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I. INTRODUCTION

A recent, illustrated version of the United States Constitution, issued in commemoration of its bicentennial, portrays the fourth amendment with a drawing of a home sitting atop the turret of a

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castle.[1] The artistic statement aptly captures the common understanding of fourth amendment protections: A man's home is his castle, at least when it comes to governmental intrusions. Two recent Supreme Court decisions, however, that uphold the aerial surveillance of a suburban backyard and a commercial manufacturing facility, appear to challenge this popular perception.[2] The home may be a castle—but that castle is impregnable only when nothing photogenic is occurring in the courtyard.

The aerial surveillance decisions raise anew a continually perplexing fourth amendment issue: When has a "search" occurred? The issue is important because "searches are presumptively improper unless authorized in advance by a warrant."[3] The question, moreover, has been a heated one since the inception of the Republic.[4] Supreme Court briefs filed in the recent aerial surveillance

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1. S. FINK, THE CONSTITUTION OF THE UNITED STATES, article IV (1985) (pages in book not numbered).

2. California v. Ciraolo, 106 S. Ct. 1809 (1986); Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986). *Ciraolo* and *Dow* were decided on the same day.

3. Most cases construing the provisions of the first clause of the fourth amendment ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated") present two questions. First, has a "search" within the meaning of the amendment taken place? Second, if so, was the search "unreasonable?" The resolution of the first question, as this Article demonstrates, has generated substantial doubt and litigation. The answer to the second has tended to turn on the outcome of the first, because for the past 40 years the Court rigidly has held that a "search" is "unreasonable" unless conducted in conformity with the second clause of the amendment, known as the "warrant clause" ("and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"). *See* Johnson v. United States, 333 U.S. 10, 14-15 (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;" only in "exceptional circumstances . . . may [it] be contended that a magistrate's warrant for search may be dispensed with"). Thus, if a "search" has occurred the Court has held the search to be "unreasonable" unless authorized in advance by a valid warrant or undertaken in "exigent" circumstances. *See, e.g.*, New York v. Class, 475 U.S. 106 (1986).

This Article will not deal explicitly with whether a given search is "unreasonable" or whether the Court's rather monolithic approach to that issue should be modified. *See, e.g.*, Robbins v. California, 453 U.S. 420, 438-39 (1981) (Rehnquist, J., dissenting) (by emphasizing the warrant requirement over the general "reasonableness" of a search, the Court has " 'stood the fourth amendment on its head' from a historical standpoint"), *quoting* Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., concurring). The Article addresses only the basic question of when a "search," triggering the substantive provisions of the fourth amendment, has occurred.

4. Disputes regarding the coverage of the fourth amendment began with disagreements over the final wording of the amendment. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 101 (1937). Furthermore, the fourth amendment's adoption did not end the controversy. *See, e.g.*, Chimel v. California, 395 U.S. 752, 770 (1969) (White, J., dissenting) ("Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search 'inci-

cases, for example, raised the spectre of George Orwell's airborne Police Patrols[5] to counter assertions that warrantless aerial surveillance is a necessary and legitimate tool in the eradication of societal crime.[6] The earnest debate of these questions, almost 200 years after the adoption of the Bill of Rights, demonstrates the amorphous nature of fourth amendment jurisprudence; doctrine evolves continually to meet the needs of changing circumstances.

During the past fifty years, the rapid development of electronic and other technologically-enhanced means of surveillance has been the primary source of fourth amendment evolutionary pressure. Faced with police use of investigative techniques beyond the ken of the drafters of the fourth amendment, the Supreme Court handed down the landmark 1967 decision in *Katz v. United States.*[7] In *Katz* the court adopted a fiexible "reasonable expectation of privacy" analysis for resolving search and seizure issues. But, for all its virtues, this modern "privacy" approach often embodies more "flex" than "analysis." Indeed, the judiciary has floundered in its attempt to delineate which expectations of pri-

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dent to an arrest.' There has been remarkable instability in this whole area . . ."). The continuing debate surrounding the fourth amendment can be attributed to the fundamental values it seeks to protect. As the Supreme Court noted in Union Pacific Railroad v. Botsford, 141 U.S. 250, 251 (1891), "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Understandably, the controversy has not been confined to the ivory towers of legal scholarship, but instead has perplexed lawyers, judges, police, and ordinary citizens. In the preface to his celebrated treatise on the fourth amendment, Professor Wayne LaFave notes that the intensive debate continues undiminished: "[I]t is beyond question that the Fourth Amendment has been the subject of more litigation than any other provision in the Bill of Rights. Indeed, I would be willing to wager . . . that . . . lawyers and judges have spilled more words over the Fourth Amendment than all of the rest of the Bill of Rights taken together." 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, at v (2d ed. 1986).

5. Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 8 n.6, California v. Ciraolo, 106 S. Ct. 1809 (1986) (No. 84-1513), *quoting* G. ORWELL, 1984, at 6 (1949); Brief for the Civil Liberties Monitoring Project as Amicus Curiae in Support of Respondent at 7, California v. Ciraolo, 106 S. Ct. 1809 (1986) (No. 84-1513), *quoting* G. ORWELL, 1984, at 6 (1949).

6. Brief for Americans for Effective Law Enforcement, Inc., as Amicus Curiae, joined by The International Association of Chiefs of Police, Inc., The Airborne Law Enforcement Association, Inc., and the Legal Foundation of America In Support of Petitioner at 7-8, California v. Ciraolo, 106 S. Ct. 1809 (1986) (No. 84-1513); Brief for the Washington Legal Foundation as Amicus Curiae in Support of Petitioner at 5-8, California v. Ciraolo, 106 S. Ct. 1809 (1986) (No. 84-1513); Brief for the Criminal Justice Legal Foundation as Amicus Curiae in Support of Petitioner at 27-32, California v. Ciraolo, 106 S. Ct. 1809 (1986) (No. 84-1513).

7. 389 U.S. 347 (1967).

vacy are "reasonable." The potentially limitless range of factors relevant to that determination has resulted in divergent and conflicting analytical resolutions.[8]

The resulting disorder in fourth amendment jurisprudence has been a boon to legal commentators, who have been quick to criticize and point out inconsistencies in discrete cases.[9] Although the literature has highlighted the confusion, it hardly has calmed the disarray. This deplorable condition need not continue. After two decades of uncertainty, a workable set of criteria is discernable in the stated rationales of Supreme Court decisions to guide the course of future fourth amendment litigation—a course that, to say the least, has not been well marked.

A careful analysis of Supreme Court cases both prior and subsequent to *Katz*, with an emphasis on the perspective afforded by the Court's most recent decisions, reveals that the Court focuses on three interrelated inquiries in determining whether governmental surveillance violates a "reasonable expectation of privacy:" (1) the place of location where the surveillance occurs; (2) the nature and degree of intrusiveness of the surveillance itself; and (3) the object or goal of the surveillance. While the Court has not adopted explicitly this trio of factors as a formal legal test, the stated grounds of decision in cases both before and after *Katz* imply this approach. The time has come to give some definite analytical content to the amorphous *Katz* "reasonableness" test. The three inquiries identified in this Article, if explicitly isolated and analyzed in the context of actual cases, will both illuminate and rationalize the judicial function in enforcing fourth amendment protections.

This Article traces the historical background and modern support for a tripartite "search" analysis. The second section examines the historic definition of a "search" within the meaning of the

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8. *See infra* notes 51-56 and accompanying text.

9. *See infra* notes 162-63 and accompanying text; *see also* Wald, *The Unreasonable Reasonableness Test for Fourth Amendment Searches*, 4 CRIM. JUST. ETHICS, Winter/Spring 1985, at 2; Note, United States v. Jacobsen: *Expanded Private Search Doctrine Undermining Fourth Amendment Values*, 16 LOY. U. CHI. L.J. 359 (1985); Note, Oliver v. United States: *Will Expectations of Privacy Shield Criminal Acts No More?*, 36 MERCER L. REV. 1401 (1985); Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. Rev. 725 (1985); Note, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191 (1986); Note, *"Bright Lines" Enter the Gray Zone: Application of Automobile Search Incident to Arrest Standards to Non-Automobile Cases*, 42 WASH. & LEE L. REV. 587 (1985); Note, New Jersey v. T.L.O.: *Finding a Reasonable Standard For Searches in Public Schools*, 12 W. ST. U.L. REV. 873 (1985); Note, *What is a Reasonable Expectation of Privacy?*, 12 W. ST. U.L. REV. 849 (1985).

fourth amendment. That determination, which originally depended almost entirely upon notions derived from the law of trespass, came under extreme pressure as modern technology began to develop modes of surveillance that did not require a physical intrusion. These practical and logical tensions resulted in the *Katz* decision.

The third section of this Article demonstrates that, despite its virtues, *Katz* created unique difficulties of its own as the courts tackled the nebulous task of applying a "reasonable expectation of privacy" test to concrete facts. The fourth section examines a particularly egregious example of the problems engendered by *Katz*: Whether the opening of a container taken from a properly stopped automobile constitutes a "search." The Court quelled the pandemonium created by this line of cases only by expanding the scope of the "automobile exception" to the warrant clause, thus making unnecessary any determination whether the opening of a given container violated a "reasonable expectation of privacy."

The fifth section of this Article analyzes the Court's most recent "search" decisions and demonstrates that the Court has narrowed dramatically the range of factors it considers under the *Katz* privacy analysis. Rather than examining all possible evidence impinging upon the reasonableness of a claimed privacy expectation, the Court focuses on the place where governmental surveillance occurs, the intrusiveness of the procedures used, and the object of the surveillance itself.

Finally, the sixth section of this Article describes both pre- and post-*Katz* cases, showing the consistent, albeit oftentimes implicit, utilization of the above three concerns as grounds of decision. Fourth amendment "search" jurisprudence would become substantially less hazy—and the decision of concrete cases significantly simplified—if the Supreme Court and lower federal courts were to adopt explicitly this multi-factor analysis.

II. An Historical Overview: From Places to Privacy

Governmental authority to search private property had a long and turbulent history prior to the creation of the search warrant, the modern policeman, or the fourth amendment.[10] The first offi-

10. For a comprehensive history of the development of fourth amendment jurisprudence, including English common-law antecedents, see N. Lasson, *supra* note 4; *see also* Marcus v. Search Warrants of Property, 367 U.S. 717, 724-29 (1961) (tracing English common-law precursors to the fourth amendment).

cial use of such governmental power developed in England shortly after the invention of the printing press, largely because Parliament feared seditious or libelous publications.[11] By the sixteenth century, the Crown commonly used general warrants (authorizing virtually indiscriminate searches to enforce publication statutes) and writs of assistance (authorizing searches and seizures to enforce import duty laws).[12]

In the mid-seventeenth century, however, public opposition to the unrestrained search and seizure power authorized by general warrants and writs of assistance escalated rapidly,[13] and the warrants and writs became the targets of increasing criticism.[14] William Pitt's celebrated and impassioned plea for the common man's right to freedom from indiscriminate government searches captures the emotional fervor that even today characterizes search and seizure issues:

> The poorest man may in his cottage bid defiance to all the force 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 cannot enter—all his force dares not cross the threshold of the ruined tenement![15]

Pitt's rhetoric, however, had little initial effect; the government continued to issue general warrants.[16]

Growing resentment among the English populace, coupled with judicial concern regarding indiscriminate searches, resulted in the landmark decision of *Entick v. Carrington*.[17] In *Entick* the secretary of state had issued a general warrant authorizing the search of John Entick's home and the seizure of his papers on the grounds that they contained seditious libel. Entick brought a trespass action for damages challenging the resulting four-hour search of his

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11. N. LASSON, *supra* note 4, at 24-25.

12. *Id.* at 28-32.

13. By the year 1643, "public opinion . . . was becoming more and more sensitive to arbitrary practice and more alive to what *ought to be* the right of the individual. This growing consciousness was in line with what the judges were doing in developing the common law." *Id.* at 34 (emphasis in original).

14. *See* Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489 (1763) (denouncing the general warrant as "worse than the Spanish inquisition; a law under which no Englishman would wish to live one hour"); *see also* Marcus, 367 U.S. at 729 n.22 (quoting a London pamphlet criticizing the general warrant as "infamous in theory, and downright tyranny and despotism in practice").

15. Frank v. Maryland, 359 U.S. 360, 378-79 (1959) (Douglas, J., dissenting) (quoting William Pitt).

16. N. LASSON, *supra* note 4, at 37.

17. 19 Howell's St. Tr. 1030 (1765).

property.[18] Lord Camden's opinion, upholding a verdict for Entick, held the general warrant invalid. Although Lord Camden suggested that some limited governmental incursions may be justified when private rights are "abridged by some public law for the good of the whole,"[19] he concluded that the general warrant exceeded a proper balance of individual rights and public necessity. Because there was no established law authorizing the wholesale search and seizure of goods and chattels, Lord Camden concluded that the general warrant was an intrusion proscribed by the English common law of trespass.[20]

Thus, *Entick* delineated the fundamental analysis that, even today, influences the outcome of a challenge to governmental authority to conduct a search: the essential inquiry balances public necessity with individual rights. In assessing that balance against the common-law milieu of eighteenth-century England, the *Entick* court relied upon rights embodied in the law of trespass as a ready benchmark with which to gauge the propriety of governmental surveillance. Nineteenth-century American courts soon followed suit.

The Supreme Court adopted *Entick*'s approach to the limits on governmental search and seizure authority in its interpretation of the fourth amendment.[21] The Court condemned searches conducted pursuant to governmental authorizations analogous to general warrants or writs of assistance as "unreasonable searches and seizures" within the meaning of the fourth amendment.[22] But,

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18. *Id.*

19. *Id.* at 1066.

20. The defendants had argued that the general warrant was valid because "at different times from the time of the Revolution to tbis present time, the like warrants with that issued against the plaintiff, bave been frequently granted by the secretaries of state." *Id.* at 1035. Lord Camden held, however, that despite the general warrant's long usage, no statute or common-law authority validated its issuance. *Id.* at 1066 ("Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society"). Lord Camden rejected the defendants' analogy to a writ authorizing a search for stolen property because he found no procedural safeguards surrounding the issuance or execution of the general warrant, *id.* at 1063, in contrast to "the caution with which the law proceeds" in the case of stolen goods, *id.* at 1067. Accordingly, Lord Camden concluded that the search of Entick's dwelling house "is a trespass." *Id.* at 1066. "By the laws of England, every invasion of private property, be it ever so minute is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damages be nothing. . . . Papers are the owner's goods and chattels: They are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection." *Id.*

21. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886).

22. *Id.* at 626-27 ("it may confidently be asserted that [*Entick's*] propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were con-

more importantly for the purposes of this Article, *Entick*'s trespass analysis became essential in determining when there had been a "search" in the first place.

