor in fourth amendment analysis.<sup>91</sup> As a consequence, pure REOP analysis almost always turns

---

<sup>88</sup> The *Katz* facts also reveal that the object may be the target. *Katz*, 389 U.S. at 348-49. This is quite common but not necessary. Consistent with the language of the fourth amendment, an object can be a person, house, paper, or effect.

<sup>89</sup> See, e.g., *United States v. Rucinski*, 658 F.2d 741, 746 (10th Cir. 1981)(person cannot have any actual expectation of privacy when his contract with the government permits inspections at any time without notice); *Lightfoot v. State*, 356 So. 2d 331, 334 (Fla. Dist. Ct. App. 1978)(keeping marijuana plants in open view of neighbor's yard "implies" the absence of any expectation of privacy); *Sponick v. City of Detroit Police Dep't*, 49 Mich. App. 162, 198, 211 N.W.2d 674, 690 (1973)(one cannot have expectation of privacy from observation in a public bar); *State v. Holt*, 291 Or. 343, 347-49, 630 P.2d 854, 857-58 (1981)(no expectation of privacy in restroom stall for behavior intentionally displayed or where target is aware of possibility of observation). An instructive, if unusual, decision is *State v. Louis*, 296 Or. 57, 672 P.2d 708 (1983). A police officer photographed Louis exposing himself from his living room window on several occasions. *Id.* at 59, 672 P.2d at 709. The court held that there was no search because one could see the defendant's actions from outside "without any special effort." *Id.* at 61, 672 P.2d at 710. Logically, proof beyond a reasonable doubt of the offense of public exposure of one's genitals effectively rebuts any claim that observation constitutes a violation of an actual expectation of privacy.

<sup>90</sup> See, e.g., *Florida v. Riley*, 109 S. Ct. 693, 696 (1989)(assuming that the target "intended and expected" privacy); *Kitzmilller v. State*, 76 Md. App. 686, 690, 548 A.2d 140, 142 (1988)(recognizing that the defendant anticipated privacy in his backyard); *State v. Harp*, 48 Or. App. 185, 190, 616 P.2d 564, 566 (1980)(assuming that defendant had actual expectation of privacy that his marijuana plants would not be discovered). See generally Note, *Protecting Privacy*, *supra* note 41, at 328 (noting that actual expectation requirement causes difficulties and that courts often presume it satisfied in order to resolve the case through the objective portion of the inquiry). The Georgia Court of Appeals stated the basis for assuming the existence of an actual expectation of privacy in explaining why it is not by itself a sufficient basis for fourth amendment protection: "[S]urely unless [the defendant] expected to remain undiscovered he would not risk possession of property carrying a highly undesirable penalty." *Williams v. State*, 157 Ga. App. 476, 477, 276 S.E.2d 923, 925, cert. denied, 454 U.S. 823 (1981). *Katz* is consistent with this reliance on a presumption; the Supreme Court never questioned that *Katz* had in fact expected that someone would overhear his calls, even though it was not clear from the way the parties framed the issues that *Katz* had ever formally asserted that he had any such expectation.

Some courts avoid the question by noting that Justice Harlan's formulation refers to whether the person "exhibited . . . an expectation of privacy." *Katz*, 389 U.S. at 361 (Harlan, J., concurring)(emphasis added). They therefore look to the efforts taken to assure privacy. For a discussion of such efforts, see *infra* note 105.

<sup>91</sup> The most troubling aspect of the "actual" expectation of privacy requirement is that in theory the prosecution can defeat it by prior notice of governmental use of any

on the reasonableness of that actual expectation of privacy. Here the courts splinter in their understandings of "sufficient." Three approaches dominate the cases; they can be characterized as the "successful," the "likely," and the "honored."

Many courts seem to demand that an expectation of privacy from observation be successful in order to be reasonable. That is, if the police were able in fact to observe the object, an individual could not have a reasonable expectation of privacy because observation was possible.<sup>92</sup> *Katz* is distinguished, if at all, on the perceived

---

surveillance technique. Professor Amsterdam notes this problem in arguing that actual expectations should be irrelevant to fourth amendment analysis. Amsterdam, *supra* note 2, at 383-85. He argues that otherwise "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under comprehensive electronic surveillance." *Id.* at 384. See also *People v. Agee*, 200 Cal. Rptr. 827, 832 (Cal. Ct. App. 1984) (characterizing an argument that the existence of "routine" helicopter patrols defines people's expectations of privacy as "bootstrapping" that would allow the government to manipulate fourth amendment coverage); 1 W. LAFAVE, *supra* note 17, at 308-10 (discussing Professor Amsterdam's hypothetical and others that undercut the notion that subjective expectations should affect the application of the fourth amendment). Justice Harlan himself came to conclude that subjective expectations of privacy are not important in defining the scope of fourth amendment protections from constructive invasions. *United States v. White*, 401 U.S. 745, 768 (1970) (Harlan, J., dissenting).

Still, the Supreme Court has adhered to its two-part inquiry in the face of Professor Amsterdam's hypothetical, noting that "[i]n such circumstances, where an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role." *Smith v. Maryland*, 442 U.S. 735, 740-41 n.5 (1979). Moreover, there are some situations in which notice might legitimately affect the application of the fourth amendment. See *infra* note 293 and accompanying text.

<sup>92</sup> Several Pennsylvania cases provide examples. In *Commonwealth v. Busfield*, 242 Pa. Super. 194, 363 A.2d 1227 (1976), the court dealt with the validity of an observation into the curtained window of a house. *Id.* at 196, 363 A.2d at 1228. Despite citing *Katz* and characterizing the issue as turning on the intent of the target to maintain privacy, the court found no reasonable expectation because the officers could see through the curtain. *Id.* at 198, 363 A.2d at 1228-29. In *Commonwealth v. Hernley*, 216 Pa. Super. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971), the court upheld a more adventurous observation. Here the agent was unable to peek through a curtain so he climbed a ladder on abutting property and used binoculars to observe illegal activity inside the premises. *Id.* at 178-79, 263 A.2d at 905. The court was untroubled by the use of binoculars or the agent's unusual efforts to gain a vantage point. *Id.* at 181-82, 263 A.2d at 906-07. Professor LaFave describes *Hernley* as "a perversion of the reasoning underlying *Katz*." 1 W. LAFAVE, *supra* note 17, at 342. The court used somewhat similar analysis in *Commonwealth v. Williams*, 262 Pa. Super. 508, 396 A.2d 1286 (1979), in which it held that there was no REOP against police use of a startron (night vision scope) to view activities in darkened rooms in an apartment. *Id.* at 518, 396 A.2d at 1290. It concluded that "the use of curtains or other window coverings would have rendered the startron, as well as more conventional techniques of observation, ineffective." *Id.* The Pennsylvania Supreme Court reversed and seemed shocked by the intrusiveness of the startron. *Commonwealth v. Williams*, 494 Pa. 496, 500, 431 A.2d 964, 966 (1981). A more recent Pennsylvania case in this area, *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 529 A.2d 1085 (1987), viewed the scope of the fourth amendment

if technically erroneous difference between hearing and seeing.<sup>93</sup> This approach is exemplified by *United States v. Whaley*,<sup>94</sup> a case in which the court decided that binocular aided observations into a target's home did not constitute a search.<sup>95</sup> All possible observation points were closed to general public access but agents were able to see into Whaley's basement from forty yards away by entering a neighboring property and climbing down an embankment to a canal that formed one of the property's boundaries.<sup>96</sup> The court emphasized that the object—a cocaine factory—was "in a lighted room directly in front of uncurtained windows . . . [and] could be viewed with the naked eye from a position on the canal or on neighboring property."<sup>97</sup> Of equal importance, the court found the secluded nature of the target's house irrelevant, essentially tossing off the argument that Whaley had a reasonable expectation that no one would look into the building.<sup>98</sup> It was conceivable that someone might climb down to the canal and look in the windows; moreover, the target's suspicious behavior elsewhere should have warned him that law enforcement surveillance was likely.<sup>99</sup>

---

very differently than it had in *Busfield*, *Hernley*, and *Williams*. It held that enhanced observations into a greenhouse attached to a house breached the defendant's REOP. *Id.* at 347, 529 A.2d at 1093. Still, a dissenting judge noted that the "glass enclosing the greenhouse invited the prying eye of anyone, including the police, to view its contents." *Id.* at 360, 529 A.2d at 1098 (Popovich, J., dissenting).

<sup>93</sup> The *Hernley* court emphasized that Katz had not successfully avoided visual observation. *Hernley*, 216 Pa. Super. at 181 n.5, 263 A.2d at 907 n.5. Its conclusion was that a reasonable expectation of privacy from such observation requires one "to preserve his privacy from visual observation." *Id.* at 181, 263 A.2d at 907.

<sup>94</sup> 779 F.2d 585 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987).

<sup>95</sup> *Id.* at 589-92.

<sup>96</sup> *Id.* at 587-88.

<sup>97</sup> *Id.* at 590. Here the connection to the Pennsylvania cases is particularly clear. Whaley did not curtain his windows, thus he had no REOP from observations from outside those windows.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* These conclusions do not really respond to Whaley's claim. The fact that some casual observation was possible does not mean that the defendant should have expected nightly observations for three months. The court's point, it seems, is that an expectation of probable privacy is not necessarily reasonable. It must, at least in the context of visual observation, be successful as well. The suggestion that one loses a REOP in one's secluded home by acting suspiciously in public is at odds with fourth amendment doctrine. *See, e.g.*, *United States v. Tabor*, 635 F.2d 131, 138-39 n.10 (2d Cir. 1980) ("What varies with the nature of the activity is not the likelihood, but rather the consequences, of its being observed. In other words, the nature of the activity does not alter the odds, but only the size of the wager."); *People v. Agee*, 200 Cal. Rptr. 827, 831-32 (Cal. Ct. App. 1984) (fact that contraband is the object of observation has no relevance to fourth amendment); *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 350, 529 A.2d 1085, 1093 (1987) ("[T]he Fourth Amendment makes no distinctions between lawful and unlawful conduct.").

The *Whaley* court seems to have meant that the defendant's suspicious behavior in-

This approach eviscerates the fourth amendment's application to visual observations. Even in cases assuming the existence of an actual expectation of privacy, targets inevitably lose because the mere fact of observation renders satisfaction of the "reasonable expectation" aspect impossible. To these courts, the only real protections from visual surveillance are good luck and barricaded windows, probably in that order.<sup>100</sup>

Other courts attempt to protect "likely" privacy. That is, they deem the *Katz* test satisfied if observation was practically unlikely.<sup>101</sup>

---

creased the likelihood of law enforcement interest in his activities, thereby making it more probable that agents would attempt to watch his basement laboratory. While this may be true, it is inconsistent with the court's conclusion that the reasonableness of Whaley's expectation of privacy turns on the possibility of observation by members of the general public. *Whaley*, 779 F.2d at 591. More fundamentally, it reinforces the suspicion that this method of analysis is inherently circular. If the only "reasonable" expectations of privacy are those that succeed in foiling surveillance by suspicious law enforcement officers, courts are unlikely to analyze any "reasonable expectations of privacy" in the real world of criminal litigation.

<sup>100</sup> See generally *United States v. Head*, 783 F.2d 1422, 1424, 1427-28 (9th Cir.), cert. denied, 476 U.S. 1171 (1986) (no REOP where it was possible for officer to look into van, notwithstanding target's coating window to deter all but the most determined attempts to look in); *United States v. Bellina*, 665 F.2d 1335, 1344 (4th Cir. 1981) (no REOP because curtains were not drawn and observers could see into window of airplane); *People v. Joubert*, 118 Cal. App. 3d 637, 646, 173 Cal. Rptr. 428, 434 (1981) (farmers assume risk of observation by aerial surveillance; no REOP unless marijuana is cultivated "in a hothouse or [is] otherwise cover[ed]"); *Sims v. State*, 425 So. 2d 563, 567 (Fla. Dist. Ct. App. 1983) (gaps in bushes around property defeat any expectation of privacy from observation); *State v. Thompson*, 196 Neb. 57, 58, 241 N.W.2d 511, 512-13 (1976) (no REOP because officers in alley could see marijuana use through sheer curtain across window). Cf. *James v. United States*, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969) (officer may look under a garage door; observations are lawful even if the officer has "to crane his neck, or bend over, or squat"). The lesson of these cases may be that privacy is protected only where all possible efforts are made to ensure it. One commentator calls this "the fort," Note, *Katz and the Fourth Amendment*, supra note 44, at 70-72, and disagrees with the premise: "Neither *Katz* nor the fourth amendment requires life in a fort in order to preserve one's security against arbitrary governmental intrusion." *Id.* at 72.

<sup>101</sup> See *People v. Lovelace*, 116 Cal. App. 3d 541, 548-54, 172 Cal. Rptr. 65, 69-73 (1981) (REOP found because courts could not expect members of public to see through the fence); *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 428-29, 158 Cal. Rptr. 86, 90-91 (1979) (REOP found because area was restricted and concealed from view, thereby rendering entry unforeseeable); *State v. Kender*, 60 Haw. 301, 303-07, 588 P.2d 447, 449-51 (1978) (REOP found despite officer's ability to make observations after climbing fence because view of marijuana in defendant's backyard was effectively blocked from normal vantage points); *State v. Stanton*, 7 Or. App. 286, 296-97, 490 P.2d 1274, 1279 (1971) (emphasizing factors concerning likelihood of observation, concluding that there was no REOP because property was open and contraband was discoverable by the general public); *Buchanan v. State*, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971), cert. denied, 405 U.S. 930 (1972) (fourth amendment privacy in public bathroom depends on whether or not the stalls have locking doors). Professor LaFave criticizes this approach:

[I]t might be assumed that police investigative activity constitutes a search whenever it uncovers incriminating actions or objects which the law's hypothetical reasonable

In such cases courts evaluate various factors relating to the target and the object. The courts may consider secluded or camouflaged objects, for example, private under this approach even if police officers are able to make an observation through happenstance or the use of sophisticated technological devices.<sup>102</sup> If the *Whaley* court had followed this approach it could not have dismissed the privacy claim in so cavalier a fashion. It would instead have had to determine whether casual observation was sufficiently likely to render *Whaley's* actual expectation of privacy unreasonable.

*State v. Kaaheena*<sup>103</sup> presents an example of the approach emphasizing likely privacy. A police officer climbed onto a crate and looked into a window from approximately six feet above ground level through a one-inch gap in venetian blinds.<sup>104</sup> The court deemed this to constitute a search even though the blinds did not successfully conceal the object. The target's expectation of privacy was reasonable because the gap in the blinds was "high enough off the ground so that no one could look in unassisted."<sup>105</sup> Under this

---

man would expect to be private, that is, which as a matter of statistical probability were not likely to be discovered. But this is not really what *Katz* is all about.

1 W. LaFAVE, *supra* note 17, at 311 (footnote omitted). He supports his analysis by discussing a hypothetical found in Note, *Private Places*, *supra* note 2. The hypothetical posits that a police officer inadvertently happens upon a night-time narcotics transaction in a remote part of New York's Central Park. Although observation is highly unlikely as a matter of statistical probability, there is no fourth amendment violation. Note, *Private Places*, *supra* note 2, at 983. There is a realistic or likely expectation of privacy, but not an expectation that society considers reasonable. *Id.* See also *United States v. Fisch*, 474 F.2d 1071, 1077 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973) (*Private Places* concludes that the reasonableness aspect of the *Katz* inquiry "bars the bizarre, the freakish, and the weird expectations").

<sup>102</sup> See *Phelan v. Superior Court*, 90 Cal. App. 3d 1005, 1011-15, 153 Cal. Rptr. 738, 742-44 (1979) (REOP for rural marijuana garden well protected from discovery by natural terrain and camouflage activities); *People v. Fly*, 34 Cal. App. 3d 665, 667, 110 Cal. Rptr. 158, 159-60 (1973) (REOP found for plants in yard because observer had to "squeeze into a narrow area between the neighbor's garage and defendant's fence and that area was almost blocked by heavy foliage and weeds"); *State v. Brady*, 406 So. 2d 1093, 1097-98 (Fla. 1981), *vacated*, 467 U.S. 1201 (1984) (REOP found largely because property was remote and discovery was unlikely); *State v. Knight*, 63 Haw. 90, 93-94, 621 P.2d 370, 373-74 (1980) (REOP because observation was into a "remote area, surrounded by vegetation and forest"). Arguably, one can be sufficiently secluded in a city. See, e.g., *People v. Arno*, 90 Cal. App. 3d 505, 509, 153 Cal. Rptr. 624, 626 (1979) (REOP from observation in an office on the eighth floor of a building at least 200 yards from a vantage point of similar height).

<sup>103</sup> 59 Haw. 23, 575 P.2d 462 (1978).

<sup>104</sup> *Id.* at 24, 29 n.7, 575 P.2d at 464, 467 n.7.

<sup>105</sup> *Id.* at 29, 575 P.2d at 467. The clearest distinction between this approach and the "successful" expectation of privacy approach is in the large number of cases that stress that there are limitations on the precautions that must be taken to preserve a sufficient expectation of privacy. See *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (fencing the backyard sufficiently evidenced an intention to maintain privacy); *United States v. Kim*, 415 F. Supp. 1252, 1257 (D. Haw. 1976) ("whether and when

theory, outdoor objects may be sufficiently shielded from observation to support a reasonable expectation of privacy; either the terrain or artificial efforts may make observation improbable.<sup>106</sup> At least before the Supreme Court's aerial search cases,<sup>107</sup> courts often evaluated the reasonableness of expectations of privacy from aerial surveillance in terms of the likelihood that such observations would occur.<sup>108</sup>

Under this second approach, the *Katz* engine is driven solely by the likelihood of observation. While this approach sounds workable

---

Kim's curtains were shut has no relevance in this case"); *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 636, 511 P.2d 33, 41, 108 Cal. Rptr. 585, 593 (1973)(window openings do not negate expectation of privacy; there is no requirement that a person "encase himself in a light-tight, air-proof box"); *Vidaurre v. Superior Court*, 13 Cal. App. 3d 550, 553, 91 Cal. Rptr. 704, 706 (1970)("a person who surrounds his backyard with a fence, and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy for the area"); *Wheeler v. State*, 659 S.W.2d 381, 390 (Tex. Crim. App. 1983)(one need not "erect a stone bastion, or retreat to the cellar to exhibit a reasonable expectation of privacy"). These points are often made in response to arguments to impose the "successful" approach indirectly by suggesting that the failure to use the most effective method of protection means that the target has no actual expectation of privacy. The common sense response of the *Kim* court was that if true, then "anyone taking steps to protect his privacy would run the risk of being considered to have forsaken it." *Kim*, 415 F. Supp. at 1257. See also Note, *supra* note 76, at 715 (arguing that preventative steps establish the subjective expectation of privacy rather than negate it).

Consistent with this notion, some courts emphasize that *Katz* requires that the target exhibit a reasonable expectation of privacy, see *Katz*, 389 U.S. at 361 (Harlan, J., concurring), and therefore emphasize the target's efforts to maintain secrecy. See, e.g., *People v. Lovelace*, 116 Cal. App. 3d 541, 550, 172 Cal. Rptr. 65, 69-70 (1981)(six-foot high fence sufficiently demonstrates expectation of privacy); *Commonwealth v. Soychak*, 221 Pa. Super. 458, 463, 289 A.2d 119, 122-23 (1972)(use of louvers on fan and doorman sufficiently exhibits the necessary expectation of privacy); *State v. Peck*, 143 Wis. 2d 624, 638-42, 422 N.W.2d 160, 166-67 (Wis. Ct. App. 1988)(emphasis is on what steps an individual has taken to prevent observation). Cf. *United States v. Broadhurst*, 805 F.2d 849, 854 (9th Cir. 1986)(efforts to block observation into greenhouse meets the subjective aspect of *Katz* test). See also Tomkovicz, *supra* note 2, at 653; Note, *supra* note 57, at 744; (both emphasizing that the inquiry pertains to manifestations rather than beliefs).

<sup>106</sup> See *supra* note 102.

<sup>107</sup> See *supra* text accompanying notes 68-74.

<sup>108</sup> See *United States v. Allen*, 675 F.2d 1373, 1381 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981)(no REOP, the key factor being that helicopter flights were common and should have been expected); *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980)(no REOP from aerial surveillance in open fields where overflights "are not infrequent"); *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 425, 158 Cal. Rptr. 86, 88-89 (1979)(no REOP from aerial observation because farmers should expect that overflights will observe the cultivation of contraband); *State v. Stachler*, 58 Haw. 412, 419, 570 P.2d 1323, 1328 (1977)(emphasizing the likelihood of aerial overflights, noting that helicopters flew over the area every day); *State v. Rogers*, 100 N.M. 517, 518, 673 P.2d 142, 143 (N.M. Ct. App. 1983)(no REOP from helicopter observation where aircraft are commonly in area). Cf. *Williams v. State*, 157 Ga. App. 476, 477, 277 S.E.2d 923, 925, cert. denied, 454 U.S. 823 (1981)(unreasonable to expect privacy from overflights at lawful heights because "[t]he sky, like the road, is a highway over which those licensed to do so may pass").



and is somewhat consistent with the Supreme Court's attempts to apply the expectations paradigm in other areas,<sup>109</sup> it fails in the visual area. The "level" of likelihood is indeterminate, as it allows courts to pick and choose among probabilities and realities in a nearly random fashion. This is aggravated by the fact that pure REOP approaches purport to ignore the government's methods, which renders artificial any attempt to assess the reasonableness of the target's expectations concerning the likelihood of observation. In *Kaaheena*, for example, the court stated that it would have held the observation valid if the gap had been at eye level because then "[a]ny member of the curious public could, without any assistance, glance into the building."<sup>110</sup> Yet even with the opening at six feet, anyone of the not uncommon height of six feet could have seen through the gap with relative ease on tip-toes. The critical fact in *Kaaheena* seems to be that this particular officer was assisted by the crate, a mechanical aid to visual observation akin in some respects to a nearby hill or a seat in an airplane.<sup>111</sup>

---

<sup>109</sup> The Court has evidenced several different minds on this matter. In *Oliver v. United States*, 466 U.S. 170 (1984), it seemed to approve of a likelihood approach when it noted that open fields are generally accessible to the public notwithstanding fences or signs. *Id.* at 179. The Court nevertheless purported to reject reliance on likelihood: "[I]t may be that because of [seclusion and efforts to deter trespassers] . . . few members of the public stumbled upon the marijuana crops seized by the police. . . . The test of legitimacy . . . is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.* at 182-83. For further discussion of *Oliver*, see *supra* note 58. *Smith v. Maryland*, 442 U.S. 735 (1979), on the other hand, suggests a somewhat different likelihood approach, noting that people assume the risks that the telephone numbers they dial will be revealed to the police because most people know that the telephone company has access to this information. *Id.* at 742-45. The aerial search cases are clearest on this point and edge even further in the direction of the "successful" REOP approach. The Court in *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986), noted that there is no REOP from aerial photography where it is feasible from public airspace. In *California v. Ciraolo*, 476 U.S. 207 (1986), the Court stated: "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." *Id.* at 215. Dissenting Justice Brennan described the plurality's analysis in *Florida v. Riley*, 109 S. Ct. 693 (1989), as defeating a REOP whenever "a single member of the public could conceivably position herself to see into the area in question without doing anything illegal." *Riley*, 109 S. Ct. at 700 (Brennan, J., dissenting). See also Note, *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 1, 142 (1986) (characterizing the decisions as "reduc[ing] the test of whether an expectation is reasonable to nothing more than an empirical assessment of actual risks").

<sup>110</sup> 59 Haw. at 30, 575 P.2d at 467.

<sup>111</sup> Courts generally uphold the use of vantage points. See *United States v. Allen*, 675 F.2d 1373, 1381-82 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981) (flatly approving both helicopter and hill vantage points for visual surveillance); *United States v. Bellina*, 665 F.2d 1335, 1345-46 (4th Cir. 1981) (use of ladder to gain view of inside of airplane is permissible); *United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (officers may station themselves on embankment looking down on de-

Even if the courts agreed on a level of likelihood sufficient to trigger the fourth amendment, they would still have to agree on an underlying standard concerning the permissible efficiency of law enforcement observations. Courts cannot ignore method to focus on likelihood because likelihood often depends on method. Because pure REOP approaches deem methods of observation irrelevant, presumably there is only a sufficient expectation of privacy where the target takes those measures likely to ward off the most intrusive methods. If so, as surveillance techniques become more sophisticated, the REOP will inevitably shrink to the expectation that succeeds. This may be the practical effect of the Supreme Court's aircraft and beeper cases.<sup>112</sup> Fortunately, however, those decisions leave open one vehicle for protecting privacy under this rubric, namely the "honored" expectation.<sup>113</sup>

The "honored" expectation of privacy approach focuses on the nature of the object. That is, regardless of the likelihood of observation, some actions or things are so inherently private that observation violates a reasonable expectation of privacy. This approach is based on the normative reading of the *Katz* "justifiable" or "reasonable" expectation requirement.<sup>114</sup> While several lines of cases sug-

---

pendant's property); *Murphy v. State*, 413 So. 2d 1268, 1270 (Fla. Dist. Ct. App. 1982)(helicopter may be lowered close to ground to get better view of field); *State v. Holbron*, 65 Haw. 152, 153-55, 648 P.2d 194, 196 (1982)(vantage point on hill is permissible); *Kitzmilller v. State*, 76 Md. App. 686, 692-94, 548 A.2d 140, 143 (1988)(upholding observation into curtilage made after climbing 40 feet up a tree). Cf. *James v. United States*, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969)(officer may get down on ground and peer under garage door).

<sup>112</sup> The Supreme Court's aerial search cases seem to suggest that if an aerial observer can see into an area, the observation does not constitute a search. See *supra* text accompanying notes 68-74. The beeper cases are even more direct, at least with respect to visual observations. The beeper surveillance in *United States v. Knotts*, 460 U.S. 276 (1983), allowed agents to track an automobile from St. Paul, Minnesota to Shell Lake, Wisconsin, despite the fact that the target successfully foiled the efforts of agents trying to follow his car by sight. *Id.* at 278.

In essence, use of a beeper renders perfect the difficult technique of mobile visual surveillance. The Court had no difficulty upholding the use of the beeper to track the car; because successful visual observation in public would not have violated any REOP, there was no objection to "the police . . . augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case." *Knotts*, 460 U.S. at 282.

<sup>113</sup> See, e.g., *Ciraolo*, 476 U.S. at 215 n.3 (suggesting that more intrusive methods and observations that disclose intimate details or intrude on privacy may not be permitted); *United States v. Karo*, 468 U.S. 705, 714-16 (1984)(monitoring beeper inside house constitutes invasion of privacy in the home). For further discussion of *Karo*, see *supra* note 67.

<sup>114</sup> See *supra* notes 41 and 43-46 and accompanying text. As suggested, most commentators emphasize this strand of *Katz* and suggest that the reasonableness aspect of the test mirrors community values—the ideal of what the public wants from a police force sensitive to civil liberties rather than the reality of what the public anticipates from the

gest the use of such an approach,<sup>115</sup> asking courts simply to determine whether an object is deemed by society as worthy of constitutional protection<sup>116</sup> is to invite grossly inconsistent decision-making in which community prejudice is elevated to constitutional principle. Rigor and fairness require the identification of definable categories. Perhaps because courts recognize that a general stan-

---

average police agency. To these commentators it was the fact of communication, not the closing of the door, that provided Katz with full fourth amendment protection. See *1 W. LAFAVE*, *supra* note 17, at 360 (since it is "the nature of the thing to be protected that is critical," a lip-reader using binoculars would violate the fourth amendment by "listening" to private conversations through his eyes); Note, *Protecting Privacy*, *supra* note 41, at 315 (calling for a "sociologically accurate" definition of privacy founded on individual needs and desires for both "secrecy and solitude").

<sup>115</sup> Despite its flirtations with various versions of a likelihood approach, the Supreme Court has usually relied on societal norm terminology. See *Oliver v. United States*, 466 U.S. 170, 179 (1984) ("There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."). See also *id.* at 189 (Marshall, J., dissenting) (defining the reasonable expectation of privacy as falling into three categories: those determined by "positive law," such as property interests, those turning on particular uses, and those that are manifested in a way most people understand and respect); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (the necessary justifiable expectation must have some "source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society"). Other courts describe the standard in similar language. See *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (analyzing the use of video surveillance in terms of what society deems to be appropriate); *United States v. Solis*, 536 F.2d 880, 881 (9th Cir. 1976) ("the critical question is the kind of intrusion a free society is willing to tolerate"); *People v. Agee*, 200 Cal. Rptr. 827, 830 (Cal. Ct. App. 1984) (seeing appropriate inquiry as involving societal values and asking "should people be 'entitled' to enjoy the domain of their backyards without being seen, heard or noted by their government?"). Cf. *Abislaiman v. State*, 437 So. 2d 181, 183 (Fla. Dist. Ct. App. 1983), *cert. denied*, 469 U.S. 833 (1984) (combining likelihood and societal views, suggesting that defendant should have expected traffic in hospital's emergency room parking lot in the middle of the night, but also noting that it is permissible to use a remote camera to scan that area because society believes that a hospital "has a right to protect its patients, employees, and property"). An instructive line of cases concerns observations into restrooms. See *infra* notes 277-80 and accompanying text.

<sup>116</sup> Indeed, such an approach would endanger the fourth amendment's application to evidence of crime. After all, the *Katz* Court applied the fourth amendment to evidence of gambling even though it obviously disapproved of illegal gambling. Society does not favor the privacy of criminal behavior; it favors the privacy of law-abiding behavior. But the only way to protect legitimate behavior is to insist that all intrusions on privacy be reasonable. There is a line of authority concerning intrusions that do nothing more than identify illegal contraband. In this area of the "dishonored" expectation of privacy, courts are quite willing to uphold most intrusions. This explains in part the Supreme Court's dog-sniff case, *United States v. Place*, 462 U.S. 696 (1983). See *supra* notes 63-65 and accompanying text. Since the dog revealed only the presence of contraband, no innocent privacy was invaded. *Place*, 462 U.S. at 707. See *Tomkovicz*, *supra* note 2, at 722 (approving the result because no legitimate information about the target was revealed). See also *United States v. Jacobsen*, 466 U.S. 109, 122-23 (1984) (concluding that a field test for cocaine is not a search because it reveals only the presence of an illegal substance). Cf. *Lucas v. United States*, 411 A.2d 360, 364 (D.C. 1980) (fact that sensoromatic device reveals only unpurchased merchandise makes it a reasonable search).

dard for "honored" expectations of privacy would become a tool for abuse, courts have most often used the approach in connection with location approaches.

## 2. Location Approaches

Cases emphasizing location draw on principles that pre-date *Katz* but do not adopt the narrow view of fourth amendment coverage usually associated with that period. There are two distinct and somewhat inconsistent approaches. The first emphasizes the location of the observer. The second focuses on the location of the object.

The "observer" approach is simple to describe and is usually simple to apply. Observations are lawful as long as the observer is at a "lawful" location.<sup>117</sup> The determination is primarily based upon the open fields doctrine; unless the officer invades the curtilage of the home, all observations are fair game.<sup>118</sup> The logic of the

---

<sup>117</sup> See *United States v. Dunn*, 480 U.S. 294, 304-05 (1987)(no fourth amendment search where agents look into curtilage from a place outside curtilage); *United States v. Coplen*, 541 F.2d 211, 214 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977)(it is "well settled" that observations from lawful locations are permitted); *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 634, 511 P.2d 35, 39, 108 Cal. Rptr. 585, 591 (1973) ("[O]bservations of things in plain sight made from a place where a police officer has a right to be do not amount to a search in the constitutional sense."); *Sims v. State*, 425 So. 2d 563, 567 (Fla. Dist. Ct. App. 1983)(if police are at a lawful location, defendant can have no constitutional challenge to observation); *People v. Wright*, 41 Ill. 2d 170, 175-76, 242 N.E.2d 180, 183-84 (1968), *cert. denied*, 395 U.S. 933 (1969)(trespass doctrine still applies to information obtained without reliance on electronic or other methods that enhance natural senses); *People v. Clark*, 133 Mich. App. 619, 627-28, 350 N.W.2d 754, 759 (1984)(implying that observation was permissible only because it was made from outside the defendant's property).

<sup>118</sup> This principle permits some intrusions into the curtilage or its functional equivalent. See *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977)(it is permissible to enter and listen in common hallway of apartment building); *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir.), *cert. denied*, 423 U.S. 826 (1975)(entry into driveway may be permitted as it "is only a semi-private area"); *Lorenzana*, 9 Cal. 3d at 629, 511 P.2d at 35, 108 Cal. Rptr. at 587 ("A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectation of privacy in regard to observations made there."); *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 840, 112 Cal. Rptr. 764, 766-67 (1974)(recognizing that front yard areas are likely to be crossed by tradespeople and other strangers); *State v. Lee*, 633 P.2d 48, 51 (Utah), *cert. denied*, 454 U.S. 1057 (1981)(observations upheld in part because "[t]he open pathway to the front door was an implied invitation to members of the public to enter thereon"). See also 1 W. LAFAVE, *supra* note 17, at 393-96 (police officers may legitimately enter the curtilage if they use normal paths or similar means of access to house). The critical point seems to be the justification rather than the place. See *People v. Superior Court (Spielman)*, 102 Cal. App. 3d 342, 344, 347-50, 162 Cal. Rptr. 295, 296, 298-300 (1980)(officer was on top of fence because he was following burglary suspect, majority concludes no search because officer was in legitimate place under the circumstances).

theory is that no person can have a reasonable expectation of privacy from observation if another person can view his or her actions or property from a "legitimate" location.<sup>119</sup> Consistent with a generally formalist bent, many courts following the "successful" expectation of privacy approach couple it with a rigid enforcement of the lawful location approach.<sup>120</sup> Blinds must be closed only enough to prevent observations by persons outside the curtilage; thus there is at least some possibility of maintaining access to light and air without giving up all privacy protection. In short, this approach affords the object a buffer zone of protection.

Still, this approach should provide only cold comfort to many targets. While it may eliminate invasions from eyes peering in poorly shuttered windows from the target's own yard, modern housing and building practices often make such buffers small or nonexistent.<sup>121</sup> Perhaps more importantly, even simple vision-enhancing

---

<sup>119</sup> See, e.g., 1 W. LAFAVE, *supra* note 17, at 391 (one has no REOP when neighbors can see or hear person). See *id.* at 390 (an officer may "see or hear what is occurring inside a dwelling while he is in an area adjacent to that dwelling's curtilage which is open to the public"); Note, *Electronic Visual Surveillance*, *supra* note 1, at 273 (no one can have REOP for activity that can be viewed through the unaided senses of other persons); Note, *Tracking Katz*, *supra* note 41, at 1482 ("The government must stand in the shoes of the public: it may see, know, and take without a warrant only what members of the public may see, know, and take."). See also *State v. Littleton*, 407 So. 2d 1208, 1211 (La. 1981)(one cannot have REOP where object is in open view from public road); *Commonwealth v. Ortiz*, 376 Mass. 349, 352, 380 N.E.2d 669, 672 (1978)(observations made in public cannot invade REOP); *State v. Grawien*, 123 Wis. 2d 428, 437, 367 N.W.2d 816, 820 (Wis. Ct. App. 1985)("The undisputed fact in this case is that the marijuana was easily viewed from an adjoining cornfield.").

<sup>120</sup> See, e.g., *Florida v. Riley*, 109 S. Ct. 693, 696-97 (1989)(emphasizing that helicopter was in lawful public airspace); *Coplen*, 541 F.2d at 214-15 (observations from lawful location are permitted even with visual enhancement); *United States v. Christensen*, 524 F. Supp. 344, 347 (N.D. Ill. 1981)(stressing that agents making the observations were at lawful location); *People v. Wright*, 41 Ill. 2d at 176, 242 N.E.2d at 184 (emphasizing that observations were made from public property); *State v. Thompson*, 196 Neb. 55, 57, 241 N.W.2d 511, 513 (1976)(emphasizing that observing officers had right to be in alley from which they made their observations); *Commonwealth v. Hernley*, 216 Pa. Super. 177, 180, 263 A.2d 904, 906 (1970), *cert. denied*, 401 U.S. 914 (1971)(visual observation permitted in part because made from outside defendant's property). Still, a number of courts have permitted "technical" trespasses in some circumstances. See *United States v. Bellina*, 665 F.2d 1335, 1344-45 & n.7 (4th Cir. 1981)(permissible to climb onto airplane wing under circumstances and make observations because there was no REOP from observations of airplane's interior); *United States v. Hanahan*, 442 F.2d 649, 654 (7th Cir. 1971)(commission of technical trespass does not constitute search and render observations invalid); *State v. Kaaheena*, 59 Haw. 23, 27, 575 P.2d 462, 465 (1978)(if trespass is technical, the observation is not automatically invalid but is instead a factor in analyzing whether there is a REOP).

