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# Re-Righting the Right to Privacy: The Supreme Court and the Constitutional Right to Privacy in Criminal Law

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# RE-"RIGHTING" THE RIGHT TO PRIVACY: THE SUPREME COURT AND THE CONSTITUTIONAL RIGHT TO PRIVACY IN CRIMINAL LAW

JANA NESTLERODE<sup>1</sup>

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## I. INTRODUCTION

Since the 1970's, federal legislation has expanded privacy rights in nonconstitutional areas.<sup>2</sup> Juxtaposed against this more liberal legislative trend is the action of a significantly more conservative judiciary which has, and is,

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<sup>2</sup>The primary federal laws governing privacy are: Fair Credit Reporting Act, 15 U.S.C. § 1681 (1988) (protecting consumers from unauthorized disclosure of credit information); Privacy Act of 1974, 5 U.S.C. § 552a (1988) (barring certain sharing of information among governmental agencies); Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22 (1988) (regulating governmental access to customer bank records); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1988) (generally prohibiting disclosures of records of video rentals); Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a (1988) (regulating cross-matching of federally held information under certain circumstances).

contracting that right in those areas governed by the Constitution.<sup>3</sup> An examination of the Supreme Court's most recent decisions in the criminal law arena readily bears witness to this proclivity.

The High Court's conservative shift certainly isn't unanimous. Justices Brennan, Marshall, Blackmun and Stevens have complained vociferously of this new direction.<sup>4</sup> They see the products of the judicial activism of the 1960's unravelling in the wake of the conservative activism of the Reagan and Bush appointees.<sup>5</sup> Their vigorous dissents urge an "evolutionary" view of the Constitution—a living, breathing document designed to mature over time. The

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<sup>3</sup>A prime example of this is the Court's evolution of the renowned abortion case, *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* was originally interpreted as bestowing an unfettered right to abortion (in the first trimester) under the Constitution. The Court has in the past several years, however, permitted several fetters. These restraints include the upholding of state statutes which: require a twenty-four hour waiting period and parental consent, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992); require parental notification, *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); prohibit the use of public funds, employees or facilities to perform the procedure or to provide abortion counseling, *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989). Additional cases cited in this text will address the diminution of the constitutional right to privacy with regard to various law enforcement practices.

<sup>4</sup>*See, e.g.*, *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989). Justice Blackmun penned a biting dissent in which Justices Brennan and Marshall joined. In this dissent, Justice Blackmun expressed "fear for the integrity of, and public esteem for [the] Court." *Id.* at 538. "This 'it-is-so-because-we-say-so' jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place." *Id.* at 552. He concludes, "[a] chill wind blows". *Id.* at 560.

In *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), Justice Marshall, joined by Justice Brennan, called the majority's analysis "unprincipled and unjustifiable". *Id.* at 680. In *Florida v. Bostick*, 111 S. Ct. 2382 (1991), Justice Marshall (joined by Justices Blackmun and Stevens) accused the Court of "trivializing" the Fourth Amendment. *Id.* at 2394. In *California v. Hodari*, 111 S. Ct. 1547 (1991), Justice Stevens (joined by Justice Marshall) accused the majority of "creative lawmaking". *Id.* at 1559.

In another case, Justice Brennan (joined by Justices Marshall and Stevens), invoked "George Orwell's dread vision of life in the 1980's". *Florida v. Riley*, 488 U.S. 445, 466 (1989) (Brennan, J., dissenting).

The black mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . 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.

*Id.* (quoting GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 4 (1949)).

<sup>5</sup> Respect for precedent has traditionally been the hallmark of conservatives. The current Court, however, has been willing to overturn prior case law quite readily. *See supra* text accompanying note 3. *See, e.g.*, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (declaring unconstitutional a statute requiring physicians to inform patients of the risks of and the alternatives to abortion); *City of Akron v. Akron Center for Reprod. Health*, 462 U.S. 416 (1983) (holding unconstitutional a statute requiring a twenty-four hour waiting period). These restrictions (and others) have since been upheld by the new conservative majority.

conservatives, by contrast, see that document as frozen in time, restricting the power and authority of the Court to its literal endowments, and bestowing (by design or by default) extensive power on state governments.<sup>6</sup> This predominant judicial philosophy, drawn against the backdrop of the war on drugs, has resulted in a perilous path for the heretofore heralded right to privacy—most notably in the area of criminal law.

## II. THE CONCEPT OF PRIVACY

Privacy has been variously defined as the right to live a life of seclusion, the right "to be free from unwanted publicity, and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned."<sup>7</sup> To many, it has become synonymous with the "right to be let alone."<sup>8</sup>

At least one court has defined privacy as comprising essentially three aspects:

- 1) an individual's interest in peace and quiet; 2) an individual's interest in relaxation and freedom from public scrutiny; and 3) an individual's interest in public esteem (to hide from public view those habits which might lower the individual's reputation should they be revealed).<sup>9</sup>

The Supreme Court has acknowledged the right to privacy and has distinguished two aspects of it: the freedom from being forced to reveal private information, and the freedom to make personal decisions without interference.<sup>10</sup> Implicit in this right is freedom from unwarranted governmental intrusion.<sup>11</sup> It is that aspect of the right, as it relates to particular areas of criminal law, which will be discussed in this article.

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<sup>6</sup>Much has been written of the growing conflict among the Court's members over constitutional interpretation. "Originalists", who eschew any "right" not specifically enumerated, have been dubbed the "new right" by at least one legal scholar. See BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* (1990).

<sup>7</sup>BLACK'S LAW DICTIONARY 1196 (6th ed. 1990).

<sup>8</sup>The phrase was given historical notoriety in an article written over a century ago: Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). This article has been credited with the genesis of a whole new field of jurisprudence. See, e.g., Wilbur Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693 (1912). The specific phrase, "the right to be let alone", however, is ascribed to THOMAS COOLEY, *TREATISE ON THE LAW OF TORTS* (1st ed. 1879). See Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 3, n.13 (1979).

<sup>9</sup>*United States v. Kramer*, 711 F.2d 789, 793 (7th Cir. 1983), cert. denied, 464 U.S. 962 (1983).

<sup>10</sup>*Whalen v. Roe*, 429 U.S. 589, 599 (1977).

<sup>11</sup>It is also apparent that the right of privacy is primarily a restraint upon unwarranted governmental interference or intrusion into those areas deemed to be

### III. CONSTITUTIONAL FOUNDATIONS OF PRIVACY

While there is some debate regarding the existence of an enforceable right to privacy at common law,<sup>12</sup> the Supreme Court has not only referenced such a right, but has imparted constitutional legitimacy to it in a number of cases.<sup>13</sup> In fact, the Court has "found" a basis for the right in several of the constitutional amendments.<sup>14</sup>

The First Amendment's "right to association"<sup>15</sup> carries with it, according to the Court, the right to keep those associations private. In *NAACP v. Alabama*, the Court denied the state of Alabama its request to force the NAACP to disclose its membership lists. The Court recognized that the inability to keep one's affiliations private would have a chilling effect on the fundamental right of association.<sup>16</sup> Subsequent cases similarly affirmed a constitutional right to privacy in one's affiliations.<sup>17</sup>

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within the 'protected zones of privacy'." *Industrial Foundation of the South v. Texas Indust. Accident Bd.*, 540 S.W.2d 668, 679 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

<sup>12</sup>Some state courts specifically disavow a common law right to privacy. See, e.g., *Brown v. American Broadcasting Co.*, 704 F.2d 1296 (4th Cir. 1983) (applying Virginia law); *Wilson v. Colonial Penn Life Ins. Co.*, 454 F. Supp. 1208 (D. Minn. 1978) (applying Minnesota law). Justice Douglas, however, in addressing marital privacy, stated, "We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>13</sup>Probably the most renowned Supreme Court case recognizing this right is *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>14</sup>"Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . [v]arious guarantees create zones of privacy." *Id.* at 484.

<sup>15</sup>In its entirety, the Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

<sup>16</sup>In 1958, the state of Alabama attempted to enforce a state statute requiring the NAACP to disclose its membership lists. The organization refused, arguing an unlawful infringement of the First Amendment's freedom of association. Supported by a unanimous Court, Justice Harlan agreed with the NAACP:

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective restraint on freedom of association as the forms of governmental action . . . .  
Inviolability of privacy in group association may in many circumstances be indispensable to the preservation of freedom of association, particularly where a group espouses dissident beliefs.

*NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The Court concluded that the disclosure of such lists could be mandated only upon a showing of a rational and compelling state interest. None was found here.

<sup>17</sup>See *Katz v. United States*, 389 U.S. 347 (1967); *DeGregory v. New Hampshire*, 383 U.S. 825 (1966); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960). Although the First Amendment does not enu-

The Third Amendment's<sup>18</sup> proscription against housing soldiers in civilian homes during peacetime certainly illustrates the heightened sense of privacy accorded one's "castle" by the Constitution.<sup>19</sup> The Fourth Amendment, however, is explicit in its "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."<sup>20</sup> This "privacy clause" has been recognized time and again as the safeguard of individuals against arbitrary governmental intrusions.<sup>21</sup>

In an early (1886) analysis, the Court referred to the Fourth Amendment's bestowal of an "indefeasible right of personal security, personal liberty and private property. . . ." <sup>22</sup> That same opinion declared that the Amendment's provisions should be "liberally construed,"<sup>23</sup> and charged *the courts* with the responsibility of guarding "against any stealthy encroachments thereon."<sup>24</sup> Moreover, the Court has condemned warrantless searches as "inconsistent with the conception of human rights enshrined in the history and basic consti-

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merate a specific privacy protection, the Court infers it as a natural extension of the freedom of association. The Court in *Griswold* stated:

The right of "association", like the right of belief, is more than the right to attend a meeting; it includes the right to express one's attitude or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

*Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

<sup>18</sup>The Amendment reads: "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

<sup>19</sup>"The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy." *Griswold*, 381 U.S. at 484.

<sup>20</sup>The Fourth Amendment, in its entirety, states:

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

U.S. CONST. amend. IV.

<sup>21</sup>See *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Chadwick*, 433 U.S. 1 (1977); *Chimel v. California*, 395 U.S. 752 (1969); *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Jeffers*, 342 U.S. 48 (1951); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Lustig v. U.S.*, 338 U.S. 74 (1949); *United States v. Morton Salt*, 338 U.S. 632 (1949); *McDonald v. United States*, 335 U.S. 451 (1948); *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>22</sup>*Boyd v. United States*, 116 U.S. 616, 630 (1886).

<sup>23</sup>*Id.* at 635.

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

tutional documents of English-speaking peoples."<sup>25</sup> Indeed, the Court has specifically denounced warrantless searches in a discourse that is quoted in many criminal law texts.<sup>26</sup> In it, the Court described the "right of privacy" as "precious,"<sup>27</sup> and stated that "police acting on their own cannot be trusted."<sup>28</sup> The Court has held for many years, then, that warrantless searches are unreasonable searches, absent some extraordinary circumstance precluding procurement of judicial authorization.<sup>29</sup>

While the Fourth Amendment has very obvious implications for the right to be left alone, the Court has relied upon the Fifth Amendment as well to articulate such a right.<sup>30</sup> The interrelationship between privacy and the privilege against self-incrimination is fundamental. A citizen may lawfully keep private that information which will implicate him in criminal activity. This connection can be found even in the early *Boyd* analysis, which perceived the Fourth and Fifth Amendments as running "almost into each other."<sup>31</sup> The

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<sup>25</sup>*Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

<sup>26</sup>*McDonald v. United States*, 335 U.S. 451 (1948). The entire passage is as follows:

We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

*Id.* at 455-56.

<sup>27</sup>*Id.* at 455.

<sup>28</sup>*Id.* at 456.

<sup>29</sup>"Where . . . officers are not responding to an emergency, there must be compelling reasons to justify the absence of a warrant." *McDonald* 335 U.S. at 454. Today, there are so many exceptions to the search warrant requirement that it can be argued that the "compelling reasons" criteria is now suspect. Indeed, this article will attempt to illustrate that the Fourth Amendment has been severely compromised in the course of the Court's shift to the right.

<sup>30</sup>The Amendment states, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ." U.S. CONST. amend. V.

<sup>31</sup>*Boyd v. United States*, 116 U.S. 616, 635 (1886).

right to keep private one's belief's, politics, practices and habits is implicit in the right to remain silent.<sup>32</sup>

A largely unexplored (by the Court),<sup>33</sup> but perhaps fertile ground for a constitutional privacy protection is the Ninth Amendment. That Amendment promises that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>34</sup>

In a departure from the Court's rather conspicuous avoidance of this Amendment for the past 200 years, Justice Goldberg, (with Chief Justice Warren and Justice Brennan concurring) braved its judicially frightening waters in the 1965 case of *Griswold v. Connecticut*.<sup>35</sup> Here, the Court held that a state may not constitutionally intrude upon the right of marital privacy by forbidding the use of contraceptives.<sup>36</sup> In so finding, the Court relied heavily on the concept of a privacy protection embodied in the Bill of Rights, and emphasized in support thereof, the First and Fourth Amendments. In the concurring opinion by Justice Goldberg, however, the Ninth Amendment was brought to life. He stated: "The language and history of the Ninth Amendment reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."<sup>37</sup>

Justice Goldberg opined that even though the right to privacy did not appear literally in the Bill of Rights, it (referring to the right of marital privacy) was protected under the rubric of the Ninth Amendment.<sup>38</sup>

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<sup>32</sup>For cases acknowledging a right to privacy in the Fifth Amendment (although not always granting same to the defendant) see *Bellis v. United States*, 417 U.S. 85 (1974); *California v. Byers*, 402 U.S. 424 (1971); *Katz v. United States*, 389 U.S. 347 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); and *Olmstead v. United States*, 277 U.S. 438 (1928). Evidence of the current Court's intent to diminish, or perhaps eliminate a privacy basis in the Fifth Amendment, however, may be seen in Justice O'Connor's concurring opinion in *United States v. Doe*, 465 U.S. 605, 618 (1984): "[t]he Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." Of course, the moderates on the Bench strongly disagree.