For example, in *Boyd v. United States*,[23] the Court reasoned that the seizure of "private books and papers" of an "owner of goods" might be an unlawful "search" because of the owner's interest in retaining custody of the goods.[24] The Court began to link the "search" issue to property law constructs such as trespass. In fact, the Court suggested that, if the object of the governmental intrusion in *Boyd* had been stolen goods, the Court would have found no constitutional objection because the defendant lacked any proprietary interest in the property seized.[25] Following *Boyd*, the Court's "search" definition became highly dependent upon technical concepts associated with the law of trespass, including the requirement of an actual physical intrusion.[26]

The Court's strict catenation of the concept of a "search" to the law of trespass was modified by Justice Holmes' decision in *Hester v. United States*.[27] In *Hester* the Court created an exception to the strict, trespassory notion of a "search" by holding that a simple trespass upon agricultural land did not violate the fourth amendment because the amendment's protection of "the people in their 'persons, houses, papers, and effects' [does] not extend[] to the open fields."[28] Thus, a defendant's claim of a proprietary interest in property no longer sufficed to invoke the protection of the fourth amendment; a defendant also had to establish that the locus of the governmental intrusion was a constitutionally protected

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sidered as sufficiently explanatory of what was meant by unreasonable searches and seizures").

23. *Id.*

24. *Id.* at 634-35.

25. *Id.* at 624; *see also* Mickenberg, *Fourth Amendment Standing After* Rakas v. Illinois: *From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197, 201 (1981).

26. Olmstead v. United States, 277 U.S. 438 (1928) (actual physical intrusion required as predicate for a "search"); *see also* Clinton v. Virginia, 377 U.S. 158 (1964) (same proposition); Goldman v. United States, 316 U.S. 129 (1942) (same proposition).

The impact of the Court's association of the constitutional concept of a "search" with the smaller details of property and tort law should not be overstated, however. In the course of developing a jurisprudential scheme which related the concepts of "search" and "trespass," the Court never completely lost sight of the underlying purpose of the fourth amendment—the protection of personal liberty. *Boyd*, 116 U.S. at 630. The point is simply that, even though the "privacies of life" animated the amendment, the Court seemed to assume that an invasion of such "privacies" went hand in hand with (and perhaps required) an "invasion of . . . private property." *Id.*

27. 265 U.S. 57 (1924).

28. *Id.* at 59.

"place." In the years following *Hester*, the Court revisited repeatedly the question whether particular locales were more analogous to "open fields" or to "houses, papers, and effects."[29]

The Court's property-based[30] construction of the fourth amendment proved to be remarkably durable—even in the face of technological advances that made judicial inquiries into "place" and "physical intrusion" seem quaint, if not wholly unsatisfactory. Despite the strain evidenced in dissents to the earliest decisions concerning modern electronic surveillance,[31] the Court's two-step analysis of the amendment survived remarkably intact until 1967. Regardless of fact pattern, cases raising a fourth amendment search issue proceeded along predictable channels: Did the governmental intrusion occur within a constitutionally protected place? If so, was the intrusion accompanied by a constitutionally objectionable physical invasion?[32]

By 1967, however, electronic surveillance was commonplace—and was itself on the brink of a new era soon to be heralded by the introduction of the micro-chip.[33] Intrusion upon the most

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29. *See, e.g.*, Stoner v. California, 376 U.S. 483 (1964) (hotel rooms within amendment); Chapman v. United States, 365 U.S. 610 (1961) (rented apartments within amendment); Rios v. United States, 364 U.S. 253 (1960) (taxi cabs within amendment); Gambino v. United States, 275 U.S. 310 (1927) (parked cars within amendment); Amos v. United States, 255 U.S. 313 (1921) (stores within amendment); Gouled v. United States, 255 U.S. 298 (1921) (offices within the protection of the fourth amendment).

30. *See, e.g.*, Mickenberg, *supra* note 25, at 199.

31. *See, e.g.*, Justice Brandeis' celebrated dissent in Olmstead v. United States, 277 U.S. at 474, 478:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may someday 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 intimato occurrences of the home. . . .
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> . . . [The makers of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Later dissenting opinions repeated and amplified Justice Brandeis' early objections. *See, e.g.*, Lopez v. United States, 373 U.S. 427, 468 (1963) (Brennan, J., dissenting) (following a severe and detailed criticism of *Olmstead*, Justice Brennan noted that modern surveillance techniques "permit a degree of invasion of privacy that can only be described as frightening"); *see also infra* note 48.

32. *See* cases cited *supra* note 26.

33. *See* H.R. REP. No. 647, 99th Cong., 2d Sess. 17-18 (1986) (Title III of the Omnibus Crime Control and Safe Streets Act of 1968 "was written in [a] different technological and regulatory era" than the present; "[t]oday, we have large-scale electronic mail operations, cellular and cordless telephones, paging devices, miniaturized transmitters for radio surveil-

intimate of conversations within the most private of enclaves required no physical penetration, and the inquiries mandated by existing law produced unsatisfactory—and often highly formalistic—results.[34] Moreover, the Court itself began to express—this time in majority opinions—growing discomfort with the state of fourth amendment jurisprudence.[35]

In *Katz v. United States*[36] the Supreme Court cleared the decks. Henceforth, the Court declared, the infringement of a legitimate expectation of privacy—not the physical intrusion upon a protected place—would govern the applicability of the fourth amendment.

III. From Privacy to Pandemonium: Application of *Katz* in a Vacuum

In *Katz* the Court concluded that the occupant of a public telephone booth had been subjected to a "search and seizure" within the meaning of the fourth amendment when FBI agents attached an electronic listening and recording device to the outside of the booth. The Court rejected the government's assertions that no "search" had occurred because the phone booth was not a "constitutionally protected area"[37] and because the agents had accomplished the surveillance without a technical trespass or "physical intrusion" into the booth itself.[38] Declaring that the fourth amendment protects "people, not places,"[39] the Court held that, notwithstanding the place where the search occurred or the nonintrusive nature of the search itself,[40] the fourth amendment's warrant clause applied to the FBI's investigatory activities.[41] Justice Harlan, in his now famous concurrence, capsulized what has be-

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lance, and a dazzling array of digitized information networks which were little more than concepts two decades ago").

34. In Clinton v. Virginia, 377 U.S. 158 (1964), for example, the Court found the predicate physical intrusion required for a "search" because a microphone had been attached to a wall with a thumbtack.

35. *See, e.g.*, Jones v. United States, 362 U.S. 257, 266 (1960) ("[I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law . . ."), *cert. dismissed*, 368 U.S. 801 (1961), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

36. 389 U.S. 347 (1967).

37. *Id.* at 350.

38. *Id.* at 353.

39. *Id.* at 351.

40. *Id.* at 350, 353.

41. *Id.* at 359.

come the accepted rationale of *Katz*:[42] the fourth amendment applies—that is, a "search" has occurred triggering the protections of that provision—any time police investigatory activities infringe an "expectation of privacy" that "society is prepared to recognize as 'reasonable.' "[43]

Katz revolutionized fourth amendment search analysis.[44] Armed with the new "reasonable expectations of privacy" test, courts were equipped to subject a wide range of emerging police investigatory techniques to constitutional scrutiny.[45] And prior law, which had focused primarily on physical intrusions into protected enclaves,[46] was largely ignored in that process.[47]

The Court's abandonment of a rigid, property-based construc-

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42. *See, e.g.*, California v. Ciraolo, 106 S. Ct. 1809, 1811 (1986); Oliver v. United States, 466 U.S. 170, 177 (1984); United States v. Knotts, 460 U.S. 276, 280-81 (1983); Smith v. Maryland, 442 U.S. 735, 740 (1979); Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Chadwick, 433 U.S. 1, 7 (1977); United States v. Miller, 425 U.S. 435, 442 (1976) (superseded by statute as stated in Hancock v. Marshall, 86 F.R.D. 209 (D.D.C. 1980)); Gooding v. United States, 416 U.S. 430 (1974) (Marshall, J., dissenting); United States v. Dionisio, 410 U.S. 1, 14 (1973); Couch v. United States, 409 U.S. 322, 335-36 (1973); United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion), *cert. denied*, 406 U.S. 962 (1972); Terry v. Ohio, 392 U.S. 1, 9 (1968).

43. 389 U.S. at 361 (Harlan, J., concurring).

44. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382 (1974) (*Katz* marked a "watershed in fourth amendment jurisprudence"); Note, *From Private Places to Personal Privacy a Post-*Katz *Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 975 (1968); *see also* Kitch, Katz v. United States: *The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133; Comment, *Eavesdropping, Wiretapping, and the Law of Search and Seizure—Some Implications of the* Katz *Decision*, 9 ARIZ. L. REV. 428 (1968); Comment, *The Fourth Amendment and Electronic Eavesdropping*—Katz v. United States, 5 HOUS. L. REV. 990 (1968).

45. *See generally* United States v. Torres, 751 F.2d 875 (7th Cir. 1984) (secret television and subsequent use of video tapes), *cert. denied sub nom.* Rodriguez v. United States, 470 U.S. 1087 (1985); United States v. Chiavola, 744 F.2d 1271 (7th Cir. 1984) (hidden telephone ear piece); United States v. Butts, 729 F.2d 1514 (5th Cir.) (aircraft transponder), *cert. denied*, 469 U.S. 855 (1984); United States v. Cassity, 720 F.2d 451 (6th Cir. 1983) (electronic homing transmitter), *cert. granted and judgment vacated*, 468 U.S. 1212 (1984); United States v. Taborda, 635 F.2d 131 (2d Cir. 1980) (high powered telescope); United States v. Bailey, 628 F.2d 938 (6th Cir. 1980) (electronic beeper); Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979) (telephone wiretap), *aff'd in part, dismissed in part*, 452 U.S. 713 (1981); United States v. Pretzinger, 542 F.2d 517 (9th Cir. 1976) (electronic location buzzer); United States v. Harvey, 540 F.2d 1345 (8th Cir. 1976) (voice recorder); United States v. Holmes, 537 F.2d 227 (5th Cir. 1976) (battery-operated beacon); United States v. Frazier, 538 F.2d 1322 (8th Cir. 1976) (tracking device), *cert. denied*, 429 U.S. 1046 (1977); United States v. Davis, 482 F.2d 893 (9th Cir. 1973) (airport luggage surveillance device).

46. *See, e.g.*, Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928).

47. *See, e.g.*, Desist v. United States, 394 U.S. 244, 250 (1969) ("*Katz* for the first time explicitly overruled the 'physical penetration' and 'trespass' tests enunciated in earlier decisions of this Court").

tion of the fourth amendment relieved much of the pressure engendered by technological advances unknown to Lord Camden at the time he decided *Entick*, and laid to rest most of the criticism that the law had become stilted and anachronistic in its attempts to accommodate modern investigative technology with fourth amendment concerns.[48] But, in the process of eschewing the traditional considerations of "protected enclaves" and "trespassory intrusion" in favor of "reasonable privacy expectations," *Katz* created its own difficulties. The decision seemed to banish to legal limbo much of the judiciary's prior experience with the fourth amendment,[49] and the highly elastic boundaries of the "reasonable expectation of privacy" test made judicial construction of the amendment quite haphazard. Under *Katz* the fourth amendment applies whenever government activity infringes upon a "reasonable expectation of privacy;" unfortunately, however, *Katz* itself provides no clear indication how the lower courts are to draw that line.[50]

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48. *See, e.g.*, Lopez v. United States, 373 U.S. 427,459 (1963) (Brennan, J., dissenting) ("The Constitution would be an utterly impractical instrument of contemporary government if it were deemed to reach only problems familiar to the technology of the eighteenth century"); *see also* Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1 (1983); King, *Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17 (1961); Semerjian, *Proposals on Wiretapping in Light of Recent Senate Hearings*, 45 B.U.L. REV. 216 (1965); Sullivan, *Wiretapping and Eavesdropping: A Review of the Current Law*, 18 HASTINGS L.J. 59 (1966-67).

49. Numerous cases following *Katz*, for example, suggested that a consideration of place or physical intrusion was no longer significant in the determination whether a "search" had occurred. *See, e.g.*, Payton v. New York, 445 U.S. 573, 615 (1980) (White, J., dissenting) ("no talismanic significance is given to the fact that an arrest occurs in the home rather than elsewhere"); Rakas v. Illinois, 439 U.S. 128, 151 (1978) (Powell, J., concurring) ("In *Katz* . . . the Court rejected the notion that the Fourth Amendment protects places or property. . . ."); Cardwell v. Lewis, 417 U.S. 583, 589 (1974) ("rather than property rights, the primary object of the Fourth Amendment was determined to he the protection of privacy"); Bivens v. Six Unknown Fed. Narcotics Officers, 403 U.S. 388, 393-94 (1971) ("Our recent decisions . . . made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass law"); Desist v. United States, 394 U.S. 244, 246 (1969) ("[*Katz*] overruled cases holding that a search and seizure . . . requires some trespass or actual penetration of a particular enclosure"); Mancusi v. Deforte, 392 U.S. 364, 368 (1968) ("*Katz* . . . makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place . . ."). *But cf.* Patler v. United States, 503 F.2d 472, 478 (4th Cir. 1974) ("The maxim of *Katz* that the fourth amendment protects 'people not places' is only of limited usefulness, for in considering what people can reasonably expect to maintain as private we must inevitably speak in terms of places").

50. The Ninth Circuit once complained that, while *Katz* held that the fourth "protects people, not places," the decision "does not tell us what people are protected, when they are protected, or why they are protected." United States v. Fisch, 474 F.2d 1071, 1076 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973). Commentators also have criticized the amorphous nature

The factual variables arguably relevant in determining whether a given situation involves an "expectation of privacy" that society is prepared to recognize as "reasonable" are well-nigh limitless. Literature discussing the "reasonable expectation of privacy" has suggested that the question should hinge on a broad spectrum of inquiries ranging from an analysis of social norms, to a determination of government agents' subjective intent, to a flat per se proscription of all artificial sense enhancement.[51] Justice Marshall, dissenting in *Oliver v. United States*,[52] suggested for his part that the issue should be resolved by a consideration of "whether the expectation . . . is rooted in entitlements defined by positive law," the "uses to which [the place where the search occurred] can be put," and "whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect."[53]

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of the *Katz* test. Professor LaFave, for example, noted that:

> [W]hile *Katz* 'has rapidly become the basis of a new formula of fourth amendment coverage,' it can hardly be said that the Court produced clarity where theretofore there had been uncertainty . . . . The pre-*Katz* rule, though perhaps 'unjust,' was 'a workable tool for the reasoning of the courts.' But the *Katz* rule . . . is by comparison 'difficult to apply.'

W. LAFAVE, *supra* note 4, § 2.1(b), at 307 (footnotes omitted); *accord*, Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 271 n.70 (1983); Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139, 154 n.67 (1983).

A national report issued 10 years ago pointed out that "[n]o one rightly laments the demise of the old trespass theory of the Fourth Amendment" because modern technology has rendered that line of analysis obsolete. Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, at 204 (1976) [hereinafter NWC Report]. The report noted, however, that "the Court's new rule, too, may well miss its mark [because] its line is drawn only at the point of judicially determined 'reasonableness.' Unfortunately, the Court has, as yet, given us no formula or ready litmus-paper test to determine where that line is, in fact or law, to be drawn." *Id.*

51. *See, e.g.*, Comment, *Aerial Surveillance and the Fourth Amendment*, 17 J. MAR. L. REV. 455, 475 (1984) (the question whether a "search" has occurred should turn upon "whether the observations were inadvertent or systematic; whether the activity was directed as [sic] specific people or property; or, whether the observations were general in nature"); Comment, *Open Air Searches and Enhanced Surveillance in California*, 21 SANTA CLARA L. REV. 779, 798 (1981) ("So long as that which is viewed or heard is in fact perceptible to the naked eye or unaided ear of the government agent whose vantage point is neither unreasonably clandestine nor assisted hy mechanical devices, the person seen or heard has no reasonable expectation of privacy in what occurs"); Comment, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 207 (1986) ("social norm of privacy should serve as a standard for defining fourth amendment searches").