<sup>121</sup> Numerous cases uphold observations or overhearings from common areas such as hallways. See, e.g., *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977)(hallways of apartment building are for common use and a person can have no REOP in such areas); *United States v. Llanes*, 398 F.2d 880, 882-84 (2d Cir. 1968)(agent permitted to listen to

devices destroy the impact of the buffer by moving the observer, in effect, well into the curtilage.<sup>122</sup> Privacy is further diminished in cases in which aerial surveillance is coupled with the use of visual

---

conversations in apartment from common hallway); *People v. Winograd*, 125 Misc. 2d 754, 757, 480 N.Y.S.2d 419, 421-22 (N.Y. Crim. Ct. 1984)(landlord may give permission for hidden video camera to film events in common hallway, even where camera can observe the inside of the target's business premises when office door is open). *Cf. United States v. Kim*, 415 F. Supp. 1252, 1258 (D. Haw. 1976)(upholding observations of a shared walkway). Some courts are reluctant to chisel down privacy in this fashion. In *Eisler*, the court held that there was a REOP for a conversation occurring inside the apartment, even though it was overheard without enhancement by a person in the common hallway. *Eisler*, 567 F.2d at 816 n.2.

Professor Amsterdam is troubled by the effects on the fourth amendment of the limited seclusion possible in contemporary housing. Amsterdam, *supra* note 2, at 401 (noting that there is little privacy from neighbors in urban and inexpensive housing, and that if officers may lurk in common hallways and similar places there is no real zone of privacy from governmental inquiry). *See also United States v. Wright*, 449 F.2d 1355, 1369 (D.C. Cir.), *cert. denied*, 405 U.S. 947 (1971)(Wright, J., dissenting)(suggesting that curbing observations is necessary to protect privacy because "in many homes now a 'plain view' of the bedroom" is feasible); Note, *Protecting Privacy*, *supra* note 41, at 333 (noting that those with disposable incomes can take precautions against invasions of privacy but that the poor cannot do so).

The Sixth Circuit appeared to be sympathetic to such concerns in *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976), in which an agent observed a suspected drug transaction after slipping into a locked apartment building when the door was opened by workmen. *Id.* at 548. The court concluded that tenants "have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry." *Id.* at 550. Noting that the building was locked and that the entry was in violation of state law, *id.* at 550-51 & n.1, the court suppressed the evidence resulting from the agent's observations in the building. *Id.* at 552. *See also Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974)("Contemporary concepts of living such as multi-unit dwellings must not dilute Fixel's right to privacy any more than is absolutely required.").

<sup>122</sup> *See, e.g., Note, supra* note 82, at 384-86 (criticizing cases reaching this result); Note, *A Reconsideration of Katz*, *supra* note 49, at 179 (criticizing *Fullbright v. United States*, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968) for this result); Note, *Constitutional Law: Use of Binoculars as Constituting an Unreasonable Search*, 27 OKLA. L. REV. 254, 257 (1974)(arguing that the use of binoculars to this effect violates the fourth amendment). Some courts evidence concern in this regard. *See, e.g., People v. Arno*, 90 Cal. App. 3d 505, 511-12, 153 Cal. Rptr. 624, 627-28 (1979)(suggesting that the observation was unlawful because the binoculars in effect placed the observer right outside of the office windows); *Riley v. State*, 511 So. 2d 282, 286-87 (Fla. 1987), *rev'd*, 109 S. Ct. 693 (1989)(disapproving helicopter surveillance in part because it intrudes too severely on the curtilage). *Cf. State v. Barnes*, 390 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1980)(observations are permitted if conducted without special equipment that unduly intrudes on private areas). Many other cases ignore the issue or are untroubled by the problem. *See Fullbright*, 392 U.S. at 434-35 (binocular-aided observations of house and shed are permitted); *United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)("Nor did the use of binoculars by the officers constitute an extension of their persons so as to put them within the curtilage."); *State v. Bennett*, 205 Mont. 119, 123, 666 P.2d 747, 750 (1983)(enhanced observation of marijuana plants in garden within a fenced lot surrounded by open fields is permissible).

enhancement devices. Where this occurs, observers constructively breach the curtilage from above as well as from the ground.

The result of combining open fields access and technological assistance is a substantial breakdown of the traditional privacy protections associated with the home. For example, in *United States v. Lacey*,<sup>123</sup> the Second Circuit approved the open fields use of binoculars and a spotting scope to scrutinize activities in the vicinity of a house and its outbuildings—all traditionally part of the curtilage.<sup>124</sup> The court concluded that there was no fourth amendment search because law enforcement officers are permitted to enter private property outside the curtilage and the enhancement devices merely improved observations made from such lawful locations.<sup>125</sup> If the analysis is logical, its application is troubling. The police conducted a major paramilitary operation, but the intrusion was unregulated by the fourth amendment simply because no officer physically invaded the curtilage.<sup>126</sup> In essence, the government may do whatever it chooses because this approach excludes from the REOP all objects visible from beyond the curtilage.<sup>127</sup> This shotgun marriage between the common law definition of the house and modern technology means that few, if any, outdoor objects are safe from governmental surveillance.<sup>128</sup> Whatever the Supreme Court meant

---

<sup>123</sup> 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982).

<sup>124</sup> 669 F.2d at 50-51. The district court did suppress enhanced observations of the interior of the house. *United States v. Lacey*, 502 F. Supp. 1021, 1041 (D. Vt. 1980), *aff'd*, 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982). The property was observed for three weeks by 24 to 30 state police officers working three shifts a day. *Id.* at 1027. For further discussion on *Lacey*, see *infra* notes 261-64 and accompanying text.

<sup>125</sup> *Lacey*, 669 F.2d at 51.

<sup>126</sup> *Id.* at 53.

<sup>127</sup> The following specifically approve enhanced observation of objects within the curtilage: *United States v. Grimes*, 426 F.2d 706, 708 (5th Cir. 1970)(binocular-aided observation from an open field is not a search); *United States v. Hensel*, 509 F. Supp. 1376, 1384 n.9 (D. Me. 1981), *aff'd*, 699 F.2d 18 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983)(enhanced observations permitted at least where there are no observations into buildings within the curtilage); *Sims v. State*, 425 So. 2d 563, 567 (Fla. Dist. Ct. App. 1982)(observation with binoculars from outside the property is permitted); *People v. Ferguson*, 47 Ill. App. 3d 654, 657, 365 N.E.2d 77, 79-80 (1977)(binocular-aided observation into an apartment approved); *Kitzmilller v. State*, 76 Md. App. 686, 692-94, 548 A.2d 140, 142-43 (1988)(upholding binocular-aided observation into defendant's curtilage from a tree outside the curtilage); *People v. Clark*, 133 Mich. App. 619, 627, 350 N.W.2d 754, 758 (1983)(approving the use of binoculars from outside the curtilage to view a vehicle in defendant's garage); *State v. Harp*, 48 Or. App. 185, 189-90, 616 P.2d 564, 566 (1980)(binocular-aided observation of marijuana plants upheld). See also *supra* notes 117-20 (citing and discussing cases of observation into curtilage).

<sup>128</sup> See 1 W. LAFAVE, *supra* note 17, at 403 ("[I]t is bizarre that the curious concept of curtilage, originally taken to refer to the land and buildings within the baron's stone walls, should ever have been deemed to be of controlling significance as to the constitutional limits upon the powers of the police."). See also *People v. Agee*, 200 Cal. Rptr.

by the reasonable expectation of privacy in *Katz*, it could not have anticipated that the term would be turned around and used to mandate nearly absolute security before fourth amendment protection attaches.

One method of limiting this effect of the "observer" approach is to define it as applicable only to unaided observations. That is, an observation from a lawful location is not permissible unless the observer can make it by use of the naked eye. While various courts rely on this version of the approach,<sup>129</sup> it too is problematic. Decisions using the approach do not usually prohibit use of enhancement devices from outside the curtilage under a theory that only naked-eye observations are permissible. Instead, courts usually pretend enhancement never occurred by omitting the results of such observations from judicial consideration<sup>130</sup> or by concluding that they

---

827, 834 n.10 (Cal. Ct. App. 1984)(noting that the only significance of curtilage/open fields line under common law was as an aspect of the law of burglary).

<sup>129</sup> See, e.g., *United States v. Taborda*, 635 F.2d 131, 138-39 (2d Cir. 1980)("any enhanced viewing of the interior of a home impair[s] a legitimate expectation of privacy"); *State v. Ward*, 62 Haw. 509, 516, 617 P.2d 568, 572 (1980)(there is a REOP unless the activities were exposed to the naked eye). Cf. *People v. Arno*, 90 Cal. App. 3d 505, 511-12, 153 Cal. Rptr. 624, 627-28 (1979)("[T]he reasonable expectation of privacy extends to that which cannot be seen by naked eye or heard by the unaided ear."); *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 347-50, 529 A.2d 1085, 1093 (1987)(use of binoculars to identify objects not identifiable to naked eye violates defendant's REOP); *State v. Blacker*, 52 Or. App. 1077, 1081, 630 P.2d 413, 415 (1981)(REOP found because marijuana plant could not be seen without enhancement). See also Note, *supra* note 82, at 391-93 (use of binoculars or telescopes to observe otherwise unseen objects breaches a REOP) and Note, *The Post-Katz Problem of When "Looking" Will Constitute Searching Violative of the Fourth Amendment*, 38 LA. L. REV. 635, 640 (1978)(proposing that warrants be required if the observer needs to use an enhancement device)[hereinafter *Post-Katz Problem*]. Professor Amsterdam appears to accept this as a general principle, but concludes that it would not resolve all problems. Amsterdam, *supra* note 2, at 400.

<sup>130</sup> This occurs in a variety of forms. In *Cooper v. Superior Court*, 118 Cal. App. 3d 499, 173 Cal. Rptr. 520 (1981), for example, the police asked the magistrate who issued the search warrant not to consider information obtained from a binocular-aided observation into an apartment. *Id.* at 503, 173 Cal. Rptr. at 522. Reviewing courts commonly suggest that an enhanced observation was probably lawful but then evaluate whether independent evidence was sufficient to support an arrest or physical search. See, e.g., *United States v. Whaley*, 779 F.2d 585, 592 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987); *United States v. Christensen*, 324 F. Supp. 344, 348 (N.D. Ill. 1981); *United States v. Bifield*, 498 F. Supp. 497, 508-09 (D. Conn. 1980)(all finding sufficient independent evidence to support arrests, searches, or seizures). Courts concluding that the observation was unlawful follow a similar process. See, e.g., *United States v. Taborda*, 635 F.2d 131, 139-41 (2d Cir. 1980)(remanding for determination whether unenhanced observations provided probable cause for the search warrant); *United States v. Lace*, 502 F. Supp. 1021, 1042 (D. Vt. 1980), *aff'd*, 669 F.2d 46, 50-51 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982)(weighing the sufficiency of evidence other than enhanced observations into house). Cf. *Commonwealth v. Williams*, 494 Pa. 496, 500, 431 A.2d 964, 966 (1981)(disapproving lengthy enhanced observations of an apartment's interior but noting that most important evidence was obtained in a permissible fashion).



merely confirmed or clarified naked-eye observations.<sup>131</sup> Attempts to incorporate enhanced observations into a theory premised on naked-eye observations are inherently unavailing. Accordingly, courts that purport to limit the observer approach to such "natural" observations must find another vehicle for evaluating enhanced observations.

One approach capable of distinguishing enhanced from naked-eye observations focuses on society's respect for privacy within the home. The most influential case using this approach is *United States v. Kim*,<sup>132</sup> which suppressed evidence resulting from a telescopic surveillance.<sup>133</sup> Agents looked into the defendant's apartment from approximately a quarter-mile away and observed him making telephone calls while reading a sports tip sheet.<sup>134</sup> The court refused to regard Kim's failure to close his curtains or his unsuccessful efforts to avoid detection as undercutting his REOP.<sup>135</sup> Instead, the court focused on the fact that the government used an extremely intrusive technique directed at a private home.<sup>136</sup> Still, *Kim* hardly took an absolutist position; only artificial aids were involved, and the court upheld some observations by enhancement devices.<sup>137</sup>

Later decisions have underscored both the justifications for and the limitations of the *Kim* analysis.<sup>138</sup> The Second Circuit, for exam-

<sup>131</sup> See *infra* notes 157-60 and accompanying text.

<sup>132</sup> 415 F. Supp. 1252 (D. Haw. 1976). *Kim* is cited approvingly in *United States v. Lyons*, 706 F.2d 321, 328 (D.C. Cir. 1983); *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980); *LaDuke v. Castillo*, 455 F. Supp. 209, 211 (E.D. Wash. 1978); *People v. Arno*, 90 Cal. App. 3d 505, 512, 153 Cal. Rptr. 624, 627 (1979); *State v. Barnes*, 390 So. 2d 1243, 1244 (Fla. Dist. Ct. App. 1980); *State v. Ward*, 62 Haw. 509, 515, 617 P.2d 568, 572 (1980); *State v. Lee*, 633 P.2d 48, 58 (Utah)(Maughan, C.J., dissenting), cert. denied, 454 U.S. 1057 (1981); 1 W. LAFAYE, *supra* note 17, at 343-44; Note, *supra* note 82, at 387; Note, *supra* note 76, at 709-23; Note, *Sense-Enhancing Devices*, *supra* note 41, at 1181-82.

<sup>133</sup> *Kim*, 415 F. Supp. at 1258.

<sup>134</sup> *Id.* at 1254.

<sup>135</sup> *Id.* at 1256-57. The government also argued that the prevalence of private use of telescopes to spy on apartment dwellers vitiated Kim's expectation of privacy. *Id.* at 1256. The court quickly dismissed the argument, noting that "[t]he fact that Peeping Toms abound does not license the government to follow suit." *Id.* The public use of visual enhancers is nevertheless relevant to fourth amendment analysis in some circumstances. See *infra* notes 337-42 and accompanying text.

<sup>136</sup> *Kim*, 415 F. Supp. at 1256-57. "It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search." *Id.* at 1256.

<sup>137</sup> The court specifically noted that its ruling did not concern naked-eye observations, *id.* at 1255, and left open its application to enhanced observations of Kim's private balcony. *Id.* at 1257. It upheld enhanced surveillance of a shared walkway from the building's elevator to Kim's apartment on the ground that no one has a legitimate expectation of freedom from observation in a public area. *Id.* at 1258.

<sup>138</sup> Additional cases emphasizing the special fourth amendment protections attached to the home include *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir.

ple, has stated: "The very fact that a person is in his own home raises a reasonable inference that he intends to have privacy, and if that inference is borne out by his actions, society is prepared to respect his privacy."<sup>139</sup> Courts emphasize the deeply personal nature of items and conduct within the home and conclude that they should not be subject to observation by means of visual-enhancement devices.<sup>140</sup> Still, many decisions disapproving of such observations stress that their analysis does not apply to observations made without technological assistance.<sup>141</sup> Thus, to some extent this approach

---

1987)(traditional fourth amendment analysis protects curtilage of home); *United States v. Thomas*, 757 F.2d 1359, 1366-67 (2d Cir. 1985), *cert. denied*, 474 U.S. 819 (1985)(noting "heightened expectation of privacy" in one's home); *Riley v. State*, 511 So. 2d 282, 286-87 (Fla. 1987)(home and curtilage receive a "high degree of protection"), *rev'd*, 109 S. Ct. 693 (1989); *State v. Louis*, 296 Or. 57, 60, 672 P.2d 708, 710 (1983)("living quarters . . . are the quintessential domain protected by the constitutional guarantee against warrantless searches"); *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 349, 529 A.2d 1085, 1093 (1987)(emphasizing special protections due home and curtilage under fourth amendment). See also Note, *Katz and the Fourth Amendment*, *supra* note 44, at 81; Comment, *Trespass and Fourth Amendment Protection*, *supra* note 49, at 727-28 (both arguing for retention of "constitutionally protected areas" approach to serve privacy in the home and to avoid complexity and uncertainty inherent in REOP analysis).

<sup>139</sup> *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980).

<sup>140</sup> The Sixth Circuit stated in its decision in *Dow*:

The home is fundamentally a sanctuary, where personal concepts of self and family are forged, where relationships are nurtured and where people normally feel free to express themselves in intimate ways. The potent individual privacy interests that inhere in living within a home expand into the areas that enclose the home as well. The backyard and area immediately surrounding the home are really extensions of the dwelling itself. . . . [P]eople have both actual and reasonable expectations that many of the private experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place.

*Dow Chem. Co. v. United States*, 749 F.2d 307, 314 (6th Cir. 1984), *aff'd*, 476 U.S. 227 (1986). See also *United States v. Taborda*, 635 F.2d 131, 138-39 (2d Cir. 1980)("The vice of telescopic viewing into the interior of a home is that it risks observation . . . of intimate details of a person's private life . . ."); *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951)(Frank, J., dissenting) (any "sane, decent, civilized society" must treat a person's home as an "involute place,") *aff'd*, 343 U.S. 747 (1952); *Riley v. State*, 511 So. 2d 282, 287 (Fla. 1987)(quoting *Dow*, 749 F.2d at 314), *rev'd*, 109 S. Ct. 693 (1989); *Commonwealth v. Williams*, 494 Pa. 496, 500, 431 A.2d 964, 966 (1981)(disapproving use of visual enhancement device, noting that it observed private sexual conduct in a private residence). This general principle does not always resolve specific cases. In *California v. Ciraolo*, 476 U.S. 207 (1986), for example, both the majority and dissent stressed the particularly strong privacy interests associated with the home but came to opposite conclusions concerning aerial surveillance of the curtilage. *Id.* at 213-15 & n.3; *id.* at 220, 225 & n.10 (Powell, J., dissenting).

<sup>141</sup> See *Taborda*, 635 F.2d at 139 (use of "unenanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy"); *United States v. Kim*, 415 F. Supp. 1252, 1255 (D. Haw. 1976)(suggesting that warrantless observations into home without "artificial amplification" would be approved); *Cooper v. Superior Court*, 118 Cal. App. 3d 499, 510, 173 Cal. Rptr. 520, 526 (1981)(no problem with looking into a home with the naked eye); *People v. Ciochon*, 23 Ill. App. 3d 363,

merely tracks the naked-eye version of the observer approach from the opposite direction. Rather than simply permitting naked-eye observations, the "house" approach flatly prohibits enhanced observations into areas that are entitled to special constitutional protection.

This approach curiously returns fourth amendment jurisprudence to the "constitutionally protected areas" theory seemingly superceded in *Katz*. But, as Justice Harlan suggested<sup>142</sup> and later decisions have confirmed,<sup>143</sup> an expectation of privacy is most clearly legitimate or reasonable in a home or other distinctly private area.<sup>144</sup> The error of the Court in *Katz*, or perhaps only of courts misinterpreting *Katz*, is in believing that the inability of the "constitutionally protected areas" theory to regulate electronic surveillance required replacing that theory in all cases with the amorphous expectations paradigm.<sup>145</sup>

*Katz's* relevance to visual observations is underscored by another aspect of the location approach. At a minimum, *Katz* both overruled the physical invasion requirement and brought electronic eavesdropping under the control of the fourth amendment. Even today, most courts analyzing naked-ear eavesdropping find it permissible in the absence of a physical invasion. The theory is that a person speaking loudly enough to be overheard without artificial amplification has no justifiable reliance on the privacy of his or her

---

366, 319 N.E.2d 332, 335 (1974) (distinguishing enhanced from unenhanced observations).

<sup>142</sup> See *supra* text accompanying note 40.

<sup>143</sup> See *supra* notes 58-60 and 67 and accompanying text.

<sup>144</sup> Such other areas may include: (1) airplanes, *United States v. Amuny*, 767 F.2d 1113, 1128 (5th Cir. 1985)(a greater expectation of privacy in airplanes than in automobiles); *United States v. Bellina*, 665 F.2d 1335, 1340-41 (4th Cir. 1981)(analogizing airplanes to automobiles for fourth amendment purposes); (2) dormitory rooms, *Piazzola v. Watkins*, 442 F.2d 284, 289 (5th Cir. 1971); (3) business offices, *People v. Arno*, 90 Cal. App. 3d 505, 509, 153 Cal. Rptr. 624, 626 (1979); (4) buildings in general, *United States v. Hensel*, 509 F. Supp. 1376, 1384 n.9 (D. Me. 1981), *aff'd*, 699 F.2d 18 (1st Cir. 1983), *cert. denied*, 461 U.S. 958 (1983); (5) public restrooms, *State v. Bryant*, 287 Minn. 205, 211, 177 N.W.2d 800, 804 (1970); and (6) department store fitting rooms, *People v. Diaz*, 85 Misc. 2d 41, 47, 376 N.Y.S.2d 849, 854-55 (N.Y. Crim. Ct. 1975). One commentator criticizes the common equation of specially protected areas with the home, suggesting that this is too limited because the justifications for special privacy apply to a variety of locations. Tomkovicz, *supra* note 2, at 674-75.

<sup>145</sup> The debate concerning whether the *Katz* formulation was designed to supplement or reshape fourth amendment analysis is critical in this setting. See *supra* note 49. The willingness of courts to use the protected area approach as a tool for applying *Katz* suggests that even if it was occasionally "awkward" and "inequitable," it was "a workable tool" that courts can render rational and fair through sensitive analysis. Note, *Private Places*, *supra* note 2, at 968. See also Note, *Katz and the Fourth Amendment*, *supra* note 44, at 80 (seeing *Katz* as supporting the "right of . . . persons to have places protected from arbitrary government intrusion").

words.<sup>146</sup> Rather, such conversations are “knowingly expose[d] to the public”<sup>147</sup> wherever they occur, at least in the sense that a person speaking loudly enough to be heard by natural hearing is held to assume the risk of being overheard.<sup>148</sup> The *Katz* holding is thus inextricably tied to eavesdropping techniques that enhance natural hearing. Similarly, courts cannot resolve the application of the fourth amendment to the use of visual enhancement devices without taking note of the impact of technology. Of the approaches discussed above, only the “home privacy” approach draws this necessary distinction, and it is limited to a particular object.

---

<sup>146</sup> Courts have reached this result through slightly different routes. Most such overhearings occur in hotels in which agents are in adjoining rooms or public areas. This recurring fact-pattern encourages courts to cite three factors—the lack of enhanced hearing, the legitimate location of the eavesdropper, and the diminished expectation of privacy in a hotel room. See *United States v. Burns*, 624 F.2d 95, 98-100 (10th Cir.), cert. denied, 449 U.S. 954 (1980)(upholding naked-ear eavesdropping of a motel room conversation by agent in common hallway); *United States v. Agapito*, 620 F.2d 324, 330-31 (2d Cir.), cert. denied, 449 U.S. 834 (1980)(finding no reasonable expectation of privacy due to these three factors); *United States v. Jackson*, 588 F.2d 1046, 1051-55 (5th Cir.), cert. denied, 442 U.S. 941 (1979)(no justifiable expectation of privacy concerning hotel room conversations overheard by agents with their naked ears while located in lawful location); *Ponce v. Craven*, 409 F.2d 621, 624-25 (9th Cir. 1969), cert. denied, 397 U.S. 1012 (1970)(emphasizing that it is the general access to motel areas that creates the lesser expectation of privacy). Cases involving apartments cannot rely on the location of the object but still find eavesdropping permissible in most circumstances. See, e.g., *United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968)(concluding that a conversation overheard by a person outside the home is “knowingly exposed to the public”); *People v. Wright*, 41 Ill. 2d 170, 175, 242 N.E.2d 180, 183-84 (1968), cert. denied, 395 U.S. 93 (1969)(limiting *Katz* to electronic eavesdropping and upholding naked-ear eavesdropping of conversations within apartment). Professor LaFave recognizes but criticizes this open door to naked-ear eavesdropping, 1 W. LaFAVE, *supra* note 17, at 396-99, and some courts suggest that protections may exist. See *Jackson*, 588 F.2d at 1054 n.13 (leaving open whether an officer in a legitimate location is permitted to obtain information through use of natural senses in all situations); *United States v. Eisler*, 567 F.2d 814, 816 n.2 (8th Cir. 1977)(upholding eavesdropping in a common hallway but indicating that conversations within an apartment would be protected).

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

<sup>148</sup> *Jackson*, 588 F.2d at 1052. The reliance on “assumption of risk” in this setting underscores the extent to which courts apply the “successful” REOP approach. Several cases deal with officers who overheard conversations with their naked ears but only after taking extreme measures to eavesdrop. See, e.g., *Agapito*, 620 F.2d at 328 (placing ears to crack between door and door frame); *Jackson*, 588 F.2d at 1049 (pressing ears to crack at the bottom of a connecting door); *United States v. Fisch*, 474 F.2d 1071, 1074 (9th Cir.), cert. denied, 412 U.S. 921 (1973)(agents lying a few inches from crack between carpet and door). Each case upheld the eavesdropping despite the unusual positions of the listening agents. *Agapito*, 620 F.2d at 332; *Jackson*, 588 F.2d at 1054-55; *Fisch*, 474 F.2d at 1077. The eavesdropping cases, then, adopt the premise occasionally applied in visual observation cases—the officer may “crane his neck, or bend over, or squat.” *James v. United States*, 418 F.2d 1150, 1151 n.1 (D.C. Cir. 1969). Apparently, one “knowingly exposes” those spoken words that are in fact overheard, not just those that one reasonably would expect to be overheard.

### 3. *Technological Approaches*

Several lines of cases directly confront the issue of enhanced visual observation. Perhaps because the emphasis on method appears to be facially inconsistent with the *Katz* paradigm, the cases do not indicate the relevance of enhancement to any general scheme of fourth amendment analysis. Still, three conceptually different approaches can be discerned in this area. They are: the permissive approach, which allows enhancement without meaningful inquiry; the confirmation approach, which tries to put enhanced observations into naked-eye terms; and the factor approach, which evaluates the legality of enhanced observations on the basis of a variety of facts concerning locations and expectations as well as the nature and level of technological assistance.

Numerous decisions have followed the permissive approach, flatly approving binocular or telescopic observations without analysis or explanation.<sup>149</sup> Similarly, a long line of cases holds that law enforcement officials may use flashlights without limitation to enhance observations.<sup>150</sup> The underlying theory is that light does no

---

<sup>149</sup> See, e.g., *United States v. Allen*, 675 F.2d 1373, 1380-82 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981)(general approval of use of sense-enhancing devices); *United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)(noting only that use of binoculars did not violate the fourth amendment by putting observers into curtilage); *United States v. Loundmannz*, 472 F.2d 1376, 1379 (D.C. Cir. 1972)(binocular observations considered—no fourth amendment analysis); *United States v. Grimes*, 426 F.2d 706, 708 (5th Cir. 1970)(no analysis other than conclusion that binocular-aided observations were lawful); *Fullbright v. United States*, 392 F.2d 432, 434 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968)(use of binoculars poses no issue, reliance on a pre-*Katz* decision, *United States v. McCall*, 243 F.2d 858 (10th Cir. 1957)); *United States v. Christensen*, 524 F. Supp. 344, 347 (N.D. Ill. 1981)(seeing no problem with use of binoculars from legitimate location); *Sims v. State*, 425 So. 2d 563, 567 (Fla. Dist. Ct. App. 1982)(use of binoculars does not render unlawful an observation from a legitimate location); *People v. Hicks*, 49 Ill. App. 3d 421, 427, 364 N.E.2d 440, 444 (1977)(court “unable to find a single case which has extended [the *Katz*] doctrine to find a use of binoculars improper”); *State v. Bennett*, 205 Mont. 117, 122-23, 666 P.2d 747, 749-50 (1983)(use of binoculars and other aids “has been determined to be legitimate”); *State v. Thompson*, 196 Neb. 55, 57, 241 N.W.2d 511, 513 (1976)(approving use of binoculars without any real analysis).

<sup>150</sup> *United States v. Dunn*, 480 U.S. 294, 305 (1987)(use of flashlight to look into barn poses no fourth amendment issue); *United States v. Booker*, 461 F.2d 990, 992 (6th Cir. 1972)(flashlight-aided observation is not a search); *United States v. Hanahan*, 442 F.2d 649, 654 (7th Cir. 1971)(use of flashlight “is of no consequence”); *Ensor v. State*, 403 So. 2d 349, 351-53 (Fla. 1981)(flashlight examination of car interior is a valid “open view” observation); *Scales v. State*, 13 Md. App. 474, 477-78, 284 A.2d 45, 47-48 (1971)(flashlight-aided observation does not implicate the fourth amendment); *State v. Powell*, 99 N.M. 381, 383, 385, 658 P.2d 456, 458, 460 (N.M. Ct. App. 1983)(shining flashlight into car is not a search); *State v. Lee*, 633 P.2d 48, 52 (Utah), *cert. denied*, 454 U.S. 1057 (1981)(use of flashlight to aid in observing interior of car is permissible). See generally Note, *Sense-Enhancing Devices*, *supra* note 41, at 1172-77 (collecting cases).

Most courts require that the observer be located in a legitimate place. See *supra*

more than render visible at night what would be in open view during the day,<sup>151</sup> and the result is that no one has a REOP from this form of visual enhancement. Aerial surveillance may now be similarly excused from intensive fourth amendment scrutiny. Yet, even without the use of direct visual aids such as binoculars or telescopes, airplanes and helicopters enhance observations in at least two respects.

---

notes 117-28 and accompanying text. Cases suppressing flashlight observations usually rely on a prior unlawful invasion or stop. *See, e.g.*, *United States v. Cody*, 390 F. Supp. 616, 617-18 (E.D. Tenn. 1974)(invalid observation, search, and seizure of items in car because warrant authorized search of house only); *State v. Schmidt*, 359 So. 2d 133, 135-36 (La. 1978)(no justification for traffic stop); *People v. Smith*, 42 N.Y.2d 961, 962, 367 N.E.2d 648, 648-49, 398 N.Y.S.2d 142, 142 (1977)(insufficient cause to stop defendant's car). *See also* Note, *Sense-Enhancing Devices*, *supra* note 41, at 1175 (noting that flashlight-aided observations are more likely to present fourth amendment issues when they involve observations into cars in private driveway or into houses, in both settings largely because of the physical invasion).

Professor LaFave disagrees with the nearly universal approval of the use of flashlights. 1 W. LAFAVE, *supra* note 17, at 328-37. He suggests that there is a substantial difference between illumination to make visible at night what would be visible during the day, and illumination to make visible what is normally dark, such as the inside of a building. *Id.* at 334-35. *See also* Raettig v. State, 406 So. 2d 1273, 1277 (Fla. Dist. Ct. App. 1981)(relying on same analysis in Professor LaFave's 1978 treatise to invalidate flashlight observations into inside of camper through 1/2 inch wide crack). *Cf.* LaDuke v. Castillo, 455 F. Supp. 209, 210-11 (E.D. Wash. 1978)(flashlight sweep of darkened residence constitutes fourth amendment search). Professor LaFave is also concerned with the fourth amendment implications of more sophisticated illumination devices. 1 W. LAFAVE, *supra* note 17, at 336-37. Courts have generally ignored the difference between such devices and simple visual aids. *See, e.g.*, *State v. Denton*, 387 So.2d 578, 584 (La. 1980)(finding no significant difference between binoculars and nightscopes); *Newberry v. State*, 421 So.2d 546, 549 (Fla. Dist. Ct. App. 1982)(analogizing night scope to flashlight). *Cf.* *United States v. Ward*, 546 F. Supp. 300, 309-10 (W.D. Ark. 1982), *aff'd in part, rev'd in part on other grounds*, 703 F.2d 1058 (8th Cir. 1983)(recognizing nature of device as a factor but treating the nightscope simply as defeating darkness).

<sup>151</sup> Judge Goldberg of the Fifth Circuit explains this principle in his usual crisp fashion:

The mere use of a flashlight . . . does not magically transmute a non-accusatory visual encounter into a Fourth Amendment search. When the circumstances of a particular case are such that the police officer's observations would not have constituted a search had it occurred in daylight, then the fact that the officer used a flashlight to pierce the nighttime darkness does not transform his observation into a search. Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightfully positioned, seeing through eyes that are neither accusatory nor criminally investigatory. The plain view rule does not go into hibernation at sunset.

*Marshall v. United States*, 422 F.2d 185, 189 (5th Cir. 1970). *See also* *United States v. Coplen*, 541 F.2d 211, 215 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977)("The fact that the officer was forced to use a flashlight is immaterial. Being dark outside, it was necessary to employ such a device."); *Newberry v. State*, 421 So. 2d 546, 549 (Fla. Dist. Ct. App. 1982)("There is no license to engage in criminal activity with impunity after sunset in an open area that would not be so protected after sunrise"). *See generally* Note, *Sense-Enhancing Devices*, *supra* note 41, at 1174-75 (seeing flashlight cases as pragmatic and based on conclusion that the degree of privacy afforded by darkness is not sufficient to prohibit warrantless use of flashlights).

First, they permit law enforcement agencies to patrol and seek out information over wide areas.<sup>152</sup> Second, they provide visual access to areas not realistically open to observation from the ground. Nevertheless, the Supreme Court has generally approved aerial surveillance while specifically declining to address the fourth amendment's application to "highly sophisticated surveillance equipment not generally available to the public."<sup>153</sup>

---

<sup>152</sup> General patrols are problematic under the fourth amendment. In some respects, a general aerial patrol is just a more efficient version of a general automobile patrol, which is an accepted aspect of contemporary police practices and has not been deemed a search. The court in *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974), viewed helicopter patrols in a similar light, noting that "[p]atrol by police helicopter has been a part of the protection afforded the citizens of the Los Angeles metropolitan area for some time. The observations made from the air in this case must be regarded as routine." *Id.* at 839, 112 Cal. Rptr. at 765. The California Supreme Court later upheld a random aerial surveillance program under a slightly different rationale. In *People v. Mayoff*, 42 Cal. 3d 1302, 729 P.2d 166, 233 Cal. Rptr. 2 (1986), that court used balancing to determine that law enforcement needs outweigh the intrusion on personal privacy caused by such patrols. *Id.* at 1316-18, 729 P.2d at 174-76, 233 Cal. Rptr. at 10-12. This approach resembles the general reasonableness test used to evaluate administrative searches. Lack of individualized suspicion is not a problem. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-64 (1976) (routine stops at immigration checkpoints may be made in the absence of individualized suspicion); *Camara v. Municipal Court*, 387 U.S. 523, 535-39 (1967) (approving area housing inspections). The fact that whole classes of people are subject to intrusion negates any stigma attached to being searched. See *Martinez-Fuerte*, 428 U.S. at 559-60 (there is little likelihood of abusive or harassing practices and routine stops are unlikely to be "frightening or offensive"); *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974) (a magnetometer "does not annoy, frighten or humiliate those who pass through it"); *People v. Hyde*, 12 Cal. 3d 158, 167, 524 P.2d 830, 835, 115 Cal. Rptr. 358, 363 (1974) (airline passengers usually appreciate limited safety screening measures).

The other way of looking at the problem is that if a random patrol is a search, it is a general search, invalid by definition. The court in *People v. Agee*, 200 Cal. Rptr. 827 (Cal. Ct. App. 1984), used this reasoning in excoriating the ruling in *Stroud*. *Agee*, 200 Cal. Rptr. at 831-32. The upshot of the *Agee* court's analysis is that "calling a general search a non-search because it is general" does violence to the fourth amendment and common sense. The *Agee* court was particularly concerned that the *Stroud* analysis would allow the government to retract the fourth amendment at will. *Id.* at 832. *Cf. supra* note 91. See also Note, *Aerial Surveillance*, *supra* note 44, at 279 (this analysis "permits governments to control an amendment that was created to control them"). No one should place undue reliance on either *Stroud* or *Agee*. The California Supreme Court disapproved of some of the language in *Stroud* in *People v. Cook*, 41 Cal. 3d 373, 385, 710 P.2d 299, 307, 221 Cal. Rptr. 499, 508 (1985), and remanded *Agee* for the appellate court's consideration of later decisions on aerial surveillance. *People v. Agee*, 43 Cal. 3d 638, 738 P.2d 720, 238 Cal. Rptr. 374 (1987). Chief Justice Bird raised concerns about general searches in her *Mayoff* dissent: "Random surveillance is nothing more than an exploratory search, *i.e.*, an effort to discover evidence of criminal activity undertaken without a warrant, probable cause or even particularized suspicion." *Mayoff*, 42 Cal. 3d at 1330, 729 P.2d at 184, 233 Cal. Rptr. at 20.

