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IS THE FOURTH AMENDMENT OBSOLETE?—RESTATING THE FOURTH AMENDMENT IN FUNCTIONAL TERMS

John M.A. DiPippa*

INTRODUCTION

We are in the midst of a technological revolution. Surveillance devices are becoming smaller and more sophisticated and, therefore, easier to hide and more useful.¹ We provide an enormous amount of information about ourselves to the Government, all of which is stored and cataloged.² While much of this information previously existed, it was poorly organized and access to it was difficult.³ Today, the capability to organize and retrieve this information is at hand.⁴ At the same time, the amount of available information about us is increasing. By 1990, some five million households will be hooked up to interactive cable television systems.⁵ These systems allow homeowners to conduct a range of activities from their homes using only their personal computers and

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1. Landever, *Electronic Surveillance, Computers, and the Fourth Amendment - The New Telecommunications Environment Calls for Reexamination of Doctrine*, 15 U. Tol. L. Rev. 597, 598 (1984); Fishman, *Electronic Tracking Devices and the Fourth Amendment: Knotts, Karo and the Questions Still Unanswered*, 34 CATH. U. L. REV. 277, 281-84 (1984-85) (Discussion of the uses of electronic tracking devices); See generally S. MANWARING-WHITE, *THE POLICING REVOLUTION: POLICE TECHNOLOGY, DEMOCRACY AND LIBERTY IN BRITAIN* (1983).

2. Landever, *supra* note 1, at 598; Note, *Intrusions Upon Informational Seclusion in the Computer Age*, 17 J. MARSHALL L. REV. 831 (1984).

3. Halls, *Raiding the Data Banks: A Developing Problem for Technologists and Lawyers*, 5 J. CONTEMP. L. 245, 246 (1978); D. BURNHAM, *THE RISE OF THE COMPUTER STATE* at 11 (1983) ("Computers have allowed far more organizations to have far more access to far more people at far less cost than ever was possible in the age of the manual file and the wizened file clerk. [Moreover] much of this information would not have been collected at all, but instead would have been stashed away in our homes.")

4. Soma & Wehmhoefer, *A Legal and Technical Assessment of the Effect of Computers on Privacy*, 60 DEN. L.J. 449 (1982-83).

5. Note, *Interactive Cable Television: Privacy Legislation*, 19 GONZ. L. REV. 709 (1983-84).

telephones.⁶ Access to this information "will make society a transparent world in which our homes, finances, and associations will be bared to a wide range of observers."⁷

Current fourth amendment law allows the government unrestricted access to this information because all of it was "voluntarily exposed" to third parties and, therefore government acquisition of it is not a fourth amendment search or seizure.⁸ Even the development of more exotic detection methods may not be searches covered by the amendment.⁹ The Framers of the fourth amendment "could not anticipate the invention of telephones, computers, data banks, or any of the electronic miracles of potential mischief surrounding us."¹⁰ Concerned with searches for subversive literature and untaxed goods the Framers adopted a system based on procedural restraints. In a slower age, these procedural restrictions worked to limit the exercise of arbitrary governmental power. In an age where reams of private information can be retrieved in minutes, it seems Canute-like to invoke the fourth amendment to halt governmental invasions of privacy.¹¹ The technology may be advancing so rapidly that any limitations may be political rather than constitutional.¹² Thus, one is tempted to ask:

6. These services include: home banking, instant voting, storage of personal information, home shopping, instant response study courses, automatic regulation of utility use, 1,000 specialized data bases and emergency home monitoring. *Id.* at 710.

7. Soma & Wehmhoefer, *supra* note 4, at 449; *See Note, supra* note 5, at 710 ("Cable company computers receive information on when, and if, you pay your bills, your bank account transactions, political and religious views, identity of housemates, consumers purchases, programs watched and information requested.").

8. *United States v. Miller*, 425 U.S. 435 (1976). *See also, Selvin, As Interactive Cable Enters, Does Privacy Go Out the Window*, 4 J. COM. ENTERTAINMENT L.J., 781, 791-92 (1982). *Infra see* notes 32-39. *Cf. Smith v. Maryland*, 442 U.S. 735 (1979).

9. *See generally, Ulemen, 1991: A Fourth Amendment Odyssey*, 70 A.B.A.J. 86 (1984). *Cf. United States v. Jacobsen*, 466 U.S. 109 (1984).

10. Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1490 (1979).

11. *Cf. Schwartz, Chief Justice Warren and 1984*, 35 HASTINGS L.J. 975, 985 (1984) (Suggests that former Chief Justice Warren may have been "Canute-like in interposing the Bill of Rights" in the face of the ever increasing ability of government to violate individual rights.).

12. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 558 (1978); R. MORGAN, *DOMESTIC INTELLIGENCE* at 12 (1980). *See generally, Soma & Wehmoefer, supra* note 4, at 482, where the authors call for an international convention on privacy; Hoff, *Two-way cable television and Informational Privacy*, 6 J. COMM. ENTERTAINMENT L.J. 797 (1984) (where the author proposes a model act for the protection of interactive cable users' privacy); and O'Brien, *The Detection and Re-*

is the fourth amendment obsolete?

The short answer to this question is no. The fourth amendment is not obsolete because the core values it seeks to protect are still important to a free society.¹³ It is not "necessarily technology that impacts society for good or bad, but its uses, which are, in turn, shaped by the values of the society and by the historical context in which the technology is used."¹⁴ The current technological changes require us to re-assert the values which prompted the Framers to draft the fourth amendment.¹⁵ These values have become more and not less important.¹⁶

Instead of asking if the fourth amendment is obsolete the better question, and the one this article addresses, is how to restate fourth amendment values to adequately protect individuals from the danger of sophisticated and advancing surveillance and detection technology.¹⁷

covery of Contraband Nuclear Material, 15 AKRON L. REV. 57 (1981) (where the author suggests that current Fourth Amendment doctrine would not stop massive invasions of privacy in search of stolen nuclear material). See also, Kirby, *Access to Information and Privacy: The Ten Information Commandments*, 55 U. CIN. L. REV. 745, 751 (1987).

13. Clark, *Historical Antecedents of the Constitutional Right to Privacy*, 2 U. DAYTON L. REV. 157, 198 (1977) ("The Constitution is, among other things a statement of enduring values. While the challenge to those values may change over time, the values remain constant . . . while the problem in the seventeenth and eighteenth centuries might have been the invasion of the home by means of general warrants, history demonstrates the value at stake there was the same as that endangered by the technology of the space age: privacy.") See also *Harris v. United States*, 331 U.S. 145 (1947) (Frankfurter, J., dissenting) (Fourth Amendment is not an outworn bit of eighteenth century romantic rationalism but an indispensable need for a democratic society.)

14. Weingarten, *Information Technology and Privacy Trends in Products and Services*, in *Invited Papers on Privacy: Law, Ethics, and Technology (National Symposium on Personal Privacy and Information Technology)* 15 (1982).

15. Bacigal, *supra* note 12, at 558.

16. Hufstедler, *supra* note 10, at 1523. See *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

17. This article will not discuss the related civil problems created by this burgeoning technology. The literature in this area is rich and expansive. The classic works include Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003 (1966) A. WESTIN, *PRIVACY AND FREEDOM* (1967), and A. MILLER, *ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS* (1971). See generally R. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY* (1985); BENDER, *PRIVACY, IN OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY*, 243-46, 250-51 (W. Dorsen, Ed. 1984); Halls, *supra* note 3. Because this article deals only with constitutional issues, it will not address the Federal wiretap law, 18 U.S.C. 2510-2520 (1984) commonly known as Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Title III proscribes wire tapping or bugging unless certain procedural safeguards are met, 18 U.S.C. 2516(1) (Attorney General must authorize

I

At one time, the Supreme Court interpreted the search and seizure clause of the fourth amendment to have independent significance. Warrantless searches were judged by the standard of reasonableness found in the first clause.¹⁸ In recent years, the

application for an order), and unless a prior judicial approval is obtained. (Judge of court of competent jurisdiction can issue order authorizing the procedure with limited scope and duration.) 18 U.S.C. 2518. Violations of Title III can result in criminal penalties, 18 U.S.C. 2511(1) (willful violations punishable by \$10,000 fine, five years in prison, or both). *See, e.g., United States v. Ross*, 713 F.2d 389 (8th Cir. 1983); *United States v. Goldsmith*, 483 F.2d 441 (5th Cir. 1973); civil liability, 18 U.S.C. 2520 (authorizes recovery of actual damages or a civil penalty, punitive damages, and costs and fees); or suppression of the evidence in a criminal proceeding. 18 U.S.C. 2518(10)(a) and (b). Although the Supreme Court has not yet considered the constitutionality of Title III, every court save one to consider the question has upheld the Act against constitutional challenges. *See J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE* 33 n.116-17 (1977) for a collection of cases. Finally even though Title II was designed to bring uniformity to this area of the law, states may adopt their own laws. 18 U.S.C. 2516(2). It is conceded, however, the state laws may be more protective of individual rights but not less protective than Title III. S. REP. NO. 1097, 90th Cong., 1st Sess., reprinted in 1968 U.S. CODE CONG. AND AD. NEWS 2112, 2187.

Twenty-seven states responded by enacting their own legislation. C. FISHMAN, *WIRETAPPING AND EAVESDROPPING* 6 n.14 (1978) for a collection of jurisdictions. This is not to say that Title III has solved all of the problems surrounding wiretaps. The vast majority of wiretaps are conducted without following the statutory procedures because of the consent of one of the parties. Moreover, the act does not apply to either video surveillance or to the interception of computer data transmissions. *U.S. v. Torres*, 751 F.2d 875 (7th Cir. 1985) *cert. denied*, 470 U.S. 1087 (1985) (Television surveillance of the interior of a private building is not *per se* unconstitutional, nor does Title III forbid it); *United States v. Serdlitz*, 589 F.2d 152 (4th Cir. 1978) *cert. denied* 441 U.S. 922 (1979) (Interception of computer data transmission did not violate Title III.) *See also*, Hoff, *Two-way Cable Television and Informational Privacy*, 6 COMM/ENT J.COM. ENTERTAINMENT L. 797, 813 (1983) and Note, *United States v. Torres: The Need for Statutory Regulation of Video Surveillance*, 12 J. LEGIS. 264, 269. Finally, significant technological developments since the passage of Title III have made parts of it obsolete. Fein, *Regulating the Interception and Disclosure of Wire, Radio, and Oral Communications: A Case Study of Federal Statutory Antiquation*, 22, HARV. J. OF LEGIS. 47 (1985). Cordless telephones provide the best example of this development. Cordless phones are not covered by Title III because they use radio frequencies accessible to the public. Fein, 22 HARV.J. OF LEGIS. 47, 64. Moreover, courts have held that users have no expectation of privacy in their conversations on cordless phones. *State v. DeLaurier*, 488 A.2d 688 (R.I. 1985); *State v. Roudybush*, 235 Kan. 834, 686 P.2d 100 (1984); *State v. Howard*, 235 Kan. 236, 679 P.2d 197 (1984). *See Comment, Distinguishing Between Radio-Telephone and Wire Communications: The Kansas Approach to Cordless Telephone Conversations*, 24 WASHBURN L.J. 175 (1986).

18. *See, e.g., Harris v. United States* 331 U.S. 145 (1947) (Warrantless search of arrestee's home upheld because not unreasonable under the circumstances); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (Test for reasonableness is flexible and depends on facts and circumstances of each case). The court was not entirely consistent in this emphasis, however, *See Amos v. United States*, 255 U.S. 313 (1921) and *Weeks v. United States*,

Court has eschewed this standard¹⁹ for a more mechanical focus: warrantless searches are presumed unreasonable unless justified by one of several exceptions.²⁰ Of course, a search conducted pursuant to a warrant must meet the requirements of the second clause of the amendment: probable cause,²¹ particularity,²² and a neutral,

232 U.S. 383 (1914).

19. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967). The Court explicitly repudiated *Rabinowitz* and *Harris* in *Chimel v. California*, 395 U.S. 752 (1969). The seeds of this rule were planted even as *Harris* was being decided. Compare *Johnson v. United States*, 333 U.S. 10, (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent . . . there are exceptional circumstances in which, balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant to search may be dispensed with") and *Harris v. United States*, 331 U.S. 145 (1947) (Jackson, J., dissenting) (The fair implication of the Constitution is that no search of premises, as such, is reasonable except the cause for it be approved and the limits of it fixed and the scope of it particularly defined by a disinterested magistrate.).

20. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) citing *Katz v. United States*, 389 U.S. 347 (1967). Although the Court has spoken of a few, well-defined and jealously guarded exceptions, rhetoric does not match reality. There are at least seven exceptions to the warrant requirement: *Chimel v. California*, 395 U.S. 752 (1969) (searches incident to arrest); *Chambers v. Maroney*, 399 U.S. 757 (1966) (exigent circumstances); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (station-house inventories); *Texas v. Brown*, 460 U.S. 730 (1983) (plain view); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent searches); *Terry v. Ohio*, 392 U.S. 1 (1968) (protective "frisk"). See Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY. 198 (1977).

21. The police have probable cause when: "[T]he facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense" or that particular items connected and criminal activity are located in a particular place. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Although the requirement of probable cause applies to all warrants, some administrative warrants are governed by a special probable cause standard. *Camara v. Municipal Court*, 387 U.S. 523 (1967). Probable cause to issue warrants for area searches for housing code compliance exists "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Camara*, 387 U.S. at 538. Warrants must be issued by a "neutral and detached magistrate." *Johnson v. United States*, 333 U.S. 10 (1948). Compare *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Attorney General of State not neutral and detached) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (Magistrate who accompanied police in raid on adult bookstore to review obscenity of items seized no longer detached). A magistrate need not be a lawyer or a judge so long as he/she is neutral and detached and is capable of determining probable cause. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). Any warrant issued must particularly describe the place to be searched and the things to be seized. *Marron v. United States*, 275 U.S. 192 (1927). Probable cause is a non-technical, common-sense concept. *Illinois v. Gates*, 462 U.S. 213 (1983). Reviewing courts must defer to a magistrate's determination of probable cause if a "substantial basis" supports it. *Masachusetts v. Upton*, 466 U.S. 727 (1984).

22. *Marron v. United States*, 275 U.S. 192 (1927); *Berger v. New York*, 388 U.S. 41 (1967) (Wiretap statute that allowed issuance of warrant on reasonable ground to believe

detached magistrate.²³ If a warrantless search has not fallen within one of the exceptions or if the warrant has not complied with the requirements of the amendment, the evidence obtained as a result of the search must be suppressed.²⁴ This emphasis on the warrant clause has some, but not unanimous, historical support.²⁵

In any view of the fourth amendment the threshold definition of a "search" or "seizure" becomes important. If police activity is not a search or seizure then neither the reasonableness clause nor the warrant clause applies.²⁶ The police are free to pursue the particular investigative activity so long as it does not violate another constitutional provision.²⁷

that evidence of a crime may be obtained violated Fourth Amendment rule of particularity); *Marcus v. Search Warrant*, 367 U.S. 717 (1961) (Warrant to seize allegedly obscene magazines must be particularized and may not issue on officer's conclusory assertion).

23. *Johnson v. United States*, 333 U.S. 10 (1948). See *supra* note 21.

24. *Mapp v. Ohio*, 367 U.S. 643 (1961). But see *United States v. Leon*, 468 U.S. 897 (1984) (Suppression is not a proper remedy if police rely in objective good faith on a search warrant that may not meet the required standards for probable cause). The exclusionary rule is not applicable in Grand Jury proceedings, *United States v. Calandra*, 414 U.S. 338 (1974), or in some civil tax proceedings, *United States v. Janis*, 428 U.S. 433 (1976), or in civil deportation hearings, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) or when police act in objectively reasonable reliance on statute authorizing warrantless administrative search, *Illinois v. Krull*, 107 S. Ct. 1160 (1987).

25. See *infra*, text accompanying notes 183-189. See Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M. L. REV. 33 (1979-80) (Tension between two clauses historically part of fundamental Fourth Amendment debate).

26. See, e.g., *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974). See generally, Moylan, *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. ILL. U.L.J. 75. See also *Oliver v. United States*, 466 U.S. 170 (1984) (Probable Cause not necessary when police not conducting a search); *Hudson v. Palmer*, 468 U.S. 517 (1984) (Particularity not required); *Illinois v. Andreas*, 463 U.S. 765 (1983) (Warrant not needed).

27. In one early case the Supreme Court suggested that the protections of the fourth and fifth amendments ran together. *Boyd v. United States*, 116 U.S. 616 (1886) (court noted the "intimate relation" of the two amendments). This position has been eroded steadily over the years until its implicit reversal in *Couch v. United States*, 409 U.S. 322 (1973); See Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184 (1977). Given the testimonial requirement for fifth amendment protection, *Schmerber v. California*, 384 U.S. 757 (1966), and the requirement of formal judicial proceedings to invoke the sixth amendment, *Massiah v. United States*, 377 U.S. 201 (1964), the only other constitutional provision which might restrain the police in the investigative stage of a criminal case is the due process clause of the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.") The violation must be inimical to a scheme of "Ordered Liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Such an approach only protects against extremely abusive practices. *Rochin v. California*, 342 U.S. 165 (1952) (police "shocked the conscience" of the court when they illegally entered defend-

The modern standard for determining whether or not police activity is a search comes from *Katz v. United States*.²⁸ Rejecting the parties' formulation of the issues, Justice Stewart declared:

[T]he fourth amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected.²⁹

Justice Harlan wrote a concurring opinion which over time has become the accepted interpretation of *Katz*. Harlan wrote that the proper inquiry was two-fold. First, did a person exhibit an actual (subjective) expectation of privacy and, second, will society recognize this expectation as reasonable.³⁰ In practice, these two prongs have merged into a single definition: "[a] search occurs when an expectation of privacy that society is prepared to consider reasonable" is infringed.³¹

Although *Katz* was hailed as a great achievement, it has failed to live up to its potential.³² Using the *Katz* standard, the Supreme Court has held that the word "search" did not include bugged informers,³³ voice and handwriting exemplars,³⁴ or acquisition of per-

ant's home, tried to pry open his mouth, and then forced a doctor to pump his stomach). Presumably, exclusion is the appropriate remedy for evidence obtained in this manner. *Mapp v. Ohio*, 367 U.S. 643 (1961). *But cf.* *United States v. Leon*, 468 U.S. 897 (1984) (exclusion appropriate when it will deter police conduct). Once investigative conduct falls outside of the fourth amendment's scope the conduct is not bound for all practical purposes by any constitutional restrictions.

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

29. *Id.* at 351-52.

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

31. *United States v. Jacobsen*, 466 U.S. 109 (1984).

32. Compare *Kitch*, *Katz v. United States: The Limits of The Fourth Amendment*, 1968 SUP. CT. REV. 133 (fourth amendment now released from the moorings of precedent) and Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) (*Katz* meant to expand the scope of the Fourth Amendment) with Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518 (The Supreme Court failed to pursue the implications of its insight).

33. *United States v. White*, 401 U.S. 745 (1971). Justice Black provided the fifth vote for the majority by concurring in the result. *White* 401 U.S. at 754. Black took an even more restrictive position than the majority. The plurality opinion is cited as though it were a majority decision. Compare the opinions of Justices White and O'Connor (concurring in part and concurring in the judgment) in *United States v. Karo*, 468 U.S. 705 (1984) in which both justices discuss the meaning of the *White* case.

34. *United States v. Dionisio*, 410 U.S. 1 (1973) (voice exemplars); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplars). Although fingerprinting may not be a

sonal financial records from a bank³⁵ or an accountant.³⁶ Because in one way or another the defendants in the foregoing cases voluntarily revealed information to someone else, the court found that society would no longer recognize their expectation of privacy as reasonable.

The most extreme form of this voluntary disclosure rule came in *Smith v. Maryland*³⁷ where the Court held that installation of a pen register was not a search because the telephone user had no expectation of privacy in the numbers dialed. Because the caller would have lost his expectation of privacy if he had revealed his numbers to a human operator, he lost his expectation when his numbers were conveyed to electronic switching equipment. The Court reasoned:

When [the petitioner] used his phone, petitioner voluntarily conveyed numerical information to the telephone company and "exposed" that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he/she dialed. The switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber. Petitioner concedes that if he had placed his calls through an operator, he could claim no legitimate expectation of privacy. We are not inclined to hold that a different constitutional result is required because the telephone company has decided to automate³⁸

Smith does violence to the plain meaning of the fourth amendment and its intent. In *Smith*, the police were searching for

search, transportation to and detention at the police station for the purpose of finger printing requires either consent or prior judicial authorization. *Hayes v. Florida*, 470 U.S. 811 (1985).

35. *United States v. Miller*, 425 U.S. 435 (1976) (Depositor had no expectation of privacy in contents or original checks and deposit slips). *Miller* generated a great deal of academic criticism. See e.g., *W. LaFare, Search and Seizure: A Treatise on the Fourth Amendment*, § 27 at 411-17 where *Miller* is called "dead wrong" and its effect termed "pernicious." and Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. REV. 1289, 1313 (1981). In response to *Miller* Congress passed the Right to Financial Privacy Act, 12 U.S.C. § 3401-3422 (Supp. 1979), which requires that a customer receive notice and an opportunity to respond before any bank records are turned over to the government. See *Razor, Controlling Government Access to Personal Financial Records*, 25 WASHBURN L. J. 417 (1986) For a survey of the law after *Miller*.

36. *Couch v. United States*, 409 U.S. 322 (1973) (No expectation of privacy in financial records turned over to an accountant for preparation of tax return).

37. 442 U.S. 735, 745-46 (1979).

38. *Smith*, 442 U.S. at 744.

something—the numbers Smith dialed. More important, however, is the way *Smith* neuters the fourth amendment's application to modern technology. It is unrealistic to expect someone in the twentieth century to forego the use of the telephone.³⁹ Not only does the telephone allow us to communicate to others but also, when used in conjunction with a computer, it can allow us to conduct almost all our business from home.⁴⁰

These and other recent cases reveal the narrowness of the *Katz* standard.⁴¹ To be sure, some of the difficulty is inherent in the standard. The standard has been called vague, shifting, and illusory.⁴² One commentator characterized *Katz* as a “lawless ruling—a decision to do without a standard and a decision to tie the constitutional right to privacy to changing cultural expectations of privacy.”⁴³ Another commentator charged that a broad reading of *Katz*, whereby warrants would be required for every investigation,

39. *Smith*, 442 U.S. at 750 (Marshall, J. dissenting); *LaFave Treatise*, *supra* note 35, at 412; See also, Fishman, *Pen Registers and Privacy: Risks, Expectations, and the Nullification of Congressional Intent*, 29 *CATH U.L. REV.* 557, 573 (1980).

40. See *supra* text accompanying notes 1-7. See also Selvin, *supra* note 8. (The small plastic keyboard wired to a central computer will enable the user to view cable television programs, take college courses, participate in community action meetings and respond to opinion polls, talk shows and debates. In addition, subscribers will be able to purchase products seen on television by ordering them through their interactive cable system and charging them to their banking or credit accounts. In the future, the system may interact with department stores, service operations, banks, police and fire departments, schools, civic centers and others elements within society.) Shattuck, *In the Shadow of 1984: National Identification Systems, Computer Matching, and Privacy in the United States*, 35 *HASTINGS L.J.* 991 (1984). (Interactive cable television systems are capable of gathering vast amounts of personal data, not only on consumer's viewing habits, but also on their buying and banking habits, as more services are added. Cable companies, for example, will soon offer burglar alarm systems which will tell the company when a consumer is at home).

41. Compare *United States v. Knotts*, 460 U.S. 276 (1983) (monitoring a beeper attached to a car was not a Fourth Amendment search) and *United States v. Karo*, 468 U.S. 705 (1984) (monitoring a beeper inside a package while it was inside a house was a fourth amendment search). See LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 *J. CRIM. L. & CRIMINOLOGY* 1171, 1174-78 (1983) for a discussion critical of *Knotts*. See generally, Comment, *Tracking Katz: Beepers, Privacy and the Fourth Amendment*, 86 *YALE L.J.* 1461 (1977); *Hudson v. Palmer*, 468 U.S. 517 (1984) (prisoners have no legitimate expectation of privacy.); *Oliver v. United States*, 466 U.S. 170 (1984) (No expectation of privacy in an open field). *New York v. Class*, 106 S. Ct. 960 (1986). (No reasonable expectation of privacy in Vehicle Identification Number).

