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Ronald J. Bacigal

University of Richmond, rbacigal@richmond.edu

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Some Observations and Proposals on the Nature of the Fourth Amendment

RONALD J. BACIGAL*

The well-recognized lack of consistency and clarity in fourth amendment¹ decisions² results from a judicial failure to articulate the underlying principles of the fourth amendment.³ Without clearly articulated principles, courts are unable to discern legally material distinctions among the varying factual situations.⁴ One unaddressed question is whether the fourth amendment should be viewed from an

* B.S., 1964, Concord College; J.D., 1967, Washington & Lee University. Professor of Law, University of Richmond. Member, District of Columbia Bar.

1. The fourth amendment provides:

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

U.S. CONST. amend. IV.

2. *E.g.*, Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUNDATION RESEARCH J. 1193, 1197 (1976): "The Supreme Court has consistently failed to articulate a fully satisfactory framework for Fourth Amendment analysis." See Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 50 (1974). See also Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L. J. 329, 329 (1973); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255 (title quoting Frankfurter, J., concurring in *Chapman v. United States*, 365 U.S. 610, 618 (1961)).

3. Weinreb, *supra* note 2, at 49.

4. *United States v. Robinson*, 414 U.S. 218, 254 (1973) (Marshall, J., dissenting) (every factual situation contains considerations that are "not easily quantified and, therefore, not easily weighed one against the other"). See also Dworkin, *supra* note 2; LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

individual perspective, which emphasizes protection of the interests of individual citizens, or from a limitation perspective, which emphasizes the regulation of governmental conduct.⁵ The individual perspective focuses only on the target⁶ of the search and governmental action taken with respect to that subject. The motives of the government officials are irrelevant.⁷ Motives are important, however, to the limitation perspective.⁸

The individual perspective and the limitation perspective are complementary rather than mutually exclusive, but selection of one over the other often can produce different legal results. The timed or pre-text arrest problem illustrates the divergence of these two models.⁹ For example, the police suspect that a student is hiding marijuana in his locker. Rather than obtain a search warrant, the police arrest the student when he is using his locker so they can search the locker incident to the arrest.¹⁰ From the individual perspective, the invasion of the student's property and privacy interests remains the same regardless of the motivation for the search. From the limitation perspective, however, acceptability of the search depends on the legitimacy of the government official's purpose and motive. When the government's purpose is to arrest the student wherever he is found, chance determines whether the police will search the locker. If the purpose behind the timing and location of the arrest is to search the locker, the government has consciously exercised its power to search. The limitation perspective permits more stringent limitations on planned warrantless searches than on governmental activity inadvertently resulting in a search.¹¹

The Supreme Court has not expressly acknowledged the existence of a choice of perspectives,¹² but has apparently adopted the individ-

5. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974); Weinreb, *supra* note 2, at 68. These two views are not limited to fourth amendment jurisprudence. The atomistic and regulatory perspectives can also be applied to the fifth and sixth amendments, and to the fourteenth amendment's due process clause. See generally Amsterdam, *supra*; Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47 (1964); Grano, Kirby, Biggers, & Ash, *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 719 (1974).

6. In this article, the terms "target" and "target individual" refer to the individual whose person, house, papers or effects are searched or seized by the government.

7. Of course, the motivation or intent of the police could be relevant to the individual perspective, if the individual's right were defined as a right to be free of planned warrantless searches. Such a definition of the individual's right encompasses the limitation perspective.

8. See *Coolidge v. New Hampshire*, 403 U.S. 443, 470 (1971).

9. This problem arises when a police officer having valid grounds for arrest times it so that search-incident-to-arrest powers can be invoked, thereby avoiding the warrant requirement. See, e.g., *Amador-Gonzalez v. United States*, 391 F.2d 308, 314 (5th Cir. 1968); *United States v. Harris*, 321 F.2d 739, 743 (6th Cir. 1963) (Boyd, J., dissenting); *Taglavore v. United States*, 291 F.2d 262, 266-67 (9th Cir. 1961); *Adair v. State*, 427 S.W.2d 67, 72 (Tex. Crim. 1968) (Onion, J., dissenting).

10. To be searched incident to arrest, the locker would have to be an "area 'within [the arrestee's] immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969).

11. Justice Marshall has indicated that he would regard the intent of the officers in a timed arrest as the controlling factor. "When an arrest is so timed that it is no more than an attempt to circumvent the warrant requirement, I would hold the subsequent arrest or search unlawful." *United States v. Santana*, 427 U.S. 38, 49 (1976) (Marshall, J., dissenting). See also *Coolidge v. New Hampshire*, 403 U.S. at 455-57.

12. Professor Amsterdam feels that the Court has consciously chosen not to address

ual perspective¹³ by frequently emphasizing that fourth amendment rights are personal rights.¹⁴ The limitation perspective, however, underlies the development of the fourth amendment¹⁵ and occasionally appears in Supreme Court opinions.¹⁶ Because decisions in fourth amendment cases may depend on the perspective employed by the court, the limitation perspective should be explicitly examined to determine its proper role in resolving fourth amendment questions.¹⁷

This article will analyze the fourth amendment from both the individual and limitation perspectives, and evaluate the desirability of each as a determinant of the reach of fourth amendment protection in specific situations. The individual perspective alone is an inadequate model to evaluate all interests relevant to fourth amendment problems.¹⁸ Conjunctive use of both perspectives, however, allows a complete and balanced analysis of the fourth amendment, and can eliminate the need to ponder such difficult questions as which expectations of privacy are socially justifiable and when an individual has waived his privacy rights. Although an accommodation between the

the question of whether the fourth amendment should be viewed from the individual or limitation perspective. Amsterdam, *supra* note 5, at 352-53.

13. The concepts of "standing" and "taint" of a constitutional violation are largely premised upon the individual perspective. Chief Justice Burger recently noted that "[b]oth these limitations on the use of the exclusionary rule are inconsistent with its deterrent rationale." *Brewer v. Williams*, 430 U.S. 387, 421 n.4 (1977) (Burger, C.J., dissenting). Although the Chief Justice was specifically concerned with the exclusionary rule, the Court has invoked the "standing" requirement when the target seeks a remedy other than exclusion of evidence to protect his privacy from general surveillance. *See, e.g., Laird v. Tatum*, 408 U.S. 1 (1972). "[M]any times the Court has denied standing and limited the scope of the amendment by saying that the defendant's fourth amendment rights are not involved when it really meant that the exclusionary rule would not be applied or the search and seizure was reasonable." Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. Rev. 1, 47 (1975). *See also* note 192 *infra*.

The Supreme Court has been more willing to adopt the limitation perspective when it causes contraction of fourth amendment protections. *E.g., South Dakota v. Opperman*, 425 U.S. 909 (1976); *Wyman v. James*, 400 U.S. 309 (1971). In such cases the Court "limits the requirement of a warrant to the small number of cases in which government officials plan to initiate contact with the person for the primary purpose of making a search." Weinreb, *supra* note 2, at 79 (emphasis added). *See also* Bacigal, *The Emergency Exception to the Fourth Amendment*, 9 U. RICH. L. REV. 249 (1975); notes 224-311 *infra* and accompanying text.

14. *See, e.g., Alderman v. United States*, 394 U.S. 165, 174 (1969).

15. *See* notes 194-204 *infra* and accompanying text.

16. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971) (warrantless search of car held unreasonable because police had ample opportunity to obtain warrant, knew in advance the car's precise location, and intended to seize it when they entered the property); *Wyman v. James*, 400 U.S. 309, 319 (1971) (caseworker's home visit held not an unreasonable intrusion under the fourth amendment, because the investigatory technique was "a gentle means, of limited extent and of practical and considerate application").

17. Although volumes have been written on the fourth amendment as perceived from the individual perspective, *see* notes 37-44 *infra*, the limitation perspective has been almost ignored. *But see* Dworin, *supra* note 2; Mascolo, *The Role of Functional Observation in the Law of Search and Seizure: A Study in Misconception*, 71 DICK. L. REV. 379 (1967).

18. Considering the limitation perspective as a distinct, theoretical alternative to the privacy analysis, however, does bring to light interests that the individual privacy approach ignores: society's interest in controlling secret agents, for example. *See* notes 146-73 *infra* and accompanying text.

two perspectives is desirable, the latter part of this article disregards questions of individual rights in order to develop a tentative model exemplifying the use of the limitation perspective in fourth amendment problems.

The Individual Perspective: The Right to Privacy and the Myth of Assumption of Risk

The individual perspective has dominated the history and development of the fourth amendment. The history of the fourth amendment can be traced to the Magna Charta,¹⁹ Roman law, and the Bible.²⁰ The individual right enjoying the longest and strongest support is the right to property, especially property rights in a dwelling house.²¹ The Supreme Court employed the fourth amendment to expand this concept to protect personal and property security in "constitutionally protected area[s]."²² Prior to *Katz v. United States*,²³ the Court limited the scope of the amendment's protection to certain special places.²⁴ This emphasis on property and physical trespass²⁵ culminated in *Olmstead v. United States*,²⁶ in which the Court held that a wiretap of private telephone lines did not violate the fourth amendment because the telephone messages were not tangible property that could be seized.²⁷ Absent physical entry into a constitutionally protected place, no entry and thus no search occurred.²⁸ Justice Brandeis, dissenting, criticized the majority for emphasizing property rights and for ignoring the individual's right to be free from

19. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States* (pt. 1), 3 U. RICH. L. REV. 278, 281 (1968).

20. "The famous maxim 'every man's house is his castle' cited by Coke, 5 Rep. 92, and generally regarded as a peculiarly English privilege, comes directly from the Roman law. *Nemo de domo sua extrahi debet*. But . . . it would seem that the concept far antedates that body of law." N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 15 n.9 (1937). The author traces the concept to Hebrew law and the Bible. *Id.* at 13-14. Lord Pitt, opposing general warrants, probably made the most famous statement regarding the sanctity of a dwelling house:

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

Quoted *in id.* at 49-50.

21. The "hue and cry" whereby all able-bodied males were to join in the search for the criminal was one of the earliest forms of official search in Anglo-Saxon jurisprudence. But even while in hot pursuit, the search party had to proceed cautiously onto a man's curtilage, due to the high regard for the owner's privilege to be undisturbed in the peaceful occupancy of his home. Stengel, *supra* note 19, at 280. See also Semayne's Case, 77 Eng. Rep. 194, 195 note c (K.B. 1604).

22. *Hoffa v. United States*, 385 U.S. 293, 301 (1966) (opinion by Justice Stewart). One year later Justice Stewart declared in *Katz v. United States*, 389 U.S. 347, 351 (1967), that the fourth amendment "protects people not places."

23. 389 U.S. 347 (1967).

24. See, e.g., *Cooper v. California*, 386 U.S. 58 (1967) (automobiles); *Stoner v. California*, 376 U.S. 483 (1964) (hotel rooms); *Taylor v. United States*, 286 U.S. 1 (1932) (garages); *Ex parte Jackson*, 96 U.S. 727 (1877) (sealed packages).

25. "The law of search and seizure has been interwoven, in historical context, with the requirement of trespassory intrusion. Attaching to the search process the requirement of a trespassory intrusion of necessity eliminates therefrom all activity that does not involve or include such intrusion." Mascolo, *supra* note 17, at 414.

26. 277 U.S. 438 (1928).

27. *Id.* at 466.

28. *Id.* at 464.

governmental intrusion.²⁹

Criticism of *Olmstead* intensified as the years passed.³⁰ The Court subsequently extended the amendment's protection to such intangibles as conversations,³¹ and eventually overruled *Olmstead* and abandoned the physical trespass requirement in *Katz v. United States*.³² *Katz* held that electronic surveillance of a person in a telephone booth violated the privacy on which the person justifiably relied and thus violated the fourth amendment's prohibition against unreasonable search and seizure.³³ If the Court in *Katz* had held only that physical trespass is unnecessary to fourth amendment violations,³⁴ the error of *Olmstead* would have been corrected and the courts would have continued to concern themselves with defining a "constitutionally protected area." *Katz* not only determined the means by which the fourth amendment may be violated, but also examined the scope of the amendment. The short answer given in *Katz*—that the amendment "protects people, not places"³⁵—is only the starting point for analysis and not the answer itself.³⁶ The majority opinion failed to delineate the contours of the right of privacy or

29. Mr. Justice Brandeis stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478. Justice Brandeis' invocation of a right to be let alone and his attack upon the view that the fourth amendment protects only property resurrected the prior broad view of the amendment enunciated in *Boyd v. United States*, 116 U.S. 616, 630 (1886).

30. See Beane, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212, 218-35.

31. *Silverman v. United States*, 365 U.S. 505 (1961).

32. 389 U.S. 347 (1967). "[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353. See also *Silverman v. United States*, 365 U.S. 505, 512 (1961). One commentator has suggested that the right to privacy recognized in *Katz* is itself a "notion drawn largely from property law" that has "imported into search and seizure anomalous rigidities derived from private property law." Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 666-67 (1961). See also note 34 *infra*.

33. 389 U.S. at 353.

34. Commentators have noted that despite Justice Stewart's pronouncement in *Katz* that the fourth amendment "protects people not places," courts remain preoccupied with physical privacy and constitutionally protected areas. See Amsterdam, *supra* note 5, at 383; Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1 (1971); Weinreb, *supra* note 2, at 52-54.

35. See note 22 *supra*.

36. 389 U.S. at 351. One writer has suggested that the *Katz* opinion is "intentionally ambiguous, pointing the way to a new scope for the Fourth Amendment while leaving the Court room to retreat." Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 138. See also Amsterdam, *supra* note 5, at 385 ("the *Katz* decision was written to resist captivity in any formula").

explain when and why an individual is justified in relying on this right.

Despite the warning in *Katz* that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,'"³⁷ fourth amendment litigation since *Katz* has centered on the privacy issue.³⁸ The origin and constitutional basis of the right to privacy are unclear,³⁹ and articulation of the scope and content of the right has proved extremely difficult.⁴⁰ Courts have invoked the privacy right in several areas outside the fourth amendment,⁴¹ but attempts by social scientists⁴² and the courts⁴³ to define the right have been unsuccessful. Definitional problems may arise because the right to privacy is not one right but many discrete rights, some of which are interrelated, while others are unrelated or inconsistent.⁴⁴

Even a clear definition of privacy⁴⁵ would not determine the extent to which constitutional protection is desirable or the weight to be assigned to the privacy right in competition with other social and political values. The Court has recently rejected an absolutist view of privacy by declining to place certain items of evidentiary value beyond the reach of a search that meets the procedural requirements of the fourth amendment.⁴⁶ Thus, any privacy interest⁴⁷ might be out-

37. 389 U.S. at 350.

38. One comment observes that "[t]he greatest misfortunes befalling the right of privacy as a constitutional doctrine are its name and birth." Doss & Doss, *On Morals, Privacy, and the Constitution*, 25 U. MIAMI L. REV. 395, 418 (1971). *But cf.* Beane, *supra* note 30, at 215: "The nearest to an explicit recognition of a right to privacy in the Constitution is contained in the Fourth Amendment."

39. *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 228-29 (1965).

40. "[T]he content of the right remains elusive, the constitutional sources from which it springs are vaguely charted, and the remedies for its vindication remain largely ephemeral." Hufstедler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 REC. N.Y.B.A. 546, 547 (1971).

41. *E.g.*, *Rowe v. Wade*, 410 U.S. 113, 152-54 (1973) (abortion); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-38 (1970) (pandering advertisement); *Kovacs v. Cooper*, 336 U.S. 77, 86-89 (1949) (sound trucks). *See generally* Doss & Doss, *supra* note 38; Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

42. A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

43. *See* *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-38 (1970).

44. *E.g.*, *Marcus v. Search Warrant*, 367 U.S. 717, 732-33 (1961) (absence of chilling effect on free speech and press); A. WESTIN, *supra* note 42, at 7 (the right "of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Dykstra, "The Right Most Valued by Civilized Man," 6 UTAH L. REV. 305, 307 (1959) ("mental and spiritual development . . . happiness, peace of mind, the proper unfolding of personality"); Ervin, *The Final Answer: The People in Control*, 7 TRIAL 14, 28 (March/April 1971) (freedom from "a climate of apprehension and fear of 'snoopers'—private or official"); Parker, *Definition of Privacy*, 27 RUTGERS L. REV. 275, 280 (1974) ("control over who can sense us"); Rossiter, *The Pattern of Liberty*, in ASPECTS OF LIBERTY 17 (M. Konvitz & C. Rossiter eds. 1958) (the right to "erect an unbreachable wall of dignity and reserve against the entire world").

45. "The legal process places limits on the subtlety and sophistication of the definitions it uses. . . . [T]he law needs some short, commonly agreed upon definition of privacy." Parker, *supra* note 44, at 277-78.

46. *Andresen v. Maryland*, 427 U.S. 463 (1976). *Andresen* raised the question left open in *Warden v. Hayden*, 387 U.S. 294 (1967): "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Id.* at 303. *Andresen* apparently answers this question in the negative by holding that a search and seizure is constitutional when the government observes the procedural requirements of the fourth amendment and avoids compulsion under the fifth amendment by ensuring that "the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence." 427 U.S. at 474.

47. The broad language of *Andresen* implies that no items, even personal diaries, are

weighed by a competing governmental interest, such as the government's interest in ferreting out crime.

Shifting emphasis from a pure individual perspective to an analysis integrating both perspectives would make the determinations in particular cases less complex. Balancing recognized privacy rights against other interests⁴⁸ as dictated by the integrated approach requires the government to establish probable cause for intruding upon a recognized right to privacy.⁴⁹ The prior and more difficult task required by *Katz*, however, is balancing interests to determine whether the expectation of privacy is justified.⁵⁰ If the expectation is not justified, the fourth amendment is inapplicable and an inquiry into probable cause is unnecessary.⁵¹ Although the *Katz* majority failed to explain why the defendant had "justifiably relied" on the privacy of the telephone booth and to delineate standards for a justifiable expectation of privacy,⁵² Justice Harlan, concurring, suggested that the expectation of privacy must be both subjective and reasonable.⁵³ The Court soon abandoned the subjective expectation requirement, because the individual defendant is unlikely to have considered the privacy question,⁵⁴ and currently employs only the reasonable expectation test to determine the applicability of the fourth amendment.⁵⁵

A standard for justifiable or reasonable expectation of privacy remains unelucidated. Courts should not entrust this determination to the jury because jurors are generally unfamiliar with police search and seizure practices.⁵⁶ The reasonable man standard is also troublesome in this context because it often requires the fact-finder to hypothesize about the expectations of the reasonable criminal and to consider the defendant's illegal activity in determining whether an

so private that they are beyond the search and seizure powers of the government. The items seized in *Andresen* were business records, however, and thus the status of personal diaries remains uncertain. In *Fisher v. United States*, 425 U.S. 391 (1976), the Court stated: "Special problems of privacy which might be presented by subpoena of a personal diary . . . are not involved here." *Id.* at 401 n.7.