In short, there is agreement that there is a line between random patrols and searches directed at particular targets or objects, but there is substantial disagreement on the significance of that line.

<sup>153</sup> *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986). Neither *Dow* nor Cali-

These cases suggest a search/non-search dichotomy premised on some benchmark of technological assistance to "standard" police practices. Short of that benchmark, enhancement is irrelevant and a search exists only if it would exist under the entry paradigm. Airplanes and helicopters are no longer deemed unusual or sophisticated, therefore overflights do not exceed the benchmark. Courts have implicitly recognized lights to be routine law enforcement tools at least since the Supreme Court decided *United States v. Lee*<sup>154</sup> and binoculars may also be sufficiently common to be an acceptable law enforcement device.<sup>155</sup> This approach has its strengths. It legit-

---

fornia v. Ciraolo, 476 U.S. 207 (1986), involved a general patrol and the Court deemed the theoretical possibility of "plain view" observation to negate any reasonable expectation of privacy, no matter how unlikely such an observation might be in fact. In *Ciraolo*, the Court was required to postulate an observation over two fences by a person "perched on the top of a truck or a 2-level bus" in order to analogize the aerial observation to a ground observation. *Ciraolo*, 476 U.S. at 211-12. In *Dow* the Court used somewhat different analysis. An individual could not have observed the area in question from ground level, but the Court found no REOP because the complex could be viewed and photographed by private persons in the public airspace. *Dow*, 476 U.S. at 239. This effectively destroys any REOP from aerial observation in any uncovered outdoor area because there is "a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C.A. § 1304 (West Supp. 1988). In *Florida v. Riley*, 109 S. Ct. 693 (1989), a majority of justices relied on likelihood principles even though the plurality relied on the legality of helicopter overflights at the altitude of 400 feet. *Id.* at 696-97 (plurality opinion); *id.* at 698 (O'Connor, J., concurring); *id.* at 701 (Brennan, J., dissenting); *id.* at 705 (Blackmun, J., dissenting). Only Justice Brennan noted that a helicopter is an "expensive and sophisticated piece of machinery." *Id.* at 701 (Brennan, J., dissenting). The analysis in all three cases necessarily moots the general search issue because under this reasoning, if there is never a REOP in an open area, observation of open areas is never a search. It also arguably moots questions concerning the intrusiveness of the government's methods. *But see infra* notes 251-60 and accompanying text.

<sup>154</sup> 274 U.S. 559 (1927). For discussion of *Lee*, see *supra* notes 22 and 82. Most of the cases examining flashlight-aided observations, see *supra* note 150, engage in no analysis of the impact of the enhanced vision provided by the flashlight. See, e.g., *Newberry v. State*, 421 So. 2d 546, 549 (Fla. Dist. Ct. App. 1982) (treating flashlights as standard police tools). See also Note, *Telescopic Surveillance*, *supra* note 76, at 720 (flashlights are routinely used for many police duties). This implies that courts find flashlights no more remarkable than eyeglasses.

<sup>155</sup> One commentator distinguishes flashlights from binoculars on two grounds. Flashlights overcome darkness, while binoculars overcome distance, which has been accepted as a protection against governmental intrusion, and flashlights are more useful for law enforcement purposes. Note, *Telescopic Surveillance*, *supra* note 76, at 719-20. Still, any attempt to distinguish enhanced illumination from simple visual aids such as binoculars must explain away *Lee*. In approving the searchlight-aided observation, the *Lee* Court described it as "comparable to the use of a marine glass or a field glass." *Lee*, 274 U.S. at 563. This non-analytical acceptance of visual enhancement may be the result of the then-dominant entry paradigm, but unlike *Olmstead v. United States*, 277 U.S. 438 (1928), this holding was not controversial. For discussion of *Olmstead*, see *supra* text accompanying notes 23-29. It is possible to draw lines here, as the court did in *Bernstiel v. State*, 416 So. 2d 827 (Fla. Dist. Ct. App. 1982). In *Bernstiel*, the court held that ordinary binoculars, but not "more sophisticated devices such as telescopes," could be used



imizes a long history of permitting unsupervised law enforcement use of various technological devices that aid surveillance to some extent. Modern courts could not be expected to give serious credence to arguments that the enhanced ability to patrol represented by the automobile or the increased visual access afforded by a high cab in a police department truck implicates the fourth amendment.<sup>156</sup> In this model, then, fourth amendment limitations attach only to new or improved aids to visual observation. Other aids are part of the law enforcement arsenal and present fourth amendment issues only to the extent that they are used in a traditional search.

The confirmation approach differs in that it analyzes all enhanced observations but it nevertheless attempts to finesse most fourth amendment questions. Under this approach, courts determine the legality of enhanced observations by comparing them to unenhanced observations. If an observation merely "confirms" a naked-eye observation, the enhancement raises no fourth amendment issue.<sup>157</sup> The approach seems designed to recognize a stan-

---

without raising fourth amendment issues. *Id.* at 828-29. The *Lee* analogy, however, was between a search light and a telescope.

<sup>156</sup> At one time, of course, law enforcement agencies changed from horses to motor vehicles, which enhanced their ability to conduct surveillance. Probably at a much earlier time, a police officer first improved his line of sight into a person's home by mechanical means. In all likelihood, the device was a ladder. Ladders still prove to be of assistance to inquisitive police officers. The agent in *Commonwealth v. Hernley*, 216 Pa. Super. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971), used both a ladder and binoculars. *Id.* at 178-79, 263 A.2d at 905. Intriguingly, the majority addressed and approved only the use of binoculars, *id.* at 180, 263 A.2d at 906, while the dissenting judge emphasized the use of the ladder. *Id.* at 182, 263 A.2d at 907 (Montgomery, J., dissenting). *See also* *United States v. Bellina*, 665 F.2d 1335, 1345-46 (4th Cir. 1981)(permissible to use ladder to gain view of the inside of airplane). Perhaps the use of "old" technology no longer violates anyone's reasonable expectations. Once society has become used to law enforcement use of technology, it passes from a "search" to a "non-search."

<sup>157</sup> *See, e.g.*, *United States v. Bassford*, 601 F. Supp. 1324, 1335 (D. Me. 1985), *aff'd*, 812 F.2d 16 (1st Cir.), *cert. denied*, 481 U.S. 1022 (1987)(binoculars may be used to enhance "view of a readily visible marijuana plot previously observed with the naked eye"); *People v. Arno*, 90 Cal. App. 3d 505, 511-12, 153 Cal. Rptr. 624, 627-28 (1979)(enhancement is permitted if object is otherwise visible); *State v. Holbron*, 65 Haw. 152, 155, 648 P.2d 194, 197 (1982)(no problem "where binoculars are used only to confirm unaided observations"); *State v. Barr*, 98 Nev. 428, 430, 651 P.2d 649, 650-51 (1982)(use of binoculars to confirm naked-eye suspicion upheld); *State v. Manly*, 85 Wash. 2d 120, 121, 124, 530 P.2d 306, 309, *cert. denied*, 423 U.S. 855 (1975)(detective saw a plant resembling marijuana in window, returned next day and confirmed it with binoculars, found not to constitute a search). *See also* Note, *supra* note 57, at 758 (aerial surveillance is permissible if conducted from a lawful altitude and binoculars are used only to confirm unaided observations).

A related theory upholds enhanced observations from a substantial distance if the target would detect surveillance from a closer lawful location. This is, in essence, a "constructive confirmation" approach. *See, e.g.*, *United States v. Gibson*, 636 F.2d 761,

dard law enforcement practice—an officer sees something suspicious and seeks to resolve that suspicion by looking through a pair of binoculars.<sup>158</sup>

Despite its understandable rationale, the confirmation approach still presents analytical problems. First, as long as the line between a non-search and a full search subject to the warrant requirement is drawn on the basis of a REOP, this approach subtly moves that line to expand police authority. The naked-eye observation is necessarily a non-search or else confirmation would be equally unlawful; the use of an enhancement device to do more than confirm is by implication a search. Into the hazy middle comes the “confirming enhanced observation,” which does not intrude on a REOP under this approach. The target’s zone of privacy is diminished, as it no longer protects objects that cannot be clearly identified as incriminating by an unenhanced observation. Instead,

---

763 (D.C. Cir. 1980)(binocular-aided observation of narcotics transaction from apartment building); *Armo*, 90 Cal. App. 3d at 509, 153 Cal Rptr. at 626 (“if the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no constitutional intrusion”); *State v. Irwin*, 43 Wash. App. 553, 554-55, 718 P.2d 826, 829-30 (1986)(police stayed in woods to avoid detection, enhancement was a mere confirmation of what could have been seen from a more open vantage point). See also 1 W. LAFAVE, SEARCH & SEIZURE 258 (1st ed. 1978); Note, *supra* note 82, at 392 (proposing use of this approach). This approach seems inconsistent with *Katz*. There agents used electronic devices that constructively put them in the same position they would have been in if they had placed their ears to the door to Katz’s telephone booth. *Katz*, 389 U.S. at 348. *Katz*, of course, would not have made his incriminating calls if someone’s ears had been to the door, but that is also true of many of the “constructive confirmation” cases. See *Fishman*, *supra* note 2, at 324-25 (noting the difference between assuming the risk that someone will hear when someone is close and assuming the risk that someone could hear if someone were close).

<sup>158</sup> This presupposes the use of binoculars, which are standard issue in patrol cars, in contrast to more sophisticated visual surveillance devices. Police could use other devices for confirmation purposes, however. For example, in *People v. Vermouth*, 42 Cal. App. 3d 353, 116 Cal. Rptr. 675 (1974), the confirming officer came in response to a report by another officer. *Id.* at 361, 116 Cal. Rptr. at 680. In this setting, it is conceivable that the responding officer could bring highly sophisticated equipment to the location. There is also no indication in the case law that officers may only confirm inadvertent observations made with the naked eye. A number of cases deal with aerial observations of suspected marijuana patches that are then confirmed by a ground search. See, e.g., *Dean v. Superior Court*, 35 Cal. App. 3d 112, 114, 110 Cal. Rptr. 585, 587 (Cal. Ct. App. 1973)(aerial discovery of a marijuana field, followed by ground searches to locate the field and obtain evidence); *Williams v. State*, 157 Ga. App. 476, 476-77, 277 S.E.2d 923, 925 (1981), *cert. denied*, 454 U.S. 823 (1981)(aerial observation of airstrip and trucks unloading what appeared to be bales of marijuana; officers on ground were advised and then entered); *State v. Havlat*, 222 Neb. 554, 555-56, 385 N.W.2d 436, 438 (1986)(aerial observation of suspected marijuana plants on farm; later entries to confirm sighting and seize evidence). Cf. *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 838, 112 Cal. Rptr. 764, 764-65 (1974)(ground response to helicopter report that auto parts were seen in a particular yard).

objects that officials can see but not fully identify without enhancement are treated as if they were in full public view.

Second, while this shrinking of the REOP might be proper under *Katz* if it represented a societal decision concerning an appropriate level of privacy, courts using this approach fail to engage in such analysis and opt instead for facile and conclusory language. There is no attempt to define the level of suspicion needed to justify the enhanced observation, and there is no attempt to explain the permissible level of enhancement. Cases simply note that the officer "thought" an object was contraband and then "confirmed" that observation through a binocular-aided observation.<sup>159</sup> This approach is totally inconsistent with the underlying theory of *Katz*, for it replaces an evaluation of the target's privacy expectations with a form of evidentiary justification for taking an otherwise prohibited intrusive action. That is, it determines whether there is a search by creating an ad hoc standard for a relatively unintrusive search. This might be an appropriate way to regulate the use of routine enhancement devices, but it is not the method the courts claim to be using. Moreover, the failure to recognize that this approach is premised on an evidentiary standard makes it impossible to set meaningful guidelines. Caught somewhere between "no reason to believe" and probable cause, the "think and confirm" standard is left undefined. Standards such as the reasonable suspicion standard applicable to

---

<sup>159</sup> Courts describe permitted enhancement in terms such as "clarify," *United States v. Whaley*, 779 F.2d 585, 592 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987), "positively identify," *People v. St. Amour*, 104 Cal. App. 3d 886, 894, 163 Cal. Rptr. 187, 192 (1980), and "verify," *State v. Rogers*, 100 N.M. 517, 519, 673 P.2d 142, 144 (N.M. Ct. App. 1983). There is apparently universal awareness that enhancement devices make observations better and more accurate, but courts do not see this as a problem. *See, e.g.*, *United States v. Christensen*, 524 F. Supp. 344, 347 (N.D. Ill. 1981)(binoculars are permitted to "magnify" and give "a better view"); *United States v. Bifield*, 498 F. Supp. 497, 500 (D. Conn. 1980)(the telescope provided "greater detail than would otherwise have been possible"); *People v. Clark*, 133 Mich. App. 619, 628, 350 N.W.2d 754, 759 (1983)(binoculars are permitted because they "merely magnify what would in any event be apparent to the naked eye"); *Manly*, 85 Wash. 2d at 121, 124, 530 P.2d at 307, 309 (upholding binocular-aided observation making evident that object was marijuana after naked-eye observation indicated only that object "resembled" marijuana). Indeed, it seems that this approach permits rather substantial magnification. *See, e.g.*, *State v. Louis*, 296 Or. 57, 61, 672 P.2d 708, 710-11 (1983)(telephoto lens used "provides only modest enlargement, not more than three times normal vision"). *See generally* I W. LAFAYE, *supra* note 17, at 339 (suggesting that enhancement not be deemed a search where it "observe[s] more clearly or carefully that which was in the open" or where observation from "closer proximity" would reveal that object was under surveillance); *Telescopic Surveillance*, *supra* note 76, at 718 (proposing that enhanced observation be permitted where the object is "visible and identifiable" without binoculars). *Cf. Note, Private Places*, *supra* note 2, at 986 (electronic surveillance is permissible where it "merely facilitates the acquisition of what could be perceived by natural means").

police stops are inherently difficult to apply;<sup>160</sup> where there is no attempt to provide a coherent definition, they become completely unmanageable.

The third technological approach also seeks compromise. It involves weighing various factors, including the nature of enhancement techniques. The underlying theory of this approach is that the determination of the reasonableness of an expectation of privacy from observation cannot rest solely on one formalistic characterization. Instead, proper resolution of the issue depends on a careful case-by-case weighing of pertinent factors. This approach is exemplified by *United States v. Ward*,<sup>161</sup> which analyzed the use of a night-scope and binoculars to see objects otherwise protected by both darkness and distance. The court described its inquiry as follows:

In the context of visually enhanced surveillance several factors should be considered: (1) The type of visual aid employed; (2) The suspect's own privacy-enhancing conduct; (3) The nature and location of the area or enclosure under surveillance; (4) The number of persons with legitimate access; (5) The social inhibitions associated with the place observed; (6) The extent of the suspect's control of the closure; (7) The manner in which the view was obtained.<sup>162</sup>

The court concluded that law enforcement officials had invaded no reasonable expectation of privacy.<sup>163</sup> Despite the sophistication of these devices, the officers did not make their observations in an unreasonable manner, the target took few precautions to insure privacy, and because the objects were in a barn, the agents did not breach any of the "social inhibitions" associated with observations into a home.<sup>164</sup> Other courts weigh similar factors.<sup>165</sup> Factor bal-

---

<sup>160</sup> *Terry v. Ohio*, 392 U.S. 1 (1968), created a doctrine that is exceptionally complex and often criticized. Over 200 pages in Professor LaFave's treatise is devoted to stop-and-frisk and related issues. 1 W. LAFAVE, *supra* note 17, at 332-546. Some criticisms emphasize the ambiguity of stop-and-frisk law. *See id.* at 424; C. WHITEBREAD & C. SLOBOGIN, *supra* note 17, at 203, 208; Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1132-35 (1984). Other criticisms focus on the ease with which police officers and courts abuse the doctrine. *See Amsterdam, supra* note 2, at 395; Comment, *Considering the Two-Tier Model of the Fourth Amendment*, 31 AM. U.L. REV. 85, 112-22 (1981).

<sup>161</sup> 546 F. Supp. 300 (W.D. Ark. 1982), *aff'd in part, rev'd in part on other grounds*, 703 F.2d 1058 (8th Cir. 1983).

<sup>162</sup> *Id.* at 310.

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

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

<sup>165</sup> A series of decisions by the Hawaii Supreme Court emphasize "the nature of the place involved, the precautions taken by the defendant to insure his privacy and the position of the government officer." *State v. Kender*, 60 Haw. 301, 303, 588 P.2d 447, 449 (1978). In *Kender* a police officer sought to corroborate a tip that marijuana was growing on Kender's property. He was able to do so only by climbing a fence at the edge of Kender's property and using binoculars. Weighing the nature of the location,

ancing is particularly common in cases analyzing aerial observations and seems to have survived *Ciraolo* and *Dow*.<sup>166</sup> In general, courts

---

Kender's largely successful efforts to prevent observation, and the officer's need to obtain an unusual vantage point and to use binoculars, the court held the observation to violate the fourth amendment. *Id.* at 304-07, 588 P.2d at 449-51. These factors might not raise fourth amendment issues under the other approaches, for the observation was not into the home, the officer was in a lawful location, and Kender's efforts to secure privacy were not successful. Taken together, however, the court believed that they required that the binocular-aided observations be subjected to the warrant requirement. *Id.* See also *State v. Barnett*, 68 Haw. 32, 703 P.2d 680, 684 (1985); *State v. Knight*, 63 Haw. 90, 93-94, 621 P.2d 370, 373-74 (1980); *State v. Ward*, 62 Haw. 509, 515, 617 P.2d 568, 571-72 (1980); *State v. Kaaheena*, 59 Haw. 23, 26-29, 575 P.2d 462, 465-67 (1978); *State v. Stachler*, 58 Haw. 412, 418-21, 570 P.2d 1323, 1327-29 (1977)(all characterizing their analysis as premised on balancing these factors). Other cases emphasizing factor-balancing include: *United States v. Vilhotti*, 323 F. Supp. 425, 431-32 (S.D.N.Y.), *aff'd in part, rev'd in part*, 452 F.2d 1186 (2d Cir. 1971)(considering several factors in evaluating legality of flashlight-aided observations of interior of garage); *People v. Dinsmore*, 103 Mich. App. 660, 669, 303 N.W.2d 857, 861-62 (1981)(weighing numerous factors to determine whether a person has REOP outside of home); *State v. Barr*, 98 Nev. 428, 430, 651 P.2d 649, 650-51 (1982)(noting locations of observer and object as well as the fact that binoculars were not used until object was spotted); *Commonwealth v. Williams*, 494 Pa. 496, 500, 431 A.2d 964, 966 (1981)(emphasizing the nature of the enhancement device, the duration of its use, and that it observed private sexual conduct in bedroom); *State v. Lee*, 633 P.2d 48, 55 (Utah), *cert. denied*, 454 U.S. 1057 (1981)(Maughan, C.J., dissenting)(urging that REOP be determined by case-by-case analysis of various factors); *State v. Manly*, 85 Wash. 2d 120, 124, 530 P.2d 306, 309, *cert. denied*, 423 U.S. 855 (1975)(analyzing the locations of the observer and the object as well as the use of binoculars only to confirm). See also *supra* note 146 and *infra* note 166 (factor balancing in naked-ear listening and aerial observation cases).

<sup>166</sup> It is not clear whether the Court's decision in *Florida v. Riley*, 109 S. Ct. 693 (1989), will end the balancing in this area. In the past, courts have weighed factors such as the frequency of overflights, the altitude of the aircraft, and the nature of the area and object in determining whether a search has occurred. See, e.g., *Giancola v. West Virginia Dept. of Public Safety*, 830 F.2d 547, 550-51 (4th Cir. 1987)(considering duration and frequency of surveillance, altitude, number of aircraft, effects on ground activities, compliance with flight regulations); *United States v. Bassford*, 601 F. Supp. 1324, 1330-31 (D. Me. 1985), *aff'd*, 812 F.2d 16 (1st Cir.), *cert. denied*, 481 U.S. 1022 (1987)(considering height, size of objects, nature of area observed, frequency of overflights, and intrusiveness of surveillance); *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 425-26, 158 Cal. Rptr. 86, 88-89 (1979)(examining various factors in determining whether there is REOP from aerial surveillance); *Murphy v. State*, 413 So. 2d 1268, 1270 (Fla. 1982)(considering altitude and location of object); *Stachler*, 58 Haw. at 418-20, 570 P.2d at 1327-28 (considering height, frequency of overflights, nature of this overflight, and area observed); *State v. Vogel*, 428 N.W.2d 272, 274-76 (S.D. 1988)(considering inadvertency of observation, compliance with flight rules, lack of precautions by target, use of equipment in common use). Cf. *People v. Reynolds*, 71 N.Y.2d 552, 561-63, 523 N.E.2d 291, 296-97, 528 N.Y.S.2d 15, 20-21 (1988)(the court should have weighed such factors in determining whether there was a REOP)(Hancock, J., dissenting). Other courts also weigh law enforcement interests, either generally, see, e.g., *People v. Mayoff*, 42 Cal. 3d 1302, 1317, 729 P.2d 166, 175, 233 Cal. Rptr. 2, 10-11 (1986)(upholding rural aerial surveillance program in part because it "may be the only feasible means of confronting" marijuana farming), or with respect to a particularized suspicion of illegal activity at the observed location, see, e.g., *United States v. Allen*, 675 F.2d 1373, 1381 (9th Cir.), *cert. denied*, 454 U.S. 833 (1981)(suspicion is a factor that "contributes to justification for the

engaging in this form of analysis attempt to serve the spirit of *Katz* by using a fluid approach that weighs in each individual case those factors pragmatically relevant to the reasonableness of the target's actual expectation of privacy.<sup>167</sup>

Balancing approaches are inevitably attractive to courts seeking to do justice in particular cases. Moreover, factor weighing is unquestionably superior to the often awkward and unfair rules of the pre-*Katz* era and to some of the equally rigid approaches now used to evaluate observations. Still, the failure of the courts to use balancing on a wide scale in this area at least suggests that it presents problems. Unless and until the Supreme Court adopts and explains a workable balancing approach that incorporates the nature of visual enhancement techniques, this will represent only one of a number of possible schemes of analysis.

---

surveillance"); *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980)(noting that aerial observation is a relatively non-intrusive way to investigate a tip).

While the Supreme Court has undercut balancing approaches to aerial surveillance by seeming to characterize the ability to observe from a lawful altitude as dispositive, *see supra* text accompanying notes 68-74, it left maneuvering room in each decision. In *California v. Ciraolo*, 476 U.S. 207 (1986), the Court emphasized the absence of visual enhancement in approving aerial observations of the curtilage. *Id.* at 213-14. In *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986), the Court noted that the result might differ in cases involving more sophisticated surveillance equipment. *Id.* at 238-39. In *Riley*, even the plurality noted that there was no interference with ground activities. *Riley*, 109 S. Ct. at 697. Moreover, state courts may impose stricter requirements under their own laws, *see, e.g.*, *People v. Cook*, 41 Cal. 3d 373, 385, 710 P.2d 299, 307-08, 221 Cal. Rptr. 499, 507 (1985)(prohibiting aerial surveillance of curtilage areas under state constitution), and *Riley* did not deal with the uniquely intrusive practices of some helicopter surveillances. For an example of such a search, *see infra* notes 256-58 and accompanying text.

<sup>167</sup> Perhaps the most traditional fluid approach borrows notions of reasonableness from stop-and-frisk law. *See supra* notes 53-56 and accompanying text. The doctrine of *Terry v. Ohio*, 392 U.S. 1 (1968), of course, applies only where there is a fourth amendment intrusion. Notwithstanding that limitation, a number of courts have applied aspects of the *Terry* reasonableness standard in evaluating *whether* the fourth amendment is involved in a particular observation. *See, e.g.*, *Smayda v. United States*, 352 F.2d 251, 257 (9th Cir. 1965)(pre-*Katz* and *Terry* case, permitting surveillance of a public restroom where there is "reasonable cause to believe" offenses are being committed and observations are limited to times when they are likely to occur); *United States v. Christensen*, 524 F. Supp. 344, 347 n.2 (N.D. Ill. 1981)(noting that court had previously upheld binocular surveillance applying *Terry* by analogy); *People v. Ciochon*, 23 Ill. App. 3d 363, 365, 319 N.E.2d 332, 334 (1974)(suggesting application of "reason to believe" standard to binocular-aided observations). Other limited intrusions have received similar treatment. *See, e.g.*, *United States v. Sullivan*, 711 F.2d 1, 2-3 (1st Cir. 1983)(air freight opening of package permitted due to suspicious behavior and public safety concerns regarding explosives); *United States v. Solis*, 536 F.2d 880, 882-83 (9th Cir. 1976)(dog sniff upheld on "founded suspicion" because the intrusion was minimal and inoffensive); *Lucas v. United States*, 411 A.2d 360, 363-64 (D.C. 1980)(use of sensoromatic tags on merchandise is reasonable because the limited intrusion is outweighed by need for effective system of detecting shoplifting).

### III. FORMULATING A NEW PARADIGM

#### A. THE KATZ FAILURE

The current state of the law is that in any particular case, a court has a choice among a wide variety of approaches in analyzing law enforcement observations and other intrusions. This serves no one's interests.<sup>168</sup> As long as a court may choose an approach that allows police agencies to use sophisticated visual enhancement devices, many agencies will do so as a routine matter. All persons living under the jurisdiction of those agencies must then behave as if they had no expectation of privacy from visual observation—they must either accept the risk of observation or live in an environment sealed from light and air. The police are no better off, for as long as a court may choose an approach that subjects even unenhanced observations to the fourth amendment's warrant requirement, they must use excessive caution in patrolling the streets or accept the risk that courts will deem observations they conduct through standard operating procedures unauthorized fourth amendment searches. Even though it appears that most courts will approve naked-eye observations made from lawful locations,<sup>169</sup> the fate of observations made with even "standard issue" technological aids such as binocu-

---

<sup>168</sup> The manipulable character of the *Katz* paradigm is well-recognized. See, e.g., *Conrad v. State*, 63 Wis. 2d 616, 634, 218 N.W.2d 252, 262 (1974) ("There is a theory to fit almost any preference. Rules of reasonableness can be tailored to fit almost every variation of reasoning"); *Cunningham*, *supra* note 41, at 569 ("the ambiguity and vagueness of Justice Stewart's opinion in *Katz* has spawned the incoherence of today's fourth amendment law"); *Tomkovicz*, *supra* note 2, at 683-84 (expectations approach is too likely to turn on individual attitudes, too likely to be affected by governmental restrictions, and too likely to rely on exposure as ending all privacy rights); Comment, *Trespass and Fourth Amendment Protection*, *supra* note 49, at 710, 725-27 (test is too reliant on individual attitudes of different judges, and government can change expectations); Note, *Protecting Privacy*, *supra* note 41, at 326 (noting that expectation structure "confuses analysis and permits manipulation of privacy protection"). The ambiguity of the test is evidenced by the hypothetical of the night-time drug transaction in the park. See *supra* note 101. While this is generally seen as proving that the REOP does not turn on likelihood factors, see Note, *Private Places*, *supra* note 2, at 983, one of the first post-*Katz* commentaries characterized the expectation of privacy in this setting as justifiable and reasonable. *Kitch*, *supra* note 18, at 139-40.

<sup>169</sup> This seems to be the lowest common denominator among all approaches discussed above. There is one exception, however, for observations in restrooms. See *infra* Part IV.B.1. The line between lawful and unlawful locations is sometimes a hard one to draw. The curtilage is now identified through a four-part balancing test. See *supra* note 20. The factors are difficult enough to evaluate after an evidentiary hearing, let alone in an immediate decision on the street. Other pertinent determinations exacerbate even this baseline rule. See, e.g., *United States v. Hanahan*, 442 F.2d 649, 654 (7th Cir. 1971) (technical trespass may be permitted); *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 629, 511 P.2d 33, 35, 108 Cal. Rptr. 585, 587 (1973) (normal means of access); *People v. Lovelace*, 116 Cal. App. 3d 541, 554, 172 Cal. Rptr. 65, 73 (1981) ("lawful location" does not include areas where members of public are unlikely to make observation).

lars is substantially in doubt. Police officers must therefore avoid using such devices in order to be confident that their observations are lawful. Courts, of course, gain the benefits of a large menu when no specific approach is mandated, but such a wide variety of choices increases both the burden of decisionmaking and the likelihood of reversal. This situation makes a particular mockery of the purposes of the fourth amendment. Under no principle can unknown standards relating to visual searches either secure personal privacy or deter police misconduct on any consistent basis.

This has occurred largely because the modern Supreme Court has never enunciated a clear and principled statement of the scope of fourth amendment protection. *Katz* is vague at best, as the Court was unwilling or unable to delineate with any rigor the parameters of the new defining principle of the "justifiable" or "reasonable" expectation of privacy. Later Supreme Court decisions only complicate matters, as the Court often seemed caught between competing visions of the scope of the protected level of privacy.<sup>170</sup>

Still, the unstated premise of the Court's adherence to the *Katz* paradigm is clear. The entry paradigm was unsound, primarily because of the government's steadily increasing ability to intrude through technological enhancement. In order to solve that problem, the Court was required to reexamine the fourth amendment's underlying policies. It did so, and found those policies to center on privacy from unreasonable governmental intrusions.<sup>171</sup> Society in the 1960s viewed warrantless wiretapping as a patently unreasonable intrusion<sup>172</sup> and the application of the warrant requirement to

---

<sup>170</sup> See generally *supra* notes 43-46 and accompanying text. Traditional legal analysis emphasizes factual similarities and dissimilarities among cases. Attempts to draw analogies in this area are particularly problematic. Observations are sometimes like casual overhearings, sometimes like ears to hotel doors, and sometimes like electronic surveillance. Separating observations into similar categories may aid analysis, but additional questions remain, for there are too many varieties of visual enhancement devices for neat comparisons to be made. Moreover, if technology is the key to defining the fourth amendment's scope, courts must somehow determine which technological advances are of particular concern and why this is the case. Eyeglasses enhance vision, but there is no justification in logic or law for requiring near-sighted police officers to obtain warrants for observations their normally-sighted colleagues could make without assistance. No general rule for technology seems possible, as evidenced by the myriad of rules the Supreme Court has designed for pen registers, dog sniffs, beepers, and airplanes.

<sup>171</sup> *Katz v. United States*, 389 U.S. 347, 352-53 (1967); *id.* at 360-61 (Harlan, J., concurring). For discussion of *Katz*, see *supra* notes 30-50 and accompanying text.

<sup>172</sup> The publication of books on the subject, see, e.g., S. DASH & R. SCHWARTZ, *THE EAVESDROPPERS* (1959); A. WESTIN, *PRIVACY AND FREEDOM* (1967), and the recurring and sometimes wide-eyed references in the cases to electronic surveillance techniques evidence this. See, e.g., *Berger v. New York*, 388 U.S. 41, 46-47 (1967) (referring to miniaturized bugs, a combination mirror and transmitter, parabolic microphones, and other devices); *Lopez v. United States*, 373 U.S. 427, 466 (1963) (Brennan, J., dissent-



wiretapping was therefore inevitable. Rather than draw on the privacy based purposes to define the new scope of fourth amendment protection, however, the Court simply left the matter alone. In other words, the only guidance was that courts should apply the fourth amendment when failure to apply it would undercut "justifiable" privacy. Justice Harlan attempted to give some shape to this concept in his concurrence, but his opinion's success as terminology and its failure to establish a meaningful defining principle testify to the ultimately useless nature of the *Katz* inquiry.<sup>173</sup>

The critical problem is that the purpose behind a law cannot be its only component. Even in a period of unabashed emphasis on the policies behind constitutional and other legal rules, *Katz* was unequalled in sacrificing the goal of cognizable meaning in the service of general values.<sup>174</sup> The fourth amendment is not a rigid code, but the result of the *Katz* paradigm is similar to what would occur if the Internal Revenue Code were reduced to: Pay whatever you think is

---

ing)("Electronic surveillance . . . makes the police omniscient; and police omniscience is one of the most effective tools of tyranny."). The *Berger* Court noted that many states prohibited some or all forms of electronic surveillance by the mid-1960s. *Berger*, 388 U.S. at 47-48, nn.5 & 6. Justice Brennan's *Lopez* dissent describes the techniques mentioned in Professor Dash's book as "truly frightening." *Lopez*, 373 U.S. at 467 (Brennan, J., dissenting). It may not be coincidental that this was the era of the television Eliot Ness and his Untouchables, who wiretapped on screen as enthusiastically as their real-life models did in enforcing prohibition, as upheld in *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>173</sup> *Katz*, 389 at 360-61. See *supra* notes 39-41, 48 and accompanying text. The general adoption of Justice Harlan's terminology suggests the difficulties of the *Katz* formulation. *Katz* cannot be compared to a case in which a concurrence represents the view of a critical fifth vote for a judgment. In such cases the rationale of the fifth Justice often establishes the state of the law. Nor was *Katz* a case in which the majority emphasized unique aspects of the litigation and the concurrence presented only general analysis of the most important legal issues. The fact that later courts have turned to Justice Harlan's analysis suggests that it, in stark contrast to the majority's analysis, provided at least some tools for resolving difficult problems.

The failure of the Harlan formulation as a workable test, at least for observation problems, underscores the difficulty of analyzing fourth amendment issues through a target-oriented approach. An actual expectation of privacy requirement, perhaps coupled with additional requirements, would at least provide lower courts with a directional signal. The ephemeral content of a *reasonable* expectation of privacy, however, provides no guideline for decision. It begs the question in the most important respect, as the breadth of the protected zone of privacy can differ from judge to judge. See Part II.B. See also O'Brien, *supra* note 26, at 718 (finding that the broad view of the policies underlying the fourth amendment has had little effect because of continued importance of the area approach); Note, *Telescopic Surveillance*, *supra* note 76, at 708 (the use of "pre-*Katz* property concepts and apparent lack of other objective criteria often combine to produce negligible differences" between decisions under the entry and expectations paradigms).

<sup>174</sup> See Note, *supra* note 16, at 970-71 (describing *Katz* as the final step in the Supreme Court's "relativization" of fourth amendment privacy, which logically followed from the Court's "pragmatic-realist premises").

fair, subject to a post hoc judicial determination that you have paid a fair tax, with penalties for bad guesses.

A good example of the failure of the expectations paradigm in this respect is its inability to provide any guidance concerning limited exposure of otherwise private activity. People often expose conduct or contraband to limited groups, apparently expecting that it will remain confidential but assuming the risk that it will be disclosed.<sup>175</sup> The facts of *Katz* suggest that such expectations are protected,<sup>176</sup> but at some level of openness an expectation of privacy necessarily becomes unreasonable. The expectations paradigm provides no help in drawing the appropriate line or identifying the pertinent factors.<sup>177</sup>

---

<sup>175</sup> See, e.g., *United States v. Carriger*, 541 F.2d 545, 551-52 (6th Cir. 1976)(tenant assumes risk of observation by other tenants and their guests); *Jacobs v. Superior Court*, 36 Cal. App. 3d 489, 494 n.2, 111 Cal. Rptr. 449, 453 n.2 (1974)(no showing of presence of others to weaken privacy expectation); *State v. Holt*, 291 Or. 343, 349, 630 P.2d 854, 858 (1981)(defendant who knowingly exposed indecent conduct to person who turned out to be a police officer assumed the risk and had no reasonable expectation of privacy). People have different expectations for different types of exposure. See generally Note, *Aerial Surveillance*, *supra* note 44, at 285. People presumably trust confederates, family, and friends not to disclose criminal conduct, and rely on the failure of interlopers such as co-tenants to recognize contraband or evidence of crime.

<sup>176</sup> *Katz* spoke to other persons on the telephone, *Katz*, 389 U.S. at 348, but this did not vitiate his justifiable expectation of privacy in the conversations. *Id.* at 352. Of course, he assumed the risk that one of those persons was recording the conversation. See *supra* note 76. At a minimum, therefore, revealing private things to confederates is not the same as knowing exposure to the police.