42. *The Supreme Court 1979 Term*, 94 *HARV. L. REV.* 1, 202 (1980).

43. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 *N. ILL. U.L. REV.* 1, 6, n.12 (1977).

would trivialize the warrant process.⁴⁴ Moreover, saying the fourth amendment protects privacy begs the question.⁴⁵ The inquiry should be directed toward ascertaining "what interests . . . are protected by the prohibition against unreasonable search and seizures."⁴⁶ In addition, the Burger Court has declined the invitation of *Katz* to explicate the central concepts of the fourth amendment.⁴⁷ Instead the Court has fashioned rules which, if they do not limit *Katz* to its facts, greatly restrict its usefulness.⁴⁸ Aside from these doctrinal problems, however, lies a more fundamental concern. *Katz* in whatever doctrinal guise it takes has been leap-frogged by advancements in surveillance technology. In a related context, Schwartz noted that "the technical changes wrought by scientific progress have outstripped the law and legal commentary. The Warren Court's protective jurisprudence may become completely outmoded by the seven-league strides being made in long-distance eavesdropping."⁴⁹

This problem is not new. In *Olmstead v. United States*,⁵⁰ the Supreme Court held that wire-tapping was not a search or a seizure because there was no entry upon the defendant's property.⁵¹ The Court noted that:

The language of the amendment can not be extended and expanded to include telephone wires reaching to the whole world . . . [o]ne who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protec-

44. Kitch, *supra* note 32, at 134.

45. Goldberger, *Consent, Expectations of Privacy, and the Meanings of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319 (1984).

46. *Id.* See also Burkhoff, *When is a Search not a "Search"? Fourth Amendment DoubleThink*, 15 U. TOL. L. REV. 515, 530, (1984); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974). Cf. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 534 (1978) (Defining privacy inherently difficult because privacy is many discrete rights, some of which are related while others are unrelated or inconsistent).

47. Allen, *supra* note 32, at 133.

48. Compare *U.S. v. White*, 401 U.S. 745 (1971) (electronic participant monitoring not a Fourth Amendment search) and *Katz v. United States*, 389 U.S. 347 (1967) (electronic monitoring of telephone call a Fourth Amendment Search.) See *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979).

49. Schwartz, *supra* note 11, at 987.

50. 277 U.S. 438 (1928).

51. 277 U.S. at 466.

tion of the fourth amendment.⁵²

Justice Brandeis' dissent is an extended essay on the relationship of technology and privacy. Brandeis argued that constitutional clauses guaranteeing individual rights should adapt to a changing world. He said:

Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth . . . Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.⁵³

The Framers designed the fourth and fifth amendments to protect citizens from forcible physical intrusions because that was the only contemporary means of acquiring information but science has now made it possible "to obtain disclosure in court of what is whispered in the closet" without recourse to force, violence, or physical entry.⁵⁴ Brandeis went on in remarkably prophetic words:

The progress of science in furnishing the government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.⁵⁵

After recalling colonial era precedent, Brandeis rhetorically asked: "Can it be that the Constitution affords no protection against such invasions of individual security?"⁵⁶

Brandeis summoned the ghost of *Boyd v. United States*⁵⁷ to help define the appropriate constitutional standard. According to *Boyd* the fourth and fifth amendments work together to protect a citizen's "indefeasible right of personal security, personal liberty, and private property."⁵⁸ It is not the means by which information

52. 277 U.S. at 465-66.

53. 277 U.S. at 472-73 (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

54. 277 U.S. at 473.

55. 277 U.S. at 474.

56. 277 U.S. at 474.

57. 116 U.S. 616 (1886).

58. 116 U.S. at 630.

is obtained that is to be condemned.⁵⁹ Rather, it is the end for which the information is sought and the consequent indignity to the person that is to be condemned.⁶⁰ To Brandeis, the fourth amendment was one piece of the "right to be let alone—the most comprehensive of rights and the right most valued by civilized men."⁶¹ Whenever the government infringed on that right, it violated the fourth amendment.⁶²

Brandeis recognized that sophisticated technology could devour individual rights. Although wire-tapping was the immediate problem, Brandeis correctly predicted further technological development.⁶³ His solution required an inquiry into the values behind the fourth amendment. It required a court to interpose an absolute value—individual security—against governmental action. At the time, however, this jurisprudential style was being replaced by legal realism. Realism was typified by a moral relativism which demanded that legal principles be justified by the degree to which they contributed to the greater social good.⁶⁴ Realists had no absolute values for judges to enforce. Rather, judges were

59. 116 U.S. at 630.

60.

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of [*Entick v. Carrington*]. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. 116 U.S. at 630.

In spite of Brandeis' declaration that *Boyd* will be remembered as long as civil liberty lives in the United States, its holding has not fared well over the years. The Court steadily eroded *Boyd's* theory of the intimate relationship between the fourth and fifth amendments until it was implicitly overruled in *Couch v. United States*, 409 U.S. 322 (1973). *Boyd's* holding that the compulsory production of business records violated the fifth amendment went out with a whimper in *Andresen v. Maryland*, 427 U.S. 463 (1976). See also *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). See generally Note, *The Life and Times of Boyd v. United States* (1886-1976), 76 MICH. L. REV. 184, (1977).

61. 277 U.S. at 478.

62. *Id.*

63. See e.g., Landever, *supra* note 1; Selvin, *supra* note 8; Shattuck, *supra* note 40; Soma & Wehmhoefer, *supra* note 4.

64. See, e.g., O.W. HOLMES, THE COMMON LAW 40-41 (1963) (Society's interests may outweigh justice to the individual); See generally, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

to use instrumentalism and balancing to decide cases.⁶⁵ Indeed, Brandeis, concluded his *Olmstead* opinion with a bit of instrumentalism. After his vigorous plea in defense of individual security, Brandeis argued that suppression of the evidence would "teach the whole people."⁶⁶ Because government is the omnipresent teacher, it must lead by example. If government can break the law in pursuit of criminals, then citizens may not respect the law either and break it to pursue their own needs.⁶⁷

The goal of the realists was to prevent courts from obstructing social progress through the imposition of so-called absolute values. *Lochner v. New York*⁶⁸ had come to symbolize all that was wrong with the old jurisprudence. In many ways, the problems in *Lochner* came about because of the pressure modern conditions placed on the formal legal concepts.⁶⁹ *Lochner* and its progeny were outstrip-

65. O.W. Holmes, *The Path of Law*, in *Collected Legal Papers* 186 (1920) ("A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.").

66. 277 U.S. at 485.

67.

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In the government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face. 277 U.S. at 485.

68. 198 U.S. 45 (1905). See, Hand, *Due Process and the Eight-Hour Day*, 21 HAR. L. REV. 495 (1908). See generally, Wright, *The Growth of American Constitutional Law*, (1942). At times, the modern Court has disparaged the *Lochner* era. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (*Lochner* repudiated); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (Court will not sit as a super legislature). *Lochner* often is used in a pejorative sense. *Roe v. Wade*, 410 U.S. 113 (1973) (Rehnquist, J., dissenting) (Court's opinion like majority's in *Lochner*). But cf. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (*Lochner* more defensible than *Roe*).

69. The precise issue in *Lochner* was whether or not a state maximum hours law violated a worker's liberty of contract. 198 U.S. at 53. See also *Muller v. Oregon*, 208 U.S. 412 (1908) (Oregon law that limited the number of hours women could work constitutional); *Adair v. United States*, 208 U.S. 161 (1908) (Federal Law which made it illegal to fire employee solely because of union membership was unconstitutional). See Brandeis, *The Living Law*, 11 ILL. L. REV. 461, 464 (1916) ("Courts continued to ignore newly arisen social needs."); A. MILLER, *THE SUPREME COURT AND AMERICAN CAPITALISM* 59-60 (1968).

ped by and forced to accommodate social and scientific advancement.⁷⁰ The essence of the dispute between Brandeis and the majority in *Olmstead* concerned which absolute value to choose—private property or individual security. The realists rebelled against this formalism in favor of their more flexible jurisprudence.⁷¹

By all accounts, the realists' victory has been overwhelming.⁷² Especially in economic areas, Courts now employ the instrumental and balancing methods.⁷³ A similar development occurred within the fourth amendment. *Olmstead* proved "hopelessly simplistic in coping with the real world of developing technology."⁷⁴ Cases subsequent to *Olmstead* continued to narrow its rule until, in *Katz*, Justice Stewart could declare that *Olmstead* had been substantially undermined.⁷⁵ The *Katz* rule represented a victory for the

[T]he Court considered the power of the individual worker to be equal to the power of the employer—even though that employer was a collectivity, a corporation, and a person in law only by application of a transparent legal fiction—an assumption that is difficult to explain except on grounds of willful blindness, or, perhaps, of a complete lack of knowledge of the facts of industrial life. The entire Court at that time did not recognize that the collective nature of economic endeavor had created an entirely new social milieu in which ancient doctrines of individuals and of freedom had to operate. They failed to see that freedom could be limited by centers of economic power—the corporation—as well as by government.

70. Peck, *Extending the Constitutional Right to Privacy in the New Technological Age*, 12 HOFSTRA L. REV. 893 (1984) (Major shifts in Constitutional doctrine occurred after the Industrial Revolution).

71. Mott & Mott, *Property and Personal Privacy: Interrelationship, Abandonment and Confusion in the Path of Judicial Review*, 18 J. MAR. L. REV. 847, 854 (1985) (Legal Realism shifted from metaphysics to social engineering and the *Boyd* premise was a casualty as the Court admitted an ever expanding category of instrumentality).

72. See, e.g., Purcell, *Alexander M. Bickel and The Post-Realist Constitution*, 11 HARV. C.R.-C.L.L. REV. 521 (1976); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; See generally, E. Corwin, *Liberty Against Government* (1948).

73. *Nebbia v. New York*, 291 U.S. 502 (1934) (Due process satisfied if law bears a reasonable relation to a legitimate purpose); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949) (minimum scrutiny of means and ends in due process and equal protection cases); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (Court outlines a test for dormant Commerce Clause cases that includes both a means and end analysis and a balancing test); *United States v. Darby*, 312 U.S. 100 (1941) (Congress has broad power to legislate if legislation is means to a commerce power end).

74. Hufstедler, *supra* note 10, at 1495.

75. 389 U.S. at 359. See *Silverman v. United States*, 365 U.S. 505 (1961) (Spike-mike which penetrated wall a Fourth Amendment Search).

realists. The Court did not announce an absolute right to privacy from governmental eavesdropping. Rather, the Court made invasion of privacy contingent upon proper justification and proper procedures.⁷⁶

The relativization of fourth amendment privacy has led to the shrinking compass of the fourth amendment.⁷⁷ Privacy inevitably loses when it is balanced against the needs of law enforcement. The balance is skewed against the law-breakers because it is more expedient to catch law-breakers than to adhere to technical rules.⁷⁸ The fourth amendment now wanders from case to case ensuring that the guilty are convicted but without enforcing its normative content.⁷⁹

The technological changes wrought by the realists have been successful in economic and social policy precisely because instrumentalism and moral relativism were well suited to those questions. It has failed in the fourth amendment because the "core values" of the amendment cannot be quantified and therefore cannot be balanced. Ironically, the Court now has returned to a kind of formalism in some cases which emphasizes property concepts.⁸⁰

76. "The duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed and clearly apprised of the precise situation it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." See Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 970 (1977).

77. Compare *Katz v. United States*, 389 U.S. 347 (1967), and *Oliver v. United States*, 466 U.S. 170 (1984). See Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U.L. REV. 1, 6, 12 (1983).

78. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Leon*, 468 U.S. 897 (1984) (Brennan, J., dissenting) ("[Framers knew] that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy."); Burkoff, *When is a Search Not a "Search?" Fourth Amendment Doublethink*, 15 U. TOLEDO L. REV. 515, 557 (1984) (Burger Court acts like over zealous police department).

