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In Search of a Fourth Amendment for the Twenty-first Century

LEWIS R. KATZ*

The ultimate question . . . is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.¹

INTRODUCTION

The Supreme Court has been blinded by the costs of the fourth amendment. This explains why the Court has permitted police surveillance powers to grow almost unchecked to their present epic proportions. Today in America, the police may target any individual for scrutiny—for good reason, for bad reason or for no reason at all. They may use any number of sophisticated surveillance techniques without judicial authorization or review. The power to gather intimate details about our private lives has been enhanced by modern technology² and divorced from the fourth amendment.

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2. The 200 year march of science spanning our history as a free republic has equipped the police with tools that enable them to monitor our actions with startling efficiency. Justice Brandeis first alerted us to this development when he wrote in 1890 that “numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’” Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890). Justice Brandeis re-emphasized that same point 38 years later in the Olmstead case. There, he urged the Supreme Court to re-evaluate its interpretation of the fourth amendment because “[d]iscovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.” Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

This problem has been noticed by Congress. See HOUSE COMM. ON THE JUDICIARY, ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986, H.R. REP. No. 647, 99th Cong., 2d Sess. (1986) [hereinafter HOUSE REPORT No. 647].

When the Framers of the Constitution acted to guard against the arbitrary use of government power to maintain surveillance over citizens, there were limited methods of intrusion into the “houses, papers and effects” protected by the Fourth Amendment. During the intervening 200 years, development of new methods of communication and devices for surveillance has expanded dramatically the opportunity for such intrusions.

Id. at 16.

For a further discussion of the threat posed to fourth amendment values by encroaching technological advances, see infra notes 41, 44 and accompanying text.
guarantee that permits the government to conduct searches and seizures only if it behaves reasonably. Few Americans are concerned when police surveillance leads to the discovery of reliable, tangible evidence of a defendant's guilt. But the principles which immunize government surveillance of a criminal's behavior from the fourth amendment's command also immunize that surveillance when it is directed at the citizen who has never committed a crime in his life. The criminal defendant who stands before a judge at a suppression hearing asks that evidence of his guilt be excluded because the police transgressed constitutional restraints during their investigation. The court's answer to his plea will set the level of privacy and freedom for the whole community. Suppression of illegally obtained evidence protects us all, not just those suspected of criminal activity. The lessening of fourth amendment protections diminishes the quality of life for all Americans, not just for the criminally inclined.

It is indisputable that the police must, at times, be allowed to gather information about us. They need this power so that they can enforce the

3. Through the fourth amendment, American government guarantees its citizens the right to be "secure in their persons, houses, papers and effects." U.S. Const. amend. IV. That guarantee serves numerous valued functions. On its broadest level, it acknowledges the vital contribution personal autonomy plays in our American culture. Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 47 (1974). Without it, an important aspect of our lives would be taken from us.

The privacy secured by the fourth amendment fosters large social interests. Political and moral discussion, affirmation and dissent, need places to be born and nurtured, and shelter from unwanted publicity. So do economic and aesthetic creation and enterprise. .. What the fourth amendment protects above all is the conduct of ordinary lives.

Id. at 85. By respecting the individual's right to privacy, American society has given two valuable benefits to its citizens that would otherwise be unavailable. They are "autonomy of self from others" and "solidarity with others." K. SCHEPPELE, LEGAL SECRETS 302-03 (1988). For a further discussion of core fourth amendment values, see infra notes 52-57 and accompanying text.

4. Justice Douglas summed up the fourth amendment's public relations dilemma in Draper v. United States:

Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike.


5. Even patently reasonable police surveillance focused exclusively upon criminal activity carries with it effects that spill into the lives of others in the community. Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, 23 U. Kan. L. Rev. 1, 11 (1974) (During the course of a police investigation "the activities of many innocent people will be tangentially viewed in the effort to apprehend the guilty party."). The magnitude of this carry-over effect, and its impact on the community at large, would grow in geometric proportion if the police were permitted to conduct unreasonable surveillance activities in their quest to catch criminals.
laws that the people have enacted. However, it is not clear that the police should be permitted to accumulate this data about any individual without judicial oversight. Under present law most surveillance decisions rest in the uncontrolled discretion of law enforcement officers. Only when a police officer's behavior triggers a fourth amendment concern need he justify that behavior in court. Yet, the Supreme Court has defined the scope of fourth amendment protection narrowly. Modern techniques developed to accumulate the intimate details of our lives do not intrude upon fourth amendment protected interests; therefore, they are insulated from judicial review. Whenever this happens, law enforcement officers are free to decide for themselves the limits of American privacy.

A partial cataloging of the surveillance techniques declared to fall outside the scope of fourth amendment protection reads like an arsenal of government power one might associate with the authority of a police state. For instance, police may choose to attach an electronic tracking device to our automobile bumper and use it to constantly monitor our movements. The

6. Id. at 22 ("efficient administration of the law . . . is the sine qua non of a self-governing society"). Some privacy will be sacrificed in the process. However, preservation of civil liberties and privacy themselves depend on society's ability to enforce its laws. Id.; see also Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's, 66 COLUM. L. Rsv. 1205, 1206 (1966) (There are pressing social needs that cry out for the use of surveillance; however, "the need involved must be serious enough to overcome the very real risk of jeopardizing the public's confidence in its daily freedom from unreasonable invasions of privacy.").

The problem thus resolves itself to one of balance. "[A]chieving and maintaining a balance among the values of privacy, disclosure, and surveillance is a subtle and complicated process in every society. This is especially true in a free society seeking both liberty and stability, as well as scientific progress." Id. at 1205.

7. Vesting uncontrolled discretion in government officials lies in direct opposition to the American system of checks and balances, a system whose purpose it is to foster both individual liberties and sensible government.

8. For an example that shows how the courts can narrow the scope of well established fourth amendment protections, compare the protection given to a public telephone in 1967 with the diminished protection given to a cordless telephone in 1985. Katz v. United States, 389 U.S. 347, 359 (1967), held that there was a protected fourth amendment privacy interest in the content of telephone communications made from home, office and even public telephones. Yet, State v. Delaurier, 488 A.2d 688, 694 (R.I. 1985), held that there was no similar protection for calls made from cordless telephones. "[D]efendant could have had no justifiable expectation that his broadcasts were confidential. The defendant was fully advised by the owner's manual that came with the phone, as was required by FCC regulations, that given the nature of the phone, privacy was not ensured." Id. (emphasis added). Query why the owner's manual should exempt police from the reasonableness requirement. See also Tyler v. Berodt, 877 F.2d 705 (8th Cir. 1989), cert. denied, 110 S. Ct. 723 (1990) (rejecting the assertion of privacy expectations by speakers aware that their conversation is being transmitted by cordless telephone).

9. United States v. Knotts, 460 U.S. 276, 282 (1983) ("Visual surveillance from public places . . . would have sufficed to reveal all of these facts to the police. . . . Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties . . . with such enhancement as science and technology afforded them in this case."). Fourth amendment interests are implicated, however, when the vehicle or article carrying the beeper is taken into
government may keep tabs on whom we correspond with\textsuperscript{10} as well as on whom we telephone and who telephones us.\textsuperscript{11} We have no fourth amendment protection in the checks and deposit slips which we process through our banks,\textsuperscript{12} so the government may learn to whom we wrote checks and who wrote checks to us. If we seek to keep prying eyes out of our backyard by erecting a tall fence around the property, the government may, if it wishes, fly an airplane\textsuperscript{13} or hover a helicopter\textsuperscript{14} overhead and film what is seen below. Similarly, the fields outside the curtilage are open to government trespass and snooping. Efforts to protect those fields by fencing, locked gates and no trespassing signs are useless because the Court has decided that the guarantees of the fourth amendment are inapplicable there.\textsuperscript{15} The garbage that we remove from our homes, wrap in opaque plastic bags and leave for collection on our lawns may be taken by the police and sifted to reveal much about the way we live inside our houses.\textsuperscript{16} The government has an even better way to learn what is going on within the house if it can persuade one of our friends to spy on us. That friend may freely report to the police all that he sees or hears while in our home. He can steer the conversation to suit his government handlers and electronically transmit our conversations while he is in the house.\textsuperscript{17}

The state of our health and whether we have a communicable disease is also discoverable. This seems odd because access to our medical records is not permissible. Government can nonetheless monitor whom we call, where we go, who receives our checks, what prescriptions we fill,\textsuperscript{18} and whose bills are found in our garbage. This enables the police to piece together great chunks of personal medical information, including which doctors we consult, whether we are seeking psychiatric care, are addicted to drugs or alcohol,

\begin{flushleft}
\textsuperscript{13} California v. Ciraolo, 476 U.S. 207 (1986).
\textsuperscript{18} See, e.g., Whalen v. Roe, 429 U.S. 589 (1977) (recording names and addresses of prescription drug patients in a state centralized computer file does not constitute an invasion of any right or liberty protected by the fourteenth amendment); McKaba v. Board of Regents, 30 A.D.2d 495, 294 N.Y.S.2d 382 (4th Dept. 1968); CAL. BUS. & PROF. CODE § 4331 (West 1974 & Supp. 1989); N.Y. EDUC. LAW §§ 6810(5), 6811(1) (McKinney 1985); OHIO REV. CODE ANN. § 3719.05 (Anderson 1980).
\end{flushleft}
or are suffering from AIDS. Sensitive personal information related to sexual behavior and political and religious activity may be discovered through these same intrusive yet unrestricted methods. Knowing whom we see, speak with on the telephone, communicate with by mail, as well as what we read and write, and what organizations we financially support, often discloses what we think. Any government’s ability to acquire this information will likely inhibit some in the community from participating in political or religious activities, and this slows the flow of communication into the marketplace of ideas.

What is most alarming about the government’s ability to assemble all of this information is that it may target any of us without regard to fourth amendment standards and protections. Conduct which falls outside the fourth amendment is absolutely unreviewable. It need not meet any constitutional standard even if it is both intrusive and offensive for government to behave in this way. By withholding fourth amendment protection the

19. The fact of an inquiry to a 900 telephone number for sexual gratification is freely available to police. Furthermore, if the purveyors of the service crumble in the face of police “persuasion,” then the government may obtain the content of the conversation as well. Human experience teaches us that the type of people running this business are probably susceptible to official pressure and would thus reveal information about their clients to the police. The legal theory that withholds fourth amendment protection on these facts survives only because the court deems us to run the risk that those with whom we speak may disclose to the police the content of our statements. “[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.” Smith, 442 U.S. at 743-44 (citing Couch v. United States, 409 U.S. 322, 335-36 (1973); White, 401 U.S. at 752 (plurality opinion); Hoffa, 385 U.S. at 302; Lopez v. United States, 373 U.S. 427 (1963)).


We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. . . . In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena. Id. at 71 (footnotes omitted).

Although Buckley dealt with first amendment concerns, the Court recognized the symbiotic relationship between these guarantees and privacy. “Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . . .” Brown v. Socialist Workers ’74 Campaign Comm., 459 U.S. 87, 91 (1982) (quoting NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

These cases dealt with compelled disclosure of information, but the damage the Court recognized results in equal measure without disclosure. Simply granting government the right to unreasonably access the information will chill associational and speech-related freedoms even though disclosure does not occur.


22. See Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind. L.J. 329, 335 (1973) (“Certainly a layman would be surprised to learn that what [triggers the fourth amendment reasonableness requirement] turns not upon the conduct of the searcher, but rather on the justifiability of the expectations of the person subjected to the search.”); Serr, Great Expectations of Privacy: A New Model for Fourth Amendment Protection, 73 Minn. L. Rev. 583, 585 (1989) (“With the Supreme Court's recent laissez faire attitude toward law enforcement searches and seizures, government investigatory techniques threaten to intrude more and more on the privacies of everyday life.”).
Court signals police officers that they may, if they choose, behave in a
manner which mirrors the most ill-mannered and uncivilized in the com-
munity.

The citizen who is pursued by the police is granted fourth amendment
protection against unreasonable searches and seizures only if the police
behavior intrudes upon a justifiable expectation of privacy. The citizen’s
privacy expectation must be one which society accepts as objectively rea-
sonable. That formulation of the constitutional protection is an amalgam
of the original opinions of Justices Stewart and Harlan in *Katz v. United
States*, the landmark decision that redefined the ground rules for fourth
amendment litigation because the old constitutional rules had lost touch
with “the kind of society in which we live.”