<sup>177</sup> Following *Katz*, one could draw the line at confederates, thereby recognizing conspiratorial privacy yet making people assume the risk of exposure to innocent and presumably law-abiding persons. The cases generally avoid so strict a rule and instead allow people a margin for gambling on the apathy or ignorance of most private persons able to observe evidence of crime. See, e.g., *United States v. Lyons*, 706 F.2d 321, 325 (D.C. Cir. 1983)(limited exposure to selected persons does not vitiate fourth amendment protection); *People v. Cook*, 41 Cal. 3d 373, 380, 710 P.2d 299, 304, 221 Cal. Rptr. 499, 504 (1985)(probability of governmental officials entering, seeing, or hearing is not inconsistent with a reasonable expectation of privacy from "intensive spying"). Cf. *Commonwealth v. McCloskey*, 217 Pa. Super. 432, 435-36, 272 A.2d 271, 273 (Pa. Super. Ct. 1970)(right of college employees to enter dormitory room to check for misuse does not amount to student waiver of fourth amendment protection); Note, *Concept of Privacy*, *supra* note 26, at 187 (suggesting that relationship of multiple tenants is one factor in determining the extent of their reasonable expectations of privacy). Perhaps the underlying notion is that "merely sharing with persons whom we ordinarily expect to protect our interests ought not be equated with losing all expectations of privacy." *Coombs*, *supra* note 44, at 1649. Courts are adrift when they attempt to rationalize these semi-exposure cases. About the most that can be done is to categorize the groups and guess whether the target has been careful or negligent in his or her gambling on privacy. See, e.g., *State v. Stanton*, 7 Or. App. 286, 296-97, 490 P.2d 1274, 1279 (1971)(recognizing reasonableness of expectations for certain groups but declining to apply fourth amendment because contraband was exposed to "a substantial segment of the public" in a "semi-public area" and defendant could not reasonably assume that no one would report it to police).

The Supreme Court was correct to reject talismans and specific formulae; it was wrong to avoid giving any explanation of the meaning of the fourth amendment. The constitutional language is frozen in generalities and the history of its adoption is relevant to only some contemporary privacy concerns.<sup>178</sup> Instead of defining a fourth amendment that can be a guarantor of its underlying privacy values, however, the Court supplied only the values themselves, hedged by the non-informative adjectives "justifiable," "legitimate," and "reasonable." Presented in an opinion of "almost paradoxical complexity,"<sup>179</sup> the open-ended idealism of the *Katz* inquiry turns nihilistic in application.<sup>180</sup>

---

<sup>178</sup> See generally Amsterdam, *supra* note 2, at 396-401 (noting the limited focus of the fourth amendment's framers, the futility of history as a useful guide, and the need to interpret the amendment to respond to new technology). The result of *Katz* is that unless one accepts Justice Harlan's assertion that it merely restated pre-existing law in most situations, it shook off precedent as guidance, leaving lower courts helpless in light of the language and pre-constitutional history. While it is necessary for such constitutional provisions to be somewhat flexible in application, *Katz* rendered the fourth amendment flaccid.

<sup>179</sup> *United States v. Choate*, 422 F. Supp. 261, 269 (C.D. Cal. 1976), *rev'd*, 576 F.2d 165 (9th Cir.), *cert. denied*, 439 U.S. 953 (1978). The reversal supports the lower court's conclusion about *Katz*'s difficulty. The district court quite understandably held that people reasonably anticipate that the identity of those with whom they correspond will remain confidential. *Choate*, 422 F. Supp. at 270. It therefore invalidated a "mail cover," in which law enforcement agents noted the return address information on letters sent to the defendant. *Id.* at 271. The court of appeals, applying its own reading of *Katz* and its own values, found return addresses not within Choate's REOP because the information was "knowingly exposed" to the public on the outside of envelopes. 576 F.2d at 177. See also *United States v. Bifield*, 498 F. Supp. 497, 509 (D. Conn. 1980) (this area is "intricate and complex," does not provide "clear guidelines," and holdings are too fact-bound to be of much use in later cases); *Conrad v. State*, 63 Wis. 2d 616, 634, 218 N.W.2d 252, 261 (1974) (describing fourth amendment law as "almost as incomprehensible as the law of obscenity").

<sup>180</sup> Nihilism about the fourth amendment seems clear in the Supreme Court's aerial search cases. See *supra* text accompanying notes 68-74. The Court could have held that the fourth amendment does not apply to aerial surveillance for any number of reasons or that even if it does apply, the surveillances in these cases were reasonable. Nevertheless, shorn of rationalizations and fuzzy caveats, the Court held in essence that the aerial surveillance was permissible because it could be done. See also Note, *supra* note 109, at 143 (characterizing *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986), and *California v. Ciraolo*, 476 U.S. 207 (1986), as destroying the REOP standard from opposite directions, *Dow* by adopting a flat permissive approach where there is no REOP, *Ciraolo* by allowing technological advances to trim back the REOP).

Even if nihilism seems too strong a term, the lack of content resulting from this mode of analysis produces grossly incoherent decisions, as shown in Part II.B. Commentators disagree on many things about the application of the fourth amendment, but they tend to agree on the ultimate failure of *Katz* as an analytical tool. See, e.g., Tomkovicz, *supra* note 2, at 691-92 (expectations approach encourages courts to deny any privacy protection due to exposure; this inadequately protects privacy because there are various levels and types of privacy); Note, *Sense-Enhancing Devices*, *supra* note 41, at 1169 (suggesting that courts have resolved problems in this area through equivocation);

## B. BUILDING A NEW PARADIGM

Reconstructing fourth amendment law is neither easy nor satisfying. The difficulty is self-evident; there is an immense range of possible applications of the fourth amendment, both because of new investigative techniques and because individuals have many different beliefs concerning the optimal balance between privacy and law enforcement. The unsatisfactory nature of the endeavor inheres in the realization that no single rule or test can completely resolve the matter. Instead, while several general principles can be identified, the bulk of fourth amendment law is and must be particular in application. Perhaps it was the Supreme Court's effort in *Katz* to draft a universal rule to resolve the specific problem of wiretapping that resulted in the present disordered doctrine.

The first step toward rationalizing fourth amendment analysis is simple enough. The missing piece of the expectations paradigm is that the fourth amendment regulates police methods of inquiry. That is, the *Katz* Court erroneously assumed that in order to serve the purpose of privacy it had to interpret the amendment by looking in each case at privacy—the individual expectation of privacy generalized into the REOP. This resulted in judicial emphasis on the target and the disavowal of interest in the method of intrusion.<sup>181</sup> But the fourth amendment makes a different choice—it prohibits unreasonable searches and seizures. In order to serve the underlying policies of the fourth amendment, accurately identified in *Katz* as the preservation of privacy, the amendment itself regulates certain law enforcement techniques. Judicial emphasis should therefore be on police methods.<sup>182</sup>

The next step is also simple. One wholly appropriate lesson of

---

Note, *Concept of Privacy*, *supra* note 26, at 154 (noting that as a result of difficulties in interpreting *Katz*, courts are required "to make up their own ground rules as they go along"); Note, *Protecting Privacy*, *supra* note 41, at 335 ("a system of law enforcement based on such indefinite and shifting ground is undesirable for citizens as well as unworkable for the police").

<sup>181</sup> See *supra* note 86 and accompanying text. In the Supreme Court, however, strict adherence to this principle appears mainly in dissents. See, e.g., *Dow*, 476 U.S. at 251 (Powell, J., concurring in part, dissenting in part)(stressing that "manner" and "method" do not relate to *Katz* inquiry); *Ciraolo*, 476 U.S. at 223 (Powell, J., dissenting)(same); *On Lee v. United States*, 343 U.S. 747, 765 (1952)(Douglas, J., dissenting)("The nature of the instrument that science or engineering develops is not important.").

<sup>182</sup> "To ensure that the fourth amendment keeps pace with this advance in surveillance [aerial observation], courts must consider the method employed by the police as a . . . factor in determining a reasonable expectation of privacy." Note, *Aerial Surveillance*, *supra* note 44, at 286. See also *supra* text accompanying notes 112 and 148 and note 156 (addressing various aspects of the impact of method on visual searches).

*Katz* is that "searches" cannot be limited to actual physical invasions if the fourth amendment is to serve its underlying policies. Constructive invasions perform some of the same functions as physical invasions and may be equally intrusive. Thus, "searches" should take its meaning from common sense and apply to those actions that in reality rummage through or about persons, houses, papers, or effects. The government therefore engages in a search whenever it examines a target's person or other protected place or thing.<sup>183</sup> *Katz* is not necessarily inconsistent with this approach; it merely omitted any inquiry about a search, as such, to focus on the protected interest, the reasonable expectation of privacy.<sup>184</sup> Despite

---

<sup>183</sup> *But see Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987)(characterizing inspection of items in plain view as a non-search but moving them, even slightly, as a search). The problem in *Hicks* is that both actions took place during a search. The inspection, however, was a reasonable action under the circumstances and did not violate the fourth amendment. The movement of the stereo equipment, on the other hand, was unreasonable, at least to the majority. *Id.* at 325-29. *Cf. United States v. On Lee*, 193 F.2d 306, 314 (2d Cir. 1951), *aff'd* 343 U.S. 747 (1952)(Frank, J., dissenting)(observations are searches, but most are reasonable and constitutional).

The underlying problem in this area may simply be that the courts have had to rely on "search" definitions that are inconsistent with one another and which make little legal or semantic sense. Cunningham, *supra* note 41, at 542-45. Only under the expectations paradigm could a court conclude that scraping paint from an automobile constitutes neither a search nor a seizure. Yet the Supreme Court so concluded in *Cardwell v. Lewis*, 417 U.S. 583 (1974), because there was no invasion of privacy. *Id.* at 588-89, 591.

It is more logical to equate "search" with actions intended to result or in fact resulting in the acquisition of information from a person. *See Tomkovicz, supra* note 2, at 664-65 (characterizing this as the "common sense" of the scope of the fourth amendment); Note, *Private Places, supra* note 2, at 974 ("The essence of a search is the gathering of nonpublic information; this is as effectively accomplished by the reception of visual stimuli as by actual, physical penetration of a 'constitutionally protected area'"). Looking constitutes an intrusion, even though the invasion is intangible rather than physical. *See* Note, *The Post-Katz Problem, supra* note 129, at 639 (treating observation as a search "comports with the spirit of *Katz* and with the word's common usage"); Note, *Concept of Privacy, supra* note 26, at 182-83 (the constructive presence constitutes an undesired intrusion). Actions such as the paint scraping in *Cardwell* are probably reasonable without a warrant, but certainly they are searches subject to the fourth amendment. *Cf. Kitch, supra* note 18, at 134, 144-45 (characterizing a search as "any effort by a government agent to obtain information" and concluding that informer cases represent a category of searches that are permitted because they do not intrude on privacy). For a discussion of the informer cases, see *supra* note 76.

<sup>184</sup> This is another respect in which *Katz* may be more limited in application than the Court anticipated, because it recognized that the fourth amendment is not limited to the protection of privacy. *Katz*, 389 U.S. at 350. It was able to avoid defining "search" in terms of governmental methods because the electronic eavesdropping intruded on what everyone could agree was *Katz's* reasonable expectation that his telephone conversations would be confidential. It chose to avoid the issue, perhaps because of concern that no single explanation or definition of a search would satisfy a majority of the Court. *See supra* note 76. What the Court failed to recognize was that one implication of its method is that in the absence of a reasonable expectation of privacy, there is no search or seizure and all governmental action is exempt from fourth amendment regulation. As shown

this omission, some courts have kept alive the notion of the police "search" as a concept separate from the expectation of privacy. One of the most influential opinions is a leading flashlight case, *Marshall v. United States*,<sup>185</sup> which holds that it is not a search to use a flashlight in a non-investigatory context.<sup>186</sup> On the other hand, "[a] probing, exploratory quest for evidence of a crime is a search governed by Fourth Amendment standards whether a flashlight is used or not."<sup>187</sup> Other statements of the principle emphasize the same elements: the intent and effect of the police conduct.<sup>188</sup> Under this view, *Katz* involved a search because the agents sought evidence through an intrusive method. The fact that the warrantless electronic eavesdropping violated *Katz's* reasonable expectation of privacy did not make it a search, it made it an *unreasonable* search.

This provides the key to reformulating the role of the fourth amendment in regulating visual intrusions. An intentional observation intrudes and is therefore a search subject to judicial regulation under the fourth amendment.<sup>189</sup> This intrusion paradigm is broader than the *Marshall* formulation, as it is not limited to investi-

---

above, however, it is police *searches* that are regulated by the fourth amendment in order to assure the protection of reasonable expectations of privacy. The amendment merely goes further than its policies, using the classification of "searches" to stand in for the amorphous concept of "invading privacy." Analogizing to equal protection principles, the fourth amendment is somewhat overinclusive. In order to protect privacy, it goes a bit further than is necessary and regulates some police actions that come close to violating privacy.

<sup>185</sup> 422 F.2d 185 (5th Cir. 1970).

<sup>186</sup> *Id.* at 189. The officer looked into the interior of a car after patrons at a restaurant raised concerns that the occupant was ill because he drove into the parking lot, left his lights on, and slumped down on the driver's seat. *Id.* at 187.

<sup>187</sup> *Id.* at 189.

<sup>188</sup> *See, e.g., United States v. Kenaan*, 496 F.2d 181, 182-83 (1st Cir. 1974)(agents conducted search when they forced defendant to place his hand under ultraviolet lamp because it was a detailed inspection to seek evidence); *United States v. Cody*, 390 F. Supp. 616, 618 (E.D. Tenn. 1974)(flashlight observation of car's interior was a search because agents went to car and looked in with intention of making general exploratory search); *State v. Stachler*, 58 Haw. 412, 417, 570 P.2d 1323, 1327 (1977)(citing *State v. Hanawahine*, 50 Haw. 461, 465, 443 P.2d 149, 152 (1968))(describing a search as a "prying into hidden places"); *People v. Clark*, 133 Mich. App. 619, 628-29, 350 N.W.2d 754, 759 (1983)(using both concepts, seeing a search as a "probing, exploratory quest" that violates a REOP); *Wheeler v. State*, 659 S.W.2d 381, 390 (Tex. Crim. App. 1982)(technologic ally-enhanced observation into greenhouse constituted a search because agents were looking for evidence). One reason that this line of analysis has survived *Katz* is that the inadvertence of finding evidence is significant under the plain view doctrine. *See supra* note 52. Inadvertence may help determine whether the search was reasonable, but inadvertence does not resolve whether a search has taken place.

<sup>189</sup> Judge Frank was quite clear on this alternative method of defining "search" in his *On Lee* dissent:

Our highest court has never decided that a "search" is valid merely because made by the eyes or the ears and not the hands. Indeed so to hold would be to

gative observations. The broader view is necessary to minimize the importance of evaluating police motivations and to serve the common meaning of "search" in an age when technology allows remote actions to be as intrusive as physical invasions.<sup>190</sup> But it does not mean that all observations are subject to the probable cause and warrant requirements, although concern about this possibility may have led to the Supreme Court's ambiguity in *Katz* concerning the breadth of fourth amendment coverage.<sup>191</sup> Instead it means that intentional observations, like other intrusive police practices, must be reasonable, and that in appropriate cases this requires probable cause and a warrant.

It is impossible to define reasonable police observations by a simple rule or a concise standard. This is largely because different

---

disregard the every-day meaning of "search," i.e., the act of seeking. In every-day talk, as of 1789 or now, a man "searches" when he looks or listens.

...  
 Seeing and hearing are both reactions of a human being to the physical environment around him—to light waves in one instance, to sound waves in the other. And, accordingly, using a mechanical aid to either seeing or hearing is also a form of searching.

*On Lee*, 193 F.2d at 313 (Frank, J., dissenting). The majority's contrary view was affirmed by the Supreme Court, 343 U.S. 747 (1952), and Judge Frank failed to recognize that *Olmstead v. United States*, 277 U.S. 438 (1928), indicated that Court's belief that passive reception is not a search. For discussion of *Olmstead*, see *supra* notes 23-26 and accompanying text. Nevertheless, *On Lee* never suggested that "searches" was to be defined with an emphasis on the target, and *Olmstead's* physical invasion requirement is consistent only with an emphasis on governmental methods. *Katz* alone turned the emphasis of the fourth amendment from regulation of police practices to protection of zones of privacy.

<sup>190</sup> Criticisms of the *Marshall* approach's limitation focus on the potential for abuse in gauging the officer's subjective intent, Comment, *Trespass and Fourth Amendment Protection*, *supra* note 49, at 728-29, and the fact that the offensiveness of an invasion does not depend on the officer's state of mind. Note, *Concept of Privacy*, *supra* note 26, at 183. Moreover, physical intrusions have not been limited by motivation. A forced entry to sell tickets to the Policemen's Ball would be a fourth amendment search, regardless of the lack of investigatory purpose. This broader view is also consistent with judicial treatments of common non-investigative intrusions such as inventory searches, *South Dakota v. Opperman*, 428 U.S. 364 (1976), and protective searches, *Terry v. Ohio*, 392 U.S. 1 (1968), which modern courts have always treated as searches. See *supra* notes 53-56 and accompanying text.

<sup>191</sup> The end of the rigid monolithic model of the fourth amendment, see *supra* note 17, means that courts need not exclude police conduct from fourth amendment coverage in order to avoid the warrant and probable cause requirements in appropriate instances. Professor Amsterdam notes that a disadvantage of the monolithic model is that it places "strains" on determining the outer boundaries of the fourth amendment. Amsterdam, *supra* note 2, at 393. See *id.* at 395 (the dilemma was to bring the conduct under the fourth amendment and thereby be over-restrictive, or leave it outside the fourth amendment and allow almost anything). See also Kitch, *supra* note 18, at 134 (applying the warrant requirement to every aspect of governmental investigations that intrude on security "would reduce the warrant process to a pervasive system of paper shuffling, trivialized by the very frequency of its use.").

people have definite and strongly held inconsistent opinions about the propriety of various surveillance techniques and practices. Judges reviewing particular observations have often expressed anger or fear in response to particular intrusive practices. The rhetoric occasionally centers on George Orwell's *1984*, with its vision of a society numbed by surveillance.<sup>192</sup> Historical allusions are also common, with Adolf Hitler and Sir Thomas More the allegorical figures in the morality play of governmental repression and legal protection of individual rights.<sup>193</sup> Privacy is repeatedly character-

---

<sup>192</sup> See, e.g., *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 n.3 (5th Cir. 1987); *United States v. Torres*, 751 F.2d 875, 877 (7th Cir. 1984), cert. denied, 470 U.S. 1087 (1985); *United States v. Taborda*, 635 F.2d 131, 137 (2d Cir. 1980); *United States v. On Lee*, 193 F.2d 306, 317 (2d Cir. 1951), aff'd, 343 U.S. 747 (1952) (Frank, J., dissenting); *People v. Cook*, 41 Cal. 3d 373, 382, 710 P.2d 299, 305, 221 Cal. Rptr. 499, 505 (1985); *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 637, 511 P.2d 33, 41, 108 Cal. Rptr. 585, 593 (1973); *People v. Agee*, 200 Cal. Rptr. 827, 827 (Cal. Ct. App. 1984); *People v. Joubert*, 118 Cal. App. 3d 637, 647, 173 Cal. Rptr. 428, 434 (1981); *People v. Arno*, 90 Cal. App. 3d 505, 511, 153, Cal. Rptr. 624, 627 (1979); *People v. Teicher*, 52 N.Y.2d 638, 653, 422 N.E.2d 506, 513, 439 N.Y.S.2d 846, 853 (1981); *Commonwealth v. Williams*, 262 Pa. Super. 508, 534, 396 A.2d 1286, 1299 (1978), rev'd, 494 Pa. 496, 431 A.2d 964 (1981) (Spaeth, J., dissenting). See also Saltzburg, *supra* note 58, at 21; Note, *Aerial Surveillance*, *supra* note 44, at 283 & n. 83.

One commonly-cited passage is Julia's warning to Winston: "'Don't go out in the open. There might be someone watching. We're all right if we keep behind the boughs.'" *Agee*, 200 Cal. Rptr. at 827 (quoting G. ORWELL, NINETEEN EIGHTY-FOUR 102 (1949)). Other references are to aerial observation in Oceana: "'In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.'" *Cuevas-Sanchez*, 821 F.2d at 251 n.4 (quoting G. ORWELL, *supra*, at 6). In dissenting from the approval of helicopter searches in *Florida v. Riley*, 109 S. Ct. 693 (1989), Justice Brennan asked, "[W]ho can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours?" *Id.* at 705 (Brennan, J., dissenting).

<sup>193</sup> Judge Frank noted in *On Lee* that "[u]nder Hitler, when it became known that the secret police planted dictaphones in houses, members of families often gathered in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus." *On Lee*, 193 F.2d at 317 (Frank, J., dissenting). This reference, immediately followed by a lengthy quotation from *1984*, is particularly potent as it was made only six years after Nazi Germany fell and two years after *1984* was published. More recent history found its way into *Arno*, in which the court compared binocular-aided observations to the Watergate burglary. *Arno*, 90 Cal. App. 3d at 511, 153 Cal. Rptr. at 627.

The reference to More is in Chief Justice Krivosha's dissent in *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986), in which the majority upheld aerial observations and an open fields intrusion because there was no reasonable expectation of privacy. *Id.* at 561, 385 N.W.2d at 441. His opinion states:

While it is apparent that we must do all we can to combat the ever-growing problem created by drugs within our society, I am nevertheless reminded of the words of Sir Thomas More, who, after being told by Roper that he would cut down every law in England to get after the Devil, said, "And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat?" *Id.* at 567, 385 N.W.2d at 444 (Krivosha, C.J., dissenting). It should not be surprising



ized as a necessary component of a free society<sup>194</sup> and the use of technological enhancement is seen as evidence of totalitarianism.<sup>195</sup> These courts explicitly recognize the harmful possibilities of unfettered law enforcement use of technology.

Nevertheless, the worst outrages remain only possibilities and extreme rhetoric only confuses analysis. The fact that continuous or indiscriminate surveillance would be totalitarian does not mean that some use, under proper conditions, is equally destructive of society's privacy values. The many references to real or fictional examples of repressive surveillances are balanced by comments that recognize the importance of differences in degree. Intemperate language invites reaction: "While defendant has sought to implicate [privacy] interests by raising the spectre of an omniscient government spying on its citizens through the assistance of a vast and ar-

---

that both *On Lee* and *Havlat* were drug cases. Law enforcement officials have used technological aids widely in drug investigations, and the present war on drugs suggests that such law enforcement agencies will use their most advanced techniques to stop drug trafficking. *See, e.g.*, *People v. Mayoff*, 42 Cal. 3d 1302, 1307, 729 P.2d 166, 168, 233 Cal. Rptr. 2, 4 (1986)(discussing aerial surveillance program designed to eradicate commercial marijuana farming). *Mayoff* supports Chief Justice Krivosha's concerns. The court upheld that program despite serious constitutional misgivings, largely because of the peculiar dangers presented by marijuana growers and law enforcement needs. *Id.* at 1308-09 n.2, 729 P.2d at 169 n.2, 233 Cal. Rptr. at 4 n.2. *Cf.* *United States v. Bernard*, 757 F.2d 1439, 1440-41 (4th Cir. 1985)(noting that marijuana farmers protect their fields with items such as trip wires, eye-level barbed wire, covered pits, traps, electric fences, and guard dogs). *See also Riley*, 109 S. Ct. at 703 (Brennan, J., dissenting)(criticizing the Court for letting its "distaste" for illegal drug trade to influence its fourth amendment analysis); Saltzburg, *supra* note 58, at 2-4 (suggesting that courts have often manipulated and truncated fourth amendment protections out of an understandable but misguided effort to participate in the war on drugs).

<sup>194</sup> *See, e.g.*, *United States v. On Lee*, 193 F.2d at 315-16 (Frank, J., dissenting)("A sane, decent civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."); *United States v. Kim*, 415 F. Supp. 1252, 1257 (D. Haw. 1976)(binocular-aided observations into apartment "violate the basic foundations of privacy, security and decency which distinguish free societies from controlled societies"); *People v. Cook*, 41 Cal. 3d 373, 377, 710 P.2d 299, 302, 221 Cal. Rptr. 499, 501 (1985)("A society where individuals are required to erect opaque cocoons within which to carry on any affairs they wish to conduct in private, and the concomitant chill such a requirement would place on lawful outdoor activity, would be inimical to the vision of legitimate privacy . . ."); *Lorenzana v. Superior Court*, 9 Cal. 3d 626, 641, 511 P.2d 33, 44, 108 Cal. Rptr. 585, 596 (1973)("The prying policeman . . . portrays a sorry figure who violates his subject's right to privacy—a right . . . precious to a free and open society.").

<sup>195</sup> *See, e.g.*, *United States v. Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977), *cert. denied*, 439 U.S. 910 (1978)("indiscriminate surveillance for unlimited periods of time of varying numbers of individuals" violates the "most precious right of privacy"); *Lorenzana*, 9 Cal. 3d at 629, 511 P.2d at 35, 108 Cal. Rptr. at 587 (observation into a window "too closely resembles the process of the police state"); *Agee*, 200 Cal. Rptr. at 832, 837 (describing "discrete surveillance" as "a hallmark of the police state," and noting that aerial surveillance of residence areas "is a sure and certain path to totalitarian control").

cane array of sense enhancing devices, all that is actually involved here is a pair of binoculars.”<sup>196</sup> There is also substantial disagreement concerning specific methods. Courts emphasizing the Orwellian possibilities of aerial surveillance find it reprehensible and destructive of the social fabric.<sup>197</sup> Other courts are only vaguely aware of these dangers and seem confident that aerial surveillance is more of a gain than a loss to society.<sup>198</sup> Those courts that emphasize the realities of individual observations, however, come to different conclusions in different cases. In short, they recognize that it is the particular use of the surveillance technique that determines whether the government has behaved reasonably.<sup>199</sup>

The fact that there are such strongly held views across a spectrum suggests two things. The first is confirmation that no simple “full search/no search” dichotomy is feasible. Neither pre-*Katz* notions of protected places nor *Katz*’s target-oriented framework can resolve all fourth amendment problems. The second, paradoxically, is that guidelines for applying the fourth amendment to visual searches can be elicited from the seemingly inconsistent decisions applying *Katz*.

Bright line possibilities fall of their own weight. Unlimited authority to use technological devices is clearly out of step with contemporary values and would inevitably result in abuses requiring legislative correction.<sup>200</sup> An unduly restrictive approach, on the

---

<sup>196</sup> *United States v. Christensen*, 524 F. Supp. 344, 347 (N.D. Ill. 1981). *See also United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978) (“Binoculars, dogs that track and sniff out contraband, searchlights, fluorescent powders, automobiles and airplanes, burglar alarms, radar devices, and bait money contribute to surveillance without violation of the fourth amendment in the usual case.”); *United States v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978) (use of beeper differs from mere “magnification of the observer’s senses as in the use of helicopter, binoculars, radar, or the like”).

<sup>197</sup> *See, e.g., People v. Mayoff*, 42 Cal. 3d 1302, 1324-31, 729 P.2d 166, 182-87, 233 Cal. Rptr. 2, 14-21 (1986) (Bird, C.J., dissenting) (condemning random aerial patrols as unconstitutional general searches that result in indiscriminate police intrusions and eviscerate privacy protections for homes and yards); *Agee*, 200 Cal. Rptr. at 829-37 (generally castigating aerial surveillance as a police state tactic that destroys personal privacy); *State v. Riley*, 511 So. 2d 282, 287 (Fla. 1987) (aerial surveillance is susceptible to abuse and invasion of privacy), *rev’d*, 109 S. Ct. 693 (1989).

<sup>198</sup> This is the thrust of the Supreme Court’s aerial search cases. *See supra* text accompanying notes 68-74, and *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 839, 112 Cal. Rptr. 764, 765 (1974) (noting the value to society of routine police helicopter patrols). For further discussion on helicopter patrols, *see supra* note 152.

<sup>199</sup> Balancing approaches were particularly common in aerial surveillance cases prior to the Supreme Court’s decisions in this area. *See supra* note 166. This approach would be revitalized through application of the reasonableness norm proposed in this Article. *See infra* Part IV.A.2.

<sup>200</sup> Commentators occasionally note that legislation is unlikely to correct unduly permissive judicial decisions. *See, e.g., PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND*

other hand, invites a different reaction—contempt for law and for judges who forbid reasonable police practices. Courts may try, like Goldilocks, to find a bright line that fits just right, but no such line exists. Different devices are used at different times and at different places for different reasons, and no rule fits all. More importantly, the lesson history teaches is that technological change is constant, and the principle that is valid for today's technology may be a laughable anachronism tomorrow.<sup>201</sup>

---

ADMINISTRATION OF JUSTICE, REPORT, THE CHALLENGE OF CRIME IN A FREE SOCIETY 94 (1967)(general statement of the problem); R. NEELY, HOW COURTS GOVERN AMERICA 145-67 (1981)(need for judicial role in regulating the criminal process); Amsterdam, *supra* note 2, at 378-79 (emphasizing the political restraints on legislative action). This appears to be less true in the area of surveillance technology than in some others. Congress followed *Olmstead v. United States*, 277 U.S. 438 (1928), with Section 605 of the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1103 (1934), which prohibited wiretapping, believing that electronic eavesdropping should be prohibited as a matter of public policy even if the fourth amendment did not regulate the practice. See Fisher, *Congress and the Fourth Amendment*, 21 GA. L. REV. 107, 127-32 (1986). Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968), was a similar if more subtle reponse to *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967). Portions of the Act went further in regulating electronic surveillance than either decision demanded. Under that statute, federal agents must obtain authorization from the Attorney General or a designated Assistant Attorney General and state agents must receive authorization from the principal local prosecuting attorney prior to seeking court authorization. 18 U.S.C. § 2516 (1982). The Act also prohibits most forms of private electronic surveillance, 18 U.S.C. § 2511 (1982), and bans manufacture, distribution, possession, and advertizing of electronic surveillance devices. 18 U.S.C. § 2512 (1982).

Title III turned out to be insufficient. When cordless telephone technology resulted in eavesdropping over radio waves, most courts held the action permissible. See, e.g., *Dorsey v. State*, 402 So. 2d 1178, 1180, 1182-84 (Fla. 1981); *State v. Howard*, 235 Kan. 236, 242-49, 679 P.2d 197, 200-206 (1984); *State v. Delaurier*, 488 A.2d 688, 692-95 (R.I. 1985). Congress then enacted the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986), which updated Title III to deal with this new technology.

The criticisms of legislative inaction may miss the salient point about public attitudes concerning police surveillance. It is logical to assume that political realities chill legislative reform in areas in which the public perceives that only criminals will be helped. But this is not the case where people believe that their own privacy is at stake. Many technological surveillance practices fall in the second category.

<sup>201</sup> Consistent with this notion, a number of dissents can fairly be characterized as future oriented, responding at least as much to the potential applications of the prevailing rulings to future technology as to the precise problem before the court. See, e.g., *Florida v. Riley*, 109 S. Ct. 693, 702-03 (1989)(Brennan, J., dissenting)(suggesting the existence of a safe and silent helicopter capable of determining what people are reading inside a private home); *Dow Chem. Co. v. United States*, 476 U.S. 227, 251 (1986)(Powell, J., dissenting)(concern about impact of dissemination and use of new technology); *United States v. White*, 401 U.S. 745, 757-58, 764-65 & nn.5-6 (1971)(Douglas, J., dissenting)(stressing implications of new surveillance techniques); *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting)(scientific advances as undercutting privacy); *Wheeler v. State*, 659 S.W.2d 381, 388 (Tex. Crim. App. 1982)(Clinton, J., dissenting)(use of more sophisticated techniques will destroy privacy).

The result of flexibility need not be the "abyss" feared by Professor Anthony Amsterdam.<sup>202</sup> A positive byproduct of *Katz's* misguided emphasis on the target's expectations is that there is a substantial volume of case law evaluating society's norms concerning surveillance practices. Although the *Katz* inquiry focuses on expectations of privacy rather than on methods of intrusion, judicial responses to the many different factual situations presented in the cases provide indications of the scope of judicial control appropriate to visual searches. A sensitive reading of the cases provides guidance concerning the nature of various law enforcement observations and their effect on prevailing privacy values.<sup>203</sup>

The abyss can be avoided; gradations are inevitable. The values set forth in the observation cases must be organized in a fashion that encourages consistent and predictable decisionmaking by judges and police officers. This requires the development of norms—principles that implement the intrusion paradigm and serve to anchor judicial analysis of visual searches. Those norms must be deeply rooted in society's attitudes about law enforcement methods and must be capable of consistent application. Four such norms can be identified. First, because of the fourth amendment's critical role in protecting against arbitrary invasions of privacy, all searches—and therefore all observations—must be undertaken for legitimate governmental purposes. Second, law enforcement officials must conduct all observations in a reasonable manner. These general norms are joined by others that concern specific types of visual searches and respond to the "prescriptive and predictive" components of the *Katz* inquiry.<sup>204</sup> First, certain places and acts are so intrinsically private that additional limitations are appropriate; enhanced and even some naked-eye observations are subject to the full probable cause and warrant requirements. Second, some techniques are so unexpected and intrusive that they too are subject to

---

<sup>202</sup> See *supra* note 56.

<sup>203</sup> In short, it is necessary to interpret the fourth amendment's regulation of police conduct with an understanding of societal values concerning police behavior and individual privacy. This is consistent with the view of most commentators, who favor fourth amendment analysis based on "honored" expectations of privacy. See, e.g., 1 W. LAFAVE, *supra* note 17, at 312 (job of court is to decide what sense of security is important in society, to do that it must look to society's customs and values); Note, *supra* note 16, at 984 (supporting fourth amendment analysis based on property rights because this is what society demands in the way of social protection); Note, *Concept of Privacy*, *supra* note 26, at 180 (finding that courts draw on the "customs and sensibilities of the populace" in determining extent of privacy subject to fourth amendment protection); see also *supra* note 44 (preference of most commentators for the societal norms approach to interpreting the fourth amendment).

<sup>204</sup> See *supra* note 46 and accompanying text.

all fourth amendment requirements. Together, these norms provide minimum standards for permissible visual searches that serve the purposes of the fourth amendment and permit effective law enforcement.

#### IV. FOURTH AMENDMENT PROTECTIONS AND VISUAL SEARCHES

##### A. GENERAL NORMS

###### 1. *Legitimate Purpose*

Courts attempting to apply fourth amendment principles to visual observations face a continuing dilemma: imposing all of the fourth amendment's requirements may place an undue burden on law enforcement, but declaring intrusive action a non-search usually means that there will be no judicial scrutiny at all. The problem is especially acute where an investigative intrusion is both relatively inoffensive and the sort of preliminary action that commonly leads to probable cause to conduct a physical search or arrest. To require probable cause and a warrant before the police may observe may in effect deny the police any use of this technique; to declare an observation a non-search is to invite abuse, a particularly severe problem when modern technology is involved. In this common setting, it seems logical to treat an observation as a search under the intrusion paradigm and emphasize the reasonableness clause of the fourth amendment.<sup>205</sup>

Most observations belong in this category. In the absence of particularly intrusive methods of surveillance,<sup>206</sup> an observation is a very limited search. The object is to some extent already exposed to the public, the invasion is remote, and only limited information is garnered. Moreover, an observation often constitutes a useful and discrete method of verifying a tip or otherwise checking suspicious

---

<sup>205</sup> There is another source of judicial authority, due process under the fifth and fourteenth amendments. *See, e.g.,* *Irvine v. California*, 347 U.S. 128, 132-33 (1954) (determining whether due process bars use of evidence obtained in a particularly offensive search because the fourth amendment's exclusionary rule had not yet been applied to states); *Rochin v. California*, 342 U.S. 165, 166-72 (1952) (due process applied to bar use of evidence resulting from forced vomiting by administration of an emetic). While due process is "the least specific and most comprehensive protection of liberties," *Rochin*, 342 U.S. at 170, it is not an apt vehicle for judicial control of observations. Its history suggests that it is best reserved for extreme cases that are not governed by any of the more specific provisions of the bill of rights. While it could arguably be applied to regulate observations of particularly private objects and the use of extremely sophisticated technology, *see infra* Part IV.B, it would be difficult to use due process as a vehicle for imposing the general norms on less intrusive searches.

<sup>206</sup> Part IV.B. identifies and proposes additional standards for more intrusive observations.

behavior in order to determine whether a more intrusive search would be appropriate.<sup>207</sup> Imposing the warrant and probable cause requirements would in essence move observations from the "preliminary investigation" category into the "evidence collection" category. Such a requirement would be both unnecessary and unwise.

Courts resistant to permitting warrantless searches often point to the problem of arbitrary searches.<sup>208</sup> Because fourth amendment theory is no longer premised on the "all in or all out" model, however, arbitrary searches may be prohibited without imposing excessive restrictions on preliminary investigative actions. The reasonableness clause can serve the policies underlying the fourth amendment if courts interpret it as imposing a strict requirement that all law enforcement observations have a legitimate purpose. The police should therefore be allowed to conduct visual searches without a warrant or probable cause, but officers should be required to justify their actions.