52. 466 U.S. 170, 189 (1984) (Marshall, J., dissenting).

53. *Id.*

With no clear guidelines as to the scope of the inquiry, litigants have urged that the height of particular fences[54] and the specific provisions of substantive tort law—such as the protection accorded "trade secrets"[55]—control the analysis of whether their respective "expectations of privacy" fall within the *Katz* standard. Given the seemingly indeterminate *Katz* test, and the broad range of factors logically impinging upon it, the lower courts' sometimes inconsistent application of the standard is understandable.[56]

But the difficulties associated with the "reasonable expectation of privacy" analysis have not been limited to the lower courts. The Supreme Court's own renowned travail in articulating workable standards for determining when the opening of a given

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54. *See, e.g.*, Brief for the American Civil Liberties Union and the American Civil Liberties Union of Northern California as Amicus Curiae in Support of Respondent at 4, California v. Ciraolo, 106 S. Ct. 1809 (1986) (No. 84-1513) ("In the instant case, there is no question that Mr. Ciraolo exhibited a subjective expectation of privacy, and that this expectation was reasonable. He protected his backyard from outside observation hy an exterior fence six feet in height and by an interior fence rising about 10 feet, which connected the perimeter fence to the house").

55. *See, e.g.*, Petitioner's Brief on the Merits at 22-23, Dow Chem. Co. v. United States, 106 S. Ct. 1819 (1986) (No. 84-1259) ("Making reasonable efforts to maintain the secrecy of a trade secret is a condition precedent to alleging that information or technology in fact constitutes a protectable trade secret. . . . Trade secrets require a context of privacy, or at least the possibility of privacy for their existence. A threat to Dow's privacy threatens its very existence and integrity as a scientific, technological and research-based company") (citation omitted).

56. *Compare* United States v. Bailey, 628 F.2d 938, 940 & n.4 (6th Cir. 1980) (criticizing cases which have "cast the problem in terms of the degree of intrusiveness" because "[a]n intrusion is not de minimus if it violates an individual's legitimate expectation of privacy") *with* United States v. Brock, 667 F.2d 1311, 1321 n.11 (9th Cir. 1982) ("[U]nless there is an 'invasion' of the defendant's interest, the fact that the defendant had a reasonable expectation of privacy, is immaterial. In order to determine if it is 'reasonable' for society to recognize the defendant's expectation of privacy, one must determine the degree of intrusiveness"); *compare* United States v. Montano, 613 F.2d 147 (6th Cir. 1980) (per curiam) (opening of suitcase constitutes a search); United States v. MacKay, 606 F.2d 264 (9th Cir. 1979) (same proposition); State v. Crutchfield, 123 Ariz. 570, 601 P.2d 333 (1979) (same proposition); United States v. Presler, 610 F.2d 1206 (4th Cir. 1979) (opening of briefcase constitutes a search); Moran v. Morris, 478 F. Supp 145 (C.D. Cal. 1979) (same proposition); *In re* B.K.C., 413 A.2d 894 (D.C. 1980) (same proposition); United States v. Benson, 631 F.2d 1336 (8th Cir. 1980) (opening of tote bag constitutes a search); People v. Minjares, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224 (same proposition), *cert. denied*, 444 U.S. 887 (1979); United States v. Bella, 605 F.2d 160 (5th Cir. 1979) (opening of guitar case constitutes a search); State v. DeLong, 43 Or. App. 183, 602 P.2d 665 (1979) (opening of camera case constitutes a search); Ulesky v. State, 379 So. 2d 121 (Fla. Dist. Ct. App. 1979) (opening of purse constitutes a search) *with* United States v. Milhollan, 599 F.2d 518 (3d Cir.) (opening of closed satchel does not constitute a search), *cert. denied*, 444 U.S. 909 (1979); Cooper v. Commonwealth, 577 S.W.2d 34 (Ky. Ct. App. 1979) (opening of taped electric razor case does not constitute a search); Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (1977) (opening of closed but unlocked toolbox does not constitute a search).

container found in a properly stopped automobile violates a "reasonable expectation of privacy" demonstrates, in a fairly dramatic fashion, the perils and ambiguities of the test.

IV. *KATZ* AND CONTAINERS: PRIVACY THEORY STUMBLES UPON REALITY

In *Carroll v. United States*[57] the Supreme Court first addressed what became known as the "automobile exception" to the fourth amendment's warrant clause. The *Carroll* decision laid the groundwork for a lengthy, confusing—and ultimately fruitless—judicial struggle to apply consistently *Katz*' "reasonable expectation of privacy" test to concrete fact situations.

In *Carroll* the Court held that "a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable within the meaning of the Fourth Amendment."[58] The *Carroll* decision, as such, did not address the question pertinent to this Article: whether stopping and examining the car constituted a "search."[59] The Court assumed a "search" had occurred and concluded that the search was substantively reasonable under what became known as the "automobile exception" to the warrant clause. The Court, however, did not "explicitly address the scope of the search that [was] permissible" under the "automobile exception,"[60] and in later cases the Court attempted to draw lines defining when the fourth amendment would permit the opening of various closed containers found by police in properly stopped cars.[61] The Court's placement of those lines depended on whether opening particular containers violated a "reasonable expectation of privacy."[62] The resulting boundaries soon resembled a patchwork quilt.

In *United States v. Chadwick*[63] the Court first applied a "reasonable expectation of privacy" analysis to container searches. There, federal officers became suspicious that a large footlocker

57. 267 U.S. 132 (1925).

58. United States v. Ross, 456 U.S. 798, 799 (1982), *citing Carroll*, 267 U.S. 132.

59. *See supra* note 3.

60. *Ross*, 456 U.S. at 799-800.

61. *See, e.g.*, Robbins v. California, 453 U.S. 420 (1981); Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

62. *Robbins*, 453 U.S. at 432-33 (Powell, J., concurring), *citing* United States v. Mannino, 635 F.2d 110, 114 (2d Cir. 1980); United States v. Goshorn, 628 F.2d 697, 700-01 (1st Cir. 1980); United States v. Mackey, 626 F.2d 684, 687-88 (9th Cir. 1980).

63. 433 U.S. 1 (1977).

contained marijauna as they watched it being loaded onto a train for Boston. Upon the locker's arrival a trained dog sniffed the footlocker and signalled the presence of the drug. Federal narcotics agents, however, did not seize the footlocker immediately but waited until it was placed in the trunk of Chadwick's automobile, at which time they arrested Chadwick, seized the trunk, and moved it to a secured location where the agents opened and searched it.[64] Although the government did not "contend that the footlocker's brief contact with Chadwick's car [made opening the trunk] an automobile search," the government did argue that the rationale of the "automobile search cases demonstrates the reasonableness of permitting warrantless searches of luggage."[65] The Court rejected the government's argument, reasoning that, while one may have a "lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects,"[66] the "factors which diminish the privacy aspects of an automobile do not apply to [Chadwick's] footlocker" because luggage "is intended as a repository of personal effects."[67] Thus, *Chadwick* held the opening of a closed container taken from a car may violate a "reasonable expectation of privacy" when such a container "is intended as a repository of personal effects."[68]

The Court expanded *Chadwick*'s rationale in *Arkansas v. Sanders*.[69] There, state police officers stopped a taxicab after observing Sanders place a green suitcase, which the officers suspected contained marijuana, in the trunk of the cab at the Little Rock airport. The suitcase was seized and opened, revealing marijuana. In contrast to the government's position in *Chadwick*, the State of Arkansas explicitly argued that the "automobile exception" applied to the perusal of the suitcase. The State asserted that the examination of any container found during a proper warrantless

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64. *Id.* at 3-5.

65. *Id.* at 11-12.

66. *Id.* at 12, *quoting* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion).

67. *Id.* at 13. The Court reasoned:

> Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.

Id.

68. *Id.*

69. 442 U.S. 753 (1979).

search of an automobile was substantively reasonable.[70] The Court rejected the State's argument, concluding that "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile."[71] The Court did state, however, that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment."[72] Whether the opening of the given containers constituted a search would depend upon the "nature" of the containers involved.[73]

Following *Sanders*, the lower federal courts embarked on a confusing—and frustrating—effort to determine when the opening of various containers during the course of an automobile search violated the owner's "reasonable expectation of privacy." The courts' decisions soon turned upon fact-bound distinctions regarding the "nature" of various containers and whether they were "intended as repositories of personal effects." Some courts went so far as to extend fourth amendment protection to "worthy" containers—such as suitcases and footlockers—but not to "unworthy" satchels such as paper bags and plastic sacks.[74] Tbe obvious difficulties of this approach culminated with the District of Columbia Circuit's decision in *United States v. Ross*.[75]

In *Ross* a police officer properly stopped a car driven by Albert Ross, upon a well-founded suspicion that Ross was engaged in narcotics trafficking.[76] After placing Ross under arrest, the officer opened the locked trunk of the car and found a "closed but unsealed brown paper sack about the size of a lunch bag and a zip-

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70. *Id.* at 763-64.

71. *Id.* at 765 n.13.

72. *Id.* at 764 n.13.

73. *Id.* at 764-65 n.13. "[S]ome containers (for example a kit of burglar tools or a gun case) *by their very nature* cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." *Id.* (emphasis added).

74. *Compare* United States v. Miller, 608 F.2d 1089 (5th Cir. 1979) (plastic portfolio), *cert. denied*, 447 U.S. 926 (1980); United States v. Presler, 610 F.2d 1206 (4th Cir. 1979) (briefcase); United States v. Meier, 602 F.2d 253 (10th Cir. 1979) (backpack); United States v. Johnson, 588 F.2d 147 (5th Cir. 1979) (duffelbag) *with* United States v. Mannino, 635 F.2d 110 (2d Cir. 1980) (plastic bag inside paper bag); United States v. Goshorn, 628 F.2d 697, 699 (1st Cir. 1980) ("[t]wo plastic bags, further in three brown paper bags, further in two clear plastic bags"); United States v. Mackey, 626 F.2d 684 (9th Cir. 1980) (paper bag); United States v. Gooch, 603 F.2d 122 (10th Cir. 1979) (plastic bag); United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (cardboard box). *See also* cases cited *supra* note 56.

75. 655 F.2d 1159 (D.C. Cir. 1981), *rev'd*, 456 U.S. 798 (1982).

76. *Id.* at 1162.

pered red leather pouch."[77] The officer immediately opened the paper sack and discovered a quantity of glassine envelopes containing a white powder that later proved to be heroin. Sometime later he opened the red leather pouch and found that it contained 3200 dollars in currency.[78] At trial, the government successfully rebuffed Ross' motion to suppress the evidence found in the sack and the pouch.[79]

On appeal a divided panel of the District of Columbia Circuit held that the opening of the leather pouch violated the fourth amendment but that the opening of the sack did not.[80] The panel justified its result by relying upon a long line of circuit court cases holding that the opening of "a suitcase, a briefcase, a purse, a duffle bag, a backpack, a gym bag, a vinyl satchel, or a guitar case" constituted unlawful searches because the intrusions infringed upon a reasonable expectation of privacy. The same line of cases, however, also held that the opening of "an open knapsack, a taped electric razor case, a toolbox, a closed but unsealed department store box, or a closed but unsealed envelope" did not infringe upon a reasonable expectation of privacy.[81] Adding to the ambiguity of its reasoning, the panel noted that it might have reached a different result regarding the bag if, instead of leaving it open, Ross had "sealed the paper bag shut."[82]

Obviously uneasy about the jurisprudential soundness of permitting constitutional issues to turn upon inferences drawn from distinctions between open paper bags, sealed bags, and leather pouches, the District of Columbia Circuit voted to rehear the case en banc.[83] Noting that, "in the first and most important instance the fourth amendment speaks to the police and must speak to them intelligibly," the en banc court refused to validate the "fine distinctions" created by the panel's "unworthy container" rule.[84] Because attempts to determine whether particular containers supported reasonable expectations of privacy threatened to thrust the police—and the courts—into an unmanageable vortex of factual

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1161 n.3.
81. *Id.* at 1175 nn.3 & 4 (Tamm, J., dissenting in part) (lengthy citations omitted). Judge Tamm was the author of the original panel opinion. *See Ross*, 456 U.S. at 803 n.3.
82. *Ross*, 665 F.2d at 1161 n.3.
83. *Id.*
84. *Id.* at 1170 n.27, *quoting* Amsterdam, *supra* note 44, at 403.

complexity,[85] the court concluded that the opening of *any* parcel would constitute a "search," that demanded the police "delay [examination] of the parcels 'until after judicial approval has been obtained.' "[86]

Thus, faced with the daunting prospect of applying *Katz'* "reasonable expectation of privacy" test to the opening of the myriad types of containers found within automobiles, the District of Columbia Circuit simply avoided the *Katz* test altogether. Without either citation to or discussion of *Katz*, the court adopted a per se rule mandating the judicial conclusion that a "search" had occurred whenever police opened a "parcel."[87]

The Supreme Court reversed the court of appeals.[88] The Court, however, agreed with the District of Columbia Circuit on one important point: "a constitutional distinction between 'worthy' and 'unworthy' containers would be improper."[89] The Court refused to accept the "proposition that the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy" because this proposition necessarily would make the "propriety of a warrantless search . . . turn on an objective appraisal of all the surrounding circumstances."[90] Under such an analysis, while ordinary bags may not be protected, a "paper bag stapled shut and marked 'private' might be found to manifest a reasonable expectation of privacy, as could a cardboard box stacked on top of two pieces of heavy luggage."[91]

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85. The en banc court noted:

> Size [of a container] could not be the dividing line [between reasonable and unreasonable expectations of privacy], nor does the Government contend otherwise given its concession that the leather pouch is encompassed by *Sanders*. A priceless bequest, great grandmother's diary, for example, could be carried in a sack far smaller than one accommodating jogging suit and sneakers. And if quality of materials is what counts, on what side of the line would one place the variety of parcels people carry? Are police to distinguish cotton purse from silk; felt, vinyl, canvas, tinfoil, cardboard, or paper containers from leather; sacks closed by folding a flap from those closed with zippers, drawstrings, buttons, snaps, velcro fastenings, or strips of adhesive tape? Would a Tiffany shopping bag rank with one from the local supermarket?

Id. at 1170.

86. *Id.* at 1171, *quoting* Arkansas v. Sanders, 442 U.S. 753, 766 (1979).

87. The court expressed no opinion on the existence of a "search" if the contents of a parcel were in "plain view" or the contents of the parcel could be " 'inferred from their outward appearance.' " *Id.* at 1170, *quoting Sanders*, 442 U.S. at 765 n.13. The court noted, however, that "[o]rdinarily, one cannot infer from the density, shape, or size of a leather pouch or opaque paper bag what is inside." *Id.* at 1170.

88. United States v. Ross, 456 U.S. 798 (1982).

89. *Id.* at 822.

90. *Id.* at 822 n.30.