79. See *United States v. Jacobsen*, 466 U.S. 109 (1984) (no legitimate expectation of privacy in contraband.) and *United States v. Leon*, 468 U.S. 897 (1984) (Cost of freeing the guilty may outweigh benefits of exclusion of illegally seized evidence). But cf., Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983) (No Fourth Amendment right to secrete evidence and a correlative right of government to search for it).

80. Compare *United States v. Knotts*, 460 U.S. 276 (1983) (no search because information gathered in public available to all) and *United States v. Karo*, 468 U.S. 705 (1984) (Monitoring a beeper after it crosses threshold of house is a search because information not

This new formalism does not adequately take into account the demands of modern life and the features of modern technology. Technology is allowed to erode fourth amendment protection, drop by drop.⁸¹

Commentators have noted the problem current fourth amendment doctrine poses. Professor Landever noted that although "[w]e have not yet entered George Orwell's 1984; . . . we have more than enough technology to meet Big Brother's needs."⁸² He would require a warrant for almost every fourth amendment activity except "where an emergency or other unusual circumstance demonstrate that judicial involvement is not appropriate."⁸³ For example, he would require a warrant in participant monitoring cases because a free society, not a citizen, should assume the risks involved in the administration of the fourth amendment.⁸⁴

Landever goes too far. Requiring a warrant for all fourth amendment activity is not supported by the text, history, or policy of the fourth amendment.⁸⁵ It would elevate form over substance and would trivialize rather than enhance the warrant process.⁸⁶

Landever's cure would be as bad as the current fourth amendment disease. Now the courts must declare that reasonable police activity is not a search to salvage it from the per se unreasonable rule. Courts under Landever's system would be tempted to find "an emergency or other unusual situation" to salvage warrantless searches.

Finally, Landever's approach is divorced from the more com-

available to public.) See also *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Payton v. New York*, 445 U.S. 573 (1980). See Schlesinger and Wilson, *Property, Privacy and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 Duq. L. Rev. 225 (1980) for scholarly commentary arguing in favor of a property centered analysis; The Supreme Court, 1979 Term 94 HARV. L. REV. 77 (1980); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977). See Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. REV. 1289, 1298, 1301 (1981) for the story of the shift from property to privacy.

81. See *United States v. Jacobsen*, 466 U.S. 109, 125, (1984), (Brennan, J. dissenting); Landever, *supra* note 1, at 598; *Lafave Treatise*, *supra* note 35, at § 2.2.

82. Landever, *supra* note 1, at 597-98.

83. *Id.* at 600.

84. *Id.* at 626.

85. See *infra* text accompanying notes 128-196.

86. Kitch *supra* note 32, at 152.

mon fourth amendment areas. The connection is not clear and, thus, we run the risk of creating an ever more complex body of doctrine with warrants required for the high-tech branch of the fourth amendment but not necessarily for the low-tech branch.⁸⁷

Professor Arnold Loewy's proposed fourth amendment theory explicitly focuses on the reasonableness clause.⁸⁸ Loewy's thesis is that the primary purpose of the amendment is to protect the innocent.⁸⁹ Reasonableness should be defined by balancing the likelihood of the searchee's innocence, the harm done to him if innocent, and the gain in crime detection if he is guilty.⁹⁰ The protections of the fourth amendment may be invoked by the guilty only when necessary to protect the innocent.⁹¹

Loewy's theory has the virtue of rationalizing the two clauses of the amendment.⁹² Moreover, it avoids the problem with the inflexibility associated with theories which require warrants. He posits a utopian society in which the police are equipped with "an evidence-detecting divining rod."⁹³ This rod would find evidence of a crime and nothing more.⁹⁴ In Loewy's utopia all the evidence of crime would be found but no innocent persons would be searched.⁹⁵ Loewy would approve of the evidence detection rod as a reasonable search.⁹⁶

Loewy's approach is the opposite of Landever's. Under a rigid doctrinal and procedural system courts will be tempted to create fine distinctions in favor of the police.⁹⁷ Courts under Loewy need

87. Cf. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, (1985) (Fourth Amendment is the Supreme Court's tarbaby); Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973) (Fourth Amendment cases are a "mess").

88. Loewy, *Protecting Citizens from Cops and Crooks*, 62 N.C. L. REV. 329, 355 (1984).

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

90. Loewy, *supra* note 88, at 356.

91. Loewy, *supra* note 89, at 1248. Loewy argues that *United States v. White*, 401 U.S. 745 (1971) *reh. denied* 402 U.S. 990 and *Smith v. Maryland*, 442 U.S. 735 (1979) are wrong because both cases allow the police to substantially intrude upon innocent activity. Loewy, *supra* note 89, at 1225-56.

92. Loewy, *supra* note 89, at 1239.

93. Loewy, *supra* note 89, at 1244.

94. *Id.*

95. *Id.*

96. *Id.*

97. Cf. *Lafave Treatise*, *supra* note 35. (All or nothing Katz test tempts courts to de-

not be tempted at all. They will find that the police activity does not threaten innocent conduct. Indeed, the current fourth amendment cases do just that.⁹⁸

We need a theory of the fourth amendment that accurately states its core values and keeps pace with advancing technology in its application. Fourth amendment security is neither absolute nor relative. The text of the fourth amendment recognizes this simple proposition. It does not prohibit all searches but only unreasonable ones. The amendment itself strikes the balance between individual security and social need. Therefore, the focus in any theory of the fourth amendment should be on the reasonableness clause.

The Supreme Court has been moving in this direction. In several recent cases the Court has explicitly adopted a balancing test to ascertain the reasonableness of police activity.⁹⁹ In other cases, the Court has invoked the conventional language but appeared to rest its decision on the general reasonableness of the search.¹⁰⁰

Professor Wasserstrom has vigorously criticized this trend.¹⁰¹ He argued that the Burger Court has used the "boundlessly manipulable process" of cost benefit analysis to limit the exclusionary rule and substantive fourth amendment law.¹⁰² In particular, Wasserstrom claimed that a case like *Illinois v. Gates*¹⁰³ "robs the fourth amendment of virtually all operative significance" and comes close to reducing the fourth amendment to a test of general reasonableness.¹⁰⁴ Although he criticizes this test because it does

cide cases in favor of police).

98. Compare *United States v. Place*, 462 U.S. 696, 706-07 (Dog sniff may not be a search because only information about criminal conduct revealed) and *United States v. Montoya De Hernandez* 473 U.S. 531, 538 (1985) (Extended detention of suspected alimentary canal smuggler justified, in part, "by the method [the defendant] chose to smuggle drugs into this country.")

99. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (Constitutionality of school search depends on the totality of the circumstances surrounding it.); *Winston v. Lee*, 470 U.S. 753 (1985) (Reasonableness of surgical removal of evidence from defendants body determined by balancing individual interest against society's).

100. See *United States v. Jacobsen*, 466 U.S. 109 (1984) (Chemical field test of substance not a Fourth Amendment search).

101. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

102. *Id.* at 262.

103. 462 U.S. 213 (1983).

104. Wasserstrom, *supra* note 101, at 274.

little to control police discretion his major objection to it is the ease with which it can be manipulated by courts to reach any result.¹⁰⁵

Manipulability is not the sole province of general reasonableness, however. The fourth amendment jurisprudence of the Burger Court shows how even so-called bright line rules can be used to reach predetermined results. The development of the *Katz* line of cases from its initial promise to its current dead end shows how the Burger Court used conventional legal analysis to restrict the fourth amendment's scope.¹⁰⁶ Most commentators would agree with Wasserstrom that the *Katz* formula is "little more than readily manipulable cant . . ."¹⁰⁷ One can also point to the developments concerning automobiles,¹⁰⁸ stationhouse inventories,¹⁰⁹ searches incident to arrest,¹¹⁰ and searches in the open fields¹¹¹ to show how the Burger Court used existing doctrine to achieve conservative results. No test can insulate the law from result-oriented jurisprudence but a test focusing on the reasonableness clause at least acknowledges what the Court may already be doing and allows other justices, courts, and commentators to debate its principles.¹¹²

Other critics of a reasonableness standard claim that it would provide the police with insufficient guidance.¹¹³ The lack of guidance objection can be refuted. Current fourth amendment law is a mass of contradictory rules plagued with hairsplitting distinc-

105. Wasserstrom, *supra* note 101, at 271. Wasserstrom reserves his most severe criticism for a test of general reasonableness based on a cost benefit analysis. *Id.* at 312-20. The approach advocated in this article is not a cost-benefit analysis. Rather, it resembles what Wasserstrom calls "a series of fixed, but graduated, restraints on searches and seizures in proportion to their intrusiveness and to the sanctity of the interests" invaded. *Id.* at 309. Other commentators have advocated theories focused on the reasonableness clause. Loewy, *supra* notes 88 & 89; Bradley, *supra* note 87.

106. See *supra* text accompanying notes 32-48.

107. Wasserstrom, *supra* note 101, at 271.

108. See *infra* text accompanying notes 239-249.

109. *South Dakota v. Opperman*, 428 U.S. 364 (1976) (impounded vehicle); *Colorado v. Bertine*, ___ U.S. ___ 107 S. Ct. 738 (1987) (bag inside impounded vehicle); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (shoulder bag of arrestee).

110. See *infra* text accompanying notes 233-236.

111. See *infra* text accompanying notes 202-204.

112. DiPippa, *Searching for the Fourth Amendment*, 7 U.A.L.R. L.J. 587, 642 (1984).

113. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 324 (1982).

tions.¹¹⁴ If courts cannot reconcile the rules in the area it is unrealistic to expect the "cop on the beat" to do so.¹¹⁵ Moreover, catalogs of artificial rules are difficult to apply.¹¹⁶ A properly defined reasonableness standard simply asks officers to apply common sense to matters that police will naturally tend to consider.¹¹⁷ It would ask no more of officers than the tort law asks of the rest of us.¹¹⁸ If the standard of reasonableness is defined functionally—that is, by reference to what police officers actually do during a search and to the actual effects of searches and seizures—police officers will be in no worse shape than now, with our subtle doctrines, and courts will find it harder to massage the facts to reach predetermined results.¹¹⁹

Professor Goldberger suggests that any new approach must meet certain conditions.¹²⁰ First, it "would have to identify carefully all of the interests protected" by the amendment.¹²¹ Second it would have to be objective, that is, external to arbitrary, ad hoc limitation, either judicial or legislative.¹²² Finally, it would have to be flexible, that is, capable of responding to technological or other developments in police techniques without losing its protective function.¹²³

I propose a new theory of the fourth amendment that satisfies Goldberger's criteria by focusing on the reasonableness clause. Courts should do away with the threshold inquiry into the definition of a search.¹²⁴ Rather, courts should take a common-sense ap-

114. *New York v. Quarles*, 467 U.S. 649 (1984)(O'Connor, J. concurring in part in the judgment and dissenting in part).

115. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 234 (1984).

116. *Id.* at 231.

117. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1491 (1985).

118. Alschuler, *supra* note 115, at 233.

119. *But see* Amsterdam, *supra* note 46, at 375 (Fourth Amendment would resemble a Rorschach test).

120. Goldberger, *Consent, Expectations of Privacy, and the Meaning of "searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319 (1984).

121. *Id.*

122. *Id.*

123. *Id.*

124. To some extent the inquiry into the existence of a search is similar to the inquiry into the existence of property or liberty interests in a procedural due process case. *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). My approach would more closely resemble that taken

proach to the question and find any purposive investigative activity into a citizen's affairs a search.¹²⁵ Although other commentators have advanced theories based on a revitalization of the reasonableness clause,¹²⁶ the theory advanced in this article would test the validity of fourth amendment searches by a rule of reasonableness measured by the degree to which the search resembles the kind of activity the framers meant to proscribe when they drafted the amendment. It is not enough, however, to ask if the framers would have approved of the search in question. The question is impossible to answer because of today's vastly different social conditions and the ever-more invasive technologies available to the police. Rather, the amendment's core values should be ascertained by resort to the historical materials but they should be defined functionally. That is, they should be stated as behavioral imperatives or prohibitions which can be applied to the conduct of the police in a particular case.

The test would expressly focus on the scope and the manner of the search. Courts would have to go beyond the current "conventional interpretation"¹²⁷ or facile cost-benefit analysis and look at the way the police carried out the search itself. Finally, warrants would be preferred so long as they did not authorize searches unreasonable in their scope or manner.

