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DIMINISHING EXPECTATIONS OF PRIVACY IN THE REHNQUIST COURT

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> The right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.[1]

Today, expectations of privacy are the touchstone of Fourth Amendment[2] analysis with respect to searches of persons and property.[3] Recent decisions of the Supreme Court, however, have so diminished our expectations of privacy that the Amendment's original function has become distorted and lost from view. This has resulted in a subtle yet significant shift in the distribution of power between the individual citizen and her government. The impact of this altered balance of power upon our freedom from unwarranted governmental intrusion is the subject of the Article.

The fundamental question addressed by the Fourth Amendment is simply put: under what circumstances must the individual's right to be let alone yield to the common good? Part I examines the mechanism employed by the Framers for resolving this question. Parts II & III examine two independent modes of Fourth Amendment analysis which have gradually captured that mechanism and made it subservient to the talismanic "reasonable expectation of privacy" touchstone.

As Part II describes, under the rapidly expanding "special

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* Associate Professor of Law, California Western School of Law. This article is dedicated to Marshall J. Hartman, whose insights inspired it, whose comments and criticisms improved it, and whose dedication and advocacy on behalf of the Bill of Rights over the past three decades has set a standard of excellence which continues to inspire all who believe in its principles. The author would like to thank Professor Michal R. Belknap for his thoughtful suggestions, and Bill Bookheim, Frank Daniels, Mary Garcia, Kenneth Troiano, John D. Williams, Mary-Ellen Norvell and Sue Patmor for their assistance and contributions.

1. Olmstead v. United States, 277 U.S. 438, 478 (1928), (Brandeis, J., dissenting).

2. In keeping with the respect that is due the Bill of Rights, and as permitted by the University of Chicago Manual of Legal Citation, the "Fourth Amendment" is capitalized throughout this article.

3. *See* California v. Ciraolo, 476 U.S. 207, 211 (1986), *citing*, Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (the touchstone of Fourth Amendment analysis is whether a person has a "constitutionally protected reasonable expectation of privacy"). *Ciraolo* held that aerial police surveillance of a fenced backyard did not constitute a "search" for purposes of the Fourth Amendment. See *infra* note 171-76 and accompanying text for a discussion of *Ciraolo*.

needs" doctrine, the traditional protections once afforded by the warrant and probable cause requirements[4] are now no longer the general rule. Instead they are now held hostage to await the results of a ubiquitous balancing test where the interests of the government are weighed against privacy interests of the citizen. Because the interest of the government (representing the many) will almost always be seen to outweigh the interest of a solitary citizen so long as the governmental interest is legitimate, this balancing process is inherently skewed. As a result, fundamental Fourth Amendment protections have inevitably been sacrificed upon the altar of state expediency.

Not only has the quality of Fourth Amendment protection thus been eroded, but the reach of the Amendment has also been constricted. As Part III demonstrates, an "expectations of privacy" analysis (hinged upon the Justice's personal value judgments as to what privacy interests are "reasonable") now restricts the parameters of what constitutes a "search" for Fourth Amendment purposes. Parts II and III each conclude with an analysis of recent Supreme Court decisions which reveals an accelerated pace of erosion and demonstrates how the Rehnquist Court, in its desire to win the War on Drugs, has been more concerned with expanding the freedom of law enforcement to make intrusions into our lives than with protecting the privacy of the citizenry.

In the space of only a single decade, we have thus witnessed the diminution of protectable privacy in our automobiles,[5] our business premises,[6] our offices,[7] our backyards[8] and even our homes.[9] We

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4. The Fourth Amendment declares:

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

U.S. CONST. amend. IV (emphasis added).

5. *See* Michigan v. Long, 463 U.S. 1032 (1983) (search of passenger compartment of car justified on reasonable suspicion weapons may be present. Special need: officer safety); New York v. Class, 475 U.S. 106 (1986) (entry into car to look for V.I.N. was justified during traffic stop, even though no reasonable suspicion existed that weapons were present. Special need: theoretical officer safety).

6. *See* New York v. Berger, 482 U.S. 691 (1987) (warrantless search of automobile junkyard upheld in absence of articulable suspicion. Special need: governmental interest in regulating particular business).

7. O'Connor v. Ortega, 480 U.S. 709 (1987). See *infra* text accompanying notes 73-97 for a greater discussion of the *Ortega* holding.

8. California v. Ciraolo, 476 U.S. 207 (1986); Florida v. Riley, 109 S. Ct. 693 (1989), discussed *infra* notes 171-186 and accompanying text.

9. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987) (warrantless entry and search of probationer's home upheld without probable cause); California v. Carney, 471 U.S. 386 (1985) (warrantless search of motor home upheld under automobile exception to warrant requirement. Special need: mobility of home which can be used as instrument in illegal drug trafficking hampers War on Drugs).

have also lost any right to privacy in our trash bins,[10] our bank records,[11] the identities of those to whom we place telephone calls,[12] and the locations to which we travel and whom we visit.[13] Our children moreover have lost important constitutional protections concerning their right to be secure in their persons and effects at school,[14] while many of us have been shorn of any meaningful protection against unjustified invasions of personal privacy and dignity at the workplace.[15]

I. The Legacy of The Framers

It has been precisely two hundred years since Congress submitted the Bill of Rights to the states for ratification.[16] The intriguing history of how the specific phraseology of the Fourth Amendment came to be adopted has been amply detailed but apparently forgotten.[17] An examination of that history and the literal language of the Amendment[18] as well reveals that the Framers did not attempt to define the contours of a comprehensive right to privacy. Rather, they attempted to construct a restraint upon governmental action. This lack of concern for a rights definition should not be surprising. As Professor Suzanna Sherry has shown, the Framers were not legal positivists who believed they were *creating* rights against government when they drafted the Bill of Rights.[19] For them the source of

10. California v. Greenwood, 486 U.S. 35 (1988) discussed *infra* notes 151-170 and accompanying text.

11. *See* United States v. Miller, 425 U.S. 435 (1976) (no reasonable expectation of privacy in checks, deposit slips, and bank statement; therefore obtaining such information from bank without a warrant held not a search).

12. *See* Smith v. Maryland, 442 U.S. 735 (1979) (no reasonable expectation of privacy in record of telephone calls collected by pen register; therfore obtaining information was not a search).

13. *See* United States v. Knotts, 460 U.S. 276 (1982) (no reasonable expectation of privacy in public travel and movements; therefore electronically monitoring citizen's public movements by using a "beeper" secretly installed in merchandise purchased by him held not a search).

14. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985) (warrantless search of student's purse upheld on reasonable suspicion; special need: maintaining discipline in the classroom and on school grounds).

15. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989). For a more detailed discussion see *infra* notes 98-137 and accompanying text. It should be noted that decisions restricting the ability of citizens to have standing to contest Fourth Amendment violations have also used an "expectations of privacy" analysis to reduce the scope of protection afforded by the Fourth Amendment. Rakas v. Illinois, 439 U.S. 128 (1978); Rawlings v. Kentucky, 448 U.S. 98 (1980).

16. The Amendments were submitted to the states on September 25, 1789. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 102 n.86 (1937).

17. See *infra* notes 38-39 and accompanying text.

18. See *supra* note 4 for text of the Amendment.

19. *See* Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1131-34 (1987).

a right to privacy, vis a vis the state, was to be found in a higher fundamental law — an amalgam of custom and natural rights enshrined in judicially recognized norms and acts of Parliament, supplemented by principles of natural law and tempered by reason.[20]

In drafting the Fourth Amendment, the Framers simply incorporated by reference their recognition of a pre-existing right to be secure from unjustified governmental invasions of privacy.[21] Their main objective, as the historical background giving rise to the Fourth Amendment reveals, was to protect future generations from the abuses they had suffered as colonists at the hands of the British under the hated writs of assistance.[22] Their focus of concern, therefore, was on creating a mechanism for preventing violations of the fundamental right to privacy, not in defining the parameters of its coverage.

The mechanism utilized by the Framers for safeguarding the right to privacy was, of course, the individualized probable cause requirement contained in the "warrant clause" of the Fourth Amendment.[23] The appellation "warrant clause" is somewhat misleading, however, because for the Framers a warrant was a given. It is often forgotten that there was no organized police force in the Colonies.[24] Instead, the warrant was the symbol of the Sovereign's authority, empowering a Crown officer or other representative to search homes and businesses.

Indeed, the writ of assistance itself was a warrant. Its evil, however, lay in the fact that it was a general warrant giving blanket authorization to conduct universal searches for a particular purpose. Armed with a writ of assistance to discover prohibited imports or uncustomed goods, a British customs officer could board any ship and enter and search any "House, Shop, Cellar, Warehouse or Room or other Place."[25] The writ of assistance evidenced proof that the

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20. *Id.* at 1129. *See generally* W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 120-22 (1765).

21. As Leonard Levy has observed in a similar context, the constitutional expression of fundamental rights had the character of a "ritualistic gesture in favor of a self-evident truth needing no further explanation . . . . To [the Framers] the statement of a bare principle was sufficient, and they were content to put it spaciously, if somewhat ambiguously, in order to allow for its expansion as the need might arise." L. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT 430 (1986).

22. *See* N. LASSON, *supra* note 16, at 59.

23. "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ." U.S. CONST. amend. IV.

24. The establishment of an organized police constabulary did not occur in England until 1829. *See generally*, 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 194-200 (1883).

25. The quotation (with commas added) is taken from the Act of Parliament, 1662 13 & 14 Car. 2 Ch. II, §5 which authorized such writs, labelling them a writ of assistance. This act was subsequently made applicable to the Colonies. *See* 2 L.K. WROTH & H.B. ZOBEL, LEGAL PAPERS OF JOHN ADAMS 108-12 (1965).

search was for a valid purpose, and no further justification in the form of individualized probable cause was necessary.[26]

In a Boston courtroom in 1761, James Otis sought to enjoin the issuance of new writs of assistance after the death of King George II, proclaiming they were "monsters of oppression" and "remnants of Starchamber tyranny," which annihilated the sanctity of the home and placed "the liberty of every man in the hands of every petty officer."[27] The thrust of Otis' argument was that only special warrants based upon probable cause and sworn to under oath were valid at common law.[28] The fact that an officer holding a writ of assistance was not required to swear on oath that he thought illegal goods were in the place he desired to search thus deprived the colonists of the protection of the common law. This resulted in the destruction of the fundamental principle that "a man's house was his castle."[29] As Otis complained: "Custom house officers may enter our houses when they please [and] break . . . everything in their way — and whether they break from malice or revenge, no man, no court can inquire — *bare suspicion* without oath is sufficient."[30] The attorney for the Crown conceded that "[i]t is true the common privileges of Englishmen are taken away in this Case" but argued " '[t]is the necessity of the Case and the benefit of the Revenue that justifies this Writ."[31]

After lengthy debate the writs were re-issued. John Adams, who had attended the argument, later observed that this event had been a catalyst in fueling the revolutionary spirit of the colonists:

> Every man . . . appeared to me to go away, as I did, ready to take up Arms against Writs of Assistance. Then and there [began] the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born.[32]

Four years later, in *Entick v. Carrington*[33] general warrants were declared illegal in England as being contrary to the common

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26. 2 L.K. WROTH & H.B. ZOBEL, *supra* note 25, at 108-12.

27. John Adams' abstract of Otis' argument, found in 2 L.K. WROTH & H.B. ZOBEL, *supra* note 25, at 142, 144. Adams' notes reflect that Otis, who had been Advocate General of the Admiralty, told the Court that he had resigned from that post in order to avoid having to argue the case on behalf of the Crown, and had undertaken instead to argue against their issuance of the writs at no fee as a matter of principle. *Id.* at 140.

28. *Id.* at 141-44.

29. *Id.* at 142.

30. *Id.* (emphasis added).

31. *Id.* at 138.

32. *Id.* at 107 (spelling modernized). Curiously, and perhaps in response to Otis' argument, the writ of assistance issued immediately following the case (in December 1761) appears more narrowly drawn in scope than that permitted by the authorizing statute, and, while arguably permitting entry into homes, omits specific authorization to do so. *Id.* at 146.

33. 19 HOWELL'S STATE TRIALS 1029 (1765).

law. Referring to that decision as one of the "landmarks of English liberty," the Supreme Court declared in *Boyd v. United States*:

> As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.[34]

The 14th Article of the Declaration of Rights in the Massachusetts Constitution of 1780, drafted substantially by John Adams,[35] and the original draft of the Fourth Amendment, written by James Madison,[36] reflect that original understanding. These contemporary documents make clear that for the Framers, the heart of the Fourth Amendment lay in the requirement that *individualized* justification be established under oath, as a necessary predicate to governmental intrusion. The cornerstone of that focused justification requirement was, moreover, the concept of probable cause.[37]

The significance of the probable cause requirement also clearly appears from the legislative history of the Amendment. Madison's proposed draft was modified only slightly and approved by the

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34. Boyd v. United States, 116 U.S. 616, 626-27 (1886).

35. "Every subject has the right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant . . . be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases and with the formalities prescribed by the laws." 2 L.K. WROTH & H.B. ZOBEL, *supra* note 25, at 116-17 n.30.

36. Madison was the original sponsor of the Bill of Rights. His proposal for what is now the Fourth Amendment reads as follows: "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, *shall not be violated by warrants issued without probable cause*, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." Annals of Cong., 1st Cong., 1st Sess. p. 452 (emphasis added).

37. Probable cause has historically required more than mere suspicion. Frisbie v. Butler, Kirby's Rep (Conn.) 213 (1787); Henry v. United States, 361 U.S. 98, 101 (1959). Under the traditional definition, probable cause was said to exist if trustworthy information was sufficient to give rise to a reasonable *belief* that an offense had been committed. *See* Draper v. United States, 358 U.S. 307, 313 (1959), where the court stated: "Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the *belief* that an offense has been or is being committed," *citing*, Carroll v. United States, 267 U.S. 132, 162 (emphasis added). Recently, however, the Supreme Court has muddied the waters and diluted this traditional formulation by referring to probable cause as simply a "fair probability" or "substantial chance" of criminal activity. Illinois v. Gates, 462 U.S. 213, 238, 244 n.13 (1983); New York v. P.J. Video, 475 U.S. 868, 877-78 (1986).

House in the following form:

> The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.[38]

Recalling that for the Framers the necessity for a search warrant was a given, it is readily apparent that this formulation captured their fear of general warrants and highlighted the importance of probable cause as the mechanism for curbing unjustified intrusions. However, due to a quirk of history, the text of the Amendment has not come down to us in that form. Instead, due to an error, deliberate or inadvertent, on the part of a certain Mr. Benson of New York, the Amendment as ultimately ratified was formulated into two clauses:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, *and* no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[39]

It is clear from the foregoing examination of the historical and textual origins of the Fourth Amendment that the Framers intended to constrain governmental intrusions upon "[t]he right of the people to be secure in their persons . . . and effects," absent individualized justification for such infringement based upon probable cause. Little more than two decades ago, however, two cases, decided in the same year by the Warren Court, created two separate modes of Fourth Amendment analysis which have undercut that intent and led to substantial impairment of our right to be free from government intrusion and surveillance. The first, *Camara v. Municipal Court*,[40] gave birth to the "special needs" doctrine and its ever-present com-

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38. N. LASSON, *supra* note 16, at 101 (emphasis added). The most significant change was to substitute "effects" for Madison's "and their other property," which seemingly was intended to broaden the meaning. But see the restrictive construction given to this term in Oliver v. United States, 466 U.S. 170, 177 (1984) discussed *infra* note 152.