91. *Id.*

The Court declined to make such distinctions.

Accordingly, the Supreme Court, like the District of Columbia Circuit, concluded—again, without citation to or discussion of *Katz*—that application of a *Katz* analysis to the opening of containers would be inappropriate because the task would become arbitrary, if not impossible.[92] But, unlike the lower court, the Supreme Court avoided the *Katz* quandary by broadening the scope of the automobile exception rather than by creating a "*per se* search" rule applicable to the opening of all parcels:[93] "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[94]

The decisions of the District of Columbia Circuit and the Supreme Court in *Ross* are remarkable because both courts responded to a reality not addressed specifically but nevertheless apparent in both opinions: the fact that experience had shown the open-ended *Katz* test to be judicially unmanageable when applied to container searches. The District of Columbia Circuit avoided the analytical difficulties of *Katz* by assuming the opening of any parcel satisfied the *Katz* requirements. The Supreme Court, in contrast, rendered the *Katz* analysis irrelevant; whatever an individual's expectation of privacy in a given container, that expectation would "not survive if probable cause is given to believe that the vehicle [carrying the container] is transporting contraband."[95] Despite the differences in approach, the conclusion of both courts regarding the applicability of *Katz* to the opening of containers is clear. Both courts realized that, notwithstanding the theoretical benefits of an open-ended "reasonable expectation of privacy" analysis, its application to the real world of automobile searches—involving as it does "an objective appraisal of all the surrounding circumstances"[96]—simply exacts too great a price.

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92. *Id.*

93. In a manner somewhat similar to the approach of the D.C. Circuit, Justice Stevens, writing for the Court, reasoned that placing various containers on one side or the other of the "reasonable expectation of privacy" line would be contrary to the "central purpose" of the fourth amendment because that provision is designed to protect "frail cottage[s]" as well as "majestic mansion[s]." *Id.* at 822. A per se rule applicable to the opening of "frail" as well as "majestic" containers, however, might not command a majority of the Court. Two sentences after his sweeping reference to the all-inclusive scope of the fourth, Justice Stevens qualified that discussion with the observation that "the protection afforded by the Amendment varies in different settings." *Id.* at 823.

94. *Id.* at 825.

95. *Id.* at 823.

96. *Id.* at 822 n.30.

V. *Oliver, Ciraolo,* and *Dow*: Narrowing the Range of Reasonableness

Ross greatly simplified the fourth amendment analysis applicable to the opening of containers taken from automobiles.[97] Unfortunately, however, the jurisprudential and administrative difficulties created by the open-ended "reasonable expectation of privacy" test extend far beyond automobile searches. How are the courts—and the police—to know when particular forms of surveillance or information gathering outside the automobile search area cross the *Katz* line and become subject to fourth amendment strictures? For example, do photographs of an individual taken through an open window violate the fourth amendment? Do observations of a residential backyard made from the top of a telephone pole cross the *Katz* line? What about observations from a high hill? An airplane? What if the observer uses a telescope? A microphone? Again, the range of evidence arguably relevant to the analysis of "reasonable expectations of privacy" in such situations appears boundless.

But, beginning with its decision in *Oliver v. United States*,[98] and continuing with its opinions in *California v. Ciraolo*[99] and *Dow Chemical Co. v. United States*,[100] the Supreme Court firmly suggested that the range of factors impinging on the *Katz* analysis is not limitless. Indeed, in these cases the Court construed the reach of the fourth amendment by harking back to themes that many thought *Katz* had interred safely in the sarcophagi of antique precedent. *Oliver, Ciraolo,* and *Dow*, in fact, demonstrate the Court's de facto application of the tripartite analysis suggested by this Article.

A. Oliver*: Back to Protected Places?*

In *Oliver* the Court considered two consolidated cases involving police intrusions upon rural marijuana patches. In both cases, police officers, in their efforts to locate obscure cannabis gardens, encroached upon rural property that was circled by fences and

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97. *Cf.* Colorado v. Bertine, 107 S. Ct. 738, 743 (1987) (in conducting inventory search of impounded van, the police need not "weigh the strength of the individual's privacy interest in the container against the possibility that the container might serve as a repository for dangerous or valuable items").

98. 466 U.S. 170 (1984).

99. 106 S. Ct. 1809 (1986).

100. 106 S. Ct. 1819 (1986).

posted with "No Trespassing" signs.[101] The trial courts in both cases granted the defendants' motions to suppress any evidence obtained as a result of the trespasses, reasoning that the defendants, by secluding their horticultural activities in remote woods surrounded with fences and "No Trespassing" signs, had evidenced a "reasonable expectation of privacy" that transformed the official intrusions into unreasonable searches.[102] The Supreme Court granted review in both cases,[103] and concluded that neither defendant possessed a reasonable expectation of privacy in their "open fields."[104]

The Court's analysis proceeded in two steps. First, the Court reaffirmed the holding of *Hester v. United States* that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."[105] The unadorned language of the fourth amendment provided the basis for this portion of the Court's opinion.[106] The Court, however, went on to examine the cases under *Katz'* "reasonable expectation of privacy" test.[107]

Justice Powell, writing for the Court, stated that "[n]o single factor" controls whether official surveillance "infringes upon individual privacy."[108] When making that determination, Justice Powell wrote, courts should examine "the intention of the Framers of the Fourth Amendment," the "uses to which the individual has put a location," and societal understandings "that certain areas deserve the most scrupulous protection from government invasion."[109] In applying that analysis to the cases before it, the Court

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101. In *Oliver* Kentucky State Police "drove past petitioner's house to a locked gate posted with a 'No Trespassing' sign. A footpath led around one side of the gate. The agents walked around the gate and . . . found a field of marihuana over a mile from petitioner's home." 466 U.S. at 173. In the consolidated case of *Maine v. Thornton*, officers entered the woods hehind the defendant's house using a path hetween the residence and a neighboring house. They followed a footpath through the woods until they reached two marijuana patches fenced with chicken wire and posted with "No Trespassing" signs. *Id.* at 174-75.

102. *Id.* at 173-75.

103. The Sixth Circuit Court of Appeals had reversed the trial court's exclusion of the evidence in *Oliver*, while the Maine Supreme Judicial Court had affirmed exclusion of the marijuana in the second consolidated case. *Id.* at 174-75.

104. *Id.* at 176.

105. *Id.* at 176, *quoting* Hester v. United States, 265 U.S. 57, 59 (1924). For a discussion of *Hester*, see *supra* notes 27-29 and accompanying text.

106. *Id.*

107. *Id.* at 177-81.

108. *Id.* at 177-78.

109. *Id.* at 178 (citing Payton v. New York, 445 U.S. 573 (1980); United States v. Chadwick, 433 U.S. 1, 7-8 (1977); Jones v. United States, 362 U.S. 257, 265 (1960)).

placed great—indeed, decisive—weight upon the location where the official surveillance took place.

The Court's analysis distinguished private places, such as the home, from more public places, such as open fields. Although the fourth amendment "reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference,"[110] the Court concluded that an open field is not such a place. In contrast to the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,"[111] open fields, according to the Court, "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[112] Nor is there any "societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."[113] In sum, the Court held that the defendants lacked a "reasonable expectation of privacy" in their marijuana gardens because the gardens lay outside "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' "[114]

Importantly, the Court rejected out of hand the assertion that the existence of a "reasonable expectation of privacy" should be determined by the circumstances of individual cases, such as the presence of locked gates, "no trespassing" signs, or high fences. Such an approach, the Court reasoned, would result in the development of a "highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions."[115] The Court found this result undesirable for two reasons. First, police would "have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy."[116] Second, such a technical analysis "creates a danger that constitutional rights will be arbitrarily and inequitably en-

110. *Id.*
111. *Id., quoting Payton,* 445 U.S. at 601.
112. *Id.* at 179.
113. *Id.*
114. *Id.* at 180, *quoting* Boyd v. United States, 116 U.S. 616, 630 (1886).
115. *Id.* at 181, *quoting* New York v. Belton, 453 U.S. 454, 458 (1981), *quoting* LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The* Robinson *Dilemma,* 1974 S. Ct. Rev. 127, 142.
116. *Id.*

forced."[117] Thus, the Court rejected the suggestion that *Katz* requires consideration of discrete, case-specific facts by concluding that a broadly applicable rule—based on locations associated with "intimate activity"[118]—was the preferable approach.

B. Dow *and* Ciraolo*: Does Intrusiveness and the Object of Surveillance Matter?*

Oliver caught some courts and commentators by surprise; many assumed that *Katz* had implicitly overruled the "open fields" doctrine and that doctrine's concomitant emphasis on constitutionally protected locales.[119] But, if *Oliver* was rather unexpected, the aerial overflight decisions in *California v. Ciraolo* and *Dow Chemical Co. v. United States* came as something of a revelation. Those opinions suggest that, despite the contrary rhetoric of *Katz*, courts must examine, along with a consideration of place, the degree of official intrusiveness and the object of the governmental surveillance.

In *Ciraolo* the Santa Clara police received an anonymous telephone tip that marijuana was growing in Ciraolo's backyard. Officers were unable to observe the yard from ground level, however, because two fences—an outer one six-feet high and an inner one ten-feet high—completely obscured the view. The officers flew a small aircraft over the backyard at an altitude of one thousand feet and identified marijuana plants growing in the yard. Shortly thereafter the officers obtained a search warrant based on their eyewitness aerial observations.[120] When police executed the warrant a

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117. *Id.* at 181-82.

118. *Id.* at 180.

119. *See, e.g.*, United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976) ("It now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy"), *cert. denied sub nom.* Gangadean v. United States, 430 U.S. 966 (1977); United States v. Magana, 512 F.2d 1169, 1170 (9th Cir.) (" '[A] reasonable expectation of privacy,' [standard], and not common law property distinctions now controls the scope of the Fourth Amendment"), *cert. denied*, 423 U.S. 826 (1975); People v. McClaugherty, 193 Colo. 360, 362, 566 P.2d 361, 362 (1977) ("As a per se exception to the Fourth Amendment, the 'open fields' doctrine of *Hester* retains little vitality . . . the 'open fields' doctrine has been substantially undermined by *Katz* . . ."); *see also* J. HALL, SEARCH AND SEIZURE, § 3:19, at 73 (1982) ("Since the open fields doctrine by definition deals with places, *Hester* appears at first blush to be in doubt or at least somewhat limited"); W. LAFAVE *supra*, note 4, § 2.2(c), at 338-39; *cf.* United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972); Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968); Nathanson v. State, 554 P.2d 456 (Alaska 1976); State v. Caldwell, 20 Ariz. App. 331, 512 P.2d 863 (1973); Dean v. Superior Court, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973); State v. Hanson, 113 N.H. 689, 313 A.2d 730 (1973).

120. *Ciraolo*, 106 S. Ct. 1809, 1810-11 (1986). The officers had attached a photograph

day later, they seized seventy-three marijuana plants.[121] The state trial court denied Ciraolo's motion to suppress the marijuana as the fruit of an unreasonable search, but the California Court of Appeals reversed. The appeals court reasoned that Ciraolo had manifested a "reasonable expectation of privacy" based on the height and existence of the two fences.[122]

In *Dow*, following an initial administrative inspection, the company denied the Environmental Protection Agency (EPA) on-site access for a second examination of two power plants located upon the company's two thousand-acre manufacturing facility in Midland, Michigan. The EPA, instead of seeking an administrative warrant for the inspection, hired a pilot to take photographs of the facility from altitudes of 12,000, 3000, and 1200 feet. When Dow became aware of the surveillance, it brought suit in federal district court alleging that the EPA's action violated the fourth amendment.[123] The district court granted Dow's motion for summary judgment, reasoning that, because the configuration of buildings and pipes photographed by the EPA constituted "trade secrets" protected by state tort law, the government had violated the company's "reasonable expectation of privacy."[124]

The Supreme Court's opinions in *Ciraolo* and *Dow* analyzed three factors: the place where the surveillance occurred,[125] the degree of intrusiveness of the surveillance,[126] and the object of the surveillance itself.[127] The balance of these factors in both cases

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of the backyard as an exhibit to the warrant affidavit. The parties, however, raised no arguments before the Supreme Court based on the photograph, and the Court decided the case on the assumption that the officers' observations, not the photograph, supported the warrant. *Id.* at 1812 n.1.

121. *Id.* at 1811.

122. People v. Ciraolo, 161 Cal. App. 3d 1081, 1089, 208 Cal. Rptr. 93, 97 (1984), *rev'd*, 106 S. Ct. 1809 (1986). Relying on reasoning similar to that discussed in the articles cited *supra* note 51, the appeals court also concluded that the surveillance constituted a search because the flyover "was not the result of a routine patrol conducted for any other legitimate law enforcement or public safety objective, but was undertaken for the specific purpose of observing this particular enclosure within defendant's curtilage." *Ciraolo*, 106 S. Ct. at 1811, *quoting Ciraolo*, 161 Cal. App. 3d at 1089, 208 Cal. Rptr. at 97. The California Supreme Court denied review, and the Supreme Court granted certiorari.

123. Dow also argued that aerial surveillance was beyond the agency's statutory investigative authority. The Supreme Court rejected this argument. *Dow*, 106 S. Ct. 1819, 1824 (1986).

124. *Id.* at 1822-23. The Sixth Circuit Court of Appeals reversed and the Supreme Court granted certiorari.

125. *Ciraolo*, 106 S. Ct. at 1812; *Dow*, 106 S. Ct. at 1826.

126. *Ciraolo*, 106 S. Ct. at 1813; *Dow*, 106 S. Ct. at 1826.

127. *Ciraolo*, 106 S. Ct. at 1813; *Dow*, 106 S. Ct. at 1826-27.

yielded the conclusion that neither the aerial observation of marijuana in a suburban back yard nor the aerial photography of a manufacturing facility constituted a "search." Significantly, the Court's opinions strongly suggest that the result in both cases would have differed if either the degree of intrusiveness or the object of the governmental surveillance had varied from the facts presented.

1. Place

As in *Oliver*, the Supreme Court discussed at some length the locales surveilled in *Ciraolo* and *Dow*, although Chief Justice Burger's analysis of "place" ultimately was not decisive in either case. *Ciraolo* involved police observation of the curtilage, an area found to be "intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."[128] *Dow*, on the other hand, involved police photography of an outdoor manufacturing facility, a place that the Court found did not trigger the exacting constitutional scrutiny appropriate for intrusions into the home and its curtilage.[129]

The Court's actual categorization of the "places" concerned in both cases is hardly precedent setting. *Oliver* already had reaffirmed the primacy accorded the home and its curtilage under the fourth amendment,[130] and the Court's rejection of Dow's assertion that an "industrial curtilage" is entitled to "constitutional protection equivalent to that of the curtilage of a private home" was fairly predictable.[131] Nevertheless, Chief Justice Burger's analysis of "place" in both cases is important for two somewhat more subtle reasons.

First, the discussion of "place" served as the foundation for the fourth amendment analysis in both cases. Although the Court had previously recognized—as it did, for example, in *Oliver*—that the "reasonable expectation of privacy" test may "often" require "reference[] to a 'place,' "[132] the opinions in *Ciraolo* and *Dow* both spent significant time with "place" even though the fourth amendment question in each case ultimately turned on other factors. The

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128. *Ciraolo*, 106 S. Ct. at 1812.