48. See *Ervin*, *supra* note 44, at 28 (suggesting that efficiency and economy values should be balanced with privacy and constitutional freedom values).

49. See, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mallory v. United States*, 354 U.S. 449 (1957); *Johnson v. United States*, 333 U.S. 10 (1948).

50. See notes 32-38 *supra* and accompanying text.

51. See e.g., *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974). Once the court classifies the government action as a "nonsearch," meaning that no intrusion upon interests protected by the fourth amendment has occurred, "it is of course of no consequence whether or not there was probable cause." 484 F.2d at 380 n.5.

52. *Katz* "offers neither a comprehensive test of fourth amendment coverage nor any positive principles by which questions of coverage can be resolved." *Amsterdam*, *supra* note 5, at 385.

53. 389 U.S. at 361.

54. See *United States v. White*, 401 U.S. 745, 751-52 (1971).

55. *Id.* Even Harlan had second thoughts about the requirement for a subjective expectation of privacy that he had suggested in *Katz*. *Id.* at 786 (Harlan, J., dissenting).

56. See *Dworkin*, *supra* note 2, at 365-66.

expectation of privacy is reasonable.⁵⁷ These problems induced the Court to state that “*one contemplating illegal activities* must realize and risk that his companions may be reporting to the police.”⁵⁸ This position imposes a required expectation on wrongdoers rather than reflecting what they actually or reasonably expect. The result is a moral judgment that wrongdoers are not justified in expecting privacy.⁵⁹

Even if courts could resist the temptation to invoke moral justifications, the major inadequacy of exclusive reliance on the reasonably prudent man standard is that the standard merely reflects existing conditions without considering their desirability.⁶⁰ The government can unilaterally change existing conditions and thus the expectations of reasonably prudent men.⁶¹ If the fourth amendment is to protect the right to privacy at all, it must consider what citizens have a right to expect rather than society’s current expectations. A public opinion poll cannot define social justification and reasonable expectation. Courts must assess the effect that the government activity would have on individuals and society absent constitutional restraints.⁶²

The *Katz* test thus requires a court to determine which privacy claims will receive fourth amendment protection rather than what the individual subjectively expects, or what the reasonably prudent man expects.⁶³ Deciding which interests are protected by the fourth amendment requires a value judgement and thus requires courts to determine which expectations of privacy are desirable and therefore justifiable.⁶⁴ When a court addresses these questions, satisfactory

57. Another obvious temptation is to consider the effect of the exclusionary rule in determining whether the fourth amendment protections apply. See generally Hufstедler, *supra* note 40.

58. *United States v. White*, 401 U.S. at 752 (emphasis added). By focusing on the expectations of one contemplating illegal activities the analysis begs the question “by using a later determination of criminality to justify the government’s earlier activity which made the determination possible.” Dworkin, *supra* note 2, at 337.

59. Dworkin, *supra* note 2, at 337.

60. The task of the law is “to form and project, as well as mirror and reflect,” and the Court should not “merely recite the expectations and risks without examining the desirability of saddling them upon society.” *United States v. White*, 401 U.S. at 786 (Harlan, J., dissenting).

61. *Amsterdam*, *supra* note 5, at 384. See, e.g., *United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973), holding that because the government had posted signs informing passengers that they would be searched before boarding an airplane, an individual choosing to board a plane relinquished any reasonable expectation that he would not be searched. Cf. *United States v. Davis*, 482 F.2d 893, 905 (9th Cir. 1973) (“The government could not avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped, or that all homes would be searched.”).

62. Stone, *supra* note 2, at 1219.

63. Of course even before *Katz* the courts had to choose which places and things were within the coverage of the fourth amendment. Determining the existence of a right of privacy in tangible things was not as difficult as the present question, however, because the courts had recourse to longstanding property principles. While property rights in intangibles are also recognized by property law, such rights are not as clearly defined by legal precedent. When the *Katz* opinion announced that the fourth amendment protects people not places, see note 22 *supra*, thus necessitating a determination of what privacy people may justifiably expect, the courts had no ready reservoir of precedents to guide them. Commentators have suggested various tests, see, e.g., Kitch, *supra* note 36, at 137 (“society’s generally shared expectations”); Parker, *supra* note 44, at 276 (“our shared intuition of when privacy is or is not gained or lost”); Stone *supra* note 2, at 1212 (concern with “relatively serious” threats to privacy); Weinreb, *supra* note 2, at 83 (claims that are “natural or essential”).

64. This “uncomfortable position” of identifying basic rights and desirable social values is not unique to fourth amendment jurisprudence. According to Justice

answers are unlikely because the court must choose between the equally important social interests in the right of privacy and the need for effective law enforcement. As long as courts are forced to choose one of these values over the other, fourth amendment law will remain unsettled.⁶⁵

Faced with the difficult task of reconciling conflicting social values, courts have abrogated their responsibility by applying an irregular version of the assumption of risk doctrine. The courts have created the fiction that the individual determines which expectations of privacy are desirable and therefore deserving of fourth amendment protection. Reasoning that the right to privacy can be waived, courts routinely conclude that an individual did not want privacy in a given situation.⁶⁶ This analysis obviates speculation on the existence of the right had the defendant actually sought it. Under this formulation, the issue resembles a consent or waiver determination.⁶⁷ The courts have eschewed traditional requirements for waiver or consent, however, and have created a peculiar version of the assumption of risk doctrine.

This article will analyze the Court's decisions using the assumption of risk doctrine in three factual settings involving the following hypothetical situation: John and Mary have an adulterous relationship. John wishes to conceal this relationship from his spouse, respectable society, and especially the government, because adultery is a crime. To protect the secrecy of this "private" relationship, John never appears with Mary in public. Their contact is confined to telephone conversations and meetings in an isolated mountain cabin, to which they come and go separately. They never appear outside the cabin together. John is arrested and prosecuted for adultery.

John is dismayed to find that the government will offer the following evidence: (1) testimony that government observation of John for the past year demonstrates that he made twenty trips from his home to the cabin; (2) testimony by a government forest ranger who has

Holmes, the judicial function necessarily and properly involves "considerations of what is expedient for the community concerned." O. W. HOLMES, *THE COMMON LAW* 35 (1923). See, e.g., *Mitchell v. State*, 120 Ga. App. 447, 170 S.E.2d 765 (1969), where the court balanced the public's interest in apprehending defendants engaging in homosexual activities in public restrooms against the individual's interest in not being watched while relieving himself. The court held that the interest in privacy must be "subordinated to the public interest in law enforcement." *Id.* at 447, 170 S.E.2d at 766.

65. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 *ILL. L. REV.* 1, 4 (1950). While a certain amount of "unstable equilibrium" may be viewed as the virtue of flexibility, "consistency and predictability are virtues too, and they must be sacrificed to achieve flexibility." Dworkin, *supra* note 2, at 365. Undue emphasis on flexibility and the factual setting of each case undermines the fourth amendment as a means of regulating the police, since police officers cannot be expected to conform their conduct to unannounced, unpredictable norms. See notes 246-49 *infra* and accompanying text. See generally Dworkin, *supra* note 2; LaFave, *supra* note 4.

66. K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 183 (1969).

67. See Weinreb, *supra* note 2, at 54.

observed, through an unshuttered window, John and Mary engaging in sexual relations inside the cabin (the forest ranger made these observations through infrared binoculars from a nearby mountain which is part of a government park); (3) John's diary, containing entries concerning his relationship with Mary, seized during a search of the cabin (government agents conducted the search after obtaining the consent of John's business partner, who shared use of the cabin with John); (4) tapes of John and Mary's telephone conversations obtained using a wiretap, without court authorization, but with Mary's consent; and (5) Mary's testimony about John's bedroom conversations with her, Mary disclosing that she has been an undercover police agent since the age of nine.

John may be dismayed at the government's efficiency in collecting this evidence. He may be further dismayed to learn that all of the evidence is probably admissible. But he will be stunned to learn that it is admissible because he is deemed to have no desire that these matters be private. Notwithstanding his subjective desire for privacy, and the reasonableness of the precautions he took to conceal his relationship with Mary, the court will inform him that he waived any claim of privacy and assumed the risk that he was under government surveillance, that the ranger would look through his unshuttered window, that his business partner would consent to a seizure of his diary, that Mary would consent to a wiretap, and that Mary was actually a government spy.

Private and Public Places

Courts employ the distinction between private and public places to determine how much privacy an individual retains when he leaves a private place and enters a public place and how much privacy an individual retains when he "invites" the public into an otherwise private place.⁶⁸ John's use of a public highway en route to the cabin exemplifies the entry of a public place. His failure to shutter the cabin windows exemplifies an "invitation" to the public to enter a private place.

Going Into Public Places

Dicta in *Katz*⁶⁹ and other cases⁷⁰ recognizes that a person's desire for privacy may be constitutionally protected even in a public place. Nevertheless, the courts generally limit fourth amendment protection to public places "where the physical arrangement creates an ex-

68. 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.")

69. *Id.* at 351-52 ("[W]hat he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.")

70. *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) ("This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."); *United States v. Chadwick*, 433 U.S. 1, 11 (1977) ("a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not simply those interests found inside the four walls of the home").

pectation of privacy."⁷¹ The courts have been less willing to determine whether the right to privacy exists in a public area lacking the physical characteristics of private places.⁷² *Terry v. Ohio*⁷³ established that an individual retains some privacy in his person and tangible property even while on a public street. The stop and frisk procedure considered by the Court in *Terry* also constitutes a trespass and a seizure under the "means-oriented" approach of *Olmstead*.⁷⁴ Under *Olmstead*, the fourth amendment does not apply absent a physical trespass.⁷⁵ The *Katz* "justifiable expectation of privacy" approach, on the other hand, fails to indicate unambiguously whether the fourth amendment applies to governmental activities that do not constitute a physical trespass, such as surveillance in public places. Many courts⁷⁶ and commentators⁷⁷ have concluded that the constitution does not reach all acts of public surveillance by the government.

The Court suggested in *Katz*, however, that physical trespass is unnecessary to place public searches within the fourth amendment. The test for a justifiable expectation of privacy is whether a particular expectation is desirable in this society, not what the reasonably prudent man,⁷⁸ or a specific individual, expects.⁷⁹ This value judg-

71. Weinreb, *supra* note 2, at 84. See, e.g., *People v. Triggs*, 8 Cal. 3d 884, 891-92, 506 P.2d 232, 236-37, 106 Cal. Rptr. 408, 412-13 (1973) (expectation of privacy in public restroom despite doorless toilet stall); cf. *Kirsch v. State*, 10 Md. App. 565, 569, 271 A.2d 770, 772 (1970) (no expectation of privacy in locked service station restroom). *Katz* speaks of the defendant excluding the uninvited ear by closing the door. 389 U.S. at 352. Regarding the right to privacy in public restroom compartments see generally 55 MINN. L. REV. 1255 (1971); 19 VAND. L. REV. 945 (1966); 63 COLUM. L. REV. 955 (1963).

72. E.g., *Laird v. Tatum*, 408 U.S. 1 (1972) (Army information-gathering "relating to potential or actual civil disturbances or street demonstrations"); *Giancana v. Hoover*, 322 F.2d 789 (7th Cir. 1963); *Scherer v. Brennan*, 266 F. Supp. 758 (N.D. Ill. 1966), *aff'd*, 379 F.2d 609 (7th Cir. 1967). Although the Supreme Court has recognized an individual's "right to satisfy his intellectual and emotional needs in the privacy of his own home," *Stanley v. Georgia*, 394 U.S. 557, 565 (1969), "the Court did not explain why the situs . . . made any difference in the state's power to interfere with [the individual's] satisfying his emotional needs or in its power to tell him what he should read or view." *Hufstедler*, *supra* note 40, at 560.

73. 392 U.S. 1 (1968).

74. See notes 19-29 *supra* and accompanying text.

75. 277 U.S. at 464; see *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765) ("[T]he eye cannot be by the laws of England be guilty of a trespass."), quoted in *Boyd v. United States*, 116 U.S. 616, 626-29 (1886). *Contra*, *United States v. On Lee*, 193 F.2d 306, 313 (2d Cir. 1951) (Frank, J., dissenting) ("In every-day talk, as of 1789 or now, a man 'searches' when he looks or listens."), *aff'd*, 343 U.S. 747 (1952).

76. E.g., *Caldwell v. United States*, 338 F.2d 385, 388 (8th Cir. 1964) ("[I]t is not a search within the meaning of the Fourth Amendment to observe in a public place that which is apparent for all the world to see."), *cert. denied*, 380 U.S. 984 (1965).

77. "Surely, an individual cannot reasonably expect to be free from observation. It seems unassailable that the courts will always affirm what the logic here demands—that a police officer be allowed, indeed be expected, to patrol and observe what transpires in areas fully open to the public." *Belair & Bock, Police Use of Remote Camera Systems for Surveillance of Public Streets*, 4 COLUM. HUMAN RIGHTS L. REV. 143, 191 (1972). See *Christie, Government Surveillance and Individual Freedom*, 47 N.Y.U. L. REV. 871, 889 n.78 (1972) (proposing statutory rather than constitutional limitations on surveillance).

78. See text accompanying notes 56-62 *supra*.

79. See text accompanying note 55 *supra*.

ment requires balancing society's need for information⁸⁰ against the harm of placing surveillance beyond fourth amendment coverage. The individual perspective indicates that surveillance interferes with the right of privacy if privacy encompasses the concept of anonymity.

The concept of anonymity recognizes that most people spend part of their lives in public.⁸¹ Although some observation is inevitable in public places, the individual observed nevertheless distinguishes between systematic surveillance and casual observation.⁸² In an urban society, therefore, anonymity replaces privacy. The urbanite merges into the "situational landscape."⁸³ Although surveillance of the individual *qua* individual clearly destroys anonymity, the social costs of this destruction are unclear. Everyone has probably experienced the vague, uneasy feeling of being watched, especially when he is unable to watch his observer contemporaneously. This feeling is obviously undesirable.⁸⁴ The inquiry required by *Katz*, however, is whether the social effects of surveillance are sufficiently undesirable to invoke fourth amendment protection.⁸⁵ This question may not have a satisfactory answer, but the Supreme Court has evaded it altogether by invoking such devices as standing⁸⁶ and assumption of risk.

The Court has reasoned that a citizen leaving a private place to enter a public place relinquishes his expectation of privacy because he has consciously chosen to encounter the risk of observation.⁸⁷ This determination that an individual voluntarily chose to encounter the risk of observation differs substantially from a determination that the fourth amendment guarantees no right to anonymity in public. A court must infer the individual's decision to encounter observation from the factual circumstances in each case, whereas the conclusion that no right to anonymity exists is a legal, not factual, conclusion. The Court's assumption of risk reasoning thus fails to address the real issue.⁸⁸

80. See McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 204; Christie, *supra* note 77, at 887.

81. Weinreb, *supra* note 2, at 81.

82. *Id.* at 81-82.

83. A. WESTIN, *supra* note 42, at 31.

84. "Knowledge or fear that one is under systematic observation in public places destroys the sense of relaxation and freedom that men seek in open spaces and public arenas." *Id.* Under the individual perspective the psychological effects of the fear of surveillance can exist independent of actual surveillance. "The fear of governmental voyeurism is thought to be almost as destructive of personality as would be a physical intrusion." Hufstедler, *supra* note 40, at 559.

85. See Weinreb, *supra* note 2, at 83. The author observes:

It is risky business to speculate how human beings will adapt to a changed environment. Without being very precise, experience suggests that if we were to lose the cloak of anonymity in public places, we should be less open, more crafty, more secretive, and more isolated than we are now. There is no way to establish that our behavior now is better (more "natural," or more "human," or more pleasant) than it would be if we expected and had less privacy. In the end we must rely on an unproved vision of man in society.

86. See note 13, *supra*.

87. See, e.g., Connor v. Hutto, 516 F.2d 853, 855 (8th Cir.) (right of privacy does not extend to commission of an act of sodomy in a car parked on a public highway), *cert. denied*, 423 U.S. 929 (1975); Wishart v. McDonald, 500 F.2d 1110, 1113-14 (1st Cir. 1974) (right of privacy may be surrendered on public display; it does not extend to "conduct displayed under the street lamp on the front lawn").

88. Amsterdam, *supra* note 5, at 406. One commentator has suggested that estoppel, rather than assumption of risk, is the appropriate doctrine when an individual's conduct evidences an indifference to privacy. Stone, *supra* note 2, at 1217.

The Court has also misconstrued the traditional doctrine of assumption of risk, which requires that the defendant voluntarily encounter⁸⁹ a known and appreciated risk.⁹⁰ Even if an individual knows and appreciates the risk of surveillance whenever he goes out in public, he has not voluntarily encountered the danger as required by traditional assumption of risk principles. The voluntary choice requirement of traditional assumption of risk analysis assumes the presence of at least one alternative to the risk chosen.⁹¹ If the alternative to surveillance is reasonable and the defendant rejects it, he has chosen voluntarily to be the subject of surveillance. If the individual has no reasonable alternative to surveillance, however, he has not made a voluntary choice. Choice in the absence of reasonable alternatives is tantamount to duress.⁹² Thus, voluntariness of choice, an essential element of assumption of risk, depends upon the reasonableness of the alternatives facing the individual at the time of his choice.⁹³ Thus, assumption of risk analysis is inappropriate in resolving fourth amendment questions unless individuals have a reasonable alternative to appearing in public places.

The only citizens who have any alternative to appearing in public places are those wealthy enough to live exclusively in private places. All other citizens are incapable of assuming the risk of surveillance

89. *Sinclair Refining Co. v. Winder*, 340 S.W.2d 503, 504 (Tex. Civ. App. 1960) (after knowledge and appreciation have been established "[t]here yet remains the issue as to whether the [individual] voluntarily exposed himself to the danger known and appreciated by him."); RESTATEMENT (SECOND) OF TORTS § 496E (1965).