However, in the two decades since *Katz* was decided, the Court has
applied the standard to reduce rather than enhance fourth amendment
protections. The *Katz* standard has been twisted to allow the government
access to many intimate details about our lives without having to establish
the reasonableness of its behavior. This uncontrolled discretion poses grave
concern. There may be a legitimate reason for the government to seek
information about a particular individual, and in such a case, government
access should be granted. But the Supreme Court’s pinched approach to
fourth amendment coverage excuses the police from having to justify their
behavior in far too many situations. The Supreme Court has, in recent
years, used the privacy test in a way that favors the exercise of unreviewable
government power and unsettles society’s own bedrock measure of freedom
by skewing the fine balance where government power ends and individual
rights begin. This approach runs counter to the other great theme of the
fourth amendment: that ours is a system of limited government.

This Article reviews the privacy test and its crucial role in determining
the scope of fourth amendment protection. After surveying the erosion of
the *Katz* standard, this Article argues that we should return to the privacy

24. Id. at 361 (Harlan, J., concurring).
25. 389 U.S. at 347.
27. The system of government created by the Colonials carries all the trademarks of a
people who distrust government power. This suspicion of official authority is symbolized by
their decision to employ a written constitution to confine the powers the government could
employ against the governed. The Bill of Rights, and particularly the fourth amendment, are
further evidence of the limited nature of the government they created. See T. BRANT, THE
BILL OF RIGHTS: ITS ORIGIN AND MEANING 47 (1963); H. STORING, WHAT THE ANTI-FEDERALISTS
WERE FOR (1981). The specific limitation on government imposed by the fourth amendment
was a prohibition against use of general warrants and writs of assistance. See generally *Katz,
Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United
States*, 3 CANADA-U.S. L.J. 103, 109-14 (1980). The fourth amendment eliminated these broad
intrusions into all segments of the colonists’ lives and replaced them with the probable cause
and warrant requirements plus an overall requirement of reasonableness.
test intended by Stewart and Harlan and to the underlying values that motivated it. Rather than exclude vast areas of modern American life from the scope of the amendment's protection, the Court should assume that the fourth amendment applies to police activity unless the conduct falls within the few exceptions Stewart\textsuperscript{28} and Harlan\textsuperscript{29} suggested.

It would be consistent with Stewart and Harlan's original analysis to recognize a new class of searches called "intrusions." Intrusions involve significant invasions of privacy—although not as invasive as traditional searches—that are presently unprotected by the fourth amendment. The Article urges a measure of fourth amendment protection for citizens who suffer governmental "intrusions" by borrowing from the arrest/stop dichotomy which already serves to define seizures under the fourth amendment. This new analytical framework would result in a two-tiered system of fourth amendment coverage embracing both searches and intrusions. Searches would be governed under now existing law while intrusions would be evaluated under a flexible reasonableness standard. The benefits of this approach are: (1) it preserves core fourth amendment values despite the threat posed by modern technology; (2) consistent with notions of limited government, it introduces a needed judicial check upon the behavior of those who execute our laws; and, (3) it leaves ample latitude so that the legitimate needs of law enforcement can be accommodated.

I. EXPECTATIONS OF PRIVACY AS THE MEASURE OF FOURTH AMENDMENT PROTECTION

The fourth amendment has not evolved into a grand scheme that regulates each and every police contact with citizens. The Supreme Court has defined the amendment's regulatory capacity by reference to the language of the Constitution itself, which prohibits "unreasonable searches and seizures."\textsuperscript{30} Only searches and seizures are limited by the reasonableness standard. All other police activities—i.e., those contacts that are not searches or seizures—may be conducted free of the limitations imposed by the amendment.\textsuperscript{31}

\begin{itemize}
  \item 29. Id. at 361-62.
  \item 30. U.S. Const. amend. IV.
  \item 31. Amsterdam, \textit{supra} note 1, at 388.
\end{itemize}

To label any police activity a "search" or "seizure" within the ambit of the [fourth] amendment is to impose [the reasonableness] restrictions upon it. On the other hand, if it is not labeled a "search" or "seizure," it is subject to no significant restrictions of any kind. It is only "searches" or "seizures" that the fourth amendment requires to be reasonable; police activities of any other sort may be as unreasonable as the police please to make them.

\textit{Id.} (footnotes omitted); \textit{see also} LaFave, \textit{The Fourth Amendment: "Second to None in the Bill of Rights,"} 75 \textit{Ill. B.J}, 424, 427 (1987) ("For the probable cause and warrant requirements
The fourth amendment privacy test determines whether or not a search has occurred. This threshold inquiry leaves room for broad swings of judicial interpretation and maneuvering. Of course, coverage is only the preliminary inquiry, but often it is the crucial one because a negative answer forecloses further review. When that threshold inquiry is answered affirmatively, the fact that fourth amendment coverage attaches does not, itself, prohibit police intrusion. It merely means that the police conduct is subject to the amendment's reasonableness command.\(^3\)

Two decades ago, in *Katz v. United States*, the Supreme Court considered the issue of the amendment's substantive coverage and imposed a test which increased the amount of contact subject to the reasonableness inquiry.\(^3\) The previous standard had required physical trespass upon a property interest as a prerequisite to attachment of fourth amendment rights.\(^3\) The *Katz* decision thus marked a "movement toward a redefinition of the scope of the Fourth Amendment." Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 Sup. Ct. Rav. 133; see also id. at 134 ("The principle that appears to be emerging from the cases is that the Fourth Amendment applies only to searches that intrude upon reasonable expectations of freedom from government search."); Amsterdam, *supra* note 1, at 382 (Katz "marks a watershed in fourth amendment jurisprudence").\(^3\)

Prior to the *Katz* decision it was often difficult to invoke fourth amendment protections except in the case where the police intruded upon the home. Following that decision the concept "protected area of privacy" replaced the traditional "a man's home is his castle" approach. T. Taylor, *Two Studies in Constitutional Interpretation* 74 (1969). *Katz* thus marked a "movement toward a redefinition of the scope of the Fourth Amendment." Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 Sup. Ct. Rav. 133; see also id. at 134 ("The principle that appears to be emerging from the cases is that the Fourth Amendment applies only to searches that intrude upon reasonable expectations of freedom from government search."); Amsterdam, *supra* note 1, at 382 (Katz "marks a watershed in fourth amendment jurisprudence").\(^3\)

For examples of landmark cases which apply the pre-*Katz* standard, see On Lee v. United States, 343 U.S. 747 (1952); Olmstead v. United States, 277 U.S. 438 (1928); Katz v. United States, 369 F.2d 130 (9th Cir. 1966), rev'd, 389 U.S. 347 (1967).\(^3\)

Historical reasons explain how fourth amendment rules were influenced by property based doctrines. People who advocated enactment of the fourth amendment cast their argument in terms common to the law of property. Linking the fourth amendment to its historical context, the Supreme Court during the pre-*Katz* era allowed the law of trespass to control the outcome whenever it was claimed that government had conducted a "search." Application of the trespass doctrine to fourth amendment issues is rooted in the landmark pre-constitution decision of Entick v. Carrington, 95 Eng. Rep. 807 (1765). There, the court recognized that the general warrant procedure itself was incapable of striking the proper balance between individual privacy and the legitimate needs of government. It thus found that an action against the state would lie under the English common law of trespass. See Wilkins, *supra* note 31, at 90-91. In denying government the unbridled discretion to search its citizens' homes, a "great right" was born. McKay, *The Right of Privacy: Emanations and Intimations*, 64 Mich. L. Rev. 259, 272 (1965). In the proceeding years, that "great right [was] translated into the fourth amendment to the Constitution of the United States . . . ." Id. Even before *Katz* however, not all trespasses gave rise to fourth amendment claims. See, e.g., Hester v. United States, 265 U.S. 57 (1924) (holding that the protection of the fourth amendment does not extend to open fields).
Court rejected this standard because it did not capture the interests sought to be protected by the amendment’s guarantees and commands. The property litmus test provided “a workable tool that often proved unjust,”37 underscoring its inadequacy as a means for drawing fourth amendment lines.38

The Court’s decision in Katz to expand fourth amendment coverage was sound for two reasons. First, it was consistent with the text of the amendment. The fourth amendment explicitly protects persons, as well as property, from unreasonable searches and seizures. The inclusion of persons within the amendment’s protection signified the framers’ intent to protect interests which transcend the law of property.

The expansion of coverage was also supported by social and economic changes. In the eighteenth and nineteenth centuries, limitations upon police invasions of property interests offered adequate protection for a predominantly rural population whose lives and aspirations were largely confined within the physical limits of their property. That was no longer true of a twentieth-century population39 whose endeavors are rarely contiguous with its property holdings. Few Americans work on their own property or out of their homes. Minimal participation in modern life requires extensive contacts which take us beyond the four corners of our property. If every such venture deprives us of fourth amendment protection, we would be denied the sense of personal security and tranquillity that the amendment was intended to promote.40

By 1880, the property test began to lose its viability.41 The Court, however,

37. 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.2(a) (1984).
38. Even under that test, not all property was accorded protection under the amendment’s guarantees. See Hester, 265 U.S. at 57. Nor did the Court actually limit fourth amendment coverage only to property interests. Cf. Schmerber v. California, 384 U.S. 757 (1966) (withdrawal of blood from driver of automobile involved in accident, where drunken driving suspected, within substantial privacy interests of fourth amendment).
39. Advancing civilization has lent new intensity and complexity to life. Warren & Brandeis, supra note 2, at 196. “[S]ocial trends toward urbanization, automation, increasing concentration of employment in large-scale organizations, and increased growth of government functions” pose a sharp threat to individual privacy. Westin, supra note 6, at 1214. Several commentators have noted how growth of government functions, a trend that first started in the early 20th century, has offered an ever increasing threat to privacy. See Rehnquist, supra note 5, at 15.

The history of government in countries such as England, Canada, and the United States in the past half century suggests an inexorable long run trend of greater and greater involvement of the government in the lives of its citizens. And I think it probably a useful point of departure to suggest that there is an inverse correlation between increasing governmental regulation and more government benefit programs, on the one hand, and privacy enjoyed by the individuals who live under those governments, on the other. This is a natural, if not an inevitable, consequence of the vast expansion of the role of government.

Id. at 17.
40. For a further discussion of core fourth amendment values see infra notes 52-57 and accompanying text.
41. Prior to 1880, during the “pre-technological era,” government did not have the tools
was slow to abandon its property based doctrines.\textsuperscript{42} By 1960, expressions of dissatisfaction with the trespass doctrine were growing within the Court.\textsuperscript{43} Similar sentiment prevailed in the legal literature. Modern technology rendered the physical trespass requirement of early fourth amendment law obsolete. In 1966, the year before \textit{Katz} was decided by the Supreme Court, one commentator argued with remarkable foresight that:

American society now seems ready—for the first time in a century—to face the impact of science on privacy and to restore the equilibrium among privacy, disclosure, and surveillance that was, until the 1880's, one of the greatest achievements of American law and liberty. To fail to do so would be to leave the foundations of our free society in peril.\textsuperscript{44}

which permitted close surveillance of its citizenry from a distance. Westin, \textit{supra} note 6, at 1233. Three developments which took place in the late 19th century "broke the practical ground rules of communication and surveillance that had been in operation since antiquity": (1) invention of the telephone in the 1870s; (2) invention of the microphone in the 1870s and the dictograph in the 1890s; and (3) invention of instantaneous photography in the 1880s. \textit{Id.} at 1236. By the mid-20th century, development of electronic eavesdropping offered police increasingly vast capabilities which amounted to "the ultimate invasion of privacy." McKay, \textit{supra} note 36, at 274. Telephones could be electronically altered so that they served instead as microphones which would transmit every sound in the room. \textit{Id.} at 274-75. Similarly, parabolic microphones could pick up a conversation conducted behind closed doors at a distance of 100 feet. \textit{Id.} at 275. 42. See, e.g., \textit{Olmstead}, 277 U.S. at 438 (holding that wiretapping did not implicate fourth amendment concerns because no physical trespass had occurred). Perhaps it is appropriate that the process which culminated in the judicial rejection of property based rules was both slow and deliberate.

It is reasonable, moreover, that the claim to privacy should evolve slowly, for privacy is in conflict with other valued social interests, such as informed and effective government, law enforcement, and free dissemination of the news. Whenever competing rights and values confront each other, it is always a slow and arduous process to evaluate the claim and counterclaim in real life situations.

This process, however, is a classic function of the law.

43. Wilkins, \textit{supra} note 31, at 94.
44. Westin, \textit{supra} note 6, at 1252; \textit{see also} Ruebhausen \& Brim, \textit{supra} note 42, at 1190-91.