This would generally increase fourth amendment protections beyond those provided by the incoherent principles discussed in Part II.B. Most cases that now impose restrictions on observations do so in settings that would be governed by the more restrictive guidelines set forth in Part IV.B. In other settings most courts either impose no requirements at all<sup>209</sup> or root around without success to divine an appropriate level of justification for a warrantless observation.<sup>210</sup>

That appropriate level is "legitimate." While one line of cases

---

<sup>207</sup> See, e.g., *United States v. Lace*, 669 F.2d 46, 48-51 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982)(observations led to search warrant); *United States v. Taborda*, 635 F.2d 131, 133 (2d Cir. 1980)(search warrant and arrest following observations); *United States v. Kim*, 415 F. Supp. 1252, 1254 (D. Haw. 1976)(enhanced observations used to establish probable cause for electronic surveillance). Visual surveillance of suspected criminals has traditionally been one of the standard investigative techniques that Congress intended to precede electronic surveillance whenever such techniques are feasible. 18 U.S.C. § 2518 (1)(c), (3)(c) (1982). See, e.g., *United States v. Vasquez*, 605 F.2d 1269, 1282 (2d Cir.), *cert. denied*, 444 U.S. 981 (1979)(physical surveillance properly preceded electronic surveillance); *United States v. Losing*, 560 F.2d 906, 909-10 (8th Cir.), *cert. denied*, 434 U.S. 969 (1977)(exhaustive physical surveillance among preliminary investigative actions).

<sup>208</sup> See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)(describing the focus of the fourth amendment as protection from "arbitrary intrusion by the police"); *People v. Triggs*, 8 Cal. 3d 884, 891, 894, 506 P.2d 232, 236, 238, 106 Cal. Rptr. 408, 412, 415 (1973)(concern about routine practice of restroom observation); *People v. Agee*, 200 Cal. Rptr. 827, 828 (Cal. Ct. App. 1984)(characterizing the state's argument as involving an "unlimited right" of aerial surveillance).

<sup>209</sup> The successful REOP and permissive approaches, see *supra* notes 92-100 and accompanying text, are examples.

<sup>210</sup> The confirmation approach is an example. See *supra* notes 157-60 and accompanying text.

suggests that probable cause but not a warrant is required,<sup>211</sup> a more appropriate inquiry for fairly non-intrusive observations is whether the officer has a reasonable justification for his or her action. That justification—legitimacy—may concern any lawful police function and is not limited to law enforcement.

The propriety of technological enhancement is self-evident for legitimate non-law enforcement purposes. Remote cameras may be used to safeguard public property or employees in dangerous areas;<sup>212</sup> airplanes and helicopters may be used for commercial, scientific, or agricultural purposes and to transport or rescue;<sup>213</sup> flashlights may be used to preserve the safety of the officer or others;<sup>214</sup> binoculars and telescopes are used for many purposes

---

<sup>211</sup> See, e.g., *United States v. Moore*, 562 F.2d 106, 111-13 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978)(requiring probable cause but not warrant for monitoring beeper on motor vehicle); *Texas v. Gonzales*, 388 F.2d 145, 148 (5th Cir. 1968)(declaring that visual intrusions are governed by the fourth amendment and are unlawful in absence of probable cause); *People v. Wright*, 41 Ill. 2d 170, 175-76, 242 N.E.2d 180, 184 (1968), *cert. denied*, 395 U.S. 933 (1969)(following *Gonzales*, upholding observation because probable cause found). One commentator supports the view that probable cause should be the standard: "It is the existence of probable cause that signals the point at which the government's interest in law enforcement outweighs the threats posed to society by the use of telescopes and binoculars to observe private activities." Note, *supra* note 82, at 395.

<sup>212</sup> See, e.g., *State v. Abislaiman*, 437 So. 2d 181, 183 (Fla. Dist. Ct. App. 1983), *cert. denied*, 469 U.S. 833 (1984)(remote camera surveillance of hospital parking lot). Observations are often suited to the protection of people and property. See, e.g., *People v. Superior Court (Spielman)*, 102 Cal. App. 3d 342, 349, 162 Cal. Rptr. 295, 300 (1980) (Grodin, J., concurring)(noting that officers may enter private property and make observations to protect or to secure property); *State v. Jones*, 33 Wash. App. 275, 276, 653 P.2d 1369, 1370 (1982)(officers watching for alcohol abuse during state fair). See also *infra* note 296 and accompanying text (other purposes for visual surveillance).

<sup>213</sup> See, e.g., *Dow Chem. Co. v. United States*, 476 U.S. 227, 231 (1986)(map-making); *People v. Agee*, 200 Cal. Rptr. 827, 828, 837 (Cal. Ct. App. 1984)(disapproving investigative surveillance but stressing that the case did not involve protection, rescue, exigent circumstances, or efficient transportation of officers); *State v. Stachler*, 58 Haw. 412, 419, 570 P.2d 1323, 1328 (1977)(noting that the area was subject to military and crop-dusting overflights).

<sup>214</sup> See *Marshall v. United States*, 422 F.2d 185, 187-88 (5th Cir. 1970)(flashlight observation to determine whether operator of car was ill); *Ensor v. State*, 403 So. 2d 349, 351 (Fla. 1981)(standard police procedure requires officers to use flashlights to check stopped vehicles for self-protection). Cf. *State v. Schmidt*, 359 So. 2d 133, 135-36 (La. 1978)(flashlight intrusion was unreasonable because safety justifications were not applicable); *People v. Smith*, 42 N.Y.2d 961, 963-64, 367 N.E.2d 648, 649-50, 398 N.Y.S.2d 142, 143 (1977)(Jasen, J., dissenting)(flashlight observations are necessary for safety of officer and public).

In *Marshall*, the court emphasized that the non-investigatory purpose rendered the officer's action a non-search. *Marshall*, at 187-88. See *supra* note 151. This is simply another way of looking at the same problem. One can treat such observations as permissible under the fourth amendment because 1) there is a legitimate basis for the action, 2) there is no search, or 3) the plain view doctrine permits the action. However structured, the point is the same—no warrant or probable cause is necessary because there is a

other than criminal investigation.<sup>215</sup> No court suggests that such actions violate the fourth amendment; the legitimate purpose provides full justification for the resulting intrusion. In fourth amendment terms, the search is reasonable.

Law enforcement justifications are more troublesome. Still, courts imposing any requirements in this setting tend to center on "reasonable cause," which in application turns into a requirement that the observation not be arbitrary. For example, if there is a reason to believe that offenses might occur at a particular location, observations of that place may be appropriate.<sup>216</sup> It is similarly reasonable for officers to make even enhanced observations when their suspicions are reasonably aroused, whether through tips or their own investigative actions.<sup>217</sup> Warrants are not required in

---

legitimate reason for the officer's action. *See also* 1 W. LAFAVE, *supra* note 17, at 335 (suggesting that the tendency of courts to characterize use of a flashlight as a non-search is understandable because the action is "sympathetic" in most settings).

<sup>215</sup> Unlike most of the other devices discussed in this Article, many private individuals own and use binoculars. The fact that these devices may be provided to police officers for law enforcement purposes does not mean that other legitimate uses are irrelevant. Magnification devices are obviously useful in searches for lost persons and to identify distant weather or dangerous conditions. These legitimate uses plainly differentiate binoculars and telescopes from devices such as wiretapping equipment. In one of the strongest anti-binocular decisions, *People v. Arno*, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979), the court refused to decide whether an enhanced observation that intruded on a REOP would be permitted in a case in which there was a "substantial risk to life, person or property." *Id.* at 513, 153 Cal. Rptr. at 628. Another "device" commonly owned by private persons is a dog, but few privately-owned dogs are capable of identifying narcotics or other contraband. Trained dogs are, of course, useful for non-law enforcement duties such as search and rescue. *See United States v. Solis*, 536 F.2d 880, 882 (9th Cir. 1976).

<sup>216</sup> *See United States v. Gibson*, 636 F.2d 761, 762 (D.C. Cir. 1980)(surveillance to investigate public complaints of narcotics trafficking); *Smayda v. United States*, 352 F.2d 251, 252 (9th Cir.), *cert. denied*, 382 U.S. 981 (1966)(surveillance of public restroom apparently used for unlawful homosexual conduct); *United States v. Bifield*, 498 F. Supp. 497, 499-500 (D. Conn. 1980)(observation of service station in response to claims that weapons had been fired); *State v. Irwin*, 43 Wash. App. 553, 554-55, 718 P.2d 826, 829-30 (1986)(observation from woods of area suspected of drug transactions).

<sup>217</sup> *See, e.g., United States v. Allen*, 675 F.2d 1373, 1377, 1381 (9th Cir.), *cert. denied*, 454 U.S. 833 (1981), *United States v. Bassford*, 601 F. Supp. 1326, 1331 (D. Me. 1985), *aff'd*, 812 F.2d 16 (1st Cir.), *cert. denied*, 481 U.S. 1022 (1987) and *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980)(all upholding aerial surveillance in part because conducted in response to information received that officers would locate evidence of drug trafficking). *See also United States v. Bellina*, 665 F.2d 1335, 1344-45 (4th Cir. 1982)(upholding observations into airplane, concluding that validity of action turned on totality of facts, including agent's reasonable suspicions based on circumstances of the airplane's arrival at the airport); *United States v. Christensen*, 524 F. Supp. 344, 345 (N.D. Ill. 1981)(noting investigative steps leading up to binocular-aided surveillance of a counterfeiting operation); *State v. Manly*, 85 Wash. 2d 120, 120-21, 530 P.2d 306, 307-09, *cert. denied*, 423 U.S. 855 (1975)(officer observed marijuana, second officer later confirmed suspicion using binoculars); *State v. Grawien*, 123 Wis. 2d 428,



such cases; instead, observations that bear out suspicions provide probable cause for arrests or more intrusive searches. Still, the key question in deciding whether such observations are reasonable is “[w]hether, prior to the use of [visual aids], authorities had reason to believe that a crime had taken place or was taking place.”<sup>218</sup>

Two related lines of decisions support the legitimacy requirement. One line adopts the “challenging situation” doctrine. According to this theory, officers perceiving suspicious behavior may take additional investigative steps as long as those steps constitute only minor intrusions. The premise is that “[i]f policemen are to serve any purpose of detecting and preventing crime by being out on the streets at all, they must be able to take a closer look at challenging situations as they encounter them.”<sup>219</sup> The confirmation approach discussed in Part II.B.3 is an unarticulated version of the same principle. An officer sees something suspicious in the normal course of his or her duties, and then confirms the observation by using a standard enhancement aid such as a pair of binoculars.<sup>220</sup>

---

438 n.7, 367 N.W.2d 816, 820 n.7 (Wis. Ct. App. 1985)(anonymous letter does not supply probable cause but distinguishes observations from random surveillance).

<sup>218</sup> *People v. Ciochon*, 23 Ill. App. 3d 363, 365, 319 N.E.2d 332, 334 (1974)(describing this as “of vital importance”).

<sup>219</sup> *Dorsey v. United States*, 372 F.2d 928, 931 (D.C. Cir. 1967). In *Dorsey* police officers approached and shined flashlights into a car containing persons they recognized as having prior convictions for narcotics violations. *Id.* at 929. See also *United States v. Wright*, 449 F.2d 1355, 1356-58 (D.C. Cir.), cert. denied, 405 U.S. 947 (1971)(applying the doctrine to officer using his flashlight to look into garage after noticing “tell-tale sweepings of nuts and bolts in front” while investigating theft of car found stripped near garage). Other cases use different terminology but uphold similarly reasonable investigative actions. See, e.g., *United States v. Bellina*, 665 F.2d 1335, 1336-38 (4th Cir. 1981)(various suspicious circumstances justified agents in taking steps to examine airplane); *United States v. Magana*, 512 F.2d 1169, 1170-71 (9th Cir.), cert. denied, 423 U.S. 826 (1975)(officers entered driveway to provide protection during arrest); *People v. Superior Court (Spielman)*, 102 Cal. App. 3d 342, 344, 182 Cal. Rptr. 295, 296 (1980)(officers observed suspected burglars, began to follow, while on top of fence officer observed marijuana processing in adjacent building); *Newberry v. State*, 421 So. 2d 546, 547-49 (Fla. Dist. Ct. App. 1982)(use of nightscope not anticipated until targets continued actions after darkness); *State v. Lee*, 633 P.2d 48, 50-53 (Utah), cert. denied, 454 U.S. 1057 (1981)(officer observed person acting suspiciously, checked person’s truck on two occasions, learned of burglary in vicinity of items seen in truck, returned to observe house and truck).

<sup>220</sup> See *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 426, 158 Cal. Rptr. 86, 89 (1979)(aided observation approved because object was visible without binoculars, which only provided additional detail); *Bernstiel v. State*, 416 So. 2d 827, 827-29 (Fla. Dist. Ct. App. 1982)(upholding binocular-aided observations to confirm previous probable identification); *People v. Ferguson*, 47 Ill. App. 3d 654, 656-59, 365 N.E.2d 77, 78-80 (1977)(officer saw suspicious activity and then looked more closely with binoculars); *State v. Barr*, 98 Nev. 428, 429, 651 P.2d 649, 650 (1982)(officer used binoculars to confirm suspicions of use of slugs to cheat gambling devices). See also *supra* notes 157-59 (confirmation theories and cases).

The unstated but invariable reason for making the confirming observation is that the officer perceived something that provided a legitimate law enforcement reason for “taking a closer look” through enhanced vision.

This suggests taking a second look at *United States v. Whaley*,<sup>221</sup> the Eleventh Circuit decision largely premised on the “successful” REOP approach. The decision remains troubling because there was an enhanced observation into a private house,<sup>222</sup> but other aspects of the court’s reasoning are more understandable in view of the relevance of a legitimate purpose. Whaley argued convincingly that inadvertent observation by members of the public was unlikely given the secluded nature of his property and the limited vantage points. The court nevertheless concluded that he had no reasonable expectation of privacy, in part because his suspicious activity “enhanced the likelihood of discovery.”<sup>223</sup> This analysis is awkward and self-defeating under the REOP inquiry,<sup>224</sup> but makes sense under a “legitimate observation” rubric. Whaley’s suspicious public behavior could not affect whether he had a REOP in his secluded residence, but it provided ample justification for the agents crossing neighboring property, climbing down the steep embankment to the canal, and watching his behavior closely.<sup>225</sup>

As in *Whaley*, there is nothing to be gained from trying to locate “reasonable cause” precisely on the spectrum between no cause and probable cause, for the point is not that it represents any particular quantum of evidentiary justification. Instead, the public demands that police officers act in a good faith attempt to perform legitimate public functions.<sup>226</sup> The requirement, applicable to all observa-

---

<sup>221</sup> 779 F.2d 585 (11th Cir. 1985), *cert. denied*, 479 U.S. 1055 (1987). For discussion of *Whaley*, see *supra* text accompanying notes 94-99.

<sup>222</sup> See *supra* text accompanying notes 97-99. It would therefore also have to satisfy the norm applicable to observations of specially protected objects.

<sup>223</sup> *Whaley*, 779 F.2d at 591.

<sup>224</sup> See *supra* note 99.

<sup>225</sup> *Whaley*, 779 F.2d at 587-88.

<sup>226</sup> This would include the public safety and general welfare functions as well as law enforcement. Perhaps the easiest way to describe the standard is to state what police officers may *not* do—make observations for arbitrary or corrupt reasons. This is what society expects of all police actions, but where those actions are subject to the fourth amendment, this requirement is of constitutional dimension. The dissenting judge in *People v. Arno*, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979), argued in favor of the binocular-aided observations of the interior of a business office as follows: “This is not a case of a ‘peeping Tom’ police officer aimlessly surveying a ‘whole building’ with the aid of binoculars just for kicks.” *Id.* at 515, 153 Cal. Rptr. at 629-30 (Hanson, P.J., dissenting). The upshot of his analysis was that the observation was conducted in a reasonable fashion for a legitimate law enforcement purpose. This would be permitted under the model proposed in this Article.

tions, is that the observer have and articulate a rational reason for making the observation.<sup>227</sup>

The court would presumably require the officer to articulate the reason only after the fact, probably most often in affidavits and complaints in support of searches and arrests. A requirement that officers file pre-observation justifications in court seems both awkward and unnecessary, at least for most simple observations.<sup>228</sup> Police officers and others who find even the post-observation requirement burdensome should note that legislation can be more demanding. The Electronic Communications Privacy Act of 1986<sup>229</sup> regulates law enforcement use of pen registers notwithstanding the Supreme Court's holding in *Smith v. Maryland*<sup>230</sup> that such use is outside the scope of the fourth amendment.<sup>231</sup> The Act requires that federal and state agents obtain court orders prior to installing such devices; the primary requirement for such an order is that the applicant certify "that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by [the] agency."<sup>232</sup>

---

<sup>227</sup> Of course, police officers may lie to cover arbitrary or corrupt reasons for observations. Still, a warrant requirement would not truly avoid this problem, as a person willing to lie under oath after the fact would presumably be willing to lie under oath before the fact as well. All in all, there seems to be no reason to assume that deceit would be more likely under this model than under the existing system of heavy reliance on warrantless searches. There is no justification for assuming bad faith; where it is established, however, the observation would violate the fourth amendment and be subject to the exclusionary rule.

By allowing any legitimate police purpose to constitute a sufficient basis for making the observation, this standard might encourage police officers to testify truthfully concerning their actions rather than to attempt to fashion probable cause out of a series of marginally suspicious circumstances. The courts could develop principles through this method that would limit application of this norm if the societal reaction is that a particular reason is not a sufficient justification for an observation.

<sup>228</sup> The California Supreme Court relied on such notions in *People v. Mayoff*, 42 Cal. 3d 1302, 729 P.2d 166, 233 Cal. Rptr. 2 (1986). The defendant argued that random aerial observations of rural areas for evidence of marijuana farming should be subject to a warrant requirement analogous to that applicable to administrative searches. *Id.* at 1318 n.8, 729 P.2d at 175 n.8, 233 Cal. Rptr. at 11 n.8. The court found the concept unduly cumbersome and expressed concerns that a magistrate would not be in a good position to evaluate the propriety of the requested action. *Id.* The court's analysis seems to be that unless a probable cause standard is applicable, a warrant process or other judicial involvement at the investigatory stage would not be an apt vehicle to enforce the fourth amendment. Unless and until it is shown that post-observation explanations of legitimacy result in abuses, courts should avoid earlier involvement and stay out of ongoing investigations. Presumably, as in *Mayoff*, later judicial review would be available to enforce the reasonableness requirement.

<sup>229</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986).

<sup>230</sup> 442 U.S. 735 (1979).

<sup>231</sup> *Id.* at 739-46. For further discussion of *Smith*, see *supra* notes 61-62 and accompanying text.

<sup>232</sup> The provision also applies to trap and trace devices. Section 3121 contains a pro-

A similar form of legislative regulation of the general use of enhancement devices can probably be avoided if police agencies and courts honor the reasonableness mandate of the fourth amendment and insist that visual searches take place only for legitimate purposes. This represents a common sense balance between law enforcement and privacy interests in most cases.<sup>233</sup> More importantly, it avoids the most unfortunate aspect of exempting observations from fourth amendment control—the inability of the courts to curb arbitrary police actions. The legitimacy norm is thus necessary to anchor all observations to the reasonableness requirement of the fourth amendment.

## 2. Reasonable Implementation

Perhaps the most important limitation on law enforcement observations is that officers must conduct them in a reasonable fashion. As with the legitimacy requirement, the reasonableness norm applies to all observations, even naked-eye observations of very public locations.<sup>234</sup> Warrants serve to control the implementation of searches with respect to places law enforcement personnel will search, items to be seized, and permissible times.<sup>235</sup> Because of-

---

hibition on law enforcement use of pen registers and trap and trace devices except under court order. 18 U.S.C. § 3121 (Supp. IV 1986). Other provisions set out requirements governing the content and implementation of such orders, congressional reporting requirements, and definitions. 18 U.S.C. §§ 3123-26 (Supp. IV 1986). The impact of these provisions is that law enforcement's assertion of unrestricted authority to use pen registers and judicial abdication of control under the fourth amendment resulted in legislative regulation beyond constitutional requirements.

<sup>233</sup> This seems to be the analysis in *Mayoff*. Citing the reasonableness clause of the fourth amendment and Supreme Court "reasonableness" precedents, the Court balanced the need for aerial surveillance against the limited intrusion of overflights. *Mayoff*, 42 Cal. 3d at 1317-18, 729 P.2d at 174-76, 233 Cal. Rptr. at 10-11. Despite a strident dissent that the court was approving general searches, *id.* at 1326-32, 729 P.2d at 182-86, 233 Cal. Rptr. at 14-21 (Bird, C.J., dissenting), and the fact that the decision permitted observations into the curtilage that it had previously held unlawful, *see* *People v. Cook*, 41 Cal. 3d 373, 710 P.2d 299, 221 Cal. Rptr. 499 (1985), the court essentially held that the legitimate purpose of locating marijuana farms in open fields outweighed the limited intrusion of aerial observation and photography. *Mayoff*, 42 Cal. 3d at 1317-18, 729 P.2d at 174-76, 233 Cal. Rptr. at 10-11.

<sup>234</sup> This principle applies to all searches and seizures. *See, e.g.,* *Payton v. New York*, 445 U.S. 573, 616-17 (1980) (White, J., dissenting) (discussing importance of "reasonable implementation" rules to assure that arrest in home does not violate fourth amendment); *Dalia v. United States*, 441 U.S. 238, 258 (1979) (manner of executing search is subject to judicial evaluation of reasonableness); *Irvine v. California*, 347 U.S. 128, 133 (1954) (analyzing due process requirements in search setting). *See generally* 2 W. LAFAVE, *supra* note 17, at 206-361; *Dix, Means of Executing Searches and Seizures as Fourth Amendment Issues*, 67 MINN. L. REV. 89 (1982).

<sup>235</sup> The "particular place" and "particular items" requirements serve to limit police discretion and to prevent unjustifiable and erroneous intrusions. *See Marron v. United*

ficers will continue to conduct most observations without warrants, however, the standards developed to limit the implementation of observations have a heightened importance. If effective rules can be developed, visual searches should not substantially decrease personal privacy; if such rules cannot be developed, a strict warrant requirement that would seriously limit legitimate police observations may be the only means of preventing unreasonable intrusions.

One unfortunate result of the expectations paradigm is that it provides no basis for judicial regulation of police intrusions that fall short of invading a REOP. In theory, unless an observation invades a constitutionally protected privacy interest, there is no search and no requirement that the police act in a reasonable fashion.<sup>236</sup> Many courts implicitly recognize this dilemma and attempt to avoid it by twisting theory to permit review of observations on some basis even if no *Katz* search is involved. Perhaps the most common way of doing this is to address two separate issues—whether there was a search and whether it was reasonable—even if the apparent conclu-

---

States, 275 U.S. 192, 193-96 (1927)(particularity requirement deters general searches); *Steele v. United States*, 267 U.S. 498, 503 (1925)(particular description requirement met where executing officers could readily determine the intended location). Time of execution rules are usually imposed by statute or rule. See, e.g., FED. R. CRIM. P. 41 (c)(1) (“The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant and for reasonable cause shown, authorizes its execution at times other than daylight.”). Such provisions protect privacy by minimizing the intrusion except in exigent circumstances. See *Gooding v. United States*, 416 U.S. 430, 462 (1974)(Marshall, J., dissenting)(“In my view there is no expectation of privacy more reasonable than the right to expect that we will be let alone in the privacy of our homes during the night.”). See also O’Brien, *supra* note 26, at 710 (suggesting that Justice Harlan’s opinion in *Katz* supports the notion of “time” as well as “place” being critical to determining the reasonableness of privacy expectations). Related issues concern matters such as the requirement that executing officers announce their identity and purpose, see *Sabbath v. United States*, 391 U.S. 585, 587-91 (1968)(suppressing evidence resulting from search begun without such announcement), and the extent of force permitted in making entry. See *Gates v. Langford*, 43 Cal. 3d 21, 28-32, 729 P.2d 822, 827-32, 233 Cal. Rptr. 367, 389-95, *cert. denied*, 108 S. Ct. 87-88 (1987)(concluding that motorized battering ram may not be used without both judicial authorization and exigent circumstances).

<sup>236</sup> A classic example of this undesirable side effect of REOP analysis is *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974). A sheriff visited and closely examined Conrad’s farm several times because he suspected Conrad of murdering his wife. *Id.* at 620, 218 N.W.2d at 254. He brought in a backhoe and scraper, moved some doghouses and a pile of discarded siding, and then dug numerous holes on the property. *Id.* The court concluded that *Katz* rendered this conduct outside the scope of the fourth amendment. *Conrad*, 63 Wis. 2d at 625-34, 218 N.W.2d at 257-61. The court recognized that there had been “an outrageous trespass,” *id.* at 624, 218 N.W.2d at 256, and disapproved “such random digging of another’s property,” *id.* at 633 n.1, 218 N.W.2d at 261 n.1, but its crabbed and awkward interpretation of “search” under the expectations paradigm meant that the constitution had no role in regulating such intrusive police practices.

sion of the first inquiry is that there was no search.<sup>237</sup> Another common way around the problem is to treat *Katz's* apparent insistence on defining search with respect to expectations of privacy as only one method and to focus instead in appropriate cases on the purpose and nature of the observation in question.<sup>238</sup> Courts occasionally indicate a concern about reasonableness through the back door by analyzing a "seizure." This occurs, for example, where the observation limits the target's freedom in some respect. In such settings, the court may discuss the problem in terms of whether there was a "search or seizure," but the analysis seems to focus on whether the police conducted themselves in a generally reasonable fashion.<sup>239</sup>

---

<sup>237</sup> There are various ways of conducting this dual analysis. In *State v. Abislaiman*, 437 So. 2d 181 (Fla. Dist. Ct. App. 1983), *cert. denied*, 469 U.S. 833 (1984), the court declined to decide whether the use of a remote camera was a search but then upheld its use on the ground that there was no REOP, largely because the use of the camera seemed reasonable under the circumstances. *Id.* at 183. *See also* *United States v. Coplen*, 541 F.2d 211, 214-15 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977) (concluding that the observation was not a search but then going on to determine whether the target had a REOP). In *State v. Rogers*, 100 N.M. 577, 673 P.2d 142 (N.M. Ct. App. 1983), the court took a different tack. It first concluded that there was no REOP from aerial observation. *Id.* at 518, 673 P.2d at 143. It then analyzed the reasonableness of the observation under the heading "Form and Degree of Police Surveillance." *Id.* *See also* *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980) (suggesting that existence of a REOP from aerial surveillance is in part dependent on the manner in which it was conducted).

<sup>238</sup> *See supra* text accompanying notes 80-83. *Cf.* *State v. Holt*, 291 Or. 343, 351-52, 630 P.2d 854, 858-59 (1981); *id.* at 353-54, 630 P.2d at 860-61 (Linde, J., concurring) (both recognizing that the absence of an expectation of privacy should not immunize the observation from reasonableness analysis and suggesting that it would review the legality of police methods in other settings).

This flexible approach to defining a search allows courts to do two things. First, as discussed above, it provides a theoretical basis for requiring reasonableness of those intrusive actions that do not invade a REOP. Second, it allows courts to judge reasonableness on the basis of the most relevant factors. *Marshall v. United States*, 422 F.2d 185 (5th Cir. 1970), suggests the interplay of these elements. For a discussion of *Marshall*, *see supra* notes 151, 185-87. The officer used his flashlight to examine the interior of a car with its lights on in response to civilian concerns that the driver was ill. *Marshall*, 422 F.2d at 187. The purpose was not to probe for evidence and for that reason the court concluded it was not a search. *Id.* at 189. Of greater importance, however, his actions constituted a reasonable implementation of his actual legitimate purpose. Had he acted in an unreasonable fashion under the circumstances, such as by opening the trunk or by studying the interior with intensity, the intrusion would have been an unlawful search under the rationale of the court and the test proposed in this Article.

<sup>239</sup> This is essentially the Court's logic in *United States v. Place*, 462 U.S. 696 (1983). It is permissible for law enforcement agents to subject luggage to inspection by a narcotics-sniffing dog, but if this unreasonably delays the target's access to his or her luggage, it constitutes a seizure subject to the warrant requirement. *See supra* note 65. Analysis that differs in form but not in substance can be found in *United States v. Kanaan*, 496 F.2d 181 (1st Cir. 1974) and *Raettig v. State*, 406 So. 2d 1273 (Fla. Dist. Ct. App. 1981). In *Raettig*, officers lawfully detained a truck and its driver for an administrative purpose,

Another method, perhaps available only to the Supreme Court and state courts of last resort, is to ignore legal doctrine and declare unreasonable observations unlawful even where no search seems to have occurred. *McDonald v. United States*<sup>240</sup> is a case in which the Supreme Court ignored doctrine. A police officer entered a rooming house by climbing into the owner's window and then admitted other officers; they searched ground floor rooms and then discovered the target's locked bedroom on the second floor; an officer stood on a chair, looked through the transom, and observed evidence of illegal gambling.<sup>241</sup> The majority's analysis focused on the fact that no exception to the warrant requirement was applicable but never explained what it viewed as the search of McDonald or his property.<sup>242</sup> After all, under the then prevailing entry paradigm, McDonald was not the victim of a search because the officers had not entered onto his property. Justice Jackson's concurrence supplied that explanation through its emphasis on the unreasonableness of the intrusion.<sup>243</sup> The police committed an unlawful entry of the rooming house, acted in an abusive fashion, and frightened the owner. This impermissible behavior eviscerated the legality of the otherwise unobjectionable observations.<sup>244</sup> In more general terms that transcend the unusual facts of *McDonald*, he concluded that this "method of law enforcement displays a shocking lack of all sense of

---

406 So. 2d at 1275, but violated the fourth amendment when they held the defendant longer than was necessary and spent the time conducting a minute examination of the truck with a flashlight. *Raettig*, 406 So. 2d at 1274-76. In *Kenaar*, the action was quicker but no more reasonable. While conducting an apparently lawful search for cocaine that had been dusted with fluorescent powder, agents forced the target to allow his hands to be scanned by an ultraviolet lamp. *Kenaar*, 496 F.2d at 182. This became "in effect, a personal search unauthorized by the warrant to search the premises." *Id.* The court could just as easily have deemed it an unreasonable observation.

<sup>240</sup> 335 U.S. 451 (1948).

<sup>241</sup> *Id.* at 452-53.

<sup>242</sup> *Id.* at 454-56. The Court's opinion was not responsive to the government's argument that there had been no search under the logic of the existing case law. Instead it stated: "We do not stop to examine that syllogism for flaws. Assuming its correctness, we reject the result." *Id.* at 454. *McDonald* is Professor Amsterdam's primary example of a case in which the Supreme Court twisted fourth amendment doctrine to assure judicial control of an unreasonable police intrusion. Amsterdam, *supra* note 2, at 388-89.

<sup>243</sup> *McDonald*, 335 U.S. at 459-61 (Jackson, J., concurring).

<sup>244</sup> *Id.* at 457-59. Justice Jackson's analysis is largely consistent with that of the court in *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976). He specifically noted that the observation would have been lawful if the police had been admitted to the building without a breach of the peace. *McDonald*, 335 U.S. at 458 (Jackson, J., concurring). Even today, prevailing REOP theories would not generally extend to prohibit the officers entering areas other than the target's room. See *supra* Part II.B.2. Moreover, the use of the chair and transom would seem to be consistent with the "crane the neck" principle, see *supra* note 100, and the "naked ears" cases. See *supra* notes 146, 148.

proportion."<sup>245</sup>

Police insensitivity to the time and duration of their observations exhibits similar overreaching.<sup>246</sup> Physical location may also be pertinent. A number of courts have held that certain actions and observations in open fields were unlawful at least in part because they occurred after agents acted unreasonably by crossing fenced or posted private property.<sup>247</sup> Even after *Oliver v. United States*,<sup>248</sup> courts may deem certain actions outside the curtilage unreasonable, if only because the curtilage/open fields distinction should not be as significant for enhanced observations as it is for physical invasions.<sup>249</sup> These various theories suggest that courts recognize the

---

<sup>245</sup> *McDonald*, 335 U.S. at 459.

<sup>246</sup> *Commonwealth v. Williams*, 494 Pa. 496, 431 A.2d 964 (1981), is a particularly good example. Although it was unnecessary to its decision, the court indicated that it was deeply troubled by the use of a startron. *Id.* at 500, 431 A.2d at 966. The court concluded that there had been an undue invasion of privacy, emphasizing that the device was used for nine days and observed private sexual conduct on several occasions. *Id.* Time, duration, and the nature of the object all relate to the reasonableness of the police action. Time and duration are not neatly categorized, however, and cannot serve as a part of a particularized bright line rule. The nature of the object is more readily categorized for this purpose. See *infra* Part IV.B.1.

*Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966), suggests an appropriate role for time considerations. The court upheld observations into a public restroom but imposed two important limitations. It required reasonable cause to believe that the restroom had been used unlawfully and insisted that observations be limited "to the times when such crimes are most likely to occur." *Id.* at 257. Such limitations minimize privacy invasions.

<sup>247</sup> See, e.g., *United States ex rel. Gedko v. Heer*, 406 F. Supp. 609, 610, 614-15 (W.D. Wis. 1975)(concluding that *Katz* abolished open fields/curtilage distinction and relying on the fact that agents made an unconsented entry onto target's property and climbed fences within it), *vacated*, 588 F.2d 840 (7th Cir. 1978); *State v. Brady*, 406 So. 2d 1093, 1094-98 (Fla. 1980)(officers entered and crossed several fences, forcing entry through gates), *vacated*, 467 U.S. 1201 (1984). See also *United States v. DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980)(concluding that "*Katz* compels a more sensitive reading of the Fourth Amendment" than simple application of open fields doctrine); *State v. Kender*, 60 Haw. 301, 304, 588 P.2d 447, 449 (1978)(refusing to accept mechanical application of curtilage doctrine); *State v. Lee*, 633 P.2d 48, 55 (Utah), *cert. denied*, 454 U.S. 1057 (1981)(Maughan, C.J., dissenting)(curtilage doctrine no longer dictates the permissible extent of law enforcement intrusions). See also *supra* note 57 (criticisms of the open fields doctrine).

<sup>248</sup> 466 U.S. 170 (1984). For further discussion of *Oliver*, see *supra* note 58 and accompanying text.

<sup>249</sup> See *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 347, 529 A.2d 1085, 1092 (1987)("A police officer parting shrubbery and peering through binoculars into one's home is certainly an intrusion which infringes upon the values protected by the Fourth Amendment."). While *Lemanski* can be read as a simple "house" case, it is more than that in reality. The court emphasized the unreasonableness of entering warrantless onto secluded property, hiding in bushes, and creeping over the property to obtain a vantage point for making a binocular-aided observation. *Id.* at 349-50; 529 A.2d at 1093. In *Wheeler v. State*, 659 S.W.2d 381 (Tex. Crim. App. 1983), the court did not assume that *Katz* ended the open fields doctrine, but instead noted that agents entered posted and



importance of the reasonableness requirement and are capable of finding ways to implement it in appropriate circumstances.

The principles that courts should apply in such cases can be drawn from aerial observations and paramilitary operations, two settings in which unreasonably intrusive conduct is likely to occur. Courts have routinely evaluated the reasonableness of aerial surveillance and have developed a number of helpful guidelines. Paramilitary operations, on the other hand, have largely escaped constitutional regulation despite the fact that they often involve substantial and not entirely constructive invasions.

Balancing was the preferred method of evaluating the reasonableness of aerial observations before the Supreme Court's consideration of aerial surveillance.<sup>250</sup> It was fairly well established that whether or not aerial surveillance constituted a search, it was allowable without a warrant if the reviewing court concluded that officials had conducted the surveillance in a reasonable fashion. This required consideration of factors such as the height of the aircraft, the duration of the surveillance, the use of additional enhancement techniques, the nature and size of the object, the frequency of overflights in the area, and any resulting disruption.<sup>251</sup> While this inquiry was often used in an attempt to define the REOP, it was sometimes and more appropriately conducted separately. That is, after the court determined that the fourth amendment was applicable, it then determined whether there was an unreasonable governmental intrusion.<sup>252</sup> This second determination resulted in fairly

---

fenced property, made a number of attempts to observe the interior of a greenhouse through aerial surveillance and a nightscope, and finally saw into a louvered opening in the building only with the aid of binoculars. *Wheeler*, 659 S.W.2d at 382, 390. Using "search" rather than "reasonableness" analysis, the court concluded that the action was unlawful based on "the technology employed, its purpose, together with the concerted effort to view what had tenaciously been protected as private." *Id.* at 390. "Concerted effort" seems to be the court's code for a "generally unreasonable effort." Numerous cases invalidate observations for similar reasons. *See, e.g.*, *Burkholder v. Superior Court*, 96 Cal. App. 3d 421, 427-28, 158 Cal. Rptr. 86, 89-91 (1979)(entry onto locked and restricted private property to locate marijuana hidden from ground level observation); *State v. Tarantino*, 83 N.C. App. 473, 476-77, 350 S.E.2d 864, 867 (1986)(discovering and looking through gap in building's siding with aid of flashlight).