90. *City of Winona v. Botzet*, 169 F. 321, 329 (8th Cir. 1909) ("Notice or knowledge and appreciation of the danger are indispensable to the assumption of the risk."); RESTATEMENT (SECOND) OF TORTS § 496D (1965).

91. See Note, *Distinctions Between Assumption of Risk and Contributory Negligence*, 23 WASH. & LEE L. REV. 91, 99 (1966).

92. *Smith v. United States*, 153 F.2d 655, 661 (5th Cir. 1946) ("To constitute duress it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils . . .").

93. RESTATEMENT (SECOND) OF TORTS § 496E(2) (1965); see also *Dougherty v. Chas. H. Tompkins Co.*, 240 F.2d 34, 36 (D.C. Cir. 1957) (decision to use snowy temporary sidewalk was not assumption of risk because no reasonable alternative was available); Keeton, *Personal Injuries Resulting from Open and Obvious Conditions—Special Issue Submission in Texas*, 33 TEX. L. REV. 1, 14 (1954). But see *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973): "When, for example threats are used, the situation is one of choice between alternatives, either one disagreeable, to be sure, but still subject to a choice. As between the rack and a confession, the latter would usually be considered the less disagreeable, but it is nonetheless a voluntary choice." *Id.* at 224 n.7 (quoting 3 J. WIGMORE, EVIDENCE § 826 (J. Chadbourn rev. 1970)). The traditional British view has been that "a man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates . . . the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will." *Bowater v. Rowley Regis Corp.*, [1944] 1 K.B. 476, 479.

For an interesting discussion of how the lack of reasonable alternatives affects substantive law, see Doss & Doss, *supra* note 38, noting that certain conduct can be proscribed as criminal because the individual has reasonable alternatives to engaging in such conduct. For example, when public drunkenness is made a crime, "[a] man can be drunk at home or in his club, and he can drink more moderately in other public places . . ." *Id.* at 417 n.123. But laws proscribing the establishment or maintenance of polygamous households unduly limit the individual's right to be left alone because the individual has no choice between reasonable alternatives. "A communal family can either live together—or it can dissolve. There are no alternatives." *Id.*

because they have no alternative.⁹⁴ The life of a total recluse, even if economically feasible, may nevertheless be unreasonable.⁹⁵ The loss of freedom from even self-imposed seclusion to avoid surveillance⁹⁶ may be too costly. If a completely private life is not a reasonable alternative, the individual going out in public has not made a voluntary choice to assume the risk of surveillance. The assumption of risk doctrine, properly applied, would not divest individuals of their rights as quickly as the courts' present version of the doctrine. Properly applied, the assumption of risk doctrine would force the courts to decide the social policy questions that they currently avoid when determining what constitutes a justifiable expectation of privacy. To determine whether an expectation of privacy is justifiable, the courts must decide whether society will recognize some right to anonymity in public places. Traditional assumption of risk analysis, however, would require the courts to determine whether living exclusively in private places is a reasonable (socially acceptable) alternative to appearing in public. Thus, if the assumption of risk doctrine were properly applied the courts would gain little in their effort to avoid ruling on social policy issues. The courts should abandon superficial assumption of risk analysis when considering questions of privacy in public places, and in fourth amendment cases generally. Assumption of risk only confuses the area and contributes nothing to an understanding of the fourth amendment.⁹⁷

Inviting the Public into a Private Place

An individual cannot necessarily create an expectation of privacy by locating himself beyond visual observation.⁹⁸ The fourth amendment

94. Many poor people are forced to conduct their social lives on the street. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 104 (1967) (citing dilapidated and overcrowded housing, inadequate recreational facilities). Making the right to privacy turn on one's standard of living may violate equal protection. Professor Weinreb suggests that tying the right of privacy to private property may require that the government provide private "places" to those who cannot afford them. Weinreb, *supra* note 2, at 84-85.

95. The privacy and life style of a Howard Hughes type may be unappealing even to those who possess the requisite financial resources. Nevertheless, assets determine one's potential for privacy. A typical middle-class individual may not be able to afford to charter a private plane or seal off an entire floor of a hotel, but he can afford to join a country club or use a union hall. The availability of such places to those with adequate financial resources leads to a basic feeling that we can retire to these places when we want *real* privacy. Amsterdam, *supra* note 5, at 404.

96. *Id.* at 402.

97. As used by the Court, assumption of risk "is not a reason but a conclusion. The public assumes that risk because the law says it is a risk the public must assume." Note, *The Applicability of the "New" Fourth Amendment to Investigations by Secret Agents: A Proposed Delineation of the Emerging Fourth Amendment Right to Privacy*, 45 WASH. L. REV. 785, 809 (1970).

98. See *United States v. Santana*, 427 U.S. 38 (1976), in which the Court held that defendant had no justifiable expectation of privacy when she was standing on the threshold of the entrance to her home. Defendant had retreated into her house when the police arrived and attempted to arrest her. The police made the arrest inside the house "in hot pursuit" of defendant. The Court reasoned:

While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment [the defendant] was in a "public" place. She was not in an area where she had any expectation of privacy She was not merely visible to the public but was exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house.

does not protect what a person knowingly exposes to the public, even in his own home or office.⁹⁹ A person relinquishes all expectations of privacy in an otherwise private place by knowingly and voluntarily inviting all comers to enter or view that place.¹⁰⁰ Courts disagree whether this relinquishment rests on consent or on waiver.¹⁰¹ Consent and waiver both emphasize the individual's state of mind, but differ in other important respects.¹⁰² Courts determine the existence of both largely by the individual's state of mind and the presence of fraud or deception.¹⁰³

Analysis under both the waiver and consent theories proceeds from the premise that the defendant voluntarily relinquished a pre-existing right to privacy. Both theories assume that the individual has complete control over his right to privacy and that the government can justify intrusion only by establishing the individual's consent to the intrusion. *Katz*, however, rendered questions of consent, waiver, and individual control unnecessary to a resolution of the privacy issue. *Katz* eliminated the necessity for the government to show a waiver of privacy by the defendant by requiring the individual to demonstrate that his claim to privacy is socially justifiable. Courts must bestow fourth amendment protection by determining which expectations of privacy are justifiable and desirable in society. They have evaded this determination by substituting conclusions about assumption of risk.¹⁰⁴ Thus courts announce that unless the individual takes actions such as drawing his curtains,¹⁰⁵ building a fence,¹⁰⁶ and boarding up a garage,¹⁰⁷ he has assumed the risk of observation.¹⁰⁸ By applying assumption of risk analysis to the hypothetical lovers, a court could conclude that John did not really want to be free from observation when he engaged in sexual activities with

Id. at 42.

99. *Katz v. United States*, 389 U.S. at 351.

100. The fourth amendment does not restrict the conduct of government officials who enter an area open to the public in order to conduct a visual inspection of the premises. *United States v. Williams*, 328 F.2d 887 (2nd Cir.), *cert. denied*, 379 U.S. 850 (1964); *Fisher v. United States*, 205 F.2d 702 (D.C. Cir.), *cert. denied*, 346 U.S. 872 (1953).

101. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 223-35 (1973).

102. Waiver requires a *knowing* and *intelligent* waiver, *id.* at 235-38, whereas consent requires only *voluntary* consent, *id.* at 231-34. The burden of proof also differs between the two theories. *Id.* at 238 n.25.

103. See notes 124-26 *infra*.

104. See notes 87-97 *supra* and accompanying text.

105. See, e.g., *People v. Berutko*, 71 Cal. 2d 84, 453 P.2d 721, 77 Cal. Rptr. 217 (1969); *Commonwealth v. Hernley*, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971).

106. See, e.g., *Ponce v. Craven*, 409 F.2d 621 (9th Cir. 1969); *People v. Wright*, 41 Ill. 2d 170, 242 N.E.2d 180 (1968). Presence of a fence is relevant to whether the area is an "open field" or part of the protected "curtilage," *Care v. United States*, 231 F.2d 22, 25 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956).

107. See, e.g., *United States v. Wright*, 449 F.2d 1355 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 947 (1972).

108. See, e.g., *Gil v. State*, 394 S.W.2d 810, 811 (Tex. Crim. App. 1965) ("[W]here one is so foolish as to leave his windows unsecured he may not complain if another observes an illegal act being committed therein.")

Mary because he left the cottage shutters open. If John assures the court that he actually did desire privacy, the court could conveniently announce that John assumed the risk of observation.

The traditional assumption of risk requirements, however, are not met in this hypothetical situation.¹⁰⁹ The doctrine assumes a known and appreciated danger, but John probably failed to consider the possibility that a federal agent with infrared binoculars¹¹⁰ would look through the cabin window from a nearby mountain top. The court should also consider John's alternatives to risking visual observation. The superficial answer, that John has the reasonable alternative of closing his shutters whenever he desires privacy,¹¹¹ is unacceptable for several reasons. This approach implies that privacy is only needed or desired for brief periods or specific activities. John can obtain permanent privacy only by shuttering his windows at all times. The resulting loss of sunshine, fresh air, and mountain view is an unreasonable alternative to government surveillance. Even if John does cover the windows, however, the privacy gained is illusory because the government may continue to observe through cracks or openings in the covering.¹¹² To guarantee one's privacy under this superficial approach requires an individual to block visual observation totally from both anticipated and unanticipated¹¹³ sources. Courts cannot reasonably tell citizens that they must take whatever steps are necessary to insure that absolutely no light or sound escapes from their premises because failure to do so subjects any emissions to government seizure. An individual today can presumably protect himself against surveillance only "by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet."¹¹⁴ This action satisfies traditional

109. See notes 89-93 *supra* and accompanying text.

110. Some courts have been tempted to regard the use of technological devices as determinative of whether a search has occurred. See generally *Belair & Bock*, *supra* note 77; *Dutile*, *supra* note 34. The "technological device" approach has not received much support in situations involving visual surveillance, probably because the arsenal of visual surveillance devices (e.g., flashlights and binoculars) cannot match the sophistication and variety of equipment used for auditory surveillance. See *Dorsey v. United States*, 372 F.2d 928, 931 (D.C. Cir. 1967) ("We do not think the need to employ a visual aid at night in the form of a flashlight converts this from lawful into unlawful conduct.").

Focusing on technological devices appears to be a return to the means-oriented approach of *Olmstead* and a departure from *Katz*, which places more emphasis on the interest to be protected than on the means of violating it. On the other hand, the introduction of technological devices can so alter conditions in society as to drastically affect reasonable or justifiable expectations of privacy. See *Weinreb*, *supra* note 2, at 82-83.

111. See, e.g., *Commonwealth v. Hernley*, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971). "It was incumbent on the suspect to preserve his privacy from visual observation. To do that the appellees had only to curtain the windows." 216 Pa. Super. Ct. at 181-82, 263 A.2d at 907.

112. See, e.g., *State v. Smith*, 37 N.J. 481, 181 A.2d 761, *cert. denied*, 374 U.S. 835 (1962). "Peering through a window or a crack in a door or a keyhole is not, in the abstract, genteel behavior, but the Fourth Amendment does not protect against all conduct unworthy of a good neighbor." 37 N.J. at 496, 181 A.2d at 769.

113. The city council of Bell Gardens, California, recently sought federal funding for a two-year, two-blimp project entitled "Demonstration of a Remotely Piloted Mini-blimp System for Law Enforcement Surveillance in an Urban Area." The blimps would measure 45 feet in length and 11 feet in diameter and would be armed with a searchlight, public-address system, and zoom lens camera. *Richmond News-Leader*, March 31, 1977, at 1, col. 1.

114. *Amsterdam*, *supra* note 5, at 402. Cf: "I do not want my house to be walled in

assumption of the risk requirements only if courts regard this seclusion as a reasonable alternative in a free society. If courts do not characterize seclusion as reasonable, they must abandon the fiction that the individual relinquishes his privacy voluntarily. This would necessitate determination of what expectations of privacy are justifiable and desirable in a free society.

Third-party Consent Situations

The law of consent is relatively clear when the police actually confront the person whose premises, property, or person is the subject of the search. The government generally concedes or the court assumes that the individual had a justifiable expectation of privacy.¹¹⁵ The controversy then centers on whether the individual relinquished this expectation and gave permission for the search. In *Schneckloth v. Bustamonte*,¹¹⁶ the Supreme Court stated that relinquishment of fourth amendment rights does not require a knowing and intelligent waiver, but merely voluntary consent, to be determined by examining the totality of the circumstances.¹¹⁷ The *Schneckloth* consent test places the courts on familiar ground in determining voluntariness.¹¹⁸ Unfortunately, clarity disappears in third-party consent situations when the police do not directly confront the individual whose premises, property, or person is searched. By invoking assumption of risk rhetoric, courts have blurred the distinction between the absence of a justifiable expectation of privacy and the voluntary relinquishment of an acknowledged expectation of privacy. If, in the hypothetical situation, the police had asked John for permission to search, the courts would simply consider the voluntariness of John's consent. But the police confronted John's business partner, a coowner sharing full use of the premises. If John's partner has voluntarily consented to the search, the court must determine whether he had authority to consent to a violation of John's privacy. Underlying the determination of the third party's authority is a need to deter-

on all sides and my windows to be stuffed. I want the cultures of all lands to be blown about my house as freely as possible." M. Gandhi, *quoted in* W. O. DOUGLAS, *THE ANATOMY OF LIBERTY: THE RIGHTS OF MAN WITHOUT FORCE* 20-21 (1963).

115. Of course, if no justifiable expectation of privacy existed, the court need not consider the question of consent because no intrusion on privacy has occurred to which the target must consent. The prosecution and the courts, however, are more accustomed to dealing with consent than with justifiable expectations of privacy. Thus, courts will frequently assume *arguendo* that the target had a justifiable expectation of privacy and then inquire whether the target voluntarily relinquished the expectation.

116. 412 U.S. 218 (1973).

117. *Id.* at 227.

118. The Court has a long history of determining the voluntariness of a confession, in which the totality of circumstances includes such factors as lack of advice as to constitutional rights, *Davis v. North Carolina*, 384 U.S. 737, 740 (1966); his lack of education, *Payne v. Arkansas*, 356 U.S. 560, 567 (1958); his low intelligence, *Fikes v. Alabama*, 352 U.S. 191, 196-97 (1957); the youth of the suspect, *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948); and length of detention, *Chambers v. Florida*, 309 U.S. 227, 230-35, 239 (1940).

mine the source of that authority, whether it is independent of or contingent on John's intentions and actions.

Courts and commentators have suggested four theories to support the third party's authority to consent to the search. The first theory emphasizes apparent authority of the third party and good faith reliance by the police.¹¹⁹ A second approach, the agency theory, suggests that the third party stands in the shoes of the target individual and may exercise all powers the target individual possesses.¹²⁰ The physical control theory holds that a third party in physical control of the subject of a search has a certain amount of raw power over that subject and the target individual has a corresponding diminution of control.¹²¹ The "fact" of physical control empowers the third party to consent to a search. Finally, under assumption of risk principles, the third party has power to consent to a search because the target individual assumed the risk that the third party would consent.¹²²

These four theories attach varying weights to the target individual's action and state of mind. Because the apparent authority concept evaluates the facts from the government's viewpoint, this article defers analysis of apparent authority to the examination of the limitation perspective. At its logical extreme, apparent authority would permit a burglar present on and in apparent control of the premises to consent to a search if the police could not reasonably discover his status as a burglar. The police face great practical difficulties in ascertaining the limits of apparent authority.¹²³ If the court views the fourth amendment from the individual perspective, however, a policeman's ignorance of the third party's actual status would not eliminate the rights of the individual.

The target individual's state of mind is determinative under the agency theory. If the third party has obtained all his authority directly from the target individual he is an agent of the target individual and agency law determines his actual authority.¹²⁴ The police must demonstrate an explicit agreement by which the target individual confers power to consent on the third party before the police may

119. *E.g.*, *United States v. Matlock*, 415 U.S. 164, 169-72 (1974).

120. *E.g.*, *United States v. Sferas*, 210 F.2d 69, 73 (7th Cir. 1954), *cert. denied sub nom. Skally v. United States*, 347 U.S. 935 (1954).

121. *E.g.*, *United States v. Sherwin*, 539 F.2d 1, 5-7 (9th Cir. 1976), *discussed at note 130 infra*.

122. *E.g.*, *Frazier v. Cupp*, 394 U.S. 731, 740 (1969); *Hoffa v. United States*, 385 U.S. 293, 300-03 (1966).

123. Sympathy for the police officers must be kept in perspective by remembering "that by resorting to consent, law enforcement officials are choosing to ignore a search warrant. This decision not to resort to a warrant is the very thing the Supreme Court is seeking to discourage. A court should eschew encouraging officers to avoid warrants, which is the clear mandate of the amendment." Mascolo, *Inter-Spousal Consent to Unreasonable Searches and Seizures: A Constitutional Approach*, 40 CONN. B.J. 351, 363-64 (1966). See also Weinreb, *supra* note 2 at 64:

The only sensible guide for the police is that they should never rely on consent as the basis for a search unless they must. If they do search relying on consent, they should be prepared to meet a heavy burden of proof that consent was in fact meaningfully given. And even then, because of the difficulties of proof, they should expect to be told often that the search was not proper.

124. *Stoner v. California*, 376 U.S. 483, 489 (1964) (fourth amendment rights may be waived "by word or deed, either directly or through an agent"). If the third party has his own interest in the subject of a search and seizure, then of course he may decide how to exercise or waive his rights. See note 140 *infra*.

justifiably rely on the third party's consent.¹²⁵ Explicit delegations of authority are infrequent, and the agency theory rarely justifies an officer's reliance on the consent of third parties.¹²⁶ Courts invoking agency concepts therefore rely partially on apparent authority, physical control, or assumption of risk.¹²⁷

Although the state of mind of the target individual determines the effectiveness of third-party consent under the agency theory, it is irrelevant to the physical control theory. Authority to consent under the physical control theory turns on the factual question of physical control. Raw power overrides the subjective aspects of consent. When a person surrenders control of a place or object, therefore, he loses the power to prevent government search and seizure of the place or object, regardless of the terms of surrender.¹²⁸ The Court has viewed subjective desires to retain control over an item beyond physical control as "metaphysical subtleties," irrelevant to consent.¹²⁹ At its logical extreme, the physical control theory produces results more startling than the concept of apparent authority. A burglar in physical control of the target individual's premises would not have to hide his status from the police. Although recognizing him as a burglar, the police could nevertheless argue that the burglar's physical control over the premises gave him actual power to consent to a search. Courts have failed to clarify whether physical control alone is sufficient to allow consent to a search.¹³⁰

125. See, e.g., *Stoner v. California*, 376 U.S. at 490 (the expectation of privacy is relinquished when left to the "unfettered discretion" of others).