Modern acoustics, optics, medicine and electronics have exploded most of our normal assumptions as to the circumstances under which our speech, beliefs and behavior are safe from disclosure, and these developments seem to have outflanked the concepts of property and physical intrusion, and presumed consent—concepts which have been relied on by the law to maintain the balance between the private personality and the public need. The miniaturized microphone and tape recorder, the one-way mirror, the sophisticated personality test, the computer with its enormous capacity for the storage and retrieval of information about individuals and groups, the behavior-controlling drugs, the miniature camera, the polygraph, the directional microphone (the "big ear"), hypnosis, infra-red photography—all of these, and more, exist today.

All of these significant advances are capable of use in ways that can frustrate an individual's freedom to choose not only what shall be disclosed or withheld about himself, but also his choice as to when, to whom and the extent to which such disclosure shall be made. . . . [E]ach of these scientific developments . . . is . . . capable of abuse in its application. And such abuse can occur in industry, in commerce, in the law and by law enforcement agencies, in medicine, in government, and in a myriad of other fields.

\textit{Id.} (footnotes omitted).
The loss of security suffered by the petitioner in \textit{Katz} exemplifies the impact of science on privacy. The invasion of privacy that occurred when federal agents used sophisticated listening devices to monitor his telephone conversation was no different in kind or quality than the loss of security that would have resulted from the trespass of a spike mike. A shift in analysis was needed to bring these two search techniques into line with one another. This change was effected when the Court recognized personal security as the core fourth amendment value and shifted from a trespass to privacy analysis. This new approach provided a means of ensuring that fourth amendment coverage kept abreast of further technological advances.\footnote{Cf. United States v. White, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting) ("To be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century.").}

In rejecting the property litmus test and its corresponding notions of protected areas, the Court in \textit{Katz} said, "[T]he Fourth Amendment protects people, not places."\footnote{\textit{Katz}, 389 U.S. at 351. For comments on the formulation that Justice Stewart fashioned for the Court in \textit{Katz}, see generally 1 W. \textsc{LaFave} \& J. \textsc{Israel}, supra note 37, § 3.2(a), at 162-63; Amsterdam, supra note 1, at 356-57; LaFave, supra note 31, at 427.} That tight, little phrase was supplied for the Court by Justice Stewart and it exemplifies the reason why he wrote so many fourth amendment majority and plurality opinions over the next fifteen years. Justice Stewart could express the Court's sense of principle in a remarkably facile way without forcing the other members of the Court to commit to specifics. In \textit{Katz} he led the majority to reject property as the sole measure of fourth amendment protection without committing them to a privacy test for all future cases.\footnote{Stewart wrote that the fourth amendment "protects individual privacy ... but its protections go further, and often have nothing to do with privacy at all." \textit{Katz}, 389 U.S. at 350.} With the Stewart disclaimer in place the Court was comfortable deciding the facts presented in \textit{Katz} on privacy grounds. When the defendant made a call from a public telephone booth, he sought and had the right to exclude the "uninvited ear," and when the government electronically listened and recorded his words, that conduct was a search within the meaning of the fourth amendment because it "violated the privacy upon which he justifiably relied."\footnote{Id. at 353.}

The essence of the Stewart formulation was that fourth amendment protection could no longer be determined solely by the physical means used by government agents when they gathered information. This aspect of the opinion was revolutionary. But while the Stewart opinion was extremely informative in this respect, it failed to offer much guidance for future cases. It freed the fourth amendment from the chains imposed by the property limitation and the requirement of a physical trespass but provided modest
guidance for determining the justifiability of an expectation of privacy in other contexts.

Partial content and lasting terminology was provided for the majority's principle by concurring Justice Harlan who captured it in a "reasonable expectation of privacy" test. In Katz, he envisioned a two-part analysis to determine coverage: first, whether an individual exhibited "an actual (subjective) expectation of privacy," and second, an objective test, whether "society is prepared to recognize [that expectation] as 'reasonable.'"49

The key to Harlan's formulation lies in the objective prong of the test he offered. The subjective prong of the Harlan test, though given equal prominence in the original opinion, turned out to be useless.50 Harlan acknowledged this fact four years later when he recognized that the privacy analysis must "transcend the search for subjective expectations or legal attribution of assumption of risk" in order to reach the determinative issue which is the "desirability of saddling [those expectations] upon society."51

The Stewart and Harlan formulations were initial attempts to fashion a fourth amendment threshold test which they believed would capture the underlying value the amendment sought to express. That value was "to secure a measure of privacy and a sense of personal security throughout our society."52 Understood in that context, the privacy test expressed the

49. Id. at 361 (Harlan, J., concurring). For discussion of Harlan's two-part analysis, see generally 1 W. LAFAVE & J. ISRAEL, supra note 37, § 3.2(a), at 163; LaFave, supra note 31, at 427-28; Wilkins, supra note 31, at 94-95.

50. The subjective prong of Justice Harlan's test "certainly deserves no place in a theory of what the Fourth Amendment protects." LaFave, supra note 31, at 427.

An actual subjective expectation of privacy obviously has no place in a statement of what Katz held or in a theory of what the fourth amendment protects. It 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 ... we were all forthwith being placed under comprehensive electronic surveillance.

Amsterdam, supra note 1, at 384; see also 1 W. LAFAVE & J. ISRAEL, supra note 37, § 3.2(a), at 164; Giannelli & Gilligan, Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va. L. Rev. 1045, 1059-60 (1976); Note, A Reconsideration of the Katz Expectation of Privacy Test, 76 Mich. L. Rev. 154, 157 (1977).

51. White, 401 U.S. at 786 (Harlan, J., dissenting).

52. Id. at 790; see also Public Util. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) ("Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom."); Boyd v. United States, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security [and] personal liberty . . . .'').

Privacy is itself a broad concept which might be roughly defined as "the control we have over information about ourselves." Note, supra note 50, at 171 n.77 (citing Fried, Privacy, 77 YALE L.J. 475, 482 (1968)); see also Warren & Brandeis, supra note 2, at 207 ("[T]he right to privacy, as a part of the more general right to the immunity of the person . . . . is the
relationship between citizens and their government in a free society. The bottom line in *Katz* was that an individual who shut the door in a telephone booth and paid the toll was entitled to assume that his conversation was right to one's personality.

Some argue that privacy contains two distinct strands. Rehnquist, *supra* note 5, at 6. The first strand limits government power by forbidding substantive regulation of certain conduct. It thus functions as a limit on the laws which the legislature may enact and is typified by the substantive due process cases such as *Roe, Griswold, Lochner and Eisenstadt.* *Id.* The second strand is entirely different. It defines the privacy concept that comes into play in the course of law enforcement. This second strand thus defines the intrusions that government may make into our lives when it enforces the laws passed by the legislature. It is this strand of privacy that is protected by the fourth amendment. *Id.*

53. Individual privacy and security are the two values which are basic to a free society. The fourth amendment embodies this principle. *Camara v. Municipal Court,* 387 U.S. 523, 528 (1967). Protection of individual privacy leads to free human discourse. It is this feature, the knowledge that each citizen is free to speak his mind, "that is the hallmark of an open society ...." *Amsterdam, supra* note 1, at 388; *see also* *Lopez v. United States,* 373 U.S. 427, 470-71 (1963) (Brennan, J., dissenting) ("Electronic surveillance ... strikes at freedom of communication, a postulate of our kind of society. ... [F]reedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office.").

Chief Justice Rehnquist agrees that the police cannot be allowed to indiscriminately gather information about us. Such action is incompatible with life in a free society. Rehnquist, *supra* note 5, at 11-12. This is true because privacy "allows us to keep ... a portion of our lives from public view. It enables us to do the things that we like to do but do badly, things that we are a bit embarrassed about doing: to meet a friend quietly, to act out love and hate ...." *Weinreb,* *supra* note 3, at 52-53.

It allows us to extend our personality .... to leave our pajamas on the floor, the bed unmade and dishes in the sink, pictures of secret heroes on the wall, a stack of comic books or love letters on the shelf; it allows us to be sloppy or compulsively neat, to enjoy what we have without exposing our tastes to the world.

*Id.* at 53. If denied this privacy, our lives would change for the worse. Suppose ... that in an attempt finally to end muggings in Central Park, New York City put the whole park "on television" from dusk to dawn, with radio-advised troopers ready to swoop down on signal. The park might be abandoned not only by the muggers, but also by lovers holding hands in secret or just in private, friends wanting to talk intimately with one another, an artist wanting to paint or think "to himself," people doing all sorts of innocent things they would not do on television. Were this practice extended to other parks, all parks, and finally all public streets, the quality of life in the city would be profoundly affected ....

*Id.* at 82.

The concept of privacy is central to the American way of life. In fact, "privacy is now generally identified with liberty." *Westin,* *supra* note 6, at 1214. The antithesis of privacy, "police omniscience[,] is one of the most effective tools of tyranny." *Lopez,* 373 U.S. at 466 (Brennan, J., dissenting).

Analogy to tort law shows further the valued position that privacy occupies in American life. See generally *Prosser, Privacy,* 48 CALIF. L. REV. 383 (1960). By 1960, the overwhelming majority of states had explicitly recognized a right to privacy and provided legal redress for violation of that right. *Id.* at 386-88; *see also* *K. Scheele,* *supra* note 3, at 303 ("Creating confidential relationships by sharing personal information brings others close and often creates special obligations among those who share information; such obligations are often enforced in American law.").
not being intercepted, and his “expectations of freedom from intrusion [were] reasonable.”

Though Harlan and Stewart both shared an understanding of the concept of privacy, Harlan’s expressions concerning privacy and the scheme imposed by the fourth amendment were more developed and sophisticated. He understood the catholic implications of privacy as a cornerstone of a free society, not just for the criminal, but for “the ordinary citizen . . . who has never engaged in illegal conduct in his life.” Harlan saw that the essence of freedom is the grant of privacy to each citizen so that he may “carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation.” This type of freedom ensures the fullest development of human potential. Its opposite, of course, stunts that development, for the individual must always be guarded, fearful that at some future time he may be required to account for a seemingly innocent action or statement.

Critics have focused upon the difficulty of reducing the formulas found in the Stewart and Harlan opinions into workable rules. The criticism is not altogether unfair. A seminal case should provide a framework for its later application. However, the seminal quality of Katz lies in its understanding of what the fourth amendment is about rather than in the clarity of its rule. Clarity, albeit limited, is forthcoming only when the Stewart-Harlan tests are coupled with the exceptions to fourth amendment coverage which both Justices discussed and upon which they seemed to agree.

Justice Stewart recognized that expectations of privacy within the home are reasonable. Nonetheless, he identified an exception to this for things “knowingly exposed” to the outside world. Justice Harlan built upon the same concept suggesting that “objects, activities, or statements” that one exposes from within his house “to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.” Both Justices used almost identical language to describe these

55. White, 401 U.S. at 790 (Harlan, J., dissenting).
56. Id.
57. George Orwell wrote:
There was of course no way of knowing whether you were being watched at any given moment . . . . It was even more conceivable that they watched everybody all the time . . . . You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.
59. Id. at 361 (Harlan, J., concurring).
exceptions and they both chose very limited, narrow terms. They intended to exclude from protection information which a person knowingly exposes to the general public. Not every limited exposure would constitute a witting or unwitting renunciation of the fourth amendment protection. They meant simply that one who shouts at others in his home, oblivious to the sensibilities of his neighbors, cannot complain when people on the street hear him. They did not mean to otherwise limit expectations which society recognizes as reasonable.

The Stewart-Harlan analysis provided a framework for ensuring freedom by protecting personal security. Their analysis provided the means for determining whether the government’s conduct should be subject to the fourth amendment's reasonableness standard. However, the Supreme Court has, subsequent to Katz, misapplied the exceptions announced by Justices Stewart and Harlan so that the exceptions have now swallowed the rule. This has caused a complete transformation of the Katz standard.

II. THE TRANSFORMATION OF KATZ

The Supreme Court discarded the property test in its 1967 Katz decision because changed conditions had made that standard obsolete. The property rationale had reached the end of a long road of honorable service. "[T]he correct solution of Fourth Amendment problems [would no longer be determined by the] incantation of the phrase 'constitutionally protected area.'" Under the new standard, the Supreme Court required citizens to show that government information-gathering activities had intruded upon a reasonable expectation of privacy. This allowed citizens to invoke the fourth amendment against their government even though police agents had committed no trespass. As the facts of Katz clearly illustrate, this new rationale recognized fourth amendment protections where the property doctrine provided none.

Katz was supposed to restore the equilibrium between the individual and his government that had existed in the early days of the republic. Ironically, Katz has not resulted in the expansion of constitutional guarantees of individual privacy. Instead, it has become the theoretical basis for ratifying the government’s expanded ability to gather information about us. This was clearly not intended by the authors of the principal opinions in Katz. However, it follows because the Court has seized upon the exception announced by Justices Stewart and Harlan and used it to contort the privacy-based standard into a trivialized risk assessment analysis.