<sup>250</sup> *See supra* text accompanying notes 68-74.

<sup>251</sup> *See supra* note 166. *See also* Note, *supra* note 57, at 747 (discussing various factors pertinent to aerial surveillance).

<sup>252</sup> *See, e.g.*, *People v. Mayoff*, 42 Cal. 3d 1302, 1310, 729 P.2d 166, 170, 233 Cal. Rptr. 2, 6 (1986)("The . . . issues . . . are whether defendant's wishes [for privacy] were objectively reasonable and, if so, whether the warrantless aerial observation invaded his expectations unreasonably."); *People v. Sneed*, 32 Cal. App. 3d 535, 540, 108 Cal. Rptr. 146, 149 (1973)(same two-part test); *State v. Havlat*, 222 Neb. 554, 571, 385 N.W.2d 436, 446 (1986)(Shanahan, J., dissenting)(characterizing second part of Justice Harlan's *Katz* test as: "Has such expectation of privacy been violated by unreasonable govern-

consistent principles governing the conduct of aerial surveillance. Lawful observation was generally not limited to casual or otherwise inadvertent sightings and there was no prohibition of U-turns or closer looks,<sup>253</sup> but there was general agreement that aircraft must maintain lawful heights, avoid frightening and disruptive practices, and respect privacy to the extent that this is feasible from the air.<sup>254</sup>

Most of the problems were encountered when law enforcement officials used helicopters for surveillance. The unique positive capabilities of helicopters for law enforcement and other legitimate purposes are accompanied by an equally unique capacity for disruption. *People v. Sneed*<sup>255</sup> exemplifies the negative possibilities. A deputy sheriff responded to a telephone tip by flying in a helicopter "back and forth across . . . [a] twenty acre ranch . . . hover[ing] as low as 20 to 25 feet above the corral" until two marijuana plants were finally spotted.<sup>256</sup> The court had no difficulty concluding that this action was patently unreasonable.<sup>257</sup>

---

mental intrusion?"). Cf. *State v. Rogers*, 100 N.M. 517, 518-19, 673 P.2d 142, 143 (N.M. Ct. App. 1983)(considering reasonableness despite concluding that there was no justifiable expectation of privacy).

<sup>253</sup> The existence of a particularized suspicion is often treated as a factor in support of an observation. See *supra* note 217. Quite a few decisions approve of multiple observations. In *Rogers*, for example, the court noted that the pilot made three passes and lowered the helicopter somewhat while over a field. *Rogers*, 100 N.M. at 519, 673 P.2d at 144. See also *United States v. Broadhurst*, 805 F.2d 849, 850 (9th Cir. 1980)(repeated circling by airplane); *United States v. Allen*, 675 F.2d 1373, 1377-78 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981)(two helicopter overflights); *United States v. Bassford*, 601 F. Supp. 1324, 1326-27 (D. Me. 1985), *aff'd*, 812 F.2d 16 (1st Cir.), *cert. denied*, 481 U.S. 1022 (1987)(at least three passes over two days).

<sup>254</sup> See, e.g., *Giancola v. West Virginia Dept. of Pub. Safety*, 830 F.2d 547, 550-51 (4th Cir. 1987)(using various factors, emphasizing whether the methods were "unreasonably intrusive"); *Bassford*, 601 F. Supp. at 1331 (characterizing the surveillance as brief); *People v. Romo*, 198 Cal. App. 3d 581, 587, 243 Cal. Rptr. 801, 804 (1988)(relying on compliance with helicopter flight regulations); *Mayoff*, 42 Cal. 3d at 1316 n.6, 729 P.2d at 174 n.6, 233 Cal. Rptr. at 10 n.6 (1986)(requiring that the aircraft must maintain a vertical distance sufficient to obscure the details of human activity below); *Rogers*, 100 N.M. at 519, 673 P.2d at 143-44 (suggesting the existence of height limitations in its list of relevant factors and analysis of conflicting testimony on altitude).

<sup>255</sup> 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973).

<sup>256</sup> *Id.* at 540, 108 Cal. Rptr. at 149.

<sup>257</sup> *Id.* at 542-43, 108 Cal. Rptr. at 151. The court held: "[W]e have concluded that [the defendant had] a reasonable expectation of privacy from noisy police observation by helicopter from the air at 20 to 25 feet and that such an invasion was an unreasonable governmental intrusion into the serenity and privacy of his backyard." *Id.* The fact that the low altitude apparently constituted a violation of state and federal law was pertinent but unnecessary to the court's holding. *Id.* at 542 & n.1, 108 Cal. Rptr. at 151 & n.1. See also *State v. Stachler*, 58 Haw. 412, 418-19, 570 P.2d 1323, 1328 (1977)(if helicopter too low, or in violation of flight regulations, or engages in harassing or prolonged observation, court might disapprove surveillance); *Commonwealth v. Oglialoro*, 377 Pa. Super. 317, 547 A.2d 387, 389-91 (1988)(invalidating helicopter surveillance that hovered at 50 feet above ground level); 1 W. LAFAVE, *supra* note 17, at 419-20 (discussing *Sneed* and

The Supreme Court's 1986 decisions did not eliminate this line of analysis; at most those decisions assumed that such problems are not common in airplane overflights.<sup>258</sup> Even its recent plurality decision to uphold a helicopter surveillance emphasized that the helicopter remained at a lawful altitude, observed no matters entitled to privacy, and created no undue disturbance.<sup>259</sup> In a curious way, therefore, the Supreme Court's strong if closely divided endorsement of aerial surveillance generally may work to turn judicial attention to the more pertinent issue—the reasonableness of each aerial observation.<sup>260</sup> The courts could have more appropriately decided

---

People v. Superior Court (Stroud), 37 Cal. App. 3d 386, 112 Cal. Rptr. 764 (1974)). See also Comment, *supra* note 29, at 153 (noting that helicopter observations arguably invade constitutionally protected interests as a result of noise, light "and perhaps mere knowledge" of private matters).

More extreme practices are detailed in National Org. for Reform of Marijuana Laws (NORML) v. Mullen, 608 F. Supp. 945 (N.D. Cal. 1985). The court found that helicopter use in a marijuana eradication program included repeated instances of hovering, peering into homes, and terrorizing of residents. *Id.* at 949, 955-59. It accordingly imposed stringent requirements on the use of helicopters in the campaign, essentially limiting helicopter observations to reasonable altitudes over open fields and restricting transportation duties to specified routes. *Id.* at 965-66. The court of appeals remanded the case to reconsider portions of the injunction in light of the Supreme Court's 1986 decisions in this area. National Org. for Reform of Marijuana Laws (NORML) v. Mullen, 796 F.2d 276 (9th Cir. 1986).

<sup>258</sup> Dow Chem. Co. v. United States, 476 U.S. 227 (1986); California v. Ciraolo, 476 U.S. 207 (1986). After those decisions, courts felt free to determine whether the particular aerial surveillance was reasonable. See, e.g., Giancola v. West Virginia Dept. of Pub. Safety, 830 F.2d 547, 550-52 (4th Cir. 1987)(evaluating intrusiveness of helicopter surveillance); United States v. Broadhurst, 805 F.2d 849, 854-56 (9th Cir. 1986)(upholding observation because it was unenhanced and from public airspace; noting also that area was near airport and that no abuses took place); People v. Romo, 198 Cal. App. 3d 581, 587-88, 243 Cal. Rptr. 801, 805 (1988)(evaluating helicopter observation in terms of altitude, use of electronic aids, and intrusiveness of manner); People v. Sabo, 185 Cal. App. 3d 845, 849-54, 230 Cal. Rptr. 170, 174-76 (1986)(invalidating helicopter observations from non-navigable airspace), *cert. denied*, 481 U.S. 1058, 1058-59 (1988)(White, J., dissenting)(Justice White dissented from *cert. denial*, but recognized that unduly intrusive observation may be unlawful). But see People v. Reynolds, 71 N.Y.2d 552, 555-57, 523 N.E.2d 291, 293-94, 528 N.Y.S.2d 15, 16-18 (1988)(seeming to look only to open nature of land); State v. Vogel, 428 N.W.2d 272, 274-75 (S.D. 1988)(upholding aerial observation, looking only to altitude).

<sup>259</sup> Florida v. Riley, 109 S. Ct. 693, 697 (1989).

<sup>260</sup> There are various sources of standards and methods of enforcement. As noted above, numerous cases have found federal constitutional standards of reasonableness whether or not there was a reasonable expectation of privacy. Moreover, *Sneed*, *Broadhurst*, *Stachler*, *Sabo*, *NORML*, *Oglialoro*, *Vogel*, and *Romo* relied on statutory and regulatory flight restrictions. See *supra* notes 257-58. *Mayoff* analyzed the California Constitution as well as federal constitutional standards. *Mayoff*, 42 Cal. 3d at 1312, 729 P.2d at 171, 233 Cal Rptr. at 5-7. See also *People v. Cook*, 41 Cal. 3d 373, 385, 710 P.2d 299, 307-08, 221 Cal. Rptr. 499, 504-07 (1986)(relying on California Constitution to invalidate aerial surveillance into curtilage). *Mayoff* makes two other important points. First, the court encouraged the legislature and law enforcement agencies to adopt clear and publicly known standards for aerial surveillance. *Mayoff*, 42 Cal. 3d at 1319, 729 P.2d at

these cases by holding that the surveillance in each case constituted a search but that it was conducted for a legitimate reason and in a reasonable fashion. Only this approach provides doctrinal support for invalidating abusive or otherwise unreasonable aerial surveillance of areas or activities that do not fit into the *Katz* REOP.

Even if the reality of judicial review of aerial observation renders the theory behind the review somewhat academic, there is no judicial history of resolving similar problems associated with paramilitary operations. Like helicopter surveillances, paramilitary operations often "hover" just outside the curtilage and may involve extraordinarily intrusive behavior. Nevertheless, *United States v. Lacey*<sup>261</sup> suggests that courts are unwilling to place meaningful limitations on such operations other than to exclude enhanced observations into houses. Yet, *Lacey* involved a large group of officers engaged in a long-term, around the clock, surreptitious presence on private property, using a variety of technological devices and military techniques to conduct surveillance and to camouflage their activities.<sup>262</sup> While the officers had a legitimate reason for making their observations, did not profit from enhanced observations into

---

176, 233 Cal. Rptr. at 12. See also *United States v. Kim*, 415 F. Supp. 1252, 1257 (D. Haw. 1977)(calling for adoption of standards to govern warrants for visual searches); *People v. Teicher*, 52 N.Y.2d 638, 656, 422 N.E.2d 506, 515, 439 N.Y.S.2d 846, 855 (1981)(recommending statutory regulation of video electronic surveillance); *State v. Holt*, 291 Or. 343, 352 n.2, 630 P.2d 854, 859 n.2 (1981)(recommending adoption of legislative rules governing restroom observations); Amsterdam, *supra* note 2, at 422-23 (proposing rulemaking requirements for defining permissible police observations and other limited searches). Second, the court noted that civil injunction actions would be an appropriate vehicle for enforcing reasonableness requirements on random aerial surveillance, which courts can otherwise review only after the fact in suppression hearings. *Mayoff*, 42 Cal. 3d at 1318 & n.9, 729 P.2d at 176 & n.9, 233 Cal. Rptr. at 11-12 & n.9. See *Giancola*, 830 F.2d at 548 (action for damages and injunction against helicopter surveillance); *NORML*, 608 F. Supp. at 948 (class action injunction proceeding).

<sup>261</sup> 502 F. Supp. 1021 (D. Vt. 1980), *aff'd*, 669 F.2d 46 (2d Cir. 1982), *cert. denied*, 459 U.S. 854 (1982). For facts of *Lacey*, see *supra* text accompanying notes 123-24.

<sup>262</sup> Judge Newman's concurrence begins as follows:

The facts of this case give new meaning to the term "invasion" of privacy. Dressed in military camouflage uniforms, 24 to 30 officers of the Vermont State Police moved onto a 70-acre tract of private property in Sharon, Vermont, leased by one of the appellants as his residence, and, working in eight-hour shifts, maintained 24-hour surveillance of the appellants for three weeks. Observations were made of the appellants while inside and outside a house on the property. The observations were so continuous as to include viewings of some of the appellants using a toilet. Among the devices used to enhance the officers' observations were field binoculars with 12-power magnification, a Bushness spotting scope with 45-power magnification, and a Questar lens with 130 power magnification. Some use was made of a Javelin nightscope, capable of magnifying existing light 50,000 times. The officers used infrared night goggles to facilitate their movement in the dark and concealed their presence not only by using the natural cover of trees and shrubs but also by cutting branches and brush to form a blind.

*Lacey*, 669 F.2d at 53 (Newman, J., concurring).

the home, and did not use exceptionally intrusive technology with much success,<sup>263</sup> the court erred in believing that the nature and extent of their paramilitary presence was irrelevant to fourth amendment analysis. It is palpably absurd to apply "reasonable limitation" considerations to the execution of a search warrant but to ignore them for observations that occur in the course of substantial invasions that skirt the curtilage.<sup>264</sup>

This incongruity results from the fact that fourth amendment analysis often seems bound in a new formalism even after *Katz*. Neat categories are useful and arguably necessary in certain respects;<sup>265</sup> they are not helpful, however, in defining the parameters of privacy from law enforcement observations. *Oliver*<sup>266</sup> has renewed that formalism if it in fact approved all warrantless physical intrusions onto private property outside the curtilage. Still, there is a difference between allowing law enforcement officers to enter private property to conduct a brief search and allowing them to set up a semi-permanent surreptitious watching post on private property.

---

<sup>263</sup> The Vermont State Police had received information that the house was used as a drug warehouse and had sufficient probable cause for the warrant even excluding the results of the surveillance. *Id.* at 48-49. The interior observations were suppressed by the district court. *Lace*, 502 F. Supp. at 1040-41. While the state police attempted to use a number of sophisticated optical devices, it found that binoculars and a spotting scope were the most practical aids. *Id.* at 1028-29; *Lace*, 669 F.2d at 50.

<sup>264</sup> Several other cases note similar, if somewhat less extreme, paramilitary operations. By and large they omit reasonableness analysis. *See, e.g.*, *United States v. Whaley*, 779 F.2d 585, 587-88, 592 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987) (long-term binocular-aided surveillance into home upheld); *United States v. Allen*, 675 F.2d 1373, 1377-79 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981) (approval of several weeks of almost continuous observation, including aerial surveillance, use of seismic sensors, and other devices); *United States v. Hensel*, 509 F. Supp. 1376, 1378-79, 1385 n.9 (D. Me. 1981), *aff'd*, 699 F.2d 18 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983) (month-long aerial and enhanced ground observations upheld); *Sims v. State*, 435 So. 2d 563, 564-65, 567 (Fla. Dist. Ct. App. 1983) (lengthy enhanced surveillance of suspected marijuana trafficking operation upheld); *State v. Denton*, 387 So. 2d 578, 580 (La. 1980) (no critical analysis of seven days of twenty-four hour surveillance).

Some judges have expressed concerns similar to those raised by Judge Newman in *Lace*. *See, e.g.*, *Whaley*, 779 F.2d at 592 (characterizing nightly surveillance over three months as "a continuous warrantless search") (Simpson, J., dissenting); *Commonwealth v. Williams*, 494 Pa. 496, 500-01, 431 A.2d 964, 966 (1981) (emphasizing time and duration of nightscope surveillance).

<sup>265</sup> This Article proposes two specific categories of observations permitted only pursuant to warrants. *See infra* Part IV.B. These limitations can be specific only because of the general societal disapproval of observations of particularly private activity and the use of highly sophisticated devices unavailable to the general public. As a result, the specific prohibitions are quite limited in effect and meaningful fourth amendment protection depends in most instances on the willingness of courts to impose restrictions on a case-by-case basis using the reasonableness norm.

<sup>266</sup> *Oliver v. United States*, 466 U.S. 170, 177 (1984). For discussion of *Oliver*, see *supra* note 58 and accompanying text.

Unless courts impose reasonableness restrictions on such intrusions, a process they have found manageable for aerial surveillance,<sup>267</sup> most protections from visual searches will be ephemeral. Time and duration limitations seem most obvious, but manner and intensity are equally important.<sup>268</sup> The fourth amendment protects society from unreasonable searches, and the courts have a duty to enforce the fourth amendment regardless of the law enforcement rationale for any particular intrusion. It may be reasonable to look from private property outside a curtilage in most settings, but to deny that such looking constitutes a search prevents courts from insisting that agents act in a reasonable fashion.

Two different situations suggest the application of reasonableness principles to other forms of visual searches. First, even open police surveillance may be unreasonable under the fourth amendment if it is unnecessarily intrusive or offensive. A constant police presence in a residential neighborhood, with or without revolving lights on patrol car roofs or the constant sound of radio static, chills personal privacy nearly as much as a physical entry.<sup>269</sup> Exigent cir-

---

<sup>267</sup> See *supra* notes 166, 250-60 and accompanying text. Some aerial observation cases suggest that it is the "military occupation" atmosphere that is most troubling. The court in *NORML* described the plaintiffs' assertions as centering around a belief that the eradication program was "'out of control' and has turned its areas of operations into 'war zones.'" *NORML*, 608 F. Supp. at 950. One former military pilot submitted a sworn declaration stating that helicopters in the program "'appeared to be using tactics similar to those [he] observed in Viet Nam to terrorize the populace.'" *Id.* at 956. Ground-level activities allegedly included warrantless entries and seizures, roadblocks, detentions, and the shooting of household pets. *Id.* at 950-55.

<sup>268</sup> Courts have a relatively easy time describing time and duration limitations in judicial opinions. This may be one reason that judges have emphasized these facts in analyzing the reasonableness of paramilitary operations. See *supra* notes 262, 264. Manner and intensity are equally important and courts can evaluate these aspects in a variety of respects. Judge Newman's analysis in *Lace* seems to suggest that the number of officers, the extent to which they use enhancement or other devices, and their destruction of private property all undercut the reasonableness of the surveillance. See *Lace*, 669 F.2d at 53-56 (Newman, J., concurring).

This norm should prevent police officers from making impermissible observations in the course of an otherwise lawful surveillance under the rationale that only the fruits of the impermissible observation would be suppressed. Present law does not have this effect. For example, in *Lace* the unlawful interior observations were suppressed but this had no effect on the court's treatment of the exterior observations. See *Lace*, 508 F. Supp. at 1040-42; 669 F.2d at 50-51. Since all observations were part of one continuous law enforcement "search," however, it is both realistic and fair to treat the officers' disregard of privacy within the home as detracting from the overall reasonableness of their surveillance. Alone it should not require invalidation of the entire surveillance; in context with the other examples of intrusiveness, however, it supports Judge Newman's conclusion that there was a grossly unreasonable invasion of privacy and that the court should have suppressed all results.

<sup>269</sup> There is little reported litigation, perhaps because courts have not previously treated such activities as searches subject to fourth amendment regulation. In the early

cumstances may require this form of intrusion, but such action on a routine basis is exceptionally abusive. Dragnet observations present a different problem. They are undertaken for legitimate law enforcement purposes and need not involve observations of private conduct or sophisticated technology. They are nevertheless unreasonable in many situations because of their scope, which renders them in substance much like the general searches that were on the minds of the fourth amendment's framers.<sup>270</sup>

These problems can be resolved only through enforcement of "reasonable implementation" standards. Under the expectations paradigm, however, judicial authority is limited because such activities involve neither physical invasions nor objects shielded from public view. Yet by adopting a functional approach to defining "searches" and by defusing the rigorous monolithic view of the warrant and probable cause requirements, judicial supervision and law enforcement needs can be met in a manner that serves the privacy objectives of the fourth amendment. By itself "reasonableness" is a

---

1960's, however, Sam Giancana brought an action challenging the blanket FBI surveillance of his person and home. *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965). The district court issued a preliminary injunction, apparently concluding that the constant overt and tight surveillance violated Giancana's fourth and fifth amendment rights. *Id.* at 367; *id.* at 371 (Swygert, J., dissenting). The injunction did not prohibit surveillance; instead it limited it in manner and intensity. *Id.* at 370 (Swygert, J., dissenting). The court of appeals ordered the case dismissed for failure to allege the monetary damages then required under the general federal jurisdiction statute, 28 U.S.C. § 1331 (1964). *Id.* at 368-70. *Cf.* *McGee v. Hester*, 724 F.2d 89, 90-92 (8th Cir. 1983)(recognizing civil rights action for open and excessive surveillance that diminished sales at business under observation), *cert. denied*, 108 S. Ct. 451 (1987).

Modern entertainment provides a similar example. Many people watching the film *The Godfather* felt genuine sympathy for the Corleone family when guests had to pass a line of police and press photographers to enter the family compound to attend a wedding reception. The overt police presence at so-called "organized crime" funerals is a similarly oppressive implementation of a search for the legitimate purpose of gathering intelligence.

<sup>270</sup> See, e.g., *People v. Mayoff*, 42 Cal. 3d 1302, 1331 & n.8, 729 P.2d 166, 184 & n.8, 233 Cal. Rptr. 2, 20 & n.8 (1986)(describing random surveillance as exploratory search analogous to pre-revolutionary searches under general warrants)(Bird, C.J., dissenting). *Cf.* *United States v. Knotts*, 460 U.S. 276, 284 (1983)(asserting that dragnet use of beepers may be subject to constitutional regulation); *Davis v. Mississippi*, 394 U.S. 721, 727-28 (1969)(relying on unreasonableness of dragnet for fingerprints to identify rape suspect); *United States v. Bronstein*, 521 F.2d 459, 463 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976)(upholding dog sniff in part because not used "in a dragnet operation directed at all flight passengers"); *Lankford v. Gelston*, 364 F.2d 197, 198, 201-05 (4th Cir. 1966)(requiring injunctive relief against mass house searches for murder suspects); *State v. Stanton*, 7 Or. App. 286, 297, 490 P.2d 1274, 1279 (1971)(might be reasonable expectation of privacy from dragnet searches even in areas generally open to public). See generally 1 W. LAFAYE, *supra* note 17, at 315 (noting relevance of dragnet procedures to validity of using narcotics-trained dogs); Fishman, *supra* note 2, at 320-21 (distinguishing dragnets from targeted use of beepers).

vague term; in the context of thoughtful legal analysis, however, it can be given an effective meaning.

## B. SPECIFIC NORMS

### 1. *Specially Protected Objects*

Society demands additional protection for extremely private objects. Even if a police officer conducts a visual search for a legitimate purpose and behaves reasonably in terms of time, duration, and manner, certain objects are entitled to the protections afforded by the warrant clause. This notion is rooted to some extent in the "constitutionally protected areas" approach,<sup>271</sup> but it is subtly different, as it is premised on the nature of the acts or things observed rather than simply their location. Location is important, but that is because location provides a readily discernible guideline for police officers and courts and not because location is an actual justification for additional protection.<sup>272</sup>

The protection of private objects is most clearly evident in the reasoning of the many cases that limit observations into private homes.<sup>273</sup> These cases recognize a constitutional freedom from enhanced observations that would be permissible if they occurred in public areas.<sup>274</sup> While fourth amendment analysis before *Katz* protected houses because they were property, most modern authorities recognize that the dwelling place receives protection because of

---

<sup>271</sup> See *supra* notes 18-22 and accompanying text. This application obviously goes beyond pre-*Katz* theories because observations into constitutionally protected areas were not generally deemed subject to the fourth amendment. The major exception concerned observations into public restrooms. See *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966); *Bielicki v. Superior Court*, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962). The Supreme Court's most noted fourth amendment analysis of an observation proved the general rule by ignoring fourth amendment theory. *McDonald v. United States*, 335 U.S. 451 (1948). For discussion of *McDonald*, see *supra* notes 240-45 and accompanying text.

<sup>272</sup> A common explanation of the societal value in the privacy of certain locations is that privacy is truly protected only if people are secure in their beliefs that some protected areas exist. Note, *A Reconsideration of Katz*, *supra* note 49, at 181. "Areas" should really be restated to refer to "actions and things," but people join fourth amendment theory in accepting "areas" as a definable category that generally fits their privacy concerns. Note, *Concept of Privacy*, *supra* note 26, at 175-76.

<sup>273</sup> See *supra* notes 132-45 and accompanying text.

<sup>274</sup> Cases suppressing interior observations usually do so despite the existence of legitimate law enforcement purposes. See, e.g., *United States v. Luce*, 502 F. Supp. 1021, 1027 (D. Vt. 1980)(informant advised that drugs were stored in home), *aff'd on other grounds*, 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982); *United States v. Kim*, 415 F. Supp. 1252, 1254 (D. Haw. 1976)(observations were part of gambling investigation); *State v. Blacker*, 52 Or. 1077, 1079, 630 P.2d 413, 414 (1981)(informant reported that marijuana was being grown in home); *Commonwealth v. Williams*, 494 Pa. 496, 499, 431 A.2d 964, 966 (1981)(reason to believe escaped convict would be in apartment).



what people do and what is located in private houses. The Second Circuit, for example, has pointed out that “[t]he vice of telescopic viewing into the interior of a home is that it risks observation . . . of intimate details of a person’s life.”<sup>275</sup> The cases nevertheless tend to protect the entire dwelling place, both because intimate behavior and private possessions may be found anywhere within a house and because non-fourth amendment principles seem to mandate special treatment for the house.<sup>276</sup> The sheer number of cases espousing this view suggests that enhanced observations into private homes demands more than satisfaction of the general norms concerning visual searches, regardless of the underlying theory.

Consistent with the notion that it is the nature of the object rather than its location that provides the reason for additional protection, a second line of cases recognizes special limitations on observations into public restrooms. While the courts establish no single rule, they uniformly recognize that patrons of public

---

<sup>275</sup> *United States v. Taborda*, 635 F.2d 131, 138-39 (2d Cir. 1980). See also *Commonwealth v. Williams*, 494 Pa. 496, 500, 431 A.2d 964, 966 (1981) (noting that device enabled officers to observe sexual conduct occurring in a bedroom); *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 347 n.4, 529 A.2d 1085, 1091 n.4 (1987) (concern with intruding on personal details). Cf. *California v. Greenwood*, 108 S. Ct. 1625, 1634 (1988) (Brennan, J., dissenting) (noting that “[a] search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene”); *United States v. Lace*, 669 F.2d 46, 57 (2d Cir.), cert. denied, 459 U.S. 854 (1982) (Newman, J., concurring) (arguing that observations of secluded private property intrude upon highly personal behavior).

<sup>276</sup> It is in this sense that other constitutional privacy rights most clearly intersect with the fourth amendment. See, e.g., Comment, *supra* note 29, at 152-53 (seeing constitutional right of privacy as arising from *Katz*, *Stanley v. Georgia*, 394 U.S. 557 (1969), and *Griswold v. Connecticut*, 381 U.S. 479 (1965)); Note, *Katz and the Fourth Amendment*, *supra* note 44, at 72-74 (noting that one fourth amendment theory of a general right to privacy draws on *Griswold*); Note, *Protecting Privacy*, *supra* note 41, at 313-14 & nn.2-6 (finding fourth amendment privacy a fundamental right, citing *Griswold* and other authorities). While still a circuit judge, Anthony Kennedy relied on these principles in *United States v. Penn*, 647 F.2d 876 (9th Cir.), cert. denied, 449 U.S. 903 (1980). The majority upheld a search in which an officer offered a young child five dollars to show him where on the premises drugs were hidden. *Id.* at 879. Judge Kennedy issued a strong dissent premised on the police officer’s intrusion into the family relationship. *Id.* at 888-89 (Kennedy, J., dissenting). It is arguable that the protected objects limitation on visual searches is less a matter of pure fourth amendment law than an application of such other constitutional principles. Cf. Tomkovicz, *supra* note 2, at 692 (taking an instrumental view, arguing that fourth amendment privacy protects such other constitutional rights).

Perhaps for this reason, courts sometimes generalize in describing the nature and scope of this protection, e.g., *Kim*, 415 F. Supp. at 1256-57 (focusing on general principles of relation between government and society as much as fourth amendment), or find this line of analysis attractive in decisions premised on property notions, e.g., *Lemanski*, 365 Pa. Super. at 349, 529 A.2d at 1092 (drawing strict line on premises). While these are all “fourth amendment” cases, a great deal of their analysis is premised on broader notions of the need for privacy and private places in modern society. This emphasis, of course, is encouraged by the analytical structure of the expectations paradigm.

restrooms are entitled to some privacy from observation even though the place is neither private nor the target's property.<sup>277</sup> The philosophy behind this principle is that our society demands privacy for evacuation and nudity.<sup>278</sup> Still, privacy in such areas is neither total nor inevitable. Courts often draw distinctions based on the location of the observer or the layout of the facilities.<sup>279</sup> The level of

---

<sup>277</sup> See, e.g., *Smayda v. United States*, 352 F.2d 251, 256 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966); *People v. Triggs*, 8 Cal. 3d 884, 891, 506 P.2d 232, 237, 106 Cal. Rptr. 408, 410 (1973); *People v. Biggar*, 716 P.2d 493, 496 (Haw. 1986); *State v. Bryant*, 287 Minn. 205, 211, 177 N.W.2d 800, 801 (1970); *State v. Holt*, 291 Or. 343, 347, 630 P.2d 854, 857-58 (1981).

<sup>278</sup> The public restroom cases are described as follows: "[T]he courts, perhaps recognizing the sanctity of private bodily functions condemned the 'clandestine exploratory' surveillance of 'guilty' and innocent alike." *State v. Kender*, 60 Haw. 301, 306 n.1, 588 P.2d 447, 451 n.1 (1979). Cf. *People v. Kalchik*, 160 Mich. App. 40, 54-55, 407 N.W.2d 627, 634 (1987) (noting that the police observed and videotaped innocent users of a public restroom) (*Shepherd, J.*, concurring). A recent judicial comment in a compulsory drug testing case explains the basis of the special protection:

There are few activities in our society more personal than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

*National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd*, 109 S. Ct. 1384 (1989). The word "restroom" is itself a euphemism. See also *Westin*, *supra* note 1, at 1026 ("American society has strong codes requiring privacy for evacuation, dressing the body, and arranging the body in public, and privacy for sexual relations is deeply rooted in our culture.").

These statements are obviously based on the actions likely to be observed rather than on anything about the room itself. This is supported by cases using similar analysis with respect to fitting rooms in clothing stores. In *People v. Diaz*, 85 Misc. 2d 41, 376 N.Y.S.2d 849 (N.Y. Crim. Ct. 1975), the court stated that:

The court does not discern much distinction between the privacy which people have a right to expect in public restrooms from that which they hope to find in fitting rooms. . . . What is crucial here is the nature of the activity involved and whether an individual engaged in that activity may reasonably believe that he may perform it in private.

*Id.* at 44-48, 376 N.Y.S.2d at 854-55.

<sup>279</sup> See, e.g., *United States v. Billings*, 858 F.2d 617, 618 (10th Cir. 1988) (no protection in public restroom from observation by officer "at a place where patrons are normally found"); *State v. Daniel*, 319 So. 2d 582, 583 (Fla. Dist. Ct. App. 1975) (permissible to follow suspect into public restroom and make observations); *Brown v. State*, 3 Md. App. 90, 94, 238 A.2d 147, 149 (1968) (privacy turns on design of facility); *People v. Heydenberk*, 171 Mich. App. 494, 495-98, 430 N.W.2d 760, 761-62 (1988) (upholding use of video cameras with same field of vision as restroom patrons); *State v. Bryant*, 287 Minn. 205, 211, 177 N.W.2d 800, 804 (1970) (no protection if there is no door on stall); *State v. Holt*, 291 Or. 343, 345-50, 630 P.2d 854, 856-58 (1981) (analyzing three separate stages of observation, emphasizing actual expectations of privacy and limitations on privacy resulting from physical layout of restroom and its fixtures); *Buchanan v. State*, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971), *cert. denied*, 405 U.S. 930 (1972) (existence of protection turns on whether stalls have doors). Cf. *In re Deborah C.*, 30 Cal. 3d 125, 137-39, 635 P.2d 446, 450-53, 177 Cal. Rptr. 852, 857-59 (1981) (no REOP in store fitting room because doors provided little protection from observation by persons in common corridor). See also Note, *Private Places*, *supra* note 2, at 984 (noting that public

constitutional privacy in a restroom is often described in the amorphous phrase "the modicum of privacy its design affords."<sup>280</sup>

The house and restroom cases exemplify the tension between the societal norm and likelihood approaches to analyzing the REOP.<sup>281</sup> The societal norm approach recognizes protection for a variety of actions that are both exclusive in nature and intrinsically deserving of privacy from outsiders. The house is not the only place where such private actions occur. A conversation at a secluded table in a restaurant or a private walk in a park, for example, may seem entitled to privacy under general societal privacy norms.<sup>282</sup> The restroom cases imply, however, that constitutional privacy is limited by the realities of public behavior. Just as one's privacy in a public restroom does not extend to observations made by other persons in the restroom and one's privacy in a telephone booth does not extend to observations through its glass sides,<sup>283</sup> there are few realistic protections from observations in public. Walls and barriers such as

---

restrooms are only somewhat "public," because although accessible to public, individual stalls are designed for exclusive use of one person at a time and are physically enclosed in order to insure that person's privacy). Cf. Note, *Aerial Surveillance*, *supra* note 44, at 282-83 (relying on this analysis to argue that there should be no need to take all precautions in order to preserve privacy, the target need only "close the door," as in restroom cases, to demand privacy from aerial observation).

<sup>280</sup> *Smayda v. United States*, 352 F.2d 251, 257 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

<sup>281</sup> See *supra* notes 43-46 and accompanying text and note 109.

<sup>282</sup> See *United States v. Lace*, 669 F.2d 46, 57 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982) (Newman, J., concurring) (argument that police violated fourth amendment by trespassing on defendant's property and observing intrinsically private behavior that often occurs in secluded areas); Note, *Private Places*, *supra* note 2, at 984 (setting up hierarchy of "public" private areas: toilet stall, restaurant table, theater box, and park bench, with the latter containing neither the exclusivity nor the intimacy associated, in ascending degree, with the others). See also *Kitch*, *supra* note 18, at 137 (suggesting that weighing privacy interests is difficult due to the requirement of evaluating the relationship between target and location). Perhaps the ultimate problem preventing the identification of more than these two categories of places where observations are subject to the warrant requirement is that there seems to be little true agreement on the hierarchy of private relationships. Compare Note, *Private Places*, *supra* note 2, at 984 (hierarchy of "public" private areas) with *Kitch*, *supra* note 18, at 140 ("[L]ong walks in parks are far more likely actually to involve significant communication of private thoughts and feelings" than are telephone conversations.).

Here the problems of a graduated fourth amendment are most severe. Gradations are difficult enough to define and apply when everyone agrees on the order of priority. Where agreement is lacking, gradations are inevitably incoherent. The virtue of recognizing special protection for houses and restrooms is that those places represent privacy values that are shared throughout our society.

<sup>283</sup> *Katz v. United States*, 389 U.S. 347, 352 (1967). The "naked hearing" cases also suggest a limit in this area. See *supra* notes 146, 148. Even though society generally respects the privacy of conversations, it protects them only from artificial eavesdropping. As shown below, the same principle attends observations into houses and restrooms. See *infra* notes 292-94 and accompanying text.

commode doors are critical, for they "exhibit[] to the world a clear demarcation between inside and outside, private and public, and, in so doing, visibly assert[] the right to have this boundary respected."<sup>284</sup>

The apparently different protections afforded houses and public restrooms provide guidance in developing meaningful judicial standards for regulating observations. As suggested above, courts that excoriate enhanced observations into houses do not similarly condemn naked-eye observations.<sup>285</sup> The only protection against such simple observations is the buffer zone of distance. The result under most cases is that objects in homes are protected only to the extent that they are invisible to the curious naked eyes of persons outside the curtilage or other lawful locations.<sup>286</sup> Restrooms, on the other hand, are generally protected from naked-eye observations. The usual setting in such cases is that an officer is hidden in an observation post that provides visual access to the inside of a commode stall.<sup>287</sup> At least as long as the stall has a door that provides the illusion of privacy, most courts prohibit observations even though there is no trespass and naked-eye observation is possible.<sup>288</sup>

---

<sup>284</sup> Note, *Private Places*, *supra* note 2, at 984.