129. The Court categorized Dow's plant as falling somewhere between the "curtilage" and "open field" classifications—although the open areas involved "were more analogous to 'open fields' than to a curtilage for purposes of aerial observation." *Dow*, 106 S. Ct. at 1825.

130. Oliver v. United States, 466 U.S. 170, 180 (1984).

131. *Dow*, 106 S. Ct. at 1825.

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

Court's discussion of "place" despite its nondecisive role in *Ciraolo* and *Dow* suggests not that "reasonable expectation of privacy" analysis will "often" require reference to a place, but rather that the analysis may in fact *always* require such reference.[133]

Second, the Court's discussion of "place" built upon the reasoning set out in *Oliver*; it did not turn upon abstract geographical constructs or cold generalizations drawn from seventeenth-century decisions. In *Ciraolo* the Court emphasized that the boundaries of the curtilage as a protected "place" are determined by "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.' "[134] The Court similarly held in *Dow* that the owner of an "industrial curtilage" could not claim analogous protection because the "intimate activities associated with family privacy and the home . . . simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant."[135] Thus, the Court focused not upon "places" as such, but instead upon the types of human conduct likely to occur in particular locales. The fourth amendment protects "people, not places,"[136] and the Court quite plainly used "place" not as a physical limitation on the scope of the fourth amendment but as an analytical tool to determine what conduct and activities people reasonably could assume would remain private.

2. Intrusion

The Court's explicit reliance on the nonintrusive nature of aerial surveillance was perhaps the most surprising element of the fourth amendment analysis in both *Ciraolo* and *Dow*—at least to the dissenting Justice Powell.[137] Although the aerial observation at issue in *Ciraolo* involved a place "where privacy expectations are most heightened,"[138] the Court concluded that this observation did not constitute a search, at least in part, because it "took place within public navigable airspace . . . in a physically nonintrusive

133. *See, e.g.*, Patler v. Slayton, 503 F.2d 472, 478 (4th Cir. 1974) ("The maxim of *Katz* that the fourth amendment protects 'people not places' is only of limited usefulness, for in considering what people can reasonably expect to maintain as private we must inevitably speak in terms of places").

134. *Ciraolo*, 106 S. Ct. at 1812, *quoting Oliver*, 466 U.S. at 180, *quoting Boyd*, 116 U.S. at 630.

135. *Dow*, 106 S. Ct. at 1825.

136. *Katz*, 389 U.S. at 350.

137. *Ciraolo*, 106 S. Ct. at 1815; *Dow*, 106 S. Ct. at 1831-32 (Powell, J., dissenting).

138. *Ciraolo*, 106 S. Ct. at 1812.

manner."[139] Similarly, in *Dow* the Court emphasized that the case involved "aerial observation . . . *without* physical entry."[140]

These references are not the first time in recent years that the Court has relied upon the absence of a direct physical intrusion as a ground of decision under the fourth amendment,[141] and they cannot be dismissed as dicta or mere "asides." On the contrary, in light of *Ciraolo* and *Dow*, the degree of intrusiveness appears to be a central factor in the Court's analysis. The Court explicitly stated that "actual physical entry . . . into any enclosed area" or the use of "some unique sensory device that . . . could penetrate the walls of buildings" would "raise very different and far more serious questions" than those before it.[142]

The Court's somewhat unexpected reliance upon "physical intrusion" provoked sharp dissenting comment by Justice Powell. "[A] standard that defines a Fourth Amendment 'search' by reference to whether police have physically invaded a 'constitutionally protected area,' " he wrote, "provides no real protection against surveillance techniques made possible through technology."[143] Chief Justice Burger defended the majority's position by turning to the third—and arguably decisive—factor in the Court's analysis: the nature of the information sought and obtained as a result of the official surveillance.

3. Object

The Chief Justice's opinion in *Ciraolo* emphasized the dissimilarities of the governments' observations in *Ciraolo* and *Katz*. The *Katz* "reasonable expectation of privacy" standard, Chief Justice Burger reasoned, was developed in the context of electronic interception of interpersonal conversation.[144] A rule designed to protect the privacy of conversation, he wrote, "does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs" is entitled to assume that such activities will remain free of

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139. *Id.* at 1813.

140. *Dow*, 106 S. Ct. at 1826 (emphasis in original).

141. For example, in United States v. Place, 462 U.S. 696, 707 (1983), the Court examined the question of whether a "canine sniff" by a trained narcotics detection dog constituted a "search." The Court concluded that it did not, at least in part because such a sniff was "much less intrusive than a typical search." *Id.* at 707; *see also* United States v. Jacobsen, 466 U.S. 109 (1984).

142. *Dow*, 106 S. Ct. at 1826-27.

143. *Ciraolo*, 106 S. Ct. at 1815 (Powell, J., dissenting).

144. *Id.* at 1813.

official observation.[145] Protecting the privacy of conversations involves a stronger constitutional interest than maintaining the secrecy of physical objects located in suburban backyards.

The Court's opinion in *Dow* further emphasized the significance of the object of the surveillance. There, the Court stressed that the information obtained by the EPA concerned simple physical details regarding the layout of the manufacturing facility. The photographs, the Court stated, "are not so revealing of intimate details as to raise constitutional concerns."[146] *Dow* would have implicated "more serious privacy concerns" if the government surveillance had uncovered "confidential discussion of chemical formulae" or if the photographs themselves had recorded "identifiable human faces or secret documents."[147] Because the EPA, however, obtained only physical data—not intimate confidential details—from its surveillance, the Court concluded that no constitutional "search" had occurred.

Viewed from the tripartite perspective discussed above, the Court's analysis in *Ciraolo* and *Dow* is straightforward. Just as it had in *Oliver*, the Court rejected assertions that the "reasonable expectation of privacy" test required it to consider discrete evidentiary and legal matters, such as the height of Ciraolo's fences,[148] the subjective intent of the officers conducting the surveillance,[149] the impact of state tort law,[150] or the use of relatively standard aerial photographic techniques.[151] Even though such factors may be logically relevant to the *Katz* inquiry in a given case,[152] the Court rejected ad hoc balancing. Instead, the cases turned upon the application of three broadly applicable analytical constructs.

First, the Court placed the governmental surveillance in each case in the context where it occurred. It then inquired whether the government had made a constitutionally offensive intrusion into that place. Finally, the Court focused upon the nature of the information obtained as a result of the surveillance. In both *Ciraolo* and *Dow*, the last two factors—the nature of the intrusion and the in-

145. *Id.*
146. *Dow*, 106 S. Ct. at 1826-27.
147. *Id.* at 1827 n.5.
148. *Ciraolo*, 106 S. Ct. at 1812.
149. *Id.* at 1813 n.2.
150. *Dow*, 106 S. Ct. at 1823, 1827 n.6.
151. *Id.* at 1826-27.
152. Justice Powell observed that state trade secrets law would proscribe private-party photography of Dow's plant thus providing "support for [Dow's] claim that society recognizes commercial privacy interests as reasonable." *Id.* at 1832 n.11 (Powell, J., dissenting).

formation obtained—determined the result. And, Justice Powell to the contrary, the Court's analysis does not appear wooden, blind to reality, or bound to a "single fact."[153] Indeed, had the balance of the last two factors been different in either case—if, for example, the aerial surveillance had involved technology capable of intruding within walls or seizing intimate information such as human faces or conversations—the Court almost certainly would have decided the cases differently.[154]

Oliver, *Ciraolo* and *Dow* could alter significantly the *Katz* analysis. Despite the *Katz* assertion that fourth amendment rights do not depend upon an analysis of "constitutionally protected area[s],"[155] the Court has now concluded that focused probing for secluded marijuana fields is not a "search" because the "special protection accorded by the Fourth Amendment . . . is not extended to the open fields."[156] Notwithstanding *Katz*' conclusion that the scope of the fourth amendment "cannot turn" upon "the presence or absence of a physical intrusion,"[157] the Court now has determined that the aerial surveillance of a backyard[158] or a commercial facility[159] does not involve a "search" because it is "physically nonintrusive."[160] Finally, the Court's suggestion that the interception of interpersonal communication or other intimate facts raises concerns more worthy of constitutional protection than mere observation of physical details[161] demonstrates that "privacy" involves more than subjective desires—the very nature of the object, undertaking or activity sought to be shielded from official scrutiny plays an important part in the *Katz* calculus.

Commentators have criticized the apparent inconsistencies and seeming tensions between the Court's recent decisions and *Katz*.[162] In an article circulated the day after the aerial surveillance

153. *Ciraolo*, 106 S. Ct. at 1814 (Powell, J., dissenting).

154. *Ciraolo*, 106 S. Ct. at 1813; *Dow*, 106 S. Ct. at 1826-27.

155. 389 U.S. at 350.

156. *Oliver*, 466 U.S. at 176, *quoting* Hester v. United States, 265 U.S. 57, 59 (1924).

157. 389 U.S. at 353.

158. *Ciraolo*, 106 S. Ct. at 1809.

159. *Dow*, 106 S. Ct. at 1819.

160. *Ciraolo*, 106 S. Ct. at 1813; *see also Dow*, 106 S. Ct. at 1826 ("[t]he narrow issue raised by Dow's claim of search and seizure . . . concerns aerial observation . . . *without* physical entry") (emphasis in original).

161. *Ciraolo*, 106 S. Ct. at 1813; *Dow*, 106 S. Ct. at 1826-27.

162. For example, several commentators have lamented the Supreme Court's reexamination of the *Hester* "open fields" doctrine in *Oliver*. *See, e.g.*, Note, *Supreme Court's Treatment of Open Fields: A Comment on* Oliver *and* Thornton, 12 FLA. ST. U.L. REV. 637 (1984); Note, Oliver v. United States: *Good Fences Make Good Open Fields*, 11 J. CONTEM-

cases were handed down, the Washington Post reported that the Court may be "letting the government eviscerate constitutional protections against unreasonable searches through the use of modern technology."[163] Justice Powell, in dissents joined by three other members of the Court, was more blunt. The reasoning of the majority in *Ciraolo* and *Dow*, he wrote, "simply repudiates *Katz*."[164]

The true impact of the Court's most recent fourth amendment pronouncements is, of course, obscure at this point. That the decisions deviate at least somewhat from the rhetoric of *Katz* is apparent. But whether—as Justice Powell asserted—they signal a repudiation of *Katz'* general approach to search and seizure analysis is more questionable. Instead, the decisions may well mark, not a departure from *Katz*, but rather a developing maturity in the Court's fourth amendment jurisprudence under that case. The Court's recent decisions suggest that, far from abandoning the *Katz* "reasonableness" test, the Court is giving the test some identifiable content; the decisions have begun to indicate "where [the 'reasonableness'] line is . . . to be drawn."[165] Thus, while the primary fourth amendment inquiry in determining whether a search has occurred remains that mandated by *Katz*—that is, has the government intruded upon a reasonable expectation of privacy?—*Oliver, Ciraolo*, and *Dow* demonstrate the Court's recognition that certain identifiable factors, well established and long applied in fourth amendment jurisprudence, channel the ultimate resolution of that question.

VI. Privacy in Perspective: The Established Elements of a "Search"

The most challenging, and certainly the most crucial, aspect of the *Katz* analysis is whether a court can legitimize a particular, subjective expectation of privacy as "reasonable." As discussed above, the task has at times seemed distressingly unmanageable. This much is clear: "Legitimation of expectations of privacy by law

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PORARY L. 531 (1985); Note, *The Return to Open Season for the Police in the Open Field,* Oliver v. United States, 50 MO. L. REV. 425 (1985); Note, *Criminal Procedure*—Oliver v. United States: *The Open Fields Doctrine Survives* Katz, 63 N.C.L. REV. 546 (1985); Note, Oliver v. United States: *Open Fields and Reasonable Expectations of Privacy*, 1985 UTAH L. REV. 463.

163. Marcus, *Aerial Surveillance Powers Broadened*, Wash. Post, May 20, 1986, at A1, col. 5, & at A10, col. 1.

164. *Dow*, 106 S. Ct. at 1831 (Powell, J., dissenting); *see also Ciraolo*, 106 S. Ct. at 1814 (Powell, J., dissenting).

165. NWC Report, *supra* note 50, at 204.

must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[166] Given such a scanty analytical framework, the proliferation of opinions regarding the legitimation of privacy interests is hardly surprising.[167]

Oliver, Ciraolo, and *Dow* are almost certain to stir the privacy debate once more. Even before the current round of decisions, some writers warned that "emphasis on property rights provides serious opportunity for courts to limit fourth amendment protections."[168] The Court's new reliance not only on property rights but on intrusiveness and the object of the surveillance itself will likely prompt further predictions that constitutional law is receding into darker times.

But whether courts and commentators should mourn these developments is questionable. Even critics of the Court's recent utilization of "property rights" recognize that fourth amendment construction under a broadly based, fact-bound "reasonable expectation of privacy" test is "almost wholly dependent upon the political and social climate and personal judicial leanings."[169] The three-part analysis suggested by the Court's recent opinions can be viewed as a serious—and meritorious—attempt to avoid impressionistic resolution of constitutional issues by instead basing the fourth amendment's definition of a "search" upon neutral principles.[170] The Court's newly emerging test represents a distillation of its experience with the definition of a "search" under the fourth amendment and, although the test is based on historic precedent, it is "an affirmation of the special values [the amendment] embod[ies] rather than . . . a finite rule of law, its limits fixed by the consensus of a century long past."[171]

The three conceptual inquiries used by the Court have, at the very least, the merit of long judicial standing. As developed above,

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166. Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

167. *See supra* notes 51-56 and accompanying text.

168. Mickenberg, *supra* note 25, at 226.

169. *Id.*

170. *See, e.g.,* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 18-19 (1959) (although the Court's interpretation of the fourth amendment should not "freeze[] for all time the common law of search and of arrest as it prevailed when the amendment was adopted," a principled Supreme Court decision should rest upon "reasons that in their generality and their neutrality transcend any immediate result that is involved").

171. *Id.* at 19.

judicial concern with "place" and "physical intrusion" extend back into the eighteenth century. The genealogy of the third factor, which focuses on the object of the governmental surveillance, is more recent—although since *Katz* no one can doubt its importance. Moreover, in cases both before and after the development of the "reasonable expectation of privacy" test, the Court consistently has utilized the place or context of a governmental intrusion, the nature of the intrusion itself, and the object of the governmental surveillance as three implicit, often interrelated, scales upon which to judge the merit of a fourth amendment claim. If tempered by the *Katz* orientation toward the protection of personal rights, these three constructs can provide a lattice-work upon which the currently sprawling vine of fourth amendment "search" analysis can begin to find direction.

A. The Protected Place: From Houses to Fields

The explicit judicial use of "place" as a valid analytical factor in fourth amendment decisions still is recovering, to some extent, from the much-quoted proclamation of *Katz* that the amendment "protects people, not places."[172] Taken at face value, this assertion appears to reject the significance of "place" in fourth amendment analysis. The *Katz* gloss, however, must be read in light of the literal language of the amendment, with its explicit protection of the "right of the people to be secure in their . . . houses,"[173] and with an eye to subsequent cases which clarify the actual application of the *Katz* dictum.