126. Weinreb, *supra* note 2, at 63: "People living agreeably together usually do not arrive at explicit, regular practices; they proceed by understandings that are most satisfactory if they are imprecise, flexible, and unstated."

127. See generally Weinreb, *supra* note 2.

128. See *United States v. Miller*, 425 U.S. 435, 443 (1976):

[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

129. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

130. See, e.g., *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976). In *Sherwin*, the court applied the individual capacity silver platter doctrine, see *Burdeau v. McDowell*, 256 U.S. 465 (1921), and held that a search conducted by a private citizen is not within the coverage of the fourth amendment. 539 F.2d at 6-7. Regarding defendant's contention that a government seizure (not search) occurred when the government accepted control of the items from the private citizen, the court held that no seizure occurred because the private searcher voluntarily relinquished the objects. The owner-defendant's consent, subjective intent, and expectation of privacy were all irrelevant.

[O]nly the fact of consent [by the third party] is relevant, not whether it was properly authorized [by the owner]. . . .

. . . The [third party's] legal authority to approve a transfer of objects found in a private search has no bearing on whether his relinquishment of those objects to the government is coerced or voluntary.

Id. at 7. The court's statement is puzzling because its converse is also true—the private person's voluntary relinquishment of objects found in a private search has no bearing on whether he has legal authority to transfer another's property to the government. "A person's consent . . . is relevant only to the extent that he has a protected interest." Weinreb, *supra* note 2, at 54.

Thus, the agency and physical control theories are antithetical. Agency focuses wholly on the target individual's subjective intent, whereas physical control excludes consideration of subjective intent and focuses wholly on the third party's actual power.¹³¹ Although courts have embraced neither theory in its pure form, both concepts, especially physical control, are important to the assumption of risk theory, the current approach. Assumption of risk analysis reasons that one sharing possession, use, or control of property with a third party assumes the risk that the third party will consent to a search of the property.¹³²

Difficulties with the assumption of risk theory include defining "possession," "use," and "control." These terms are ambiguous even in their property law context,¹³³ and the courts' efforts to free the fourth amendment from its property law origins have made these terms especially intractable.¹³⁴ Even if the definitional problems were resolved, the connection between conferring possession, use, or control on a third party and conferring authority to consent to a search is unclear. A babysitter in exclusive control of the owner's premises may lawfully consent to a search of those premises,¹³⁵ but courts have failed to elucidate a burglar's inability to consent, even though he possesses the same physical control. The distinction does not depend on the owner's state of mind regarding a search, because both the babysitter and burglar may lack explicit authorization to consent to a search of the premises. When an owner permits a third

The *Sherwin* court apparently reasoned that once the third party, legally or illegally, gains control over the items, the owner's privacy interest is eliminated and only the property interests of the owner are implicated. 539 F.2d at 8 n.10. The court further reasoned that because the fourth amendment protects privacy and not property rights, the government's action did not intrude on a fourth amendment interest. *Id.* An individual loses his justifiable expectation of privacy whenever he loses actual control, and the loss of control in *Sherwin* was due to the conduct of a private citizen, not the government. What happens after the individual loses his justifiable expectation of privacy is irrelevant to the fourth amendment.

Although the holding in *Sherwin* is limited to the seizure issue, the analysis is equally applicable to determine whether a search has taken place. If a private person can eliminate another's justifiable expectation of privacy by taking control, a burglar can do so when he takes control of the victim's house. Only the owner's *property* interest in the dwelling remains when he has lost actual control, and under *Sherwin*'s reasoning, if the burglar voluntarily consents to a search of the house the government has not intruded on the owner's *privacy* interests. Judicial acceptance of the physical control analysis used in *Sherwin* would eliminate the fourth amendment as a protection of privacy in third-party consent situations and leave the protection of privacy totally to the resources and ingenuity of the individual. Even though the individual expects privacy and takes reasonable steps to protect his privacy, if someone succeeds in breaching his defenses and gaining actual control, the individual thereby loses his expectation of privacy and the protections of the fourth amendment. See notes 112-14 *supra* and accompanying text.

131. Consent "is a particularly open concept, which refers to both an 'internal' state of mind and an 'external' performance; consent is unequivocal and unquestioned only when it includes both." Weinreb, *supra* note 2, at 55.

132. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

133. See, e.g., *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 67 (1914) ("[T]here is no word more ambiguous in its meaning than Possession."). When the fourth amendment speaks of "[t]he right of the people to be secure in their persons, papers and effects," does the word *their* "refer to 'ownership' or 'possession' or 'custody' as these are known to the local civil law or to something totally different?" Dutilleul, *supra* note 34, at 2.

134. See notes 26-41 *supra* and accompanying text.

135. See *People v. Misquez*, 152 Cal. App. 2d 471, 479-80, 313 P.2d 206, 211 (1957) (babysitter deemed to have been authorized to permit a search because she had been left the keys to her employer's apartment).

party to be present on the premises, the owner knows that he has partially relinquished his exclusive control over the premises to the third party by virtue of the third party's physical presence. This *knowing* surrender of control distinguishes the babysitter from the burglar. Unlike the theory of physical control, assumption of risk principles do not apply when the owner involuntarily loses control to third parties. Courts invoke the assumption of risk doctrine only when the owner has knowingly surrendered some degree of physical control. Courts employing the knowing surrender of physical control analysis should also determine if this analysis satisfies traditional assumption of risk criteria and if the extent of control surrendered affects the third party's legal ability to consent to search.

The traditional assumption of risk doctrine requires that the homeowner voluntarily encounter a known and appreciated danger.¹³⁶ To ascertain that the danger was known and appreciated, courts would have to decide whether the homeowner realized that the babysitter might admit the police to conduct an unauthorized search, and whether the homeowner realized that the babysitter, the known and accepted risk, was more likely to consent to the search than the burglar, the risk encountered by leaving the house empty. Although the traditional assumption of risk doctrine requires courts to confront these questions, ascertaining the answers is no small matter. Neither the homeowner nor the court can accurately compare the likelihood that a babysitter will consent to a search of the home with the likelihood that a burglar will break into the house and then consent to a search.¹³⁷ Thus the requirement that the risk be known and appreciated is virtually insurmountable.

To ascertain if the homeowner has actually made a voluntary choice between reasonable alternatives, courts should inquire into the homeowner's alternatives to leaving his home unoccupied or to hiring a babysitter to care for his small children. If no reasonable alternatives exist, no assumption of the risk has occurred. Courts have, unfortunately, failed to confront these questions in third-party consent situations, just as they have failed to confront them when attempting to distinguish what is private from what is public.¹³⁸ The Supreme Court continues to announce conclusions expressed in superficial assumption of risk terminology without attempting reasoned analysis.

Even if traditional requirements of assumption of risk are met, applying assumption of risk to third-party consent problems is especially tenuous. An interpretation of the assumption of risk doctrine broad enough to eliminate all expectations of privacy would emasculate

136. See notes 89-93 *supra* and accompanying text.

137. See Amsterdam, *supra* note 5, at 406-07.

138. See notes 94-97, 109-14 *supra* and accompanying text.

late the fourth amendment's protection against unreasonable searches because the target will always have acquiesced in the intrusion.¹³⁹ The nature of the third party's conduct would therefore become irrelevant. If an owner relinquishes his expectation of privacy in his premises whenever he hires a babysitter, the fourth amendment requires no additional relinquishment of the owner's rights¹⁴⁰ by the babysitter. Regardless of the third party's consent or lack of consent,¹⁴¹ the police are merely entering an area in which the owner had no expectation of privacy.

If the effect of assuming the risk is viewed narrowly, however, an individual voluntarily relinquishing his justifiable expectation of privacy to designated persons may nevertheless retain his privacy against all others.¹⁴² Recognition of limited assumption of risk or qualified expectation of privacy does not give the third party authority to set aside the target individual's remaining expectation of privacy.¹⁴³ If the target individual retains his justifiable expectation of privacy against everyone except the third party he has knowingly selected, the search threatens this remaining expectation of privacy. The government should therefore obtain the consent of the target rather than that of any third party.¹⁴⁴ Courts, however, have rejected this theory of a selective expectation of privacy.¹⁴⁵ In the secret agent

139. Note, *supra* note 97, at 804 n.112: "[T]he consent question here relates to the issue whether the fourth amendment applies in the first place. In other words did the person knowingly expose information to the public."

140. Of course, the babysitter by virtue of her presence has her own right of privacy in the premises and her action is required to relinquish her rights. The owner has a certain expectation of privacy by virtue of being the owner, and the third party has a certain expectation of privacy by virtue of being present. Certainly each can relinquish his own expectation of privacy, but what authorizes the third party to relinquish the owner's expectation of privacy? Professor Weinreb has suggested that each party with an interest has the independent power to deal with that interest and neither party can limit the interest of the other. Weinreb, *supra* note 2, at 61. If two owners fully control access to the premises, each owner may admit anyone. In so doing, one owner is not waiving the rights of the other owner, but is merely exercising his own right to do as he pleases with his property.

This analysis raises two questions. First, does it apply to situations where the third party, a babysitter, for example, is not a coowner but derives his interests from the owner? Presumably, the owner has the right to limit the interest surrendered to such a third party. 79 HARV. L. REV. 1513, 1515 (1966). Second, even in situations where two parties have independent interests in the place to be searched or the item to be seized, is the third party truly interested in the sense that the searcher and the target individual are? In the vast majority of cases the third party has no desire to exercise his independent interest, because he is disinterested and his consent is "a passive acquiescence at best." *Id.* at 1515 n.7. See also Mascolo, *supra* note 123, at 369-77.

141. If the target individual has relinquished his expectation of privacy, he has no standing to contest the constitutionality of a search that may have violated another's fourth amendment rights. *Alderman v. United States*, 394 U.S. 165, 174 (1969).

142. See *Stoner v. California*, 376 U.S. 483, 488-89 (1964).

143. Because the courts have held that "Fourth Amendment rights are personal rights which . . . may not be vicariously asserted," *id.*, they should also hold that such rights may not be vicariously waived. See *Alderman v. United States*, 494 U.S. 165, 179 & n.11 (1964).

144. *Stoner v. California*, 376 U.S. 483, 489 (1964): "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the [third party's]. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent."

145. The courts have tended to recognize limited assumption of risk (or qualified expectation of privacy) only if the limitation is expressed in terms of physical areas. Thus, the owner may tell his babysitter, "You may enter the television room, the kitchen, and the children's bedroom, but you may not enter the master bedroom." If the babysitter violates these instructions and enters the master bedroom, she becomes a trespasser and cannot authorize a search of the forbidden area. See *State v. Evans*, 45

and informer cases, for example, courts construe relinquishment of privacy to one individual as a general release of the expectation of privacy.

Secret Agents and Informers

The secret agent and informer problem includes undercover policemen such as Mary in the hypothetical situation previously developed. This problem also includes government agents who purchase narcotics, infiltrate political or social organizations, report or record conversations with friends and associates, or disguise themselves to gain access to homes or businesses.¹⁴⁶

The Supreme Court has generally declined to impose fourth amendment requirements on secret agents and informers.¹⁴⁷ The only meaningful restraints originated in the pre-*Katz* cases that took a property-oriented approach¹⁴⁸ to privacy. Thus, when a govern-

Hawaii 622, 631-34, 372 P.2d 365, 371-73 (1962). But if the owner expresses his qualified expectation of privacy in terms of purposes, not places, the courts are less willing to recognize a qualified right of privacy. Thus, although the owner may instruct his babysitter, "You may enter all rooms of the house for purposes related to babysitting, but you may not allow the police to enter for the purpose of searching," if the babysitter violates these instructions and admits the police, her consent is deemed valid and the search is not a violation of the owner's right to privacy. See *United States v. Miller*, 425 U.S. 435, 443 (1976). *But cf. Stoner v. California*, 376 U.S. 483 (1964) (hotel employee's consent to search of guest's room held invalid where police had no basis to believe the employee was authorized to permit the search). The courts have not distinguished these two situations. The owner's subjective intent in both situations is the same; in neither case does he intend to authorize the third party to consent to a search. Nor does a distinction arise in terms of physical control. If the "forbidden bedroom" is not actually locked, then as a practical matter the third party has access to all parts of the house. The courts have not explained why one must assume the risk that a third party will violate an agreement not to authorize a search, but does not assume the risk that a third party will violate an agreement not to enter a restricted physical area. Again, assumption of risk is merely a conclusion and not a reason.

146. See *Dix, Undercover Investigations and Police Rulemaking*, 53 *TEX. L. REV.* 203 (1975); *Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 *YALE L.J.* 1091 (1951); *Stone, supra note 2, Comment, Present and Suggested Limitations on the Use of Secret Agents and Informers in Law Enforcement*, 41 *U. COLO. L. REV.* 261 (1969).

147. See, e.g., *United States v. White*, 401 U.S. 745, 753 (1971); *Lewis v. United States*, 385 U.S. 206, 208 (1966); *Hoffa v. United States*, 385 U.S. 293, 300 (1966); *On Lee v. United States*, 343 U.S. 747, 753 (1952).

The Court has, however, placed fifth and sixth amendment restrictions on the use of secret agents and informers. In *Lopez v. United States*, 373 U.S. 427 (1963), Chief Justice Warren noted: "This Court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a suspect, but suffice it to say here, the issue is substantial." *Id.* at 444 (Warren, C.J., concurring). See generally Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring With the Consent of a Participant in a Conversation*, 68 *COLUM. L. REV.* 189 (1968).

The use of informers can also be regulated under due process or the courts' supervisory powers, see *Hoffa v. United States*, 385 U.S. 293, 320 (1966) ("affront to the quality and fairness of federal law"). *But see McCray v. Illinois*, 386 U.S. 300, 307 (1967) ("[W]e accept the premise that the informer is a vital part of society's defensive arsenal.") (quoting *State v. Burnett*, 42 N.J. 377, 385, 201 A.2d 39, 49-50 (1964)); H. UVILLER, *THE PROCESSES OF CRIMINAL JUSTICE: INVESTIGATION* 439 (1974) ("the criminal insider, secretly cooperating with the police or turning subsequently against his criminal associates, performs an indispensable service to law enforcement").

148. In the area of secret agents, the Supreme Court has taken "an extremely nar-

ment agent uses misrepresentation, impersonation, or subterfuge to gain admittance to the premises,¹⁴⁹ courts have generally held that the government activity constitutes a search within the prohibitions of the fourth amendment.¹⁵⁰ Courts are familiar with questions of physical trespass and the seizure of tangibles because of the fourth amendment's development from property law.¹⁵¹ The more complex issue, seizure of intangible property such as conversations, requires courts again to struggle with the justifiable expectation of privacy problem.¹⁵² The Court has unanimously and consistently held that the use of secret agents to deceive individuals into revealing information in conversation, absent electronic recording or transmitting devices, is beyond the scope of the amendment.¹⁵³

The critical question for the Court is whether the use of an electronic eavesdropping device subjects this kind of governmental conduct to the coverage of the fourth amendment. The Court addressed the question in *United States v. White*,¹⁵⁴ and held that use of electronic surveillance devices by agents in direct conversation with the target does not violate the fourth amendment.¹⁵⁵ The Court proceeded from the unchallenged premise that speakers must assume the risk of informers and secret agents without electronic devices,¹⁵⁶

row view of what constituted an invasion of privacy. The privacy analysis which resulted is little different from the property analysis" Note, *supra* note 97, at 798.

149. "In attempting to gain entry to individuals' homes and offices . . . government agents have posed as refrigerator salesmen, Western Union employees, air conditioning mechanics, representatives of the County Assessor's Office, carpet salesmen, friends of purported mutual friends, and so on." Stone, *supra* note 2, at 1258-59 (citations omitted).

150. *E.g.*, *Gouled v. United States*, 255 U.S. 298, 306 (1921); *Fraternal Order of Eagles v. United States*, 57 F.2d 93, 94 (3d Cir. 1932); *United States v. General Pharmacal Co.*, 205 F. Supp. 692, 695 (D.N.J. 1962); *United States v. Reckis*, 119 F. Supp. 687, 690 (D. Mass. 1954); *United States v. Mitchneck*, 2 F. Supp. 225, 226 (M.D. Pa. 1933); *People v. Mesaris*, 14 Cal. App. 3d 71, 75, 91 Cal. Rptr. 837, 840 (1970).

151. See notes 19-29 *supra* and accompanying text.

152. Miller, *Computer v. Personal Dignity*, 7 TRIAL 26 (March/April 1971). "From the constitutional point of view privacy under the Fourth and Fifth amendments is likely to remain a right to be free of unrestrained prying, peeping and snooping. It will be a long time before constitutional law concerns 'communication of thoughts, sentiments and emotions.'" *Id.* at 27 (paraphrasing Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 198 (1890)).

153. *E.g.*, *Hoffa v. United States*, 385 U.S. 293 (1966); *Lewis v. United States*, 385 U.S. 206 (1966). See *United States v. White*, 401 U.S. 745, 751 (1971), *discussed at* notes 154-58 *infra*.

154. 401 U.S. 745 (1971).

155. *Id.* at 753. The Court split five to four on the question. Justice Black concurred in the judgment, based on the view expressed in his dissent in *Katz*, that non-trespassory electronic surveillance does not constitute a search and seizure under the fourth amendment, *id.* at 754 (Black, J., concurring). Justice Brennan concurred in the result, finding that "current Fourth Amendment jurisprudence" interposes a warrant requirement on both third party electronic monitoring and electronic recording by a government agent in face-to-face conversation with the target, *id.* at 755 (Brennan, J., concurring).