39. U.S. CONST. amend. IV (emphasis added). During the debate on the floor of the House, Mr. Benson had objected to the phrase "by warrants issuing," claiming that it was not strong enough and should be changed to affirmatively assert "and no warrant shall issue." This proposed amendment was rejected by the House by a considerable majority. House Journal, August 24, 1789. However, Mr. Benson was the chairman of a Committee of Three, appointed to arrange the Amendments in final form as approved by the House. The final version which appeared was Benson's version, even though it had been rejected. No one apparently caught the error and the Amendment was subsequently passed by the Senate and ratified by the states in that form. The discrepancy was apparently first noticed by Osmand K. Frankel. Frankel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366 n.30 (1921).

40. 387 U.S. 523, 538-39 (1967).

panion, the balancing test, a methodological device which has permitted the Court to gradually supplant the warrant and probable cause requirements in an increasing number of circumstances. The second, *Katz v. United States*,[41] was intended to extend the coverage of Fourth Amendment protection by expanding the definition of what constitutes a "search" for the purposes of that Amendment. *Katz*, as will be shown in Part II, however, created a nebulous test which, in the hands of the Rehnquist Court, has increasingly accomplished just the opposite result. Under both modes of analysis, the outcome hinges upon and is indeed pre-determined by the Justices' personal assessment regarding "expectations of privacy."

II. Balancing Away the Framers' Intent

> "There is nothing like a good balancing test for avoiding rigorous argument."[42]

In *Camara*, a lessee was prosecuted for refusing to permit a housing inspector to make a warrantless entry into his premises for the purpose of enforcing San Francisco's Housing Code.[43] The Court held that a search of a private residence was "presumptively unreasonable"[44] in the absence of a warrant, since the home owner had "no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector [was] acting under proper authorization."[45]

Having determined that a warrant was necessary, Justice White, author of the Court's opinion, could have left the applicable standard for granting a warrant in the non-criminal "administrative" search context to future case by case development. Given the literal language of the Fourth Amendment (i.e., that "no Warrants shall issue but upon probable cause"), there is little doubt, however, that most municipal public health and safety legislation would have been invalidated. Such legislation authorized the inspection of entire areas, instead of requiring individualized justification based upon in-

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41. 389 U.S. 347, 353 (1967).

42. Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 761 (1989).

43. *Camara*, 387 U.S. 523.

44. This was the Court's own characterization of its *Camara* holding in See v. City of Seattle, 387 U.S. 541, 543 (1967), a companion case in which the Court held that a businessman could likewise not be prosecuted for insisting upon his constitutional right to require that a fire inspector obtain a warrant authorizing entry into his locked warehouse.

45. *Camara*, 387 U.S. at 532. Even though the entry was authorized by legislation mandating routine annual inspections of apartment buildings, the Court found this check on discretion insufficient, declaring that "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." *Id.* at 533.

formation pertaining to a particular building or residence.[46] Therefore, Justice White reached out, in what was essentially an advisory opinion for magistrates, and attempted to redefine probable cause for the purpose of administrative searches by gutting the probable cause requirement of its most essential characteristic, individualized justification:

> [I]t is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied . . . . Such standards . . . will vary with the municipal program being enforced [and] will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a "synthetic search warrant" and thereby to lessen the overall protections of the Fourth Amendment . . . . We do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitable restricted search warrant.[47]

This passage totally ignores history and the reasons why the Framers insisted upon the probable cause requirement. No doubt from the British government's perspective, a "valid public interest" was served by enforcing the Molasses and Stamp Acts through searches made with writs of assistance! For the Framers, "reasonableness," at a minimum, meant probable cause in its traditional sense. That is, it required individualized suspicion sufficient to give rise to a reasonable belief that the search would uncover evidence at the premises searched, which was relevant to a legitimate state interest.

While the *Camara* opinion pretends to adhere to the Amendment's literal command that "no Warrants shall issue without probable cause," by devoiding the term "probable cause" of its essential meaning, it is, at bottom, logically premised upon a structural interpretation of the Fourth Amendment. This interpretation, subsequently championed by Chief Justice Rehnquist,[48] holds that the

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46. *Id.* at 536. See Justice Clark's dissenting opinion in See v. City of Seattle, 387 U.S. at 550 (Clark, J., dissenting).

47. *Camara*, 387 U.S. at 538-39. That these comments were unnecessary to the actual decision and are dicta is clear from the Court's treatment of *Camara*'s companion case, See v. City of Seattle, 387 U.S. 541 (1967), involving administrative inspections of business premises. In *See* the Court confessed unfamiliarity with the "broad range" of such investigations. *See* 387 U.S. at 544. The Court further observed that any constitutional challenge to such programs would have to be resolved on a case by case basis, declaring: "We hold only that the basic component of a reasonable search under the Fourth Amendment — that it not be enforced without a suitable warrant procedure — is applicable in this context . . . to business as well as to residential premises." *Id.* at 546.

48. Robbins v. California, 453 U.S. 420 (1981), where then Justice Rehnquist declared in dissent: "[N]othing in the Fourth Amendment itself requires that

first clause (known as the reasonableness clause) gives the state power to conduct "reasonable" searches, independent of and unrestricted by the traditional probable cause requirement contained in the second clause (known as the warrant clause).[49] This approach is indefensible both as a matter of history and logic.[50] As noted

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searches be conducted pursuant to warrant. The terms of the amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which *may* issue shall only issue upon probable cause." *Id.* at 438 (emphasis in original).

49. The reasonableness clause is shown by the capitalized portion below, while the warrant clause is in italics:

> THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, *and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

U.S. CONST. amend. IV (emphasis added).

50. See *supra*, Part I of this article. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969), has been cited by Chief Justice Rehnquist as affording historical support for this interpretation. Robbins v. California, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting). Professor Taylor argues that the Framers only intended to limit warrants and were not concerned with warrantless arrests and warrantless searches incident to arrest which had historically been permissible. T. TAYLOR, *supra*, at 23-44. Therefore, Professor Taylor concludes, all searches and seizures should not require a warrant. With this much one can readily agree. However, Professor Taylor's reasoning, which is based solely upon a study of the use of warrants, ignores the independent history of the probable cause requirement. It is true, as Professor Taylor suggests, that a warrant was not necessary to arrest a felon at common law. However, it is not true that a felon could be arrested without probable cause. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 289-91 (1765). Indeed if a man "wantonly" raised a hue and cry without cause, he was "severely punished." *Id.* at 295. Even a Constable broke doors at his peril if he entered a home to search for a fleeing felon upon hue and cry. 2 M. HALE, HISTORY OF PLEAS OF THE CROWN 98-104 (1847). Professor Taylor's conclusions as to warrant use, therefore, do not support an argument that the Framers would have thought that the suspicionless search of a home was reasonable.

The requirement that there be sufficient justification for invading the privacy of the home by establishing the probability that evidence of wrongdoing will be discovered in the premises searched, moreover, had roots in ancient Roman law, and grew out of the development of the common law writs authorizing a party in a dispute between private citizens to enter another's home to search for stolen property. *See* N. LASSON, *supra* note 16, at 17-18 and 34-36. The curbing of the Royal search power to likewise conform to this common law requirement of individualized justification was attained in Entick v. Carrington, 19 Howell's State Trials 1029 (1765), just eleven years before the Declaration of Independence. This decision formed the backbone of the Framers' opposition to the hated writs of assistance.

Not surprisingly, having cut off the first ("reasonableness") clause of the Fourth Amendment from the definition of its meaning (contained in the probable cause requirement of the second clause) Professor Taylor could find "[n]othing in the legislative or other history of the fourth amendment [which] sheds much light on the purpose of the first clause." *See* T. TAYLOR, *supra*, at 43. As Part I of this article has shown, however, the primary protection the Framers sought was to require individualized justification for governmental invasions of privacy. By keeping the warrant requirement, but displacing the probable cause requirement with a general test of "reasonableness," Justice White's dicta in *Camara* thus distorted the purpose of the Amendment and the intent of the Framers. *Camara*, 387 U.S. at 538-39.

above it was through a quirk of history that the Amendment has come down to us with two clauses, rather than the one clause originally proposed by James Madison. More importantly, as Jacob Landynski has pointed out:

> It would be strange, to say the least, for the amendment to specify stringent warrant requirements [in the second clause], after having in effect negated these by authorizing judicially unsupervised "reasonable" searches without warrant. To detach the first clause from the second is to run the risk of making the second virtually useless.[51]

This, of course, is precisely what occurred in *Camara*. Having jettisoned the Framers' individualized justification standard, Justice White concluded that he could discover no "ready test" for determining the "reasonableness" of a search under the now independently suspended first clause, "other than by balancing the need to search against the invasion which the search entail[ed]."[52] Reasonableness under this "balancing test" approach thus became a function of government need. If the government's need to intrude outweighed the citizen's privacy interest infringed by the intrusion, then the intrusion was "reasonable" and did not violate the Fourth Amendment. The Court's decision as to what "weight" to give the respective competing interests was, moreover, completely unguided and uncontrolled by any constitutional principle. The "balancing test" was thus a fiction, giving the appearance of judicial propriety to the determination of constitutional rights based on nothing more than the value preferences of a current majority of the members of the Court.

It is interesting to observe in this context that, just as the Crown had argued in 1761 that it was the "necessity of the Case" which justified issuing writs of assistance for the purpose of enforcing revenue laws,[53] Justice White's assessment of the government's need to make inspections of homes in *Camara* was likewise governed by a value judgment concerning practical necessity. In Justice White's opinion, it was "doubtful" that "acceptable results" would be obtained if the individualized justification standard applied to enforcement of municipal health and safety codes, since many dangerous conditions (e.g., faulty wiring) were not observable without first conducting an inspection.[54] By contrast, since a building inspector did not rummage through drawers and private papers looking for evidence of a crime, there was only a "limited invasion" of privacy involved. Balancing the "limited" intrusion occasioned by such a hypothetical administrative search (no search had actually taken place

51. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 44 (1966).
52. See *Camara*, 387 U.S. at 536-37.
53. See *supra* text accompanying note 29.
54. See *Camara*, 387 U.S. at 537.

in *Camara*) against the necessity for such inspections to ensure community safety, the *Camara* Court was readily able to conclude that such searches, when authorized by warrant, were "reasonable" within the meaning of the Fourth Amendment even in the absence of traditional probable cause.[55] It was in this manner, then, that the "balancing test" gained its first footing. It was a foothold, however, that would continually expand, proving the wisdom of the warning issued almost a century earlier:

> 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 . . . [which] lead[] to gradual depreciation of the right . . . [until] it consist[s] more in sound than in substance.[56]

One year after *Camara*, in *Terry v. Ohio*,[57] the Court utilized the balancing test to justify dispensing with both the warrant and probable cause requirements. Substituting "reasonable suspicion" for probable cause as the standard by which to measure reasonableness, the Court permitted a police officer who reasonably feared for his safety to perform a limited "pat down" search for weapons during a street encounter.[58] Initially, the Court attempted to confine *Camara* and *Terry* as two isolated, narrowly drawn exceptions to the probable cause requirement and was slow to relax this traditional standard of protection, at least with respect to ordinary searches for evidence of crime.[59] In *Michigan v. Summers*,[60] how-

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55. *See id.* This assessment of course involved a value judgment that one's expectation of privacy regarding the general area within the walls of the home is somehow less than it is for areas encompassed by closed drawers.

56. Boyd v. United States, 116 U.S. 616, 635 (1886).

57. 392 U.S. 1 (1968).

58. *Id.* at 26-27.

59. *See* Sibron v. New York, 392 U.S. 40, 64-65 (1968), and Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979) (both cases distinguishing *Terry*). In *Ybarra*, the Court declared: "The 'long prevailing' constitutional standard of probable cause embodies 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.' " 444 U.S. at 95-96, *citing*, Dunaway v. New York, 442 U.S. 200, 208 (1979), *quoting*, Brinegar v. United States, 338 U.S. 160, 176 (1949).

It should be noted, however, that the balancing test has been extensively employed to justify warrantless investigative stops based on reasonable suspicion of criminal activity. In analyzing these temporary *Terry* type seizures, a different set of factors for assessing intrusiveness has been employed which focuses upon the length and purpose of the detention, and the diligence of the police in investigating their founded suspicion. *See, e.g.*, Dunaway v. New York, 442 U.S. 200, 210-11 (1979); United States v. Sharpe, 470 U.S. 675, 685 (1985); United States v. Place, 462 U.S. 696, 709 (1983). Although an investigatory stop also intrudes upon one's privacy, these seizure cases have been analyzed under different principles which focus upon the degree of infringement of physical liberty. They are, therefore, beyond the scope of this Article.

60. 452 U.S. 692 (1981).

ever, Justice Stewart warned in his dissent that the Court was turning the balancing test into a "general rule" that threatened to upset the original constitutional balance which the Framers had drawn between law enforcement and privacy interests.[61] Today, just eight years later, that prophecy has proven to be accurate. Whenever the government can show that there is a "special need" beyond the normal need for law enforcement which makes the probable cause or warrant requirement impracticable, the Court readily engages in a balancing test to determine if a less stringent degree of justification is sufficient.[62] As a result, under this approach, an increasing number of Americans have gradually seen diminishing expectations of privacy in their automobiles,[63] their schools,[64] and their business premises.[65] With respect to the home, the Burger Court, over dissents by Justices White and Rehnquist, did refuse to condone the warrantless night time entry of a home in order to make an arrest and preserve destructible evidence regarding a nonjailable traffic offense.[66] The Rehnquist Court, on the other hand, has sustained the warrantless entry and search of the home of a probationer based only on "reasonable grounds."[67] Undoubtably, the most far reaching privacy decisions by the Rehnquist Court, however, concern personal privacy and security in the workplace. Here, constitutional protections have been totally stripped away, permitting the warrantless search of a public employee's office, and allowing employment in a wide range of jobs to be conditioned upon the disclosure of medical information through warrantless blood, urine and breath testing without any requirement of individualized suspicion of

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61. *See id.* at 706-07 (Stewart, J., dissenting).

62. See, for example, Justice Blackmun's recent explanation concerning the use of the balancing test: "Courts turn to the balancing test only when they conclude that the traditional warrant and probable-cause requirements are not a practical alternative. Through the balancing test, they then try to identify a standard of reasonableness, other than the traditional one, suitable for the circumstances." O'Connor v. Ortega, 480 U.S. 709, 744 n.8 (1987) (Blackmun, J., dissenting). *See also* Griffin v. Wisconsin, 483 U.S. 868, 881 (1987) (Blackmun, J., dissenting). *Cf.* Dunaway v. New York, 442 U.S. 200, 213 (1979), where the Court, in an opinion by Justice Brennan, refused to adopt the balancing test, warning that "the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases." *Id.*

63. *See* New York v. Class, 475 U.S. 106 (1986); Michigan v. Long, 463 U.S. 1032 (1983).