Barely a year after deciding *Katz*, the Court emphatically reaffirmed the significance of the home as a constitutionally significant "place" in *Alderman v. United States*.[174] The opinion disposed of three consolidated cases concerning electronic interception of interpersonal conversations. Although the facts of the consolidated cases did not establish where the electronic surveillance occurred,[175] the Court analyzed all three cases as if the

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172. 389 U.S. at 351.

173. *See, e.g., Oliver*, 466 U.S. at 169 n.6 ("This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope of its affirmative protections") (citations omitted).

174. 394 U.S. 165 (1969).

175. In the first case, brought by petitioners Alderman and Alderisio, the government had electronically surveilled Alderisio's place of business. *Id.* at 167. In the other two cases the government "admit[ted] overhearing conversations of each petitioner, but where the surveillance took place and other pertinent details are unknown." *Id.* at 170 n.3.

government had intercepted the conversations within the confines of a home.[176] The precise issue confronting the Court was whether only the participants in the intercepted conversations had been subjected to a "search," or whether the owner of the premises surveilled also had a constitutional complaint, despite the fact that he may not have participated in the intercepted conversations.[177] Notwithstanding Justice Harlan's emphatic dissent that only the participants in the surveilled conversations had a reasonable expectation of privacy in those conversations, and that any other conclusion would be tantamount to holding "that the Fourth Amendment protects 'houses' as well as 'persons,' "[178] the Court concluded that, on the facts before it, a "search" occurred whenever the government overheard "conversations of a petitioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations."[179]

The Court rejected the argument that, so long as the conversational privacy of the actual participants is protected, the fourth amendment does not protect "the homeowner against the use of third-party conversations overheard on his premises."[180] The homeowner plainly has an expectation of privacy in his own conversations, but he also has the constitutional right to expect that his home will be free from unauthorized governmental intrusion. Although the homeowner may have no interest in the seized conversations "as 'effects' protected by the Fourth Amendment," he or she *does* have a valid constitutional complaint because the seized conversations were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment."[181] *Katz*, the Court concluded, "by holding that the Fourth

176. *Id.* at 176-80.

177. The Court analyzed the issue as one of "standing," that is, whether the individual raising the fourth amendment claim had been personally aggrieved such that he could invoke the exclusionary rule. *Id.* at 171-74; *id.* at 188-89 (Harlan, J., dissenting); *see also* Jones v. United States, 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980) (holding that defendants charged with crimes of possession had "automatic standing" to challenge legality of searches producing evidence against them regardless of their ownership of the evidence seized or the premises searched). In Rakas v. Illinois, 439 U.S. 128, 139 (1978), the Court abandoned any "theoretically separate . . . concept of standing" to contest an allegedly illegal search "in favor of an inquiry that focuse[s] directly on the substance of the defendant's claim that he or she possessed a 'legitimate expectation of privacy' in the area searched." *See also* Rawlins v. Kentucky, 448 U.S. 98, 104 (1980).

178. 394 U.S. at 191-92, 194.

179. *Id.* at 176.

180. *Id.*

181. *Id.* at 177.

Amendment protects persons and their private conversations, was [not] intended to withdraw any of the protection which the Amendment extends to the home."[182]

Other cases turning on the "place" where the governmental surveillance occurred followed *Alderman*.[183] These cases illustrate that, "hy focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment."[184]

But if *Katz* did not eliminate the relevance of "place" in fourth amendment analysis or withdraw any of the protection traditionally afforded the home, *Katz* did, nonetheless, redefine the nature of the locational inquiry. Before *Katz*, the home was protected simply because it *was* the home, which, under literal fourth amendment terms, constituted a protected place. After *Katz*, the home is a protected locale, not only by virtue of its explicit mention in the language of the fourth amendment, but also (and perhaps primarily) because of the human activities innately associated

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182. *Id.* at 180.

183. *See, e.g.*, United States v. Dunn, 107 S. Ct. 1134 (1987) (a barn located 60 yards from a house is not within the "curtilage" and federal agents did not need a warrant to examine its outer perimeter); Donovan v. Lone Steer, Inc., 464 U.S. 408 (1984) (warrantless entry into a public lobby of a hotel to serve a subpoena is not the sort of act forbidden by the fourth amendment); Steagald v. United States, 451 U.S. 204, 222 (1981) (a search warrant, not merely an arrest warrant, is necessary under the fourth amendment for the search of a home); Payton v. New York, 445 U.S. 573, 589-90 (1980) (The fourth amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms"); Michigan v. Tyler, 436 U.S. 499 (1978) (fourth amendment applies even to burned premises, and a search warrant is required even when there is a suspicion of arson); United States v. Santana, 427 U.S. 38 (1976) (a person standing in a doorway to a home, exposed to public view, is in a "public place" for purposes of the fourth amendment, and her retreat into her home could not thwart an otherwise proper arrest); Cady v. Dombrowski, 413 U.S. 433 (1973) (the reasonableness of a search and seizure depends upon the facts of each case, and the reasonableness of a search of an automobile may be different from the search of a home or other fixed place); *accord* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976); Sifuentes v. United States, 428 U.S. 543 (1976) (*Martinez-Fuerte* and *Sifuentes* were consolidated appeals); Cardwell v. Lewis, 417 U.S. 583 (1974); Chambers v. Maroney, 399 U.S. 42 (1970); Vale v. Louisiana, 399 U.S. 30, 34 (1970) (suspected drug deal outside home could not justify search of house, because "only in a few . . . well delineated situations . . . may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it") (quoting *Katz*, 389 U.S. at 357).

184. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

with it. As the Court recently noted: "The sanctity of the home is not to be disputed. But the home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within."[185]

Katz sought to avoid a literal application of the fourth amendment in terms of "places" that would risk protecting the place instead of the person. However, recognition that a place is "protected" in fourth amendment terms because it is the context for intimate human activities avoids that danger without ignoring the language of the Constitution.[186] Thus, the determination whether any given locale legitimizes an expectation of privacy rests not on whether the "place" can be distinguished, categorized, and given a constitutionally significant geographic label, but rather whether it is conceptually linked with intimacy and personal privacy.[187]

Viewed in the above light, a conceptual scale emerges to legitimize an expectation of privacy in terms of place. At one end, where the "zone of privacy" is most "clearly defined,"[188] is the home. At the other end, where privacy interests associated with a "place" are most attenuated, is the "open field."[189] The polar extremes of this scale alone may determine whether particular governmental surveillance infringes upon a "reasonable expectation of privacy" and therefore constitutes a search; crossing a home's threshold is a search, climbing over fences in forested woods is not.[190]

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185. Segura v. United States, 468 U.S. 796, 810 (1984) (emphasis in original).

186. *See, e.g.*, Oliver v. United States, 466 U.S. 170, 177 n.6 (1984) (the effect of the "reasonahle expectation of privacy" test was not to "sever Fourth Amendment doctrine from the Amendment's language," hut to recognize that "the Court fairly may respect the constraints of the Constitution's language without wedding itself to an unreasoning literalism"); *see also* Rohbins v. California, 453 U.S. 420 (1981); Payton v. New York, 445 U.S. 573, 589-90 (1980); Alderman v. United States, 394 U.S. 165, 178-80 (1969).

187. In *United States v. Dunn*, for example, the Court was presented with a claim that a barn located 60 yards from a residential dwelling was within the "curtilage" of the home and was therefore a "place" entitled to exacting fourth amendment protection. 107 S. Ct. at 1139. The Court concluded that whether a given "place" qualifies as "curtilage" depends upon "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses of which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* Applying that analysis to the facts before it, the Court found that the barn simply was not an area "associated with the 'sanctity of a man's home and the privacies of life,' " and rejected the assertion that the warrantless examination of its outer perimeter constituted a search. *Id., quoting Oliver*, 466 U.S. at 180.

188. *Payton*, 455 U.S. at 589.

189. *Oliver*, 466 U.S. at 177-81.

190. *Compare Payton*, 455 U.S. at 589-90 *with Oliver*, 466 U.S. at 177-81.

Between these two extremes lies a broad variety of locales that, depending upon the strength of their conceptual link with interpersonal intimacy and privacy, may validate an expectation of privacy. Indeed, the degree to which various places within this "middle range" legitimize an expectation of privacy turns upon the closeness of their connection to the "peculiarly strong concepts of intimacy, personal autonomy and privacy associated with the home."[191] The "automobile exception" to the fourth amendment's warrant clause, for example, rests at least in part upon the conclusion that an automobile is a "place" which, because of its mobility and other inherent characteristics, substantially lacks any such association.[192]

Factors such as the pervasiveness of governmental regulation of certain locales and the types of activities generally conducted there are relevant to whether a given "place" merits rigorous constitutional protection. Thus, although the amendment's protection may extend to commercial premises because the "word 'houses,' as it appears in the Amendment, is not to be taken literally," the "expectation of privacy that the owner of a commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home."[193] This differentiation between residential and commercial premises is due, at least in part, to a "long tradition of close government supervision" of commercial premises which undermines any claim that such places are the loci for intimate personal activities.[194] Some locales, moreover, by their very nature are only remotely connected with established notions of intimacy or interpersonal privacy. As the Court noted in *Oliver*, "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government inter-

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191. Dow Chem. Co. v. United States, 106 S. Ct. 1819, 1823 (1986), *quoting* Dow Chem. Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984). *Compare* Mancusi v. DeForte, 392 U.S. 364, 367 (1968) ("the protection of the Amendment may extend to commercial premises") *with* G.M. Leasing v. United States, 429 U.S. 338 (1977) (a business, by virtue of its special nature, may be open to intrusions that would be impermissible in a private context), *cert. denied*, 435 U.S. 923 (1978) *and* See v. Seattle, 387 U.S. 541, 546 (1967) (commercial premises may be inspected in many more situations than private residences). *See also* United States v. Dunn, 107 S. Ct. 1134, 1139 n.4 (1987) (a barn located 60 yards from a private residence does not "harbor[] those intimate activities associated with domestic life and the privacies of the home").

192. *See, e.g.*, California v. Carney, 471 U.S. 386, 388-90 (1985) (holding that a motor home, because of its mobility and regulation as a motor vehicle, falls within the "automobile exception").

193. *Mancusi*, 392 U.S. at 367.

194. Marshall v. Barlow's, Inc., 436 U.S. 307, 313-14 (1978).

ference or surveillance" because there is "no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields."[195]

Between the polar extremes of "homes" and "open fields," however, the locational inquiry rarely determines the "search" issue; the "reasonable expectation of privacy" analysis generally hinges on two other factors. Apparently, the presence or absence of an actual physical intrusion has been decisive in cases involving alleged searches of commercial premises.[196] The object of the official surveillance also has determined the "reasonable expectation of privacy" issue in cases concerning other "places" falling somewhere between homes and open fields.[197] It is to the first of these factors, the degree of intrusiveness of the governmental surveillance, that attention is now turned.

B. Physical Intrusion: From the Person to the Skies

Following *Katz*, the presence or absence of a physical intrusion ostensibly ceased to be the focal point of fourth amendment analysis. Yet, while the Court's conclusion that "the reach of [the fourth amendment] cannot turn upon the presence or absence of a physical intrusion"[198] put to rest a rigid calculus hopelessly inept in the face of advancing technology, the inherent intrusiveness of governmental surveillance does remain relevant to the determination whether a reasonable expectation of privacy has been infringed. Although the Court is wary of any suggestion that a physical intrusion is "necessary [or] sufficient to establish a

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195. *Oliver*, 466 U.S. at 179; *cf. Dunn*, 107 S. Ct. at 1140 (a barn was not a "place" entitled to stringent fourth amendment protection because it "was not being used for intimate activities of the home").

196. *Compare Mancusi*, 392 U.S. at 370 (physical entry into business office violates reasonable expectation of privacy) *with* Dow, 106 S. Ct. at 1825-26 (although actual surveillance of the interior of buildings would raise more serious constitutional concerns, aerial surveillance of business premises does not infringe upon a reasonable expectation of privacy); *compare* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979) (wide-ranging examination of printed materials offered for sale by "adult" bookstore constitutes a "search"; "because a retail store invites the public to enter, it [does not] consent to wholesale searches and seizures that do not conform to Fourth Amendment guarantees") *with* Maryland v. Macon, 472 U.S. 463, 468-71 (1985) (purchase of magazine offered for sale by "adult" bookstore does not violate a reasonable expectation of privacy).

197. *Compare* Katz v. United States, 389 U.S. 347, 361 (1967) (interception of conversation from telephone booth constitutes a search) *with* Smith v. Maryland, 442 U.S. 735, 741 (1979) (use of a pen register to obtain the telephone numbers dialed from a specific telephone does not constitute a search because "pen registers do not acquire the *contents* of communications") (emphasis in original).

198. 389 U.S. at 353.

constitutional violation," the Court nevertheless has acknowledged that a physical intrusion is at least "marginally relevant to the question of whether the Fourth Amendment has been violated."[199] Recent cases have gone further, relying upon the absence of a physical intrusion as an express analytical factor.[200]

Indeed, *Katz* itself may have retained the essential nugget of an "intrusiveness" inquiry. The majority opinion stated: "[what] a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[201] If this element of *Katz* is interpreted (as it often has been) to require a "subjective expectation of privacy" as a foundation for fourth amendment protection,[202] the Court's reasoning carries the seeds of the amendment's own destruction—the amendment could be nullified by a simple governmental announcement that all expectations of privacy are henceforth unreasonable.[203] If, however, courts read this "knowing exposure" prong of *Katz* as requiring a constitutionally objectionable *intrusion* upon personal interests as the predicate for fourth amendment protection, they avoid the above anomaly. Fourth amendment protection in an individual case might turn upon whether a person has "knowingly exposed" otherwise private information,[204] but the analysis does not hinge upon the presence

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199. United States v. Karo, 468 U.S. 705, 713 (1984).

200. *See* California v. Ciraolo, 106 S. Ct. 1809, 1813 (1986); Dow Chem. Co. v. United States, 106 S. Ct. 1819, 1826-27 (1986); United States v. Jacobsen, 466 U.S. 109, 122-24 (1984); United States v. Place, 462 U.S. 696, 707 (1983).

201. 389 U.S. at 351.

202. *See, e.g.*, Justice Harlan's *Katz* concurrence, where he stated that, to invoke fourth amendment protection, an individual must have "an actual (subjective) expectation of privacy." *Id.* at 361 (Harlan, J., concurring).

203. For example, one commentator states:

> "[A]n actual subjective expectation of privacy" . . . can neither add to, nor can its absence detract from, an individual's claim to Fourth Amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.

Amsterdam, *supra* note 44, at 384. Significantly, just three years after *Katz*, Justice Harlan expressed doubts about the wisdom of engrafting a "subjective expectation of privacy" requirement upon fourth amendment "search" analysis. *See* United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) ("While [tbe expectations approach of *Katz*] . . . represent[s] an advance over the unsophisticated trespass analysis of the common law, [it] too ha[s] [its] limitations and can, ultimately, lead to the substitution of words for analysis").