<sup>33</sup>For a comprehensive treatise on the Amendment, see RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (1989).

<sup>34</sup>U.S. CONST. amend. IX.

<sup>35</sup>381 U.S. 479 (1965).

<sup>36</sup>*Id.*

<sup>37</sup>*Id.* at 488 (Goldberg, J., concurring).

<sup>38</sup>*Id.* at 491 (Goldberg, J., concurring).



This right of privacy has also found support in the Fourteenth Amendment.<sup>39</sup> In *Roe v. Wade*,<sup>40</sup> the Court struck down a Texas abortion law as violative of the Due Process Clause of that Amendment. The Court stated that "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."<sup>41</sup> Justice Blackmun, in his dissenting opinion in *Webster v. Reproductive Health Serv.*,<sup>42</sup> refers to the right to privacy as "a species of 'liberty' protected by the Due Process Clause."<sup>43</sup> This is supported by the Court's declaration in 1949 that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."<sup>44</sup>

The right to privacy, then—the "right to be let alone—the most comprehensive of rights, and the right most valued by civilized men"<sup>45</sup>—is guaranteed by more than just the Fourth Amendment, but by others as well, and "emanates from the totality of the constitutional scheme under which we live."<sup>46</sup> Or does it? With five new Justices appointed since 1981, and the appointment of William Rehnquist as Chief Justice in 1986, we are beginning to see a divergence from precedence and a markedly restrained interpretation of the Bill of Rights in the realm of privacy.

#### IV. THE CRIMINAL ARENA

##### A. Aerial Surveillance - Flying in the Face of Katz

###### 1. On the Runway

It is hardly likely that the framers<sup>47</sup> of our Constitution could have foreseen the scientific developments which have made possible penetrating views of

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<sup>39</sup>The relevant portion of the Amendment states: "nor shall any State deprive any person of life, liberty, or property without due process of law . . .". U.S. CONST. amend. XIV.

<sup>40</sup>410 U.S. 113 (1973).

<sup>41</sup>*Id.* at 152 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>42</sup>492 U.S. 490 (1989) (Blackmun J., dissenting).

<sup>43</sup>*Id.* at 548.

<sup>44</sup>*Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

<sup>45</sup>*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>46</sup>*Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting).

<sup>47</sup>Such a phenomenon was anticipated over one hundred years ago by legal scholars, however,

The intensity and complexity of life . . . have rendered . . . necessary some retreat from the world, and man . . . has become more sensitive . . . so that solitude and privacy have become more essential . . . [but] modern enterprise and invention have, through invasion upon his

our personal lives.<sup>48</sup> Application of the broad principles of the Bill of Rights to these technological advances has been difficult and disjointed,<sup>49</sup> especially with regard to Fourth Amendment issues.<sup>50</sup> In most of the cases cited here, technology and the priority of law enforcement have prevailed over individual rights. Nowhere is this more apparent than in the Supreme Court's sanction of warrantless aerial surveillance.

In 1928, the Court upheld the wiretapping of a telephone, finding that such intrusion was not the kind of search or seizure contemplated by the Fourth Amendment.<sup>51</sup> Significantly, the Court found that a physical trespass<sup>52</sup> was necessary before there could be a determination that the search was unreasonable.<sup>53</sup> By 1967, however, the Court had changed its mind. In *Katz v. United States*,<sup>54</sup> the Court held that "the Fourth Amendment protects people,

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privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren and Brandeis, *supra* note 8, at 196.

<sup>48</sup>See *Florida v. Riley*, 488 U.S. 445 (1989) (permitting warrantless helicopter surveillance of citizens); *United States v. Place*, 462 U.S. 696 (1983) (holding that the use of specially trained dogs to detect narcotics in luggage at airports is not a "search" within the meaning of the Fourth Amendment); *United States v. Miller*, 425 U.S. 435 (1976) (asserting that depositors have no expectation of privacy in information such as checks, deposit slips, etc. voluntarily conveyed to banks and their employees); *Smith v. Maryland*, 442 U.S. 735 (1949) (allowing police to obtain, without a warrant, a listing of numbers dialed by a customer from the phone company); and *Carroll v. United States*, 267 U.S. 132 (1925) (permitting the warrantless search of automobiles if police have probable cause to believe contraband will be found therein).

<sup>49</sup>See, e.g., *People v. Sabo*, 230 Cal. Rptr. 170 (Cal. App. 4th Dist. 1986) *cert. denied*, 481 U.S. 1058 (1987). Here, the lower court held that a warrantless search by officers in a helicopter flying in navigable airspace was unreasonable. Because this reasoning ran counter to the Supreme Court's holdings in *Dow Chemical v. United States*, 476 U.S. 227 (1986), and *California v. Ciraolo*, 476 U.S. 207 (1986), it came as a surprise when the Court denied certiorari. Chief Justice Rehnquist, with Justice White, however, filed a dissent to the denial, saying the lower court's decision was a "highly questionable interpretation of our decision in *California v. Ciraolo*." *Sabo*, 481 U.S. at 1059. (Rehnquist J., dissenting).

<sup>50</sup>"The course of true law pertaining to searches and seizures . . . has not . . . run smooth." *Chapman v. United States*, 365 U.S. 610, 618 (1961) (Frankfurter J., concurring).

<sup>51</sup>*Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>52</sup>See, e.g., *Goldman v. United States*, 316 U.S. 129 (1942) (upholding the use of a concealed microphone because there was no unauthorized entry into a constitutionally protected area).

<sup>53</sup>*Olmstead*, 277 U.S. at 466. Justice Brandeis was prescient. In his dissenting opinion, he urged the Court to consider that "our contemplation cannot be only of what has been but of what may be." *Id.* at 473 (Brandeis J., dissenting). In essence, Brandeis was warning of further technological advances which could despoil the privacy of citizens' lives.

<sup>54</sup>389 U.S. 347 (1967).

not places."<sup>55</sup> The Court, in essence, "discarded the property-based approach of Olmstead and adopted a privacy based approach."<sup>56</sup> Until recently, *Katz* has been regarded as a benchmark case for Fourth Amendment issues.<sup>57</sup>

*Katz* involved the use, by law enforcement officers, of an electronic device to monitor phone conversations taking place in a public telephone booth. The device was attached, without prior judicial authorization, to the outside of the booth. Relying on precedent, the Court of Appeals affirmed the conviction, reasoning that because no physical intrusion of the phone booth had occurred, there could be no Fourth Amendment violation.<sup>58</sup> The Supreme Court granted review.

Justice Stewart, writing for the majority, noted that "what a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . ." <sup>59</sup> The reasoning makes clear the emphasis on an individual's reasonable expectation of privacy, rather than on the physical location of the challenged search. The Court readily concluded that *Katz* possessed a reasonable expectation of privacy in his phone conversations, even though they took place in a public phone booth. Again, the location holds weight in the analysis only to the degree that it is relevant to the question of whether the individual's privacy expectation is reasonable. Noting the advances in investigative technology, the Court stated specifically that "the reach of the Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."<sup>60</sup>

Justice Harlan's concurring opinion established the familiar two-prong test for determining whether the Fourth Amendment had been violated:

- 1) did the individual manifest a subjective expectation of privacy, and
- 2) is that expectation one that society is prepared to accept as objectively reasonable?<sup>61</sup>

Reversing the defendant's conviction, the Court affirmed that individuals are entitled to the enjoyment of privacy whenever and wherever that presumption is reasonable. Justice Harlan's test, while sound in principle, opened broad areas of discretion to the Court in application.

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<sup>55</sup>*Id.* at 351.

<sup>56</sup>Bradley W. Foster, *Warrantless Aerial Surveillance and the Right to Privacy: The Flight of the Fourth Amendment*, 56 J. AIR L. & COM. 719, 727 (1991).

<sup>57</sup>This case is also significant because there was only one dissent (by Justice Black).

<sup>58</sup>*Katz v. United States*, 369 F.2d 130 (9th Cir. 1966).

<sup>59</sup>*Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>60</sup>*Id.* at 353.

<sup>61</sup>*Id.* at 361 (Harlan J., concurring).

In 1984, the Supreme Court reviewed the "open fields" doctrine established sixty years earlier.<sup>62</sup> *Oliver v. United States*<sup>63</sup> presented facts, which, in view of the Court's assertions in *Katz*, called for a new constitutional analysis. In *Oliver*, and its companion case,<sup>64</sup> law enforcement officers (without probable cause) ignored "No Trespassing" signs to perform warrantless searches of secluded areas of the petitioners' properties. In each case, the trial court determined that the defendant had exhibited sufficient evidence of a privacy expectation to render the officers' warrantless search unreasonable under the Fourth Amendment. In each case, the Supreme Court disagreed.

At the outset in *Oliver*, the Court acknowledged a distinction between the curtilage<sup>65</sup> within which a citizen (at least theoretically) may possess a reasonable expectation of privacy, and neighboring fields, where such an expectation would be deemed *unreasonable*. While conceding "the overriding

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<sup>62</sup>The "open fields" doctrine was delineated in *Hester v. United States*, 265 U.S. 57 (1924). In this case, federal agents had concealed themselves on the defendant's property, about fifty to one hundred yards away from the house, and from that vantage point, observed Hester transporting moonshine. The officers began pursuit; one even fired his pistol. The Court characterized the land surrounding the house as "open fields". Relying on the explicit language of the Fourth Amendment, and its specific reference to "persons, houses, papers, and effects", the Court concluded that the Amendment provided no protection to such open areas. There is no reasonable expectation of privacy in open fields, even if privately owned. *Id.* at 58-59.

<sup>63</sup>466 U.S. 170 (1984). *Oliver* owned a farm in Kentucky upon which it was claimed that he was growing marijuana. Narcotics agents drove onto *Oliver's* property, and passed his house to a locked gate upon which a "No Trespassing" sign had been placed. The agents exited their vehicle and walked around the gate and along the road, passing a barn and a camper. About a mile from the defendant's home, but on his property, they located a field of marijuana. In its findings of fact, the trial court concluded that this was *not* an "open field". The defendant had done all that could reasonably be expected to assert his privacy rights in the property. He had posted "No Trespassing" signs at regular intervals, and had locked the gate at the entrance to the farm. The trial court noted further that the field where the plants were found was highly secluded, bounded in its entirety by woods, fences, or embankments, all of which precluded observation from any point of public access. *Id.* at 173-74.

<sup>64</sup>*Maine v. Thornton*, 466 U.S. 170 (1984). In this case, officers disregarded the "No Trespassing" signs posted by defendant *Thornton* and followed a path between his house and a neighbor's house to a secluded area where two patches of marijuana plants were enclosed by chicken wire. The trial court, in this case as well, concluded that the defendant had exhibited sufficient evidence of a privacy expectation to render the officers' warrantless search unreasonable under the Fourth Amendment. *Id.* at 174. (The Supreme Court heard *Oliver* and *Thornton* on the same day and delivered a single opinion addressing both cases).

<sup>65</sup>"Curtilage" is defined as "those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the lands or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment." BLACK'S LAW DICTIONARY 384 (6th ed. 1990).

respect for the sanctity of the home,"<sup>66</sup> and, presumably, its environs, the Court asserted forcefully that a reasonable expectation of privacy within the meaning of the Fourth Amendment cannot be created by erecting fences around a property or posting "no trespassing" signs. The Court concluded that, while such precautions may discourage members of the public from entering upon the property, they do not "legitimize" a privacy expectation in the sense required by the Fourth Amendment. Justice Powell, writing for the majority, reiterated Justice Harlan: "The Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable."<sup>67</sup>

Justice Marshall, joined by Justices Brennan and Stevens in his dissenting opinion, argued that society *does* recognize as reasonable a privacy expectation by a landowner who fences and posts his property in such a manner. They would have held that: "private land marked in a manner sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures."<sup>68</sup> The majority, however, refused to embrace this logic, and chose to grant to police the power to enter onto open land, albeit fenced and posted, without a warrant, and without probable cause to believe that criminal activity is occurring.<sup>69</sup>

From Justice Harlan's test, the ensuing question was inevitable: *who* determines what society accepts as "reasonable?"<sup>70</sup> Who measures society's

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<sup>66</sup>*Oliver*, 466 U.S. at 178.

<sup>67</sup>*Id.* at 177.

<sup>68</sup>*Id.* at 195 (Marshall, J., dissenting).

<sup>69</sup>*Id.* at 182-84. Interestingly, Justice Scalia, in a more recent dissenting opinion, makes the same point as the dissenters in *Oliver*. The Court struck down the death penalty for a juvenile as contrary to the "evolving standards of decency that mark the progress of a maturing society". *Thompson v. Oklahoma*, 487 U.S. 815, 864-65 (1988) (Scalia, J., dissenting) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Justice Scalia assailed his colleagues' presumptions to knowledge of societal opinion. "Of course the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views." *Id.* at 865. He goes on to suggest that the only reliable standard of determining society's opinion is the legislation enacted by its representatives. *Id.* Thus, he concludes that the enactment of Oklahoma's death penalty statute reflects society's view that such a punishment is acceptable. *Id.* at 865. This argument runs parallel to that presented in the *Oliver* dissent (by Justices Marshall, Brennan and Stevens) that society regards the warrantless entry onto private and posted property by police as violative of state trespass laws.