61. Id. at 350.
A. Risk Assessment Analysis—The Devourer of Privacy

The *Katz* decision contained a narrow exception to the new test it offered. It included limiting language which specified that a person could not have a reasonable expectation of privacy in things that were "knowingly expose[d] to the public." This simple principle is an appropriate element in measuring expectations of privacy. However, when it is applied broadly almost any exposure becomes a "knowing exposure." The Supreme Court has used the "knowing exposure" rationale to transform the reasonable expectation of privacy standard into a simple assumption of risk test. Virtually every disclosure of information now leads to a complete loss of fourth amendment protection in that information. Because the fourth amendment is not applied here, the police may behave unreasonably in gathering this information. It is an "all or nothing" approach in which privacy is treated as "a discrete commodity, possessed absolutely or not at all." In its evolved form, the *Katz* privacy test has become a roadblock to fourth amendment protection instead of a roadmap for ensuring it. It strips the individual of a great measure of fourth amendment protection—the single most important characteristic which distinguishes a free society from a police state—simply as a result of living in a high-tech society. Its result is to strip the fourth amendment of its normative values which were intended to regulate and limit the powers of government.

Perhaps the Supreme Court's preoccupation with risk assessment is partially powered by Justice Rehnquist's drive to reduce the impact of the fourth amendment in criminal litigation. After all, if a police-citizen

62. *Id.* at 351.
63. *See supra* notes 9-20 and accompanying text.
65. Use of the knowing exposure rationale and the resulting shrinkage of fourth amendment coverage is but a single prong of this Court's multi-faceted attempt to limit the impact of the fourth amendment upon criminal litigation. There are numerous other examples. The Court has weakened the warrant requirement. *See, e.g.*, New York v. Burger, 482 U.S. 691 (1987) (upholding warrantless administrative searches of "highly regulated" industries where the sole purpose of the intrusion is the search for evidence of crime). The Court has further eroded the fourth amendment warrant requirement by making it *per se* inapplicable in certain contexts. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367 (1987) (weakening controls upon automobile inventory searches); California v. Carney, 471 U.S. 386 (1985) (applying automobile exception to motor homes); United States v. Ross, 456 U.S. 798 (1982) (applying automobile exception to containers found in motor vehicle). It has also recognized a new category of "special circumstances" where warrantless searches are exempted from the probable cause and warrant requirements. *See, e.g.*, National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (upholding *causeless* random urine testing of certain customs agents working at border crossings); O'Connor v. Ortega, 480 U.S. 709 (1987) (upholding warrantless search of government employee's desk, etc. on reasonable suspicion); New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding warrantless search of school children's possessions on reasonable suspicion). The Court also has limited the application of the exclusionary rule by adopting a so-called good faith exception. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984).
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encounter falls within the "knowing exposure" doctrine then the fourth amendment is simply inapplicable. This forecloses any possible use of the exclusionary rule and ensures that the evidence gathered will be available to the prosecution. The problem, of course, is that any redefinition of the scope of fourth amendment protection spills over from criminal cases and redefines the rights of all citizens in their relationship with the government.

The Supreme Court's use of the "knowing exposure" doctrine is undesirable for at least four reasons: (1) It rests on an unsound premise because it contravenes the principle of limited disclosure; (2) it diverts the focus of constitutional adjudication because it causes the Court to focus upon individual instead of governmental behavior; (3) it causes Americans who interact with their community and participate in modern life to forfeit fourth amendment protections; and (4) it allows the police in a great many contexts to determine for themselves the limits upon their own conduct.

1. Principle of Limited Disclosure

In countless ways, Americans expose daily aspects of their private lives to others. But when they do so they limit the disclosure along two dimensions. First, they confine this information to certain specified persons. In this way people share information with one another without also sharing it with the world.66 They also confine the use of that information to a particular purpose.67 This is the principle of limited disclosure. As long ago as 1966, one scholar wrote that:

[C]onsent to reveal information to a particular person or agency for a particular purpose is not consent to the circulation of that information to all, nor to its use for other purposes. . . . Unless this principle of consent is understood and accepted as the first principle for controlling information flow in a data-stream society, serious problems of privacy will arise in the future.68

66. Warren & Brandeis, supra note 2, at 199 (When we share information we retain the right to determine to what extent our thoughts are shared with others. "The right is lost only when the author himself communicates his production to the public . . . ."); Ruebhausen & Brim, supra note 42, at 1189 ("The essence of privacy is . . . the freedom of the individual to pick . . . the extent to which [information about himself will] be shared with or withheld from others.").

67. "[W]hat would happen to the process of education if student attitudes, as revealed in the Socratic interchanges of the classroom, were recorded . . . and then used for scientific research or for other purposes—such as responding to inquiries by potential employers?" Ruebhausen & Brim, supra note 42, at 1198. "[C]onsent to the revelation of private personality for one purpose . . . is not license to . . . use the information so obtained for different purposes . . . ." Id. at 1199.

68. Westin, supra note 6, at 1211. Congress has recognized the concept of limited disclosure and attempted to implement it. In the Privacy Act of 1974, Pub. L. No. 93-579, § 2(b)(2), 88 Stat. 1896 (1974), one purpose is stated to "permit an individual to prevent records pertaining to him obtained by such [government] agencies for a particular purpose from being used or made available for another purpose without his consent." Id.
Nevertheless, the Supreme Court has frequently denied Americans fourth amendment protection for information disclosed for limited use on the theory that this disclosure amounts to a complete renunciation of any privacy interest in that information. At least two defects are apparent in the Court's logic. First, the Court incorrectly assumes that a single act of disclosure operates as consent for endless further disclosure. Second, the Court wrongly presupposes that information released for a certain purpose may be freely used for other purposes as well. These two premises both ignore the principle of limited disclosure and violate well-settled tort law.69

Consent must be evaluated with reference to the expectations of the one who releases information. Disclosure to the bank, the pharmacist, or the telephone company is not the same as a general release of that information. We generally know how others will use the information we share with them. Disclosure under these circumstances is consent for the recipient to use the information for the intended purpose only. Disclosure to police is not among the contemplated uses agreed to by the disclosing party. The police will use the information for very different purposes. Consider, for example, the information we share with the telephone company whenever we dial a number. In its use of our telephone records, the telephone company conducts only a "limited and episodic scrutiny" of the data.70 The limited scope of the phone company's examination helps shape our expectations about how the information will be used. The police, on the other hand, would apply a "more focused" examination of that information.71 This very different use adds new content and transforms the data. It makes the revealed information available for purposes never contemplated.

Thus, the principle of limited disclosure is defined by two separate dimensions. First, an individual may confine disclosure to specific people. Second, he may require that the information be used only for certain purposes. Yet, the Supreme Court's current use of the knowing exposure doctrine/risk assessment rationale assumes that a single act of disclosure is consent for endless further disclosure. Alternatively, the Court assumes that disclosed information may legitimately be employed for any purpose at all. Both of these assumptions are severely flawed because they violate the principle of limited disclosure.

2. Risk Assessment Diverts the Court from its Primary Function in Constitutional Adjudication—Examination of Government Behavior

Risk assessment analysis measures reasonable expectations of privacy by focusing on the individual's conduct rather than upon government behavior.

69. See generally Prosser, supra note 53 (describing how tort law protects privacy).
70. LaFave, supra note 31, at 428.
71. Id.; see also id. at 429 ("[T]here is a critical difference between revealing bits and pieces of information sporadically to a small and often select group for a limited purpose and [sharing that information with the police].").
This distracts the Court from the fourth amendment’s most important purpose—regulation and limitation of government conduct.

The first principle of constitutional law is that the power of government is limited. There are certain things that government is not authorized to do. The American system of government permits the people to scrutinize every action of their elected officials and executive branch actors, if only to satisfy themselves that official behavior falls within the permissible bounds set down in our written constitution. Risk assessment subverts this basic function of the law. Under risk assessment analysis, the conduct of citizens, rather than the government, is scrutinized. Government conduct is shielded from review. Whether government behaved reasonably is a question that the Court often never reaches.

For instance, suppose the government announced “half-hourly on television” that it would sift through the curbside garbage cans of its citizens to look for evidence of crimes. Suppose the announcements also advised that the government would begin collecting data from our personal checking accounts, telephone records and local pharmacy records, and that it would surveil our back yards from aircraft and focus binoculars on the windows of our homes. Elected officials would not dare proclaim that the government had these powers. Yet, each has been delivered into the hands of the police for use against citizens by the Supreme Court through its “risk assessment/knowing exposure” rationale. This outcome would never have been reached if, along the way, the Supreme Court had remembered that its responsibility under the fourth amendment is to evaluate the reasonableness of the government’s behavior as a means of protecting and promoting individual freedom and security.

The course charted by the Court is doubly dangerous because there is little check, if any at all, offered by the legislature. The elected branch of government is institutionally ill-suited to check aberrant case law in this area because Congress simply cannot respond to the “shifting equilibrium among privacy, disclosure and surveillance . . . .” The Court’s pronouncements on fourth amendment issues thus occur without benefit of legislative advice and, where wrong, without likelihood of legislative correction.

3. Risk Assessment Analysis Places an Unacceptably High Cost on Fourth Amendment Protection—the Individual Must Live an Isolated Life

Participation in modern life necessitates exposure of one’s affairs to others. Under the Supreme Court’s current “risk assessment/knowing ex-

72. Amsterdam, supra note 1, at 384.

pose” doctrine the fourth amendment is eliminated from a great many aspects of modern life. The Court requires the individual who seeks full fourth amendment protection to live an isolated life within his house with the shades drawn. This is a choice that most of us are unwilling or unable to make. Long ago an individual could get by without exposing any information to others because he lived largely within the four corners of his own land. But times have changed greatly. We work for others and purchase the goods we need instead of making them for ourselves. We communicate by telephone and live on small tracts of urban land. Modern living compels the exposure of large portions of our lives to others in a way that could not be contemplated by the framers of the fourth amendment. Risk assessment analysis leads to a harsh outcome in this modern environment. It results in the denial of fourth amendment coverage to most aspects of modern life simply because they take place outside of our homes. The result is that participation and involvement in modern life is incompatible with modern fourth amendment protection. In the face of this approach, the security which the amendment was written to promote disappears.

4. Risk Assessment Analysis Lets the Police Decide Whether They Will Behave Reasonably When They Gather Information About Us

Whenever the Court concludes that the citizen “knowingly exposed” any information to some third person then the police may have it as well. Furthermore, the fourth amendment’s reasonableness command does not apply. The government is free from any judicial oversight. Without a reasonableness limitation, we must rely on government officials to voluntarily respect our privacy.

Reliance alone on government self-restraint is a very weak foundation on which to support a commodity as fragile as individual freedom. Official wielders of power can always justify, at least to themselves, the need to use extraordinary measures. Yet the result of the risk assessment doctrine’s

74. Risk assessment, when carried too far, “would afford fourth amendment protection only to those who live within windowless, soundproof forts.” Note, supra note 50, at 170 (footnote omitted).

75. When gathering information about us free of fourth amendment concerns the government could, presumably, pressure the receiving party into a position of compelled disclosure. Government agents could further pressure that person into becoming an active agent to pursue additional information on behalf of the interested government agency. The police would be free to resort to extreme and unreasonable methods if they chose—only their conscience and sense of decency restrain them.

76. No better example exists than the Nixon administration’s investigation of the Pentagon Papers leak which among other things led to wiretaps of newspaper reporters and a former administration official’s telephones as well as the burglary of Daniel Ellsberg’s psychiatrist’s office. See C. Bernstein & B. Woodward, All the President’s Men 312-13 (1974).
narrowing of fourth amendment protection makes all citizens potential targets of broad government inquiry into personal affairs.

The Court must reconsider its risk assessment doctrine if the fourth amendment is to be restored as a guarantor of individual liberty. Under present law we are prevented from both challenging whether government should accumulate certain types of information and from demanding that the methods used satisfy the reasonableness standard. The byword of the fourth amendment is no longer right but risk. It is this insulation of government conduct from the fourth amendment's demand that threatens the balance of freedom.

B. Risk Assessment: Its Use in the Twenty Years Since Katz

Transformation of the Katz privacy inquiry into a risk assessment analysis is a misuse of the principles in that case. This has stunted the development of fourth amendment protection. A return to the principles advanced by the Court in Katz would have numerous beneficial effects. It would cure the aberrant risk assessment analysis plus other anomalous doctrines as well.\(^7\) The exclusive focus of this article, however, is on the way that risk assessment erodes core fourth amendment values.