204. *See, e.g.*, United States v. Miller, 425 U.S. 435, 442-43 (1976) (an individual cannot claim fourth amendment protection for information that he voluntarily has disclosed to a third party) (superseded by statute as stated in Hancock v. Marshall, 86 F.R.D. 209 (D. D.C. 1980)); Couch v. United States, 409 U.S. 322, 335-36 (1973) (same proposition); United

or absence of a manipulable "subjective expectation of privacy." Rather, the predicate to constitutional protection is the presence or absence of a governmental "intrusion." Information that an individual knowingly exposes or voluntarily discloses to the government or its agents has not been obtained by means of an "intrusion" and is therefore not within the bulwark against official intrusiveness erected by the fourth amendment.

That the Court is more concerned with "intrusiveness" than actual subjective expectations of privacy is suggested by the recent opinions in *Ciraolo* and *Dow*. Although the Court discussed briefly in both cases whether Ciraolo and Dow possessed subjective expectations of privacy,[205] that discussion, while somewhat cryptic, suggests that the Court, in looking to such expectations, emphasizes intrusiveness more than subjective anticipation. The Court did not undertake any substantial analysis of the actual, subjective expectations of Ciraolo and Dow Chemical. Rather, it simply concluded that there had been in each case at least a minimal governmental intrusion to obtain information that both parties had attempted to keep private. The Court's approach is thus consistent with its earlier observations that the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[206]

Indeed, as with the "place" analysis discussed above, *Katz* now can be understood not as eliminating the relevance of physical intrusion, but rather as shifting the emphasis placed on that analytical element. Just as *Katz* infused the "place" inquiry with a concern for personal intimacy rather than geographical location, it similarly redirected the "intrusion" inquiry. Fourth amendment cases no longer turn upon whether a thumbtack physically penetrates a protected enclave;[207] nevertheless, their resolution may well depend upon whether a given form of surveillance impermissi-

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States v. White, 401 U.S. 745, 752 (1971) (same proposition); Hoffa v. United States, 385 U.S. 293, 302 (1966) (same proposition).

205. *See Ciraolo*, 106 S. Ct. at 1812 (noting that it "can reasonably be assumed" that Ciraolo had some expectation of privacy "from at least street level views," although whether he "manifested a subjective expectation of privacy from *all* observations of his backyard . . . is not entirely clear in these circumstances"); *Dow*, 106 S. Ct. at 1826 n.4 (finding it "important" that, although Dow had taken "elaborate and expensive measures for ground security," the surveillance occurred in "an area where Dow ha[d] made [no] effort to protect against aerial surveillance") (quoting Dow Chem. Co. v. United States, 749 F.2d 307, 312 (6th Cir. 1984)).

206. Schmerber v. California, 384 U.S. 757, 767 (1966).

207. *See, e.g.*, Silverman v. United States, 365 U.S. 505, 512 (1961) (slight intrusion by a "spike microphone" is an "actual intrusion into a constitutionally protected area").

bly intrudes upon the person. For 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."[208]

Like the "place" construct, the Court's cases dealing with "intrusion" can be placed on a scale; at one end lie those intrusions which almost certainly violate a reasonable expectation of privacy and at the other end lie those intrusions which do not. And, as with the "place" scale, the "intrusion" scale's polar ends now seem well defined. An actual, physical intrusion upon the person—such as the insertion of a needle to draw a blood sample—quite clearly constitutes a search.[209] At the other end of the "intrusion" scale are cases involving the voluntary disclosure of information to the government where, because data is "knowingly expose[d],"[210] no "reasonable expectation of privacy" is violated.[211]

In between lie numerous cases where the inherent intrusiveness of government surveillance influences, but does not alone determine, whether a search has occurred. In this middle ground, generically similar cases can differ in result depending upon the perceived intrusiveness of the governmental conduct at issue. Two cases concerning the seizure of pornographic materials from adult bookstores, *Lo-Ji Sales, Inc. v. New York*[212] and *Maryland v. Macon*,[213] are illustrative.

In *Lo-Ji* a town justice issued a blank warrant authorizing the

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208. Boyd v. United States, 116 U.S. 616, 630 (1886).

209. *See, e.g., Schmerber*, 384 U.S. at 767 (the administration of blood tests "plainly constitute[s] searches of 'persons' ").

210. Katz v. United States, 389 U.S. 347, 351 (1967).

211. *See, e.g.*, J. HALL, *supra* note 119, § 4:3 (discussing "consent" cases where, by voluntarily consenting to an intrusion, a suspect gives up any expectation of privacy); *see also* United States v. Mendenhall, 446 U.S. 544 (1980) (strip search of person suspected of being a drug courier upheld when tbe totality of circumstances showed search was voluntary); United States v. Matlock, 415 U.S. 164 (1974) (search producing the fruits of a bank robbery was valid when consent was given by common law wife of suspect); Coolidge v. New Hampsbire, 403 U.S. 443 (1971) (wife may consent to a search of common areas of house, which produces evidence against husband); Lewis v. United States, 385 U.S. 206 (1966) (consensual entry of undercover police officer to purchase drugs which produced evidence of crime and incriminating conversations did not violate fourth amendment); Lopez v. United States, 373 U.S. 427 (1963) (incriminating statements obtained by an IRS agent wearing a body microphone violated no fourth amendment interests when the agent was admitted with defendant's consent); On Lee v. United States, 343 U.S. 747 (1952) (conversation obtained by a government informant wearing a hidden mike was not violative of the fourth when the informant was on the premises with the suspect's consent).

212. 442 U.S. 319 (1979).

213. 472 U.S. 463 (1985).

seizure of pornographic materials. The justice then accompanied police officers to the adult bookstore, and, during a six-hour examination of the store's wares, filled in the blank warrant with particular descriptions of the items seized. The Court struck down this warrant procedure as "reminiscent of the general warrant or writ of assistance of the eighteenth century."[214] New York, however, argued that, even though the warrant procedure may have been defective, no warrant was in fact needed because the state's entry into the bookstore did not constitute a "search." The state's suggestion was "that by virtue of its display of the items at issue to the general public in areas of its store open to them, [Lo-Ji] had no legitimate expectation of privacy against governmental intrusion."[215]

Maryland raised a similar argument in *Macon*. There, three county police detectives visited the Silver News adult bookstore and, after browsing for "several minutes," purchased two magazines with a marked fifty-dollar bill. Following a conference outside the store, the officers determined that the magazines were obscene and they returned to arrest the clerk, Baxter Macon. Macon moved to suppress the magazines as fruits of an unlawful search. The State asserted that there had been no "search" because the officers had merely purchased items regularly offered for sale.[216]

The state prevailed in *Macon* because the Court concluded that the purchase of the magazines did not constitute a "search."[217] In contrast, the Court held that the intrusion involved in *Lo-Ji* was a "search" because "there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches . . . that do not conform to Fourth Amendment guarantees."[218] The only critical factor distinguishing *Macon* from *Lo-Ji* was the severity of the governmental intrusion. The fairly unobtrusive purchase of two magazines offered for sale did not constitute a "search," but the wholesale boxing up of similar magazines did. As the Court noted in *Macon*, "[a]lthough a police officer may not engage in a 'wholesale searc[h] . . .' in these circumstances, . . . nothing in our cases renders invalid under the Fourth Amendment . . . the purchase as here by the police of a

214. 442 U.S. at 325.
215. *Id.* at 329.
216. 472 U.S. at 469.
217. *Id.*
218. 442 U.S. at 329.

few of a large number of magazines and other materials offered for sale."[219]

The Court similarly has concluded that the propriety of using an electronic "beeper" without a warrant depends upon the intrusiveness of a given application of the technology. The Court has held that the use of a beeper to track the course of a vehicle on public streets does not constitute a "search" because, although the beeper aids visual surveillance, it does not give police information beyond that "voluntarily conveyed to anyone who wanted to look."[220] When the government uses a beeper to monitor the movement of materials inside a home, however, the Court has concluded that a search occurs.[221] Such a case is unlike the use of a beeper on the highway because the use of a beeper in a home reveals information "about the interior of the premises" that the Government cannot obtain by simple visual observation.[222] Although the surveillance technique in both instances is virtually identical, the use of a beeper inside a home is too intrusive to escape constitutional regulation. "Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight."[223] The relative intrusiveness of various surveillance techniques has determined the "search" issue in many cases.[224]

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219. 472 U.S. at 470, *quoting Lo-Ji Sales*, 442 U.S. at 329. In addition to the "search" question, hoth *Lo-Ji* and *Macon* concerned the issue whether an unlawful "seizure" of the magazines had occurred. The "seizure" analysis, however, turned upon the same factors as the "search" question, *i.e.*, the nature of the official intrusion. In *Lo-Ji* state officers "seized" the magazines by boxing them up "wholesale." 442 U.S. at 319. In *Macon* the Court found no "seizure" because the complainant "voluntarily transferred any possessory interest he may bave had in the magazines to the purchaser upon the receipt of the funds." 472 U.S. at 469.

220. United States v. Knotts, 460 U.S. 276, 281 (1983).

221. United States v. Karo, 468 U.S. 705 (1984).

222. *Id.* at 715.

223. *Id.* at 716.

224. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 117 (1984) ("It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information"); *id.* at 115-17, 120 (the conduct of government agents in opening and inspecting a package previously opened by private individuals does not violate the fourth because it was no more intrusive than the private investigation; the government invasion did not enable the government to learn anything "that had not previously been learned during the privato search" and therefore "[i]t infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment"); United States v. Place, 462 U.S. 696, 707 (1983) ("sniff test" of luggage by trained narcotics detection dog is not a "search"); Walter v. United

Evaluation of the "intrusiveness" of governmental surveillance is often closely related to the "place" analysis discussed earlier. In *Lo-Ji* and *Macon* the magazines' location in a public store played a significant role in evaluating the intrusiveness of a wholesale examination of the store's contents as opposed to a discrete sale. Similarly, the electronic beeper cases appear to turn on the fact that monitoring a beeper on a public street is less intrusive than tracking the device inside a home.[225]

The fact that the "place" and "intrusion" inquiries are often related, and may in fact overlap, is not surprising.[226] Unless a given case concerns a "place" or an "intrusion" well toward either end of the scales—such as breaking down the doors of a home or the consensual viewing of an open field—neither factor alone is likely to be determinative and the interplay of both is essential to the reso-

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States, 447 U.S. 649, 657, 663-64 (1980) (opinion of Stevens, J., and opinion of Blackmun, J., dissenting) (same proposition); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (striking down random "stops" to check documents of motorists as unlawful searches and seizures, but suggesting that the opinion "does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion"); United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) (the stopping of motorists at fixed checkpoints is a lesser intrusion upon the motorist's fourth amendment interests than random "roving patrol" stops; "we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop"); *see also* United States v. Viera, 644 F.2d 509 (5th Cir.), *cert. denied*, 454 U.S. 867 (1981) (squeezing some of the air out of an object to be tested by a trained dog before letting the animal sniff the object is a "de minimus intrusion" and not a search); *cf.* Amos v. United States, 255 U.S. 313, 317 (1921) (revenue agents who entered the defendant's home to search the premises for violations of the revenue laws with the wife's consent violated the fourth because the officers were actually admitted under "implied coercion").

225. A recent case is also illustrative. In Arizona v. Hicks, 107 S. Ct. 1149 (1987), police entered respondent's apartment without a warrant after a bullet fired through the floor of the apartment had injured another tenant. While inside, one officer noticed two sets of expensive stereo equipment and, suspecting it to be stolen merchandise, read and recorded the serial numbers, moving some of the components to do so. Despite the dissent's understandable protest that moving the equipment a few inches was a "minimal invasion of privacy," *id.* at 1160, (O'Connor, J., dissenting), the Court held that a "search" had taken place because the officer had moved, not simply read, the serial numbers on the stereo components. *Id.* at 1152. The best explanation for the Court's conclusion is that the act of moving the components, though not highly intrusive in itself, occurred within respondent's apartment—a place entitled to the highest constitutional protection. *Cf.* New York v. Class, 475 U.S. 106 (1986) (moving papers on an automobile's dashboard to uncover the vehicle's serial number does not constitute a "search").

226. *See* United States v. Miller, 425 U.S. 435, 440 (1976) (" 'No interest legitimately protected by the Fourth Amendment' is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into the 'security a man relies upon when he places himself or his property within a constitutionally protected area' ") (quoting Hoffa v. United States, 385 U.S. 293 (1966)).

lution of the "search" issue. In *Dow* and *Ciraolo*, for example, neither the "place" nor the "intrusion" involved was decisive. Dow Chemical's plant was not an "open field" such that aerial surveillance was unquestionably constitutional without more. And the backyard setting of *Ciraolo*, ordinarily entitled to heightened protection, was not determinative because the Court deemed any "intrusion" into the curtilage to be minimal. The Court's analysis, however, did not stop there. Central to both cases was a consideration of a third inquiry: the nature of the information sought and obtained by the governmental surveillance.

C. *The Object of Surveillance: Personal or Public?*

Although, as has been noted above, dicta in *Katz* suggests that "place" and "intrusion" inquiries have little or no constitutional significance, the same cannot be said of the third factor traditionally utilized by the Court in its "search" decisions. Indeed, by holding that a telephone call made from a public phone booth was protected regardless of location and the complete absence of any physical intrusion, *Katz* based fourth amendment protection primarily on the nature of the information obtained by the government surveillance—a private telephone conversation.[227] In focusing on the conversation, rather than solely upon the place or intrusion involved, the *Katz* Court explicitly established the object of governmental surveillance as the third, and often crucial, inquiry in fourth amendment "search" analysis.

This third element, like "place" and "intrusion," can be conceived as a conceptual scale. *Katz* itself establishes one end of the scale: the highly personal content of a private, interpersonal conversation is the type of information most likely to receive constitutional protection against unauthorized official surveillance. Indeed, in the absence of countervailing factors, the interception of interpersonal conversation likely will violate a reasonable expectation of privacy, thus implicating the fourth amendment.[228] The polar extreme of the "object of surveillance" construct, where generally courts would not find a "search," is best illustrated by an array of decisions which hold that certain data, by their very nature, cannot

227. Katz v. United States, 389 U.S. 347, 350-53 (1967).

228. Countervailing factors include, of course, the "place" and "intrusion" inquiries. If, for example, police seize a conversation without any constitutionally objectionable intrusion—such as recording a conversation voluntarily entered into with a government agent—the Court likely would refuse to find that a "search" had occurred. *See supra* notes 211 & 224.

support a legitimate claim of privacy. Such data, courts have found, support only a diminished expectation of privacy because the data either contain little information that is truly "private,"[229] or they contain little personal information that society has a strong interest in protecting as private.[230]

Despite an individual's most ardent desires, society and the courts realistically cannot recognize certain information as "private" in any real sense of the word. Such information includes a person's own physical characteristics—appearance, height, weight, and, in most cases, gender[231]—which simply cannot be shielded from the public gaze. The Supreme Court has concluded that this category of inherently "public" information includes fingerprints[232] and the physical characteristics of the voice itself.[233] Furthermore, while a person's "papers" are entitled to explicit constitutional protection, the actual vehicle of written communication—namely, an individual's handwriting—is not "private" within the meaning of the fourth. "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice."[234]

Similarly, the Court has concluded that the use of a pen register[235] to record local numbers dialed from a private phone does not infringe upon a reasonable expectation of privacy because the only information recorded by the device—the actual numbers dialed from a particular telephone—is not in fact "private." On the con-

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229. *See infra* notes 231-37 and accompanying text.