<sup>70</sup>For a lengthy discussion of the *Katz* two-prong test and a critical analysis of the "reasonableness" standard, see generally Gerald K. Freund, *Look Up In The Sky, It's A Bird, It's A Plane, It's Reasonableness*, 20 Sw. U. L. REV. 195 (1991). Freund asserts that the "reasonableness" standard is uniquely vulnerable to abuse by the Court, and has been used as a justification for the diminution of Fourth Amendment protections.

values? Is it legislators (as Justice Scalia has suggested),<sup>71</sup> the media,<sup>72</sup> or the Court? If it is the Court, there are some inherent difficulties: 1) that the Justices are so removed from the lives of normal citizens that they cannot accurately make that assessment,<sup>73</sup> and 2) that their determinations will be colored by their own predilections.<sup>74</sup>

## 2. Takeoff

Two recent and closely decided cases have established that law enforcement officers may even take their search to the air when trudging upon the land is too tiresome, illegal, or may alert the landowner. These cases hold that it is constitutionally permissible for police to fly over property at low, but legal altitudes, to seek out criminal activity. According to the Court, such activity does not constitute a search. Therefore, no warrant is needed, nor is there a probable cause requirement.<sup>75</sup> In so holding, the Court relied on the simple inquiry of whether the officer had a legal right to be in the position from which he made his observations. The answer to that question, it seems, is dispositive of the second question of the *Katz* test.

*California v. Ciraolo*<sup>76</sup> was decided in 1986. Here, officers flew at an altitude of one thousand feet over the defendant's property. They had received an anonymous telephone tip that Ciraolo was growing marijuana in his back yard. The yard, however, was shielded from public view by two fences (one six feet, the other ten feet high). Based upon the anonymous tip, officers secured a private plane and flew, within navigable airspace, over the defendant's yard.

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<sup>71</sup>Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting).

<sup>72</sup>See *infra* notes 214-217 and accompanying text.

<sup>73</sup>That particular criticism was insinuated regarding Justice O'Connor's majority opinion in *Florida v. Bostick*, 111 S. Ct. 2382 (1991). In his dissent, Justice Marshall states, "I agree that the appropriate question is whether a passenger who is approached during such a sweep 'would feel free to decline the officers' requests or otherwise terminate the encounter'. What I cannot understand is how a majority can possibly suggest an affirmative answer to this question." *Id.* at 2391. See also *California v. Hodari*, 111 S. Ct. 1547, 1553 n.4 (1991) (stating Justice Stevens' criticism of Justice Scalia as promulgating an "ivory-towered analysis of the real world . . . fail[ing] to describe the experience of many residents.").

<sup>74</sup>Justice Scalia has voiced this concern. See *Thompson*, 487 U.S. at 865, 871, and 873 (Scalia, J., dissenting).

<sup>75</sup>Foster takes issue with the Court's conclusion that such aerial surveillance is not a "search" under the Fourth Amendment. He states: "[w]hen an officer circles a person's home and peers into his windows . . . what on earth is he doing up there but searching?". Foster, *supra* note 56, at 759 (paraphrasing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 396 (1974)).

<sup>76</sup>476 U.S. 207 (1986).

The officers observed marijuana plants, photographed them, and used this information as a basis to obtain a search warrant.<sup>77</sup>

The Court reduced the analysis to the two essential inquiries established in *Katz*: "[F]irst, had the defendant manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as objectively reasonable?"<sup>78</sup> *Ciraolo* passed the first test,<sup>79</sup> but failed the second. The Court reasoned that because the officers were in a legally acceptable location for viewing such activity, (within public navigable airspace), their actions did not fall under any Fourth Amendment restraint. For that reason, the defendant's manifested expectation of privacy could not be one which society was ready or willing to recognize as reasonable, or to protect.

A more recent case, *Florida v. Riley*,<sup>80</sup> was decided using the same logic. Like *Ciraolo*, an anonymous tip prompted law enforcement officials to take to the air to view what they could not lawfully observe from the ground. The officer circled the enclosed property in a helicopter at a height of four hundred feet to observe marijuana plants through two missing panels in a greenhouse roof.<sup>81</sup> The Court, once again, concluded that the search was not unreasonable even though conducted without a warrant and without probable cause, because the officer was within the airspace accessible to the public.<sup>82</sup> The majority did not find any constitutional relevance to the fact that police observations were specifically targeted for particular persons and places. They drew no distinction between the inadvertent glance of an air traveler and the purposeful search of a police officer.<sup>83</sup>

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<sup>77</sup>*Id.* at 209.

<sup>78</sup>*Id.* at 211.

<sup>79</sup>The Court readily concluded that *Ciraolo* had made apparent his subjective intent of securing his property from view. It noted, however, that a passenger of a large truck or two-tiered bus might have been able to observe the defendant's property from that vantage point. *Id.*

<sup>80</sup>488 U.S. 445 (1989).

<sup>81</sup>*Id.* at 448.

<sup>82</sup>"The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 450, (quoting *Ciraolo*, 476 U.S. at 215).

<sup>83</sup>The Court thought "novel" the California Court of Appeals' holding that *Ciraolo*'s reasonable expectation of privacy had been violated because of the officers' "focused" observations. In rejecting this reasoning, the Court referred to the distinction as irrelevant. *See California v. Ciraolo*, 476 U.S. 207, 214 n.2 (1986). Justice Powell, writing for the dissent, argued, "the Court fails to acknowledge the qualitative difference between police surveillance and other uses made of the airspace. Members of the public use airspace for travel, business, or pleasure, not for the purpose of observing activities taking place within residential yards." *Id.* at 224 (Powell, J., dissenting). This criticism may have been rendered moot, however, by the Court's recent ruling in *Horton v. California*, 496 U.S. 128 (1990). Here, the Court explicitly removed "inadvertency" as a required element to justify police seizures under the plain view doctrine. While this case dealt with the purposeful search for items not named in a search warrant, the

The holdings in these cases appear to fly in the face of the principle cited in *Katz* that the Fourth Amendment "protects people, not places."<sup>84</sup> *Katz* established the premise that the lawfulness of a search did not depend upon whether there was an actual physical intrusion by police, or their physical position. Rather, the appropriate inquiry was whether the surveillance had invaded a constitutionally reasonable expectation of privacy. The majority has now repudiated *Katz* by returning to property law to answer that question, and by resting its logic on whether the police were in a place to which the public had access. The Court focuses its attention on the manner of surveillance (since ground access was not lawfully permissible in these cases), rather than the citizen's legitimate privacy interests.

The absurdity of the majority's argument that both *Ciraolo* and *Riley* could have been observed from the air by those in either private or commercial aircraft was noted in the dissenting opinion. Justice Powell called such risks "virtually non-existent"<sup>85</sup> and "simply too trivial to protect against."<sup>86</sup> The larger question, however, is whether the mere *possibility* of observation renders privacy expectations unreasonable. It is a gross distortion of *Katz* to decree that any public exposure or risk thereof, no matter how remote, precludes Fourth Amendment protection.<sup>87</sup> The Court in *Katz* stated forthrightly that "what (a citizen) seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>88</sup> Airspace is certainly accessible to the public, but that fact in and of itself, should not render "public" a citizen's backyard as the Court seems to conclude.

It is no leap of logic to conclude that, were *Katz* to be decided today under the reasoning of these cases, the Court would find that *Katz* "knowingly exposed" the contents of his discussion because a passerby *might* have overheard parts of the phone conversation. Governmental agents, therefore,

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groundwork has been laid for the approval of such searches (of constitutionally protected areas) where no warrant exists. Even if the Court were to conclude that aerial surveillance by police constituted a "search" with its attendant Fourth Amendment considerations, such conduct may now be considered permissible under the "new" plain view doctrine.

<sup>84</sup>*Katz v. United States*, 389 U.S. 347, 351 (1967). This includes the notion that the Amendment reflects a choice that our society should be one in which citizens, "dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

<sup>85</sup>*California v. Ciraolo*, 476 U.S. 207, 223 (1986) (Powell, J., dissenting).

<sup>86</sup>*Id.* (Powell, J., dissenting).

<sup>87</sup>For further discussion of the Court's repudiation of *Katz*, see Foster, *supra* note 56, at 753-59. This author asks: Do inadvertent acts justify intentional governmental acts? See also Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989). "This analysis, although perhaps commendable for its simplicity, begs the constitutional question and undercuts the spirit of both *Katz* and the fourth amendment." *Id.* at 598.

<sup>88</sup>*Katz v. United States*, 389 U.S. 347, 351 (1976).



would have committed no Fourth Amendment wrong by eavesdropping themselves. The use of the electronic bugging device would be no obstacle to this conclusion, as it is analogous to the aircraft used in *Ciraolo* and *Riley*. The Court's reliance on a property law approach to these Fourth Amendment issues is indication that *Katz* and its principles may very well have been implicitly overturned.

There is an even greater concern, however. On the heels of *Ciraolo* came *Dow Chemical Co. v. United States*.<sup>89</sup> In this case, the Court found to be constitutionally permissible the Environmental Protection Agency's warrantless aerial photography of Dow's industrial plant.<sup>90</sup> In the supporting opinion, the Court emphasized that while commercial establishments are protected by the Fourth Amendment's proscription against unreasonable searches and seizures, that protection is somewhat less stringent than that enjoyed by a homeowner.<sup>91</sup> From that premise, the Court's analysis turned, once again, to the position from which the search was conducted and the manner of surveillance. Like *Ciraolo*, and its offspring *Riley*, significant reliance was placed on the fact that there was no physical trespass since the plane was within navigable airspace. That fact, coupled with the Court's finding that Dow had a diminished expectation of privacy from aerial observation, established to the Court's satisfaction that no constitutional infraction had occurred.<sup>92</sup>

Although this case is consonant with the Court's rulings in *Ciraolo* and *Riley*, there is an additional factor in *Dow* which may set precedent for more invasive governmental searches. While *Ciraolo* and *Riley* involved only naked-eye observations, *Dow* involved the use of sophisticated photographic equipment. It was revealed that magnification of the photographs taken would permit identification of objects as small as one-half inch in diameter.<sup>93</sup> Refusing to

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<sup>89</sup>476 U.S. 227 (1986).

<sup>90</sup>After conducting a consensual administrative inspection of Dow's 2,000 acre plant in Midland, Michigan, the EPA requested a second inspection. When Dow refused, the agency, rather than obtain a warrant for an administrative search, hired a commercial aerial photographer to take pictures of the facility from altitudes as low as twelve hundred feet. *Dow Chemical*, 476 U.S. at 230.

<sup>91</sup>The Court stated, "[t]he intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant". *Id.* at 236. *But see* Seth H. Ruzi, Comment, *Reviving Trespass-Based Search Analyses Under the Open View Doctrine: Dow Chemical v. U.S.*, 63 N.Y.U. L. REV. 191 (1988) for an analysis asserting that the Fourth Amendment extends to commercial environs.

<sup>92</sup>The Court noted that Dow had taken no precautions against aerial intrusions. *Dow Chemical*, 476 U.S. at 237 n.4. Precautions against physical intrusions, however, were quite extensive. An eight foot high chain link fence completely surrounded the plant. Security guards, closed circuit television monitors, motion detectors, and an elaborate alarm system were all employed to ensure privacy. In addition, the open air plants were deliberately placed in the center of the complex to protect against physical observation from the ground. *Id.* at 241 (Powell, J., dissenting).

<sup>93</sup>*Id.* at 238.

squarely address the issue,<sup>94</sup> the Court dismissed Dow's concern regarding this technological capability with the statement, "the mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems."<sup>95</sup> The Court gives observers little hope to believe that law enforcement officers engaged in warrantless aerial surveillance of citizens' homes would not be permitted to use high magnification photography of the curtilage.

The outcome of *Dow* reflects yet another closely decided case. Four justices, only one of whom remains on the High Court today, dissented.<sup>96</sup> These four dissenting justices argued that the standard for determining whether or not a warrantless governmental search is constitutionally permissible should not rest upon whether there was an actual physical trespass, nor by the method of surveillance, but by "reference to the privacy interests that a free society recognizes as reasonable."<sup>97</sup> In *Katz*, the individual's precautions against invasions of privacy were central to the determination of whether the expectation was reasonable, and therefore enforceable. Under these rulings, however, even extraordinary precautions against inquisitive eyes are insufficient to protect citizens from police intrusions. Such intrusions are being found by the Court to be almost presumptively reasonable.

Under the current case law, citizens can no longer rely on the long-held premise that, absent some "grave emergency"<sup>98</sup> or consent, the government must obtain a warrant before intruding upon their privacy. The warrant presumption has given way to the Court's interpretation of what constitutes a "reasonable expectation of privacy."<sup>99</sup> Under the current Court's reasoning, it appears that citizens' "reasonable expectations of privacy" must change as technology becomes more advanced. Rather than drawing a bright line behind which individuals are protected from governmental intrusion, the line will move, bend, and sometimes disappear. According to the Court, the definition

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<sup>94</sup>Interestingly, the Court could not rely on the "inadvertent air traveler" rationale of *Ciraolo* and *Riley*, since few commercial air passengers possess \$22,000 precision mapping cameras. See *Dow Chemical*, 476 U.S. at 250 n.12 (Powell, J., dissenting).

<sup>95</sup>*Id.* at 238. Ironically, *Dow* had established strict policies prohibiting the use of any photographic equipment on the premises, or the release of any pictures of the facility without prior approval by the management. *Id.* at 241 (Powell, J., dissenting.)