II

Defining the Framers's intent for any constitutional provision is bound to be an elusive enterprise for the historical sources are

by courts in substantive due process cases where the Court seems to assume the existence of a protected interest. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); Monogahn, "Of Liberty and Property", 62 CORNELL L. REV. 405 (1977).

125. Other commentators have advocated a similar approach. Tomkovicz, *Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645-64 (1985) (Inherent in the notion of searching is an attempt to acquire, or the acquisition of, information); Bacigal, *supra* note 12, at 562 (Search should encompass any information-gathering activity by the state including careful inquiry, research, and systematic tracking.) Goldberger, *supra* note 120, at 324 (Fourth Amendment activity is any governmental action impairing a person's interest in the privacy of physical presence, place, communication, or possession); Note, *Defining a Fourth Amendment Search: A Critique of the Post-Katz Jurisprudence*, WASH. L. REV. 191, 194 (1986) (Search should be defined by whether or not government conduct violates a social norm of privacy).

126. Bradley, *supra* note 87; Loewy, *supra* note 88 and 89.

127. Wasserstrom, *supra* note 101.

vague, scanty, and inconclusive.¹²⁸ The fourth amendment's pedigree is clearer. Scholars agree that the Framers directed the fourth amendment against general warrants.¹²⁹

The Framers drafted the fourth amendment to guard against the objectionable practices which they had recently experienced.¹³⁰ Although the history of the search power goes back several hundred years prior to the American Revolution, the most important historical events happened closer to the Revolution.¹³¹

Sir Matthew Hale declared that "a general warrant to search in all suspected places is not good."¹³² Hale was concerned with the legal authority to conduct a search. A valid warrant provided "constables and other public officials" with an absolute defense to a trespass action.¹³³ Thus, only warrants issued for particular places and upon probable cause were valid because "these warrants are judicial acts and must be granted upon examination of the fact."¹³⁴ Hale objected to general warrants because they made the party searching "to be in effect the judge."¹³⁵ Hale's discussion of warrants is concerned with warrants for stolen goods because warrants were not often used in other cases.¹³⁶ The Star Chamber issued the first warrant for something other than stolen goods during the reign of Queen Elizabeth.¹³⁷ The Star Chamber began to issue search warrants in political cases while the Court of High Commis-

128. In a different context, Justice Jackson noted his surprise:

[a]t the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams of Joseph was called to upon to interpret for Pharaoh.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J. concurring). See W. CROSSKEY, *POLITICS AND THE CONSTITUTION* (1953) for a unique approach to the Framers' intent. See generally, P. BOBBITT, *CONSTITUTIONAL FATE* 9-24 (1982).

129. See e.g., Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 50 (1974).

130. J. LANDYNSKI, *SEARCH AND SEIZURE IN THE SUPREME COURT*, 20 (1966).

131. *Id.* at 20-27.

132. SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* at 150 (1947).

133. *Id.*

134. *Id.*

135. *Id.* at 149.

136. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part One*, 3 U. RICH. L. REV. 278, 284 (1969).

137. *Id.*

sion began to issue general warrants.¹³⁸ Eventually, General Warrants became the rule in seditious libel actions.¹³⁹

Although the increasing use of general warrants generated some opposition, it was not until the middle of the Eighteenth Century that general warrants fell from grace. In the litigation that followed the ransacking of John Wilkes' house, Chief Justice Pratt said the general warrant in that case was "arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom."¹⁴⁰

In the famous case of *Entick v. Carrington*, Pratt attacked the general warrant.¹⁴¹ If general warrants were sustained "the secret cabinets and bureaus of every subject in this Kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."¹⁴² Star Chamber precedent to the contrary was "null."¹⁴³ Later Lord Chatham expressed the full scope of the growing displeasure against general warrants:

The poorest may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter, the rain may enter; but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement.¹⁴⁴

138. *Id.*

139. *Id.* at 285.

140. LANDYNSKI, *supra* note 130, at 28. Wilkes published an offensive series of pamphlets attacking the government. Lord Halifax, Secretary of State, issued a general warrant for the arrest of those responsible and the seizure of their papers. After the arrest of forty-nine people, Halifax's messenger learned that Wilkes had authored one pamphlet in particular. The messenger arrested Wilkes over his protests and ransacked his house and papers. Both the printers of the pamphlet and Wilkes successfully sued the messengers for false imprisonment. A critical issue in the cases was the propriety of the warrants under which the messengers acted. *Id.* See also, Stengel, *supra* note 136, at 286-87; I. BRANT, *THE BILL OF RIGHTS: ITS ORIGINS AND MEANING* 189-93 (1965).

141. 19 *Howell's State Trials* 1029 (1765). By now, Pratt had been elevated to the peerage as Lord Camden. LANDYNSKI, *supra* note 130, at 29. Entick brought a suit for trespass after a general search of his papers. Entick, like Wilkes, was involved with a publication critical of the government. Entick won a jury verdict of three hundred pounds which Pratt, now Lord Camden, affirmed on appeal. *Id.*

142. HOWELL'S STATE TRIALS *supra* note 141, at 1063.

143. Lord Camden said such precedent was "null, and nothing but ignorance can excuse the judge that subscribed [to] it." *Id.* at 1071.

144. Stengel, *supra* note 136, at 288.

These sources illustrate the dangers of general warrants. They were subversive of liberty, notably the liberty to speak freely. They were too broad: all subjects were threatened by them. They were too intrusive: private, innocent information was disclosed in the process of the search. On the other hand, although popular and political sentiment was aroused against all general search warrants, and Parliament abolished them in 1766, it never abolished general arrest warrants.¹⁴⁵

Although these judicial and parliamentary actions offered religious and political dissenters more freedom, "ordinary run-of-the-mill criminal suspects" received little protection.¹⁴⁶

Opposition to the American version of the general warrant arose among some ordinary criminals of the day—smugglers. This opposition combined with the libertarian notions from England and eventually led to the adoption of the fourth amendment.

In America, the general warrant appeared as the writ of assistance.¹⁴⁷ These writs may have been worse than the general warrants issued in seditious libel cases because they were permanent and vested the government with unlimited discretion. They were permanent search warrants placed in the hands of customs officials; they might be used with unlimited discretion and were valid for the duration of the life of the sovereign.¹⁴⁸ Their use aroused much opposition in the colonies. For example, in 1772 the Boston town meeting drew up "A List of Infringements and Violations of Rights" which, among other things, colorfully declared that "our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches, whom no prudent man would venture to employ even as menial servants."¹⁴⁹

145. LANDYNSKI, *supra* note 130, at 30; Lasson, *The History and Development of the Fourth Amendment* 48-49 (1937).

146. Stengel, *supra* note 136, at 289.

147. Writs of Assistance were used to enforce the provisions of a number of navigation and trade acts. LANDYNSKI, *supra* note 130, at 30. These writs were issued by courts and remained in effect for the life of the sovereign. T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 35, 36 (1969).

148. Landynski, *supra* note 130, at 31. Ironically, colonial governors began to issue writs because of the opposition to the practice of warrantless searches by customs officers. Lasson, *supra* note 145, at 55.

149. R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* 25 (1955).

The most famous example, however is the challenge brought by Boston merchants to the issuance of new writs.¹⁵⁰ They retained James Otis, Jr.—“the most able, manly and commanding Character of his Age at the Bar.”¹⁵¹ Although Otis lost the case, his argument greatly influenced the Framers.¹⁵² Echoing Entick, Otis claimed that the writs were “the worst instrument[s] of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law-book.”¹⁵³ He compared the writs unfavorably with a general warrant because both were “unlimited geographically and perpetual temporally.”¹⁵⁴ These writs were particularly oppressive because they invaded “one of the most essential branches of English Liberty . . . the freedom of one’s house.”¹⁵⁵ Otis made other, less spectacular arguments¹⁵⁶ which the Court rejected after a delay of nine months during which it sought the advice of English officials.¹⁵⁷

The Boston case built on the gathering momentum in the colonies against general search warrants. Most colonies had guarantees against arbitrary infringement of the colonist’s rights, but

150. The old writs were due to expire in 1761 because of the death of George II in October 1760. TAYLOR, *supra* note 147, at 36. For a detailed history of all aspects of the case see M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1976).

151. LANDYNSKI, *supra* note 130, at 34, citing JAMES ADAMS DIARY, VOL. II, at 275.

152. LANDYNSKI, *supra* note 130, at 35, citing JAMES ADAMS DIARY, VOL. II, at 275.

153. *Id.* at 34 citing ADAMS, *THE LIFE AND WORKS OF JOHN ADAMS*, VOL. II, at 523.

154. TAYLOR, *supra* note 147, at 37.

155.

Now one of the most essential branches of English liberty, is the freedom of one’s house. A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and everything in their way—and whether they break through malice or revenge, no man, no court can inquire—bar suspicion without oath is sufficient Again these writs are NOT RETURNED. Writs in their very nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in law live forever, no one can be called to account. Thus reason and the constitution are both against this writ.

Id. citing 2 LEGAL PAPERS OF JOHN ADAMS 141-44 (Wroth & Zobel ed. 1965).

156. Otis argued that the statutes authorizing the Writs did not apply in the colonies, and that even if they did, they did not provide authority for the Writs. LANDYNSKI, *supra* note 130, at 34; Taylor, *supra* note 147, at 37.

157. LANDYNSKI, *supra* note 130, at 35. The presiding judge sought advice from the provincial agent, a former Crown prosecutor in Massachusetts, instead of Pratt who by then was Attorney General. Lasson, *supra* note 145, at 62-63.

none specifically prohibited unreasonable searches and seizures until just before the Revolution.¹⁵⁸ Apparently responding to Otis' rhetoric and the increasing distaste for British economic regulations, Virginia became the first colony to move against oppressive searches and seizures. In June 1776, Virginia enacted its Declaration of Rights.¹⁵⁹ Among other things it stated:

The general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described, and supported by evidence, and grievous and oppressive, and ought not to be granted.¹⁶⁰

The Virginia Declaration was widely disseminated throughout the colonies and fixed the pattern of rights in their own subsequent declarations.¹⁶¹ The Pennsylvania version expressly declared the right of the "people . . . to hold themselves, their houses, papers, and possessions free from search and seizure" absent warrants issued upon "oaths or affirmations first made."¹⁶² Delaware, Maryland, and North Carolina all followed suit in 1776, patterning their declarations after both Virginia's and Pennsylvania's.¹⁶³ To bring home the point, North Carolina added that general warrants "are dangerous to Liberty."¹⁶⁴ In 1777, Vermont adopted the Pennsylvania version verbatim.¹⁶⁵ Massachusetts was the first state to use the term "unreasonable search and seizure when it adopted its Constitution in 1780, declaring:

every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause of foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons, or to seize their property, be not accompanied with a special designation of the per-

158. Stengel, *supra* note 136, at 293.

159. VIRGINIA'S DECLARATION OF RIGHTS IN SOURCES OF OUR LIBERTIES 311-313 (R. Perry & J. Cooper, eds. 1978) [Hereinafter cited as Sources.]

160. *Id.* at 312.

161. RUTLAND, *supra* note 149, at 44.

162. Sources, *supra* note 159, at 330.

163. *Id.* at 338, 346.

164. *Id.* at 355.

165. *Id.* at 362.

sons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.¹⁶⁶

New Hampshire copied this provision in 1784 to complete the pre-Constitutional development.¹⁶⁷

This textual history shows the immediate acceptance of the prohibition on general warrants. So tenacious was this embrace that in Connecticut, a state without a Bill of Rights, a court declared a general warrant "clearly illegal."¹⁶⁸ Robert Rutland explained that the revolutionary legislators did not bother "to examine the niceties of law" in framing their declarations of rights.¹⁶⁹ Instead, they sought to give full expression to a "whole catalog of human rights which [they] reviewed . . . not as common law rights, but as natural rights."¹⁷⁰ Thus, by incorporating these ideas into a legal system, "the natural rights' became civil rights, and these civil rights in turn received constitutional sanction."¹⁷¹ Even though opposition to the writs of assistance arose in commercial cases, the ready acceptance of the prohibition as natural law and its inclusion in the Constitutions of eight states indicated that the Colonists were as serious as the British about prohibiting these kinds of searches.