Individual freedom has suffered because government agents now have broad-ranging access to private information about each American citizen. Numerous examples were listed previously.\(^8\) A few of these fact-specific situations will now be examined in closer detail.

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\(^7\) One such inconsistency is the Court's "open fields" exception to fourth amendment coverage. That doctrine is difficult to reconcile with the Katz decision. There, the Court held that the fourth amendment protects "people, not places." Katz, 389 U.S. at 351. This formula has been repeated over and over through the years and it teaches that locale is not dispositive of the privacy issue. Yet protection is routinely denied because of location—even where the individual undertakes heroic efforts to create a reasonable expectation of privacy. See Oliver v. United States, 466 U.S. 170 (1984) (Narcotics agents entered the defendant's property because they suspected that he was growing marijuana. They ignored a "No Trespassing" sign and used the footpath which skirted a locked gate to penetrate his property line. Once onto the land, they located a field of marijuana deep inside the defendant's property. The Court held that the intrusion was not a search due to the location of the area surveilled.); United States v. Dunn, 480 U.S. 294 (1987) (The defendant's land was encircled by a perimeter fence, several interior barbed wire fences and a wooden fence. The police entered upon the land three times, crossing the fences when necessary. The Court held that the intrusions were not a search.). These cases disable the fourth amendment and its effort to protect personal privacy. The better approach is to apply the Katz "reasonable expectation of privacy" test. Instead of avoiding the fourth amendment because of location, the Court should determine whether the individual's expectation of privacy deep inside his fenced off private lands is one that society is prepared to recognize as reasonable. Where this threshold issue is answered in the affirmative the citizen is entitled to demand reasonable behavior of the police officers who invade his property.

\(^8\) See supra notes 9-20 and accompanying text.
1. Disclosure to Business Entities

Private disclosure by a bank of its customers' checking and savings transactions, absent a court order, would be actionable. This legal protection fosters personal security and advances important societal interests. Orderly commercial activity would be jeopardized if individuals believed that telling a bank was the equivalent of telling the world. The information contained in our checking account reveals much about our private lives. In a sense a person is defined by the checks he writes. By examining them [government] agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads, and so on ad infinitum. These are all tied to one's social security number; and now that we have the data banks, these other items will enrich that storehouse and make it possible for a bureaucrat—by pushing one button—to get in an instant the names of the 190 million Americans who are subversives or potential and likely candidates.

It would therefore shock most Americans to learn that there is no fourth amendment protection whatsoever for the information they share with their bank. The police may scrutinize anyone's bank records whenever they please. In United States v. Miller, the Court held that a bank customer had no "legitimate expectation of privacy concerning information kept in bank records" because the information was "voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. . . . The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." The Court reached the same result when it analyzed pen registers. A pen register is a device which may be installed by the telephone company in its computerized switchboards. It records the numbers dialed by the customer and also the origin of the customer's incoming calls. In Smith v. Maryland, the Court held that no search occurs when the telephone company installs the device at the request of police. In holding the fourth amendment inapplicable to this information the Court reasoned that the customer "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business."

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82. Id. at 442-43.
83. 442 U.S. at 735.
business. In so doing, [the customer] assumed the risk that the company would reveal to police the numbers he dialed."

This line of cases exposes huge chunks of our private lives to police inspection. It permits the police to collect vast quantities of personal information about us and to do so "despotically and capriciously" if they choose. Following the Court's logic to its natural conclusion suggests that executive officials now have total discretion to collect information "from all our bookstores, all our hardware and retail stores, [and] all our drug stores." The Court's constitutional blinders deprive contemporary society of the blessings of personal security that were the concern of the fourth amendment's framers. The same problems recur in the Court's misplaced confidence doctrine.

2. Disclosure to Confidants

People sometimes choose to share personal information with a trusted friend. It is an irresistible component of the human condition that leads us to share confidences, to talk through our problems and to seek support from those around us. In certain relationships, privileges are conferred by society—such as those between doctor and patient, priest and penitent, or attorney and client. These privileges bar disclosure of confidential communications both because of tradition and because of the social recognition that these confidences contribute to the well-being of our citizens.

Most confidences are shared in a relationship which lies outside of legally recognized privileged relationships. People choose their confidant in this case with greater care because they know that moral obligation alone, and no legal sanction, prevents disclosure. We recognize that we are at risk and that the confidant may prove untrustworthy. Disclosure may irreparably harm our relationships with family members or people in the community; it may destroy our business interests and it might lead even to criminal prosecution. Despite all these risks of betrayal, we share intimacies with others because it is part of a full life.

There is a line of cases in which the Supreme Court uses the "misplaced confidence" rationale to deny fourth amendment protection. One year before *Katz*, in *Hoffa v. United States*, the Court stated that betrayal by

84. *Id.* at 744. For a critique of this case and the pen register doctrine in general, see L. Tribe, *American Constitutional Law*, 1390-93 (2d ed. 1988); *see also* Professor Kamisar's commentary on the sum effect of these cases in J. Choper, Y. Kamisar & L. Tribe, *The Supreme Court: Trends and Developments* 143-44 (1979). Congress responded to the *Smith* case with legislation which narrowed the holding of that decision. *See Privacy Act*, *supra* note 73.

85. Amsterdam, *supra* note 1, at 411.


an informer "'is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.'"

Surprisingly, the Katz decision and its new approach to fourth amendment issues did not lead the Court to reconsider the misplaced confidence doctrine. United States v. White was decided in 1971, and there the court held that Hoffa "'was left undisturbed by Katz . . . .'

There is, however, a crucial distinction between the typical misplaced confidence situation and the Court's misplaced confidence rationale as illustrated by Hoffa and White. Misplaced confidence, as it is commonly understood, would withhold fourth amendment protection whenever a friend turns fickle and decides on his own initiative to betray the relationship by disclosing information previously shared between the two. The informer's decision is personal and has not been instigated by the government. In Hoffa and White, however, the informer acted not of his own volition but at the request of government agents. Furthermore, the informer in both cases agreed to gather future information. This raises two troubling points. First, the government had used trickery to engineer a breach of the target citizen's personal security. Second, the planted informer led the discussion in a way that elicited damaging admissions from the target. Justice Douglas captured the essence of this important distinction when he wrote: "'In the one case, the Government has merely been the willing recipient of information supplied by a fickle friend. In the other, the Government has actively encouraged and participated in a breach of privacy . . . .'

The issue is not whether the government may or should use planted informers—clearly it should. There are some crimes that society could not combat without the use of informants who are willing to betray the trust of their wrongdoing friends. The point is that this law enforcement technique assaults core fourth amendment values. The planted informant is the equivalent of a search by police except that it is more invidious because the

89. 401 U.S. 745 (1971).
90. Id. at 749.
91. In Hoffa, Edward Partin was the government informant who testified against James Hoffa at trial. The two were friends and business associates. The government "persuaded" Partin to gather incriminating information about his friend Hoffa by having state and federal officials drop Partin's pending criminal charges. The authorities also delivered $1200 to Mr. Partin's wife. Hoffa, 385 U.S. at 298.

In White, it was Harvey Jackson who informed on his friend James A. White. Once again, the government persuaded a friend to use the friendship to gather damaging information about the target. The scheme here was that Jackson would secrete a federal agent in the kitchen closet and then invite White over to his home. He would engage White in conversations which the officer could then overhear. White, 401 U.S. at 747; see also id. at 760 (Douglas, J., dissenting).

target does not know he is being searched. It is comparable to a planted
eavesdropping device except that the informant, unlike the device, can
maneuver the discussion to the desired subject. Whether government may
indiscriminately observe our behavior and listen to our conversations by
planting informants in our midst goes to the very heart of what the fourth
amendment protects. Unrestrained government plants are a hallmark of
twentieth century police states. Stated in the alternative, the target suffers
an invasion of his "reasonable expectation of privacy." Fourth amendment
reasonableness standards should therefore apply.

3. Accidental Disclosure

Risk assessment analysis has not been limited by the Court to only those
cases where an individual willingly shared information with another individ-
ual or institution. Its use has been expanded to withhold fourth amendment
protections even though the information was jealously guarded. Here the
individual does not set out to share—the exposure is accidental or else its
occurrence is unavoidable due to the circumstances of modern life. The
aerial surveillance cases exemplify loss of privacy due to accidental exposure.
The trash collection case, on the other hand, shows how modern life can
compel exposure.

Many of us believe that the privacy created by our backyard allows
behavior which we would not ordinarily think of doing in a public place.
To safeguard the privacy of that setting we form natural barriers by planting
shrubs and trees. We use fences to preclude the uninvited eye. These
expensive and painstaking efforts used to create the backyard idyll are
undertaken even though we know that our efforts to shut out the world
might be stymied. Natural barriers may be circumvented and fences may
be scaled. Persons who hold as their object the invasion of our privacy—
the summons server, the bill collector, the burglar and the peeping tom—
will find a way. We have laws to protect us in this regard and to discourage
those who would usurp our privacy. Nonetheless, the Supreme Court has
held that the fourth amendment does not apply to police officers who use
aerial surveillance to violate this same private world denied to others.

In California v. Ciraolo, the police suspected that Ciraolo was growing
marijuana plants in his backyard. Two fences completely enclosed the
backyard and their height prevented the officers from seeing inside. Re-
sorting to an airborne inspection of Ciraolo's property, they obtained an
airplane and used it to observe the backyard. The Court, using risk assess-

93. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON
ment analysis, held that no fourth amendment search had taken place because "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed."95 Thus, accidental exposure had resulted in a loss of all fourth amendment protection. The Court reaffirmed this strained logic in Florida v. Riley96—even though the police chose a much more intrusive method of overflight. Ciraolo involved momentary overflights by a speeding airplane at 1000 feet, but in Riley the Court allowed use of a hovering helicopter at 400 feet.

The fallacy of both decisions is that they allow the police to indiscriminately breach our privacy through means that would be considered reprehensible if undertaken by the private individual. This type of government conduct should be subject to a reasonableness standard. Core fourth amendment values are harmed when government actors are given license to behave in ways that would be intolerable if undertaken by private members of the community. The decisions in Ciraolo and Riley will be felt by ordinary citizens. The personal security they took for granted in the areas immediately next to their homes may now be compromised by government officials snooping from above for no reason at all. Some might argue that this is only a small encroachment by government, but over a century ago the Supreme Court spoke about minor encroachments in the following words: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."97

In addition to things accidentally exposed, there are things which we are forced to disclose as a condition of modern social life. One such item is our household refuse which concededly contains a wealth of information about our personal lives. Yet the Supreme Court held in California v. Greenwood98 that the fourth amendment has no applicability here. Police officers in that case suspected that the defendant was involved in narcotics trafficking. They instructed the trash collector to keep Greenwood's trash separate from the garbage of other homes and to deliver it to the police. The Court relied on the risk assessment doctrine in concluding that there was no fourth amendment protection for the plastic bags of garbage set out for collection. It reasoned that the items were vulnerable to "animals, children, scavengers, snoops and other members of the public" and that this exposure was sufficient to cause the defendant to forfeit any reasonable expectation of privacy.99 The Court decided that privacy was lost even

95. Id. at 213-14.
99. Id. at 40 (footnotes omitted).
though scrutiny of garbage is universally condemned as contrary to civilized behavior and illegal in many communities.100

These cases demonstrate the Court's misuse of the Katz knowing exposure rationale to sidestep the fourth amendment reasonableness requirement. It erodes the very values which compelled the Katz Court to reject property-based trespass rules in favor of the reasonable expectation of privacy test. Each decision forces us incrementally further into the cocoon to protect privacy and this denies us the full life that the amendment sought to guarantee. Each decision substitutes for principles of limited disclosure an all or nothing approach to individual privacy. In the end preservation of our privacy is left totally to the restraint that the police choose to impose on themselves. And in the end we will transform the nation from one where individual freedoms were once hallowed into a society where those freedoms are as fragile as the official self-restraint upon which their continued existence now totally depends.

III. REVITALIZING THE FOURTH AMENDMENT BY REDEFINING PROTECTED PRIVACY

Invocations of expectations of privacy for the past eighteen years have heralded denial of constitutional protection. With attention centered on particular criminal cases, the Court has defined privacy in the narrowest way to minimize this collateral issue's effect upon determinations of guilt or innocence. While doing that, however, the Court has also reduced the fourth amendment's impact upon all Americans.101

100. Id. at 51-52 (Brennan, J., dissenting).

101. Justice Brennan has written about the Court's concern with crime which has led it to minimize fourth amendment considerations.