156. "[H]owever strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities." *Id.* at 749. Cf. *Osborn v. United States*, 385 U.S. 323 (1966), in which Justice Douglas applied the limitation perspective:

[A] person may take the risk that a friend will turn on him and report to the police. But that is far different from the Government's "planting" a friend in a person's entourage so that he can secure incriminating evidence. In the one case, the Government has merely been the willing recipient of information supplied by a fickle friend. In the other, the Government has actively encouraged and participated in a breach of privacy by sending in an undercover agent.

and reasoned that the risk assumed did not increase materially simply because the same informers were transmitting the conversation electronically.¹⁵⁷ Justice Harlan, dissenting, argued that allowing third-party bugging would inhibit spontaneity in personal conversations.¹⁵⁸

The Court's approach to electronic surveillance is commendable insofar as it explicitly attempts to determine proper expectations and risks in a free society, as mandated by *Katz*. Unfortunately, the Court has not exhibited the same candor when considering the use of secret agents without electronic devices. Instead of balancing the individual's sense of security against the utility of the surveillance to law enforcement,¹⁵⁹ the Court announces that the risk of betrayal by one's friends and confidants is "inherent in the conditions of human society" and that "it is the kind of risk we necessarily assume whenever we speak."¹⁶⁰

Expectations concerning the loyalty of private parties differ from the expectation that a supposedly private party is in fact a government agent.¹⁶¹ Betrayals by private parties are not within the fourth amendment,¹⁶² but the fourth amendment does regulate government action through its agents. Citizens would react quite differently to reports that their personal confidants are fickle or gossips than to reports that the government has released upon society "sprawling, mass-producing, self-perpetuating systems of spies and informers"¹⁶³ A citizen willing to risk his privacy in one situation may not be willing to risk it in the other situation. The Court makes no distinction, indicating that individuals can merely choose their listeners more carefully.¹⁶⁴ This approach enables the Court to neglect the cumulative impact of an army of government spies on society, because each individual may avoid the risk or assume the risk.¹⁶⁵

Id. at 347 (Douglas, J., dissenting).

157. 401 U.S. at 752.

158. *Id.* at 787-89 (Harlan, J., dissenting). For an attempt to apply empirical evidence in a similar context, see Brief for Plaintiff, *Laird v. Tatum*, 408 U.S. 1 (1972), reprinted in Askin, *Surveillance: The Social Science Perspective*, 4 COLUM. HUMAN RIGHTS L. REV. 59, 62-88 (1972).

159. This is the test suggested by Justice Harlan in *United States v. White*, 401 U.S. at 786 (Harlan, J., dissenting).

160. *Hoffa v. United States*, 385 U.S. 293, 303 (1966).

161. Kitch, *supra* note 36, at 150.

162. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). However, instances may arise in which "there can be a kind of after-the-fact ratification" of the private conduct by government officials sufficient to bring the amendment into play. *White, The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 221 n.107.

163. Amsterdam, *supra* note 5, at 401; see Stone, *supra* note 2, at 1236: "[T]here are virtually no hard empirical data concerning the use of secret agents, spies, and informers. Nevertheless, the best available estimates indicate that the practice is employed at least tens, and perhaps even hundreds of thousands of times annually, and its use is apparently steadily increasing."

164. See *Lopez v. United States*, 373 U.S. 427, 450 (1963) (Brennan, J., dissenting).

165. See *United States v. White*, 401 U.S. at 752.

Characteristically, the Court's use of assumption of risk principles in the secret agent cases is superficial, failing to consider the availability of reasonable alternatives. One obvious alternative is "to keep one's mouth shut on all occasions."¹⁶⁶ By applying the fourth amendment to telephone wiretaps,¹⁶⁷ however, the Court has implicitly recognized that total silence is not a reasonable alternative.¹⁶⁸ The Court has failed to explain why an individual must assume the risk that the listener is a government agent but need not assume the risk that the government is tapping his telephone.

Another alternative to speaking to government agents, often invoked by the Court, is for the speaker simply to exercise caution in choosing his audience.¹⁶⁹ The Court has reasoned that if a speaker doubts the trustworthiness of his listener, confidential communication "will very probably end or never materialize."¹⁷⁰ This reasoning ignores those situations in which an individual must speak,¹⁷¹ and overestimates the average citizen's ability to recognize a secret agent.¹⁷² If the individual has the ability to forego speech or to identify government spies, he does have an alternative to surveillance; but the reasonableness of the alternative remains questionable, and the Court has failed to assess its social costs. Justice Harlan was correctly concerned that widespread electronic surveillance by the government "might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life."¹⁷³

Summary of the Individual Perspective

The individual perspective requires courts to identify the interests protected by the fourth amendment. The "means-oriented" approach of *Olmstead* allowed courts to specify these interests in terms of freedom from physical intrusion. Although the *Olmstead* approach resulted in unsatisfactorily intricate factual determina-

166. *Lopez v. United States*, 373 U.S. 427, 450 (Brennan, J., dissenting). The individual is forced to choose between silence and speaking to the entire world, because the Court has not recognized the concept of limited consent: "consent to reveal information to a particular person or agency, for a particular purpose, is not consent for that information to be circulated to all or used for other purposes." A. WESTIN, *supra* note 42, at 375.

167. *Katz v. United States*, 389 U.S. at 350-53; *see Berger v. New York*, 388 U.S. 41, 54-55 (1967).

168. "The only difference is that under electronic surveillance you are afraid to talk to anybody in your office or over the phone, while under a spy system you are afraid to talk to anybody at all." Amsterdam, *supra* note 5, at 407; *cf. Greenawalt, supra* note 147, at 219: "In general, however, it seems doubtful that the risk of participant monitoring is one that would have any direct effect on communications to friends."

169. *See* note 164 *supra* and accompanying text.

170. *United States v. White*, 401 U.S. 745, 752 (1971).

171. Greenawalt, *supra* note 147, at 220.

172. The average citizen may be dealing with a "skilled professional dissembler, able to manufacture the usual indicia of reliability." White, *supra* note 162, at 229.

The individual who is confronted with the possibility that his supposed friends and associates are in reality secret agents of government must attempt to assess, not only their loyalty as persons, but also the likelihood that they are professional spies specially trained in the art of deception, or that, at some unknown level of inducement they would agree to "sell" that loyalty to the authorities.

Stone, *supra* note 2, at 1241.

173. *United States v. White*, 401 U.S. at 787 (Harlan, J., dissenting).

tions,¹⁷⁴ the standard itself was clear. When *Katz* cut the fourth amendment free from the physical intrusion requirement, the Court was cast adrift on a sea of uncertainty concerning the scope of the amendment. The Court in *Katz* invoked a right to privacy without defining it. The Court stated that not all forms of privacy are protected by the fourth amendment,¹⁷⁵ but provided no meaningful guidance as to which claims of privacy are covered by the amendment.

Olmstead required precise measurements of physical intrusions. The Court must now determine which expectations of privacy are desirable in our society. Some may consider this improper judicial legislation,¹⁷⁶ others consider it the highest of the judicial functions.¹⁷⁷ Regardless of the view accepted, the Court's invocation of the assumption of risk doctrine is indefensible when used to avoid determining whether the individual has foregone reasonable alternatives to encounter a known risk. Like obscenity,¹⁷⁸ the Court apparently knows assumption of risk when it sees it, but is unable or unwilling to explain how individuals can involuntarily or unknowingly assume risks they do not desire to incur.

Identifying socially legitimate expectations of privacy would not, however, fully delineate the contours of the fourth amendment. The Court in *Katz* recognized that the interests protected by the fourth amendment "often have nothing to do with privacy at all."¹⁷⁹ These other interests are the limitation and regulation of government power. A balanced view of the fourth amendment therefore requires consideration of the limitation perspective.

The Limitation Perspective: A Theoretical Model

The individual perspective places an initial burden on the individual to justify his expectation of privacy.¹⁸⁰ The type and quantum of evi-

174. *E.g.*, *Silverman v. United States*, 365 U.S. 505 (1961).

175. 389 U.S. at 350.

176. *See id.* at 374 (Black, J., dissenting); *Berger v. New York*, 388 U.S. 41, 77 (1967) (Black, J., dissenting).

177. *See, e.g.*, B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13 (1921):

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. . . .

If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.

Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence.

178. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., dissenting).

179. 389 U.S. at 350.

180. *See* text accompanying notes 50-55 *supra*.

dence required to meet this burden are unclear because the courts avoid determining which expectations of privacy are justified.¹⁸¹ If the target individual does establish a reasonable expectation of privacy, the burden shifts to the government to demonstrate the reasonableness of its intrusion. The government's burden to demonstrate reasonableness, however, is similarly unclear.¹⁸² If the individual fails to justify his expectation of privacy, use of the individual perspective renders even the "minimal requirement of reasonableness"¹⁸³ of the governmental conduct irrelevant for fourth amendment purposes.¹⁸⁴ The governmental conduct is immunized from scrutiny even though it results from such illegitimate or even malicious motives as governmental curiosity, a desire to gather and report interesting information, or personal distaste for the political philosophies or lifestyles of certain citizens.¹⁸⁵ The courts thus "leave the individual at the mercy of the police."¹⁸⁶ Other possible restrictions on governmental action, such as the due process clause,¹⁸⁷ the supervisory powers of the Supreme Court,¹⁸⁸ the self-discipline of the executive branch,¹⁸⁹ and the enactments of the legislative branch¹⁹⁰ are illusory. Current practice leaves decisions to in-

181. "[E]ffective articulation of the fourth amendment threshold in the language of 'privacy' assumes a willingness on the part of courts to deal openly on the plane of human values." Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 991 (1977). To date, the courts have been unwilling to make such value-laden determinations. See notes 63-67 *supra* and accompanying text.

182. The fourth amendment prohibits "unreasonable searches and seizures" and guarantees that "no Warrants shall issue but upon probable cause," note 1 *supra*. In *United States v. Rabinowitz*, 339 U.S. 56 (1950), the Court split over the relationship between these two clauses. The majority stated that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id.* at 66. Justice Frankfurter disagreed, arguing that "the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.* at 70 (Frankfurter, J., dissenting). The result in a particular case, therefore, turns on the relationship between the two clauses.

183. *United States v. Dionisio*, 410 U.S. 1, 15 (1973).

184. *Marullo v. United States*, 328 F.2d 361, *rehearing denied*, 330 F.2d 609 (5th Cir. 1964): "Since we held that the location of the evidence in question was not within the protection of the Fourth Amendment, the reasonableness of the search is not a relevant constitutional consideration." See Dworkin, *supra* note 2, at 335.

185. Hufstедler, *supra* note 40, at 552. The United States Army's surveillance of private citizens in the sixties was directed at "people who were outspoken against the [Vietnam] war, people who belonged to peace organizations, people who criticized the President on matters either foreign or domestic. In short, it aimed at active citizens." Mikva, *Society's Threat: The Military Sleuth*, 7 TRIAL 20, 20 (March/April 1971). See *People v. Collier*, 85 Misc. 2d 529, 376 N.Y.S.2d 954 (1975).

186. Mascolo, *supra* note 17, at 418. The author also asserts that by classifying the government activity as non-search and thereby exempt from the fourth amendment, the courts "deny the protection [of the amendment] to those most in need of it—those individuals who have not given the police probable cause to act." *Id.* at 418-19. See also Comment, *supra* note 32, at 698, noting that "search and seizure, particularly in the absence of a warrant, come at an early stage in the law enforcement process. The danger of confounding the innocent with the guilty is greater here than in subsequent stages, which may be reached only after a variety of judicially controlled checks." See also K. DAVIS, *supra* note 66, at 172.

187. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952).

188. See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966).

189. See, e.g., *Hearings on Federal Data Banks, Computers and the Bill of Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 603 (1971) (testimony of W. H. Rehnquist).

190. "Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police." Amsterdam, *supra* note 5, at 378-79.

investigate, to place subjects under surveillance, or to do anything short of search, in the hands of individual police officers, whose power is unchecked.¹⁹¹

A determination that a given form of police conduct does not constitute a search is therefore tantamount to exempting the conduct from all legal control. Conduct subject to fourth amendment requirements, on the other hand, must meet the standard of reasonableness. The limitation perspective frames the fourth amendment coverage issue as a choice between requiring the police to act reasonably and permitting them to act without legal restraint. The limitation perspective concludes that all police activity should be subject to the fourth amendment. In contrast to the individual perspective, which is primarily concerned with intrusions upon individual rights, the limitation perspective focuses on the unreasonable or irrational exercise of governmental power. From the limitation perspective, an individual need not establish his right and a violation of that right. He must only demonstrate government action sufficient to constitute a search in order to force the government to justify that action as reasonable.¹⁹²

Viewing unreasonable government action as an evil is as much a value judgment as concluding that privacy is desirable and worthy of fourth amendment protection. Although courts must define with particularity the concept of unreasonable governmental action, the basic value judgment that the government should act reasonably is beyond question.¹⁹³ The concept of limited government is a familiar theme of fourth amendment jurisprudence.¹⁹⁴

191. Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 576 (1972). These decisions by individual police officers are beyond the control of the law because the prime instrument of controlling illegal searches and seizures—the exclusionary rule—is not involved when the fourth amendment is inapplicable. Improper police behavior is thus “concentrated on investigative techniques not covered by the amendment.” Kitch, *supra* note 36, at 152.

192. In his study of Greek jurisprudence, Sir Paul Vinogradoff emphasized that “the most usual means of keeping the magistrates in order was provided by the right of every citizen to attack and arraign a magistrate who had actually broken the law,” even though the citizen himself was not directly affected. 2 P. VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* 114 (1922). This right of accusation was “one of the fundamental principles of the Athenian Constitution [and] . . . it is apparent throughout the whole Greek system that its importance was enormous.” *Id.* at 115. While application of the limitation perspective could lead to the elimination of all standing requirements, *see, e.g.*, *People v. Martin*, 45 Cal. 2d 755, 759-61, 290 P.2d 855, 856-57 (1955), removing the initial burden of establishing a justifiable expectation of privacy does not necessarily mean that the individual has no burden to establish some form of standing. It would mean only that the burden would be different from the rather confused standing requirement. The present Court’s dissatisfaction with the exclusionary rule has caused it to take a very restrictive view of standing and the scope of the fourth amendment. *See generally* Knox, *supra* note 13 (proposing a more traditional view of standing and scope of the fourth amendment); Hufstедler, *supra* note 40.

193. “The acceptance of police authority depends largely on the belief that its exercise is reasonable.” NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: POLICE 18 (1973) [hereinafter cited as N.A.C. POLICE].

194. Doss & Doss, *supra* note 38, at 396; Emerson, *supra* note 39, at 229: “The concept

The power of the state has always been limited by practical constraints. Information-gathering technology is advancing so rapidly, however, that future limitations on governmental power may be political rather than practical.¹⁹⁵ These changes may signal a need to emphasize the moral and philosophical basis for limited government,¹⁹⁶ and to return to "the oldest theme which underlies the history of American constitutional law, that of Liberty Against Government."¹⁹⁷

Although commentators have explained the moral and philosophical limitations on government as a recognition of the natural rights of the individual,¹⁹⁸ other mechanisms to limit governmental power are present in constitutional law. The notion of checks and balances and the concept of separation of powers are unrelated to individual rights but also recognize the inherent danger of unchecked power.¹⁹⁹ The Bill of Rights in general and the fourth amendment in particular are restrictions on unfettered governmental power rather than reflections of natural law rights.²⁰⁰

Sensitivity to the dangers of unchecked power and totalitarianism arose in the years immediately preceding the American Revolution,²⁰¹ but the role it played in the drafting of the fourth amendment is unclear. Good authority indicates, however, that the authors of the Bill of Rights, who had known oppressive government, intended to guarantee their successors maximum freedom from governmental

of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen."

195. Robert Henderson, vice president and general manager of the electronic data processing division of Honeywell, Inc., notes that computer technology is advancing so rapidly that it may soon possess "the eventual capability to store and constantly update in computer memory all the information available in the world." Henderson, *A False Fear*, 7 TRIAL 24, 24 (March/April 1971).

196. Beaney, *supra* note 30, at 214: "[O]ur constitution and our system of constitutional government reflect a decision that government is limited in the powers and in the methods it may use." See generally Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943 (1958).

197. E. CORWIN, *LIBERTY AGAINST GOVERNMENT* xiii (1948).

198. E.g., Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 248 (1914): "The written constitution is . . . but a nucleus or core of a much wider region of private rights, which, though not reduced to black and white, are as fully entitled to the protection of government as if defined in the minutest detail." In arguing against the issuance of general warrants, James Otis asserted that their issuance was improper because "an act against natural equity is void," quoted in J. LANDYSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 34 (1966).

199. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (constitutional checks and balances were devised "not to promote efficiency but to preclude the exercise of arbitrary power"). See THE FEDERALIST NOS. 48 and 51 (J. Madison); K. DAVIS, *ADMINISTRATIVE LAW* 30 (6th ed. 1977).

200. See, e.g., *United States v. United States District Court*, 407 U.S. 297, 317 (1972) ("The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy."); *Watts v. Indiana*, 388 U.S. 49, 61 (1949) (Jackson, J., concurring) (describing the Bill of Rights as "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself"); *McDonald v. United States*, 335 U.S. 451, 456 (1948) ("Power is a heady thing; and history shows that the police acting on their own cannot be trusted.")

201. In the famous *Wilkes* affair, the King's Bench invalidated general warrants issued to search for the authors, printers, and publishers of a seditious and treasonable paper. Chief Justice Pratt characterized nameless warrants as "a law under which no Englishman would wish to live an hour." *Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763).

interference.²⁰²

Unchecked power to search and seize is crucial to the maintenance of a totalitarian state. Totalitarian regimes typically proscribe "offenses" like sedition, unpopular thought, and disapproved literature, which threaten the government's existence.²⁰³ Plenary search and seizure power is essential to the detection of these crimes.²⁰⁴ Strict controls on the government's power to search and seize inhibit the enforcement of oppressive laws, and serve as a bulwark against totalitarian government.

In addition to limiting institutional tyranny, the fourth amendment limits the exercise of arbitrary power by individual government officials.²⁰⁵ The official who decides to investigate is most frequently a policeman on the street rather than a high government official.²⁰⁶ To place these decisions beyond fourth amendment control is, in the words of James Otis, to place "the liberty of every man in the hands of every petty officer."²⁰⁷ Security against arbitrary police intrusion is a basic tenet of free society and lies at the heart of the fourth amendment.²⁰⁸

Although recent decisions concerning border searches²⁰⁹ and airport searches²¹⁰ confer broad discretion on officers in those specialized areas, the courts have traditionally recognized that failure to impose a reasonableness standard on officials may permit capricious or malicious conduct.²¹¹ Complete elimination of discretion and the potential for arbitrariness, however, is both undersirable and impos-

202. See *Chimel v. California*, 395 U.S. 752, 760-61 (1969) (the fourth amendment's "proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words'—a history of 'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution.'") (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)); Weinreb, *supra* note 2, at 47: "The fourth amendment is one of the Constitution's richly generative texts. Its important terms are general. . . . The amendment invites treatment as a broad statement about the relationship between an individual and the government."