The equation of general warrants with unreasonable searches also helps explicate the meaning of the fourth amendment. The Massachusetts Constitution made clear that the right of the people in question is security from unreasonable searches and that warrants issued without oath or affirmation, or particularity were unreasonable. Even though colonial and early state authorities conducted many warrantless searches, the trend was away from arbitrariness.¹⁷² The opposition to the general warrants defined the scope of this emerging natural right of security in one's person, home, and possessions.

There is no recorded discussion of a search and seizure provi-

166. *Id.* at 376.

167. *Id.* at 383.

168. *Frisbie v. Butler*, Kirby, (Conn. 213-15 (1787)) cited in Stengel, *supra* note 136, at 42.

169. RUTLAND, *supra* note 149, at 298.

170. *Id.*

171. *Id.* at 43.

172. Stengel, *supra* note 136, at 293.

sion at the Constitutional Convention. Indeed, the discussion of a Bill of Rights did not arise until late in the Convention's deliberations and received short shrift from the tired delegates. The absence of a Bill of Rights and, in particular, a search and seizure provision was a matter of some controversy in the debates over the ratification of the Constitution.¹⁷³ In Pennsylvania, Richard Henry Lee's "Federal Farmer" asserted that a freedom from unreasonable searches and seizures was one of certain fundamental rights which should form the basis for the new government.¹⁷⁴ In Virginia, Patrick Henry railed against the lack of a search and seizure amendment. Henry declared that the Virginia Constitution included the famous Declaration of Rights which "guarded those indefeasible rights which ought ever to be held sacred" but the base power of the Federal Government would allow:

"[t]he officers of Congress [to] come upon you now . . . [and] go into your cellars and rooms, and search and ransack, and measure, everything you eat, drink, and wear. They ought to be restrained within proper bounds."¹⁷⁵

Similar sentiments were expressed in New York, Maryland, Massachusetts, North Carolina, and Rhode Island.¹⁷⁶

The Constitution was ratified without a Bill of Rights largely on the strength of the Federalists' promise to include one as soon as possible.¹⁷⁷ James Madison reminded his colleagues of this promise several times during the early days of the First Congress. He repeated the by-then well-known argument that a search and

173. Virginia and New York ratified the Constitution but with a call for a Bill of Rights which would include a proscription on unreasonable searches and seizures. North Carolina also proposed a Bill of Rights with a search provision but refused to ratify the Constitution. Although both Pennsylvania and Maryland ratified the Constitution without a call for any amendments there was strong sentiment in both states for a Bill of Rights with search and seizure provisions. LANDYNSKI, *supra* note 130, at 40-41. For a discussion of the compromise whereby Federalists promised to prepare a Declaration of Rights during the First Congress in exchange for Anti-Federalist votes in favor of ratification see RUTLAND, *supra* note 149, at 159-89. 1) 15 (1787)) citing in Stengel, *supra* note 136, at See J. MAIN, *THE ANTIFEDERALISTS* for a history of the Antifederalists campaign (1961).

174. RUTLAND, *supra* note 149, at 139 citing PAMPHLETS ON THE CONSTITUTION (Force Ed.) 290-91.

175. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States Part Two* 4 U.RICH. L. REV. 60, 70 (1970) citing 2 J. ELLIOT, *THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (1836).

176. *Id.* at 71.

177. See LANDYNSKI *supra* note 130, at 40.

seizure provision was necessary in view of the potential power of the Federal Government to enforce its laws through general warrants.¹⁷⁸

The First Congress delegated to Madison the task of drafting the search and seizure amendment. His first draft of what would become the fourth amendment read:

The rights of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.¹⁷⁹

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

The right of the people to be secure in their persons, houses, papers, and effects, from all unreasonable searches and seizures, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the places to be searched, or the persons or things to be seized.¹⁸⁰

Benson of New York wanted to make the provision stronger by deleting the phrase "by warrants issuing" and substitute the words "and no warrant shall issue" but his motion did not command a majority vote. Yet Benson's Committee reported his version to the whole body, and it was this version which was adopted and ultimately became the fourth amendment.¹⁸¹ Apparently, Benson, the chairman of the Committee, manipulated the process to report out his defeated version and managed to win approval.¹⁸²

This chicanery does not change the fundamental purpose of the amendment: to eliminate the abuse of power occasioned by general warrants. The warrant clause speaks directly to the

178. LANDYNSKI, *supra* note 130, at 41. Madison specifically adverted to the necessary and proper clause as giving Congress the power to pass all laws necessary to collect its revenue. *Id.* The scope of Congressional power to pass laws which were a means to the enactment of its Constitutionally delegated powers was decided in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) See also, C. WARREN, *THE MAKING OF THE CONSTITUTION* 309 (1928) (The Framers did not appreciate the scope of the necessary and proper clause.)

179. LANDYNSKI, *supra* note 130, at 41.

180. *Id.*

181. LANDYNSKI, *supra* note 130, at 41-42.

182. LASSON, *supra* note 145, at 101-03. See also, Stelzner, *The Fourth Amendment: The Reasonableness and the Warrant Clauses*, 10 N.M.L. REV. 33, 38-41 (1980).

problems associated with them. Scholars do not agree, however, on the relationship between the reasonableness clause and the warrant clause. Jacob Landynski argued that the two clauses modified each other. The warrant clause defined "reasonableness" in terms of probable cause and particularity, while the reasonableness clause "reemphasized" the requirements of a valid warrant.¹⁸³ He concluded that because of this relationship the amendment prohibited warrantless searches.¹⁸⁴ Landynski argued that there were only two exceptions to the warrant requirement which he combined within the concept of emergencies: searches of moving vehicles and searches incident to arrest of a person and the area around him.¹⁸⁵

On the other hand, Telford Taylor contended that the Framers "were not at all concerned" with warrantless searches.¹⁸⁶ Instead, the Framers were concerned with the oppressive use of the search warrant and sought to put limits on the judicial power to issue general warrants.¹⁸⁷ Taylor believed that the Framers implied acceptance of warrantless searches incident to arrest suggested that they accepted their legitimacy.¹⁸⁸ At best, warrantless searches must be kept within reasonable bounds.¹⁸⁹

Landynski's view saves the reasonableness clause from becoming meaningless and preserves the protection of the warrant clause. If warrantless searches are tested only by a rule of reasonableness, then the strict requirements of the warrant clause are superfluous. On the other hand, by defining reasonableness in terms

183. LANDYNSKI, *supra* note 130 at 42. Landynski argued that:

The first clause—"The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated"—recognized as already existing a right to freedom from arbitrary governmental invasion of privacy and did not seek to create or confer such a right. It was evidently meant to re-emphasize (and, in some undefined way, strengthen) the requirements for a valid warrant set forth in the second clause. The second clause in turn, defines and interprets the first, telling us the kind of search that is not "unreasonable," and therefore not forbidden, namely, the one carried out under the safeguards there specified. *Id.* at 43.

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

185. *Id.* at 44.

186. TAYLOR, *supra* note 147, at 43.

187. *Id.*; *Cf.* Force, *The Bill of Rights and the Courts: Imperfect and Incomplete Protection of Human Rights in Criminal Cases*, 56 TUL. L. REV. 148, 159-60 (1981).

188. TAYLOR, *supra* note 147, at 43.

189. *Id.*

of the warrant requirements, some meaning is imparted to an otherwise vague standard. Nevertheless, Landynski's position presents problems. For example, requiring warrants for all searches would trivialize the warrant process.¹⁹⁰ Moreover, although Landynski asserts that his two exceptions are "historically defined" only searches incident to arrest can make that claim.¹⁹¹ There is no indication that the problem of searching moving vehicles was considered by the Framers at all. It was not until the invention of the automobile that this exception came into being.¹⁹² If these two situations are exceptions to the warrant clause they undercut Landynski's position and tend to support Taylor's. That is, the Framers recognized some warrantless searches. Therefore, it is conceivable that the Framers would approve of other warrantless searches so long as they were reasonable. It would follow, however, that such warrantless searches might still be judged by the standards of probable cause and particularity.¹⁹³

In spite of their differences Landynski and Taylor agree on a point fundamental to any new theory:¹⁹⁴ the Framers intended to prohibit general searches.¹⁹⁵ This is the "central concept" of the amendment. By defining the evils of the general search it should be possible to test modern-day intrusions into privacy by their resemblance to these evils. Such a delineation satisfies each of Goldberger's qualifications. General searches provide a gauge against which modern searches can be measured.¹⁹⁶ Modern day searches

190. Kitch, *supra* note 32, at 152.

191. TAYLOR, *supra* note 147, at 44-50.

192. Carroll v. United States, 267 U.S. 132 (1925); See LANDYNSKI, *supra* note 130, at 87-98.

193. Cf. Wilson, *Enforcing the Fourth Amendment: The Original Understanding*, 28 CATH. LAW. 173, 177 (1983) ("Although it is not obvious from the language alone, the antecedent history of the amendment makes it clear that the second clause was intended by the Framers to provide a standard, though not necessarily the only standard, of what constitutes a reasonable or an unreasonable search or seizure.").

194. See United States v. Martinez-Fuente, 428 U.S. 543, 570 (Brennan, J., dissenting) (balancing becomes a way to condone unconstitutional conduct); Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 190-92 (1979).

195. TAYLOR, *supra* note 147, at 41; LANDYNSKI, *supra* note 130, at 20. See also Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 50 (1974) ("The central theme of the amendment is its prohibition against general searches.")

196. Wasserstrom, *supra* note 101, at 303-04. (The Warrant Clause tells us what the Framers meant to condemn).

that resemble general searches to any significant degree should be unreasonable under the amendment. Courts should compare the objectionable features of general warrants with the search in question.

III

The foregoing historical survey revealed the most objectionable features of the searches conducted pursuant to general warrants: their intrusiveness, their arbitrariness, their suppression of free thought, and their invasion of the home. A judicial inquiry based on these considerations would proceed along these lines:

A search must be limited in either time, space, or subject.

A search may not chill legitimate, particularly First Amendment, activity.

A search must be carried out in a manner which minimizes the intrusion upon an individual's person, home, or real property.

A search may not discover an amount of wholly private information disproportionate to the information or evidence of criminal activity or to the justification of the search.

The degree of justification for a search may vary in proportion to the intrusiveness of search or the legitimate interests with which it interferes but in any event may never be less than probable cause.

This is not simply a balancing test where a court is asked to take a multitude of factors into account and, in some mystical fashion, arrive at a conclusion. Rather, this approach asks courts to compare the search in question to the list above. If the search violates any of these norms then it is illegal under the fourth amendment and evidence gathered pursuant to it should be suppressed.¹⁹⁷ To be sure, some of the factors are "softer" than others but this ensures that courts will have the flexibility to deal with new situations.

197. Forests have gone to the blade in the debate over the exclusionary rule. No more trees should be felled in that cause, and, thus, this article will not address the efficacy of the rule. Suffice it to say that in remedial Fourth Amendment law as well as in substantive Fourth Amendment law cost-benefit analysis has no place.

This approach would accommodate a good deal of modern fourth amendment law but there also would be many changes. The *Katz* cases would change the most. Because this theory takes a common-sense approach to the definition of a search, this threshold inquiry now prominent in many cases would disappear. Instead, the question would be whether the police acted reasonably. This change would be particularly significant when a court confronts a new surveillance or detection device. For example, *Smith v. Maryland* would be reversed. The pen register was permanent, it disclosed a great deal of information extraneous to the investigations, and had the potential to chill legitimate activity. Arguably, it was not excessively intrusive because it did not physically invade Smith's house nor did it disrupt his affairs. Additionally, the pen register had the specific purpose of finding a certain number and so it was not a "fishing expedition." On balance, however, the pen register would be an unreasonable search unless authorized by a warrant.