Although I recognize that the traffic in illicit drugs is a matter of pressing national concern, that cannot excuse this Court from exercising its unflagging duty to strike down official activity that exceeds the confines of the Constitution. In discussing the Fourth Amendment in Coolidge v. New Hampshire, 403 U.S. 443, [455] (1971), Justice Stewart stated: "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts."

We must not allow our zeal for effective law enforcement to blind us to the peril to our free society that lies in this Court's disregard of the protections afforded by the Fourth Amendment.

Florida v. Royer, 460 U.S. 491, 512-13 (1983) (Brennan, J., concurring) (citation omitted). Brennan, best of all, has also pinpointed the context in which we must today consider these issues.

When one reflects upon the text's preoccupation with the scope of government as well as its shape, however, one comes to understand that what this text is about is the relationship of the individual and the state. The text marks the metes and bounds of official authority and individual autonomy. When one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitution.

Brennan, My Encounters with the Constitution, 26 The Judges' Journal 7, 10 (Summer 1987).
Restoration must begin by adherence to the Stewart-Harlan principles for determining constitutionally protected privacy interests. Stewart and Harlan intended these principles to serve as a guarantor of liberty, not merely a measurement of risk. They provided a workable and understandable formula, measuring protected interests by the common understanding of citizens in a free society, excluding conduct from protection only where the individual has made no effort to guard his privacy. Embracing their approach entails rejecting later revisions that leave unprotected any information that is communicated to any person for any reason—an interpretation that is simply not part of the common understanding of what one "knowingly makes public."

Revitalizing the Stewart-Harlan standards will not cause the pendulum of justice to swing radically in favor of defendants’ rights. In the long run, its effect upon the outcome of criminal cases will be dwarfed by the societal impact which accompanies the setting of boundary lines between government power and individual freedom. The Stewart-Harlan approach defines search more broadly than the present test, but it would only subject that behavior to the amendment’s reasonableness standard. This standard has always been adequate to support legitimate law enforcement needs. Admittedly, adherence to a reasonableness standard imposes costs upon law enforcement. It would certainly introduce a level of inconvenience, regardless of whether reasonableness demands pre- or post-intrusion judicial review,

102. In addition to restricting the scope of fourth amendment protection over the past two decades, there have been many other decisions redefining the constitutional standards of reasonableness. The probable cause test has been eased. See Illinois v. Gates, 462 U.S. 213 (1983). Additionally, the restrictions upon warrantless searches have been relaxed. See, e.g., Colorado v. Bertine, 479 U.S. 367 (1987) (easing the restrictions on inventory searches of lawfully impounded vehicles); United States v. Ross, 456 U.S. 798 (1982) (extending the automobile exception to the warrant requirement so that it would encompass containers located in the vehicle); New York v. Belton, 453 U.S. 454 (1981) (upholding warrantless search of interior compartment of vehicle and containers found therein incident to custodial arrest of occupant of vehicle even though the area searched was not actually within the arrestee’s reaching or grabbing distance at the time of the search); United States v. Edwards, 415 U.S. 800 (1974) (upholding a delayed warrantless search incident to arrest of the arrestee’s effects on the theory that these items were subject to search at the time and place of arrest). The Court has also recognized a new category of searches, “special circumstances” searches, where neither the probable cause standard nor the warrant requirement apply. See, e.g., New York v. Burger, 482 U.S. 691 (1987) (relaxing the warrant requirement for administrative inspections of highly regulated industries); O’Connor v. Ortega, 480 U.S. 709 (1987) (upholding the warrantless search on reasonable suspicion of a government employee’s office and desk); New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding the warrantless search of a school child on reasonable suspicion that evidence of a crime or school rule violation will be found in the child’s possessions). Most recently the Supreme Court upheld warrantless drug testing of railroad engineers following accidents and certain other reportable incidents. Skinner v. Railway Labor Executives Ass’n, 109 S. Ct. 1402 (1989). It also endorsed the causeless and warrantless testing program requiring drug urinalysis of employees seeking promotion or transfer to positions having a direct involvement in drug interdiction or positions requiring the carrying of firearms. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).
but inconvenience is a cost which the fourth amendment was intended to impose. The underlying scheme of the amendment is to ensure that important decisions like search and seizure are not left to the uncontrolled discretion of law enforcement officials but that the propriety of the intrusion is determined by neutral and detached judges who are independent of the law enforcement effort.\(^{103}\) Redefinition and expansion of the term "search" will not dictate whether a warrant will be required anymore than it dictates the outcome of the reasonableness inquiry.

Ordinarily, a search must comply with all of the requirements of the warrant clause. This means that a search may be conducted only after a warrant is obtained upon a showing of probable cause.\(^{104}\) However, notwithstanding the ringing endorsement of the universality of both the warrant and probable cause requirements in \textit{United States v. Chadwick},\(^ {105}\) most searches fit into exceptions to the warrant requirement. Fourth amendment requirements are generally satisfied by a hybrid of standards depending upon the circumstances surrounding the search. Moreover, in differing contexts outside of even traditional exceptions to the warrant requirement either or both of the warrant and traditional probable cause requirements have been excused.\(^{106}\) Consequently, expansion of fourth amendment coverage need not automatically result in imposition of all the requirements of the warrant clause. The important objective is that the reasonableness requirement be extended to these contexts.

The process of formulating a reasonableness standard in this extended context can profit by reference to the distinctions in the law of seizure. There are two types of seizures of persons: arrests and stops. Both types are subject to the fourth amendment reasonableness requirement. However, the two are analyzed differently, and both are distinguished from citizen-police encounters which do not implicate the fourth amendment at all.


\(^{105}\) 433 U.S. 1 (1977). In \textit{Chadwick}, the government suggested that only homes, offices and private communications implicate core interests of the fourth amendment, and that reasonableness should turn on whether a warrant was secured only in those contexts. Chief Justice Burger, writing for the majority, reviewed cases in which the warrant requirement had been applied in contexts other than those which the government claimed implicated the amendment's core values. The Chief Justice said:

\begin{quote}
These cases illustrate the applicability of the Warrant Clause beyond the narrow limits suggested by the Government. They also reflect the settled constitutional principle... that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home.
\end{quote}

\textit{Id.} at 11 (footnote omitted).

The most rigorous fourth amendment scrutiny is applied to arrests. An arrest must be supported by probable cause. Furthermore, if the arrest occurs in a residence and is not justified by exigent circumstances it must be supported by a warrant. These stringent fourth amendment requirements are justified because an arrest is an extreme intrusion on privacy, and an arrest in a residence involves a search of the residence for the person whose arrest is sought.

An investigatory stop is so different from an arrest that it is not subject to the same level of fourth amendment scrutiny. It does not have all the attributes of an arrest; it is of relatively short duration; it is permissible only for the purpose of investigating suspicious circumstances; and it does not generally involve the movement of the suspect from one location to another. Nonetheless, a stop interferes with a protected privacy interest.

107. See Michigan v. Summers, 452 U.S. 692, 700 (1981) (a seizure "having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause").
108. See Steagald v. United States, 451 U.S. 204 (1981) (entry of a home to arrest a non-resident must be supported by a search warrant absent exigent circumstances or the consent of a resident); Payton v. New York, 445 U.S. 573 (1980) (entry of a home to arrest a resident must be supported by an arrest warrant absent exigent circumstances or the consent of a resident).
110. The Supreme Court in Terry described an investigatory stop as momentary. However, in United States v. Sharpe, 470 U.S. 675 (1985), the Supreme Court held that a twenty-minute detention based upon reasonable and articulable suspicion of criminal activity is reasonable where that amount of time is needed to achieve the purpose of the stop, and where police diligently pursue a means of investigation that is likely to confirm or dispel their suspicion quickly. In a border detention case, decided the same year as Sharpe, the Court upheld a sixteen-hour incommunicado detention on reasonable suspicion of a traveler suspected of smuggling drugs in her alimentary canal. United States v. Montoya de Hernandez, 473 U.S. 531 (1985). Even though the Supreme Court in Montoya de Hernandez insisted that it had rejected hard-and-fast time limits for stop and frisk, the extended detention allowed in that case has to be attributed to the leeway allowed at border crossings. Twenty minutes seems to be pushing the limit in any other context because the duration of a stop will often be critical in drawing the line between an investigatory stop and an arrest. See AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE ¶ 110.2 (1975).
111. Initially, a Terry stop was limited to investigating suspicious circumstances in order to prevent the completion or commission of a crime. Now, a Terry stop may also be used to question a person suspected of a past crime. The stop may be based upon a "wanted flyer" issued by another department, provided that the agency issuing the flyer has articulable facts supporting a reasonable suspicion that the wanted person committed an offense. United States v. Hensley, 469 U.S. 221 (1985).
112. The manner in which officers conduct an investigative detention will determine whether it is a Terry stop or an arrest. One factor to be considered is where the officers conduct the investigation. Slight movement of a suspect from the spot where he is stopped will not necessarily turn a stop into an arrest. Where the suspect is taken will determine whether the intrusion remains an investigative stop or has escalated into an arrest which must be supported by probable cause. Unless a suspect willingly accompanies police to a police station, a detention which involves transporting a suspect to a police station invariably transforms a stop into an arrest. Hayes v. Florida, 470 U.S. 811 (1985) (reasonable suspicion not adequate basis for
because the subject's freedom of movement is restrained. Consequently, the Court has held that police must have "reasonable suspicion" that a crime has been or is about to be committed before an investigatory stop may be made. This standard is less stringent than the probable cause standard applicable to arrests, but it still provides fourth amendment protection against arbitrary investigatory stops.

The "consensual encounter" rounds out the law of seizure. It involves a citizen-police interchange that the Court has ruled does not implicate the fourth amendment standard at all because the context of the exchange and the conduct of the officer would lead the reasonable person to conclude that he is free to walk away. Because the consensual encounter implicates

transporting suspect to police station for fingerprinting); Dunaway v. New York, 442 U.S. 200 (1979) (suspect transported to police station for interrogation). There are no hard and fast rules about other movements of a suspect. Where a suspect is moved to a police investigative room within the same facility where the stop took place the intrusion likely must be supported by probable cause. Cf. Royer, 460 U.S. at 491. But in United States v. Mendenhall, 446 U.S. 544 (1980), the fact that the suspect was moved from the airport concourse to the security room at the airport did not turn the detention into an arrest. Justice Brennan, on the other hand, has indicated that a suspect may not be moved or asked to move more than a short distance during an investigative stop. Kolender v. Lawson, 461 U.S. 352 (1983) (Brennan, J., concurring).

113. See Mendenhall, 446 U.S. at 544.

We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.... In the absence of some such evidence, [e.g. display of a weapon, physical touching of the person,] otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-55 (Stewart, J., plurality opinion) (footnote and citation omitted).

114. Terry, 392 U.S. at 1.


Although we have yet to rule directly on whether mere questioning of an individual by a police officer, without more, can amount to a seizure under the Fourth Amendment, our recent decision in [Florida v. Royer, 460 U.S. 491 (1983)] plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure....

... While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.... Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.

Id. at 216 and Terry, 392 U.S. at 1:

Obviously, not all personal intercourse between policemen and citizens involves "seizures" of the persons. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

Id. at 16 with People v. De Bour, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976), where the New York Court of Appeals rejected the notion that all constitutional considerations
no fourth amendment interests it is not subject to review and consequently need not be supported by any measure of cause.\textsuperscript{116}

Although distinctions between probable cause and reasonable suspicion may seem terribly difficult to draw and even more so since the relaxation of the probable cause standard, they are important ones. The Court, in \textit{Terry v. Ohio},\textsuperscript{117} originally recognized that it was dealing with a gray area that neither fit within nor fell comfortably outside of the fourth amendment. To have imposed the probable cause standard applicable to arrests on investigatory stops would have illogically invoked a standard which was ill-suited for contexts which were never foreseen at the time the standard was adopted. It would have failed legitimate societal interests by curtailing investigations of suspicious behavior. It would also have frustrated fourth amendment concerns by encouraging law enforcement officers to circumvent the constitutional standard that they could not hope to satisfy. In other words, imposition of the probable cause standard upon investigatory stops would have imposed an impossible standard and, thus, would have failed the constitutional mandate of reasonableness.

The opposite extreme is to suggest that a stop which does not amount to an arrest is not governed at all by the fourth amendment standards. Immunizing these stops from the reasonableness requirement was also unsatisfactory. This extreme would have eliminated judicial oversight of the most common contact between citizens and law enforcement officers, leaving those encounters to the unbridled discretion of the police officers.\textsuperscript{118} In other words, an all or nothing approach would not have served any legitimate interests.