64. New Jersey v. T.L.O., 469 U.S. 325 (1985).

65. New York v. Burger, 482 U.S. 691, discussed *infra* notes 114-121 and accompanying text.

66. Welsh v. Wisconsin, 466 U.S. 740 (1984).

67. Griffin v. Wisconsin, 483 U.S. 868 (1987). Although the Court noted that the supervision of probationers constituted a special need, this decision may be explained by the separate ground that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.' " *Id.* at 874, *citing*, Morrissey v. Brewer, 408 U.S. 471, 480 (1972)).

wrongdoing.[68]

In each case under the "special needs" balancing approach, the Court's assessment of the citizens' expectation of privacy infringed by the search has been of crucial importance in the weighing process.[69] As will be demonstrated below, the fundamental danger in this approach lies in the fact the degree of justification required, and therefore, the degree of Fourth Amendment protection afforded, ultimately rests upon ad hoc subjective value judgments of the Justices, rather than on neutral principles which can be uniformly applied to broad categories of cases.[70] This is especially disturbing when the balance turns on the views of a single justice, as was the case in both *O'Connor v. Ortega*[71] and *National Treasury Employees Union v. Von Raab*.[72]

A. Diminished Privacy in Our Home Away From Home: O'Connor v. Ortega

In *Ortega* a public employee filed a civil rights suit under 42 U.S.C. §1983, alleging that his Fourth Amendment rights had been violated by a supervisor's warrantless search of his desk and office filing cabinets while he was under suspension and on administrative leave. The employee, a physician and psychiatrist for seventeen years at a State Hospital, had been under investigation for alleged improprieties concerning his management of a residency program for physicians. The issue before the Court therefore appeared to involve a single question: what standard of Fourth Amendment protection should be provided in the context of an investigatory search for evidence of work-related employee misfeasance? The Court, however, determined that there was a factual dispute regarding the characterization of the search as "investigatory," since the state had claimed that its agents were only conducting a noninvestigatory search for the purpose of making an inventory of the contents of Dr. Ortega's office. The Court, therefore, also reached out to decide, largely on hypothetical facts, what standard should be employed to

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68. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); Skinner v. Railway Labor Executive Ass'n, 109 S. Ct. 1402 (1989), see discussion *infra* notes 98-137 and accompanying text.

69. A telling example of this is seen in the Court's remand in National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989), see discussion *infra* notes 98-137 and accompanying text, instructing the lower court to "consider pertinent information bearing upon [government] employees' privacy expectations" in assessing the reasonableness of the Customs Service drug testing program aimed at persons having access to classified information. *Id.* at 1397.

70. *See* H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 27 (1961) and Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 3 (1971).

71. 480 U.S. 709 (1987).

72. 109 S. Ct. 1384 (1989).

permit a routine noninvestigatory work-related intrusion into one's workplace office.[73]

Justice O'Connor, writing for a plurality[74] of the Court, conceded that the defendant had a reasonable expectation of privacy in his desk and his file cabinets and that the entry into those areas by the supervisor therefore constituted a "search" for the purposes of the Fourth Amendment. (See Part III *infra* for a discussion of this mode of analysis). Nevertheless, in dicta, the plurality suggested that one might not have a reasonable expectation of privacy regarding intrusions into other areas of an office depending upon how "open" the office was to access by fellow employees or the public.[75] However, a majority of the Court (Justice Scalia, concurring, and four dissenting Justices) expressly reaffirmed protection for privacy of the office *in toto*, arguing that since the office has become another home for most working Americans, expectations of privacy should not be lost merely because consensual entries are permitted for some visitors.[76]

Accepting, therefore, that "[s]earches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment,"[77] a majority of the Court nevertheless determined that the Amendment's express restraints were not a necessary predicate to the invasion of one's privacy in the workplace. Finding that the "realities of the workplace" made the warrant requirement impracticable, a majority easily took the next step and also discarded the probable cause requirement. This was accomplished in the plurality opinion by setting up the "routine noninvestigatory work-related search" as a straw man, thus permitting Justice O'Connor to persuasively argue, using hypothetical facts, that "the work of [public] agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or piece of office correspondence."[78] The plurality opinion then swiftly reached "a similar conclusion for searches conducted pursuant to an investigation of work-related employee mis-

73. 480 U.S. 709 (1987). Since *Ortega* had been decided on cross-motions for summary judgment, no evidentiary hearing had been held. In light of its perceived factual dispute, the Supreme Court determined that summary judgment had been inappropriate, and therefore remanded the cause to determine whether the search was investigatory or noninvestigatory and to then apply the appropriate standard. *Id.*

74. The Chief Justice, Justice White, Justice O'Connor, and Justice Powell (now retired) formed the plurality in *Ortega*. The opinion, therefore, represents the views of only three members of the present Court.

75. 480 U.S. at 718.

76. *See id.* at 732 (Scalia, J., concurring); *Id.* at 736-38 (Blackmun, J., dissenting).

77. 480 U.S. at 715.

78. *Id.* at 723.

conduct."[79] Since the "effective and efficient . . . work of [public] agencies inevitably suffers from the inefficiency, incompetence, mismanagement or other work-related misfeasance of its employees, . . . a probable cause requirement for [investigatory] searches . . . would impose intolerable burdens on public employers."[80]

Balanced against this "intolerable burden" were the privacy interests of hundreds of thousands of federal, state and local governmental employees which the Court acknowledged "may be substantial."[81] However, in an astonishingly cramped view of what constitutes privacy, the plurality maintained that since employees could limit the invasion of their privacy by leaving their "personal belongings" at home, the employer intrusions were not significant.[82] Governmental offices, after all, were provided to employees for the sole purpose of facilitating the work of an agency.[83] The entire discussion of the privacy interests of public employees took only a single paragraph.

Justice Scalia, concurring in the dismantling of the warrant and probable cause protections, found that " 'special needs' are present in the context of government employment [because] the government, like any other employer, needs frequent and convenient access to *its* desks, offices, and file cabinets for work-related purposes."[84] Justice Scalia's opinion is devoid of any discussion of the privacy interests involved.

Having agreed that "efficiency" and "convenience" qualify as special needs justifying the abandonment of traditional warrant and probable cause requirements, the Court fragmented on what standard of protection against unjustified intrusions should be substituted. For Justice Scalia no such substitute is necessary. The fact that a search is work-related (whether investigatory or not) is a sufficient validating purpose. Justice Scalia's *per se* rule would thus give any public employer a writ of assistance to go into any office and search any desk or other area without the need for other justification, so long as the purpose of the search is work-related.[85] By contrast, the plurality opinion at one point seems to adopt a reasonable suspicion standard,[86] but then shifts to "reasonable grounds" as the basis for both investigatory and noninvestigatory searches:

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79. *Id.*
80. *Id.* at 724.
81. *Id.* at 721.
82. *Id.* at 724.
83. *Id.*
84. 480 U.S. at 732 (emphasis added).
85. One presumes that Justice Scalia would require at least a good faith basis for the employer's assertion that the search is work-related. However, his failure to mention even this minimal requirement is disturbing.
86. *See* 480 U.S. at 724.

> Ordinarily, a search of an employee's office by a supervisor will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigative work-related purpose such as to retrieve a needed file.[87]

"Reasonable grounds" of course is not the same thing as "reasonable suspicion," which by definition requires that suspicion of wrongdoing be focused upon an individual. Indeed, the plurality expressly notes that since "individualized suspicion" existed in *Ortega* there was no need to decide whether it was in fact necessary.[88] The stage would therefore appear to be set for future decisions to authorize suspicionless searches for investigatory work-related purposes if there are reasonable grounds for conducting such searches.[89] Thus, for example, if an employer has reasonable grounds for believing that some of its employees are using drugs, the search of *everyone's* desk would be permissible under this sweeping permission of authority.[90] It is ironic that the plurality's noninvestigatory standard actually may, in some cases, be higher than its investigatory standard since it requires that the supervisor have reasonable grounds for believing that the non-investigatory search is "necessary."[91]

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87. *Id.* at 726.

88. *Id.*

89. Given Justice Kennedy's views in the drug testing cases, see *infra* note 107, it would appear that a majority could be found for this position.

90. One would presume that the search of a purse or briefcase would still require a warrant based upon probable cause, United States v. Chadwick, 433 U.S. 1 (1977). However, given the Court's rationale that privacy interests are minimal at the workplace because employees can leave personal belongings at home, this issue is not entirely free from doubt. See, for example, the treatment of personal effects found in automobiles in Ross v. United States, 456 U.S. 798 (1982), where the Court upheld the warrantless search of a zippered leather pouch found in the trunk of the defendant's car. *Ross* may be distinguished from *Ortega* in that in *Ross* there was probable cause to search the car in the first instance. Whether this fact makes a difference, however, is debatable given the flexibility of the balancing test. It could be plausibly argued, for example, that given the reduced expectation of privacy at the workplace, if the intrusion into the employee's office and closed desk drawers for a work-related purpose is reasonable, then entry into a briefcase or purse found in the office would likewise be reasonable so long as the object of the search could be contained within it.

The only remaining distinguishable feature between the above hypothetical and *Ortega* is the fact (emphasized by Justice Scalia) that in *Ortega* the government, rather than the defendant, owned the desk and filing cabinets which were searched. While admittedly a line could be drawn on property rights, it would be an arbitrary line having little to do with any rational theory of privacy. *See infra* note 93.

91. Thus, in Justice O'Connor's hypothetical case of a missing file, it would seem that the employer must make a determination that it is necessary to search a particular office in order to find the file. Assuming that possession of drugs on the job was a work rule violation, however, no such determination would be required since investigatory searches can be justified simply on reasonable grounds. The ambiguity in the plurality's own statement of its twin standards demonstrates the dangers the Court faces when it attempts, through judicial legislation, to create standards covering a broad range of factual situations instead of adhering to the time-honored common law tradition of narrowly deciding cases based upon the facts actually before the

Justice Blackmun, writing for Justices Brennan, Marshall and Stevens, dissented, finding that no "special interest" was presented upon the concrete facts of the case actually before the Court. Since Dr. Ortega was suspended and on administrative leave, he was not permitted to enter the Hospital grounds or have access to his office. The dissenters, therefore, could discover no exigency justifying the need for a warrantless entry into that office. Noting that the minimalistic standard created for searches would make almost any workplace search by a public employer reasonable, the dissent suggested that the plurality had divorced its analysis from the actual facts of the case "to arrive at a result unfavorable to public employees whose position members of the plurality do not look upon with much sympathy."[92]

More to the point, it is submitted, it is the concept of privacy which the Rehnquist majority does not look upon with much sympathy — or perhaps understanding. It is not true, as the plurality suggests, that a person has a limited expectation of privacy at work because they can leave personal items at home. The need for privacy is not something that attaches itself just to pieces of property.[93] Rather, as Jeffery H. Reiman has explained, privacy is a complex set of social relations by which society recognizes — and communicates to the individual that it recognizes — his or her unique existence as a human being, who has worth and is deserving of respect.[94] Reiman's concept of privacy is in turn based upon the work of Stanley I. Benn, who believed that the general right to privacy is grounded upon the principle of respect for persons as agents having the capacity for choice.[95] As Benn observed: "To respect someone as a person is to concede that one ought to take account of the way in which [that person's] enterprise might be affected by one's own decisions."[96] This, it is submitted, the members of the *Ortega* majority failed to do. In diminishing the privacy expectations which public employees can have in their offices, the Court has in the same stroke also diminished their freedom of choice. For, to the extent that I no longer have an expectation of privacy in my office and the drawers of my desk, are not my choices as to what I can put there, and thus my freedom of action, correspondingly restricted? While it may be

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Court. See K. LEWELLYN, THE BRAMBLE BUSH 41-44 (1985).

92. 480 U.S. 700, 734 n.3 (1987).

93. See Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26-44 (1976), *reprinted in* F. SCHOEMAN, PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY, 300-16 (1984). Reiman refutes the idea that the fundamental right to privacy is derivative or dependent upon property interests.

94. *Id.*

95. *See* S. BENN, PRIVACY, FREEDOM AND RESPECT FOR PERSONS (1971), reprinted in F. SCHOEMAN, *supra* note 93, at 223-44.

96. *Id.* at 229.

the government's desk, the distinction between professional and private affairs, as the dissent correctly points out, simply does not exist in the "realities of the workplace" where many employees spend the better part of their days and often much of their evenings. The tragedy of *Ortega* is that because the majority's indifference to privacy produced such a sweeping decision, the Court may never have occasion to examine those realities.[97]

B. *Skinning the Fourth Amendment: The Drug Testing Cases*

In *Skinner v. Railway Labor Executive's Association*[98] and *National Treasury Employees Union v. Von Raab*,[99] both authored by Justice Kennedy, the most recent Reagan appointee, the Court ventured into unexplored territory involving highly sensitive privacy issues surrounding drug testing in the workplace. Answering the question left open in *Ortega*, these decisions balanced Fourth Amendment protections into oblivion by permitting highly intrusive *suspicionless* searches of the person in the workplace context. By skinning away the last remaining layer of Fourth Amendment protection — individualized suspicion — these cases have insured that

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97. It may be argued that because *Ortega* did not involve a search for evidence of a crime, its impact will be limited only to invasions of public employee privacy occasioned by a governmental entity acting in its capacity as an employer. In light of New York v. Berger, 482 U.S. 691 (1987), however, any attempt to draw a line between criminal and noncriminal searches would appear to be untenable. In *Berger*, five police officers conducted a warrantless search of an automobile junkyard. 482 U.S. at 693-94. The sole purpose of the search was to look for stolen vehicle parts. *Id.* at 694. The officers relied upon a state statute authorizing any police officer to enter an auto junkyard during regular business hours to inspect vehicles or vehicle parts subject to record-keeping requirements under the statute. The state sought to justify the search under that branch of the administrative search doctrine which permits warrantless searches of closely regulated business premises for administrative purposes. *Id.* at 696. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (inspections of liquor dealers under 26 U.S.C. §§ 5146(b) and 7606); United States v. Biswell, 406 U.S. 311 (1972) (inspections of firearms dealers under Gun Control Act of 1968). The New York Court of Appeals rejected this contention, finding that the statute violated the Fourth Amendment because it served no truly administrative purpose, but rather used the administrative rationale as a pretext to authorize general searches solely for the purpose of uncovering evidence of criminal activity. New York v. Berger, 67 N.Y.2d 338, 344-45, 493 N.E.2d 926, 929-30, 502 N.Y.S.2d 702, 705-06 (1986), *rev'd*, 482 U.S. 691 (1987). The Supreme Court reversed, ruling that the New York high court's view of its own state statute was incorrect, and upheld the officers' warrantless and suspicionless search under the administrative search doctrine. *Berger*, 482 U.S. at 715-18. The Court argued that "a State can address a major social problem *both* by way of an administrative scheme and through penal sanctions" and concluded that the fact that evidence of crime is uncovered or that police officers are used to implement an administrative scheme does not make the administrative exception to the warrant and probable cause requirement inapplicable. *Id.* at 712, 717 (emphasis in original). For further discussion of *Berger*, see *infra* notes 114-121 and accompanying text.

98. 109 S. Ct. 1402 (1989).

99. 109 S. Ct. 1384 (1989).

the American worker of the 1990's will have significantly diminished expectations of privacy on the job.

Skinner was an easy case in which to make inroads upon the Fourth Amendment. Alcohol abuse was a "significant problem" in the railroad industry.[100] A 1979 study found that 23% of railroad operating personnel were problem drinkers. A review of accident investigation reports over an 11 year period also indicated that alcohol or drug use was a contributing cause in at least 21 accidents which had resulted in 25 fatalities, 61 non-fatal injuries and $19 million in property damage. Acting on this evidence, the Federal Railroad Administration (F.R.A.) promulgated regulations requiring railroad employers to automatically obtain blood and urine samples from employees involved in train accidents which cause injury or substantial damage. These tests are required even if there is no suspicion of impairment due to drugs or alcohol.[101] An employee who refuses to submit to testing cannot work in any job covered by the regulations for nine months.[102] Similar regulations authorize employers to require breath and urine testing following noninjury accidents and certain rule violations.[103] The regulations also authorize testing at any time if there is reasonable suspicion of impairment due to drug or alcohol use. The railway unions brought suit to enjoin enforce-

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100. *Skinner*, 109 S. Ct. at 1407 n.1.

101. 49 C.F.R. §§ 219.201-219.213 (1988).