230. *See infra* notes 238-47 and accompanying text.

231. *See, e.g.*, pop star Boy George.

232. Davis v. Mississippi, 394 U.S. 721, 727 (1969) (fingerprinting does not reveal personal or interpersonal information, it "involves none of the probing into an individual's private life and thoughts that marks a . . . search").

233. United States v. Dionisio, 410 U.S. 1, 14 (1973) ("The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. . . . No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will he a mystery to the world"); *see also* United States v. Doe (Schwartz), 457 F.2d 895, 898-99 (2d Cir. 1972) ("[W]hile the content of a communication is entitled to Fourth Amendment protection . . . the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear"), *cert. denied sub nom.* Schwartz v. United States, 410 U.S. 941 (1973).

234. United States v. Mara, 410 U.S. 19, 21 (1973); *see also* United States v. Euge, 444 U.S. 707 (1980).

235. A pen register is a device that can record numbers dialed from a particular telephone without recording the actual conversation. *See* Smith v. Maryland, 442 U.S. 735, 742 (1979).

trary, the numbers voluntarily are disclosed to the telephone company when the call is initiated.[236] A pen register, moreover, does not record any highly personal information. Unlike the listening device employed in *Katz*, a pen register does "not acquire the *contents* of communications."[237]

In addition to the above communications which contain little truly "private" data, there is certain information that society has no significant interest in obscuring from official gaze because of its functional role in modern society or its tenuous connection to fundamental privacy concerns. Thus, an individual has no reasonable expectation of privacy in an automobile's vehicle identification number (VIN) because "of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view."[238] Information recorded on checks and deposit slips is likewise beyond fourth amendment protection because, despite the sensitive nature of the documents themselves, they are "negotiable instruments" passed in commerce and not "confidential communications."[239] And, as *Oliver* reemphasized, there is normally no legitimate expectation of privacy regarding such impersonal information as the cultivation of crops in open fields.[240]

In certain circumstances, the Court has held one final category of information to be beyond the purview of the fourth amendment. In *United States v. Jacobsen*[241] the Court concluded that a discrete sensing device, specifically, a specialized chemical test to de-

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236. *Id.* at 743-46.

237. *Id.* at 741 (emphasis in original).

238. New York v. Class, 106 S. Ct. 960, 966 (1986); *cf.* Arizona v. Hicks, 107 S. Ct. 1149 (1987) (moving stereo equipment to uncover serial numbers during a warrantless entry of an apartment constitutes a "search").

239. Miller v. United States, 425 U.S. 435, 442 (1975) (superseded by statute as stated in Hancock v. Marshall, 86 F.R.D. 209 (D.D.C. 1980)).

240. In his *Oliver* dissent, Justice Marshall argued that open fields should indeed be accorded fourth amendment protection because they may be the setting for intimate and interpersonal activities such as lovers' trysts and secluded worship services. Oliver v. United States, 466 U.S. 170, 191-93 (1984) (Marshall, J., dissenting). The majority, of course, did not argue that a given case, if truly involving such activities, would not merit constitutional protection. It simply reasoned that open fields, "by their very character as open and unoccupied, are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment." *Id.* at 179 n.10 (majority opinion). In any event, the police seized or revealed no intimate personal information in *Oliver*. See *supra* notes 101-18 and accompanying text for a discussion of *Oliver*.

241. 466 U.S. 109 (1984).

termine the presence of cocaine,[242] which is capable of disclosing only the presence of contraband, does not, of itself, disclose information of a sufficiently personal nature to evoke fourth amendment protection.[243] Although the Court's conclusion that a test designed solely to determine the presence of contraband "does not compromise any legitimate interest in privacy"[244] is potentially troublesome,[245] possession of contraband is rather far removed from the central concern of *Katz*—the protection of interpersonal communication.[246] Moreover, the conclusion that the use of discrete sensing devices to discover contraband does not involve a "search" is consistent with one of the Court's most celebrated fourth amendment decisions, *Boyd v. United States*. The modern-day Court's refusal to extend full fourth amendment protection to possession of contraband is reminiscent of *Boyd's* suggestion that a defendant could not raise the amendment to guard against govern-

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242. *Id.* at 123.

243. *Cf.* United States v. Place, 462 U.S. 696, 707 (1983) (use of trained narcotics dog to "sniff" luggage for presence of illegal drugs is not a "search"). A trained narcotics dog could be described as a "discrete sensing device." Whether the use of such a dog constitutes a search, however, does not depend solely upon this fact. In most instances, sniffing the air around an object does not result in a constitutionally objectionable intrusion. *See supra* note 224.

244. 466 U.S. at 123.

245. The Court previously has created a first amendment right to possess at least one form of "contraband"—obscene pornography. *See* Stanley v. Georgia, 394 U.S. 557 (1969). Although the facts of *Stanley* can be distinguisbed from *Jacobsen* because (1) *Stanley* concerned the possession of contraband in the home, while *Jacobsen* concerned testing for contraband in public places, and (2) no one has a first amendment right to possess illegal drugs, some tension exists between the cases. One author astutely has observed:

> [T]he Court's analysis makes the legislature the arbiter of the scope of the fourtb amendment. Because Congress had decreed that cocaine was contraband, the use of the chemical test in Jacobsen was not a search. If Congress were to make the possession of cocaine legal, use of the test presumably would then be a search. The Court should not make Congress the arbiter of the scope of a constitutional provision protecting individual rights.

Note, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, *supra* note 9, at 203.

246. In California v. Ciraolo, 106 S. Ct. 1809 (1986), the Court stated:

> [O]ne who enters a telephone booth is entitled to assume that bis conversation is not being intercepted. This does not translate readily into a rule of constitutional dimensions that one who grows illicit drugs in his backyard is "entitled to assume" his unlawful conduct will not be observed by a passing aircraft—or by a power company repair mechanic on a pole overlooking the yard.

Id. at 1813; *see also* Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH L. REV. 1229, 1244-48 (1983) (because the fourth amendment permits the government to search for and seize evidence of a crime and there is no inherent right to secrete such evidence, use of a device that can disclose only evidence of a crime is not a "search").

ment searches and seizures of stolen property.[247]

The "object of surveillance" construct is useful in parsing given facts to determine whether official surveillance infringes a reasonable expectation of privacy. In *Ciraolo* and *Dow* the fact that the aerial overflights revealed nothing more than the presence of contraband and the physical layout of a manufacturing facility, as opposed to information directly related to "families or personal privacy"[248] or "identifiable human faces or secret documents,"[249] was crucial to the Court's conclusion that no "search" had occurred.[250] But, like the "place" and "intrusion" factors, consideration of the object of surveillance alone rarely determines whether police have violated a reasonable expectation of privacy. Although *Katz* establishes it as an essential inquiry, undue emphasis on the object of governmental surveillance could well lead courts astray.

In *United States v. Jacobsen*, for example, Justice Brennan in dissent chastised the Court for "its exclusive focus on the nature of the information or item sought and revealed through the use of a surveillance technique."[251] The Court's emphasis, he asserted, creates the possibility that "if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present."[252]

Justice Brennan's criticism of the majority's approach, if accurate, is telling. His prophecy of the future, moreover, is disturbing. The Justice, however, is unduly grudging in his characterization of the majority's approach. The object of the governmental surveillance is not the "exclusive focus" of the opinion in *Jacobsen*. Furthermore, a careful application of the three-factor approach set out in this Article alleviates the fear, illustrated by Justice Brennan's hypothetical police cocaine cruiser, that "search warrants . . . may very well become notions of the past."[253]

In *Jacobsen* Drug Enforcement Administration agents ex-

247. Boyd v. United States, 116 U.S. 616, 624 (1886); *see supra* notes 21-25 and accompanying text. *But cf.* Arizona v. Hicks, 107 S. Ct. 1149 (1987) (respondent successfully raised fourth amendment to suppress evidence relating to the possession of stolen stereo equipment).

248. *Ciraolo*, 106 S. Ct. at 1812.

249. Dow Chem. Co. v. United States, 106 S. Ct. 1819, 1827 n.5 (1986).

250. *See supra* notes 146-47 and accompanying text.

251. 466 U.S. 109, 137 (1984) (Brennan, J., dissenting).

252. *Id.* at 138 (Brennan, J., dissenting).

253. *Id.*

amined the contents of a damaged package that an interstate shipper previously opened and inspected.[254] The shipper, who opened the damaged package pursuant to a company policy regarding insurance claims, notified the federal agents when it found a suspicious white powder inside.[255] The agents did nothing more than examine the previously opened package and remove a small amount of the powder for testing to determine the presence of cocaine.[256] The question before the Court was whether either the agents' inspection of the previously opened package or their testing of the powder constituted a search.[257]

The majority opinion implicitly examined each of the factors set forth in this Article. The Court first found that the official action touched a constitutionally protected "place" because the package "was unquestionably an 'effect' within the meaning of the Fourth Amendment."[258] The Court then went on to consider the nature of the governmental intrusion and the object of the surveillance in analyzing the "search" issue.

The Court found that, on the facts presented, the agents' actual examination of the package was not a constitutionally objectionable intrusion. At the time the agents arrived to examine the package, it had been thoroughly ransacked by private parties, who voluntarily conveyed to the agents all the information they had obtained.[259] Because an "official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred,"[260] the agents' actions raised no constitutional concern so long as they did not exceed the scope of the private inspection.[261] The agents' opening and physical examination of the package did not frustrate any "legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment" because such actions "enabled the agents to learn nothing that had not previously been learned during the pri-

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254. *Id.* at 111.

255. *Id.*

256. *Id.* at 111-12.

257. *Id.* at 118. The Court also considered whether the governmental action constituted an unlawful "seizure" under the fourth amendment. *Id.* at 121-22, 124-25. Although the question of what constitutes an illegal "seizure" is beyond the scope of this Article, the Court's conclusions on that point track almost precisely its "search" analysis. *Id.*

258. *Id.* at 114.

259. *Id.* at 115.

260. *Id.*

261. "The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.* at 117.

vate search."[262]

The actual chemical testing of the powder, however, exceeded the scope of the private search. The Court, therefore, moved beyond the intrusion inquiry to determine whether the information obtained as a result of the test required a finding that a "search" had occurred. The Court noted that the test's additional intrusion was minimal; "only a trace amount of material was involved."[263] In addition, the test "could disclose only one fact previously unknown . . .—whether or not a suspicious white powder was cocaine."[264] It could reveal nothing more, "not even whether the substance was sugar or talcum powder."[265] In this context the Court concluded that the official collection of this limited additional information did not constitute a "search."

Thus, contrary to Justice Brennan's assertion, the Court did not "focus[] . . . solely on the product of the would-be search" in reaching its conclusion.[266] Instead, the Court placed the official surveillance in the context of where it occurred,[267] and carefully examined the nature of the governmental intrusion involved. In examining the chemical test, the Court looked to the nature of the information obtained only after finding that the test, in any event, represented a minimal governmental intrusion. And, because that information had little to do with core concepts of intimacy and personal autonomy and revealed only a single fact—the presence or absence of cocaine—the test did "not compromise any legitimate interest in privacy."[268]

The Court's analysis, furthermore, does not support any well-founded fear that the police will begin cruising the streets with sensor devices trained on American homes in search of discrete crimes.[269] Such activity would be significantly more intrusive than the official conduct at issue in *Jacobsen*.[270] The intrusion, moreover, would occur in a place traditionally accorded the strictest

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262. *Id.* at 120.
263. *Id.* at 125.
264. *Id.* at 122.
265. *Id.*
266. *Id.* at 140 (Brennan, J., dissenting).
267. *See id.* at 139 (Brennan, J., dissenting) ("In determining whether a reasonable expectation of privacy has been violated, we have always looked to the context in which an item is concealed").
268. *Id.* at 123.
269. *See id.* at 138 (Brennan, J., dissenting).
270. *Cf.* Dow Chem. Co. v. United States, 106 S. Ct. 1819, 1827 (1986) ("An electronic device to penetrate walls or windows so as to hear and record confidential discussions . . . would raise very different and far more serious questions . . . ").

constitutional protection—the home.[271] Accordingly, even if Justice Brennan's hypothetical sensor could detect only the presence of contraband, the first two factors in the search analysis suggest that it could not be used without a warrant.

VII. CONCLUSION

The definition of a "search" under the fourth amendment has provoked considerable controversy during its evolutionary history. Beginning with concepts derived from the common law of trespass, the Supreme Court developed doctrines dependent upon place and physical intrusion which guided the judicial application of the amendment until the 1967 decision of *Katz v. United States*. That decision, which freed the concept of a "search" from archaic notions of then-existing law, held that a "search" occurs any time official surveillance impinges upon a "reasonable expectation of privacy." The amorphous nature of that standard, however, created substantial difficulties in actual application.

The potentially limitless number of factors relevant to the determination whether a given expectation of privacy is "reasonable" has resulted in confusion and uneven application of constitutional doctrine. In at least one area—the opening of containers taken from automobiles—the Court has reduced the disarray by expanding the scope of the "automobile exception" to the warrant clause, thereby eliminating any need to determine whether particular actions constitute a "search." But that approach to the difficulties posed by the *Katz* test is not available throughout the wide arena in which the decision applies.

Beginning with its decision in *Oliver v. United States*, and continuing with the aerial surveillance opinions in *California v. Ciraolo* and *Dow Chemical Co. v. United States*, the Supreme Court has begun to narrow the range of factual and legal variables impinging upon the "reasonable expectation of privacy" analysis. These decisions suggest that, in applying the *Katz* standard, the Court looks to (1) the place or location where official surveillance occurs, (2) the nature and degree of intrusiveness of the surveillance itself, and (3) the object or goal of the surveillance. These

271. In its discussion of the seizure issue in *Jacobsen*, the Court implicitly suggested that the place where material is seized may alter the constitutional analysis. United States v. Jacobsen, 466 U.S. 109, 126 n.28 (1984) ("We do not suggest . . . that any seizure of a small amount of material is necessarily reasonable. An agent's arbitrary decision to take the 'white powder' he finds in a neighbor's sugar bowl, or his medicine cabinet, and subject it to a field test for cocaine, might well work an unreasonable seizure").

inquiries, although drawn from both pre- and post-*Katz* precedent, are focused and modified by the privacy rationale of that decision. Thus, fourth amendment protection does not depend solely upon a finding of a particular intrusion into a defined place to obtain specified information. Rather, as *Katz* itself held, a "search" occurs when government probing for information intrudes upon fundamental concepts of personal intimacy and privacy. The emerging tripartite analysis does not obscure this fundamental teaching, but instead aids in its rational and consistent judicial application.

The three inquiries isolated in this Article do not together constitute an easy litmus test that points unerringly toward the proper resolution of all fourth amendment "search" questions. Particular instances of surveillance will require thoughtful scrutiny and analysis of place, intrusiveness, and object as they interact in a given fact pattern. Factually similar cases, for example, may differ in result depending upon the perceived intrusiveness of the surveillance or the nature of the information obtained. Nevertheless, explicit judicial recognition and examination of the three constructs set out here will rationalize the sprawling legal vortex created by *Katz*—a result long overdue on the twentieth anniversary of the decision.