\textsuperscript{116} \textit{Mendenhall}, 446 U.S. at 553 (plurality opinion) ("[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards.").

\textsuperscript{117} 392 U.S. at 1.

\textsuperscript{118} \textit{See id.}

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

\textit{Id.} at 21.
Creating an intermediate category for investigatory stops, where the stop had to be based on reasonable suspicion signified recognition of a gray area where a perfect solution could not be fashioned. The intermediate category was the best way to serve core fourth amendment interests. This approach protected individual privacy while accommodating legitimate law enforcement interests. It provided the solution most in line with the constitutional principles embodied in the fourth amendment.

The same process which expanded and refined the fourth amendment approach to seizures of persons should be applied to the definition of search. A similar intermediary category of searches, here called "intrusions," should be recognized. Like an investigatory stop, reasonable suspicion would be needed to justify an intrusion. This approach would serve the fourth amendment better than the Court's current all or nothing approach. The current approach totally eliminates significant invasions of privacy from any fourth amendment protection because they are not akin to traditional searches. However, these unprotected invasions of privacy involve interests that a reasonable person in a free society would expect to have protected. There are marked differences between a police officer using his natural senses to observe a target suspect's movements and that officer using super-sensitive electronic devices to keep track of the target.

119. The analogy to the seizure cases is not without problems. The Court's efforts to carve out an area of police-citizen encounters that are free of the amendment's reasonableness command makes it a strain to borrow from the seizure cases in order to expand the definition of search. *Mendenhall* tests the limits of credibility when the Court holds that a reasonable person in the defendant's position would have felt free to ignore the agents' questions. The limits of that credibility have been commented upon by Judge Posner, writing for the majority, and Judge Cudahy, dissenting, in United States v. Notorianni, 729 F.2d 520 (7th Cir. 1984), although neither judge recognized the strain placed upon the fourth amendment. Commenting upon the *Mendenhall* and *Royer* conclusion that the average person in an airport confronted by a federal agent who requests information "feel[s] free to thumb his nose at the agent," Judge Posner said, in a parenthetical aside, "Maybe this is a wrong guess about what the average person feels in this situation but it is the law of this circuit." *Id.* at 522.

Dissenting Judge Cudahy expressed no greater concern for fourth amendment principles; he wrote:

> It is perfectly appropriate to indulge what may be a modest fiction that a person being casually questioned by a policeman about possible criminal activity feels entirely free to say nothing and move on. Such a psychological assumption does no violence to the fourth amendment and makes it possible to cope with drug traffic in a place like O'Hare airport.

*Id.* at 523 (Cudahy, J., dissenting).

Nonetheless, this much less than perfect solution offers a workable alternative to the totally imperfect framework that presently excludes many aspects of modern life from protected expectations of privacy.


The Court suggests that the Fourth Amendment does not inhibit "the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them." But the Court held to the contrary in *Katz v. United States*. Although the augmentation in this case
Similarly, there is a significant difference between information provided to police by a confidant who betrays a confidence and a wired confidant who is planted in the betrayed person’s home or entourage. These differences are similar, in kind, to distinctions between consensual encounters which do not invoke fourth amendment scrutiny and forcible stops which must meet the amendment’s reasonableness standard.

The benefit of this proposal lies in its recognition that there exists a class of government incursions into individual privacy which does not merit full scrutiny accorded to traditional searches but which, nonetheless, implicates important fourth amendment interests which could be adequately guarded by a flexible reasonableness standard. An intermediate category of protected searches, “intrusions,” as well as an intermediate standard for determining their reasonableness, is necessary to protect the personal security that the amendment seeks to ensure, especially now when that security is threatened at every turn by modern technology.

The remaining problem is to redefine the term “search” into a tripartite definition, similar to what has been done with the term seizure. The first of the three categories comprising the law of search should be the traditional search, as that term is currently used by the Supreme Court. The traditional warrant clause considerations apply to these. The more difficult task lies in

[monitoring of defendant’s movements on the highway and on private property visible from the highway by a beeper installed in a drum carried on defendant’s truck] was unobjectionable, it by no means follows that the use of electronic detection techniques does not implicate especially sensitive concerns. 

Id. at 288 (Stevens, J., concurring) (citations omitted); cf. Dow Chemical Co. v. United States, 476 U.S. 227, 238 (1986) (“It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant.”).


What the ancients knew as “eavesdropping,” we now call “electronic surveillance”; but to equate the two is to treat man’s first gunpowder on the same level as the nuclear bomb. Electronic surveillance is the greatest leveler of human privacy ever known. How most forms of it can be held “reasonable” within the meaning of the Fourth Amendment is a mystery. To be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of “commerce” would be hopeless when it comes to the management of modern affairs. At the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on.

Id. at 756 (Douglas, J., dissenting).

The Fourth Amendment does, of course, leave room for the employment of modern technology in criminal law enforcement, but in the stream of current developments in Fourth Amendment law I think it must be held that third-party electronic monitoring, subject only to the self-restraint of law enforcement officials, has no place in our society.

Id. at 790 (Harlan, J., dissenting).
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distinguishing those governmental information gatherings which should be classified as "intrusions" and subjected to an intermediate reasonableness test. The third and final category would be comprised of informational gatherings which do not implicate fourth amendment interests at all because they are neither searches nor intrusions. These would not be subject to review.

If the fourth amendment was intended to promote a sense of personal security, it must extend to the protection of informational privacy. Recognizing this new class of intrusions will accomplish this important goal. An "intrusion" is the gathering of information by a government agency that involves (1) planting an agent, wired or not, within a home or office that the government would ordinarily be precluded from entering without a warrant,\(^122\) (2) acquiring information from sources that the target has provided in the ordinary course of the source's business in return for normal services,\(^123\) (3) exploiting technology to gather information about a target

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\(^122\) This standard requires reversal of Hoffa v. United States, 385 U.S. 293 (1966), and White, 401 U.S. at 745. There would be no difference between the wired informant in White and the informant in Hoffa who was not wired. The standard would not affect cases where a confidant comes forward and betrays a confidence where the government was not involved in planting the informant.

\(^123\) This standard requires reversal of Smith v. Maryland, 442 U.S. 735 (1979) (attachment of pen register at phone company office is not a search because it does not intrude upon customer's reasonable expectation of privacy), and United States v. Miller, 425 U.S. 435 (1976) (bank customer has no reasonable expectation of privacy in information communicated to bank through deposit slips and checks). It recognizes the principle of limited disclosure: that information turned over to a bank or institution will be utilized only for internal business purposes. The State of Pennsylvania has gone even further, recognizing installation of a pen register as a traditional search which requires a court order supported by probable cause under the state constitution. Commonwealth v. Melilli, 521 Pa. 405, 555 A.2d 1254 (1989); Commonwealth v. Beauford, 327 Pa. Super. 253, 475 A.2d 783 (1984).

California v. Greenwood, 486 U.S. 35 (1988), should also be reversed under this standard (in some communities where it is against the law for anyone to handle the trash of another but employees of the agency charged with collecting and disposing of garbage, Greenwood might be susceptible to reversal under the fourth standard). The concept of limited disclosure is applicable to information provided to different government agencies. See, e.g., M. Saltzman, IRS PRACTICE AND PROCEDURE § 4.06[6] (1981):

"Disclosure of tax returns in nontax criminal cases should be more restricted than in tax prosecutions... In nontax criminal cases, with one exception, disclosure may be made by the IRS to the Justice Department or another federal agency only on the grant of an ex parte order of a federal district court judge. . . . The rationale for this procedure is the congressional decision that "the information that the American citizen is compelled by our tax laws to disclose to the Internal Revenue Service is entitled to essentially the same degree of privacy as those private papers maintained in his home."

Id. (citations omitted). A later amendment to the relevant Internal Revenue Code section changed the procedure but did not alter these general principles. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 356, 96 Stat. 324, 641-45 (codified in scattered sections of 26 U.S.C. 6103). If a legitimate privacy interest is recognized in information required to be given to the IRS in a tax return which results in qualified restrictions upon the agency's ability to share that information with other government agencies, certainly there
suspect which could only have been obtained without such technology through a conventional search with a warrant, or (4) using means which constitute a violation of substantive criminal or tort law. should be a greater privacy interest and, consequently, greater restrictions upon one government agency's ability to turn over trash to another agency. The placement of trash on the curb for pick-up does not ordinarily, in itself, communicate any information. If the container is not tampered with until it is co-mingled with the trash of others, which is the normal expectation, it is information-neutral and discloses nothing about the lifestyle of its previous owner.

124. This standard requires reversal of the aerial observation and filming cases. Florida v. Riley, 109 S. Ct. 693 (1989); California v. Ciraolo, 476 U.S. 207 (1986); Dow Chem. Co., 476 U.S. at 227. Obviously, these cases involve exploitation of technology to avoid the dictates of the fourth amendment.

An Oregon appellate court held, contrary to Riley, that the state constitutional right to be free from unreasonable searches and seizures extends to the right to be free from unreasonable government scrutiny, and that a warrantless use of a helicopter to fly over rural private property in order to make focused observations of alleged criminal activity occurring there violates the state constitutional right. State v. Ainsworth, 95 Or. App. 240, 770 P.2d 58 (1989). On the other hand, an initial view of marijuana by police officers flying over property was not a search because it was not a purposeful effort to observe defendant's property. State v. Nevler, 95 Or. App. 694, 770 P.2d 956 (1989). These cases are premised upon an Oregon Supreme Court decision which stated that the use of technology, wholly at the government's discretion, significantly impairs the right of the public to be free from scrutiny. State v. Campbell, 306 Or. 157, 759 P.2d 1040 (1988). In Campbell, the Oregon Supreme Court also rejected the United States Supreme Court approach that allows the government to focus in on a target's property from the air because an individual flying over in an airplane might observe what is on the ground. The same court has also said, "A determined official effort to see or hear what is not plain to a less determined observer may become an official search." State v. Louis, 296 Or. 57, 61, 672 P.2d 708, 710 (1983).

Where the lines are to be drawn under this standard will require constitutional interpretation. Ordinarily, devices such as flashlights and binoculars which enhance human senses do not implicate fourth amendment interests when similar observation with the naked eye or ear would not. Cf. Dow Chem. Co., 476 U.S. at 238. But the decision in Katz, 389 U.S. at 347, recognized limitations on that doctrine. Where the lines will be drawn will have to be decided on a case-by-case basis to determine, for example, whether beepers used for tracking, Knotts, 460 U.S. at 276; United States v. Karo, 468 U.S. 705 (1984), and chemical field tests used to determine whether powder is an illegal substance, United States v. Jacobsen, 466 U.S. 109 (1984), constitute "intrusions" under this test. This author would answer affirmatively because in the one case the invasion by a beeper is ongoing and the electronic device's tracking is inescapable, and in Jacobsen the test discloses more than would be disclosed even by enhanced senses. Cf. Campbell, 306 Or. at 157, 759 P.2d at 1040 (holding under the state constitution that the use of a radio transmitter to monitor the movements of an automobile as it travelled on public streets is a search). On the other hand, a stronger argument for a different classification not rising to the level of an "intrusion" could be made for the use of a drug detection dog because the investigative procedure is so limited and the invasion virtually non-existent. Cf. United States v. Place, 462 U.S. 696 (1983).

125. This standard requires reversal of Oliver v. United States, 466 U.S. 170 (1984), and United States v. Dunn, 480 U.S. 294 (1987), holding, respectively, that police entry onto open fields and into the area outside of curtilage is not a search and, thus, not subject to fourth amendment protection notwithstanding precautions taken by the owners of the property to protect their privacy. Under state laws in each case police disregard of fences, no trespassing signs, or gates would have constituted the crime of trespass. The Supreme Court has rejected the argument that a trespass constitutes a search.

Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a trespass at common law. The
The means to draw the necessary distinctions between protected and unprotected categories are found in Stewart and Harlan's conceptualizations of what the fourth amendment protects. They agreed that it protects expectations of privacy. They defined protected expectations only by indicating what is not protected: that which a person "knowingly exposes to the public." Those words should be given their natural meaning and should be allowed to provide the natural boundary for the term "search." "Knowing," "exposure" and "public" encapsulate a renunciation of secrecy; they should not be applied to accidental, inadvertent or limited disclosures. When the government seeks information by planting an agent in the target's home, it is conducting either a search or an intrusion. When the government accesses information released for limited purposes by a target to his bank, stock broker, pharmacist, the telephone company and credit card issuer, an intrusion has occurred and it must be justified. The same is true when private property is entered or flown over for surveillance purposes. If these activities are not traditional searches governed by the warrant requirement then they are "intrusions," subject to the constitutional command that they be reasonable.