102. 49 C.F.R. § 219.213(a) (1988). Employment covered by the regulations is broadly defined to include any service for a railroad that is subject to the Hours of Service Act. 45 U.S.C. § 61(A) (1982). Employees are deemed to have consented to testing in circumstances prescribed by the regulations by virtue of their performance of a job covered by the regulations. 49 C.F.R. § 219.11(a) (1988). The option to refuse to submit to testing and suffer what in effect is a nine month suspension from work is statutorily authorized only with respect to Subpart "C" incidents (e.g., major train accidents) which involve taking blood tests. A hearing is provided in which the employee can show that the refusal to take the blood test was made in good faith, based upon medical advice. *Id.* § 219.213(c). Other provisions in the regulations covering both Subparts "C" and "D" provide that physical coercion cannot be used to compel the taking of any tests. *Id.* § 219.11(e). However, the regulations expressly provide that railroad employers retain discretion to impose additional sanctions in the event of refusal. *See id.* § 219.213(3), § 219.1(b). Employers are also subject to sanctions for "failing to take action [under § 219.213] against [an] employee who refuses to provide samples." *Id.* at Appendix A — Schedule of Civil Penalties.

While testing cannot be physically compelled, there is nevertheless significant economic coercion upon an employee to submit to such tests. If such testing proceudres constitute unreasonable searches under the Fourth Amendment, then advance consent to such searches would not be a reasonable condition of employment. McDonell v. Hunter, 612 F. Supp. 1122 (D. Iowa, 1985). *See also* Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

103. 49 C.F.R. §§ 219.301-219.309 (1988). These regulations authorized but did not require employers to collect breath or urine samples if an employee was directly involved in certain rule violations or if there was reasonable suspicion that the employee's acts or omissions had contributed to an accident which involved only minor property damage. No reasonable suspicion of drug or alcohol impairment, however, was necessary, in order to trigger these testing procedures.

ment of the regulations on constitutional grounds. The Court of Appeals for the Ninth Circuit upheld the testing regulations based upon reasonable suspicion of impairment, but concluded that in the absence of such particularized suspicion, the remainder of the testing regulations were unreasonable searches under the Fourth Amendment.[104]

Justice Kennedy (writing for seven members of the Court) disagreed and concluded that upon balance, suspicionless testing was reasonable in the interest of railroad safety. The Court accepted that all three forms of biological testing (blood, urine and breath) constituted searches,[105] and that the Fourth Amendment applied to these searches even though they were conducted by private employers, because there were "clear indices of the Government's encouragement, endorsement and participation."[106] Acknowledging that the piercing of the skin necessary for blood testing amounts to an intrusion which infringes upon reasonable expectations of privacy; that the chemical analysis of urine could reveal a "host of private medical facts" (including whether one was epileptic, diabetic or pregnant); and that few activities were more private than the act of urination; the Court, nevertheless, found these privacy interests wanting when balanced against the government's "special interest" in ensuring railroad safety.[107] The Court concluded that with respect

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104. Railway Labor Executive Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988), *rev'd*, 109 S. Ct. 1402 (1989).

105. Skinner v. Railway Labor Executive's Ass'n, 109 S. Ct. 1402, 1412-13 (1989). Curiously, the Court classified a breath test as a search simply on the basis that this procedure required a "deep lung" breath. *Id.* at 1412.

106. *Id.* at 1412. While testing in certain situations was mandated under the FRA regulations (e.g., major train accident), other regulations simply authorized private employers to test in certain circumstances. However, the FRA mandated that the railroads not bargain away their authority to perform such tests. *Id.* at 1411-12.

107. *Id.* at 1413-18. The Court also deemed insignificant the fact that tested employees were required to disclose all medications taken during the preceding thirty days. *Id.* at 1418 n.7. In addition, Justice Kennedy explicitly declined to deal with the seizure issue presented by the case. *Id.* at 1413. Although the regulations required employees to be transported to an independent medical facility for testing, Justice Kennedy declared that in view of the fact that the collection of biological samples was deemed a search, it was not necessary to view this restriction of the employee's freedom of movement as a seizure. *Id.* at 1413. Instead, Justice Kennedy simply treated the restrictions upon an employee's freedom of movement in connection with testing as a consideration in assessing the intrusiveness of the searches under the testing program. *Id.* Finding the restrictions necessary to procure blood and urine testing minimal, given the employment context (where employees normally consent to significant restriction on their freedom anyway), the Court found that the additional interference with an employee's freedom of movement did not infringe upon significant privacy interests. *Id.* at 1417. The failure to separately analyze the seizure issue is perplexing. To suggest that a restriction on personal liberty can be subsumed under the issue of the reasonableness of a search makes nonsense of the literal language of the Fourth Amendment which protects against *both* unreasonable searches and unreasonable seizures. While the regulations expressly stated that they did *not* authorize "the use of physical coercion or other deprivation of liberty in order to

to mandatory testing following a major train accident, the government's interest in suspicionless testing was "compelling" because it would be difficult to determine individualized suspicion in the chaotic aftermath of such a serious accident. In a passage not joined by Justice Stevens, six members of the Court also added a deterrence rationale as justification for dispensing with individualized suspicion. They argued that since loss of employment was the standard rule if caught using drugs or alcohol on the job, knowledge that mandatory testing would automatically follow an accident would deter such use.[108] The Court then turned to the testing regulations in which the F.R.A. had authorized, but not required, breath and urine testing following a minor accident or a rule violation. Here, too, the Court said, it would be "unrealistic" to require reasonable suspicion of drug or alcohol impairment because it was difficult to spot impairment and the delay caused by an attempt to gather evidence of impairment would result in loss of evidence furnished by the test.

In justifying this sweeping decision, the Court attacked the very foundation of the Framers' Fourth Amendment, declaring that "individualized suspicion" was not a constitutional floor below which a search must be presumed unreasonable. The single case cited by Justice Kennedy in support of this position, *United States v. Martinez-Fuerte*,[109] is instructive in throwing light on how far down the road the Rehnquist Court (with its thumb on the scales of the balancing test) has traveled since *Camara*. *Martinez-Fuerte*, a seizure case, had upheld the brief roadside stop of a suspected illegal alien, based only on apparent Mexican ancestry. The stop occurred at a permanent I.N.S. checkpoint located approximately 50 miles north of the Mexican border. The Court's rationale for permitting this temporary seizure without particularized suspicion was premised upon the fact that the intrusion (a momentary stop for a brief question or two to determine citizenship) was minimal.[110] The *Martinez-*

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compel breath or body fluid testing" (49 C.F.R. § 219.11(e) (1987)), it is by no means clear that in a given case an employee might not reasonably feel that he was required to accompany a supervisor to the hospital. *See* Michigan v. Chesternut, 108 S. Ct. 1975 (1988); United States v. Mendenhall, 446 U.S. 544 (1980). Furthermore, while the regulations also provided that an employee was deemed to have consented to testing by virtue of performing safety sensitive jobs covered by the regulations, it is not clear that such an implied consent provision would be valid. *See* Sullivan, *supra* note 102.

108. *Skinner*, 109 S. Ct. at 1419-20. Justice Stevens thought it a "dubious proposition" that an intoxicated person who operated a locomotive, undeterred by the risk of death or serious personal injury from an accident, would nevertheless be deterred by the risk of dismissal if an accident occurred. *Id.* at 1422 (Stevens, J., concurring).

109. 428 U.S. 543 (1976).

110. *Id.* at 563. While the officer had wide discretion to refer a motorist passing through the checkpoint to the side of the road, the Court stressed that his discretion was nevertheless controlled somewhat in that only cars passing through such perma-

Fuerte Court expressly noted that it was not dealing with searches and stressed that any search and indeed any detention beyond the momentary stop described would, absent consent, require probable cause.[111] How is it possible just thirteen years later, that this case can become a precedent for justifying a far greater intrusion — the search of the human body — without any evidence of misconduct whatsoever?

Apart from administrative searches[112] and prisoner searches,[113] no prior case had permitted a search without some quantum of individualized suspicion. Moreover, the special exceptions made for administrative and prisoner searches were premised upon reduced expectations of privacy. For example, in *New York v. Burger*,[114] the Court noted:

> An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home . . . [citations omitted]. This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries . . . . Because the owner . . . has a reduced expectation of privacy, the warrant and probable cause requirements . . . have lessened application in this context.[115]

The Court in *Burger*, furthermore, established three requirements which must be met before commercial property can be subjected to a warrantless search. First, there has to be a "substantial" government interest at stake. Second, there must be a "constitutionally adequate substitute for a warrant" which advises the owner that the search is lawful and which limits the officers' discretion by "carefully limit[ing]" the time, place and scope of the search. Finally, the warrantless inspection must be "necessary to further [the] regulatory scheme."[116]

Although the Court had diluted the probable cause requirement for administrative searches for homes in *Camara* (while still retaining the warrant requirement) and relaxed the warrant requirement for administrative searches of heavily regulated business premises in *Burger* (substituting a three-pronged test), these searches did not, as *Camara* painstakingly pointed out, involve intrusive invasions of

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nent checkpoints could be stopped. Since motorists could avoid taking such roads the intrusiveness of such checkpoints was thus further limited.

111. 428 U.S. at 567.

112. *See* New York v. Berger, 482 U.S. 691 (1987), *infra* notes 114-121 and accompanying text; *Camara*, 387 U.S. 523 (1967), *supra* notes 43-55 and accompanying text.

113. *See* Bell v. Wolfish, 441 U.S. 520 (1979) (body cavity searches of prison inmates).

114. *Berger*, 482 U.S. 691 (1987).

115. *Id.* at 700.

116. *Id.* at 702-03.

personal privacy.[117] Indeed, *Camara* approved only limited structural inspections of homes and *Burger* countenanced only the inspection of stock on commercial premises open to the public. From this narrow platform it is an extraordinary leap to similarly uphold, without any individualized justificatory showing, such an intrusive search of the "person" as the extraction of blood, or such an extensive invasion of personal privacy as that resulting from the disclosure of intimate medical details revealed by urinalysis. Yet, the Court found that only minimal expectations of privacy were "justifiable"[118] in light of the fact that railroad employees worked in an industry that was "regulated pervasively to ensure safety."[119] As the Court of Appeals below had pointed out, however, the long history of close regulation of railroads had diminished only the owners' and managers' expectation of privacy in *railroad property*.[120] It had not previously acted directly upon railroad employees in any way which could be said to diminish their expectation of privacy in their "persons." Indeed, it had neither required railroad employees to be licensed nor had it established standards governing their qualification for employment.[121]

Having summarily diminished whatever personal expectations of privacy railroad employees may have once had, the Court then proceeded to minimalize the intrusiveness of the searches, citing *Schmerber v. California*[122] as support for the proposition that the extraction of blood did not constitute an "unduly extensive imposition of an individual's privacy and bodily integrity."[123] The reliance upon *Schmerber* is baffling. There the driver of an automobile involved in an accident had been arrested at the hospital where he was receiving treatment for injuries. At the direction of the arresting officer, a doctor, over defendant's objection, withdrew a blood sample for toxicological testing. In upholding this warrantless intrusion, the

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117. See *Camara*, 387 U.S. 523, 537, and discussion *supra* notes 43-55 and accompanying text.

118. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1419 (1989). The fact that one's expectation of privacy can apparently be "reasonable" (thus qualifying the intrusion as a search — see Part III of this article *infra*) and yet not be "justifiable" (thus diminishing its "weight" under the balancing test approach), adds a new level of confusion to the analysis. By what standard is it to be determined that a *reasonable* expectation of privacy is *unjustifiable*? Indeed, some courts have found the term "unjustifiable" so imprecise that criminal statutes employing that terminology have been struck down under the vagueness doctrine. See, *e.g.*, State v. Meinert, 225 Kan. 816, 594 P.2d 232 (1979).

119. *Skinner*, 109 S. Ct. at 1418.

120. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 585 (9th Cir. 1988), *rev'd*, *Skinner*, 109 S. Ct. 1402 (1989).

121. *Id.*

122. 384 U.S. 757 (1966).

123. Skinner v. Railway Labor Executive's Ass'n, 109 S. Ct. 1402, 1417 (1989), *quoting*, Winston v. Lee, 470 U.S. 753, 762 (1985).

Court stressed that the officer "plainly [had] probable cause . . . to arrest"[124] the defendant for drunk driving, and excused the requirement of a warrant under the traditional "exigent circumstances" exception because the "special facts" of that case presented an emergency situation requiring immediate action.[125] Far from supporting suspicionless intrusions into the body, *Schmerber* addressed the question of whether, despite the existence of probable cause and exigent circumstances, the forcible extraction of blood was an "unreasonable" search.[126] The Court's comments that blood tests administered by the physician in a hospital environment were "commonplace" and involved "virtually no risk, trauma, or pain" for most people were thus directed at a separate issue, wholly apart from privacy concerns.[127] Justice Kennedy's use of *Schmerber* to justify suspicionless intrusions into the body thus shamelessly distorted its holding.

Despite the cavalier treatment of employee privacy interests and the Court's refusal to candidly recognize that it was breaking new ground in extending the administrative search doctrine to searches of the person, it is difficult to quarrel with the testing requirement under Subpart "C" for employees who are involved in a major train accident, since the event itself serves as the triggering mechanism for testing and thus acts as a check against the arbitrary abuse of discretion. Similarly, under Subpart "D," testing following a minor accident is triggered by reasonable suspicion that the employee's conduct contributed to the accident. While reasonable suspicion that an employee contributed to an accident does not constitute reasonable suspicion that the employee was impaired as the result of drugs or alcohol, here also the occurrence of an accident serves to control discretion. Curiously, the Court's opinion does not substantially develop this line of reasoning but relegates most of its

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124. *Schmerber*, 384 U.S. at 768.

125. *Id.* at 770-71. Where, for example, police are in hot pursuit of a fleeing felon who enters a house, the Court has excused the warrant requirement on the grounds that such exigent circumstance make compliance unreasonable. *See* Warden v. Hayden, 387 U.S. 294 (1967). *But see* Welsh v. Wisconsin, 466 U.S. 740 (1984), where the Court employed the balancing test approach in holding that the existence of exigent circumstances alone did not justify a warrantless nighttime entry into the home where no important governmental interest was shown to be at stake.

126. This inquiry viewed the reasonableness clause of the Fourth Amendment as an additional *restriction* upon the power to search. Under this view, when core values protected by the Fourth Amendment are at stake, not only must the threshold requirements of a warrant and probable cause be met, but the manner of conducting the search must also be reasonable. *See* Winston v. Lee, 470 U.S. 753 (1985), where despite a court order based upon probable cause, surgery to remove a bullet for use as evidence was prohibited because the manner of conducting the search (i.e., the operation) involved risking permanent nerve damage to defendant.

127. *Schmerber*, 384 U.S. 757, 771.

discussion on the control of discretion to a footnote.[128] Perhaps this is because the argument is less persuasive with respect to testing requirements under Subpart "D" involving nonaccident rule violation situations. Analysis of the long list of rule violations that trigger testing (which include noncompliance with a timetable under certain circumstances, failure to secure "sufficient" hand brakes, and failure to provide "proper" protection for a train) would indicate that there is a great deal of discretion involved in determining when a rule violation has occurred.[129] In the final analysis, however, the "event controls discretion" argument simply proves too much. If the occurrence of an event which has no necessary relationship to drug or alcohol abuse can justify triggering intrusive testing requirements, then *any* event can serve that purpose. If any event can trigger testing, then all events can. Thus, we could be subjected to suspicionless testing upon being stopped for speeding, failing to signal a left turn, or even committing a parking violation. Applying for a license to carry a gun could likewise trigger a testing requirement, as could applying for a license to sell real estate or practice law.