<sup>96</sup>Those dissenting in *Dow* were Justices Powell, Brennan, Marshall, and Blackmun. Only Justice Blackmun remains on the High Court today. The others have been replaced by Justices Anthony Kennedy, David Souter and Clarence Thomas.

<sup>97</sup>476 U.S. at 251 (Powell, J., dissenting).

<sup>98</sup>*McDonald v. United States*, 335 U.S. 451, 455 (1948).

<sup>99</sup>See *infra* note 149 for further criticism of the Court's separation of the privacy and warrant clauses of the Fourth Amendment. See *infra* notes 182-83 for comments regarding the unworkability of the "reasonableness test".

of "reasonable" will turn upon scientific advances. If it can be done, the citizen should reasonably expect that it *will* be done.<sup>100</sup>

### B. Trash

Courts have applied the *Katz* two-prong test to warrantless searches of citizens' trash as well. In *United States v. Kramer*,<sup>101</sup> the defendant argued that police had violated his privacy rights by entering onto his property to seize, without a warrant, trash he had put out for collection. The cans were placed just inside a knee-high chain fence which ran along the curb. The items seized by police were inside plastic trash bags, and inside plastic trash containers with plastic lids. The evidence seized implicated Kramer in drug trafficking.<sup>102</sup>

The court reasoned that the entrance by police onto Kramer's property by only a few feet was not an invasion of privacy as envisioned by the Fourth Amendment.<sup>103</sup> Concluding that there was no legitimate or objectively reasonable expectation of privacy once the trash had been so placed, the court found the seizure constitutionally permissible. When the Supreme Court denied certiorari, the groundwork was laid for *Greenwood*.

*California v. Greenwood*<sup>104</sup> involved similar factual elements. The defendant placed his trash in opaque bags at curbside for pickup as local law required. Police seized the bags and used the incriminating evidence found therein to obtain search warrants. The execution of those warrants resulted in Greenwood's arrest. The trial court dismissed the charges on the grounds that the defendant's privacy rights had been violated<sup>105</sup> and California appealed.

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<sup>100</sup>For a disturbing recitation of insults by helicopter surveillance, see Gayle J. Mayfield, Comment, *Florida v. Riley: The Beginning of the End or 'Big Brother'?*, 12 CRIM. JUSTICE J. 53, 59-60 (1990). The article provides examples of affidavits from California residents who were harassed by helicopters employed by California's Campaign Against Marijuana Planting (CAMP). Probably the most offensive account is one helicopter chasing two running and terrified twelve year old girls. See *The National Organization For the Reform of Marijuana Laws (NORML) v. Mullen*, 795 F.2d 276 (9th Cir. 1986).

<sup>101</sup>711 F.2d 789 (7th Cir. 1983), cert. denied, 464 U.S. 962 (1983).

<sup>102</sup>*Id.* at 791-92.

<sup>103</sup>"Every trespass, by definition, invades someone's right of possession, but not every government trespass violates the Fourth Amendment. Only those that infringe a privacy interest do." *Id.* at 794. (citations omitted)

<sup>104</sup>486 U.S. 35 (1988).

<sup>105</sup>*Id.* at 38.

Rejecting traditional abandonment language,<sup>106</sup> the Court applied the *Katz* test and found no invasion of any protectable privacy interest.<sup>107</sup> The Court explained that placing trash at curbside for pickup by a third party, exposes the property to public view and scrutiny and therefore terminates any previously held privacy right. The Court further explained that scavengers, curiosity-seekers, dogs and others could easily explore the containers so placed. If the trash could be legitimately exposed to this cast of characters, it would be unreasonable to deny the same freedom of action to the police.<sup>108</sup> Recognizing that *Greenwood* had manifested a subjective expectation of privacy by using opaque, sealed containers, the Court found that society was not willing to confer objective legitimacy to that expectation. Essentially, according to the Court, there is no reasonable or protectable expectation of privacy in trash left at curbside for pickup.

Under an analysis truly faithful to the letter and spirit of *Katz*, however, *Greenwood* would have prevailed. The two cases are factually analogous. Each involved a "container" (a phone booth and a trash can, respectively); each involved a "public" setting; and in each case, the defendant expressed a subjective expectation of privacy. In a rather feeble justification, the *Greenwood* Court concluded that the likelihood of public intrusion was greater regarding trash than conversations in a phone booth. This reasoning eschews the "person-oriented" approach (as opposed to the "property-oriented" approach) espoused in *Katz*. In addition, the *Greenwood* Court failed to appreciate the interconnectedness of the two prongs of the *Katz* test. *Katz* focused its analysis on the actions of the citizen, and explicitly rejected location as the focal point of the issue. By routinely accepting the defendant's assertions of a subjective expectation of privacy, and then equally routinely rejecting arguments that

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<sup>106</sup>Historic property law tenets hold that two questions must be answered to determine whether property has been abandoned: 1) whether the owner intended to abandon the property, and 2) whether the retrieval of the property was "accomplished by an intrusion upon the curtilage". WAYNE LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT*, § 2.6c, at 476 (2d ed. 1987).

At least theoretically, application of property law would invalidate a seizure of trash placed within the curtilage of the home. In addition, the defendant's argument that municipal law *required* him to dispose of trash in the manner used would logically negate the volitional element necessary to prove intent. "The *Greenwood* majority failed to acknowledge that if a citizen must break the law to avoid voluntarily exposing the contents of his or her garbage can to public scrutiny, the crux of the issue is compulsion, not consent." Julie A. Line, Note, *Fourth Amendment - Further Erosion of the Warrant Requirement for Unreasonable Searches and Seizures: The Warrantless Trash Search Exception*, 79 J. CRIM. L. & CRIMINOLOGY 623, 645, (1988).

See also Jon E. Lemole, *From Katz to Greenwood: Abandonment Gets Recycled from the Trash Pile - Can Our Garbage Be Saved from the Court's Rummaging Hands?*, 41 CASE W. RES. L. REV. 581 (1991) (arguing persuasively that the *Greenwood* Court's privacy language is a thin disguise for a traditional abandonment approach).

<sup>107</sup>*California v. Greenwood*, 486 U.S. 35, 40 (1988).

<sup>108</sup>*Id.*

those expectations are objectively reasonable, the Court failed to grasp the essence of *Katz*. It so severed the two prongs as to render each meaningless.

What about trash *not* at curbside? This question was raised in a recent appellate ruling, *United States v. Hedrick*.<sup>109</sup> On this occasion the trash was thirty feet from the street and eighteen feet from the sidewalk, well onto the defendant's property. Still, the opaque bags in the closed trash containers were placed at that location for regular pickup. Police, hiding behind trees and bushes as they approached the suspect's house, seized without a warrant, items which had been placed in those cans.<sup>110</sup> Does an individual retain a legitimate privacy interest in trash located well within the curtilage of the home?

Containers, other than garbage cans, clearly cannot be subject to a warrantless police search absent consent or some articulable exigency.<sup>111</sup> However, the court noted that such containers, whether at curbside or well onto the property, may be examined by members of the public, and are eventually removed by a third party. These distinctions from other types of containers were sufficient to defeat a Fourth Amendment privacy claim. Moreover, although the intent to convey the property to another in and of itself could not effectively terminate a legitimate expectation of privacy, it was a factor the court considered in applying the critical test of public access.<sup>112</sup>

Nor did the court conclude that the willingness of the public to trespass on the property of another to inspect his trash could necessarily defeat a reasonable expectation of privacy.<sup>113</sup> In this case, however, it was noted that the property was placed in a location readily accessible to the third party collector, and to public view. Under these circumstances, the defendant "knowingly exposed"<sup>114</sup> his property to the public for Fourth Amendment purposes, and lost any protectable privacy interest.

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<sup>109</sup>922 F.2d 396 (7th Cir. 1991), *cert. denied* 112 S. Ct. 147 (1991).

<sup>110</sup>*Id.* at 397.

<sup>111</sup>See *Hedrick*, 922 F.2d at 399. The court discusses the articulable exigency by stating:

The Court has never indicated, however, that a container such as a backpack which was placed at the side of a driveway within the curtilage of a house could be searched without a warrant; in fact, caselaw indicates that such a container could not be searched because its contents are not in plain view and have not been knowingly exposed to the public. We must now determine, however, whether that container may be searched if it is a garbage can. The result can differ only if there is something in the nature of a garbage can which results in the exposure of its contents to the public.

*Id.*

<sup>112</sup>"[T]he proper focus under *Greenwood* is whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable." *Id.* at 400.

<sup>113</sup>*United States v. Hedrick*, 922 F.2d 396 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 147 (1991).

<sup>114</sup>*Id.*

The distinction between the containers relied upon in *Hedrick* ignores prior case law. In *Robbins v. California*,<sup>115</sup> the Court stated, "Unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment."<sup>116</sup> A year later, in *United States v. Ross*,<sup>117</sup> the Court referenced a "virtually unanimous agreement in *Robbins* . . . that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper."<sup>118</sup>

Likewise, a citizen's intent to transfer the property to a third person should have no weight in assessing his privacy interest in the object. "Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox or other depository with the 'express purpose' of entrusting it to the postal officer or private carrier . . . ." <sup>119</sup>

Nor should the possibility of unlawful invasion by members of the public be dispositive. "The mere possibility that unwelcome meddlers might open and rummage through the containers does not negate the expectation of privacy in their contents any more than the possibility of a burglary negates an expectation of privacy in the home. . . ." <sup>120</sup>

Yet, some or all of these factors were used to justify the Court's conclusions that *society* does not recognize a legitimate privacy interest in trash placed on one's property for pickup. Nevertheless, it is difficult to accept the notion that the members of the Court would not feel affront at scavengers, neighbors or police going through their trash.<sup>121</sup>

The Supreme Court's denial of certiorari in *Hedrick* is a clear signal of its tacit approval. It would seem that the closer to one's domicile the trash container is located, the more reasonable (and therefore protectable) the expectation of privacy. The line being drawn, however, is inching its way to the doorstep. Under the current reasoning, law enforcement officers may, should they have the time and the inclination, go from house to house, without a warrant and without probable cause, systematically searching the trash containers of each resident on trash pick-up eve.

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<sup>115</sup>435 U.S. 420 (1981).

<sup>116</sup>*Id.* at 427.

<sup>117</sup>456 U.S. 798 (1982).

<sup>118</sup>*Id.* at 822-23.

<sup>119</sup>*California v. Greenwood*, 486 U.S. 35, 55 (Brennan, J., dissenting).

<sup>120</sup>*Id.* at 54 (Brennan, J., dissenting) (emphasis added).

<sup>121</sup>"Most of us, I believe, would be incensed to discover a meddler - whether neighbor, a reporter, or a detective - scrutinizing our sealed trash containers to discover some detail of our personal lives." *Id.* at 51 (Brennan, J., dissenting). See also *infra* notes 214-17 and accompanying text.

## C. Arrests

The Supreme Court, in the 1968 case of *Terry v. Ohio*,<sup>122</sup> found that it was constitutionally permissible for police officers to temporarily stop an individual if that officer could articulate facts which caused him to reasonably suspect that criminal activity was afoot. This holding was a departure from the long-accepted Fourth Amendment standard of probable cause as the threshold requirement for interference with the liberty of a citizen.

Two factors guided the Court to its conclusion. The first was the reasoning of a case decided the prior year: *Camara v. Municipal Court*.<sup>123</sup> In examining a warrantless administrative search, the Court applied a balancing test for Fourth Amendment considerations. That balancing test called for the Court to weigh the government's interest in conducting such searches against the individual's interest in privacy. In *Terry*, the Court decided to apply this balancing test to law enforcement protocol.<sup>124</sup>

The second factor guiding the Court to its (then) novel conclusion was the nature of the case itself. Officer McFadden had reason to believe that a violent felony was about to occur. He feared for his immediate safety and that of others. Although the information he had did not rise to the level of probable cause as required by the Fourth Amendment, he restrained the defendant, and during the ensuing patdown located a weapon. Under these circumstances, and applying the balancing test of *Camara*, the Court found the officer's actions reasonable. The effect of the *Terry* decision was to substantially lower the level of proof required for police to lawfully interfere with citizens. Recognizing the need for caution, however, the Court advised: "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances . . . ." <sup>125</sup>

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122392 U.S. 1 (1968).

123387 U.S. 523 (1967).

124"[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)). Scholars, however, have noted the difficulty inherent in applying such a nebulous test to fundamental Fourth Amendment issues. See, e.g., Robert Berkley Harper, *Has the Replacement of "Probable Cause" with "Reasonable Suspicion" Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13 (1988); Ronald J. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L. F. 763 (1979); Christine M. Wiseman, *The "Reasonableness" of the Investigative Detention: An "Ad Hoc" Constitutional Test*, 67 MARQ. L. REV. 641 (1984).

125*Terry v. Ohio*, 392 U.S. 1, 20 (1968). See also *Terry's* companion case, *Sibron v. New York*, 392 U.S. 40 (1968) (condemning a search where the officer had no reason to fear for his safety).

This warning was not enough for Justice Douglas, however. He saw the decision as taking "a long step down the totalitarian path."<sup>126</sup> The succeeding erosion of Terry's original holding bears witness to those fears. *Terry* called for a particularized suspicion to be articulated in order to uphold a temporary seizure based upon less than probable cause. That requirement has given way to acceptance of a mere generalized suspicion, permitting seizures even where no exigency is alleged.<sup>127</sup>

One of the most recent cases demonstrating this erosion is *California v. Hodari*.<sup>128</sup> In this case two officers on routine patrol, and in an unmarked vehicle, rounded a corner and observed several youths gathered around a car parked at the curb. Seeing the officers approaching, the youths took flight. A footchase ensued. As Officer Pertoso closed in, Hodari tossed away a small object. Hodari was tackled, arrested and found to be in possession of \$130 and a pager. The discarded object was found to be crack cocaine.