<sup>285</sup> See *supra* note 141. Even *United States v. Whaley*, 779 F.2d 585 (11th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987), pays lip service to this principle. *Id.* at 591-92 (disapproving use of enhancement devices to look into house but upholding observations in that case through a version of the confirmation approach).

<sup>286</sup> See *supra* notes 117-21 and accompanying text. Courts using the term "lawful location" to describe the permissible location of the observer may enlarge protection beyond the curtilage in some circumstances. In *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976), the court held that an agent who slipped into a locked apartment building and made observations from common areas violated the fourth amendment. *Id.* at 550. For more on *Carriger*, see *supra* note 121. The court specifically relied on Michigan laws forbidding unauthorized entry into such areas. *Carriger*, 541 F.2d at 550-51. In essence, Michigan treats such common areas as part of the house. Although there is no actual or reasonable expectation of privacy from people legitimately present in such areas, such people are treated as guests rather than as interlopers. The fact that a target has guests in his or her house, of course, does not mean that the target is subject to enhanced observations into the home by others. See also *People v. Triggs*, 8 Cal. 3d 884, 893, 506 P.2d 232, 238, 106 Cal. Rptr. 408, 414 (1973) (relying on California statutory prohibition of spying into bathrooms); *State v. Havlat*, 222 Neb. 554, 573, 385 N.W.2d 436, 447-48 (1986) (Shanahan, J., dissenting) (police intrusions onto open fields were criminal trespasses and, as such, unlawful searches); Comment, *Trespass and Fourth Amendment Protection*, *supra* note 49, at 729-32 (discussing *Carriger* and concluding that a trespass violates a reasonable expectation of privacy).

<sup>287</sup> See, e.g., *Smayda v. United States*, 352 F.2d 251, 252 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966); *Triggs*, 8 Cal. 3d at 888, 506 P.2d at 234-35, 106 Cal. Rptr. at 410-11; *State v. Bryant*, 287 Minn. 205, 206, 177 N.W.2d 800, 801 (1970); *State v. Holt*, 291 Or. 343, 345, 630 P.2d 854, 856-57 (1981); *Buchanan v. State*, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971), *cert. denied*, 405 U.S. 930 (1972).

<sup>288</sup> There is a facial distinction between the house and restroom cases. The house

The house and restroom protections are less different than this description suggests. They are similar in concept but diverge in application because different possibilities for observation exist in the two settings. Observations into a house are normally possible only through windows or open doors. The often unstated premise of the house cases is that when a target places an item where it can be seen by a naked eye from beyond the curtilage through a window or door, the target knowingly exposes the object to public view.<sup>289</sup> This is rarely the situation in restroom cases; where it is, however, such simple observations appear to be uncontroversial.<sup>290</sup> The secret observation post, on the other hand, constitutes an unforeseeable vantage point. If an observer similarly peeped through a small hole in someone's bedroom wall, even from a lawful location, there is every reason to believe that the courts would condemn unenhanced as well as enhanced observations.<sup>291</sup>

---

cases represent an attempt to limit the "successful" REOP approach by denying observers the ability to cross the curtilage constructively through the use of enhancement devices. The restroom cases, on the other hand, flatly repudiate the premise of the "successful" REOP approach.

<sup>289</sup> See, e.g., *United States v. Minton*, 488 F.2d 37, 38 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)(no search to look into open door); *Cooper v. Superior Court*, 118 Cal. App. 3d 499, 509-10, 173 Cal. Rptr. 520, 525-26 (1981)(no search to look into apartment window); *Turner v. State*, 499 S.W.2d 182, 183-85 (Tex. Crim. App. 1973)(police officers may look into house windows); *State v. Manly*, 85 Wash. 2d 120, 124-25, 530 P.2d 306, 309, *cert. denied*, 423 U.S. 855 (1975)(majority and concurrence both stressing that observations could be made by naked eye). Cf. *United States v. Head*, 783 F.2d 1422, 1426-28 (9th Cir. 1986), *cert. denied*, 476 U.S. 1171 (1986)(no search to look into car window, collecting cases).

<sup>290</sup> See, e.g., *United States v. Billings*, 858 F.2d 617, 618 (10th Cir. 1988)(no search because officer could see suspicious conduct from public area of restroom); *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969), *cert. denied*, 397 U.S. 1012 (1970)(officers may look through window into motel room bathroom because target has no REOP from observations through a window); *In re Deborah C.*, 30 Cal. 3d 125, 137-39, 635 P.2d 446, 450-51, 177 Cal. Rptr. 852, 857 (1981)(no visual search where observation into store fitting room was made from normal position in common corridor); *Triggs*, 8 Cal. 3d at 894 n.7, 506 P.2d at 238 n.7, 106 Cal. Rptr. at 414 n.7 (law officers are free to enter public restrooms and make plain view observations free of fourth amendment concerns); *State v. Holt*, 291 Or. 343, 346-47, 630 P.2d 854, 856-57 (1981)(officer's observations from public area of restroom creates no fourth amendment issue).

<sup>291</sup> Cf. *State v. Tarantino*, 83 N.C. App. 473, 478-80, 350 S.E.2d 864, 866-68 (1986)(officer violated fourth amendment by looking through wall cracks in building). Judge Pope's concurring opinion in *Smayda v. United States*, 352 F.2d 251, 257 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966), discusses analogous issues. The court upheld the use of an observation post in a men's restroom at Yosemite National Park. *Id.* at 252, 256-57. Judge Pope argued that it was analogous to a landlord surreptitiously adjusting the blinds in a tenant's room so that police officers could see into the room from outside. *Id.* at 258 (Pope, J., concurring). There are at least two problems with this analogy. First, the blinds are adjusted by a person with the "right" to do so, something that is not always true with respect to the public restroom cases. Second, the landlord's action is different from that of the officer who cuts a hole or hides in a secret area adja-

Still, enhancement is the key to the prevailing analysis in both settings. The house cases typically involve enhancement by magnification; the restroom cases typically involve enhancement by vantage point, a form of mechanical assistance. This suggests that aerial observations into houses would also run afoul of the fourth amendment.<sup>292</sup> The only remaining question concerns whether all vantage points are equally troubling. The answer seems to lie in the fact that secret observation posts are artificial in the sense that patrons cannot reasonably anticipate their use. The same is not true for hills or nearby buildings that aid observations into house or restroom windows<sup>293</sup> or even for unusually tall officers able to see at a better an-

---

cent to a restroom. The landlord is instead acting like an officer who leaves a restroom window open hoping that he or she can then see into the restroom from outside. In that situation, unlike the usual vantage point observation, the target should be aware that there is visual access into the room and can correct the matter, much as an observant tenant could readjust the blinds. Judge Pope's theory about the scope of fourth amendment protection may simply be wrong, at least if looking through an adjusted blind is analogous to seeing through a curtained window by standing on a box. See *State v. Kaaheena*, 59 Haw. 23, 30, 575 P.2d 462, 467 (1978); *supra* text accompanying notes 105-06, 110-11. It is also significant that Judge Pope refers to adjusting a blind rather than cutting a hole in the wall. *Kaaheena* might be a close case, but it would not be close if the officer had done what is common in the restroom cases and cut a hole in the wall or ceiling or modified the building's structure to allow observations from above or behind the room.

<sup>292</sup> See *e.g.*, National Org. for Reform of Marijuana Laws (NORML) v. Mullen, 608 F. Supp. 945, 957 (N.D. Cal. 1985)(helicopter observations into houses violate the fourth amendment); *People v. Mayoff*, 42 Cal. 3d 1302, 1312, 1313, 729 P.2d 166, 171-72, 233 Cal. Rptr. 2, 7-8 (1986)(no aerial examination of curtilage is permitted). *But see* *State v. Vogel*, 428 N.W.2d 272, 273-75 (S.D. 1988)(upholding observation into residence). *NORML* underscores the connection between the protection of deeply personal actions and the protection of the house and curtilage. The court emphasized that helicopters had hovered outside house windows and buzzed people in outdoor showers and out-houses. *NORML*, 608 F. Supp. at 955-57. The former action was offensive because people are entitled to privacy in their homes; the latter actions were offensive because people are entitled to privacy for nudity and evacuation as long as they avoid public areas.

<sup>293</sup> See, *e.g.*, *United States v. Minton*, 488 F.2d 37, 38(4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974)(observations from hill upheld); *United States v. Bassford*, 601 F. Supp. 1324, 1333-35 (D. Me. 1985), *aff'd*, 812 F.2d 16 (1st Cir.), *cert. denied*, 481 U.S. 1022 (1987)(observation from hill upheld); *Cooper v. Superior Court*, 118 Cal. App. 3d 499, 509-10, 173 Cal. Rptr. 520, 525-26 (1981)(observations from apartment across street upheld); *State v. Holbron*, 65 Haw. 152, 153-55, 648 P.2d 194, 196 (1982)(approving observations from public tennis court and hill 300 meters away). *People v. Arno*, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979), presents this issue in a stark fashion. The majority relied on the fact that the observer could not find a vantage point to look into Arno's office without going to a hilltop at least 200 yards from the office building. *Id.* at 509, 153 Cal. Rptr. at 626. There is no suggestion that the court would have similarly disallowed a naked-eye observation. The dissent suggested that binocular-aided observations were permissible, emphasizing that the surveillance "was conducted from a natural hill mass." *Id.* at 524, 153 Cal. Rptr. at 635 (Hanson, J., dissenting). See also *supra* note 111 (cases upholding observations from vantage points).

gle than are most of their colleagues. The enhancement that breaches the privacy of private objects, therefore, is mechanical or technological enhancement that crosses the line between normal and supernormal observation.<sup>294</sup>

There is one respect in which the overriding reasonableness inquiry suggests a possible distinction between houses and restrooms. Professor Amsterdam's hypothetical of a recurring public announcement that we are all subject to video surveillance may destroy the underpinning of any blanket requirement of an actual expectation of privacy before fourth amendment protections attach,<sup>295</sup> but in certain circumstances notice may make reasonable what would otherwise be unduly intrusive observations. While society generally recognizes the privacy of activities in a public restroom, society may deem notice of observation in some circumstances to constitute an adequate protection of personal privacy. Unlike a home, a public restroom is not the target's property and the owner, whether governmental or private, has the right to set reasonable conditions on its use. Where a restroom is used as a location for criminal conduct or is vandalized, or where some users present health or sanitation problems or endanger other users, the owner and legitimate users might reasonably prefer observation to privacy. As long as adequate warnings are posted, the public may well consider observation to be preferable to the owner's closing the facility.<sup>296</sup> The analogy to airport and public building searches is

---

<sup>294</sup> There are some borderline examples, such as *State v. Kaaheena*, 59 Haw. 23, 575 P.2d 462 (1978). For discussion of *Kaaheena*, see *supra* text accompanying notes 103-05 and 110-11. The court purported to rely on the location of the gap in the blinds but really seemed to address the fact that the officer used the assistance of a crate in gaining visual access of the room. See *id.* at 29, 575 P.2d at 467. A crate may not constitute an "artificial" aid, however, at least where crates are normally in the vicinity of the window and the target is aware of that fact. In such cases crates seem more like hills, something the target must take account of in order to maintain privacy. Ladders are less problematic, if only because the observer must normally transport them to the place from which he or she makes the observation. See *Commonwealth v. Hernley*, 216 Pa. Super. 177, 180, 263 A.2d 904, 908 (1970), *cert. denied*, 401 U.S. 914 (1971) (Montgomery, J., dissenting) (emphasizing use of ladder rather than use of binoculars).

<sup>295</sup> Amsterdam, *supra* note 2, at 384. See also Note, *A Reconsideration of Katz*, *supra* note 49, at 158 (suggesting similarly offensive manipulation of actual expectations of privacy by publicly announcing that extensive searches will take place at toll booths).

<sup>296</sup> See *In re Deborah C.*, 30 Cal. 3d 125, 138-39, 635 P.2d 446, 453, 177 Cal. Rptr. 852, 859 (1981) (recognizing interest of retailers in discouraging shoplifting and resulting justification for providing little privacy in fitting rooms); *State v. Bryant*, 287 Minn. 205, 211, 177 N.W.2d 800, 804 (1970) (recognizing store's interest in protecting restrooms and suggesting that signs warning of surveillance would eliminate fourth amendment concerns); *People v. Diaz*, 85 Misc. 2d 41, 47, 376 N.Y.S.2d 849, 855 (N.Y. Crim. Ct. 1975) (acknowledging interests in decreasing shoplifting but requiring that stores use methods other than surveillance of fitting rooms). Cf. *Lucas v. United States*,

clear even if the usual problems in restrooms are more mundane than terrorism. It is not the seriousness of particular crimes that upsets the balance and justifies observation in this setting, however, it is the combination of collateral effects of crime or unsanitary conditions, the existence of prior notice, and the potential alternatives that together make announced observations reasonable.<sup>297</sup>

The resulting principles are clear if limited in effect. Widely shared societal attitudes concerning the intrinsic privacy of actions in homes and restrooms simply demand more protection for such objects than is provided by the general visual search norms. All fourth amendment protections should apply to unnatural or enhanced observations into houses and public restrooms, much as physical searches of such areas normally require warrants based on probable cause.<sup>298</sup> Judicial screening should prevent routine use of such extremely intrusive practices early and perhaps unnecessarily

---

411 A.2d 360, 364 (D.C. 1980)(upholding use of sensoromatic tags and readers, relying in part on public and private interest in protecting stores from theft). Some public restrooms have been closed because of such problems and some stores have discontinued the use of fitting rooms because they facilitate thieves as well as shoppers. Permitting observations subject to adequate warnings allows individuals to make the choice between privacy and comfort. See *United States v. Henry*, 615 F.2d 1223, 1227-28 (9th Cir. 1980); *United States v. Edwards*, 498 F.2d 496, 499-501 (2d Cir. 1974); *United States v. Davis*, 482 F.2d 893, 914-15 (9th Cir. 1973)(all three relying on some form of notice of airplane security searches as supporting reasonableness of limited fourth amendment intrusions); *Lucas*, 411 A.2d at 365-66 (Mack, J., concurring)(proposing that stores post signs warning customers that they are subject to sensoromatic search).

<sup>297</sup> Most cases considering restroom observations are prosecutions for homosexual conduct, apparently between consenting adults. While homosexual conduct may be driven to such locations by erroneous and outdated perceptions of permissible sexual behavior, society should not condone such conduct in public locations. Heterosexual conduct, although protected from enhanced observation when it occurs in the home, see *Commonwealth v. Williams*, 494 Pa. 496, 500, 431 A.2d 964, 966 (1981), is not protected in public. Moreover, not all offensive conduct that occurs in such locations is sexual in nature. See, e.g., *State v. Daniel*, 319 So. 2d 582, 583 (Fla. Dist. Ct. App. 1975)(narcotics offenses); *Brown v. State*, 3 Md. App. 90, 92-93, 238 A.2d 147, 148-49 (1968)(narcotics offenses). Cf. *People v. Diaz*, 85 Misc. 2d 41, 42-44, 376 N.Y.S.2d 849, 850-51 (N.Y. Crim. Ct. 1975)(fitting room observations conducted to reduce theft); *Deborah C.*, 30 Cal. 3d at 130, 635 P.2d at 447-48, 177 Cal. Rptr. at 854 (theft observed in fitting room). See also *People v. Young*, 214 Cal. App. 2d 131, 135, 29 Cal. Rptr. 492, 494 (1963)(asserting that public restrooms are "often the locale of vice of many kinds such as sexual perversion, sale of narcotics, petty thefts, robbery and assaults").

<sup>298</sup> Most standard warrant exceptions would not apply. While there are various different formulations of the warrant exceptions, three general categories exist: search incident to arrest, consent, and exigent circumstances. See *W. LAFAVE & J. ISRAEL, supra* note 17, at 126. While search incident to arrest and consent would appear inapplicable, there is no reason that exigent circumstances should excuse the failure to obtain a warrant for a physical invasion but not excuse the failure where only a visual observation is at issue. Cf. *People v. Agee*, 200 Cal. Rptr. 827, 837 (Cal. Ct. App. 1984)(suggesting use of helicopters to pursue fleeing felons). Courts would still require probable cause in such circumstances. See *United States v. Rubin*, 474 F.2d 262, 265-70 (3d Cir. 1973), for a



even in legitimate investigations. The only categorical exception would be where the owner of a public restroom reasonably acts to protect persons or property by placing the facilities under surveillance, and then only after clearly warning all users of the scope of the observations. In general, then, the warrant requirement attaches as a result of the nature of the object in these limited situations.<sup>299</sup> In other settings warrants are required because of the government's technology.

## 2. *Highly Sophisticated Technology*

The problem of technologically-based limits on visual searches differs from that pertaining to particularly private objects in that courts only need draw one line to separate observations requiring warrants from all others. Nevertheless, that line wavers and is exceptionally blurred. In theory, courts could avoid the problem by either approving warrantless use of all enhancement devices or forbidding all such use without a warrant.<sup>300</sup> Practical considerations prevent such an approach, for some available technologies cut too deeply into personal autonomy for routine use to be permitted,<sup>301</sup>

---

description of various types of exigent circumstances justifying a search without a warrant.

<sup>299</sup> As suggested above, it would not be wise to extend this principle to even very private actions conducted in public. There may nonetheless be additional indoor locations deserving of heightened protection from visual searches. In order to meet the standard, however, they would have to be both exclusive in fact and the sort of place at which society expects private conduct to occur. The only areas likely to meet these requirements on a categorical basis are hotel rooms and private business offices. Existing case law seems to recognize that hotel rooms are within this category; in reality they are simply temporary houses, as recognized in the pre-*Katz* case law. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 301 (1966)(hotel room, like home or office, receives fourth amendment protection); *Stoner v. California*, 376 U.S. 483, 489-90 (1964)(fourth amendment protects occupants of hotel rooms). Inclusion of offices within this category causes problems. Although many offices have attributes of privacy, a business office, as a general matter, is neither as private as a house nor as obviously private to outsiders.

<sup>300</sup> Several commentators come close to concluding that the fourth amendment bars video electronic surveillance even when authorized by court order. See, e.g., Note, *Let's Go to the Videotape: The Second Circuit Sanctions Covert Video Surveillance of Domestic Criminals*, *United States v. Biasucci*, 53 BROOKLYN L. REV. 469, 484 (1987)(use of video electronic surveillance may be constitutionally unreasonable in all settings); Note, *Electronic Visual Surveillance*, *supra* note 1, at 288-93 (availability of other techniques renders video electronic surveillance unreasonable); Note, *Visual Surveillance*, *supra* note 84, at 1050 (such surveillance can only be reasonable if it is clearly necessary). Another commentator suggests strict limitations on aerial surveillance, arguing that courts should "reason that the flight technology allowing aerial surveillance should be analyzed in the same way as other intrusive technologies, such as electronic monitoring and sophisticated optical devices, which the fourth amendment prohibits from being used against the home without a warrant." Note, *supra* note 57, at 748.

<sup>301</sup> This is most obvious with respect to devices such as the polygraph, which purports to ascertain whether the speaker is telling the truth. The accuracy of the polygraph is

while subjecting certain other technologies to the warrant clause would be unimaginable.<sup>302</sup> Unfortunately, despite the general recognition that there is some point at which technological sophistication mandates full fourth amendment protection, there are very few established guidelines in this area.<sup>303</sup>

In order to begin to formulate general principles, it is necessary to catalog the various technological devices available for law en-

---

open to question, but even assuming accuracy, there would still be general opposition to the involuntary use of such techniques on privacy grounds. Moreover, a polygraph cannot be administered surreptitiously and requires physical control of the subject, thereby raising additional fourth amendment problems.

The Supreme Court suggested in *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986), that it would draw the line of permissible aerial surveillance when the government uses satellites for this purpose. *Id.* at 238. We are close to that time already, given the apparent use of high-altitude U-2 airplanes to seek out marijuana crops. National Org. for Reform of Marijuana Laws (NORML) v. Mullen, 608 F. Supp. 945, 949 (N.D. Cal. 1985). In any event, satellite technology is certainly in use in foreign intelligence. Unless the courts follow the Supreme Court's suggestion in *Dow*, nothing would stop the government from using satellites to spy on this country except the cost and the good sense of our political leadership, or, in the alternative, its fear of the public response.

Justice Brandeis's dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928), focused on problems of technological progress. He suggested that "[w]ays may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home." *Id.* at 474 (Brandeis, J., dissenting). Such devices may not yet be available, but this is only 1989. His vision is uncomfortably close to what is already possible with computer technology. It is now quite possible to obtain remote access to computer records through a telephone line and then rummage through and extract particular information without the owner ever becoming aware. See Fisher, *On the Front Lines in Battling Electronic Invader*, N.Y. Times, Nov. 5, 1988, at A7, col. 1-4 (noting that computer hackers can inject "viruses" into computer networks that can copy and transmit data while remaining undetected); Markoff, *Computer Hacker in Britain Said to Enter U.S. Systems*, N.Y. Times, Oct. 24, 1988, at D1, col. 1-2, D3, col. 4-5 (individual suspected of using computer and modem to break into hundreds of military, corporate and university computer systems over public telephone lines).

<sup>302</sup> See *United States v. Taborda*, 635 F.2d 131, 138 n.8 (2d Cir. 1980) (excluding observations through eyeglasses and contact lenses from enhanced observations). No cases or commentators appear to take the opposite view or suggest that the use of a hearing aid is unlawful electronic surveillance.

<sup>303</sup> See 1 W. LAFAYE, *supra* note 17, at 345-47 (noting that the level of sophistication at which enhancement becomes a search is undefined); Comment, *supra* note 29, at 166 (suggesting that there is a "void in the law" concerning "highly sophisticated visual equipment"). Many opinions suggest the existence of limits but do not purport to define them because there is no need to do so in the particular case. See, e.g., *United States v. Torres*, 751 F.2d 875, 882-83 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (recognizing that video electronic surveillance is so intrusive that special protections may be necessary, but finding such observations of terrorist bomb factory to be appropriate); *United States v. Bassford*, 601 F. Supp. 1324, 1335 (D. Me. 1985), *aff'd*, 812 F.2d 16 (1st Cir.), *cert. denied*, 481 U.S. 1022 (1987) (approving aerial observation but suggesting that use of "sophisticated technological devices" might be restricted in other circumstances); *State v. Stachler*, 58 Haw. 412, 419, 570 P.2d 1323, 1328 (1977) (upholding aerial surveillance but implying that more intrusive forms might be disapproved).

forcement observations. Most of the cases previously discussed involved binoculars, telescopes, flashlights, airplanes, helicopters, cameras, or simpler mechanical aids, such as ladders or crates. Perhaps the two most sophisticated devices commonly used in law enforcement are video cameras<sup>304</sup> and nightscopes.<sup>305</sup> Other highly advanced devices used in law enforcement enhance vision constructively, such as beepers, ultra-violet scanners, sensoromatic devices, x-rays, and fluoroscopes.<sup>306</sup> Police officers often use these and other devices in combination to further enhance their ability to conduct surveillance.<sup>307</sup>

Drawing analogies between devices may be of some assistance in evaluating their intrusiveness. After all, if one can agree that naked-eye and eyeglass observations are permissible and that elec-

---

<sup>304</sup> Cameras can be in the open, e.g., *State v. Abislaiman*, 437 So. 2d 181, 182-83 (Fla. Dist. Ct. App. 1983), *cert. denied*, 469 U.S. 833 (1984), or hidden, e.g., *United States v. Cuevas-Sanchez*, 821 F.2d 248, 250 (5th Cir. 1987); *Torres*, 751 F.2d at 877; *People v. Dezek*, 107 Mich. App. 78, 84, 308 N.W.2d 652, 653 (1981). See also *infra* note 331 (cases on open and surreptitious use of video cameras).

<sup>305</sup> Cases addressing nightscopes include: *United States v. Ward*, 546 F. Supp. 300, 308-10 (W.D. Ark. 1982), *rev'd in part on other grounds*, 703 F.2d 1058 (8th Cir. 1983); *United States v. Hensel*, 509 F. Supp. 1376, 1384 n.9 (D. Me. 1981), *aff'd*, 699 F.2d 18 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983); *Newberry v. State*, 421 So. 2d 546, 547 (Fla. Dist. Ct. App. 1982); *State v. Denton*, 387 So. 2d 578, 581-82 (La. 1980).

<sup>306</sup> Cases addressing such techniques include:

(1) Beepers: *United States v. Curtis*, 562 F.2d 1153, 1155 (9th Cir. 1977), *cert. denied*, 439 U.S. 910 (1978); *United States v. Moore*, 562 F.2d 106, 108 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978). See also *Karo v. United States*, 468 U.S. 705, 708 (1984) (beeper placed in can of ether) and *Knotts v. United States*, 460 U.S. 276, 277 (1983) (beeper placed in drum of chloroform).

(2) Ultra-violet scans: *United States v. Kanaan*, 496 F.2d 181, 182 (1st Cir. 1974); *Commonwealth v. DeWitt*, 226 Pa. Super. 372, 374, 314 A.2d 27, 28 (1973).

(3) Sensoromatic devices: *Lucas v. United States*, 411 A.2d 360 (D.C. 1980).

(4) X-rays and fluoroscopes: *United States v. Sullivan*, 711 F.2d 1, 2 (1st Cir. 1983); *United States v. Head*, 546 F.2d 6, 8 (2d Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

(5) Narcotics-sniffing dogs are also "enhancement devices," see *United States v. Place*, 462 U.S. 696 (1983). See *supra* notes 63-65 and accompanying text. Cases involving dogs trained to identify narcotics include *United States v. Thomas*, 757 F.2d 1359, 1366 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985) and *United States v. Solis*, 536 F.2d 880, 881 (9th Cir. 1976).

<sup>307</sup> Nightscopes are essentially a combination of artificial lighting and magnification. Video electronic surveillance is often used in connection with aural electronic surveillance. See, e.g., *Torres*, 751 F.2d at 876, 883; *In re Order Authorizing Interception*, 513 F. Supp. 421, 422 (D. Mass. 1980); *People v. Dezek*, 107 Mich. App. 78, 81, 308 N.W.2d 652, 653 (1981).

*United States v. Lace*, 502 F. Supp. 1021 (D. Vt. 1980), *aff'd*, 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982), reveals the wide variety of surveillance equipment that law enforcement officials use in long-term surveillance. The officers in *Lace* used binoculars, a spotting scope, a nightscope, a device called an "Owl's Eye," a Questar lens, various cameras, and infrared night goggles; many items came with zoom extenders or other attachments. *Id.* at 1028-29.

tronic eavesdropping is permissible only with a warrant, perhaps analogies can sort out the rules concerning various devices. The problem is that the analogies drawn in the cases are hopelessly inconsistent. One analogy, between electronic surveillance and "aided vision,"<sup>308</sup> would suggest that all devices, perhaps excepting mechanical aids, are subject to the strict regulations imposed on wiretapping and bugging. Electronic eavesdropping is more commonly equated with more sophisticated visual aids, such as beepers, nightscopes, and video cameras.<sup>309</sup> If this implies that those devices that do more than magnify the field of vision are necessarily subject to the warrant clause, the suggestion is rebutted by numerous analogies that suggest the opposite conclusion. For example, courts sometimes analogize between nightscopes and binoculars to suggest that both are permitted,<sup>310</sup> or confuse matters even further by describing a device such as a sensoromatic tag reader, which "sees" something that a person cannot, as less intrusive than simple visual surveillance.<sup>311</sup> Beepers cause particular trouble in this regard, as courts characterize them in different cases as comparable to elec-

---

<sup>308</sup> *People v. Arno*, 90 Cal. App. 3d 505, 511, 153 Cal. Rptr. 624, 627 (1979). *See also* *People v. Ciochon*, 23 Ill. App. 3d 363, 366, 319 N.E.2d 332, 335 (1974) (finding no distinction between electronic eavesdropping and use of binoculars). *Cf.* *United States v. Kim*, 415 F. Supp. 1252, 1254-56 (D. Haw. 1976) (begging the question by limiting analogy to use of sophisticated aids); Note, *supra* note 82, at 391 (telescopes and binoculars are "potentially more intrusive" than wiretapping). It is also possible to compare unaided observations to electronic surveillance. Note, *Private Places*, *supra* note 2, at 974 (finding constitutional analogy between visual observation and electronic eavesdropping).

<sup>309</sup> *See, e.g.*, *United States v. Holmes*, 521 F.2d 859, 865 (5th Cir. 1975) (beeper), *aff'd en banc*, 537 F.2d 227 (5th Cir. 1976); *State v. Denton*, 387 So. 2d 578, 584 (La. 1980) (Watson, J., concurring) (nightscope); *Commonwealth v. Hernley*, 216 Pa. Super. 177, 183, 263 A.2d 904, 908 (1970) (Montgomery, J., dissenting), *cert. denied*, 401 U.S. 914 (1971) (video camera).

<sup>310</sup> *See, e.g.*, *People v. Vermouth*, 42 Cal. App. 3d 353, 362, 116 Cal. Rptr. 675, 680 (1974); *Newberry v. State*, 421 So. 2d 546, 549 (Fla. Dist. Ct. App. 1982) (also analogizing to flashlights). Analogies to flashlights are particularly common, even though the two devices operate totally differently. *See, e.g.*, *Bernstiel v. State*, 416 So. 2d 827, 827 (Fla. Dist. Ct. App. 1982). *See also supra* note 155 (various analogies of lights to binoculars). *Cf.* *People v. Beavers*, 393 Mich. 554, 580, 227 N.W.2d 511, 522, *cert. denied*, 423 U.S. 878 (1975) (Coleman, J., dissenting), and *State v. Glass*, 583 P.2d 872, 885 (Alaska 1978) (Burke, J., dissenting) (both would uphold consent monitoring, drawing analogy to use of binoculars).

<sup>311</sup> *See, e.g.*, *Lucas v. United States*, 411 A.2d 360, 364 (D.C. 1980); 1 W. LAFAVE, *supra* note 17, at 349. Probably the closest analogy to such devices is the dog sniff, which also reveals only whether a particular item is present. *See* *United States v. Place*, 462 U.S. 696 (1983), and *supra* notes 63-65 and accompanying text. Analogies are still treacherous, as a dog sniff may be relatively non-intrusive compared to most enhanced observations, *see supra* note 116, but it is still more intrusive than the use of eyeglasses. *Thomas*, 757 F.2d at 1367. *See also* Note, *Sense-Enhancing Devices*, *supra* note 41, at 1201 (analogizing dogs to flashlights and binoculars).

tronic surveillance, less intrusive than binoculars, helicopters, and radar, and identical to night-vision binoculars.<sup>312</sup> The overriding problem may be that enhancement devices are used in too many different settings for simple analogies to apply in all cases. Beepers that facilitate mobile surveillance are much like airplanes or very efficient naked-eye surveillance; beepers that identify the location of an item within a house, on the other hand, can be as informative and arguably as intrusive as wiretapping or video electronic surveillance.<sup>313</sup> All in all, analogies are of little assistance.<sup>314</sup>

The logical alternative is to evaluate the nature and effect of individual technological devices in light of the policies underlying the fourth amendment.<sup>315</sup> This requires reconsidering *Katz* in some respects, for the opinions and result, if not the amorphous methodology, provide sound policy guidance. At bottom the decision holds that our society expects freedom from warrantless electronic surveillance, but tolerates its use pursuant to judicial authorization. It is thus necessary to examine other technological aids in terms of

---

<sup>312</sup> See *United States v. Dubrofsky*, 581 F.2d 208, 212 (9th Cir. 1978)(night binoculars); *United States v. Moore*, 562 F.2d 106, 112 (1st Cir. 1977), *cert. denied*, 435 U.S. 926 (1978)(less intrusive); *United States v. Holmes*, 521 F.2d 859, 865 (5th Cir. 1975)(electronic surveillance), *aff'd en banc*, 537 F.2d 227 (5th Cir. 1976). *Dubrofsky* combines analogies by suggesting that the appropriate comparison is to the use of night-vision binoculars from the roof of a building with the owner's permission, that is, from a good vantage point at a lawful location. *Dubrofsky*, 581 F.2d at 211-12.

<sup>313</sup> The Supreme Court's decisions in *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984), see *supra* notes 66-67 and accompanying text, recognize that each analogy is accurate in its separate context, which results in sharply different requirements in different settings. *Karo* relied on the fact that the beeper was being monitored while it was in a residence, *Karo*, 468 U.S. at 714-18, thereby following the principles set forth in section IV.B.1. It may be that many attempts to draw lines based on technology largely collapse into reliance on such other tests. Still, one aspect of beepers that makes their technology a pertinent factor is that they are not in general public use. See *infra* note 347.

<sup>314</sup> See, e.g., Fishman, *supra* note 2, at 325 n.203 (noting the difficulty of drawing analogies concerning various forms of surveillance aids). This is also suggested in Justice Douglas' dissent in *United States v. White*, 401 U.S. 745, 756 (1971)(Douglas, J., dissenting). He noted that equating simple eavesdropping and electronic surveillance is much like equating gun powder and nuclear weapons. *Id.* at 756 (Douglas, J., dissenting).

<sup>315</sup> "Innovative encroachments on privacy require a return to first principles." *People v. Agee*, 200 Cal. Rptr. 827, 829 (Cal. Ct. App. 1984). See also *On Lee v. United States*, 343 U.S. 747, 759 (1952)(Frankfurter, J., dissenting)(raising concerns about "rapid advances of science"); *United States v. Kim*, 415 F. Supp. 1252, 1257 (D. Haw. 1976)("as the technological capability of law enforcement agencies increases, the Fourth Amendment must likewise grow in response"); Note, *Aerial Surveillance*, *supra* note 44, at 280 (courts need to measure impact of new investigative techniques on privacy protections); Note, *Electronic Visual Surveillance*, *supra* note 1, at 298 ("The present conditions of rapid technological development demand that the impact of new technology upon individual privacy be evaluated and controlled before its use becomes widespread . . .").

these concepts. Further complicating the matter, each device must be examined in context, for attitudes toward a single device may vary over time and concerning different uses.<sup>316</sup> Thus, one year's precedent about nightscopes in a rural area may have little relevance to later use in an urban area.

Judicial rhetoric provides substantial evidence of these societal attitudes. Courts emphasize that the fourth amendment's primary role with respect to technology is to respond to "the use of sophisticated modern mechanical or electronic devices and the frightening implications of their possible development."<sup>317</sup> Sophistication is a recurring concern, as courts explicitly or implicitly assert that privacy is at greater risk from new, complex and ever-more advanced technology than from yesterday's simpler aids.<sup>318</sup> Changing circumstances yield changing expectations. In 1951, Judge Frank described the use of a hidden radio microphone as "a method seemingly fantastic and smacking rather of lurid gangster movies or the comic strips than of American realities,"<sup>319</sup> a comment that

---

<sup>316</sup> In 1973, the Third District Court of Appeal for California cogently made this point in evaluating aerial surveillance:

At a recent but relatively primitive time, an X-2 plane could spy on ground activities from a height of 50,000 feet. Today's sophisticated technology permits overflights by vehicles orbiting at an altitude of several hundred miles. Tomorrow's sophisticated technology will supply optic and photographic devices for minute observations from extended heights. Judicial implementations of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance.

Dean v. Superior Court, 35 Cal. App. 3d 112, 116, 110 Cal. Rptr. 585, 588 (1973).

<sup>317</sup> United States v. Solis, 536 F.2d 880, 882 (9th Cir. 1976).

<sup>318</sup> See, e.g., United States v. Curtis, 562 F.2d 1153, 1156 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978) ("The three judges here concerned wish to make it clear that in this age of ever-advancing sophistication in the development of electronic eavesdropping devices, they are not insensitive to unjustifiable intrusions on the right of privacy, a right that is deemed to be most precious to the American people."); People v. Cook, 41 Cal. 3d 373, 382, 710 P.2d 299, 305, 221 Cal. Rptr. 499, 505 (1985) ("We reject the Orwellian notion that precious liberties . . . simply shrink as the government acquires new means of infringing upon them."); People v. Arno, 90 Cal. App. 3d 505, 511, 153 Cal. Rptr. 624, 627 (1979) (referring to "sophisticated optical systems, infrared process, and computer image enhancement"); Wheeler v. State, 659 S.W.2d 381, 388 (Tex. Crim. App. 1982) (referring to "exotic, sophisticated devices and techniques"). Cf. Lopez v. United States, 373 U.S. 427, 465-66 (1963) (Brennan, J., dissenting) (arguing that electronic recording renders use of even an overt agent an unconstitutional invasion of privacy).