The problem with the *Skinner* decision is not so much with the result which seems laudable, but with its import upon the future. As Professor Kamisar warned several years ago, "the administrative search concept . . . is swarming around the Fourth Amendment like bees. And the drone may soon become deafening."[130] Dissenting in *Skinner*, Justice Marshall likewise predicted, "[U]ltimately, today's decision will reduce the privacy all citizens may enjoy, for as Justice Holmes understood, 'principles of law, once bent, do not snap back easily.'[131] A dire warning to be sure, but perhaps one which deserves reflection. Suppose, for example, a local police department set up a roadblock and directed all passing motorists to step into a stall where under direct observation, shielded only by a partial partition, they were compelled to provide a urine specimen or have their driver's license suspended for 9 months. Given the rationale of *Skinner*, can a line be drawn which says this would not be permissible?"[132]

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128. The discussion of discretion is confined to a brief argument made in support of dispensing with the warrant requirement, *Skinner*, 109 S. Ct. at 1415, 1416 n.6, and a fleeting reference in conclusion. *Id.* at 1422.

129. *See* 49 C.F.R. § 219.301(b)(3) and (c)(1) (1987).

130. Y. Kamisar, *The Fourth Amendment in an Age of Drug and AIDS Testing*, NEW YORK TIMES MAGAZINE, Sept. 13, 1987, at 109.

131. *Skinner*, 109 S. Ct. 1402, 1433 (1989) (Marshall, J., dissenting).

132. The analogy is in fact compelling. Drunk driving is clearly a significant problem and state governments certainly have just as great an interest in ensuring highway safety as the federal government does in ensuring railroad safety. Requiring individualized suspicion is also unrealistic even in the nonaccident context. Given the heavy volume of cars on the road, it is difficult to spot those cars with drivers who, though legally impaired, have not visibly manifested their impairment or had an acci-

The critical variable in determining to what extent *Skinner* will be applied elsewhere, of course, is the importance of the government interest in conducting suspicionless testing. In *National Treasury Employees*, a five-to-four decision which split the Court's own conservative majority,[133] the flimsiest of justifications was sufficient. The case involved the validity of a drug-screening program established by the U.S. Customs Service. The program required urinalysis tests of any employee seeking a transfer or promotion to positions falling into one of three categories: (1) front-line positions having direct involvement in drug interdiction, (2) positions requiring the carrying of firearms, or (3) positions involving the handling of classified information. Employees who tested positive were subject to dismissal.

The five-justice majority quickly determined under the balancing test that the government's interest in such a testing program outweighed any privacy concerns. Front-line DEA agents and people handling classified information *might* be subject to bribery if they were themselves drug users, and employees authorized to carry firearms *might* cause dangerous injury if their judgment or perception was impaired by drugs. These "operational realities" reduced Customs employees' reasonable expectations of privacy since they should expect inquiry into their fitness and probity.

Despite the fact that the testing program had resulted in only 5 out of 3,600 applicants testing positive for drugs, the Court, nevertheless, concluded that where "the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes ample justification. . . ."[134] Upholding suspicionless testing for the front-line and firearms categories, the majority remanded the issue regarding the classified information category

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dent. Finally, such suspicionless testing would serve as an effective deterrent against driving while impaired by drugs or alcohol. Against this compelling need to conduct suspicionless testing in the interests of highway safety, we must balance the privacy interests involved. But driving a car is quite clearly a heavily regulated activity, requiring licensing and the monitoring of one's adherence to the rules of the road by radar, hidden speed traps and roving highway patrols. Drivers, therefore, have a reduced expectation of privacy while engaging in that activity. On balance then, it would appear plausible that a court could decide that the reduced privacy interests of automobile drivers, like the reduced privacy interests of locomotive engineers, would be outweighed by the compelling governmental interest in safety.

133. Admittedly, despite the popular view that Justices Rehnquist, White, O'Connor, Scalia and Kennedy form "a fairly reliable" conservative majority (see Phillips, *The Pendulum of Politics*, Los Angeles Times, July 16, 1989, at Part V, col. 5) it may be too early to attach such labels to Justice Scalia, who parted company with the above group to write an eloquent and blistering dissent in *National Treasury*. The unreliability of labels is also demonstrated in the fact that in the same case Justice Blackmun, often denominated a liberal, joined the so-called conservative camp.

134. 109 S. Ct. at 1395.

because it was not clear that some of the positions listed in this category, (such as Animal Caretaker, Baggage Clerk, and Co-op Student) actually had access to sensitive material.

In dissent, Justice Scalia, joined by Marshall, Brennan and Stevens, declared the Customs Service testing program an "immolation of privacy and human dignity in symbolic opposition to drug use."[135] Not only was there no evidence that drug use was a significant problem in the Customs Service, observed the dissent, but there was also no showing that any of the speculated harms had actually occurred as a result of drug use. Citing *Delaware v. Prouse*,[136] where the Court struck down suspicionless random stops to check motorists' drivers license and registration on the ground that they were not productive, the dissent questioned that the Government's interest in the testing program was anything more substantial than public relations, declaring, "[T]he impairment of individual liberties cannot be the means of making a point. . . .symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search."[137]

From two narrowly defined and well-justified exceptions to the probable cause requirement in *Camara* and *Terry*, the Court has come in little more than two decades to a position where no individualized justification is required to permit substantial invasions of privacy, and where virtually any governmental need is "special," no matter how speculative the justification. If the "special needs" cases have demonstrated how easy it has become for a government interest to qualify as "special," the search definition cases discussed below demonstrate how difficult it has become for a privacy interest to qualify for Fourth Amendment protection. Part III addresses this second mode of Fourth Amendment analysis.

III. From *Katz* to *Riley*: Open Season on Open Backyards

The progeny issuing from *Katz v. United States*[138] ironically have turned that decision's rationale for expanding Fourth Amendment coverage into a double edged sword producing even greater threats to privacy interests than the balancing test. This is because the outcome of the *Katz* mode of analysis has increasingly resulted in the total loss of Fourth Amendment protection. Under a *Katz* analysis, "reasonable expectations of privacy" have become the divining rod for revealing what constitutes a "search" for the purposes of the Fourth Amendment. Obviously if no "search" has occurred,

135. *Id.* at 1398.
136. 440 U.S. 648 (1979).
137. 109 S. Ct. at 1401.
138. 389 U.S. 347 (1967).

then the Fourth Amendment does not apply and its protection against invasions of privacy are simply not available. Thus, if the Court, in its unbridled determination, is of the opinion that a citizen's expectation of privacy is not "reasonable," then there is no constitutional requirement that governmental activities which invade the privacy interest themselves must be reasonable.[139] A finding that no "search" has occurred is tantamount to finding that there is no constitutionally protectable interest. As will be seen, this is the fundamental flaw in the *Katz* mode of analysis. It conflates two separate and distinct issues: (1) Is there a constitutionally protected interest? and (2) Has that interest been infringed?

In *Katz*, an electronic eavesdropping device attached to the outside of a telephone booth recorded a bookie's incriminating conversation. The prosecution argued that under the trespass doctrine established in *Olmstead v. United States*[140] there was no Fourth Amendment "search" because there had been no physical penetration of the phone booth. Furthermore, the prosecution argued, the phone booth was not a constitutionally protected area. Declaring that the Fourth Amendment protected "people not places,"[141] the Court held that the interception of defendant's conversation constituted a search because it "violated the privacy upon which he justifiably relied."[142] It is, however, the two pronged test set forth in Justice Harlan's concurring opinion, that has become the touchstone which subsequent decisions have adopted, "My understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and,

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139. It is possible, however, to envision a Due Process claim under the Fifth and Fourteenth Amendments even though it has been determined that no Fourth Amendment violation has occurred. For example, in United States v. Knotts, 460 U.S. 276 (1983), where the Court held that no search occurred when police monitored defendant's public travel by means of a hidden beeper, defendant raised the possibility of official harassment by pointing out that twenty-four hour surveillance of any citizen would be possible without judicial authorization. Chief Justice Rehnquist responded to this argument stating, "if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 284. Whether the Chief Justice was alluding to the due process clause is unclear. In light of Graham v. Connor, 109 S. Ct. 1865 (1989), which held that claims against police for using excessive force when making arrests are governed by the Fourth Amendment *rather than* the due process clause, this avenue would now appear to be foreclosed. In any event, a due process approach would operate after the fact and, therefore, would not, like the warrant requirement, *prevent* unreasonable governmental action. Furthermore, the standard under a due process analysis would prohibit only the grossest abuses, since for the present Court, even arbitrary and unreasonable law enforcement practices do not rise to the level of a due process violation unelss they "shock the sensibilities of civilized society." Moran v. Burbine, 475 U.S. 412, 433-34 (1986).

140. 277 U.S. 438 (1928).

141. 389 U.S. at 351.

142. *Id.* at 353. Justice Black dissented, maintaining that the Fourth Amendment applied only to searches of physical places and seizures of tangible objects.

second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[143] Although *Katz* necessarily rejected the trespass doctrine as the *exclusive* test for determining when there has been an infringement of an interest protected by Fourth Amendment, *Katz* by no means suggested that a governmental trespass against property rights should not continue to be sufficient to invoke Fourth Amendment protection. Instead of viewing the "reasonable expectation of privacy" test as an alternate or supplemental approach for special situations like electronic surveillance, however, the Court subsequently abandoned the trespass doctrine altogether. Thus, in *Oliver v. United States*,[144] the Court found the fact that police illegally trespassed on posted property was constitutionally irrelevant, declaring:

> [I]t does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass . . . confers protection from intrusions by others far broader than those required by the Fourth Amendment.[145]

Having thus discarded the trespass doctrine, the *Oliver* Court then concluded, without citation to any historical material, that "[t]he Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary governmental interference."[146] This remarkable statement of course blatantly contradicts *Katz's* fundamental premise that the Amendment protects people not places.

In *Oliver*, police officers acting on an anonymous tip, entered upon defendant's farm without a warrant or probable cause and observed marijuana growing in a field. Pursuing its "enclave" theory of Fourth Amendment privacy, the Court declared that "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[147] Therefore, "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[148] The fact that the officers had intruded upon the defendant's property based solely upon an unverified and unsubstantiated anonymous tip was therefore irrelevant. Since the officers' illegal trespass did not infringe any privacy interest, and since the defendant had no reasonable expectation of privacy in his field, the officers' conduct did not constitute a

143. *Id.* at 361.
144. 466 U.S. 170 (1984).
145. *Id.* at 183-84 n.15.
146. 466 U.S. at 178.
147. *Id.* at 179.
148. *Id.* at 178.

"search." Thus, the protections of the Fourth Amendment were unavailable.

But surely this is a cramped conception of privacy which fails to recognize that privacy is also a power as well as a status. As Stanley Benn has observed, "[p]rivacy as a power" means the ability ". . . to control access by others to a private object (to a private place, to information, or to an activity). [It] is the ability to maintain the state of being private or to relax it as, and to the degree that, and to whom one chooses."[149] The common law recognized in developing the law of trespass that the ability to maintain privacy by controlling access to one's property should be protected as a right. Surely the Framers would not have excised that substantial body of doctrine from their minds when contemplating the fundamental right to privacy and security which the Court has repeatedly asserted the Fourth Amendment was intended to protect.[150]

As *Oliver* graphically demonstrates, by making expectations about privacy the exclusive test for determining whether a search has occurred, the Court has enabled itself to diminish constitutional protection for privacy. As its recent decision in *California v. Greenwood*[151] reveals, moreover, the effect of this approach has been to allow the Justices' personal judgment about the reasonableness of privacy expectations to defeat privacy interests expressly protected by the literal language of the Fourth Amendment.[152]

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149. S. BENN, A THEORY OF FREEDOM 266 (1988).

150. *Camara*, 387 U.S. 523, 528 (1967). *See also* Boyd v. United States, 116 U.S. 616, 626-28 (1886).

151. 108 S. Ct. 1625 (1988).

152. In *Oliver*, the Court had been able to avoid a direct conflict with the literal language of the Amendment by finding that open fields were not encompassed under a textual approach. Acknowledging that James Madison's original draft of the Fourth Amendment had protected "other property" and that this language had been changed in committee to "effects," the Court nevertheless concluded that "the term 'effects' is less inclusive than 'property' and cannot be said to encompass open fields." Oliver v. United States, 466 U.S. 170, 177 (1984). In light of the history which gave rise to the Fourth Amendment (see Part I of this article, *supra*) this interpretation is untenable. The merchants in whose behalf James Otis had argued against the issuance of new writs of assistance, had been aggrieved by the seizure of their goods and stock. Indeed John Adams had defended John Hancock in an incident involving the seizure of Hancock's sloop the *Liberty* and the confiscation of its cargo of Madeira —an event that had touched off a riot in Boston in 1768. *See* N. LASSON, *supra* note 16, at 72, and L.K. WROTH & H.B. ZOBEL, *supra* note 25 at 173-77. It would therefore seem apparent in light of this history, that the reason "other property" was changed to "effects" was to ensure that protection was *extended* to goods and chattels and other personal property as well as real property. It is also inconceivable that the Framers, many of whom were businessmen, would have intended to exclude warehouses and other real estate from protection by changing the words "other property" to "effects."

A. Trashing the Fourth Amendment: California v. Greenwood

In *Greenwood*, a neighbor had complained about heavy vehicular traffic late at night in front of Greenwood's single-family home. Police thereafter observed "several" cars making brief stops at Greenwood's house.[153] The neighborhood trash collector was then contacted and during the next eight weeks, at police request, he turned over Greenwood's sealed trash bags to the police for their scrutiny. Information obtained from Greenwood's garbage was subsequently used to obtain a search warrant which, upon execution, led to the discovery of cocaine and hashish. The trial court dismissed the narcotics charge, relying upon a long-standing California Supreme Court precedent, *People v. Krivda*,[154] which held that warrantless searches of a citizen's trash violated the Fourth Amendment. The California Court of Appeals affirmed the trial court, and the California Supreme Court declined review. The Supreme Court reversed.

Continuing its "enclave" theory of privacy the Court held that the warrantless seizure and opening of a sealed, opaque, plastic trash bag, temporarily left for collection outside the curtilage of a home, did not violate the Fourth Amendment. While the majority of lower courts considering the subject reached a similar conclusion, Professors LaFave and Israel have observed that:

> [T]he better view is that when a person puts out his trash for collection he has a justified expectation that items not visible without rummaging will not be examined by others until the trash has lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere . . . . It is [therefore] inconsistent with the *Katz* rationale to hold, as some courts have, that no search occurred.[155]

In a brief opinion that lacked the usual analytical clarity that one has come to expect from Justice White, the Court seemingly disposed of the case under a *Katz* analysis, concluding ". . . that society would not accept as reasonable respondent's claim to an expectation of privacy in trash left for collection in an area accessible to the public. . . ."[156] The "enclave" mentality, so antithetical to *Katz's* fundamental premise, is clearly revealed in Justice White's remark that "Fourth Amendment analysis must turn on such factors as 'our *societal* understanding that certain areas deserve the most scrupulous protection from government invasion.' "[157]

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153. 108 S. Ct. at 1627.

154. 5 Cal. 3rd 357, 96 Cal. Rptr. 62 (1971).

155. W. LAFAVE AND J. ISRAEL, CRIMINAL PROCEDURE § 3.2 (h) (1984).

156. 108 S. Ct. at 1629. Yet *Katz* declared: "What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351-52.