203. Comment, *supra* note 32, at 700.

204. *Id.*

205. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (noting the "grave danger that . . . unreviewable discretion would be abused by some officers in the field"); See *v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

206. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: THE URBAN POLICE FUNCTION, Standard 4.1 (1973); K. DAVIS, POLICE DISCRETION (1975); N.A.C. POLICE, *supra* note 193, at Standard 1.3; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91-95 (1967).

207. James Otis, *quoted in* 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Wroth and H. Zobel eds. 1965).

208. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

209. *E.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

210. *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). In his concurring opinion, Judge Friendly stated that he would have "no difficulty in sustaining a search that was based on nothing more than the trained intuition of an airline ticket agent or a marshal of the Anti-Hijacking Force," *id.* at 675 (Friendly, J., concurring).

211. *New York v. United States*, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting) ("Absolute discretion, like corruption, marks the beginning of the end of liberty.")

sible.²¹² It is undesirable because mechanical application of rules frequently leads to injustice. It is impossible because rules always lack sufficient detail to resolve every problem.²¹³ Officials can use their discretion properly to further justice or improperly to frustrate justice. The remedy for the potential abuse of discretion is to employ checks and balances to control the exercise of discretion and to prevent arbitrary action.²¹⁴

The Fourth Amendment as a Specific Limitation on Government Power

The fourth amendment proscribes "unreasonable searches and seizures"²¹⁵ rather than providing a basis for plenary control of all governmental power. The requirement of a search has bedeviled the Court in its use of the individual perspective to construe the fourth amendment. The Court has defined the search concept in terms of the individual's justifiable expectation of privacy.²¹⁶ In contrast, the limitation perspective emphasizes the conduct of the government rather than the expectation of the individual.²¹⁷ The fourth amendment therefore governs the exercise of governmental power regardless of the effect of the search on a particular individual.²¹⁸ Thus, the limitation perspective defines a search as that type of government action that is controlled by the fourth amendment.

Before the right to privacy became an important fourth amendment concept, courts commonly defined a search as a quest for incriminating evidence.²¹⁹ The Court indicated that fourth amendment safeguards should extend primarily to quests for evidence of crime and secondarily to intrusions on privacy.²²⁰ In *Camara v. Municipal Court*,²²¹ however, the Court rejected the traditional definition and applied fourth amendment standards to a non-evidentiary search for fire and health code violations.²²² *Camara* is

212. K. DAVIS, *supra* note 66, at 17: "No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been a *government of laws and of men*."

213. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 428 (1960); Goodhart, *supra* note 196, at 949: "It is obvious that under no conceivable political system can there be complete rule under law, as a large degree of freedom of action must be left to those who exercise the power of government."

214. K. DAVIS, *supra* note 66, at 216.

215. See note 1 *supra*.

216. See notes 50-55 *supra* and accompanying text.

217. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). See also Dworkin, *supra* note 2, at 339.

218. For an apparent example of the limitation perspective expressed in the terminology of the sixth amendment, see *Massiah v. United States*, 377 U.S. 201 (1964).

219. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 13-15 (1968); *Abel v. United States*, 362 U.S. 217, 237 (1960); *United States v. Gravitt*, 484 F.2d 375, 380 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974); *United States v. Goldenstein*, 456 F.2d 1006, 1009-10 (8th Cir. 1972), *cert. denied*, 416 U.S. 943 (1974); *Root v. Gauper*, 438 F.2d 361, 364 (8th Cir. 1971); *United States v. Barone*, 330 F.2d 543, 545 (2nd Cir.), *cert. denied*, 377 U.S. 1004 (1964); *Haerr v. United States*, 240 F.2d 533, 535 (5th Cir. 1957).

220. *Frank v. Maryland*, 359 U.S. 360 (1959). *Frank* viewed the fourth amendment as serving a dual purpose. First, the amendment protects citizens from unwarranted governmental invasions of their privacy, *id.* at 365. Second, by prohibiting unreasonable searches and seizures, it prevents the government from compromising the fifth amendment right against self incrimination, *id.*

221. 387 U.S. 523 (1967).

222. *Id.* at 530. Defining a search as limited to criminal investigations reduces the

consistent with the individual perspective because the fourth amendment grants the same protection to a person accused of a crime as to a person who is not. The individual perspective ignores the purpose of the government intrusion by concentrating on the scope of the target individual's rights.

In contrast, the limitation perspective does consider the government's purpose. This perspective recognizes the factual differences between a search for incriminating evidence and a routine inspection for fire and health hazards.²²³ In *Wyman v. James*,²²⁴ for example, the Court held that routine home visits by welfare workers were not searches for purposes of the fourth amendment.²²⁵ The Court emphasized that the primary purpose of the visits was not investigative even though welfare workers could uncover evidence of criminal fraud,²²⁶ and refused to equate the visit with a fourth amendment search.²²⁷ *Wyman* implies that governmental intrusion for purposes other than criminal investigation is not a search and is therefore beyond the scope of the fourth amendment.

Unlike *Camara*, *Wyman* is incomprehensible from the individual perspective, under which an invasion of privacy is not determined by examining the invader's purpose.²²⁸ The limitation perspective, on the other hand, allows the court to moderate the government's power to investigate crime by using the fourth amendment and to moderate the government's power to inspect for health, safety, or welfare by using other controls. The Court's decision in *Wyman* therefore seems to incorporate the limitation perspective.

Although *Wyman's* approach is defensible, its definition of a search as a quest for incriminating evidence effectively removes administrative searches from the fourth amendment and is probably too narrow even under the limitation perspective. The Court has recognized, for example, that the framers of the Constitution were concerned with forfeitures of property as well as criminal prosecutions.²²⁹ The concept of the "New Property"²³⁰ demonstrates the citi-

fourth amendment to "little more than a rule of criminal procedure," Hufstедler, *supra* note 40, at 557. Of course at present the chief means of "enforcing" the fourth amendment is by the exclusion of evidence in a criminal prosecution, and to that extent the amendment has functioned primarily as a rule of criminal procedure.

223. *District of Columbia v. Little*, 178 F.2d 13, 17 (D.C. Cir. 1949) ("public interest required that personal privacy be invadable for the detection of crime").

224. 400 U.S. 309 (1971).

225. *Id.* at 317. Alternatively, the Court held that if the visits were searches, they were nonetheless reasonable under the fourth amendment, *id.* at 318.

226. *Id.* at 323.

227. *Id.*

228. *See* *District of Columbia v. Little*, 178 F.2d 13, 17 (D.C. Cir. 1949).

229. *Frank v. Maryland*, 359 U.S. 360, 365 (1959): "[I]t was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought."

230. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Under the New Property concept,

[w]ealth is not 'owned', or 'vested' in the holders. Instead, it is held condition-

zen's dependence on the state in many novel ways, exposing the citizen to subtle forms of government retaliation short of criminal prosecution.²³¹ The Court has recognized the link between government information-gathering, enhanced greatly by modern electronics and computers,²³² and the increased coercive power available to the state.²³³ This information-gathering ability "gives the government the raw materials of tyranny."²³⁴

Insofar as all knowledge acquired by the government enhances the potential for coercion,²³⁵ courts should expand the definition of a search to encompass any information-gathering activity by the state.²³⁶ Absence of intent to misuse information is irrelevant to the fact of misuse.²³⁷ Just as subjective intent is not determinative of an individual's justifiable expectation of privacy,²³⁸ courts should likewise disregard the governmental agent's intent, benevolent or pernicious, in defining a search from the limitation perspective. If a fourth amendment search includes any practice by which the government is likely to obtain information about an individual, surveillance and the use of secret agents are within the scope of the fourth amendment. This definition encompasses almost all police investigations because "investigation" connotes careful inquiry, research, examination, and systematic tracking, all of which are characteristic

ally, the conditions being ones which seek to ensure the fulfillment of obligations imposed by the state. Just as the feudal system linked lord and vassal through a system of mutual dependence, obligation, and loyalty, so government largess binds man to the state.

Id. at 769-70.

231. See, e.g., *Smith v. Board of Comm'rs*, 259 F. Supp. 423, 424 (D.D.C. 1966) (welfare benefits are grants and gratuities and "[b]eing absolutely discretionary, there is no judicial review of the manner in which that discretion is exercised.").

232. See note 195 *supra*.

233. *Frank v. Maryland*, 359 U.S. 360, 365 (1959).

234. Senator Charles Mathias, Jr. quoted in *The Right of Privacy*, 7 TRIAL 13, 13 (March/April 1971).

235. If courts could develop safeguards against governmental misuse of information, safeguards against the mere acquisition of information could become unnecessary. The problem with such an approach is that the misuse of information may be subtle or secret and thus beyond the reach of effective safeguards. See, e.g., *Laird v. Tatum*, 408 U.S. 1 (1972) (claim that Army intelligence data gathering had a chilling effect on first amendment rights held not justiciable). The Supreme Court has on other occasions rested a decision on the opportunities for abuse of official power. See, e.g., *United States v. Wade*, 388 U.S. 218, 230-31, 236 (1967); *Miranda v. Arizona*, 384 U.S. 436, 445-47 (1966); *McNabb v. United States*, 318 U.S. 332, 343 (1943). See also *Beane*, *supra* note 30, at 228 (object of fourth amendment is arguably to limit the possibilities of arbitrary, overzealous, governmental action).

236. See Note, *supra* note 97, at 788. Judge Shirley M. Hufstедler, circuit judge for the Court of Appeals for the Ninth Circuit, defines a search as "any governmental probe, corporeal or incorporeal, designed to uncover or to disclose information about a person." Hufstедler, *supra* note 40, at 561. Although this definition is otherwise sound from the limitation perspective, the term "designed" is too narrow if confined to subjective intent to uncover or disclose information. It invites perjury, see generally Chevigny, *Police Abuses in Connection with the Law of Search and Seizure*, 5 CRIM. L. BUL. 3 (1969); Comment, *Police Perjury in Narcotics "Dropsey" Cases: A New Credibility Gap*, 60 GEO. L. J. 507 (1971), and "hedging" of the facts, see *Amsterdam*, *supra* note 5, at 437 (motivation is a self-generating phenomenon); *LaFave*, *supra* note 4, at 154 (not difficult to convince one's self of nonexistence of "bad" motive for search). *But cf.* *Mascolo*, *supra* note 17, at 416: "The critical factor in any search is the mental processes of the searcher. . . . [I]t can only lead to confusion if one attempts to divorce the officer from his purpose."

237. *Olmstead v. United States*, 277 U.S. at 479 (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."). See generally *Bacigal*, *supra* note 13.

238. *United States v. White*, 401 U.S. at 751-52.

of a paradigmatic search.²³⁹

The chief criticism of this definition of search is that it would apply the full panoply of fourth amendment protection to every attempt by the government to acquire information. This application would either paralyze the government or trivialize the warrant requirement by the very frequency of its use.²⁴⁰ This criticism assumes that the full complement of fourth amendment protection would apply to every search. The Supreme Court, however, has shown great flexibility in determining what fourth amendment safeguards are required for various types of searches.²⁴¹ The Court no longer relies on the traditional monolithic view, which imposes all of the safeguards or none of the safeguards. If the search is less intrusive than ordinary searches, the Court requires less than probable cause.²⁴² Conversely, a more intrusive search, such as extraction of a blood sample, requires more than probable cause.²⁴³ The Court has also held that strict compliance with all procedural rigors²⁴⁴ of the fourth amendment is unnecessary for some information-gathering practices.²⁴⁵

The flexibility of this sliding scale approach is appealing. It frees the courts from strict formulations of probable cause or reasonable suspicion,²⁴⁶ and permits them to react sensitively to the variety of factual situations confronting police officers. Ironically, flexibility is also the greatest potential drawback of this formulation. The Court has failed to explain or define reasonableness.²⁴⁷ Without a standard,

239. *People v. Hobbs*, 50 Misc. 2d 561, 563, 270 N.Y.S.2d 732, 736 (1966). See also *Amsterdam*, *supra* note 5, at 396; *Kitch*, *supra* note 36, at 134.

240. *Kitch*, *supra* note 36, at 134; see *Camara v. Municipal Court*, 387 U.S. 523, 547-48 (1967) (Clark, J., dissenting).

241. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (operation of a fixed checkpoint); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (search of impounded automobile); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (search during street encounter when officer believes his safety or that of others to be in danger); *Camara v. Municipal Court*, 387 U.S. 523, 530-31 (1967) (routine inspection for housing and fire code violations); *Schmerber v. California*, 384 U.S. 757, 771 (1966) (blood test).

242. *Terry v. Ohio*, 392 U.S. at 30 (pat-down search when officer reasonably believed subject was armed and dangerous).

243. *Schmerber v. California*, 384 U.S. at 770-71.

244. The procedural requirements of the fourth amendment are a showing of probable cause for a search, procurement of a search warrant, and specification of the location to be searched and the articles sought. See *Andresen v. Maryland*, 427 U.S. 463 (1976).

245. *E.g.*, *United States v. Biswell*, 406 U.S. 311, 317 (1972) (regulatory inspection to further urgent federal interest sustained if possibilities of abuse are not great); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) (detention for fingerprinting permissible on warrant issued for less than probable cause); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (routine inspection warrant granted based on legislative or administrative standards of reasonableness).

246. The reasonable suspicion requirement of *Terry v. Ohio*, 392 U.S. 1 (1968), see notes 241-42 *supra*, has been lowered in other cases. *E.g.*, *United States v. Lindsey*, 451 F.2d 701, 703 (3d Cir. 1971), *cert. denied*, 405 U.S. 995 (1972); *United States v. Marshall*, 440 F.2d 195, 196 (D.C. Cir.), *cert. denied*, 400 U.S. 909 (1970); *Ballou v. Massachusetts*, 403 F.2d 982, 985 (1st Cir. 1968), *cert. denied*, 394 U.S. 909 (1969).

247. *Cady v. Dombroski*, 413 U.S. 433 (1973):

The Framers of the Fourth Amendment have given us only the general stan-

the Court merely recites the factual situation and announces in conclusory fashion that the search was or was not reasonable.²⁴⁸ This “show it to me and I’ll tell you if it’s reasonable” analysis denies police officers and citizens advance notice²⁴⁹ of the fourth amendment’s scope and thus reduces the amendment to a Rorschach blot. The limitation perspective offers a mechanism for defining reasonableness within the fourth amendment.

Reasonableness Under the Limitation Perspective

The standard of reasonableness employed by the limitation perspective limits judicial review of searches and seizures by deferring to the determination of reasonableness made by some other responsible entity. A court’s determination that the government’s conduct meets the reasonableness requirement of the fourth amendment will not require detailed factual inquiry, unless the courts themselves have responsibility for controlling the governmental power to search.²⁵⁰ The court will simply determine whether the responsible entity observed proper procedure and had a rational basis for approving the search. This form of limited judicial review is consistent with the approach adopted by the Supreme Court in *Stone v. Powell*,²⁵¹ which held that in habeas corpus proceedings, federal courts should respect determinations of fourth amendment issues by state courts.²⁵²

The main purpose of the limitation perspective, controlling the arbitrary and oppressive use of state power against citizens,²⁵³ determines the appropriate mechanism to moderate the government’s search power. Courts select the mechanism by ascertaining the component of citizenry to be searched, and classifying the components as the entire citizenry, the citizen as an individual, or the citizen as a member of a group or class. These three possible targets of a search suggest three categories of searches and three distinct mechanisms to review the reasonableness of each type of search.

dard of “unreasonableness” as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions . . . and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this.

Id. at 448 (citations omitted).

248. See notes 176-78 *supra* and accompanying text.

249. See *Wright, supra* note 191, at 588 (calling for recognition of “a due process right to have one’s conduct governed by rules which are stated in advance”).

250. See notes 279-317 *infra* and accompanying text.

251. 428 U.S. 465 (1976).

252. The Court recognized that the state court was a “fair and competent” entity for adjudicating fourth amendment rights and refused to apply the exclusionary rule. *Id.* at 493 n.35. The limitation perspective suggests that administrative officials and the general electorate can determine competently certain fourth amendment issues. The scope of judicial review required by the limitation perspective is confined to whether an appropriate entity has fully and fairly determined that the search was reasonable.

253. The term “citizens” is used generically to include all members of society, and is not meant to exclude aliens.

Category I: Searches Applied Openly and Uniformly to All Citizens

If the government exercises its power to acquire information openly and equally against all citizens, the citizenry itself should determine the reasonableness of the search. This conclusion assumes that a body of law cannot endure unless it corresponds with existing social mores,²⁵⁴ and that no constitution, law, or court can preserve or revive liberties that are no longer highly valued.²⁵⁵ Indeed, the public has the right to judge the reasonableness of government action and the wisdom to exercise that power properly.²⁵⁶ Nevertheless, critics could suggest that the Category I procedure improperly submits constitutional questions to majority vote,²⁵⁷ and thus disregards the importance of the Constitution as a guarantor of the rights of the minority. The Bill of Rights insulates certain subjects from the vicissitudes of political controversy, and entrusts the enforcement of certain rights to the courts.²⁵⁸

The individual perspective considers the fourth amendment an expression of the individual's inalienable right to privacy, and places the question of reasonableness of a search beyond the control of the electorate.²⁵⁹ From the limitation perspective, however, protecting individuals from the tyranny of the majority²⁶⁰ differs from protecting the majority from itself. The tyranny of the majority presents no problem when the governmental action in question affects all citizens equally. Underlying the first amendment is the premise that well-informed citizens can distinguish truth from falsehood.²⁶¹ Courts should extend this confidence in the citizens by deeming citizens capable of determining the reasonableness of Category I searches. This confidence in the people's ability to identify unreasonable actions by the government developed early in American history.²⁶²

254. O. W. HOLMES, *supra* note 64, at 41.

255. L. HAND, *THE SPIRIT OF LIBERTY* 190 (1952).

256. Placing our hope in the collective judgment of the people does not mean we must abandon hope that we will see "the high resolve of political officials, law-makers and law-implementers, to take affirmative steps to protect and enlarge the liberties of those they govern. Pollack, *To Secure the Individual Rights of Many*, in *LAW IN A CHANGING AMERICA* 55 (G. Hazard ed. 1968).