In similar fashion, the participant monitoring cases would be reversed.¹⁹⁸ This particular technique very closely resembles a gen-

198. See *United States v. White*, *supra* note 48; *Hoffa v. United States*, 385 U.S. 293 (1966), *Lewis v. United States* 385 U.S. 206 (1966); and *Lopez v. United States*, 373 U.S. 427 (1963). In *Hoffa*, the Court held that the fourth amendment did not prevent the use of an informant's testimony at trial. *Lewis* similarly held that a police undercover officer who misrepresented his identity while purchasing drugs from the defendant did not violate the fourth amendment. *Lopez* held the fourth amendment was not violated by an informant who secretly taped conversations with the defendant. The analysis should be the same whether or not the informer is "wired" and whether he immediately broadcasts the conversation or tapes it for later use. For an incisive critique of these cases, including *White*. See Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activities, Probable Cause and the Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 435-38 (1978). Professor Weinreb has advanced the theory that the fourth amendment protects the "privacy of presence." Weinreb, *supra* note 129, at 69. Privacy of place protects our property; privacy of presence protects our person when we are in a private place. Weinreb, *supra* note 129, at 69. Using this theory, Weinreb reconciles *Katz* and *White* saying that the defendant in *White* couldn't invoke either protection. Weinreb *supra* note 129, at 69 n.65. He concludes that *Lewis* was wrongly decided. Weinreb *supra* note 129 at 67. Under Weinreb's analysis, *Lewis* clearly could invoke the privacy of presence because the transaction occurred inside of his house. Weinreb *supra* note 129, at 69. I agree with Professor Weinreb on *Lewis* but disagree on the other cases. To the extent that the Supreme Court has created an enhanced zone of privacy when police intrude upon a house, the court has adopted Professor Weinreb's approach. Compare *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (court reluctant to find circumstances to justify warrantless entry of home) and *United States v. Karo*, 468 U.S. 705 (1984) (warrantless beeper surveillance in a private residence violates fourth amendment).

eral search. It is open-ended on all counts, it intrudes not only into a person's home but into his confidences, it typically reveals much extraneous information, and, in particular, greatly chills legitimate First Amendment activity. Professor Anthony Amsterdam made this point when he equated participants—monitors, spies, and electronic surveillance. He said:

I can see no significant difference between police spies, bugged or unbugged, and electronic surveillance, either in their uses or abuses. Both have long been asserted by law enforcement officers to be indispensable tools investigating crime, particularly victimless and political crime, precisely because they both search out privacies that government could not otherwise invade. Both tend to repress crime in the same way, by making people distrustful and unwilling to talk to one another. The only difference is that under electronic surveillance you are afraid to talk to anybody in your office or over the phone, while under a spy system you are afraid to talk to anybody at all.¹⁹⁹

Amsterdam goes on to describe his experience in the civil rights movement when a group was confronted with the possibility of a spy in their midst. After the group speculated as to the identity of the spy, the group's leader suddenly said:

"Tell the people it was the bug. I made a mistake and said it on the phone." The others were incredulous. He had never made that kind of a mistake before. And how could he have sat there, letting them spill out every suspicious circumstance they could think up about every movement worker in the place, if it had been him? "Go and tell the people it was the bug." They understood him and they went and told the people. It had to be the bug. If it was a spy, the movement would have torn itself apart.²⁰⁰

Only a narrowly circumscribed warrant founded upon probable cause should authorize such practices. The warrant should be particular to the subject. That is, if an informer is to be used to investigate a certain crime his infiltration should be managed so that he acquires information about that crime and little else.²⁰¹ The warrant should state the information sought, the length of time the informer will be undercover, and the means the informer plans to

199. Amsterdam, *supra* note 46, at 407.

200. Amsterdam, *supra* note 46, at 408.

201. Cf. *Andresen v. Maryland*, 427 U.S. 463 (1976). *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). See also *Morgan*, *supra* note 12, at 94 (Spies more intrusive than bugs because they can follow the subject from place to place). *Morgan* does not believe warrants will be an effective tool, however. *Morgan supra* note 12, at 123.

use. The warrant should be valid for a limited time but can be renewed upon a sufficient showing.

The open fields cases, where the Court has held that a person has no reasonable expectation of privacy outside of the curtilage,²⁰² would receive a different treatment. Strict application of this rule would allow police investigative activity to occur on someone's property no matter how invasive or damaging the activity was.²⁰³ Under the proposed new approach, whether or not the police trespassed would be a significant but not necessarily the controlling factor.²⁰⁴ Other factors including the presence of probable cause, the conduct of the police while on the property, and the extent of the search would inform the court's judgement about the reasonableness of an open fields search.

Two recent cases, where the open fields rule met with advancing technology, provide a good comparison between current fourth amendment law and the proposed approach.²⁰⁵ In *Dow Chemical Co. v. United States*,²⁰⁶ the Court held that aerial photography of a chemical plant from an aircraft lawfully in public navigable airspace was not a fourth amendment search. State tort law protecting such information was immaterial in defining the scope of the fourth amendment.²⁰⁷ Moreover, the court found that the photographs were not greatly intrusive because "[a]ny person with an

202. *United States v. Dunn*, 107 S. Ct. 1134 (1987); *Oliver v. United States*, 466 U.S. 170 (1984). See generally Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986).

203. See, e.g., *United States v. Brown*, 473 F.2d 952, 954 (5th Cir. 1973) (Seizure of suitcases buried next to chicken coop within open fields doctrine.); *Conrad v. State*, 63 Wis. 2d 616, 620-21 (1974) (Police trespassed, dug over a dozen holes in ground during random search for a corpse); See Note, *Katz In Open Fields*, 20 AM. CRIM. L. REV. 485 (1983) for a general discussion of the open fields doctrine which includes an analysis of the Circuit Court opinion in *Oliver*.

204. Currently, confusion reigns as to importance of property doctrines in open field and other cases. Compare *Rakas v. Illinois*, 439 U.S. 128 (1978) (Defendant did not have standing to challenge search because he didn't claim ownership on possession in items seized on place searched) and *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (Defendant did not have standing to challenge search even though he owned the items seized). See also *Oliver v. United States*, 466 U.S. 170 (1984). (No search even though officers trespassed on property because law of trespass protects different interests than Fourth Amendment).

205. See generally Note, *Warrantless Aerial Surveillance After Ciruolo and Dow Chemical: The Omniscient Eye in the Sky*, 18 LOY. U. OF CHI. L. J. 285 (1986).

206. 106 S. Ct. at 1819 (1986).

207. 106 S. Ct. at 1823.

airplane and an aerial camera could readily duplicate them" and the photographs did not reveal "intimate details."²⁰⁸ The open spaces of the plant were not comparable to the curtilage of a dwelling in which a person has a reasonable expectation of privacy but were more like the open fields where any expectation of privacy is unreasonable.²⁰⁹ The Court reserved the question whether or not the use of highly sophisticated equipment "not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant."²¹⁰

In *California v. Ciraolo*,²¹¹ the court held that a warrantless, naked-eye aerial observation of a marijuana patch in a fenced-in back yard from aircraft lawfully in public navigable airspace was not a search. Using the "voluntary exposure" rule, the court held that the defendant had no reasonable expectation of privacy because "[a]ny member of the public flying in this airspace who glanced down could have seen everything" the police saw.²¹²

Justice Powell's dissent in both cases raised the fear that developing technology is eroding fourth amendment protections. In *Dow*, Powell criticized the majority's nonchalance about the threat of technology. Powell noted that fourth amendment interests are measured by what a free society recognizes as reasonable and not be the availability of the method of surveillance.²¹³ To do otherwise would place privacy rights "seriously at risk as technological advances become generally disseminated and available in our society."²¹⁴ Powell echoed this view in *Ciraolo*.²¹⁵ He went on to criticize the majority's almost exclusive reliance on "the fact that members of the public fly in planes and may look down at homes as they fly over them."²¹⁶ The majority apparently found that because of this potential observation any expectation in backyard ac-

208. 106 S. Ct. 1823, n.126-127. *But see* 106 S. Ct. at 1829 n.4. (Powell, J., concurring in part and dissenting) (Camera cost over \$22,000 and could resolve details as small as ½ inch in diameter).

209. 106 S. Ct. at 1827.

210. 106 S. Ct. at 1826.

211. 476 U.S. 207 *reh'g denied* 106 S. Ct. 3320 (1986).

212. 476 U.S. at 215.

213. 106 S. Ct. at 1833.

214. 106 S. Ct. at 1833.

215. 476 U.S. 217.

216. 476 U.S. at 219.

tivities was unreasonable. Powell called this reasoning flawed because the potential for observation by passengers in commercial aircraft was nil and because the activities observed occurred in private.²¹⁷ There is a qualitative difference between the public use of the airspace for business and pleasure and the low altitude overflights for the sole purpose of discovering information about a person's activities "within a private enclave into which [the police] were constitutionally forbidden" to enter without a warrant.²¹⁸

Under the approach proposed in this article there would be no need to decide if the open fields doctrine applied or to resort to tortured arguments about a business curtilage.²¹⁹ Rather, the question, absent a properly issued warrant, is "is the search reasonable?" There is no question that both overflights were searches. The police in *Ciraolo* and the EPA in *Dow* purposefully flew over their targets to gather information about the activities below. The flights were not limited in duration or scope. The EPA conducted three overflights of the Dow plant from distances of 12,000, 3,000, and 1,200 feet.²²⁰ Both flights allowed indiscriminate access to information about a range of activities not connected to the purpose of the investigation. In *Dow*, the surveillance exposed the entire "open-air" plants which included "reactor equipment, loading and storage facilities, transfer lines, and motors located in the open areas between buildings."²²¹ In *Ciraolo*, the backyard included "a swimming pool and a patio for sunbathing and other private activities."²²² Routine aerial surveillance may lead people to conclude that they would not be safe from governmental snooping unless

217. *Id.*

218. *Id.*

219. In *Ciraolo*, the precise issue was whether or not aerial observation of the curtilage violated the Fourth Amendment. In *United States v. Dunn*, 107 S. Ct. 1134 (1987), the Court outlines a four-part inquiry to determine if an area is within the curtilage of a residence: "the proximity of the area . . . 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 . . . to protect from observation" by passers by. *Id.* at 1139. In *Dow*, the company argued that the area photographed was within their "industrial curtilage" because it had taken steps to bar access from ground level. *Dow*, 106 S. Ct. at 1825. The Court rejected this argument saying that the area fell between the open fields and the curtilage but lacked critical characteristics of both. 106 S. Ct. at 1825-26.

220. 106 S. Ct. at 1822.

221. 106 S. Ct. at 1828 (Powell, J., concurring in part and dissenting).

222. 106 S. Ct. at 1817, n.7 (Powell, J. dissenting).

“they retreat behind the walls of their homes”²²³ and thus forego other legitimate activities.

Unlike the majority’s position, the availability of the technology to the public or the potential for observation by others is immaterial. Assuming *arguendo* that the kind of camera used in *Dow* is generally available,²²⁴ this would simply be beside the point. As Professor Amsterdam noted, the government could not nullify the fourth amendment by regularly announcing the existence of pervasive surveillance.²²⁵ Making the application of the fourth amendment turn on the private availability of technology has the same effect. In addition, my expectation of the nosiness or the lawlessness of others does not diminish my expectation that the government will not gather information about me unless it has reason to do so and follows the constitutionally prescribed procedures. If I live in a high-crime area I still may expect that the government will not barge into my house without a warrant.²²⁶ The question is not whether or not there is a risk that some private party will discover information about me. Rather, the question is what risks we should assume in a free society.²²⁷

In short, had the proposed approach been used in *Dow* and *Ciraolo* the results would have been different. Aerial surveillance has a place in law enforcement but its potential for abuse requires that it be conducted pursuant to a warrant.

Many of the searches currently recognized as exceptions to the warrant clause would be reasonable under this approach. For example, the result in “plain view” cases would be the same because the seizure of evidence discovered in the course of otherwise lawful police activity is reasonable. The leading plain-view case is *Coo-*

223. 106 S. Ct. at 1819, n.10 (Powell, J. dissenting).

224. The majority noted that the EPA did not use a “unique sensory device that . . . could penetrate the walls of buildings and record the conversations [therein], but rather a conventional, albeit precise, commercial camera commonly used in map-making,” *Dow*, 106 S. Ct., at 1826. This statement ignores the cost of the camera and the incredible detail revealed by the photographs. 106 S. Ct. at 1823 n. 126-127. Even if the availability of the technology mattered, the majority’s characterization of this technology was absurd.