157. 108 S. Ct. at 1630, *citing*, Oliver v. United States, 466 U.S. at 178 (empha-

Curiously, despite the Katzian overtones of the opinion, *Greenwood* never addresses the issue in terms of whether the opening of the trash bag constituted a "search." Rather the issue is framed as ". . . whether the Fourth Amendment prohibits the warrantless search and seizure" of the trash bag.[158] This would seem to call for a balancing of interests approach,[159] but the opinion is silent on that subject as well. The true rationale, it would seem, appears in the following passage:

> [W]e conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops and other members of the public . . . . Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so . . . a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.[160]

But this is the language of waiver, more properly considered in terms of Fourth Amendment analysis, under the third party consent doctrine. In *Schneckloth v. Bustamonte*,[161] the Court had refused to apply traditional standards for waiver of constitutional rights to the surrender of Fourth Amendment rights.[162] Thus, instead of requiring the "intentional relinquishment of a 'known' right,"[163] the Court

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sis in original).

158. 108 S. Ct. at 1627.

159. See Part III of this article *supra*.

160. 108 S. Ct. at 1629.

161. 412 U.S. 218 (1973).

162. Under the traditional formulation set down by Justice Black in Johnson v. Zerbst, 304 U.S. 458 (1938), the waiver of a constitutional right must be voluntary, knowing and intelligent. With respect to the knowing and intelligent standard, a valid waiver thus normally requires "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464. This, therefore, logically requires that the citizen (i) be aware of the existence of a legal right, and (ii) be aware of the nature of his or her conduct — i.e. that the right in question is being forfeited by such conduct. *Schneckloth* purported to abandon this formulation, insisting that even if a person was not aware that he had a legal right to refuse entry, "there [was] nothing constitutionally suspect in a person's voluntarily *allowing* a search." 412 U.S. at 243 (emphasis added). As this passage demonstrates, while *Schneckloth* discarded the first prong of the traditional standard (awareness of the existence of a legal right) it did not, and indeed could not, discard the second prong (awareness of the nature of one's conduct). To *allow* a search, by hypothesis, includes elements of awareness and choice. It cannot be said that one "allows" an event, if they are not, at a minimum, aware that there is a risk that the event will take place as a result of their act or omission. One cannot choose to suffer a consequence if one is not aware that such a consequence will be the result or likely result of one's conduct. It has been the Court's failure to understand this aspect of *Schneckloth* that has caused it to fall into confusion and turn to an "expectation of privacy" analysis when instead it ought properly to be considering what levels of awareness and freedom are necessary to the capacity to make valid choices. See text following note 203 *infra*.

163. *Schneckloth*, 412 U.S. at 238.

simply focused upon whether the consent given to search was "voluntary."[164] With respect to consent by a third party, the Court has adopted a two-pronged test known as the "common authority" rule. Under this test, evidence obtained by third party consent is admissible if the prosecution shows: (1) that consent was obtained from a person who had sufficient authority over the premises or effects to permit a search in his or her own right, and (2) that the privacy holder assumed the risk that a search might be permitted by that person having apparent authority.[165]

Applying this test to the facts of *Greenwood* raises a number of interesting questions: First, what is the nature of the authority that a homeowner gives to her trash collector with respect to sealed trash bags? Does it include the right to open and inspect such containers? Second, assuming sufficient authority exists to permit the search, what degree of risk must the privacy holder have assumed with respect to whether the trash collector would permit the police to search? Is the mere possibility sufficient or is a reasonable probability, strong likelihood or some other standard required? Moreover, doesn't the answer to that question require assessing the risk that the police will ask the trash collector to permit such a search in the first place? Does the average citizen assume that there is a risk such a request might be made with respect to his garbage? Finally, it might also be asked whether, as the dissent points out, a person who is compelled by law to remove waste material from his premises and who is prohibited from otherwise disposing of it by burning, voluntarily conveys his trash to public sanitation workers.

Had the Court analyzed *Greenwood* as a third-party consent case, it would have had to address these issues. Moreover, the burden of proof would have been on the state to establish valid consent.[166] By employing a muddled *Katz* analysis instead of treating the issue as one of third-party consent, the Court thus not only conveniently avoided having to discuss these questions, but also effectively shifted the burden of proof to the defendant.

Even taking the *Greenwood* opinion on its own terms, the Court's "reasonable expectation of privacy" analysis is far from con-

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164. In Colorado v. Connelly, 479 U.S. 157 (1986), the Court completely renovated the "voluntariness doctrine" for the purposes of the waiver of Fifth Amendment rights. Under this re-formulation, "coercive police activity" is a "necessary predicate" to a finding of involuntariness. *Id.* at 167. Given the Court's deterrence-based rationale for its holding in *Connelly*, the Court may well treat "voluntariness" the same in both Fourth and Fifth Amendment contexts. *See* Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59, 143 (1989).

165. *See* United States v. Matlock, 415 U.S. 164 (1974) and W. LAFAVE, SEARCH AND SEIZURE, § 8.3 (2d ed., 1987).

166. Bumper v. North Carolina, 391 U.S. 543 (1968).

vincing. As Justice Brennan observed in dissent, "intimate activity associated with the 'sanctity of a man's home and the privacies of life' " is revealed in our trash.[167] Indeed, our garbage reveals details about our sexual practices, health, political affiliations, eating, reading and recreational habits, personal relationships and private thoughts. To evaluate whether there remains any expectation of privacy in these telltale "effects," one has only to contemplate his or her own reaction, for example, to the discovery of a reporter going through their garbage searching for details of one's personal life. As Professors LaFave and Israel have noted: "One who deposits refuse into a dumpster might expect some minor, inadvertent examination by garbagemen or other third persons, but such expectations would not include a detailed systematized inspection of the garbage . . ."[168]

Nevertheless, the Court in *Greenwood* concluded that by placing a sealed opaque container on the street for the purpose of conveying it to a trash collector, we surrender any reasonable expectations of privacy in the contents of that container. Suppose, however, Greenwood had been given the option to burn his trash and had set out on his way to an incineration facility when he temporarily placed his trash bag down on the street corner while waiting to cross the street. Can there be any question that while the police could have detained the bag on reasonable suspicion,[169] they could not have opened it without a warrant based upon probable cause?[170]

The Court's refusal to conceptualize privacy as a power to control who has access to information about ourselves has led to diminishing expectations of privacy and thus, to diminished protection under the Fourth Amendment. In *Greenwood*, moreover, the trash bags were clearly "effects" expressly protected by the literal language of the Amendment. Yet, through the medium of the Court's nebulous "expectations of privacy" analysis, that protection has disappeared.

B. *The Knothole Theory of Privacy: California v. Ciraolo*[171]

Even when it has been established that a reasonable expectation of privacy exists, that does not necessarily end the inquiry. A second tier of analysis in the *Katz* "expectations of privacy" approach to Fourth Amendment jurisprudence can still operate to de-

167. 108 S. Ct. at 1634, *quoting*, Oliver v. United States, 466 U.S. 170, 180 (1984), and Boyd v. United States, 116 U.S. 616, 630 (1886).
168. W. LAFAVE, SEARCH AND SEIZURE, § 8.3 (2nd ed., 1987).
169. United States v. Place, 462 U.S. 696 (1983).
170. *See* 108 S. Ct. at 1633 (Brennan, J., dissenting).
171. 476 U.S. 207 (1986).

feat an otherwise legitimate expectation of privacy, depending upon the method of surveillance used to invade that privacy interest. In order to appreciate how concern over methods of surveillance has fragmented the Rehnquist Court, it is necessary to revisit *California v. Ciraolo*, a Burger Court precedent which previously addressed that issue.

In *Ciraolo*, Santa Clara police received an anonymous telephone tip that marijuana was growing in a yard near the intersection of Stebbins and Clark.[172] Unable to substantiate the tip by investigation of the neighborhood at ground level, police noticed that a six-foot outer and 10-foot inner fence completely enclosed defendant's yard on Clark Street. Two police officers trained in aerial recognition of marijuana then flew over defendant's backyard in a fixed wing aircraft at 1,000 feet and observed a swimming pool, patio and marijuana plants eight to ten feet in height growing inside the fence. This naked-eye observation was used in obtaining a search warrant.

Defendant argued that because his fenced yard was within the curtilage of his home, the aerial observation was not permissible without a warrant. Therefore, asserted defendant, since the search warrant was the fruit of an illegal aerial search, the 73 marijuana plants discovered pursuant to its execution should be suppressed.

The Supreme Court disagreed. Conceding that the yard was within the curtilage[173] of the home and, therefore, subject to Fourth Amendment protection, Chief Justice Burger, writing for a five-member majority, nevertheless began his consideration of the issue by observing that the "touchstone of Fourth Amendment analysis" was whether a person had a "reasonable expectation of privacy."[174] Despite the fact that defendant had subjectively manifested his expectation of privacy by erecting two fences to obscure ground level view, the majority found that defendant's expectation was unreasonable. The majority reasoned that because commercial and private air traffic routinely travel at an altitude of 1,000[175] feet, "[a]ny member

172. The message left by the anonymous tipster said: "Can see grass growing in yard Stebbins by Clark, S/B on left." Brief for Petitioner at Joint Appendix, 11, California v. Ciraolo, 476 U.S. 207 (1986) (No. 84-1513).

173. The Court defined "curtilage" as ". . . the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life' . . . an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 U.S. at 212-13. *See* United States v. Dunn, 480 U.S. 294, 297 (1987) (Court employed a four-factor approach in determining that a barn was not within the curtilage).

174. 476 U.S. at 211.

175. The lowest elevation permitted over congested areas of a city by FAA regulations is actually 1,000 feet *above the highest obstacle* within a horizontal radius of 2,000 feet of the aircraft. 14 C.F.R. § 91.79(b) (1988). Since telephone poles and indeed the defendant's house would presumably constitute obstacles to air traffic, the Court's persistent assertion that the police aircraft was lawfully in public navigable

of the public flying in this airspace who glanced down could have seen everything that these officers observed."[176] The Chief Justice's opinion also stressed that the officers' naked eye observation, unaugmented by technology, was made in a physically non-intrusive manner from public navigable airspace.

After *Ciraolo*, it appeared that a majority[177] of the Court would be prepared to find an expectation of privacy unreasonable, even in an area expressly covered by the text of the Fourth Amendment, if it was possible that the expectation of privacy could be defeated by a naked-eye observation made in a physically non-intrusive manner from a lawful vantage point. In effect, by failing to put a roof over his backyard, the defendant in *Ciraolo* had left a rather large knothole in his protective fence. Since it was possible to view his yard through that knothole, his expectation of privacy and his Fourth Amendment protection vanished. Justice Powell, writing for Justices Brennan, Marshall and Blackmun, issued a strong dissent. The *Katz* Court, Justice Powell observed, had assessed the reasonableness of the defendant's expectation of privacy by focusing upon the importance of that expectation to the individual and to a free society. The Court had not made that determination by looking to see whether there was some method by which it was possible to defeat the expectation of privacy. Moreover, the dissenters asserted, the risk to defendant's privacy from overflying commercial or private aircraft was "virtually nonexistent" and "too trivial to protect against" since such travellers catch only a "fleeting, anonymous and nondiscriminating glimpse" of the landscape below.[178] To equate the risk of such observations with the risk of deliberately focused official aerial observations thus ignores the qualitative difference between such police surveillance and normal use of the airways.

C. *How Low Can You Go?: Florida v. Riley*[179]

> In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.[180]

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air space at 1,000 feet would appear to be technically incorrect. Query: Does the Supreme Court's assertion to the contrary constitute an interpretation of the FAA Regulations which changes by implication the meaning of the term "obstacle"?

176. 476 U.S. at 213-14.

177. The *Ciraolo* majority included Justices White, Rehnquist, Stevens and O'Connor in addition to then Chief Justice Burger.

178. 476 U.S. at 223.

179. 109 S. Ct. 693 (1989).

180. Florida v. Riley, 109 S. Ct. 693, 705 (1989) (Brennan, J., dissenting), *quoting*, G. ORWELL, NINETEEN EIGHTY-FOUR 4 (1949).

Florida v. Riley,[181] presented the Rehnquist Court with some obvious questions left unanswered by *Ciraolo*: Since a helicopter can lawfully hover at any altitude so long as it is operated without hazard to persons or property[182] can one have a reasonable expectation of privacy from such observation? If not, how low can a helicopter descend before it becomes "physically intrusive?" In piecing together the opinions of a fragmented Court, it appears that the formula which a majority adopted for answering the first question rendered the second question unnecessary.

In *Riley*, police again were acting on an anonymous tip that the defendant was growing marijuana on his property. Riley lived in a rural area and had a greenhouse located 10 to 20 feet behind his mobile home. A wire fence encompassed both the greenhouse and the mobile home and the property was posted with a "Do Not Enter" sign. Unable to see into the greenhouse from the road, officers circled twice over Riley's property in a police helicopter at a height of 400 feet. Two of the translucent corrugated roofing panels to the greenhouse were missing, and through this opening the officers observed marijuana plants. Based upon this observation a warrant was obtained and the marijuana seized.

Justice White, writing for a plurality which included the Chief Justice and Justices Scalia and Kennedy, took the view that as a general rule the police should be permitted to see anything observable from a lawful public vantage point.[183] Citing statistics on police use of helicopters to support its conclusion that helicopter flight was "routine" in the United States, the plurality found *Ciraolo* controlling. Since any member of the public could legally have flown over Riley's property in a helicopter at 400 feet and looked through the missing panels into his greenhouse, Riley could not claim to have a reasonable expectation of privacy from such an observation. The aerial helicopter observation was, therefore, not a search and no justification for the intrusion was required.

Justice O'Connor, concurring in the result only, disagreed with the plurality's "any lawful public vantage point" standard, noting that FAA regulations governing lawful vantage points in the air were concerned with air safety, not with expectations of privacy.[184] The question in her view was, therefore, not whether the police were

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181. 109 S. Ct. 693 (1989).

182. 14 C.F.R. § 91.79(d) (1988).

183. 109 S. Ct. at 696.

184. *See* Comment, *Helicopter Observations: When Do They Constitute a Search?* 24 CAL. W. L. REV. 379, 392 n.88 (1988) reaching a similar conclusion that the protection of privacy interests is "too important a question to be determined by the mechanistic application of flight regulations promulgated by an administrative agency."

where they had a right to be under FAA regulations, or whether police helicopters routinely flew at 400 feet. For Justice O'Connor, the appropriate standard was whether members of the *public* flew at that altitude with "sufficient regularity" that the defendant's expectation of privacy was unreasonable:

> If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.[185]

Because Justice O'Connor believed that the defendant must bear the burden of proof on the issue of whether or not an expectation of privacy was reasonable, and because Riley had presented no evidence to contradict her belief that there was "considerable public use of airspace at altitudes of 400 feet,"[186] Justice O'Connor concluded that the defendant's expectation of privacy was not reasonable. The four dissenters agreed with Justice O'Connor that the plurality's lawful public vantage point test should be rejected. They were nevertheless of the opinion that for most communities it was a "rare event" for a non-police helicopter to fly over one's backyard at 400 feet. Justice Brennan, writing for Justices Marshall and Stevens, would have taken judicial notice of that fact, or in the alternative, would have found against the state by default since there was no evidence of the frequency of such flights on the record. Justice Blackmun, dissenting separately, would likewise have placed the burden on the prosecution, but would have remanded to give the state an opportunity to meet that burden.