257. Of course the traditional concept of properly limited judicial power restricts the Court to deciding constitutional questions as a byproduct of traditional cases and controversies. See *United States v. Richardson*, 418 U.S. 166, 194 (1974) (Powell, J., concurring); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

258. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

259. J. S. Mill, *On Liberty*, in 25 *HARVARD CLASSICS* 219 (C.W. Elliot ed. 1909): "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."

260. See text accompanying notes 279-317 *infra*.

261. *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting).

262. In the Virginia debates on the Federal Constitution, Patrick Henry rhetorically queried: "When these harpies (federal sheriffs) are aided by exisemen, who may search, at any time, your houses, and most secret recesses, will the people bear it?"

Even under the prevailing individual perspective, public evaluation of government action influences the judicial determination of reasonableness under the fourth amendment. Although purporting to follow "the rule of law"²⁶³ rather than public pressure, courts remain sensitive to those pressures²⁶⁴ and have admitted that the "degree of community resentment aroused by particular practices" is one component in determining the constitutionality of searches.²⁶⁵ This component alone fails to provide a reliable method for identifying the prevailing consensus on reasonable searches. Electoral resolution of the Category I problem eliminates the need for courts to divine popular sentiment.²⁶⁶ The courts would ensure only that the people have an opportunity to determine reasonableness by requiring that the search be open and uniform.

Effective use of electoral power by citizens depends on citizen knowledge of the governmental investigatory activity being reviewed, and this knowledge results from publicity given to that activity.²⁶⁷ The publicity requirement is inapplicable to the limited use of secret searches by the government. Secret searches are within the Category II or III because they are generally beyond the control of the electorate.

In addition, the government must conduct Category I searches uniformly to enable the electorate to assess the searches properly. Uniform application precludes arbitrary discrimination,²⁶⁸ and the public

Quoted in Stengel, The Background of the Fourth Amendment to the Constitution of the United States (pt. 2), 4 U. RICH. L. REV. 60, 69 (1969).

263. *People v. Norman*, 14 Cal. 3d 929, 942, 538 P.2d 237, 246-47, 123 Cal. Rptr. 109, 118-19 (1975) (Clark, J., dissenting, adopting opinion below of Thompson, J.) ("Judges do not represent people, they serve people. . . . To do so, they must not represent a political or social point of view; they must serve the rule of law.") (quoting Buchanan v. Rhodes, 249 F. Supp. 860, 865 (1966)).

264. Hufstедler, *supra* note 40, at 555.

265. *Terry v. Ohio*, 392 U.S. 1, 17 n.14 (1968). See also *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 n.14 (1976) (the use of police roadblocks for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use).

266. See McGowan, *Rule-Making and The Police*, 70 MICH. L. REV. 659, 692 (1972): "The measurement of the public temper at any one point in time is an inexact process at best, and one for which the Supreme Court is perhaps not peculiarly qualified."

267. Publicity is essential for effective control of the government. 1 BENTHAM, JUDICIAL EVIDENCE 524 (1827), cited in K. DAVIS, *supra* note 66, at 112.

268. See notes 205-14 *supra* and accompanying text. See also *United States v. Lopez*, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971) (when an airline company "updated" the F.A.A.-approved hijacker profile, eliminating one criterion and adding two others, one ethnic, the other calling for individual judgment on the part of airline employees, the modification destroyed "the essential neutrality and objectivity of the approved profile"); McGinley & Downs, *Airport Searches and Seizures—A Reasonable Approach*, 41 FORDHAM L. REV. 293, 302 (1972): "Informed discussion about the profile is difficult because the characteristics are secret. However, these characteristics are ostensibly based on the behavioral characteristics of embarking passengers rather than on inherited or social characteristics."

Courts have occasionally upheld roadblocks because they are uniformly applied, see e.g., *Commonwealth v. Mitchell*, 355 S.W. 2d 686, 687 (Ky. 1962) ("systematic and indiscriminate stopping of all motor traffic on the highway"). Although a particular roadblock is uniformly applicable to motorists encountering it, this is not the type of uniformity proposed under the limitation perspective. Roadblocks are not uniformly applied to all citizens or to a sufficiently large group of citizens, see note 276 *infra*. Assuming that the uniform impact of a roadblock upon motorists using a certain highway eliminates possible discrimination against an individual member of that group, it does not eliminate the potential for discrimination against the entire group inherent in choosing the geographic location of the roadblock. But cf. *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (officers in the field do not choose fixed checkpoints

will more easily recognize the oppressive use of power if the oppression is uniform.²⁶⁹ Public opinion rarely rises to the level of a check on governmental power unless the public is directly affected by the action. For example, on hearing that the government broke into an individual's bedroom, some members of the community would be upset because they felt that a wrong was done, and that a wrong done to any man is a wrong done to all. Other members of the community, however, would show less sympathy because the situation is foreign to them and does not affect them.²⁷⁰ The majority of Americans, confident that the government will not conduct a similar search against them, would condone the search in the abstract.²⁷¹ If the government uniformly extends the search to all citizens,²⁷² however, the result acceptable in the abstract could become intolerable.

The government's investigations rarely rise to the level of a Category I search. The lack of open uniform searches may well reflect the electorate's effective exercise of control. The considerable costs and manpower requirements of uniform searches also restrict their use.²⁷³ Census-taking, border searches, and antiskijacking proce-

operated by the border patrol and officials responsible for making the most effective allocation of limited enforcement resources will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class).

269. Amsterdam, *supra* note 5, at 427; see notes 259-62 *supra* and accompanying text. Professor Davis reports that many Chicago police think "all society is divided into two classes of people, the 'kinky' (criminal) class and the law-abiding class. The officers can tell which are which by physical characteristics and appearance—mostly hair and dress, but also the look in the eyes." K. DAVIS, *supra* note 206, at 18. Historically, opposition to the government's search and seizure power arises primarily when the power is directed against those holding unpopular political beliefs, such as authors and printers suspected of seditious libel. Stengel, *supra* note 19, at 283-85. In Lord Pitt's famous speech against the general warrant he noted that government searches to enforce the cider tax were "particularly dangerous, when men by their birth, education, profession, very distinct from the trader, became subject to those laws." Quoted *in id.* at 289.

270. See e.g., F. CARRINGTON & W. LAMBIE, *THE DEFENSELESS SOCIETY* (1976).

271. See note 269 *supra*. For many police "[t]he working principle is that searches of 'kinky' people for drugs and handguns are necessary and proper, whether or not the searches would be constitutional if evidence so obtained were presented in court." K. DAVIS, *supra* note 206, at 18.

272. Perhaps true uniformity could be achieved only if the government assigned one officer to accompany each individual throughout life. Even then the varying abilities of the police officers would mean less than perfect uniformity. Courts must clearly define the contours of all three categories by answering such questions as: What is "uniformity" for Category I? What is "focus on an individual" for Category II? What is "directed against groups or classes of people" for Category III? See text accompanying notes 316-17 *infra*.

273. In addition to the check of an aroused electorate, the sheer scope of a uniform practice would create economic limitations on the practice. See Belair & Bock, *supra* note 77, at 147 (use of closed circuit television for street surveillance in Olean, New York, was discontinued after one year partly because "the small upstate community had too little street crime to justify the costs of intensive surveillance"). See also Brodsky, *Terry and the Pirates: Constitutionality of Airport Searches and Seizures*, 62 Ky. L.J. 623, 656 (1974) (some airline officials regard the current antihijacking program as a "costly overreaction"). Situations exist in which economic considerations do not limit a particular practice. Stone, *supra* note 2, at 1238: "The vast majority of all currently operating informers and spies had agreed to serve in that capacity in order to obtain a reduction of pending charges or some other concession in the criminal process."

dures are among the few contemporary examples of open and uniform searches.²⁷⁴ Courts must scrutinize these practices for the actual uniformity required by Category I. For example, when all airline passengers must pass through a magnetometer²⁷⁵ the practice is uniform;²⁷⁶ when only "selectees" must pass through, the uniformity is destroyed.²⁷⁷ When the search meets the requirements of openness and uniformity, the electorate can determine its reasonableness. In the final analysis, society must distinguish between reasonable and unreasonable governmental conduct.²⁷⁸

Category II: Searches Focused on an Individual Citizen

Although the majority in a democratic state may need no constitutional protection from oppressive government,²⁷⁹ the Constitution attempts to protect individuals and minorities from oppression.²⁸⁰ The "right to be let alone"²⁸¹ relates to the rights of the individual against the group, the respective rights of minorities and majorities, and the powers and limitations of government in its association with individuals.²⁸² Throughout history, civilizations have sought to limit the power of government to acquire information about individuals, families, and groups within society.²⁸³

Other concepts restrict the government's relations with individuals. Considerations of fair play require the government to leave the individual alone absent good cause for disturbing him.²⁸⁴ The adversarial system also forecloses to the government certain methods of investigation and interrogation.²⁸⁵ Finally, the imbalance between a powerful state dealing with weak and lonely citizens, even without official abuse, is improper.²⁸⁶

274. These practices arguably qualify as uniform, although no practice is perfectly uniform. See note 272 *supra*.

275. The use of the magnetometer was held to be a search in *United States v. Epperson*, 454 F.2d 769, 770 (4th Cir. 1972). But cf. *United States v. Mitchell*, 352 F. Supp. 38, 42-43 (E.D.N.Y. 1972) (airport searches do not invoke fourth amendment standards because their purpose is air safety regulation, and magnetometer is merely a coarse-screening device).

276. The practice is uniformly applied to airline passengers and not to all citizens, *i.e.*, those who never fly. Since perfect uniformity is probably impossible, see note 272 *supra*, sufficient uniformity must exist to classify the search within Category I. See text at notes 316-17 *infra*.

277. For a description of the selection process, referred to as the "Gate Plan," see Brodsky, *supra* note 273, at 627-29.

278. See G. GILMORE, *THE AGES OF AMERICAN LAW* 9 (1977).

279. See notes 261-66 *supra* and accompanying text.

280. See note 202 *supra* and accompanying text.

281. Griswold, *The Right to be Let Alone*, 55 Nw. L. REV. 216 (1960).

282. Dykstra, *supra* note 44, at 305.

283. A. WESTIN, *supra* note 42, at 22.

284. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

285. See, *e.g.*, *United States v. Wade*, 388 U.S. 218, 221-23 (1967) (police lineup); *Miranda v. Arizona*, 384 U.S. 436, 455-58 (1966) (custodial interrogation by police without warning of right to remain silent); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (interrogation of suspect on whom police investigation has begun to focus); *Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (use of surreptitious means to elicit incriminating statements from suspect while on bail, in absence of counsel). See generally Enker & Elsen, *supra* note 5; Greenawalt, *supra* note 147.

286. Enker & Elsen, *supra* note 5, at 65. Although these general concepts of fair play, state-individual balance, and the requirements of an adversary system have appeared most often in fifth or sixth amendment cases, they cannot be confined to those settings. Especially in *Miranda* and *Wade*, the Court was concerned with preventing such perceived "evils" as inherently coercive interrogations and suggestive lineups.

Although these historical concepts may justify creating a separate category for searches directed against individuals, the limitation perspective also supports the creation of such a category. The limitation perspective suggests that the fourth amendment is directed at the twin dangers of unchecked governmental search power: arbitrariness and oppression. The potential for arbitrariness and oppression increases when the government searches a particular person, as opposed to society generally. Abuse of the search power may be intentional, but abuses also can be attributed to the lack of objectivity created by placing the agent in an adversary position.²⁸⁷ Frequently, the government's position is properly adverse to the individual's interest. Police act as adversaries to suspected wrongdoers by investigating and preventing violations of the law.²⁸⁸ Even when the government properly plays the role of adversary, however, the potential for a loss of objectivity is apparent. The limitation perspective recognizes that once the adversarial relationship arises, the fourth amendment precludes the arbitrary exercise of governmental power.²⁸⁹

Oppression is the second potential evil of unchecked governmental power to search individuals. The danger that the state will abuse its coercive power is greatest when a single individual is selected for special treatment and deprived of the protection of anonymity. Depriving the individual of anonymity can cause great psychological damage by disclosing the individual's best kept secrets and destroying his ultimate autonomy.²⁹⁰ Piercing the protective shell of ano-

The right to counsel and the right to *Miranda* warnings exist not as inalienable rights of the suspect, but because the Court has deemed them appropriate remedies for the perceived evils. "Even when, in the apparent absence of alternatives, a procedural rule is held to be constitutionally required, it may cease to be so if suitable alternatives are developed, or if other measures have eliminated or brought under control the evil at which it is aimed." Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 181 (1969).

The Court also has warned that its holdings in *Miranda* and *Wade* are not intended to create "a constitutional straitjacket which will handicap sound efforts at reform . . ." *Miranda v. Arizona*, 384 U.S. at 467; *United States v. Wade*, 388 U.S. at 239 (quoting *Miranda v. Arizona*, 384 U.S. at 467). The door was left open to other remedies in the form of legislation or administrative regulation of police departments. The *Miranda* warnings are required "unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it." *Miranda v. Arizona*, 384 U.S. at 444.

287. When the government seeks to acquire information about a specific individual it may approach him and ask for permission to collect information. In such a situation the individual serves as a check upon the government power and presumably would demand a statement justifying the government's request. If the individual consents, the purpose of the fourth amendment under the limitation perspective has been served, because the individual has acted as an appropriate entity to review the reasonableness of the government action. If the individual withholds permission to search, then the adversary relation between government and individual arises. Similarly, if the government never seeks permission from the individual, the government's interest is usually adverse to the individual's interest.

288. *Katz v. United States*, 389 U.S. at 360.

289. "[W]hen we say a decision is ad hoc, random, or unreviewable we mean in effect the decision is lawless." Wright, *supra* note 191, at 588.

290. A. WESTIN, *supra* note 42, at 33-34.

onymity may also subject the individual to manipulation by those who know his intimate secrets. Persons privy to this information can use it to stifle free expression, to serve improper political purposes, or to modify behavior. The Founding Fathers understood the need for anonymity in a system of free expression. Between 1789 and 1809, for example, many prominent public officials published political writing either anonymously or under pseudonyms.²⁹¹ The Supreme Court has recognized that anonymity is an important means of protecting individuals holding unorthodox beliefs from government oppression.²⁹² Even without government reprisal, the mere loss of anonymity may silence dissenters.²⁹³

In addition, loss of anonymity may alter the individual's conduct by encouraging conformity. Although the government has many techniques for reprisals against heretics and rebels,²⁹⁴ government power to conduct investigations and surveillance of individuals exacts conformity and acts as a form of reprisal.²⁹⁵ Clinical studies indicate that few people possess the necessary courage to resist authority, especially when it is wielded by a powerful government against isolated individuals.²⁹⁶ The government can easily augment its coercive powers by publicizing its investigations, because most people will infer

Each person is aware of the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality. . . . Every individual lives behind a mask in this manner. . . . If this mask is torn off and the individual's real self bared to a world in which everyone else still wears his mask and believes in masked performances, the individual can be seared by the hot light of selective, forced exposure. The numerous instances of suicides and nervous breakdowns resulting from such exposures by government investigation, press stories, and even published research constantly remind a free society that only grave social need can ever justify destruction of the privacy which guards the individual's ultimate autonomy.

291. Comment, *The Constitutional Right to Anonymity*, 70 YALE L.J. 1084, 1085 (1961):

The Federalist papers of Hamilton, Madison and Jay were published originally as letters to the editor under the name of 'Publius.' The Letters of Pacificus by Alexander Hamilton defending Washington's proclamation of neutrality and Madison's answering Letters of Helvidius were published anonymously. Even Chief Justice Marshall, writing anonymously as a 'friend to the Republic,' vigorously defended certain Supreme Court decisions against attacks by Spencer Roane, also writing anonymously.

292. *E.g.*, *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960); *Talley v. California*, 362 U.S. 60, 65 (1960); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 462 (1958).

293. Politically active citizens could hardly remain anonymous under the present system, *see, e.g.*, *Donohoe v. Duling*, 330 F. Supp. 308, 309 (E.D. Va. 1971): "It has long been the policy in Richmond and other places throughout the nation to photograph persons participating in vigils, demonstrations, protests and other like activities whether peaceful or otherwise." *Donohoe* also suggests that such police practices "are not only permissible and constitutional, but they are also commendable and should be encouraged." *Id.* at 311.

294. *See* notes 230-31 *supra* and accompanying text. *See also* Ervin, *supra* note 44, at 14, noting "the habit all governments and all societies have of surveillance, blacklisting and subtle reprisal for unpopular political or social views."

295. Johoda & Cook, *Security Measures and Freedom of Thought*, 61 YALE L.J. 295, 318 (1952). For a discussion of totalitarian regimes' efforts at behavior modification through government investigation and surveillance, *see* H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 431 (1951). For a discussion of behavior modification in the United States during the McCarthy era, *see* P. LAZARSELD & W. THIELENS, *THE ACADEMIC MIND* (1958).

296. Milgram, *The Compulsion to Do Evil*, in *PATTERNS OF PREJUDICE* 3, 5 (Nov.-Dec. 1967).

evil deeds from the mere fact of investigation.²⁹⁷ Thus, the public prosecutor possesses awesome discretionary power to investigate citizens and to release public statements pursuant to the investigation that adversely affect the investigated citizen's reputation.²⁹⁸ Any government official with unchecked power to investigate individual citizens poses a similar threat.²⁹⁹

Thus, when the government directs its power to search at individual citizens, arbitrariness and oppression are likely incidents. The limitation perspective suggests that the fourth amendment requires some entity to check and control such power. The general public provides an inadequate safeguard against undisclosed governmental conduct directed at individuals.³⁰⁰ Commentators have advocated administrative regulation of searches and police conduct to restrain governmental power.³⁰¹ Regulations provide general rules or standards for controlling police conduct and eliminate the need for a detailed factual inquiry in recurring situations.³⁰² These benefits diminish when the government focuses on a single individual, and therefore administrative regulations are inappropriate to govern searches directed at individuals.³⁰³ The government should justify its decision to investigate a particular individual because its coercive power is strongest and most frightening when directed at particular individuals.³⁰⁴ A less detailed justification, such as compliance with a regulation, should suffice to legitimize searches conducted against

297. Comment, *supra* note 32, at 701: "What the innocent citizen has most reason to fear is being singled out as the object of official suspicion." *But cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976): "Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature." In his dissenting opinion in *Martinez-Fuerte*, Justice Brennan stated: "One wonders what actual experience supports my Brethren's conclusion that referrals 'should not be frightening or offensive" *Id.* at 572 (Brennan, J., dissenting).