In the proceedings that followed, the prosecution conceded that the officers had neither probable cause to arrest, nor a reasonable suspicion sufficient to justify a stop under the tenets of *Terry*. The government argued, however, that the defendant had not been "seized" or "stopped" until he was tackled. The drugs should be admissible, then, since they were voluntarily discarded *prior* to any police misconduct.

The defendant, relying upon the standard set forth by the Court in *United States v. Mendenhall*,<sup>129</sup> argued that he had been "seized" when he saw the officer run towards him.<sup>130</sup> Hodari contended that the officer's footchase was a sufficient "show of authority" to render reasonable his conclusion that he was not "free to leave."

The Court rejected the defendant's arguments on the grounds that *Mendenhall* merely stated a necessary, but not always a sufficient, condition for seizure. According to the Court, a "show of authority" is not tantamount to a

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<sup>126</sup>*Terry*, 392 U.S. at 38 (Douglas, J., dissenting).

<sup>127</sup>See *Michigan Department of Police v. Sitz*, 110 S. Ct. 2481 (1990) (upholding the use of field sobriety checkpoints which detained all motorists, even though no evidence existed to justify the particular stop); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (permitting the suspicionless testing of employees for drugs); *United States v. Hensley*, 469 U.S. 221 (1985) (permitting seizures based upon a reasonable suspicion that the individual had committed a crime in the past); *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984) (holding that the suspicion-less questioning of factory workers by INS agents after posting armed agents at the exits was not "search" and therefore lawful); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (relaxing the *Terry* standard for border search cases); and *Adams v. Williams*, 407 U.S. 143 (1972) (permitting a seizure based upon an informant's uncorroborated tip).

<sup>128</sup>111 S. Ct. 1547 (1991).

<sup>129</sup>446 U.S. 544 (1980).

<sup>130</sup>*Id.* at 554. The *Mendenhall* test stated: "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*



seizure, and until an actual seizure occurs, there can be no Fourth Amendment infraction.

Justices Stevens and Brennan fervently disagreed. These Justices found appalling the majority's definition of "seizure," noting its stark contrast to precedent. Justice Stevens wrote:

In particular, the Court now adopts a definition of 'seizure' that is unfaithful to a long line of Fourth Amendment cases. Even if the Court were defining seizure for the first time, which it is not, the definition that it chooses today is profoundly unwise. In its decision, the Court assumes, without acknowledging, that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target.<sup>131</sup>

It would be difficult indeed for any reasonable person to conclude that *Hodari* was "free to leave" under these circumstances. This conclusion being inescapable, the Court had to abandon any standard which would focus on the officer's illegal conduct. Thus, the majority created, seemingly out of thin air and certainly in contradiction to prior holdings, a tortured distinction between seizures accomplished by an actual touching, and those effected by a show of force.<sup>132</sup> Because of this, police will be encouraged to engage in illegal, (but sufficiently slow) chases of citizens in the hope of obtaining contraband.

Officers may now gain by intimidation what they could not gain by adhering to the law. The majority has concluded that an officer's "attempt to make an unconstitutional seizure is beyond the coverage of the Fourth Amendment, no matter how outrageous or unreasonable the officer's conduct may be."<sup>133</sup> In the process, the exclusionary rule has been severely compromised. The officer may break the law with impunity, as long as he is not immediately successful.<sup>134</sup>

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<sup>131</sup>*California v. Hodari*, 111 S. Ct. 1547, 1552 (1991) (Stevens, J., dissenting).

<sup>132</sup>The rigid definition of "seizure" adopted by the Court contradicts long-accepted rules of construction. "The Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words." *Olmstead v. United States*, 277 U.S. 438, 488 (1928) (Butler, J., dissenting). This view was embraced by the majority in *Katz v. United States*, 389 U.S. 347, 353 (1967).

<sup>133</sup>*Hodari*, 111 S. Ct. at 1561 (Stevens, J., dissenting).

<sup>134</sup>In *Hodari*, California admitted that the officers had no lawful cause to chase the defendant. By upholding the admissibility of the drugs seized as a result of that unlawful pursuit, the Court has eliminated the means created to deter such conduct. The dissent argued forcefully that the exclusionary rule was meant to deter all police misconduct, including attempted misconduct that results in the seizure of evidence. Justice Stevens impassioned:

A search must be justified on the basis of facts available at the time it is initiated; the subsequent discovery of evidence does not retroactively validate an unconstitutional search. The same approach

The truth of this case is revealed, however, in a footnote to Justice Scalia's majority opinion.<sup>135</sup> In this footnote, Justice Scalia implies his own belief that the officers *did* possess the requisite level of proof to justify at least a temporary seizure. Rather than grounding the decision in an explication of the "reasonable suspicion" standard,<sup>136</sup> however, the Court chose to expound upon the legal definition of "seizure", engaging in what Justice Stevens calls "logic-chopping."<sup>137</sup>

While the Court's resort to tortured semantics in this case is notable, what is more troubling is its contrast to *Terry* (although there has been a continuing erosion of the tenets of that case). In *Hodari*, there is no assertion from any quarter that the officers feared for their safety at any time. Nor was there the slightest hint that a violent crime was about to occur. Indeed, no exigency is even mentioned. The Court obviously found these contrasts unremarkable, indicating just how diluted the original *Terry* standard has become. *Terry* has metamorphosed from requiring a particularized suspicion in exigent

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should apply to seizures; the character of the citizen's response should not govern the constitutionality of the officer's conduct. *California v. Hodari*, 111 S. Ct. 1547, 1560 (1991) (Stevens, J., dissenting).

<sup>135</sup>Justice Scalia noted:

California conceded below that Officer Pertoso did not have the 'reasonable suspicion' required to justify stopping Hodari . . . That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. *See Proverbs 28:1* ("The wicked flee when no man pursueth.") We do not decide that point here, but rely entirely upon the State's concession.

*Hodari*, 111 S. Ct. at 1549 n.1.

In a war of footnotes, Justice Stevens responded:

The Court's gratuitous quotation from *Proverbs 28:1* . . . mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers . . . It has long been "a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion'."

*Id.* at 1553 n.4 (Stevens, J., dissenting) (citations omitted).

<sup>136</sup>There is precedent for the Court to find lawful police conduct which the government concedes is unlawful. In *Cupp v. Murphy*, 412 U.S. 291, 296 (1973), the state admitted that the officers did not have probable cause to detain and search the defendant. They sought to justify the search on an exigent circumstances rationale. While the Court agreed that the exigency (the destruction of evidence) justified the search, it found as an additional basis for its decision the belief that the officers did indeed have probable cause to arrest Mr. Murphy. Thus, the search could have been justified as incident to arrest. The *Hodari* Court was not strictly bound, then, by the state's concession that the officers had acted unlawfully.

<sup>137</sup>*Hodari*, 111 S. Ct. at 1561 (Stevens, J., dissenting).

circumstances, to requiring a mere generalized suspicion even in the absence of any exigency.

Have we reached the bottom of this "slippery slope"? The Court has openly indicated that "reasonable suspicion" is not the Constitutional floor.<sup>138</sup> It has demonstrated this by giving approbation to stops of scores of innocent motorists when police have no suspicion at all vis-a-vis the individual driver.<sup>139</sup> In upholding wholesale stops of citizenry at checkpoints designed to test for persons driving under the influence of drugs or alcohol, the Court has simply ignored the Constitution in order to aid law enforcement. In a "lose-lose" kind of logic, the Court has found such intrusions justified, at least in part, by the *lack* of an individualized suspicion—that such intrusions are constitutionally acceptable precisely because they are conducted en masse.<sup>140</sup>

Other cases demonstrate that *Hodari* is no anomaly. In *United States v. Sokolow*,<sup>141</sup> the Court upheld the stop of a traveler because he fit the profile of a drug dealer. No illegal behavior was observed.<sup>142</sup> Nor were there any

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<sup>138</sup>See *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). See also *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989).

<sup>139</sup>See *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>140</sup>As one commentator stated: "It is rather peculiar, however, that random detentions of only a few violate the Fourth Amendment, but that such violations disappear as long as *everyone* is subjected to the same stop." Jill W. Broderick, Casenote, *Michigan Department of State Police v. Sitz: Suspicionless Seizures and the Fourth Amendment*, 11 N. ILL. L. REV. 349, 370 (1991). Further reference is made to this novel reasoning by Justice Rehnquist:

Because motorists, apparently like sheep, are much less likely to be "frightened" or "annoyed" when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop *all* motorists on a particular thoroughfare, but he cannot without articulable suspicion stop *less* than all motorists. The Court thus elevates the adage "misery loves company" to a novel role in Fourth Amendment jurisprudence. The rule becomes "curiouser and curiouser" as one attempts to follow the Court's explanation for it.

*Delaware v. Prouse*, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting) (emphasis in original).

<sup>141</sup>490 U.S. 1 (1989).

<sup>142</sup>The following facts gave rise to the agents' "reasonable suspicion": Sokolow paid cash for his ticket; he was traveling to and from Miami; he was staying in Miami for only forty-eight hours; he did not check any luggage; he was dressed in a black jumpsuit; he wore gold jewelry; he appeared nervous; his name did not match the name under which the phone number he provided was listed. *United States v. Sokolow*, 490 U.S. 1, 3-4 (1989).

Justice Marshall, however, noted that a drug courier profile has a "chameleon-like way of adapting to any particular set of observations" and listed a host of cases describing characteristics found by the Court to be suspicious: first to deplane; last to deplane; deplaned in the middle; purchased one-way ticket; purchased round-trip ticket; changed planes; non-stop flight; no luggage; gym bag; new suitcases; traveling alone; traveling with companion; acted nervously; acted too calmly. He argued persua-

indication that a violent crime was about to occur, or that the agents might be in danger. In *United States v. Montoya de Hernandez*,<sup>143</sup> the Court upheld the warrantless sixteen-hour incommunicado detention of an airline passenger suspected of smuggling drugs in her alimentary canal. (Agents told her she would remain until she consented to an x-ray or defecated in a bucket.)<sup>144</sup> The Court found this conduct reasonable under the Fourth Amendment and blamed the length, discomfort, and humiliating nature of the detention on the defendant's action (her method of drug smuggling).<sup>145</sup> Addressing the Court's failure to apply the warrant clause, Justice Brennan stated: "Something has gone fundamentally awry in our constitutional jurisprudence when a neutral and detached magistrate's authorization is required before the authorities may inspect the plumbing . . . in a person's home, but *not* before they may hold him in indefinite involuntary isolation . . . ."<sup>146</sup> Further addressing the Court's distortion of *Terry*, he continued: "It is simply staggering that the Court suggests that *Terry* would even begin to sanction [such a detention], even one occurring at the border."<sup>147</sup>

#### D. Searches

In 1969, the Supreme Court held in *Chimel v. California*,<sup>148</sup> that officers lawfully arresting an individual could search, incident to that arrest, the arrestee's person, and the area within his reach or control. The search of this area was permitted without a warrant, in the interests of protecting the officers and preserving evidence.

*Chimel* had been lawfully arrested within his home. Contemporaneous with his arrest, however, officers had conducted a warrantless search of his entire house. This, the Court ruled, violated the Fourth Amendment's proscription against unreasonable searches and seizures. "If you want to search the house,"

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sively that such profiles may be adapted to fit large numbers of presumably innocent travelers. *Id.* at 13-15 (Marshall, J., dissenting).

<sup>143</sup>473 U.S. 531 (1985).

<sup>144</sup>*Id.* at 532-36.

<sup>145</sup>*Id.* at 544.

<sup>146</sup>*Id.* at 555-56 (Brennan, J., dissenting) (referring to the *Camara* Court's conclusion that a warrant was needed for administrative inspections) (emphasis in original).

<sup>147</sup>*Id.* at 559 (Brennan, J., dissenting). *Terry* authorized "temporary" stops, not sixteen-hour detentions.

<sup>148</sup>395 U.S. 752 (1969).

the Court opined, "get a search warrant."<sup>149</sup> The presumptive need for a warrant was reaffirmed.<sup>150</sup>

In *Maryland v. Buie*,<sup>151</sup> however, the Court retreated from this position. In this case, police obtained arrest warrants for two men wanted in an armed robbery of a pizza parlor. Executing a warrant two days after the robbery, officers entered Buie's house. At the top of the basement stairs, an officer shouted for anyone in the cellar to come out. Buie did so and was arrested without incident. In what the officers characterized as a "protective sweep," the basement was then searched for other people. In the course of that search, clothing matching the description of that worn by one of the robbers was seized.<sup>152</sup>

Buie's subsequent conviction, based in part on the incriminating clothing, was reversed by the Court of Appeals of Maryland.<sup>153</sup> That Court held that a warrantless search may only be justified as a "protective sweep" when there is probable cause to believe that an articulable and demonstrable potential for danger exists. None was shown here. The Supreme Court of the United States reinstated the conviction, holding that the protective sweep was justified because the arrest occurred on "the adversary's turf" where "an ambush in a confined setting of unknown configuration is more to be feared. . . ."<sup>154</sup> The Court balanced the need to search against the invasion of privacy suffered

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<sup>149</sup>Judges and scholars have long debated whether the Fourth Amendment forbids warrantless searches, or merely unreasonable searches. Its phrasing (the use of the word "and" between the privacy clause and the warrant clause) begets confusion. One scholar has isolated three possible interpretations:

- 1) that the "reasonable" search is one which meets the warrant requirements specified in the second clause; 2) that the first clause provides additional restriction by implying that some searches may be "unreasonable" and therefore not permissible, even when made under a warrant; or 3) that the first clause provides an additional search power, authorizing the judiciary to find some searches "reasonable" even when carried out *without* a warrant.

See JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966) (emphasis in original) He concludes, after historical examination, that "either of the first two interpretations is faithful to the intended meaning of the amendment (although the second is preferable)". He further notes that "It would be strange, to say the least, for the amendment to specify stringent warrant requirements, after having in effect negated these by authorizing judicially unsupervised 'reasonable' searches without a warrant. To detach the first clause from the second is to run the risk of making the second virtually useless." *Id.* at 42-44.

<sup>150</sup>For cases supporting the presumptive need for a search warrant, see, *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Ventresca*, 380 U.S. 102 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *McDonald v. United States*, 335 U.S. 451 (1948); *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>151</sup>494 U.S. 325 (1990).

<sup>152</sup>*Id.* at 328.

<sup>153</sup>*Id.* at 329.

<sup>154</sup>*Id.* at 333.

thereby in favor of the state. The Court distinguished the instant case from *Chimel*:

The type of search we authorize today is far removed from the "top to bottom" search involved in *Chimel*; moreover it is decidedly not "automati[c]," but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.<sup>155</sup>

Once again, however, the Court's logic is strained. The officers provided no "reasonable, articulable suspicion" that anyone else was present in the house. The sweep was conducted as a matter of course. The officers gained no new information indicating danger to them after entering the house beyond what they possessed before their arrival. That being the case, there is simply no legal justification for excusing the requirement of a search warrant. If the arrest in his house, of an individual suspected of a violent crime, in and of itself creates an exigency justifying a protective search, then officers who have taken the time to secure an arrest warrant, and who have substantial control over the time and place of arrest, can certainly be asked to comply with the Fourth Amendment's search warrant requirement. Surely this conclusion works no onerous burden on law enforcement. Absent some real, rather than speculative potential for danger, such searches clearly violate the Fourth Amendment.

In *Florida v. Bostick*,<sup>156</sup> the High Court addressed the Broward County Sheriff's Department's drug interdiction practice of "working the buses." Two uniformed officers (at least one bearing a firearm) boarded a bus traveling from Miami to Atlanta during a stopover in Fort Lauderdale and chose Terry Bostick for questioning. The officers acknowledged that they had no articulable suspicion regarding Bostick, or any of the passengers. Bostick agreed to allow the officers to inspect his ticket and identification, both of which were unremarkable. The officers persisted, requesting permission to inspect his luggage. The defendant insisted that he refused; the officers testified that he consented.<sup>157</sup> The ensuing search revealed a quantity of cocaine. Bostick appealed his conviction to the Florida Supreme Court.

The Florida Supreme Court recognized that the Fourth Amendment permits police officers to approach citizens randomly, without an articulable suspicion of wrongdoing, in airports and other public places, to question them and ask their consent to search parcels and luggage, as long as a reasonable person would understand that he or she can refuse to cooperate.<sup>158</sup> The Florida

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<sup>155</sup>*Id.* at 336.

<sup>156</sup>111 S. Ct. 2382 (1991).

<sup>157</sup>Bostick insisted 1) that he did not consent to the search, and 2) that he was not told that he had a right to refuse to consent to such a search. The police, of course, disagreed, and the trial court ruled in their favor. *Bostick v. State*, 554 So. 2d 1153, 1154-55 (Fla. 1989).

<sup>158</sup>The approach of a police officer is a fearful thing. Officers do not approach citizens to ask the time of day or to chat about the weather. Citizens may rightfully assume that

Supreme Court distinguished the above situations from those occurring on a bus. For the Florida court, the bus setting provided a necessarily cramped and confined setting. Police loom over seated passengers creating such an intimidating atmosphere that people cannot reasonably feel free to leave (or to refuse cooperation). For this reason, the court held that police-citizen encounters which would be permissible in most public places are not permissible on a bus. The U.S. Supreme Court granted certiorari, avowedly to examine this per se rule, rather than to rule on the specific findings of the case at hand.

In overturning the Florida court's decision, Justice O'Connor wrote that there was insufficient reason to distinguish between public places and a bus for Fourth Amendment purposes. The issue should not have been the physical site of the encounter, or whether the defendant felt "free to leave."<sup>159</sup> Rather, the question should have been whether a reasonable person would have felt free to refuse the police request or otherwise terminate the encounter. This question should have been answered by examining the totality of the circumstances surrounding the incident. The physical site of the encounter was but one of those factors. The majority remanded the case to the Florida Supreme Court for a re-evaluation under the appropriate standard.<sup>160</sup>

Dissenting, Justices Marshall, Stevens and Brennan would have found the suspicionless, warrantless sweep of buses unconstitutional as coercive and unjustified invasions of privacy. While agreeing in concept with the test articulated by the majority, the Justices easily concluded that the search conducted here failed that test on its face. No reasonable person seated on a bus, waiting for it to depart, confronted by two standing, uniformed police officers, one armed, blocking egress from the seat, and "requesting" permission to search one's bags, would feel that they had a right to refuse.<sup>161</sup>

The dissenting Justices had no difficulty distinguishing a bus from other public settings. In bus or airport terminals, citizens move about more freely to evade or terminate unwanted encounters with the police. Bus seats provide

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the approach of an officer signals an investigation of criminal activity. Even for the innocent, the "mere encounter" the Court sanctions is not without its intimidating effects. In addition, most citizens do not know that they have the right to walk away, and officers are under no obligation to so inform them.

<sup>159</sup>*Florida v. Bostick*, 111 S. Ct. 2382, 2386 (1991). She pointed out that once on a bus, passengers might be constrained from leaving for reasons other than police presence—such as missing their departure.

<sup>160</sup>*Bostick*, 111 S. Ct. at 2388.

<sup>161</sup>*Bostick's* argument before the trial court, while not successful, was credible: What 'reasonable person', having been approached by uniformed officers who have identified themselves as narcotics investigators, having been advised that he could refuse their request to search his bag, knowing that there was a quantity of cocaine there, would voluntarily consent to such a search? *Id.* Logic would lead to the conclusion that either 1) he was intimidated into consenting to the search, or 2) he was so incompetent that he could not have lawfully provided a knowing and voluntary consent.

very little freedom or opportunity to move. According to the dissent, by permitting such searches, the majority effectively declared buses a zone devoid of constitutional protections.

The dissent also pointed out how far out of touch the majority had become with the reality of life in America. Bostick, once confronted, had two choices: refuse to comply or leave the bus. Both avenues created risks that, in essence, nullified his freedom of choice. By refusing to cooperate, he risked arousing the anger and further suspicions of the officers, who would then intensify the interrogation. This response to a suspect's refusal to comply is commonly known and accepted. The fact that police are not lawfully permitted to hold such refusal against a passenger is not a fact citizens can be expected to know. Bostick's alternative was to leave the bus, squeezing by the very officers he was seeking to avoid, and risking the loss of his bus ride and becoming stranded in a strange town.<sup>162</sup> Justice Marshall complained: "The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers—in short a *raison d'être*—is foreign to any fair reading of the Constitution, and its guarantee of human liberties."<sup>163</sup>

Quoting an ominous passage from a Federal District Court, Marshall concluded: "It seems rather incongruous at this point in the world's history that we find totalitarian states becoming more like our free society while we in this nation are taking on their former trappings of suppressed liberties and freedoms."<sup>164</sup> Travelers, according to the Court, should no longer be surprised by uniformed officers "requesting" identification, travel documents, and "permission" to search personal belongings.<sup>165</sup>

#### V. ANALYSIS—HYDRAULIC FORCES AT WORK

In 1968, Justice Douglas warned of "powerful hydraulic pressures . . . that bear heavily on the Court to water down constitutional guarantees and give

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<sup>162</sup>*Id.* at 2393 (Marshall, J., dissenting).

<sup>163</sup>*Id.* at 2391 (Marshall, J., dissenting) (quoting *State v. Kerwick*, 512 So. 2d 347, 348 (Fla. Dist. Ct. App. 4th Dist. 1987)).

<sup>164</sup>*United States v. Lewis*, 728 F. Supp. 784, 788 (D.D.C. 1990), *rev'd*, 921 F. 2d 1294 (D.C. Cir. 1990).

<sup>165</sup>[I]n Broward County, Florida, these police officers approach every person on board buses and trains ("that time permits") and check identification, tickets, ask to search luggage—all in the name of "voluntary cooperation" with law enforcement—to the shocking extent that just one officer, Damiano, admitted that during the previous nine months, he himself, had searched in excess of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck.

*Bostick v. State*, 554 So. 2d 1153, 1158 (quoting *State v. Kerwick*, 512 So. 2d 347, 348-49 (Fla. Dist. Ct. App. 4th Dist. (1987))).



the police the upper hand."<sup>166</sup> Those hydraulic forces have taken on some new guises, but they are readily apparent.

#### A. *The New Conservatives*

The past decade has seen the appointment of a large number of federal judges by conservative Presidents.<sup>167</sup> These appointments are central to the conservative shift occurring in constitutional jurisprudence.<sup>168</sup>

Many of these conservatives embrace the philosophy of judicial restraint. Simply put, the "restraintists" believe that the Court should be limited in its power and authority, and bound by the literal wording of the Constitution, and when that fails, to the debates leading to the adoption of the particular clause in question (although pure restraintists would likely take issue with that resort). These advocates believe that this conservative ideology will not only stay the judicial indulgences of the 1960s, but that it effectively eliminates the uncertainty inherent in constitutional interpretation. Moreover, judicial restraint reflects allegiance to the federalist principles upon which the country was founded.<sup>169</sup>

This philosophy is seductive. It appears, first of all, to be self-effacing. The Court, under this doctrine, enables the will of the people (as determined by their elected representatives) to be implemented by according great deference to state statutes and regulations. The Court "restrains" itself, magnanimously, from invalidating rules established by the majority, even if it disagrees with them.<sup>170</sup>

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<sup>166</sup>*Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

<sup>167</sup>During his eight year term, President Reagan appointed more than half of all lower court judges (372 out of 736), three Supreme Court Justices, and elevated Rehnquist to the position of Chief Justice. "No other President has had as great an impact on the federal judiciary since Roosevelt . . . Through judicial appointment . . . the administration 'institutionalize(d) the Reagan revolution so it can't be set aside no matter what happens in future presidential elections'." DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 100-102 (2d ed. 1990).

<sup>168</sup>President Reagan, in each of his campaigns, promised to appoint only those judges who opposed abortion and the judicial activism of the Warren and Burger Courts. See O'Brien, *supra* note 167, at 100; see also HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988).

The use of the presidential power to appoint life-tenured judges as a political tool is not new. Regarding this practice, Chief Justice Rehnquist said, "There is no reason in the world why a President should not do this." He further characterized such political moves as "both normal and desirable". See DAVID GELFAND ET AL., *8 MEN AND A LADY: PROFILES OF THE JUSTICES OF THE SUPREME COURT* (Bethesda: National Press 1990)

<sup>169</sup>See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

<sup>170</sup>Note Justice O'Connor's disclaimer: "[T]his Court is not empowered to forbid law enforcement practices simply because it considers them distasteful." *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991).

Second, this theory of jurisprudence reinforces the Court's standing as a neutral, detached<sup>171</sup> and objective body. The Court avoids the temptation of becoming legislators, retains a legitimacy as the supreme arbiter of law, and maintains a Solomon-like image of wisdom and forbearance.

Third, judicial restraint is a safe ideology. It provides structure, discipline and predictability to constitutional analysis. Logically, this would result in an elevation of the doctrine of *stare decisis*, and lend credibility, authority and stability to the Court.<sup>172</sup>

Fourth, the exercise of judicial restraint is said to minimize the all too human tendency to allow one's own predilections to color the outcome of the case.<sup>173</sup>

Fifth, the doctrine permits judges to honorably sidestep difficult constitutional issues by asserting a lack of authority. To the textualists,<sup>174</sup> if the Constitution does not address the issue directly, its resolution is left to the people, not to the courts.<sup>175</sup>

As alluring as this philosophy may be, there are persuasive arguments from the "nontextualists."<sup>176</sup> While recognizing the validity of the democratic, majoritarian system, these proponents also value the unique and essential role of the Court in setting boundaries beyond which even the majority may not tread. The purpose of a Bill of Rights is to protect the minority from the tyranny of the majority.

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<sup>171</sup>For instance, the overturning of *Roe v. Wade*, 410 U.S. 113 (1973) has been advocated not only because the "right to abortion" does not appear literally in the Constitution, but also because the issue is a "political" one, and the Court must detach itself from political issues.

<sup>172</sup>This article points out several departures from prior case law taken by the Court in the past few years. It cannot be safely said that the new conservative jurists will adhere to precedent as a general rule. See *supra* text accompanying note 5.

<sup>173</sup>Justice Scalia has lauded the doctrine of "original intent" as restraining judicial activism. It "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

<sup>174</sup>It is not axiomatic that one who advocates judicial restraint is also a textualist. For the purposes of this article, however, I will take the liberty of placing restraintists and textualists together as components of the conservative camp. For a comprehensive treatment of these philosophies, see SCHWARTZ, *supra* note 6.

<sup>175</sup>Justice Black epitomizes this concept. When the majority struck down the Connecticut law prohibiting the use of contraceptives, he dissented. "The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not." *Griswold v. Connecticut*, 381 U.S. 479, 508 (1965) (Black, J., dissenting). He continues: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." *Id.* at 510 (Black, J., dissenting).

<sup>176</sup>Professor Schwartz claims that the jurisprudence of original intent is "both undesirable and unworkable. It would turn back the constitutional clock two centuries and fossilize our public law." See SCHWARTZ, *supra* note 6, at 7.