What is to be made from the shards of this fragmented decision? At least two points are clear. First, a majority has placed the burden on the defendant to prove that his subjective expectation of privacy is one which society should accept as reasonable. This includes the burden of proving that his expectation that he would be free from a particular method of surveillance is also reasonable. Second, a majority of the Court clearly rejects the plurality's implicit assumption that police conduct alone can defeat an otherwise reasonable expectation of privacy. That assumption arises from Justice White's statement that "[a]s a general proposition, the police may see what may be seen "from a public vantage point where [they have] a right to be."[187]

Certainly, rejection of "lawful public vantage point" as a gen-

185. 109 S. Ct. 698-99.
186. *Id.* at 699.
187. *Id.* at 696, *quoting*, California v. Ciraolo, 476 U.S. 207, 213 (1986).

eral test is sound. Under such an overly broad license the police would everywhere be able to defeat reasonable expectations of privacy simply by invading them. Such intrusion would be limited only by the bounds of the law of trespass, FAA regulations and perhaps other legislation having nothing to do with privacy. But herein lies the rub. In *Oliver*, the Court specifically rejected the idea that unlawful police conduct (trespassing upon defendant's open field) had any constitutional relevance.[188] This view was recently re-affirmed in *United States v. Dunn*.[189] Why then does Justice White stress the lawfulness of the officers' conduct, noting that it is "of obvious importance?"[190] The answer appears to lie in the two-tiered analysis that must now be undertaken after *Ciraolo* and *Riley*. In both *Oliver* and *Dunn*, the Court found that there was no reasonable expectation of privacy in the area invaded. That being the case, the fact that the officers trespassed was irrelevant because, according to *Oliver*, the law of trespass cannot be the test of Fourth Amendment privacy rights.[191] However, in both *Ciraolo* and *Riley*, the defendants *did* have a threshold reasonable expectation of privacy in their curtilage. Nevertheless, the Court engaged in a second level of analysis by asking whether the defendants also had a reasonable expectation of privacy regarding the method of surveillance. Trespass or other unlawful conduct is thus relevant here because people don't reasonably expect the police to unlawfully invade what the Fourth Amendment ordinarily recognizes as a protected area of privacy.

It is also important to recognize what is obvious but unstated in *Riley*. The method of surveillance was by helicopter, a highly sophisticated piece of technological equipment, which when used by police for surveillance, "augment[s] the sensory faculties bestowed upon them at birth"[192] by permitting them to see what they would otherwise be unable to see standing on their own two feet. A careful

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188. 466 U.S. 170, 183 (1984). See discussion *supra* note 152.

189. 480 U.S. 294 (1987). In *Dunn* officers trespassed on defendant's ranch and were thus not in a lawful position when they peered into his barn and observed an illicit drug laboratory. The Court found, however, that the barn was not within the curtilage and that "no constitutional violation occurred" as a result of the officer's trespass. *Id.* at 304.

190. *Riley*, 109 S. Ct. at 697.

191. 466 U.S. at 183 n.15.

192. United States v. Knotts, 460 U.S. 276, 282 (1982). In *Knotts*, Justice Rehnquist, writing for five members of the Burger Court, found that the use of a beeper to trail defendant on the public highway did not violate the Fourth Amendment since defendant did not have a reasonable expectation of privacy in his public movements, and the use of the beeper revealed no more than would have been revealed to police had they visually surveilled defendant along his public route. By contrast, in United States v. Karo, 468 U.S. 705 (1984), the Court found the warrantless monitoring of a beeper installed inside a can of ether violated the Fourth Amendment because it revealed information about the inside of a home which would otherwise not have been observable by officers standing outside the home.

reading of Justice White's opinion with this perspective in mind reveals a more refined, two-pronged analysis than just the "lawful public vantage point" test. The second prong is revealed by Justice White's somewhat feeble effort to show by statistics that helicopter flight is " 'routine' in this country."[193] The purpose of this effort, however, was not to establish the foreseeability of helicopter flights as much as it was to show that helicopters are "generally available" to the public. With this fact established, Justice While was thus able to avoid running afoul of the Court's (and the Government's) acknowledgement in *Dow Chemical Co. v. United States*[194] that: "[i]t may well be, as the Government concedes, that surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally prescribed absent a warrant."[195]

In *Dow*, the EPA used a sophisticated but commercially available aerial mapping camera to photograph Dow's fenced-in industrial complex from the air. Rejecting Dow's contention that this open area constituted industrial "curtilage" entitled to Fourth Amendment protection, the Court also observed that the use of the camera itself did not give rise to constitutional problems. Although the high resolution camera enhanced human vision somewhat, the Court found that the photographs taken did not actually reveal any "intimate details." Therefore, nothing in the photographs infringed any reasonable expectation of privacy.[196] *Dow* can thus also be seen as the motivation for Justice White's concluding remarks in *Riley* that "no intimate details connected with the use of the home or curtilage were observed."[197] These remarks are puzzling, for they would seem to have nothing whatsoever to do with the test proposed by Justice White. If one is lawfully entitled to peer into Riley's greenhouse, it should make no difference what one sees there. Perhaps, as in *Dow*, these remarks were intended simply to indicate that there was no invasion of privacy beyond what could be seen from a lawful public vantage point at 400 feet. A particularly disturbing alternative interpretation, however, is that the plurality would countenance a distinction based on what the search turns up.[198]

This caveat having been noted, it would appear that the plural-

193. *Riley*, 109 S. Ct. at 696, *quoting*, *Ciraolo*, 476 U.S. at 215). Justice White's citation of the fact that "[m]ore than 10,000 helicopters, both public and private are registered in the United States," (*Riley*, 109 S. Ct. at 696 n.2), is hardly persuasive as this works out to approximately only one helicopter for every 24,000 persons residing in the country.

194. 476 U.S. 227 (1986).

195. *Id.* at 238.

196. *Id.*

197. 109 S. Ct. at 697.

198. *See* Draper v. United States, 358 U.S. 307, 325 (1959) (Douglas, J., dissenting), *citing*, United States v. Di Re, 332 U.S. 581, 595 (1948), "a search is not to be made legal by what it turns up").

ity's position is as follows: so long as the technological equipment used to carry out the surveillance is generally available to the public and the surveillance is conducted from a lawful public vantage point, no expectation of privacy regarding that method of surveillance can be reasonable since any member of the public could have invaded defendant's privacy by such means. Curiously Justice White makes no attempt to provide any theoretical underpinnings or rationale explaining why this is the appropriate standard for the Court to adopt. What is readily apparent, however, is the utilitarian value of Justice White's test which formulates a bright line rule for approving or disapproving "high tech" methods of surveillance based upon factors which the Court can easily determine — i.e. lawful public vantage point and general availability of the technological equipment.[199] The most telling argument against it, however, is that if adopted, it would force us into a never-ending struggle to keep up with an expanding technology which increasingly threatens our privacy.

The list of technological devices for invading privacy already includes, in addition to miniature transmitters, bugs, beepers and phone taps, more sophisticated items like parabolic microphones, image intensifiers, pen registers, computer usage monitors, electronic mail monitors, cellular radio interception, satellite beam interception, pattern recognition systems and detector systems operating on vibrations, ultrasound and infrared radiation sensors.[200] Perhaps most disturbing are the implications of laser technology which today can bounce a laser beam off a closed window and retrieve conversation by digital transformation of the window pane vibrations.[201] If such technology becomes generally available at your local Radio Shack, what remains of the holding in *Katz* if police, from a lawful public vantage point, may aim their laser at a public telephone booth?[202] Justice White's attempt to fashion a bright line rule is

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199. I am indebted to Professor Marilyn Ireland for the insight that Justices seeking to fashion bright line rules generally eschew discussions of rationale, as it was that insight that led to this observation.

200. *See High Tech and Civil Rights*, Los Angeles Times (editorial) May 30, 1988, p.2, col.1; *Congressional Office of Technology Assessment*, CRIMINAL JUSTICE: NEW TECHNOLOGIES AND THE CONSTITUTION (1988).

201. *See* Berger v. New York, 388 U.S. 41, 126 (1967), (White, J. dissenting), *quoting, The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice* at 200-03 (1967)); Philadelphia Resistance v. Mitchell, 58 F.R.D. 139, 145 (E.D. Pa. 1972); National Wiretapping Commission, Commission Studies, Supporting Material for the Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 177, 181 (1976); *Roving Wiretaps: Balancing Privacy, Law Enforcement*, San Diego Daily Transcript, May 31, 1989, p.4A, col.5.

202. Perhaps the plurality's fallback position would be that such an obviously intrusive invasion of privacy would require a warrant because it reveals "intimate

thus fraught with difficulties — especially if one seeks to preserve privacy as a continuing value in the landscape of American life.

Justice Blackmun believed that Justice O'Connor and the four dissenters basically agreed upon a standard for determining reasonable expectations of privacy from aerial surveillance. While there is agreement that it is the frequency of public, as opposed to police, helicopter flights at an altitude of 400 feet that is the relevant consideration, a skill more akin to reading tea leaves may be required to define a majority consensus as to the precise formulation of a standard. For example, which "public" were the Justices referring to? What if flights are common in the urban part of the state, but extremely rare in the rural part of the state? What if such flights are more common in the Northeast part of the country than in the Midwest? For Justices O'Connor and Blackmun the standard appears to be a national one.[203] Thus, for them, if it appears that public helicopter flights are frequently made over backyards throughout the nation, then Riley's expectation of privacy from such method of surveillance would be unreasonable even if such flights were rare in his rural area. This would seem to be a meat axe approach to resolving the question which ignores the true issue. If it is agreed that Riley has a threshold reasonable expectation of privacy in his greenhouse, but that what he "knowingly exposes to the public"[204] is not entitled

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details." If so, then by what standard will intimacy be determined? The necessity for asking that question thus muddies the plurality's bright line rule and defeats its utility.

203. Florida v. Riley, 109 S. Ct. 693 (1989). Justice O'Connor's statement for example that ". . . there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above," *Id.* at 699, could not refer to the local area surrounding Riley's rural five-acre tract since no evidence regarding such use was submitted on the record. Justice Blackmun referred to helicopter flights over "communities" and specifically noted that the Court should not establish a rule for the "entire Nation" based upon judicial suspicion as to the frequency of such flights. *Id.* at 705 (Blackmun, J., dissenting).

204. Curiously, while the Justices reach different results, they all start from this premise, first stated in *Katz*: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). Justice Stewart cited two cases, Lewis v. United States, 385 U.S. 206 (1966) and United States v. Lee, 274 U.S. 559 (1927) as authority for that proposition. In *Lewis*, the defendant had voluntarily allowed an undercover agent entry into his home for the purpose of selling narcotics to the agent. Finding that that case "present[ed] no question of the invasion of the privacy of a dwelling" the Court stressed that the agent, like any other member of the public coming to buy drugs, saw nothing that was not "contemplated" by the defendant. *Lewis*, 385 U.S. at 211-12. United States v. Lee involved an arrest on the high seas for bootlegging liquor. The Coast Guard had followed a suspicious vessel, and upon seeing further suspicious activity with a second boat, approached and observed (with the aid of a search light) cases of liquor in plain view in an open motorboat. *Lee*, 274 U.S. at 560-61. The Court held that the Coast Guard had probable cause to believe the revenue laws were being violated and that the observation of cases of liquor in the open motorboat was justified as a search incident to a lawful arrest. The Court's additional comment that no search was shown, was directed at the use of the search light

to Fourth Amendment protection, then it would seem that Justice Brennan, writing with Justices Marshall and Stevens, comes closest to the correct solution when he observes: "The question before us [is] . . . whether public observation of Riley's curtilage was so commonplace that Riley's expectation of privacy in his backyard could not be considered reasonable."[205] Under this standard, which focuses on the actual backyard affected, national, state or local norms regarding helicopter overflights would be relevant but not dispositive of the issue.

Because the true issue is a subjective one — whether the defendant "knowingly exposed" his greenhouse to public observation — even this approach, however, is flawed. As the opinions by a fragmented Court graphically illustrate, the conceptual difficulties created by the two tiered *Katz* analysis underscores what would have seemed obvious to any law student in the days before *Schneckloth v. Bustamonte*;[206] the members of the Court have confused waiver of Fourth Amendment rights with the substance of Fourth Amendment protection. It is of course unfashionable today to speak of "waiver" and the Fourth Amendment in the same breath. The proper terminology is "voluntary" consent.[207] But a rose is a rose regardless of the name you give it, and logic must in the end triumph. It is simply illogical to suggest, as *Ciraolo* and *Riley* do, that you can have Fourth Amendment protection in your backyard with respect to people on the ground, but not have it with respect to people in the air, and base both determinations upon the same standard — expectations of privacy which society is prepared to accept as reasonable. Either society accepts that it is reasonable to have privacy in your backyard or it does not. But it is sheer nonsense to suggest that society is schizophrenic about the matter.

By the same token, suppose a man, whose ground floor apartment faces Main Street, freely opens the curtains of his picture window at the height of rush hour. Undeniably, he has knowingly exposed his living room to public view, and has voluntarily surrendered his right to privacy and, therefore, his Fourth Amendment protections designed to safeguard that right. Suppose then that the same man goes to his secluded ocean-view beachhouse located high on a cliff overlooking the sea. Should his same conduct in opening the curtains of his picture window there constitute a surrender of the right to privacy? Has he thus surrendered his Fourth Amendment safeguards against unjustified telescopic snooping by a

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and, in light of the finding of probable cause, was in any event unnecessary to the holding of the case. *Id.* at 563.

205. 109 S. Ct. at 701 (Brennan, J., dissenting).

206. 412 U.S. 218 (1973).

207. *Id.* at 248.

police helicopter lawfully and unobtrusively hovering out at sea?

What is the difference between these two hypothetical examples? The answer is of course obvious. The degree of risk of public observation is substantially greater in the city than at the beachhouse. Observe, however, that in making that assessment we naturally draw upon our own experience of norms of human behavior. Yet this approach asks the wrong question. The question is whether *this* man surrendered his constitutionally protected privacy. The true answer to that question is subjective: did he know he could be observed by the public, or, to be more precise, was he aware of the risk of such observation and did he voluntarily choose to run that risk?[208] If so, then it can be said that he surrendered his right to privacy.

On this view, a waiver of Fourth Amendment protection thus would occur if a citizen was aware of the risk that her privacy could be lost as a result of her voluntary act or omission. The state would, moreover, have to establish such awareness by a preponderance of the evidence.[209] This analysis however, requires resolution of two further questions. First, what *degree* of risk must a citizen be aware of before they can be said to have waived their Fourth Amendment protections against unjustified invasions of privacy? Will awareness of any degree of risk, no matter how trivial, result in waiver? This would seem to be the teaching of *Ciraolo* and the effect of the plurality's "any lawful public vantage point" approach in *Riley*. Second, since the legal system cannot go inside a person's head to determine such subjective matters as a person's "awareness of risk," how, in the absence of an admission, will the state meet its burden of proof?

With respect to the degree of risk required, it is clear that if any theoretical risk, no matter how remote, would qualify, such a standard could result in significant curtailment of our freedom of choice and action — i.e. the loss of our liberty. This is because it is theoretically possible for someone with modest ambition to make incursive invasions of our privacy from the numerous lawful public vantage points available. It begs the question to say that the citizen can protect herself against such intrusion, because in so doing the citizen is forced into a tradeoff between freedom of action and privacy. For example, it is theoretically possible for a member of the public to fly over my backyard, even in a rustic mountain area where I have gone

208. Assuming that one starts out in the position of having privacy, we can understand the voluntary loss of privacy to be a "result" which may or may not occur as a consequence of one's conduct. But one cannot have actual "knowledge" of a future "result" prior to the event. Therefore, to say that a person "knowingly exposes" an area to the public is, more accurately, to say that the person is aware of the risk that the public may view that area as a consequence of one's act or omission.