225. Amsterdam, *supra* note 46, at 384.

226. DiPippa, *supra* note 112, at 612, n.176 Cf. Amsterdam, *supra* note 46, at 406-07 (When a car is parked in a high crime area “does that mean government agents can break into [the] car uncontrolled by the Fourth Amendment?”).

227. *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting).

*lidge v. New Hampshire*²²⁸ where the court held that evidence in plain view may be seized if the police are lawfully on the premises. The exact standard enunciated by *Coolidge* is not clear. Justice Stewart outlined three requirements for the application of the plain view rule. First, the police must be lawfully on the premises. Second, they must inadvertently discover the item. Third, it must be immediately apparent to them that the item is evidence of a crime, contraband, or otherwise subject to seizure. The Court mustered five votes in favor of suppression, but Justice Harlan, who provided the fifth vote in favor of suppression, did not join Stewart's opinion on the plain view issue.²²⁹ Recently, the Court gave meaning to the "immediately apparent" language of *Coolidge* when it held that the police must have probable cause to believe that the item seized is connected to criminal activity.²³⁰ Whether or not the discovery must be inadvertent is still an open question.²³¹

The proposed approach would follow the current law. It would be reasonable for the police to conduct plain view seizures because they are limited both in scope and in the amount of information which can be revealed and there is little chance that they will chill legitimate activity. Under the proposed approach, the question of inadvertance would be immaterial. The objective reasonableness of the search and seizure should not depend on the subjective frame of mind of the officer so long as the officer is where he belongs and has probable cause to seize an item. The same can be said for emergency searches.²³²

Most searches incident to arrest²³³ would be reasonable. Searches of the person and the area within his immediate control should be generally sanctioned. Although the search is intrusive it is limited in scope and will reveal an amount of information pro-

228. 403 U.S. 443 (1971). In *Texas v. Brown*, 460 U.S. 730 (1983), four members of the court remarked that although *Coolidge* was a plurality opinion on the plain view issue it should be a point of reference for any further discussion. On the other hand, five members either implicitly or explicitly accepted the *Coolidge* formulation.

229. 403 U.S. at 490 (Harlan, J. dissenting).

230. *Arizona v. Hicks*, 107 S. Ct. 1149 (1987).

231. 107 S. Ct. at 1155 (White, J., concurring).

232. See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (Gravity of the underlying offense important factor in determining exigency); *Schmerber v. California*, 384 U.S. 757 (1966) (Intrusiveness of search important factor).

233. *Chimel v. California*, 395 U.S. 752 (1969).

portionate to its justification. The intensity of the search will be limited by its justification. Thus, an arrest for a minor offense will only justify a *Terry*-type frisk for the officer's protection.²³⁴

The bright-line rule in *United States v. Robinson*²³⁵ would be reversed. Because in some cases the amount of private information would be disproportionate to the evidence of criminal activity. For example, the defendant in *Robinson* was stopped for a traffic violation but then was subjected to, first, a pat-down, and, then, a search of his shirt pocket. Ultimately, the officer found a cigarette package which contained contraband.²³⁶ This search would fail under the proposed approach because, absent evidence that the defendant was dangerous or that he was engaged in illegal activity, a search after a traffic stop will acquire information disproportionate to the offense. Similarly, the bright-line rule of *New York v. Belton*²³⁷ also would be reversed. In *Belton*, the Court held that police may make a search of the entire passenger compartment of an automobile and all of the containers found within it subject to lawful custodial arrest.²³⁸ As a general rule under the proposed approach, the search would be unreasonable because it is open-ended. That is, unlike a search of a car conducted pursuant to the automobile exception where the scope of the search is limited by its justification, a *Belton* search automatically allows a search of the entire passenger compartment in every case whether or not the police have reason to believe they are in danger or that evidence of a crime is hidden in the car. Moreover, *Belton* searches are intrusive and will turn up a disproportionate amount of private information.

Automobile searches without warrants would still be allowed although a few situations may come out differently. *Chambers v. Maroney*²³⁹ provides a good example. In *Chambers*, the Court up-

234. Compare *United States v. Robinson*, 414 U.S. 218 (1973) (arrest for minor traffic offense justifies search of arrestee's pocket) and *Terry v. Ohio*, 392 U.S. 1 (1968) (Search of person and its intensity determined by nature of situation.) See *LaFave*, "Case by Case Adjudication" versus "Standardized Procedures"; *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, for the classic discussion of the problem of rules versus *ad hoc* decisions.

235. See *United States v. Robinson*, 414 U.S. 218 (1973) (Protection of the police and preservation of the evidence are the twin justifications for searches incident to arrest).

236. 414 U.S. at 223.

237. 453 U.S. 454 (1981).

238. 453 U.S. at 460.

239. 399 U.S. 42 (1970).

held a warrantless search of an automobile.²⁴⁰ The opinion suggested that exigent circumstances existed to justify the warrantless search because of the car's inherent mobility.²⁴¹ The car, however, had been driven to the police station and searched there after the defendants had been taken into custody.²⁴² Thus, the facts of the case undercut the mobility rationale. Although a later case stressed mobility to overturn a decision upholding a search of an automobile,²⁴³ more recent cases have reaffirmed *Chambers* and all but eliminated mobility and exigency as necessary elements of the doctrine.²⁴⁴

Recently the court further muddied the waters in *California v. Carney*.²⁴⁵ In the course of holding that a search of a mobile motor home parked in a downtown parking lot came under the automobile exception the court remarked that "although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases made clear that ready mobility is not the only basis for the exception."²⁴⁶ The court noted a vehicle's reduced expectation of privacy because of its extensive regulation.²⁴⁷ In spite of these statements, the case turned on the mobility of the vehicles in question because it was in a setting that objectively indicated its use for transportation.²⁴⁸ The court reserved the question of whether or not the vehicle exception applied to a motor home more obviously and permanently used as a residence.²⁴⁹

My approach would revive exigency as an independent factor in such cases. Because warrantless car searches resemble trespasses on real property, because much extraneous information can be discovered and because they chill legitimate activity, I would be hard pressed to generally sanction them absent true mobility. To the

240. 399 U.S. at 52.

241. 399 U.S. at 51-52.

242. 399 U.S. at 44.

243. *Michigan v. Thomas*, 458 U.S. 259 (1982) (Justification for warrantless search does not vanish when car stops); *Texas v. White*, 423 U.S. 67 (1975) (Reaffirming *Chambers*).

244. See *Cardwell v. Lewis*, 417 U.S. 583 (1974) (Plurality rejected contention that mobility had legal significance).

245. 471 U.S. at 386 (1985).

246. 471 U.S. at 391.

247. 471 U.S. at 392.

248. 471 U.S. at 394.

249. 471 U.S. at 394.

extent that *Carney* considers the mobility of a vehicle and the intrusiveness of a search on property used as a home, it is consistent with the proposed approach.²⁵⁰ In any event, a clearer rationale would emerge for automobile cases than currently exists.²⁵¹

One category of cases deserves special treatment. Because the fourth amendment is rooted in the Framers' distaste for the use of general warrants to suppress political dissent, searches which may potentially chill the exercise of First Amendment rights should receive rigorous scrutiny from the courts even if they are carried out pursuant to a warrant.²⁵² A warrant should be required in every case. Even then, the government must show probable cause that the group is involved in illegal activity which is dangerous to the public safety.²⁵³

This approach puts a premium on warrants. Even though the Framers were fearful of the abuse of the warrant, they nevertheless authorized its use after compliance with certain procedural and substantive safeguards. When taken seriously and subjected to judicial scrutiny these safeguards should protect citizens from abu-

250. The rules respecting the warrantless search of containers located in vehicles as defined in *United States v. Ross*, 456 U.S. 798 (1982) should stay the same. *But see Katz, United States v. Ross: Evolving Standards of Warrantless Searches*, 74 J. CRIM. L. & CRIMINOLOGY 172 (1983).

251. *Compare Chambers v. Maroney*, 399 U.S. 42 (1970), where the Court phrased the rationale as an exception to the warrant clause based on mobility and *United States v. Chadwick*, 433 U.S. 1 (1976) where the court explained that the diminished expectation of privacy in a car justified the automobile exception. *Cf. Cady v. Dombrowski*, 413 U.S. 433 (1973) (Automobiles not like other items because of extensive regulation.) *See also Katz, The Automobile Exception Transformed: The Rise of A Public Place Exemption to the Warrant Requirement*, 36 CASE WESTERN RES. L. REV. 375 (1985-86).

252. Most of the current rules governing the interplay of the first and fourth amendments arose from obscenity cases. The first amendment imposes special constraints on searches for and seizures of presumptively protected material. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326, n.5 (1979). The fourth amendment must be applied with "scrupulous exactitude" in these circumstances. *Stanford v. Texas*, 379 U.S. 476, 485 (1965). The seizure of allegedly obscene material contemporaneous with or as an incident to an arrest for unlawful public exhibition may not be done without a warrant. *Roaden v. Kentucky*, 413 U.S. 496, 497 (1972). Any warrant must be particularized and may not issue on the officers conclusory assertions. *Marcus v. Search Warrant*, 367 U.S. 717, 731-732 (1961). *But see Maryland v. Macon*, where the court applied the "voluntary disclosure" rule to find that an undercover officer's purchase of material on display was not a search.

253. *Cf. Laird v. Tatum*, 408 U.S. 1 (1972) *reh. denied* 409 U.S. 901 (1973) (Court dismissed complaint attacking military surveillance of civilian political activity but in *dicta* suggested that when presented with facts showing specific injury courts could entertain case).

sive searches. If these conditions are met, then searches under warrant should be presumed reasonable unless carried out in a patently unreasonable manner.²⁵⁴ The defendant should bear the burden of proof to show that the judicial officer who issued the warrant had no substantial basis for his conclusion.²⁵⁵ At the same time, this approach does away with the good faith exception.²⁵⁶ The police should not be able to rely on a search warrant that cannot meet the above relaxed standard. Otherwise, one has the absurdity of reasonable reliance upon a warrant which can not authorize a reasonable search.²⁵⁷ Finally, the police would bear the burden of proof whenever they conducted a warrantless search. This would be similar but not identical to current law.²⁵⁸

CONCLUSION

The course of fourth amendment law has not often run smoothly.²⁵⁹ This may be true no matter which approach is taken. The difficulty lies in applying the Framers' hybrid normative and practical judgment to an infinite variety of fact situations.²⁶⁰ Nevertheless, by defining the Amendment's central values in functional terms we may develop a jurisprudence that can adapt to our technology and still be faithful to the Framers' purpose.

254. Dix, *Means of Executing Searches and Seizures as Fourth Amendment Issues*, 67 MINN. L. REV. 89 (1982) (Courts should look at amount of force, time of day, and duration of the search).

255. *Illinois v. Gates* 462 U.S. 213 (1983) *reh. denied* 463 U.S. 1237 (1983).

256. *United States v. Leon*, 468 U.S. 897 (1984).

257. The Court's apparent approval of this result in *Leon* and its companion case, *Massachusetts v. Shepherd*, 468 U.S. 981 (1984), is a puzzle. The question is whether a warrant invalid under the objective reasonable standard of *Gates* could still be relied upon by objectively reasonable police officers. Justices Brennan and Marshall referred to this question as mind-boggling. If a warrant invalid under *Gates* is unreasonable under the fourth amendment, then *Leon/Shepherd* add nothing except confusion to the *Gates* decision. Cf. Kamisar, *Gates*, "Probable Cause, Good Faith", and *Beyond*, 69 IOWA L. REV. 551, 589 (1984) ("To say that the evidence obtained pursuant to a warrant should be admissible even though police lacked a 'substantial basis' for a 'substantial chance' of criminal activity as long as they had a reasonable belief that they had a 'substantial basis' for a 'substantial chance' would be to promulgate an almost mind-boggling standard.") (emphasis in original).

258. See, e.g., *Mincey v. Arizona*, 437 U.S. 385 (1978); *Katz v. United States*, 389 U.S. 347 (1967).

259. *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J. concurring); see LaFave, *Search & Seizure, The Course of True Law . . . Has Not . . . Run Smooth*, 1966 U. ILL. LAW FORUM 255.

260. Amsterdam, *supra* note 46, at 411.