Second, the nontextualists believe that the role of the Court is integral to a free society, and necessary to balance the sometimes overzealous or misguided actions of government against those fundamental rights accorded by the Constitution. As Justice Douglas said, "Power is a heady thing . . ."177

Third, they hold that the Constitution should not be limited to a literal interpretation.<sup>178</sup> In the nontextualist's view, the Constitution was designed to live, breathe, and evolve as society matures.<sup>179</sup> The fact that this makes constitutional jurisprudence more difficult is no reason to abdicate the Court's responsibility to adapt the document to the modern world.

Fourth, (in reply, more specifically, to the textualists), it is not only unwise, but impossible to ascertain the "original intent" of the framers. Incomplete and unclear historical records preclude an accurate determination of the exact meaning of the Constitution's authors.<sup>180</sup>

For the restraintists, however, recognition of a constitutionally-based, albeit unenumerated, right to privacy opens a Pandora's box. It invites judicial

<sup>177</sup>McDonald v. United States, 335 U.S. 451, 456 (1948).

<sup>178</sup>Professor Schwartz delineates several unenumerated rights which have long been accepted as an integral part of our system of criminal justice: the right to be presumed innocent, the right to proof of guilt beyond a reasonable doubt, and the right to attend criminal trials. Other intrinsic rights include the right to vote, to travel, to compete for public office and to engage in political activities. SCHWARTZ, *supra* note 6, at 62-67. The Court has created additional rights (founded in those specifically enumerated), most notably: the right to be told your rights before custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436 (1966); and the right to have illegally obtained evidence excluded in a criminal trial, *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>179</sup>Two centuries ago Thomas Jefferson expounded this philosophy. In a 1789 letter to James Madison, he addresses "whether one generation of men has a right to bind another". He asserted, "[e]very constitution, then, every law naturally expires at the end of thirty-four years. If it be enforced longer, it is an act of force, and not of right . . . the earth belongs in usufruct to the living . . . the dead have neither powers nor rights over it." III THE WRITINGS OF THOMAS JEFFERSON 103-107 (1854).

More recently, Professor Schwartz declares, "The Constitution . . . from its nature . . . deals in generals, not details. The Constitution states, not rules for the passing hour, but principles for an ever-expanding future." SCHWARTZ, *supra* note 6, at 10 (referencing *Bank of United States v. Deveaux*, 5 U.S. (1 Cranch) 61,87 (1809) and BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921)).

Professor Amsterdam insists, "[g]rowth is what statesmen expect of a Constitution." Amsterdam, *supra* note 75, at 399.

<sup>180</sup>Professor Schwartz explains that we have a "strikingly incomplete" historical record of the Philadelphia Convention of 1787. "Madison's notes, the fullest account we do have . . . are at best a sketchy transcript . . . Then, too, there is the question of whose intent is to govern." He notes that it is difficult to determine who qualifies as a "framer" and of those who do, whose statements should be accorded more weight? SCHWARTZ, *supra* note 6, at 9.

expansionism precisely because it is imprecise.<sup>181</sup> Since the Constitution does not provide specifics for such a protection, jurists must brave uncharted, and often frightening territory. It is much easier just to deny its existence.

Yet these restraintists are anything but restrained. The Court has assumed for itself broad areas of discretion in Fourth Amendment cases by adopting vague and malleable standards of interpretation which readily accommodate any conclusion it might care to reach.<sup>182</sup> By relying upon such amorphous terms and phrases as "totality of the circumstances," "weighing the government's interest against the individual's interest in privacy," and "reasonable" (as in the "reasonable person standard" or "what society accepts as objectively reasonable" or even "reasonable suspicion"), the Court allows itself extraordinary latitude to indulge personal preferences and predilections under the guise of sound constitutional principles.<sup>183</sup> The imprecision of such lofty terms permits the very judicial indulgences that the restraintists claim to oppose. This metamorphic jurisprudence has allowed the Justices so inclined to tip the scales in favor of further governmental intrusions rather than individual privacy rights. The conservative agenda is well-served by this constitutional strategy. The Court can uphold wholesale constitutional intrusions into citizens' private lives, be it from aerial surveillance, trash searches, or suspicionless stops, and still claim allegiance to the Constitution. But why is the Court so willing to do so?

### B. Drug Wars

A declaration of war is usually accompanied by the suspension of accepted restrictions on law enforcement officers and by the imposition of martial law. In the view of some legal scholars, the "war on drugs" of the past several years has resulted in just such an erosion (if not a suspension) of judicial regard for

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<sup>181</sup>Justice Black attacked the notion of a constitutional right of privacy in a memorandum. In it he assailed the Court's reliance upon an unenumerated right and predicted "the freedom constitutionally promised (will become) a debased alloy - transmuted into a freedom which will vacillate and grow weaker or stronger as the Court personnel is shifted from time to time". BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 274 (1985).

<sup>182</sup>"[T]he 'unreasonableness' standard is obviously much too amorphous either to guide or regulate the police. Lurking beneath the difficulty, in turn, is the monstrous abyss of a graduated Fourth Amendment . . . splendid in its flexibility, awful in its unintelligibility, unadministrability, unenforcibility and general oozeiness." Amsterdam, *supra* note 75, at 414-15.

<sup>183</sup>According to Justice Marshall, abuse of the "reasonableness balancing test" has rendered the Fourth Amendment "virtually devoid of meaning, subject to whatever content shifting judicial majorities, . . . choose to give to that supple term." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting). In the same opinion, he refers to the test as "formless and unguided" and "Rohrschach-like". *Id.* at 639.

individual rights.<sup>184</sup> It is, in essence, a judicially imposed martial law.<sup>185</sup> If one accepts the notion that drugs are the scourge of our society and must be eliminated,<sup>186</sup> relaxation of some constitutional protections for the accused,<sup>187</sup> particularly a protection which is considered unenumerated and indistinct, may seem acceptable.<sup>188</sup> The folly of such a course, however, was observed years ago: "[T]he history of the destruction of liberty . . . has largely been the history of the relaxation of those safeguards in the face of plausible-sounding governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society."<sup>189</sup>

In 1985, the Supreme Court began to recognize that there are such threats, dubbed "special needs,"<sup>190</sup> which may call for special rules in Fourth Amendment considerations. Using its famous balancing test, the Court declared that there are times when a special interest of the government may

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<sup>184</sup>See Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987). See also *Skinner*, 489 U.S. at 636. ("[T]he first, and worst, casualty of the war on drugs will be the precious liberties of our citizens.") (Marshall, J., dissenting); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 681 (1989) ("[T]he [drug testing] rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.") (Scalia, J., dissenting); *United States v. Sokolow*, 490 U.S. 1, 17 (1989) ("[W]hen drug crimes or anti-drug policies are at issue, [the Court] give[s] short shrift to constitutional rights.") (Marshall J., dissenting).

<sup>185</sup>Indeed, most of the cases cited here involved the violation of a controlled substance law. *Dow Chemical Co. v. United States* involved environmental regulations. *Maryland v. Buie* involved an armed robbery.

<sup>186</sup>The Court has described the drug problem as "one of the greatest problems affecting the health and welfare of our population". *Von Raab*, 489 U.S. at 668. It has also referred to "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics". *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Wisotsky, *supra* note 184, at 904, describes Washington in 1986 as being "in 'a frenzy over drugs' with Democrats and Republicans racing to 'outperform' one another." (quoting Joel Buckley, *Fighting Narcotics Is Everyone's Issue Now*, N.Y. TIMES, Aug. 10, 1986, § 4 at 1). See also Wisotsky, *supra* note 184, at 907 n.93 (citing EPSTEIN, AGENCY OF FEAR (1979) for exploration of the notion that the drug war is merely a political tool.)

<sup>187</sup>Justice O'Connor has stated:

This Court . . . is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a "war on drugs". If that war is to be fought, those who fight it must respect the rights of individuals whether or not those individuals are suspected of having committed a crime.

*Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1989). The Court, however, seems to be finding fewer and fewer "rights" to be respected.

<sup>188</sup>Freund notes "society's acceptance of 'dog sniffs,' police intrusions into homes to prevent the destruction of narcotics, and even the vague standards supplied by the 'drug courier profile'" as a result of the fear of drugs. Freund, *supra* note 70, at 217 (citations omitted).

<sup>189</sup>Amsterdam, *supra* note 75, at 354.

<sup>190</sup>See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

outweigh that of the individual to the extent that traditional constitutional protections may be reduced.<sup>191</sup> Justice Marshall put it somewhat differently: "[T]he Court has now permitted 'special needs' to displace constitutional text."<sup>192</sup> Such diminution is, in the Court's view, "reasonable". These "special needs" include, inter alia: the maintenance of order in schools,<sup>193</sup> the "efficient and proper operation of the workplace,"<sup>194</sup> the need to preserve "the deterrent effect of the supervisory arrangement" of probation,<sup>195</sup> the need to detect possible drug use of railroad employees to ensure safety,<sup>196</sup> the need to deter drug use among those seeking promotions to "sensitive" government positions,<sup>197</sup> and the need to prevent drugs from entering the country.<sup>198</sup> When a special need is found (and drugs have been so deemed),<sup>199</sup> the government may dispense with the warrant requirement, the probable cause requirement, the individualized suspicion requirement of *Terry*, and, now, the requirement of even a generalized suspicion. Contrary to Justice Marshall's declaration that there is no "drug exception to the Bill of Rights",<sup>200</sup> the Court seems to have found one.

The price of this "anything goes"<sup>201</sup> war on drugs is the sacrifice of individual liberties, most notably the privacy protection.<sup>202</sup> By construing the Fourth Amendment to proscribe "unreasonable" searches (rather than warrantless searches), the Court may, in its discretion, find "reasonable" even the most

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<sup>191</sup>*Id.*

<sup>192</sup>*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 636 (1989) (Marshall, J., dissenting).

<sup>193</sup>*New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>194</sup>*O'Connor v. Ortega*, 480 U.S. 709, 725 (1987).

<sup>195</sup>*Griffin v. Wisconsin*, 483 U.S. 868, 878 (1987).

<sup>196</sup>*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

<sup>197</sup>*National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>198</sup>*United States v. Montoya De Hernandez*, 473 U.S. 531 (1985).

<sup>199</sup>*See supra* note 186.

<sup>200</sup>"There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting).

<sup>201</sup>*United States v. Lewis*, 728 F. Supp. 784, 789 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990).

<sup>202</sup>Professor Wisotsky addresses other basic rights which have been sacrificed on the battleground: the presumption of innocence, the right to non-excessive bail, interference with the attorney-client relationship, the pre-conviction confiscation of property and the imposition of disproportionate sentences. Wisotsky, *supra* note 184, at 895-907.

egregious invasions.<sup>203</sup> In striving for the eradication of drugs, near unlimited power has been bestowed upon law enforcement.<sup>204</sup> However, as one jurist noted, "[d]uties of law enforcement officials are extremely demanding in a free society. But that is as it should be. A policeman's job is easy only in a police state."<sup>205</sup>

The erosion of Fourth Amendment protections has been gradual, steady, and insidious. Fundamental rights to privacy have "recede(d) by gradual erosion, by relentless nibbling, rather than gobbling."<sup>206</sup> The need to deal effectively with drug abuse is not disputed here. In its eagerness to be of assistance, however, the Court has abdicated its role as an independent arbiter and defender of the Constitution. But, as even Justice Scalia has said, "the impairment of individual liberties cannot be the means of making a point."<sup>207</sup>

Nor are the honorable intentions of the Court disputed. However, honorable intentions do not a free society make. Justice Brandeis said it well:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>208</sup>

### C. *The Presumption of Guilt*

Fourth Amendment issues stand in stark contrast to others raised under the Bill of Rights. In most of these cases, uniquely, the factual guilt of the accused

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<sup>203</sup>Professor Wisotsky relates the resignation of a federal magistrate "in protest of the continued erosion of the rights of those accused of crime". Wisotsky, *supra* note 184, at 923. Magistrate Nimkoff of the Southern District of Florida accused police of behaving like criminals in the war on drugs and spoke of "classically authoritarian behaviors" which jeopardize the presumption of innocence. Wisotsky, *supra* note 184, at 923-24 (citing Payne, *Upset With Court Trends, Top-Rated Nimkoff To Quit*, MIAMI NEWS, Jan. 4, 1986, § A, at 1.)

<sup>204</sup>See generally Wisotsky, *supra* note 184. Professor Wisotsky relates the extent to which the executive branch of government and its attendant law enforcement agencies (including, inter alia, NASA, CIA, FBI, IRS, DEA, DoJ., Dept. of the Treasury, NNBIS (National Narcotics Border Interdiction System) and the military) have gone to wage this war on drugs. He includes sections on the military, the collection of information on hundreds of thousands of innocent citizens by a computerized index system known as NADDIS (Narcotics and Dangerous Drug Information System), invasive monitoring of personal behavior, the use of drug courier profiles to stop motorists, and the increasingly widespread use of suspicionless stops at roadblocks.

<sup>205</sup>*People v. Spinelli*, 315 N.E.2d 792, 795, (N.Y. 1974); see also Foster, *supra* note 56, at 762.

<sup>206</sup>Wisotsky, *supra* note 184, at 923.

<sup>207</sup>*National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting).

<sup>208</sup>*Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

is indisputable. Unless the defendant denies knowledge of, or a possessory interest in the questionably seized evidence, its very existence is dispositive. While justice is blind in theory, its application is subject to the frailties inherent in human judgment. It is understandable that a constitutional infraction of a nebulous "right to privacy" will be overlooked when those injured by the infraction are presumed guilty of what may be perceived as an even greater harm.