<sup>319</sup> United States v. On Lee, 193 F.2d 306, 311 (2d Cir. 1951), aff'd, 343 U.S. 747 (1952) (Frank, J., dissenting). Lurid gangster movies and American realities have both changed since 1951. Today's standard fare in entertainment often couples graphic violence and technology that did not even make the comic strips in 1951. Consent monitoring, Judge Frank's subject matter, remains controversial but is now an everyday police practice in many jurisdictions and the Supreme Court's recurring battles over its constitutionality have stilled since 1971. See *supra* note 76. The relationship between real law enforcement activities and fictional portrayals may still be significant as an indicator of what the public perceives as standard law enforcement procedure.

would be naive if made today. Present concerns are more likely to center on the possibility of constant satellite observation or the ability of police officers to observe miniscule details at enormous distances even at night.<sup>320</sup> Such concerns are often raised in dissent, perhaps out of the judge's frustration that the majority has failed to recognize that the challenged use of technology heralds the arrival of the police state.<sup>321</sup>

Once the use of a particular technological device is upheld, time takes its toll on the device's sophistication:

[T]he more use of such exotic, sophisticated devices and techniques is condoned, the more will society become conditioned to take as reasonable that which an earlier generation rejected. When the invasion approved today is extended in the next case and then the next, all reasonable expectations are doomed if the peace officer can but find the technology that enables him steadily to intrude.<sup>322</sup>

This presents sad but accurate logic. No matter how doggedly courts try to design a timeless formula for fourth amendment analysis,<sup>323</sup> time changes society's expectations and understandings con-

---

<sup>320</sup> See, e.g., Note, *supra* note 57, at 759 (proposing analytical structure that encompasses "satellite remote sensing" to eliminate fears of "secret, minute, constant, and even automatic surveillance by an 'eye in the sky'"). See also *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (satellite observations may be fourth amendment searches); *United States v. Kim*, 415 F. Supp. 1252, 1254 (D. Haw. 1976) (detailed observation from a quarter of a mile away); *People v. Agee*, 200 Cal. Rptr. 827, 838 (Cal. Ct. App. 1984) (Evans, P.J., dissenting) (noting that law enforcement aerial surveillance is primitive compared to existing military technologies).

<sup>321</sup> Judge Frank's opinion in *On Lee* was in dissent. *On Lee*, 193 F.2d at 311 (Frank, J., dissenting). The opinion in *Curtis* was the functional equivalent of a dissent, as the panel expressed its own serious concerns about the warrantless installation of a beeper but upheld it because of a binding precedent within the circuit. *Curtis*, 562 F.2d at 1156 & n.2. See also *Florida v. Riley*, 109 S. Ct. 693, 702-03, 704-05 (1989) (Brennan, J., dissenting) (noting police state overtones of helicopter surveillance); *Dow*, 476 U.S. at 240 (Powell, J., dissenting) (arguing that majority's analysis will result in "gradual decay" of fourth amendment protections due to technology); *People v. Mayoff*, 42 Cal. 3d 1302, 1331 n.8, 729 P.2d 166, 185 n.8, 233 Cal. Rptr. 2, 21 n.8 (1986) (Bird, C.J., dissenting) ("Today, the sound of English messengers at the doorstep has been replaced by the drone of the police surveillance plane."). The quotation accompanying the following note is one of those rare judicial items, a dissent in a decision later reversed on rehearing. *Wheeler v. State*, 659 S.W.2d 388 (Tex. Crim. App. 1983), *rev'g* 659 S.W.2d 381 (Tex. Crim. App. 1982).

<sup>322</sup> *Wheeler*, 659 S.W.2d at 388. See also *Dow*, 476 U.S. at 251 (Powell, J., dissenting) (effect of court's holding will be reduction of personal privacy "as technological advances become generally disseminated and available in our society"); Note, *Electronic Visual Surveillance*, *supra* note 1, at 298 (technology must be regulated "before its use becomes widespread").

<sup>323</sup> *Katz*, at least as restated by Justice Harlan and interpreted over the years, tried to create a general formula capable of resolving the scope of the fourth amendment in all cases. The dissent in *Dow* noted this aspect: "The reasonable expectation of privacy standard was designed to ensure that the Fourth Amendment continues to protect privacy in an era when official surveillance can be accomplished without any physical pene-

cerning police practices. If the driving force behind fourth amendment protection is society's general sense of security from intrusion, that sense is inevitably affected by the extent to which the law fails to prevent widespread use of particular technological devices.

Looking first to the sophistication of surveillance devices, there is little agreement or explanation concerning permissible levels of technological assistance. A telescope may constitute "powerful technology,"<sup>324</sup> and the use of binoculars may not constitute a "sophisticated electronic surveillance technique,"<sup>325</sup> but courts expend little effort and have less success in defining the parameters of the inquiry. One attempt to provide a workable guideline suggests that impermissibly sophisticated techniques are those that replace rather than simply improve human senses.<sup>326</sup> It fails as a defining characteristic because it takes no account of either the level of intrusion or the difficulty of separating enhancement from replacement. Other attempts emphasize the level of intrusion, but do so in a fashion that suggests that the problem is more the unreasonable behavior of the observer than the device itself.<sup>327</sup>

---

tration of or proximity to the area under inspection." *Dow*, 476 U.S. at 247 (Powell, J., dissenting). Yet even the dissent inevitably focused to some extent on technological rather than privacy issues. *Id.* at 249-50 & n.12 (Powell, J., dissenting).

<sup>324</sup> *Kim*, 415 F. Supp. at 1256.

<sup>325</sup> *State v. Stachler*, 58 Haw. 412, 421, 570 P.2d 1323, 1329 (1977).

<sup>326</sup> *See, e.g., United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985), *cert. denied*, 474 U.S. 819 (1985)("[T]he officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument."). This is troublesome in two respects. First, the use of narcotics-sniffing dogs is generally seen as constituting a very limited intrusion, despite its conceptual distinction from magnification. *See, e.g., United States v. Place*, 462 U.S. 696, 707 (1983)(dog sniff does not constitute search where no seizure is involved); *United States v. Solis*, 536 F.2d 880, 882 (9th Cir. 1976)(recognizing that dogs have "keen olfactory sense" but that their use only presents limited intrusion). *Cf. United States v. Alborado*, 495 F.2d 799, 803, 806 (2d Cir. 1974)(magnetometer is relatively unintrusive but reveals presence of metal otherwise hidden from all human senses); *Lucas v. United States*, 411 A.2d 360, 363-64 (D.C. 1980)(similar analysis for sensoromatic device). Second, the line between enhancement and replacement sounds more meaningful than it really is. A dog's sense of smell may be many times that of the average person, but many enhancement devices are similar in effect. The difference between replacement and enhancement devices is that the inference from a "positive reading" is circumstantial in the former and direct in the latter. Since the underlying premise of using trained dogs and other replacement devices is that their circumstantial evidence is as reliable as direct evidence, it elevates form over substance to rely on the scientific theory of the "device" rather than on the extent to which it improves what humans can do. Still, the fact that some replacement devices are not widely used by the public supports requiring warrants and probable cause for law enforcement use. *See infra* note 347.

<sup>327</sup> *See, e.g., Commonwealth v. Williams*, 494 Pa. 496, 500, 431 A.2d 964, 966 (1981)(focus on duration of surveillance and observation of sexual conduct rather than



One technique, video camera surveillance, provides a good subject for analyzing the undue sophistication issue. While the Supreme Court has never addressed the problem of video electronic surveillance, a number of lower courts have considered the issue in recent years.<sup>328</sup> Most have engaged in interest balancing to conclude that video camera surveillance is permissible when it is conducted under the rigorous requirements established for audio electronic surveillance in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>329</sup> Analogy seems appropriate in this limited instance, largely because both techniques are highly intrusive and rely on electronic means.<sup>330</sup> One issue that courts have

---

nature of startron technology); *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 349-50, 529 A.2d 1085, 1092-93 (1987)(emphasizing actions of observing officers rather than the degree of enhancement afforded by binoculars). *Cf. Riley v. State*, 511 So. 2d 282, 287 (Fla. 1987), *rev'd*, 109 S. Ct. 693 (1989)(distinguishing helicopter observations from surveillance by fixed-wing aircraft by emphasizing the intrusiveness of the particular observations in the case). *See generally supra* Part IV.A.2 (the reasonable implementation norm).

<sup>328</sup> *See, e.g.*, *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251-52 (5th Cir. 1987); *United States v. Biasucci*, 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985); *In re Application for Order Authorizing Interception*, 513 F. Supp. 421 (D. Mass. 1980); *Ricks v. State*, 312 Md. 11, 537 A.2d 612, *cert. denied*, 109 S. Ct. 90 (1988).

<sup>329</sup> Pub. L. No. 95-351, 82 Stat. 211-225 (1968), codified at 18 U.S.C. §§ 2510-2520 (1982). *Torres* concluded that video surveillance under limitations analogous to wiretapping requirements meets fourth amendment restrictions, at least where it is not used in a person's residence. *Torres*, 751 F.2d at 882-83. *Torres* reached this result by balancing law enforcement and privacy interests. Noting that the camera was secreted in a bomb factory, the court held that such surveillance was appropriate because "[t]he benefits to the public safety are great and the costs to personal privacy are modest. A safe house is not a home." *Id.* at 883. *See also Cuevas-Sanchez*, 821 F.2d at 252 (5th Cir. 1987)(applying most Title III requirements to video electronic surveillance); *Biasucci*, 786 F.2d at 510 (following *Torres* and characterizing Title III as providing constitutional standards); *Application for Order Authorizing Interception*, 513 F. Supp. at 423 (applying Title III's provisions as a matter of "judicial deference" to congressional policy). *Cf. Ricks*, 312 Md. at 13-16, 20-24, 27-31, 537 A.2d at 613-14, 616-18, 620-21 (following *Torres* and *Teicher*); *People v. Teicher*, 52 N.Y.2d 638, 651-56, 422 N.E.2d 506, 512-15, 439 N.Y.S.2d 846, 852-55 (1981)(relying on general warrant authority and fashioning standards from *Katz* and *Berger*). *But see Sponick v. City of Detroit Police Dept.*, 49 Mich App. 162, 198-99, 211 N.W.2d 674, 689-90 (1973)(refusing to apply Title III to video surveillance). Commentators have noted various difficulties in developing a law of video electronic surveillance that meets constitutional standards. *See, e.g.*, Note, *supra* note 300, at 486-97 (concluding that courts have not yet found ways to implement the *Berger* and *Katz* standards for such surveillance); Note, *Electronic Visual Surveillance*, *supra* note 1, at 281-89 (concluding that reasonableness depends on resolving serious problems of particularity, duration, minimization, and necessity).

<sup>330</sup> "We think it also unarguable that television surveillance is exceedingly intrusive, especially in combination (as here) with audio surveillance, and inherently indiscriminate, and that it could be grossly abused—to eliminate personal privacy as understood in modern Western nations." *Torres*, 751 F.2d at 882. *See generally Biasucci*, 786 F.2d at 510 (noting "obvious similarities between aural and video electronic surveillance");

rarely addressed is whether the non-surreptitious use of video cameras in public places is permissible in the absence of a warrant.<sup>331</sup> Here the issues concerning societal attitudes are starkly presented. On the one hand, in many cases use of this technique may represent a reasonable response to high crime rates in particular areas where the permanent assignment of a police patrol is impracticable. On the other hand, it was this form of an open and permanent technological observation post that symbolized governmental oppression in Orwell's *1984*.<sup>332</sup>

As suggested above, one cannot fully evaluate the use of sophisticated surveillance devices without taking account of their history and contemporary use. The history of wiretapping suggests that our society has long abhorred the practice, even prohibiting it and related practices by legislation notwithstanding the Supreme Court's refusal to place it under constitutional control until 1967.<sup>333</sup> Aerial surveillance, on the other hand, carries little of the stigma

---

*Teicher*, 52 N.Y.2d at 653, 422 N.E.2d at 513, 439 N.Y.S.2d at 853 (recognizing that video electronic surveillance is highly intrusive). Where distinctions are drawn, they tend to treat video surveillance as more intrusive. See, e.g., *Application for Order Authorizing Interception*, 513 F. Supp. at 423 (characterizing this as the view of "[m]ost observers"); *Ricks*, 312 Md. at 20, 537 A.2d at 616 ("[V]ideo surveillance is more intrusive than audio surveillance."); Note, *Electronic Visual Surveillance*, *supra* note 1, at 294 (stressing that video surveillance cannot be escaped, involves exposure of a person's body, and violates absolute expectations of privacy, all unlike audio surveillance); Comment, *supra* note 84, at 1043 & n.6 (noting several respects in which this is true).

<sup>331</sup> See, e.g., *State v. Abisliman*, 437 So. 2d 181, 182-83 (Fla. Dist. Ct. App. 1983), *cert. denied*, 469 U.S. 833 (1984) (remote camera in hospital parking lot). Cases upholding surreptitious use in public, e.g., *Sponick*, 49 Mich. App. at 198, 211 N.W.2d at 690, and at private places with consent of building managers, e.g., *People v. Winograd*, 125 Misc. 2d 754, 755, 757, 480 N.Y.S.2d 419, 421, 422 (N.Y. Sup. Ct. 1984), support the notion that open use in public is permissible. See also *United States v. Karo*, 468 U.S. 705, 709 (1984) (surreptitious video camera used in commercial storage facility with consent of business—no analysis of issue); *State v. Okubo*, 3 Haw. App. 396, 410, 651 P.2d 494, 504 (1982), *aff'd on other grounds*, 67 Haw. 197, 682 P.2d 79 (1984) (videotaping of matters occurring in public raise no fourth amendment issues).

<sup>332</sup> Orwell, *supra* note 192, at 6-9. It is unlikely that courts or legislatures would strictly prohibit the practice. Banks and many other private entities have a substantial justification for overt video surveillance. Thus, courts would have to fashion some exceptions for justifiable uses of open video surveillance. This may be analogous to warned observations in public restrooms. See *supra* note 296 and accompanying text. If open observation may sometimes be reasonable in restrooms despite the intrinsic privacy of actions associated with such places, it is difficult to state categorically that open observation in public is inappropriate merely because electronic means are used.

<sup>333</sup> See, e.g., *Johnson v. State*, 2 Md. App. 300, 302-05, 234 A.2d 464, 465-67 (1967) (discussing history of aural surveillance from simple eavesdropping through interception of telegraph and telephone communications, noting federal and state laws prohibiting certain forms of electronic surveillance). See also *Berger v. New York*, 388 U.S. 41, 45-50 (1967) (discussing technology and public attitudes); S. Rep. No. 1097, 90th Cong., 2d Sess. 67, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2154 (describing the harmful effects of widespread electronic surveillance). See generally

attached to electronic surveillance. Law enforcement officials have used airplanes since the 1920s and the many non-law enforcement uses of aerial patrols render them a routine and generally approved police practice.<sup>334</sup> The history of visual electronic surveillance is much shorter. Congress did not regulate it in the 1968 Act because technology was not yet sufficiently advanced for law enforcement to use surreptitious video surveillance with any degree of success—not because of any affirmative policy decision to permit discretionary use of the technique.<sup>335</sup> If the courts continue to regulate video surveillance through analogies to aural electronic surveillance law, they may succeed in repeating the history of wiretapping. In that event, the public will become conditioned to expect privacy rather than intrusion in this regard and warrants will always be required.<sup>336</sup>

---

Fisher, *supra* note 200 at 127-32 (describing early legislation to prohibit electronic surveillance).

<sup>334</sup> For a good general treatment of the history of aerial patrols, see Comment, *supra* note 29. In California, which still produces the bulk of decisions in this area, airplanes were first used in 1929, a full-time aerial detail was formed in the 1930s, with substantial increases in use in each succeeding decade. *Id.* at 146-47. A 1960's study showed helicopters to be exceptionally useful for both law enforcement and various other public safety purposes, such as water and mountain rescues. *Id.* at 147. This seems to be at least part of the court's message in *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974), when it pointed out that helicopters are a "routine" aspect of police protection in Los Angeles. *Id.* at 839, 112 Cal. Rptr. at 765. See also *Florida v. Riley*, 109 S. Ct. 693, 696 n.2 (1989) (tracing history and describing use of helicopters in police work).

<sup>335</sup> *Torres*, 751 F.2d 875, 880-81 (noting that "television cameras in 1968 were too bulky and noisy to be installed and operated surreptitiously"). Cf. *Johnson*, 2 Md. App. at 303, 234 A.2d at 465 ("Up to this time, the problem of violation of privacy by visual means has not become as acute [as audio electronic surveillance], since visual sensory aids apparently have not reached the advanced state of development of audio sensory aids."). Times have changed. See Note, *supra* note 300, at 471 (noting increased use of video electronic surveillance); Feder, *Devices Gain in Range and Sophistication*, N.Y. Times, Nov. 26, 1986, at D5, col. 4 (noting that microchip technology now allows "astonishingly concealable" video cameras).

In 1977 Congress passed the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1977), which defines electronic surveillance to include television surveillance and submits aural and video electronic surveillance to the same procedural requirements. See generally 50 U.S.C. §§ 1801-1806 (1982). The courts have generally held that this Act does not regulate domestic law enforcement use of video technology. See *United States v. Biasucci*, 786 F.2d 504 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986); *Torres*, 751 F.2d at 881-82.

<sup>336</sup> See *Wheeler v. State*, 659 S.W.2d 381, 388 (Tex. Crim. App. 1983). See *supra* text accompanying note 322. The converse of judicial abdication and the resulting loss of privacy is that judicial enforcement of limitations on the use of technology allows individuals to expect privacy with confidence. Thus, the history of a particular technology is not simply a matter of how long it has been available, but an understanding of the ways in which people have become accustomed to its use.

*United States v. Tabora*, 635 F.2d 131 (2d Cir. 1980), provides an example. The government argued that telescopes had been in use since the 1600's, but the court was suitably unimpressed. *Id.* at 138 n.7. A long history of general use was not relevant to

Conditioning through general use has brought quite a few technological devices into the realm of acceptance and it would serve no purpose to limit their use at this time. Binoculars and flashlights are such common tools that it is unreasonable to limit their use in public areas solely because they are scientifically sophisticated and enhance the sense of sight.<sup>337</sup> There may, however, be a valid distinction between binoculars and telescopes, if only because binoculars are far more commonly used.<sup>338</sup> Still, the overall point is that “[i]t is unreasonable to expect law enforcement officials not to take advantage of modern technology, and tools that are in common usage, in the ordinary course of the performance of their duties.”<sup>339</sup>

---

the validity of telescopic observations into private homes. The general use of telescopes out of doors for many years, on the other hand, is relevant to the legitimacy of outdoor law enforcement use of binoculars and telescopes. Everyone from bird watchers to boy scouts has used them for so many years in that setting that society no longer has any realistic sense of privacy from such observation in outdoor areas.

<sup>337</sup> See generally *State v. Stachler*, 58 Haw. 412, 421 n.6, 570 P.2d 1323, 1329 n.6 (1977)(refusing to regulate binocular use under state constitution because binoculars were “commonly used in police work” at the time that a prohibition of invasions of privacy was added to constitution); *People v. Smith*, 42 N.Y.2d 961, 963, 367 N.E.2d 648, 649, 398 N.Y.S.2d 142, 143 (1977)(Jasen, J., dissenting)(“It is a well-recognized, fundamental, and traditional police practice to shine lights into dark places . . .”); 1 W. LAFAVE, *supra* note 17, at 330 (noting that the lack of a justifiable expectation of privacy from flashlight observations is mainly due to the fact that the flashlight is a common device); Note, *Electronic Visual Surveillance*, *supra* note 1, at 279 (contrasting beepers to “traditional methods” such as binoculars).

<sup>338</sup> Florida courts seem to draw this distinction. In *State v. Barnes*, 390 So. 2d 1243 (Fla. Dist. Ct. App. 1980), the court disallowed the use of a high-powered telescope, essentially because the observation was “accomplished by special equipment not in general use.” *Id.* at 1244. In *Bernstiel v. State*, 416 So. 2d 827 (Fla. Dist. Ct. App. 1982), a different appeals court concluded that *Barnes* implicitly authorized the use of “ordinary” binoculars. *Bernstiel*, 416 So. 2d at 829. See also *United States v. Taborda*, 491 F. Supp. 50, 53 (E.D.N.Y.), *vacated*, 635 F.2d 131 (2d Cir. 1980)(suggesting that telescopes are “powerful and sophisticated devices” not ordinarily used by general public); *United States v. Kim*, 415 F. Supp. 1252, 1256 (D. Haw. 1976)(warrantless observations by telescope disallowed, reliance on telescope being “special equipment not in general use”). This distinction between binoculars and telescopes is not universally recognized. See Note, *supra* note 82, at 393 (“Because the use of telescopes and binoculars is not widespread in our society, citizens maintain a reasonable expectation of privacy for activity and objects not readily observable by the naked eye.”).

<sup>339</sup> *Newberry v. State*, 421 So. 2d 546, 549 (Fla. Dist. Ct. App. 1982)(upholding use of nightscope). See also Note, *Sense-Enhancing Devices*, *supra* note 41, at 1179 (suggesting that use of a technological aid constitutes a violation of a REOP if it is “a sophisticated optical instrument not generally available”). One reason for the Supreme Court’s close division in the aerial search cases is that aerial surveillance is probably somewhere between binoculars and electronic surveillance in terms of common use. See *Florida v. Riley*, 109 S. Ct. 693, 696-97, 699, 701, 704, 705 (1989)(each opinion suggesting a somewhat different understanding of the prevalence of helicopter use). Authorities calling for close regulation stress that aerial surveillance is an unusual investigative means, e.g., Note, *Aerial Surveillance*, *supra* note 44, at 287, or a “rather novel form of police investigation,” *People v. Cook*, 41 Cal. 3d 373, 376, 221 Cal. Rptr. 499, 501, 710 P.2d 299, 301 (1985).

One attempt at fashioning a standard in this area compares law enforcement observations to those of a "reasonable private citizen."<sup>340</sup> The underlying premise is that police officers should be permitted to make observations using methods that are used by members of the general public. This is in one sense a version of the likelihood REOP approach; an expectation of privacy from a particular device is reasonable only if a private observer is unlikely to intrude in this manner.<sup>341</sup> In any event, the message is the same in each form: law enforcement officers are entitled to use those devices that private persons routinely use.<sup>342</sup>

This is not the usual principle in fourth amendment analysis. Courts and commentators commonly note that the fourth amendment imposes burdens on law enforcement officers that are not imposed on private citizens.<sup>343</sup> It is nevertheless a valid principle with

Other authorities may recognize that aerial observation results from recent technology, but stress that at least fixed-wing aircraft are commonly used by the public and are not the sort of sophisticated technology that people fear. See, e.g., *United States v. Broadhurst*, 805 F.2d 849, 853, 856 (9th Cir. 1986).

<sup>340</sup> Various versions of this analysis use slightly different terminology. See *United States v. Vilhotti*, 323 F. Supp. 425, 431 (S.D.N.Y.), *aff'd in part, rev'd in part*, 452 F.2d 1186 (2d Cir. 1971) ("reasonably respectful citizen"); Note, *Aerial Surveillance*, *supra* note 44, at 284-85 ("natural curiosity"); Note, *supra* note 57, at 746 ("reasonable passerby").

<sup>341</sup> See, e.g., 1 W. LAFAYE, *supra* note 17, at 419-21 (discussing aerial surveillance and noting the difference between normal observations and those made only after careful scrutiny); Note, *supra* note 57, at 752 (noting that people behave in accordance with what strangers can be expected to see); Note, *Tracking Katz*, *supra* note 41, at 1482 (this approach serves *Katz* policies).

In *Vilhotti* the court relied on this concept to uphold an officer's flashlight examination of the interior of a garage from outside. *Vilhotti*, 323 F. Supp. at 431-32. It concluded that a reasonably respectful citizen might have made the observation, emphasizing the "extent of social inhibition on natural curiosity and . . . the degree of care required to insure privacy." *Id.* at 431.

<sup>342</sup> See Note, *supra* note 57, at 755-56 ("It is no longer reasonable to expect that people in the air will not observe the ground; indeed many members of the public ascend solely in order to look down."). Under this theory, law enforcement officers are permitted to make aerial observations that are consistent with those that private citizens would make in routine overflights. *Id.* at 756. This is distinctly more limited than the theory used by the Supreme Court in the aerial search cases, which seemed to set the benchmark at "possible observation." See *supra* text accompanying notes 68-74. One problem that results from this approach is that it revisits all of the complications of defining the appropriate level of likelihood that now confounds REOP analysis. See *supra* notes 109-112 and accompanying text.

<sup>343</sup> See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (fourth amendment applies only to government action). See generally *United States v. Kim*, 415 F. Supp. 1252, 1256 (D. Haw. 1976) ("lack of concern about intrusions from private sources has little to do with an expectation of freedom from systematic governmental surveillance"); *People v. Agee*, 200 Cal. Rptr. 827, 836 (Cal. Ct. App. 1984) (scrutiny from private overflights does not subject people to scrutiny from law enforcement overflights); *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 348, 529 A.2d 1085, 1092 (1987) (that various persons could view contraband is irrelevant, as the fourth amendment is directed to governmen-

respect to observations. Coverage of "actors" and coverage of "actions" are two separate issues. The fact that only official actors are subject to the fourth amendment does not mean that the prevalence and acceptance of certain private "actions" is irrelevant to defining that outer boundaries of the fourth amendment. Application of the fourth amendment to the use of technological devices requires an evaluation of societal values, and there is no better evidence of such values than non-constitutional law and practices concerning private use of a particular device.<sup>344</sup> Thus, it is simply myopic to deny law enforcement officers access to those tools that are permitted in private surveillance and are commonly used by criminals.<sup>345</sup> It is instructive that traditional fourth amendment limitations on physical invasions are usually paralleled by laws against private trespasses and that *Katz* was promptly followed by a federal statute that prohibited private electronic surveillance and limited private access to eavesdropping devices.<sup>346</sup> If society had been unwilling to regulate

---

tal intrusion); *State v. Ludvik*, 40 Wash. App. 257, 262, 698 P.2d 1064, 1067 (1985) (fourth amendment does not apply to private persons acting without official involvement). See also 1 W. LAFAVE, *supra* note 17, at 421-22 (noting that casual observation from private aircraft is different from intentional observation from police airplanes); Note, *Katz and the Fourth Amendment*, *supra* note 44, at 81 (fact that private citizens can make observation is not dispositive, people rarely eavesdrop or peep in windows, and law enforcement restrictions are not measured against private behavior).

<sup>344</sup> Controversy concerning the increasing use of technology by reporters suggests that there are few established principles concerning the ethics of private use of sophisticated devices. See Zuckerman, *Sticky Issues in Gumshoe Journalism*, TIME, Aug. 8, 1988, at 72 (discussing use of miniature cameras and microphones, hidden video cameras, and nightscopes). See also Wills, *Did Gary Get Screwed?*, Village Voice, May 19, 1987, at 17 ("[I]f God didn't mean for reporters to stake out candidates' houses, he wouldn't have invented the telephoto lens.").

<sup>345</sup> See *State v. Spica*, 389 S.W.2d 35, 45-46 (Mo. 1965), *cert. denied*, 383 U.S. 972 (1966) (upholding consent monitoring, noting that criminals use new devices and police should have similar right). Cf. Comment, *supra* note 43, at 210 (arguing for reliance on private norms in this area and defending holding government to same standards). See also *United States v. Knotts*, 460 U.S. 276, 284 (1983) (police efficiency is a virtue and has no role in and of itself in constitutional analysis); *United States v. Agapito*, 620 F.2d 324, 332 (2d Cir.), *cert. denied*, 449 U.S. 834 (1980) (emphasizing a second theme, that the fourth amendment does not require "gentlemanly" behavior); *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979) (relying on "the prevalence of uninvited listeners in human society" as supporting law enforcement eavesdropping); *Vilhotti*, 323 F. Supp. at 431 (adopting the "reasonably respectful citizen" standard as properly reflecting contemporary norms underlying *Katz* standard); *Newberry v. State*, 421 So. 2d 546, 549 (Fla. Dist. Ct. App. 1982) ("It is unreasonable to expect law enforcement officials not to take advantage of modern technology, and tools that are in common usage, in the ordinary course of the performance of their duties.").

<sup>346</sup> See, e.g., *United States v. Carriger*, 541 F.2d 545, 551 n.1 (6th Cir. 1976); *People v. Triggs*, 8 Cal. 3d 884, 893, 506 P.2d 232, 238, 106 Cal. Rptr. 408, 414 (1973) (both relying on statutes prohibiting private invasions as establishing an enforceable public policy against governmental intrusions). With respect to private electronic surveillance, see: 18 U.S.C. § 2511 (1984) (unauthorized electronic surveillance constitutes a crime);

such private electronic surveillance, it would be difficult to conclude that society demands freedom from the same intrusions by law enforcement officers. On a more subtle level, common privacy invasions define general privacy expectations. Unless society demands privacy from use of a particular technology, it cannot reasonably expect privacy from such use. If it tolerates widespread discretionary use of a specific device, law enforcement use of that device should not be limited by the warrant and probable cause requirements.

The result is that there are few limitations based solely on the nature of particular technological devices. Aural electronic surveillance fits into this category, largely because Title III has successfully prevented it from becoming a generally available technology. The same is true of video electronic surveillance, but it is imperative that the law regulate private use or else video surveillance may eventually be thought of as nothing more exotic than remote control binoculars. The public rarely uses beepers and some other "replacement" technologies, and these should therefore be governed by the warrant clause.<sup>347</sup> Most photographic techniques, on the other hand, are no longer so unusual as to constitute highly so-

---

18 U.S.C. § 2512 (1984)(manufacture, distribution, possession, and advertizing of interception devices constitutes a crime); 18 U.S.C. § 2513 (1984)(such devices may be confiscated).

If anything, society tolerates more intrusive conduct from law enforcement officers than from private citizens. See, e.g., Note, *Private Places*, *supra* note 2, at 979 (footnote omitted)("To strip law enforcement of all furtive fact-finding techniques that would be offensive coming from a private citizen would be a radical step . . ."). Perhaps one reason for this is the unarticulated requirement of a legitimate purpose. Private activities are obviously not limited to legitimate purposes, as binoculars and similar devices can be used for "tom peeping" as well as for nature study. Of course, where private persons use binoculars for a legitimate purpose, the use is not offensive. To some extent, this was the court's point in *Kim* when it characterized the prevalence of "tom peeping" as irrelevant to the government's telescopic observations of Kim's apartment. *Kim*, 415 F. Supp. at 1256. Some improper use of technology does not make all use of technology unreasonable. On the other hand, *Kim* is limited by location. See *supra* note 137. If the agents had observed Kim outdoors, the prevalence of legitimate enhanced observations by members of the public would support the government's use of a telescope.

<sup>347</sup> See Note, *Tracking Katz*, *supra* note 41, at 1488 (suggesting that people will look in windows but will not use beepers). This goes beyond the Supreme Court's holding in *Knotts*, but may be the inevitable result of the holding in *United States v. Karo*, 468 U.S. 705 (1984). For discussion of *Karo*, see *supra* note 67.

Other technological devices raise issues that cannot be fully resolved here. Private citizens rarely use magnetometers, but the same is not true of the somewhat similar sensoromatic devices. The common judicial treatment of the use of such devices as a search not requiring a warrant or probable cause may simply be an example of a correct result for the wrong reason. Nevertheless, such devices and other sophisticated but relatively non-intrusive devices such as narcotics-sniffing dogs suggest that sophistication is not the end of the analysis.

phisticated technology.<sup>348</sup> Magnification devices present a more difficult problem, as indicated by the somewhat artificial line occasionally drawn between binoculars and telescopes. Still, the fact that telescopes are disapproved primarily in home observation cases suggests that courts should not subject the outdoor use of such devices to the warrant clause.<sup>349</sup> Similarly, aerial observation is simply too common for courts to subject it to such regulation simply because of its technological nature.<sup>350</sup> At present, therefore, only electronic surveillance and "replacement" technologies used primarily by the government are sufficiently sophisticated to mandate judicial supervision in all cases. Other technologies, if used to make observations into areas other than houses or restrooms, are subject only to the general norms.

## V. CONCLUSION

Courts and legislatures have done relatively little to place visual searches under legal control. The formalistic attitude of the entry paradigm concerning property restrained regulation for most of the nation's history, and the well intentioned but ultimately empty tautology of the expectations paradigm changed the rules without solving the problem. Technological progress and increasing aggressiveness by law enforcement agencies mandate that the legal system develop a new approach capable of addressing the propriety of governmental observations.

Too many courts in the past have assumed that the fourth amendment imposes few, if any, restrictions on law enforcement observations. The trend may be changing, as some courts are now seeking to identify principles in this area. This development proba-

---

<sup>348</sup> See, e.g., *United States v. Allen*, 675 F.2d 1373, 1380 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981)(use of special lens upheld because "[s]uch equipment is widely available commercially and is not more sophisticated than lenses generally available to the public"); 1 W. LAFAVE, *supra* note 17, at 345 (concluding that enhanced photography is permissible). *But see* Saltzburg, *supra* note 58, at 25 (describing cameras used in aerial surveillance as "modern sophisticated equipment").

<sup>349</sup> See *supra* notes 136-41. It is also difficult to draw straight lines in this regard. A strong set of binoculars or a telephoto lens may be far more intrusive than a simple telescope.

<sup>350</sup> See *supra* notes 108, 334. The Supreme Court stated in *California v. Ciraolo*, 476 U.S. 207 (1986):

One can reasonably doubt that in 1967 Justice Harlan considered an aircraft within the category of future "electronic" developments that could stealthily intrude upon an individual's privacy. In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.

*Id.* at 215.



bly results from the enormous recent advances in technology, which have forced a sufficient number of people to recognize the privacy implications and to raise concerns in this area. Nevertheless, the development of legal doctrine has been halting and inconsistent, largely because courts and legislatures have too often focused on isolated devices and practices without taking cognizance of the more general problems raised by law enforcement observations.

The first step toward regulating this activity on a general basis is to admit that observations are searches. Too often courts deny that looking is searching, even though the rationale of *Katz* and the reality of modern technology compel the conclusion that many constructive invasions are extremely intrusive. Characterizing law enforcement observations as visual searches brings them under constitutional control and permits effective judicial protection of privacy and security. This simple step—adoption of the intrusion paradigm—provides a theory of fourth amendment analysis that is both inclusive and coherent.

The four norms proposed in this Article together constitute a workable framework for implementing the intrusion paradigm. Every visual search must have a legitimate purpose and be conducted in a reasonable manner. These two general norms, which would apply to all observations and all other searches, should serve to prevent arbitrary conduct and minimize intrusions. More offensive observations would be subject to the warrant and probable cause requirements. One specific norm would require judicial authorization for enhanced or otherwise unnatural observations into houses or restrooms; the second would require judicial authorization for observations using sophisticated technology not widely used by members of the public. Adoption of these norms would protect society from many intrusive surveillance practices without depriving the government of the reasonable use of modern technology for legitimate law enforcement purposes.<sup>351</sup>

---

<sup>351</sup> Many people may want greater protection from observations. Moreover, consistent application of these four norms may identify gaps or additional problems that require creative applications of the fourth amendment. This is consistent with the paradigm concept, a theory that consolidates and explains existing approaches, but which leaves room for developing exceptions and additional principles. More stringent restrictions can be imposed through state constitutions or legislation.

Also consistent with the paradigm concept, the four norms may serve as a model for regulating other uses of technology that affect privacy. This Article has adhered to the traditional view of the fourth amendment as applicable only to information gathering, but there may be other vehicles for regulating other forms of governmental privacy invasions. Computer data collection would seem to be an obvious target for regulation. Privacy would be enhanced if governmental agencies were subject to restrictions on computer use analogous to those proposed for observations. The general norms could

The intrusion paradigm and the four norms proposed in this Article provide one solution to the seemingly intractable problem of the increasingly technological society. At a minimum they would limit the adverse effects of sophisticated technology used in police surveillance. They respond to the worst present abuses and provide a means for effective control of the worst future abuses. In a doctrinal field mined with awkward, inconsistent, and incoherent decisions, they provide four guideposts for the preservation of privacy from unreasonable searches and seizures.

---

consist of requirements that records be maintained only for legitimate purposes and that records be accessed and used reasonably. The specific norms could include a prohibition of maintaining any records of exceptionally private information and a prohibition of domestic use of sophisticated computer technology not available to the public.