209. *See* United States v. Matlock, 415 U.S. 164, 177-78, n.14 (1974).

to enjoy privacy. Must I give up my freedom to enjoy the scenic view, fresh air and sunshine (either by building a roof over my backyard or staying indoors) in order to ensure my privacy from unjustified state interference? As Professor Amsterdam correctly pointed out more than a decade ago, the fundamental question inevitably raised by the Fourth Amendment is "how tightly . . . people [should] be driven back into the recesses of their lives by the risk of surveillance."[210] If we do not take drugs and do not engage in criminal activities, should we not be able to go about our lives in freedom, confident that we are not being spied upon? Does it not then follow that it should be our liberty interests which serve as the touchstone of Fourth Amendment analysis, with privacy viewed as one aspect of liberty rather than as a monolith?

From this perspective one could argue that a very high degree of risk of public observation should be apparent before waiver should be established. Borrowing a page from the modern criminal law's treatment of mental states with respect to "result" elements in crimes, one could adopt a standard requiring that the citizen be aware that it is "practically certain" that public observation will occur.[211] This standard would be consistent with a liberty-focused approach, because, as the "picture window on main street" hypothetical demonstrates, if it is practically certain that members of the

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210. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 402 (1974). Professor Amsterdam continues:

> Mr. Katz could, of course, have protected himself against surveillance by forebearing to use the phone; and — so far as I am presently advised of the state of mechanical arts — anyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the amendment because, if it were, the amendment's benefit would be too stingy to preserve the kind of open society to which we are committed and in which the amendment is supposed to function. What kind of society is that? Is it one in which a homeowner is put to the choice of shuttering up his windows or of having a policeman look in . . .? [U]nless the fourth amendment controls tom-peeping and subjects it to a requirement of antecedent cause to believe that what is inside is indeed criminal, police may look through windows and observe a thousand innocent acts for every guilty act they spy out. Should we say that prospect is not alarming because the innocent homeowner need not fear that he will get caught doing anything wrong? The fourth amendment protects not against incrimination, but [rather] the right to maintain privacy without giving up too much freedom as the cost of privacy. The question is whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.

Id. at 402-03.

211. *See* MODEL PENAL CODE, § 2.02(2)(b)(ii) (Proposed Official Draft 1962) which defines "knowledge" for mens rea purposes. Under the Model Penal Code, when "knowledge" is the prescribed mental state, if an element of a crime "involves a result of his conduct, [the defendant must be] aware that it is practically certain that his conduct will cause such a result."

public would observe the same details as those seen by a policeman standing on the public sidewalk, the fear of police surveillance has not resulted in any actual loss of freedom. There was no freedom to look out the window and at the same time preserve privacy in the first place.

Such a high standard would obviously not be palatable to a majority of the present Court. Contrary to *Riley*, it would impose an extremely heavy burden of proof upon the state. It also fails to address the second question noted above: how is the state, as a practical matter, to meet its burden of showing such subjective awareness? Might it not turn out in practice to be virtually impossible for the state to meet such a burden? In addition, given the Court's current fascination with deterrence as the sole rationale for the exclusionary rule,[212] it would also seem unlikely that the Court would countenance the exclusion of evidence resulting from surveillance unless it was reasonably apparent to the police that the defendant had not waived his or her Fourth Amendment protection.

Whatever virtues the "practical certainty" standard may have in terms of theoretical purity, it must be conceded that an alternative approach has to be found as a practical matter. Such an alternative does exist, however, because a familiar and workable standard is readily at hand: reasonable foreseeability. Under this standard, if the risk of public observation is reasonably foreseeable, then we can infer that the citizen was aware of the risk, and (assuming the choice was voluntary) chose to run that risk to his privacy. This standard, therefore, not only quantifies the degree of risk in a way in which both citizen and policeman alike can understand, but it also furnishes an objective standard for proving the subjective awareness necessary to establish waiver. Indeed, under a reasonable foreseeability standard, we would appear to come out at the same place as Justice O'Connor and the four dissenters.[213] The only difference is that having correctly identified the issue as involving the waiver of Fourth Amendment protection, the burden of establishing that the risk of public observation was reasonably foreseeable is now where it properly belongs — on the state. Thus, instead of the two-tiered *Katz* analysis employed in *Riley*, such aerial surveillance cases would be resolved first by determining whether Fourth Amendment protection existed as a threshold matter,[214] and then by determining

212. *See generally* United States v. Leon, 468 U.S. 897, 906-08 (1984); Colorado v. Connelly, 479 U.S. 157, 169 (1986), discussed in Benner, *supra* note 164, at 135-39.

213. Florida v. Riley, 109 S. Ct. 693 (1989). For example, see Justice O'Connor's statement that "if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation." *Id.* at 699. Is this not the same thing as saying that under such circumstance public observation would be reasonably foreseeable?

214. As previously suggested this determination should focus first upon the text

whether that protection had, nevertheless, been waived because it was reasonably foreseeable that the details actually observed by the police would have also been observed by members of the public.

The problem of high technology devices still remains.[215] Under a reasonable foreseeability test standing alone, we would still be forced into a losing race with technology. As soon as the public use of a particular device became reasonably foreseeable, an inference in favor of waiver of privacy would arise. This problem would be solved, however, if the reasonable foreseeability test was confined in its focus to risks created only from observations made with unaugmented and unenhanced human senses.[216] Under this test, technology[217] could then be used only with the safeguards provided by the Fourth Amendment, unless its use revealed no more than what a reasonable person could have foreseen would be observed by a member of the public unaided by any technological device. Since both an airplane and a helicopter enhance normal powers of observation beyond the capabilities of the normal human body, an aerial observation would, therefore, normally be subject to the restrictions of the Fourth Amendment, unless what was observed from the air was also observable from the ground and that ground level observation was foreseeable by a reasonable person. This test, it is submitted, would provide a reasonably bright line rule which would return control

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of the Amendment and determine whether there is Fourth Amendment coverage under a textual approach. By liberally construing the language of the Amendment to effect its purpose in protecting privacy as mandated by Boyd v. United States, 116 U.S. 616, 635 (1886), much of the need for a Katzian analysis would disappear. In any event, the *Katz* mode of analysis should not usurp the traditional textual approach as was done for example in *Greenwood*, discussed *supra* notes 152-170 and accompanying text.

215. As Professor Richard Wasserstrom has observed in commenting on modern technological surveillance techniques: "I think it quite likely that the anxiety produced by not knowing whether one is doing an intimate act in private is often more painful and more destructive than the certain knowledge that one is being observed or overheard, despite all precautions . . . . If I am correct, then one of the inevitable consequences of living in a society in which sophisticated spying devices are known to exist and to be used is that it does make more rational the belief that one may be being observed or overheard no matter what the appearances. And this in turn make engagement more difficult . . . [O]ur social universe would [therefore] be altered in fundamental and deleterious ways. . . ." Wasserstrom, *Privacy, Some Arguments and Assumptions*, *reprinted in*, F. SCHOEMAN, *supra* note 93, at 324-25.

216. *See* Comment, *Law Enforcement Use of High Technology: Does Closing the Door Matter Any More?* 24 CAL. W.L. REV. 83 (1988) for a thoughtful approach to the same problem.

This commentator draws a distinction between augmenting one's senses and enhancing one's vantage point and would thus not restrict the use of aircraft and helicopters, on the grounds that they enhance one's vantage point, rather than augment the senses. The standard proposed by this Article would not make such a distinction.

217. "Technology" would be defined as any manufactured device or thing which augments or enhances the powers of observation or other information gathering capabilities (i.e. auditory, tactile and olfactory) of the human body beyond that normally bestowed by nature.

over privacy to the citizen, unless the invasion of privacy was authorized under the Fourth Amendment by compliance with its restrictions.

CONCLUSION

> The first object of a free people is the preservation of their liberty. The spirit of liberty is . . . a sharpsighted spirit . . . it demands checks; it seeks guards, it insists on securities, it entrenches itself behind strong defenses, and fortifies itself with all possible care against the assaults of ambition and passion . . . . This is the nature of constitutional liberty; and this is our liberty, if we will rightly understand and preserve it.[218]

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . . [T]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[219]

We have seen, in Part II, how over the past two decades the Court has gradually chipped away at the core of the warrant clause of the Fourth Amendment until even the most intrusive invasions of privacy can now routinely be made, not only in the absence of probable cause, but without any individualized justification whatsoever. While the initial exceptions made in *Camara* and *Terry* were founded upon pressing public health and safety concerns and the necessity to protect officer safety, today mere "convenience" (*Ortega*) and "symbolism" (*National Treasury*) serve as "special needs" which justify dispensing with the Framers' craftsmanship.

In referring to Supreme Court decisions which had cut back the Fourth Amendment's exclusionary rule, Senator Sam Ervin observed:

> As Chief Justice John Marshall made plain in *Marbury v. Madison*, the oath of Supreme Court Justice to support the Constitution imposes on him a constitutional duty as well as a moral obligation to accept the Constitution as the absolute rule for his official conduct. Bound by oath or affirmation to support the Constitution in its entirety, a Supreme Court Justice ought to accept as valid and enforce every provision in it as written, even though he may not approve of the handiwork of the Founding Fathers in some particular respect. After all, it is not his function to amend, revise, modify, or nullify the Constitution.[220]

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218. 7 D. WEBSTER, THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 122 (Nat'l ed. 1903).

219. *National Treasury*, 109 S. Ct. 1402 (Scalia, J., dissenting), *quoting*, *Olmstead*, 277 U.S. 438, 479 (Brandeis, J., dissenting).

220. S. Ervin, *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, SUP. CT. REV. 283, 304 (1983). Senator Ervin was responding to Chief Justice Warren Burger's attacks on the exclusionary rule in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971) (Burger, J., dissenting) and Stone

The text of the Fourth Amendment is clear: ". . . and no Warrants shall issue but upon probable cause. . . ." The Framers' choice of individualized justification as the mechanism for preventing unreasonable invasions of the fundamental right to privacy is likewise clear. As Justice Frankfurter admonished: "One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment."[221] The plain meaning and intent of the Amendment, amply supported by its legislative history,[222] thus requires, at the very least, that the Court give meaning and content to the language of the warrant clause instead of simply discarding it after performing a perfunctory ritual consisting of nothing more than a subjective and increasingly disingenuous balancing act.

Moreover, if the Court is going to read words from the literal text out of the Constitution, it should at least, in the words of Judge Robert Bork,

> demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution . . . . If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates . . . that alone justi[fy] its power.[223]

The ubiquitous balancing test, however, is not a theory derived from the Constitution. Indeed, the Court has no theory, only an appeal to perceived necessity. Justice White moreover candidly admitted this theoretical bankruptcy in *Camara* even as he initiated the balancing test: "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[224]

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v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring).

221. United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

222. *See* discussion *supra*, Part I of this article. As explained there, the idea that a suspicionless search could be valid if the *purpose* of the search was a reasonable one in light of the importance of the governmental interest, would have been anathema to the Framers. The lack of individualized suspicion was the essence of their complaint against the writs of assistance. Furthermore, by 1765, the common law of England had expressly recognized and confirmed the validity of their position. Thus, not only was a search warrant necessarily required (since this instrument evidenced that the warrant holder had been granted the power to conduct the search) but, as Entick v. Carrington, 19 Howell's State Trials 1029 (1765) established, *in addition*, the warrant had to be based upon individualized justification sworn to under oath. While there may have been historical exceptions to the warrant requirement in cases of arrest upon hue and cry and searches incident to such arrests, nevertheless here, too, individualized justification was still required for such intrusions. *See* discussion *supra* note 50. The Rehnquist Court's total abandonment of individualized suspicion in the drug testing cases is thus contrary to text, history and logic. For the Framers, a search was *reasonable* only if it was based upon *individualized* justification.

223. Bork, *supra* note 70 at 1, 3.

224. *Camara*, 387 U.S. 523, 537 (1967).

Where are there to be found neutral principles to control such a freewheeling determination when the outcome can be preordained simply by what one chooses to place upon the scales? The requirement that a Justice interpret the Constitution based upon neutral principles arises precisely because of the need to keep personal values and predilections held in check by the discipline of theory. As Justice Blackmun, dissenting in *O'Connor v. Ortega*, candidly observed:

> [J]udges are never free from the feelings of the times, or those emerging from their own personal lives . . . . Deep below consciousness are . . . the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.[225]

The Rehnquist Court majority no doubt sincerely believes that it is doing the right thing as a matter of policy in freeing the hand of law enforcement to combat the drug menace which, make no mistake, takes a terrible toll upon society in terms of human misery and suffering as well as economic cost. But, as the Chief Justice himself has recognized: "[H]owever socially desirable the goals sought to be advanced . . . advancing them through a freewheeling, non-elected judiciary is quite unacceptable in a democratic society."[226]

In Part III we have also seen the reach of the Fourth Amendment severely restricted by manipulation of the definition of a "search," the mechanism which triggers its application. As a result, the government's power to intrude into our lives, whether by trespassing or by employing high technology, has increasingly expanded, while the expectations of privacy we may justifiably hold have correspondingly diminished. Justice Douglas long ago foresaw this progression of events when he observed:

> [T]he privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen — a society in which government may intrude into the secret regions of [a citizen's] life at will .. where everyone is open to surveillance at all times; where there are no secrets from government . . . [where] dossiers on all citizens mount in number and increase in size . . . . When that time comes, privacy, and with it liberty, will be gone.[227]

Justice Black, prophetically dissenting in *Katz*, protested strongly against forsaking the neutral principles established by the Amendment and instead hinging its application upon the Justices' personal

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225. O'Connor, 480 U.S. 709 (1987), *quoting*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167 (1921)).

226. Rehnquist, *A Living Constitution*, 54 TEX. L. REV. 693, 699 (1976).

227. Osborn v. Lewis, 385 U.S. 323, 340, 342, 353 (1966) (Douglas, J., dissenting).

conceptions of privacy, warning: "It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention . . . . The history of governments proves that it is dangerous to freedom to repose such powers in courts."[228]

The threat to freedom may seem far in the distance, but as the recent decisions of the Rehnquist Court clearly signal, the horizon is rapidly approaching. The implications of a "national" norm for "reasonable expectations of privacy" determined by a bare majority of a Court made up of only the elite members of society is antithetical to the commitment to minority values which has formed the bedrock of American's unique form of government. Looking back, the path which the assault upon privacy has taken indeed confirms the wisdom of holding firm to the principle that the rights of even the most despised members of society must be protected.[229] For while the erosion of Fourth Amendment protection began as an attack on the rights of suspected criminals, it has steadily encroached upon the rights of businessmen, public school children and now public employees.[230] Can the rest of us be far behind?[231]

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228. *Katz*, 389 U.S. at 373-74.

229. As Justice Frankfurter observed in United States v. Rabinowitz, 339 U.S. 56, 69: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."

230. The assault upon governmental employees may itself have far reaching repercussions for, as Justice Scalia has warned, the respect public officials have for a citizen's privacy "can hardly be greater than the small respect they have been taught to have for their own." *National Treasury*, 109 S. Ct. 1384, 1402 (1989) (Scalia, J., dissenting).

231. One is reminded of the statement of clergyman Martin Niemoeller (J. BARTLETT, FAMILIAR QUOTATIONS 824 (15th ed.) made following the Second World War, explaining how the failure of responsible citizens to protest against the actions of the Third Reich in depriving first the communists, and then the trade unionists, and finally the Jews, of their civil rights, led to the gradual erosion of freedom for all German citizens. Of course, today we are secure in our belief that, "It can't happen here." Yet from Berlin to Buenos Aires to Tiananmen Square, hasn't history shown that belief to be an illusion? Will a Martin Niemoeller of the future someday explain:

First they came for the drug addicts and muggers,
And I said "Good riddance."
Then they came for the Hispanics and the Blacks
But I looked the other way.
Then they came for the anti-nuclear and anti-abortion advocates
And I thought "This is getting out of hand."
And then they came for me . . .
But there was no one left to hear my cry.