But more is expected of members of the Court. They must, by necessity, rule on issues which may "involv[e] not very nice people."<sup>209</sup> The distaste they may have for the defendant's behavior should not color the application of sound constitutional principles.<sup>210</sup>

The temptation to engage in "post hoc rationalizations"<sup>211</sup> is one that must be resisted if the Court is to remain true to its constitutional mandate. The examination of possible Fourth Amendment violations must be made with the firm notion that the accused was presumptively innocent. Too often, the Court seems to slight this critically important element in its analysis. "[B]y such disregard . . . the rights of liberty [are] extinguished, heedlessly at first, then stealthily, and brazenly in the end."<sup>212</sup>

Beyond the pitfalls of post hoc analyses, lies the question of whether the Court has an accurate picture of the realities of the lives of ordinary citizens. The Court has assumed the responsibility of faithfully assessing a "reasonable man's" values and standards. Yet who is this "reasonable man"?

Justice Scalia asserted that the Court could most reliably ascertain society's values by examining laws promulgated by its elected representatives.<sup>213</sup> In *Greenwood*, however, the Court found the defendant's expectation of privacy in his trash to be one that society was not willing to honor, despite the fact that many municipalities have ordinances prohibiting anyone but authorized haulers from rummaging through or interfering with trash placed out for collection. Likewise, the *Oliver* Court found warrantless police entry onto private and posted lands to be permissible, even when such conduct by civilians would violate state trespass laws.

If legislation is not the gauge, should the Court look to the respected segments of the media and news organizations? Apparently not. In *Greenwood*,

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<sup>209</sup>United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

<sup>210</sup>"Trickle-down morality" is no more workable in constitutional jurisprudence than "trickle-down economics" is in the marketplace.

<sup>211</sup>[S]uch *post hoc* rationalizations have no place in our Fourth Amendment jurisprudence, which demands that 'we prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure.'" United States v. Montoya de Hernandez, 473 U.S. 531, 559 (1985) (Brennan, J., dissenting) (quoting United States v. Martinez-Fuertz, 428 U.S. 543, 565 (1976)).

<sup>212</sup>*Id.* at 567 (Brennan, J., dissenting) (quoting Davis v. United States, 328 U.S. 582, 597 (1945) (Frankfurter, J. dissenting)).

<sup>213</sup>Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting).



once again, the dissent cited news articles expressing outrage at the invasion by a tabloid reporter of (then) Secretary of State Henry Kissinger's trash. *The New York Times* reported that Mr. Kissinger was "really revolted."<sup>214</sup> Other journals characterized the event as "a disgusting invasion of personal privacy,"<sup>215</sup> "indefensible as . . . civilized behavior,"<sup>216</sup> and contrary to 'the way decent people behave in relation to each other'.<sup>217</sup> If elected representatives of the people are not "reasonable," and statesmen such as Henry Kissinger are not "reasonable," and international news agencies are not "reasonable," what barometer are the Justices using to make this determination?

There is credence to the complaints of those who claim that the Court has lost touch with the everyday experiences that constitute life in this country.<sup>218</sup> Justice Marshall illustrates this point in his *Bostick* dissent. After reviewing the case, the majority found plausible the government's assertion that the encounter between the police and the defendant was voluntary. According to Justice Marshall, however, the facts belied this conclusion.<sup>219</sup>

Citizens do not know that they may lawfully walk away from a police officer wishing to speak with them. They have no idea whether the officer possesses either a reasonable suspicion, or probable cause to authorize the interference, and the officer has no obligation to tell them. In most cases, officers do not tell citizens that they may refuse consent to search their personal belongings or vehicles, and the citizen has no reason to know that he may lawfully decline that consent.

A refusal to cooperate with the officer's "requests" only serves to elevate his suspicions and invariably leads to an intensification of the encounter.<sup>220</sup> That is a reality that all but the High Court seem to know. The notion that an officer, having been denied consent to search a traveler's bags will politely tip his hat, apologize for the inconvenience and walk away may be textbook, but it is not reality.

Referring to the police practice of suspicionless questioning of citizens, Professor Amsterdam remarked: "Unless one takes a very middle-class white

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<sup>214</sup>*California v. Greenwood*, 486 U.S. 35, 52 (1988) (Brennan, J., dissenting) (citing N.Y. TIMES, July 9, 1975, at A1).

<sup>215</sup>*Id.* (citing Fliieger, *Investigative Trash*, U.S. NEWS & WORLD REPORT, July 28, 1975, at 72).

<sup>216</sup>*Id.* (citing WASHINGTON POST, July 10, 1975, at A18 (editorial)).

<sup>217</sup>*Id.*

<sup>218</sup>Justice Stevens chastised the majority for postulating an "ivory-towered analysis of the real world for it fails to describe the experience of many . . .", *California v. Hodari*, 111 S. Ct. 1547, 1553 n.4 (1991) (Stevens, J., dissenting).

<sup>219</sup>*Florida v. Bostick*, 111 S. Ct. 2382, 2391 (1991) (Marshall, J., dissenting).

<sup>220</sup>"[R]espondent reasonably could have believed that [refusal to cooperate] would only arouse the officers' suspicions and intensify their interrogation. Indeed, officers who carry out bus sweeps like the one at issue here frequently admit that this is the effect of a passenger's refusal to cooperate." *Id.* at 2393 (Marshall, J., dissenting).

view of life, here is a practice that cries out for some sort of fourth amendment regulation."<sup>221</sup> But even middle-class white America is not so naive.

#### *D. Ramifications for the Law-Abiding Citizen*

Denial of fundamental rights by the government, even to the factually guilty, is unacceptable under our constitutional scheme. But what the Court does not see are the intrusions by police which do not result in criminal prosecution. For every Fourth Amendment case before the Court, there are thousands of questionable invasions of privacy which go unexamined.<sup>222</sup>

Innocent people subjected to such intrusions, be they temporary inconveniences or humiliating personal invasions, are unlikely to complain or otherwise bring such conduct to the attention of authorities.<sup>223</sup> Nor are these individuals likely to seek redress in the civil courts. Many cannot afford the cost of a lawyer or the attendant fees of a civil suit. Many simply do not have the time or the temerity to endure a lengthy civil process. For those who may choose a civil rights action, the likelihood of success is low unless there are willing eyewitnesses or the chance passerby with a video camera. The last recourse of an aggrieved individual has traditionally been the Supreme Court. The Court, however, seems to have abdicated this role, and has left individual privacy in the sole discretion of officials.

Furthermore, some of these sanctioned searches are of such a nature that citizens may not even be aware of the intrusion. It is not axiomatic that lack of

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<sup>221</sup>Amsterdam, *supra* note 75, at 405.

<sup>222</sup>Justice Marshall pointed out that in one case a single officer employing the technique of sweeping the buses searched over three thousand bags in one nine-month period; the percentage of drug finds was low. In another case a search of one hundred buses netted seven arrests. *Florida v. Bostick*, 111 S. Ct. 2382, 2390 (1991) (Marshall, J., dissenting) (citing *Florida v. Kerwick*, 512 So. 2d 347, 348-49 (Fla. Dist. Ct. App. 4th Dist. 1987) and *United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990)).

Justice Brennan noted that one physician, who had performed many invasive searches (rectal, vaginal, and stomach pumping) at the behest of customs officials, found illegal substances in only fifteen to twenty percent of those so examined. He further noted that estimates show that contraband is found in only sixteen percent of women subjected to body-cavity searches at the border. *United States v. Montoya de Hernandez*, 473 U.S. 531, 557 (1985) (Brennan, J., dissenting) (citing *Thompson v. United States*, 411 F.2d 946, 948 (9th Cir. 1969) and *United States v. Holtz*, 479 F.2d 89, 94 (9th Cir. 1973)).

In another case, at oral argument, government representatives refused to disclose recent statistics regarding the number of innocent travelers subjected to x-ray searches, because "it's not in the record and it's not public". *United States v. Montoya de Hernandez*, 473 U.S. 531, 557 n.26 (1985) (Brennan, J., dissenting) (citing *Florida v. Royer*, 460 U.S. 491, 500, (1983)).

In yet another case, opposing mandatory drug-testing for promotion-seekers, counsel for the union cited statistics that revealed that "no more than five employees out of three thousand six hundred tested positive for drugs". *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 683-84 (1989).

<sup>223</sup>Of course, there is no reason to believe that satisfactory recourse would be found by alerting law enforcement superiors.

awareness means that no harm is done. The crux of Fourth Amendment is not protection against incriminating evidence, it is protection of privacy interests. Officers may enter onto private homesteads to search citizens' "open fields" or trash, or conduct aerial surveillance of their homes, and acquire information which, while not criminally incriminating, might be embarrassing or compromising:

Police may look through windows and observe a thousand innocent acts for every guilty act they spy out . . . . The question is not 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.<sup>224</sup>

Moreover, removing the constitutional constraints from those who may abuse their privileged status as police officers is to invite increased intimidation and alienation of the police from the citizenry. We are witnessing an unprecedented revelation of police overreaching and the people are responding. Unfettered police power can only result in more crime, greater unrest, and increased distrust of these public servants. Justice Clark's words are as true today as they were in 1961:

Nothing can destroy a Government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence . . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.<sup>225</sup>

## VI. CONCLUSION

The aforementioned observations are, of course, but a small portion of the realms which may be impacted by the Supreme Court's interpretation of the Constitution as it pertains to the right of privacy.<sup>226</sup> Many of the Justices have

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<sup>224</sup>Amsterdam, *supra* note 75, at 403.

<sup>225</sup>*Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

<sup>226</sup>Areas the Court may be called upon to consider include, inter alia: AIDS testing of defendants accused of rape; AIDS testing of public and private health employees; the limits of state restriction to the right to terminate or refuse life support systems for the terminally ill; the right of those not terminally ill to end their lives with professional medical assistance; privacy of one's medical records and health insurance claims; the right of access by patients to their medical records; the distribution of consumer information, data banks, dossiers and mailing lists; interception of cordless phone conversations; privacy of library book or video rental records; privacy of bank and financial records; privacy of personnel files; privacy of computer communications. Congress has addressed some of these issues through legislation. Fair Credit Reporting Act, 15 U.S.C. § 1681 (1988) (protecting consumers from unauthorized disclosure of credit information); Privacy Act of 1974, 5 U.S.C. § 552a (1988) (barring certain sharing of information among governmental agencies); Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22 (1988) (regulating governmental access to customer bank records); Video

already expressed opinions which either question the existence of a right to privacy in the Constitution, or which represent a very narrow view of that right. The Fourth Amendment, the cornerstone of the privacy protection in the criminal arena, has been compromised almost beyond recognition. By disengaging the warrant clause from the privacy clause, the Court has rendered the warrant requirement almost non-existent.<sup>227</sup> By permitting "special needs" and personal predilections to dominate the determination of "reasonable", the privacy clause has been rendered meaningless.

In addition, the Court has shown an extraordinary willingness to overturn or dilute (either implicitly or explicitly) such touchstone cases as *McDonald* (preference for a warrant), *Katz* (privacy as a personal rather than a property right), and *Terry* (requiring articulable and individualized suspicion for temporary stops). In so doing, they have strayed even further from the Fourth Amendment's essence and purpose.

Under the new interpretations of the Amendment, citizens have lost privacy rights on a grand scale. Police officers have been given unfettered discretion to enter onto fenced and posted land in violation of state trespass laws; to conduct aerial surveillance at low altitudes (and presumably take photographs) over citizens' yards; to rummage through citizens' trash at will; to stop and oblige citizens to produce identification, travel tickets, and agree to parcel searches; to perform humiliating body searches at our borders; and to engage in a literal pursuit of citizens as long as the officers do not catch them. Justice Marshall's warning of an insidious and creeping "totalitarianism" is not the lament of a bleeding heart liberal. It is the cry of a broken-hearted patriot.

The evisceration of the right of privacy comes not at the hands of an enemy, but of those who are "well-meaning, but without understanding."<sup>228</sup> The desire to "get tough" in the war on drugs by empowering law enforcement, ignorance of the thousands of abuses endured by private citizens at the hands of unsupervised governmental agents, a detachment from the realities of the lives of ordinary people, the distastefulness of preserving privacy when the "unworthy" have asserted it, and a conservative ideology have all converged to create this unprecedented assault on the right to privacy.

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Privacy Protection Act of 1988, 18 U.S.C. § 2710 (1988) (generally prohibiting disclosures of records of video rentals); Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a (1988) (regulating cross-matching of federally held information under certain circumstances).

Many of these issues, however, will land in the lap of the Supreme Court. The conservative shift of the Court provides some indication of how that body may eventually decide these issues. The civil arena provides even further opportunities for such invasions.

<sup>227</sup> See LANDYNSKI, *supra* note 149, at 108-11 for a discussion of *United States v. Rabinowitz*, 339 U.S. 56 (1950) and the Court's separation of the warrant clause from the "unreasonable search and seizure" clause.

<sup>228</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

But "civilization is the progress toward a society of privacy. The savage's whole existence is public, ruled by the laws of his tribe. Civilization is the process of setting man free from men."<sup>229</sup> If we expect our society to evolve, then respect for individual rights, and individual privacy in particular, must be given a high priority. Citizens have the right to be left alone; to carry on their private and professional affairs free from governmental intrusion and interference; to "breathe and not be stared at."<sup>230</sup> Such rights are indispensable to a free society.

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<sup>229</sup>See Foster, *supra* note 56, at 746 (quoting AYN RAND, *THE FOUNTAINHEAD* (1943)).

<sup>230</sup>Amsterdam, *supra* note 75, at 401.