Broadening the definition of search does not necessarily deny the government access to the information it seeks. It simply eliminates unreasonable police behavior by requiring the government to justify the reasonableness of targeting a particular suspect and the means used to obtain the information. This modest definitional adjustment tailors protected zones of privacy to coincide with the reasonable expectations of citizens in a free society.

existence of a property right is but one element in determining whether expectations of privacy are legitimate. . . . The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

Oliver, 466 U.S. at 183-84 (citations and footnotes omitted).

Applying the state constitution, the Oregon Supreme Court rejected the reasoning underlying Oliver. State v. Dixson, 307 Or. 195, 766 P.2d 1015 (1988). The court said, "If the individual has a privacy interest in land outside the curtilage of his dwelling, that privacy interest will not go unprotected simply because of its location." Id. at 208, 766 P.2d at 1022. In Dixson, the court upheld the police entry onto the land because the erection of "No Hunting" signs was insufficient to manifest an intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs. See also People v. Reynolds, 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988) (holding that owner had no reasonable expectation of privacy under state constitution where no precautions had been taken to exclude public from entry and reserving for later time whether state constitution requires different result if defendant's lands are fenced or marked in any other way which demonstrated an expectation of privacy).

126. Katz, 389 U.S. at 351; see also id. at 361 (Harlan, J., concurring) ("[O]bjects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.").
Two remaining issues must be resolved to determine the reasonableness of an "intrusion." First, consideration must be given to the level or degree of cause which will be required to establish the reasonableness of an "intrusion." Second, consideration must be given to whether the warrant requirement should attach to "intrusions." Strict adherence to the arrest/investigatory stop analogy would lead to rejection of the warrant requirement and adoption of a reasonable suspicion standard.

The analogy to the law of seizures is complete only if the burden imposed upon the government to justify the reasonableness of an "intrusion" is modest. The nature of an "intrusion" caused by a determined overflight and filming of events below is sufficiently different from police entry into and search of a backyard to justify a more lenient standard for determining its reasonableness. Similarly, a lesser showing of cause should be adequate to support the reasonableness of obtaining a cancelled check from a bank or the record of a telephone number dialed from the telephone company than should be required if the police were to enter the target's home and seek the same information. There is also an obvious difference between police seeking evidence by rummaging through trash placed at the curb and police rummaging through the target's home, office or car in a search for evidence.

The appropriate standard for determining the reasonableness of an "intrusion" is reasonable suspicion, the standard which justifies investigatory stops. It imposes a modest obligation upon law enforcement, but one which introduces judicial oversight to protect citizen privacy by striking a balance between protecting personal liberty interests and respecting legitimate law enforcement needs. The reasonable suspicion standard should be adequate to restore the regulatory function of the fourth amendment as well as its normative commands in an area where it has been missed. It should also serve to send the strong message that the fourth amendment remains viable even in a world of technical advancements which have eaten away at individual privacy in this century.

Reasonable suspicion is appropriate for justifying "intrusions" which, like investigatory stops, are more limited in scope than conventional searches. The fourth amendment interest will be satisfied by the limited scrutiny of a non-burdensome standard which assures that the targeting of a suspect is not based upon hunch or intuition and is not arbitrary. That end will be met by satisfaction of the "reasonable suspicion" test which demands articulable facts and circumstances. The judicial inquiry itself is, in the end,

127. Terry, 392 U.S. at 20-23; see also LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond, 67 Mich. L. Rev. 40, 75 (1968) ("it should be sufficient that there is a substantial possibility that a crime has been or is about to be committed and that the suspect is the person who committed or is planning the offense").
more important than the standard.\textsuperscript{128} It interposes a limited barrier between the government and a citizen's qualified right to be let alone. The current narrow definition of search virtually eliminates that qualified right which faces further threat from the future growth of technology.

As neat and tidy as adherence to the seizure analogy would be, it breaks down on the warrant issue. Investigatory stops were initially justified as valid attempts to intercept and prevent the commission of crime. A law enforcement officer is attracted by suspicious behavior and intercepts a suspect to confirm or dispel that suspicion. In most instances the suspicion is quickly dispelled or does not escalate into probable cause, and the engagement is terminated. No warrant is required for two reasons. First, the encounter is relatively minor and of a short duration. Second, an investigatory stop is prompted by unexpected circumstances which require police interception to prevent the commission of a crime. That opportunity will be lost if the officer were to divert his attention from the suspicious circumstances in order to get a warrant.

Exempting "intrusions" from the warrant requirement would be similarly supportable because, while an invasion of justifiable expectations of privacy, an "intrusion" is in most instances sufficiently minor to support an argument that after-the-fact judicial oversight would adequately protect the interests intended to be protected.

There are, however, dissimilarities between investigatory stops and the class of searches which fit within the expanded definition. Rejection of the warrant requirement for "intrusions," while practical, does not automatically follow. An investigatory stop is predicated upon exigent circumstances, the traditional justification for excusing the warrant requirement. The suspicious circumstances could escalate into a crime if the time were taken to seek a warrant. "Intrusions" are not predicated upon exigent circumstances; these searches are not spontaneous. They are likely part of an extensive investigation. Planting a police agent in a home, obtaining a record of phone numbers dialed, flying over a particular backyard are all planned exercises, and some involve substantial expenditure of resources. There is generally no exigency to justify dispensing with a warrant. A search warrant in these circumstances is very feasible.

Realization that a different and lesser standard than probable cause would support the issuance of a warrant for an "intrusion" does not, in itself, make dispensing with a warrant an uncontrovertible decision. We already recognize a class of warrants, administrative search warrants, which are issuable on less than traditional probable cause.\textsuperscript{129} Moreover, protection of fourth amendment privacy especially for innocent members of the com-

\textsuperscript{128} Cf. Terry, 392 U.S. at 21-22.
\textsuperscript{129} Cf. Camera, 387 U.S. at 523; See, 387 U.S. at 541.
munity can best be assured by requiring judicial authorization prior to the search rather than through suppression of evidence after the fact.\textsuperscript{130}

Despite arguments in favor of requiring warrants, imposition of the warrant requirement upon "intrusions" is not feasible and probably would guarantee rejection of this proposed redefinition of fourth amendment protection. Exceptions to the warrant requirement have grown so over the past two decades that the requirement itself is fast becoming the exception. The formerly proclaimed judicial preference for a warrant is virtually non-existent. Effective protection of privacy interests in the area of non-traditional searches can be achieved without requiring a warrant because "intrusions" generally are part of extensive police investigations where the ultimate objective is to obtain sufficient probable cause to justify a full-blown search.\textsuperscript{131} Judicial oversight, after the fact, of the reasonableness of an "intrusion," under those circumstances, should provide protection against arbitrary exercises of government power. If an "intrusion" occurs within the context of a major investigation, as part of an effort to develop probable cause to secure a search warrant, the threat of review resulting in suppression of evidence should deter law enforcement officers from jeopardizing the products of that investigation.\textsuperscript{132} The primary purpose will be served by the process of redrawing the lines where unlimited government power ends and the right of the people to be free from unreasonable searches begins.

**CONCLUSION**

In the two decades since *Katz* we have witnessed a revolutionary removal of fourth amendment protection from our lives. Justices Stewart and Harlan anticipated that *Katz* would create a new analytical framework for deter-

\textsuperscript{130} See Chimel v. California, 395 U.S. 752 (1969), where Justice Stewart responded to the dissenters' claim that the warrant requirement imposed in that case provided no greater protection of privacy than is provided at a suppression hearing. "More fundamentally, however, we cannot accept the view that Fourth Amendment interests are vindicated so long as 'the rights of the criminal' are ‘protect[ed] . . . against introduction of evidence seized without probable cause.' The Amendment is designed to prevent, not simply to redress, unlawful police action." Id. at 766 n.12. Similarly, see Linkletter v. Walker, 381 U.S. 618 (1965), quoting Justice Jackson's comments in Irvine v. California, 347 U.S. 128, 136 (1954), on the limitations of the exclusionary rule. "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. . . . [I]t does nothing to protect innocent persons who are the victims of illegal but fruitless searches." Linkletter, 381 U.S. at 632.

\textsuperscript{131} For example, the evidence found in a search of trash in Greenwood, 486 U.S. at 35, led to issuance of a search warrant, as did the evidence revealed by the pen register in Smith, 442 U.S. at 735. The aerial observations from a fixed-wing aircraft in Ciraolo, 476 U.S. at 207, and from a hovering helicopter in Riley, 109 S. Ct. at 693, provided the probable cause for search warrants in those cases.

\textsuperscript{132} See L. TIFFANY, D. McINTYRE & D. ROTENBERG, DETECTION OF CRIME 101 (1967) ("[S]earch warrants are used only where there is an overriding desire by police to conduct a search which courts will hold to be lawful.").
mining fourth amendment coverage. They foresaw expanded coverage which would protect the values inherent in the right to be left alone which the framers tried to capture in the fourth amendment guarantee against unreasonable searches and seizures. The framework Stewart and Harlan imposed would have preserved those values even though conditions had radically changed. Instead, that framework has been used to rework the relationship between citizens and their government, very different from the use intended by Stewart and Harlan. The privacy framework has been applied in a way which enhances government's ability to escape the commands imposed by the amendment. These changes have resulted from utilization of a counter-intuitive definition of the term "search" calculated to ease the grip which the amendment exerts over the exercise of official power.

Determining fourth amendment coverage by simply measuring assumed risks has narrowed the term "search" so drastically that much of twentieth century life now lies totally outside the amendment's protection. The Supreme Court defines search in a way that would be familiar to people living in the eighteenth century, but that definition is subject to exploitation by a government dealing with citizens who must survive in the twentieth century. The sides are not actually redrawn in eighteenth century terms in any event because citizens armed with eighteenth century rights confront government utilizing twentieth century technology.

This revisionist formulation of a basic guaranty which has helped to provide the unique definition of American liberty threatens both the quality of American life and our heritage. It poses an untenable choice. An individual can withdraw from all contact with others and with society by not dealing with people, by not venturing outside, by not using banks, telephones, mail, garbage collection and other services, and maintain the type of informational privacy available to his eighteenth century forbearer. But it is impossible to lead an eighteenth century life today. The definition of search coupled with modern conditions and government's technological capabilities results in the individual having a narrower constitutionally protected right to informational privacy than his eighteenth century counterpart. The net effect, then, is a loss of freedom and a reduction in the ability of the individual to achieve self-fulfillment.

The ability of our government to invade our informational privacy without restraint is now akin to the ability of governments in societies we do not ordinarily compare ourselves to. Of course, unlike those countries we are confident that our government is not compiling dossiers on all of us. We are free to live our lives with the security that comes from confidence in our government's own self-restraint, to some extent greater security than that which could be provided by law.

This reassurance, however, is contrary to the American tradition. While government self-restraint may be the most reliable form of protection, it was the wisdom of the founders of this country that individual freedom
should not be dependent upon government self-control. One of the overriding precepts upon which our system of government is founded is distrust of official authority. Distrust is embodied in the system of checks and balances and enshrined in the Bill of Rights. Our history is filled with examples of the breakdown of government self-restraint. Each generation has had the opportunity to relearn the original lesson and to appreciate the wisdom of the framers who firmly believed that reliance upon explicit legal processes was far more likely to perpetuate the blessings of liberty than trust in official self-restraint.

To ensure that Americans in the twenty-first century are able to enjoy those same blessings of personal liberty we must find a way to restore personal security in informational privacy. The failure to define constitutional rights in a manner which preserves these important values is contrary to the common understanding of our constitutional system whose very longevity is due to its ability to adapt to changing times without sacrificing the core values which the framers sought to secure.¹³³

Creation of an intermediate category of search, “intrusion,” governed by a reasonable suspicion standard and free of the warrant requirement has the potential to protect informational privacy and further the values which stand as the underpinnings of the fourth amendment. The suggested standards for governing “intrusions” impose such modest requirements upon law enforcement agencies that they cannot interfere with legitimate law enforcement needs. Still, these modest requirements are acutely necessary to protect the rights of future generations of Americans if the fourth amendment is to continue to protect liberty by prohibiting unreasonable government intrusions into the people’s reasonable expectations of privacy.

No less than the very nature of this society is at stake. For two hundred years this society has been defined by its protection of individual freedom and autonomy, the very characteristic which current fourth amendment coverage curtails and threatens. Our approach to the issue of the scope of the amendment’s coverage will define, in large measure, for the next century of Americans the kind of society in which they will live.


Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.

Id. at 373.