298. Jackson, *The Federal Prosecutor*, 24 J. AMER. JUD. SOC'Y. 18, 18 (1940).

299. K. DAVIS, *supra* note 66, at 22. Professor Davis states:

[A] decision to investigate calls for further discretionary determinations of what to investigate, what parties, by what methods, when, how broadly and how deeply. Each facet of each question necessarily involves a separate discretionary determination. Even a negative decision has to determine what and who will not be investigated when.

Id.

300. See notes 268-72 *supra* and accompanying text.

301. K. DAVIS, *supra* note 206, at 158; Amsterdam, *supra* note 5, at 416-28; McGowan, *supra* note 266, at 663; Wright, *supra* note 191, at 587-93.

302. See generally Dworkin, *supra* note 2.

303. Administrative regulations are appropriate to govern searches against groups, however. See notes 318-60 *infra* and accompanying text.

304. The individual has a right to ask whether "the Government has good grounds for singling him out for special scrutiny." Christie, *supra* note 77, at 886. When two individuals are treated differently the government agent authorizing or conducting the search

should be able to point to some distinction between the two cases which it is permissible for him to consider. While he may not be able to articulate in advance what all the distinguishing factors in all cases will be, he must at least be able to show later that cases treated differently were in fact different in some relevant respect—that is, that he is following some sort of rational, non-discriminatory rule. If he cannot make such a showing, his different treat-

groups of citizens,³⁰⁵ or against the citizenry as a whole.³⁰⁶

When the government conducts a search of an individual, the appropriate fourth amendment check is the warrant clause and the recognized exceptions to it. Magistrates, in issuing or denying warrants, and the courts, in determining whether a warrantless search is constitutional, are the appropriate entities to control the government's power to search individual citizens. Only magistrates and courts can effectively check governmental imposition on individuals because the general public often is unwilling, and the drafters of administrative regulations usually are unable, to consider meaningfully the unique facts of each search focused on an individual citizen.

Definitions are necessary for two terms integral to analysis of searches focused on individuals, "focus" and "individual." The focus test of *Escobedo v. Illinois*³⁰⁷ enjoyed a short period of prominence until *Miranda v. Arizona*³⁰⁸ overruled it by implication. The Supreme Court has recently disposed of the focus concept in police interrogation cases.³⁰⁹ The Court can nevertheless use the focus test effectively in fourth amendment cases.

Although criticism of the focus test of *Escobedo* centered on its vagueness,³¹⁰ this criticism applies to any principle until the principle has been interpreted and employed in specific fact situations.³¹¹ Further judicial interpretation could refine the focus concept for use in moderating searches directed at individuals.³¹² The vagueness of the *Escobedo* focus test resulted primarily from the Court's failure to consider the proper perspective from which to define "focus." If some subjective standard is chosen, the state of mind of the police on the one hand, or of the suspect on the other, are alternatives. Inquiries into subjective thoughts and motivations of police officers and

ment of the two cases is irrational or invidious, and hence violative of equal protection.

Wright, *supra* note 191, at 594. Although Judge Wright was referring to prosecutors, the same standard should apply to police officers who exercise a similar discretion:

In our entire system of law and government, the greatest concentrations of unnecessary discretionary power over individual parties are not in the regulatory agencies but are in police and prosecutors. . . . The police are among the most important policy-makers of our entire society. And they make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.

K. DAVIS, *supra* note 66, at 222.

305. See notes 318-60 *infra* and accompanying text.

306. See notes 254-78 *supra* and accompanying text.

307. 378 U.S. 478 (1964). Regarding the focus problem, the Court in *Escobedo* stated:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution

Id. at 490-91.

308. 384 U.S. 436 (1966).

309. *E.g.*, *Beckwith v. United States*, 425 U.S. 341 (1976).

310. See Enker & Elsen, *supra* note 5, at 70-77.

311. Amsterdam, *supra* note 5, at 352; LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 68 (1968).

312. LaFave, *supra* note 311, at 46 n.28.

suspects would probably be fruitless.³¹³ By defining search as any government activity intended or likely to produce information about citizens, courts could solve these problems of perspective.³¹⁴ The courts could then apply an objective standard except in cases where the searcher's subjective intent is clear.³¹⁵

The remaining definitional problem for Category II searches is the term "individual." Courts need not limit application of Category II standards to searches directed at the solitary citizen,³¹⁶ but also may apply these standards to searches directed against two, three, or more specified individuals. Category I and Category II searches are easily distinguishable. When the government activity is not applied uniformly to all citizens, some focusing of the search power is readily apparent. Distinguishing between Categories II and III is more difficult. If the government directs a search at some identifiable class or group, the court must determine whether the group is sufficiently large that the safeguards of Category III should attach, or whether the group is so small that the more stringent safeguards of Category II should apply. Courts will encounter situations in which the line is difficult to draw, but can generally distinguish Category II and Category III searches by considering the relative adequacy of the checks on the government's power to search.³¹⁷ Even if a court improperly categorizes a particular factual situation, the limitation perspective guarantees some fourth amendment protection against arbitrary and oppressive government action to each category. In contrast, a court invoking the individual perspective to determine that a given action is not a search eliminates all fourth amendment protections.

Category III: Searches Directed Against Groups or Classes of Citizens

Category III occupies the large middle ground between Category I, open and uniform searches, and Category II, searches focused on in-

313. See note 236 *supra*.

314. See text accompanying note 239 *supra*.

315. This objective approach is apparently the direction the lower courts were taking in interpreting *Escobeda*, see Enker & Elsen, *supra* note 5, at 70.

316. Nor is the suggested definition of focus limited to situations in which the government has selected a named or identifiable person. Random selections, such as spot checks for enforcing auto registration and licensing requirements, would be a form of focus under the proposed focus concept. Cf. *State v. Kabayama*, 98 N.J. Super. 85, 88, 236 A.2d 164, 166 (App. Div. 1967) ([t]he temporary stoppage of vehicles upon the highways, either singly or as a part of a check by means of a roadblock procedure" is a valid exercise of the state's power to regulate its highways).

317. Courts can base the line between Category II and Category III searches on general considerations in defining a "sufficiently large group" versus an "isolated individual." While the line ultimately drawn may be somewhat arbitrary, the limitation perspective obviates the detailed factual inquiry characteristic of the individual perspective. See generally Dworkin, *supra* note 2.

dividuals. Category III procedures determine the reasonableness of the government's efforts to acquire information about members of a group or class of people. Police frequently justify searches focused on members of groups or classes by contending that their conduct is a necessary and proper police practice in these situations. For example, the high statistical frequency of injury inflicted on policemen by armed traffic violators suggests that all motorists who are stopped or arrested should be searched for weapons.³¹⁸ The police contend, therefore, that a weapons search incident to a traffic stop is a routine procedure necessary for police safety and is accordingly reasonable within the meaning of the fourth amendment.

Courts have been inconsistent in assessing the reasonableness of particular searches, sometimes emphasizing routine police procedures and other times emphasizing the unique factual situation.³¹⁹ Although an emphasis on particular facts may reflect proper judicial restraint and is consistent with a view of the fourth amendment as a guarantor of individual rights, this approach emasculates the fourth amendment as a means of checking government power.³²⁰ The limitation perspective suggests that the fourth amendment, as enforced by the exclusionary rule, primarily regulates day-to-day police activities³²¹ and its requirements must therefore be clear to individual officers. By emphasizing complex factual settings in fourth amendment decisions, however, courts fail to express general rules or principles that police officers can readily understand.³²² A diligent officer familiar with Supreme Court cases and striving to follow the Court's lead may know how to react to a factual situation similar to that presented in *Katz v. United States*.³²³ Nevertheless, the officer is probably unable to extract guiding principles from these cases to help him deal with the multitude of dissimilar situations arising in the course of his day-to-day activities.³²⁴

Courts cannot, however, formulate guiding fourth amendment principles, even assuming that their institutional role would permit it.³²⁵ They lack an understanding of the day-to-day problems of law enforcement and their only source of information is the particular

318. See *United States v. Robinson*, 414 U.S. 218 (1973).

319. This swing back and forth from routine procedures to specific facts has been most apparent in cases involving automobile searches. Compare *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) with *Chambers v. Maroney*, 399 U.S. 42 (1970).

320. The assumption "that fourth amendment law can develop meaningfully on a case by case basis, and which finds great significance in differing factual situations, is an abysmal failure." Dworkin, *supra* note 2, at 334.

321. LaFave, *supra* note 4, at 141.

322. See LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965). The authors cite *Escobedo v. Illinois*, 378 U.S. 478 (1964), as a prime example of an opinion that is "not written in a way which makes it easy for the police to understand what they are expected to do." *Id.* at 1007.

323. 389 U.S. 347 (1967), discussed at notes 32-36 *supra* and accompanying text.

324. The individual officer is unlikely to receive much help from police agencies, which have made few attempts to congeal judicial decisions dealing with aspects of police investigations into a systematic outline of policy, procedures, and rules. N.A.C. POLICE, *supra* note 193, at 25. See also LaFave & Remington, *supra* note 322, at 1008.

325. See *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (discussing judicial restraint).

record before them in a given case. In contrast, police administrative officials, having acquired expertise and perspective on law enforcement, are competent to draft generalized search and seizure rules.³²⁶

Delegating this kind of rulemaking power to police administrators has several advantages. The individual officer ceases to be burdened with the complex task of interpreting court decisions, and is freed to follow the department policies and rules in which he has been trained.³²⁷ Moreover, because of internal disciplinary measures, he is more likely to follow agency rules than to follow the present vague judicial guidelines.³²⁸ By giving agency administrators an interest in enforcing their own rules rather than rules judicially imposed on them, supervision of police conduct would improve.³²⁹ Disregarding whether the rulemaking process can replace the exclusionary rule,³³⁰ the process has many advantages over the exclusionary rule as a method of regulating the conduct of individual officers.

To date, courts have failed to show proper respect for administrative rules promulgated by police officials, even when the courts have dealt with routine police procedures. Courts reviewing the constitutionality of routine police procedures have addressed the merits of these procedures without attaching significance to their origin.³³¹

326. Some examples of police rules are set out in the Appendix to N.A.C. POLICE, *supra* note 193.

327. "If police agencies fail to establish policy guidelines, officers are forced to establish their own policy based on their understanding of the law and perception of the police role." N.A.C. POLICE, *supra* note 193, at 23. Policy should "emanate from the administrative level of the police hierarchy instead of from the operational level." *Id.* at 25.

328. McGowan, *supra* note 266, at 673:

The police, organized in a semi-military tradition, work in that tradition's responsiveness to going by the book, which is always less grudging if one has had a role in writing the book. The physical structure of the police is also directed towards discipline for failure to follow explicit commands from above.

329. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786 (1970): "[T]he Supreme Court, like any other court, lacks the sort of supervisory power over the practices of the police that is possessed by the chief of police or the district attorney." Administrative rules would also have a much wider scope than the present exclusionary rule, and would cover incidents not followed by prosecution. K. DAVIS, *supra* note 206, at 127: "The greatest advantage of required police rulemaking over the exclusionary rule is that the exclusionary rule reaches only two or three percent of police activities, whereas required police rulemaking can reach almost all policy activities."

330. The Court has noted contemporary dissatisfaction with the effectiveness of the exclusionary rule as a means of regulating police conduct. See *Stone v. Powell*, 428 U.S. 465 (1976), and cases cited therein. This article is confined to an examination of the positive benefits of rulemaking as one means of regulating police conduct. It does not address the question of whether the rulemaking process should constitute an alternative to the exclusionary rule, see McGowan, *supra* note 266, at 690, or an additional means of controlling police conduct. That question requires detailed consideration of whether the exclusion of evidence is a constitutional requirement or a judicially created remedy. See *United States v. Janis*, 428 U.S. 433 (1976); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621.

331. Compare *United States v. Robinson*, 414 U.S. 218 (1973) with *Gustafson v. Florida*, 414 U.S. 260 (1973). In *Robinson*, the police officer followed written regulations,

Thus the courts have failed to distinguish among procedures embodied in a written administrative rule or directive,³³² vague unwritten rules of practice,³³³ and mere post hoc rationalizations for unfounded practices.³³⁴

When a written directive exists, the police agency has methodically considered, articulated, and adopted the rule.³³⁵ If, on the other hand, the police practice is vague or nonexistent, the court must act as a rulemaker of first instance. In so doing, the court subjects itself to the criticism that it is preoccupied with policing the police and that it is improperly qualified to write police manuals.³³⁶ The courts' willingness to consider police conduct that supposedly conforms to an unwritten or nonexistent rule eliminates the checks on power inherent in the process of administrative rulemaking.³³⁷ Commentators have explored the benefits of police rulemaking in great detail.³³⁸

The rulemaking process is consistent with the fourth amendment as viewed from the limitation perspective. The limitation perspective suggests that limiting and controlling arbitrary and oppressive use of the search power is an important fourth amendment value. Search and seizure rulemaking is implied by the limitation perspective because rules are necessary to guarantee equity and fairness to target individuals.³³⁹

Category III procedures and criteria of reasonableness therefore require that government searches conform to written rules promulgated by the government agency conducting the search.³⁴⁰ This requirement facilitates judicial review of the constitutionality of a

whereas in *Gustafson*, the arresting officer acted discretionarily or pursuant to an unwritten routine practice. The Court failed to make this distinction although the cases were considered simultaneously.

332. *E.g.*, *South Dakota v. Opperman*, 428 U.S. 364 (1976).

333. *Gustafson v. Florida*, 414 U.S. 260 (1973).

334. *See Amsterdam*, *supra* note 5, at 420.

335. At present most procedure and policy are "made primarily by patrolmen, the least qualified." K. DAVIS, *supra* note 206, at 165.

336. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411-24 (1971) (Burger, C.J., dissenting).

337. "Recognition that police policy formulation is an administrative process suggests the applicability to it of administrative procedures found serviceable in other contexts." *Amsterdam*, *supra* note 329, at 813 (emphasis in original). *Cf. Gellhorn & Robinson, Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 792-93 (1975) (limiting police discretion is difficult because of the numerous variables in each decision, the level of the hierarchy at which decisions are made, and their low visibility).

338. *See, e.g.*, K. DAVIS, *supra* note 66; K. DAVIS, *supra* note 206; McGowan, *supra* note 266; Wright, *supra* note 191.

339. L. FULLER, *THE MORALITY OF LAW* 46 (rev. ed. 1969). *See also* K. DAVIS, *supra* note 66, in which the author discusses the basic question

that legal philosophers have pondered for thousands of years: In our entire legal and governmental system, how can we improve the quality of justice for individual parties; how can we reduce injustice? Over the centuries, the main answer has been to build a system of rules and principles to guide decisions in individual cases.

Id. at 215.

340. Police rulemaking may be voluntary, legislatively required or court-ordered. For a discussion of the possible legal foundations of court-ordered rulemaking, see Wright, *supra* note 191, at 592-93. *See also* K. DAVIS, *supra* note 206, at 131-38; *Amsterdam*, *supra* note 329, at 812-14. With respect to the fourth amendment, police rules governing searches and seizures could be required as part of the constitutional definition of a reasonable search.

search,³⁴¹ and utilizes the searching agency itself as an important check against arbitrary or oppressive exercise of the power to search.³⁴² Even under this proposed system of police rulemaking, the police do not serve as the ultimate check on their own power.³⁴³ Written administrative regulations are simply an initial limitation of power with subsequent judicial review³⁴⁴ guaranteeing that the investigative agency has acted lawfully.³⁴⁵

Many important benefits would result from requiring an agency to limit its use of power by promulgating its own administrative rules. The drafting process encourages rationality and circumspection.³⁴⁶ Administrative standards for searches are certainly preferable to the frequently capricious decisions of individual officers.³⁴⁷

The rulemaking process must be mandatory and visible to check the powers of police agencies effectively.³⁴⁸ If police departments demonstrate reluctance to draft rules or draft ineffective rules,³⁴⁹ courts can require³⁵⁰ police administrators to draft rules with sufficient detail and specificity to limit discretion and reduce the poten-

341. The requirement for written rules reduces the dangers inherent in vague rules of thumb and precludes the danger of after the fact rationalization, *see* text accompanying notes 327-30 *supra*. In reviewing such a rule, one court stated:

We also note that, after this case arose, the Metropolitan Police Department put into operation a regulation restricting on- and near-the-scene identification confrontations to suspects arrested within 60 minutes after the alleged offense and in close proximity to the scene. We see in this regulation a careful and commendable administrative effort to balance the freshness of such a confrontation against its inherent suggestiveness, and to balance both factors against the need to pick up the trail while fresh if the suspect is not the offender. We see no need for interposing at this time any more rigid time standard by judicial declaration.

United States v. Perry, 449 F.2d 1026, 1037 (D.C. Cir. 1971).

342. "Police discretion can best be structured and controlled through the process of administrative rule-making by policy agencies." AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: THE URBAN POLICE FUNCTION § 4.3 (1973). *See also* N.A.C. POLICE, *supra* note 193, Standard I.3.

343. This concern is expressed by Dworkin, *supra* note 2, at 344: "The fourth amendment exists to control the government. It is folly to let the controlled dictate the terms by which they will be regulated."

344. *See* notes 356-60 *infra* and accompanying text.

345. "The last word as to the propriety of police-made rules always remains with the judicial branch." McGowan, *supra* note 266, at 675.

346. McGowan, *supra* note 266, at 680. *See also* N.A.C. POLICE, *supra* note 193.

347. *People v. Sibron*, 18 N.Y.2d 603, 606, 219 N.E.2d 196, 198, 272 N.Y.S.2d 374, 377 (1966) (Van Voorhis, J., dissenting) ("frisking a suspect . . . can be done in practice (though not in theory) at the officer's whim"), *rev'd*, 392 U.S. 40 (1968).

348. "Department-wide policies, as distinct from the individual conduct of police officers, can be adequately controlled only from outside a police department." Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRM. L.C. & P.S. 160, 164 (1967).

349. Most existing police manuals "never discuss . . . the hard choices a policeman must make every day: whether or not to break up a sidewalk gathering, whether or not to intervene in a domestic dispute, whether or not to silence a street corner speaker . . ." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 103 (1967).

350. "[W]hile all branches of government must join in the fight to limit discretion, I believe it is the courts which will have to bear the primary burden." Wright, *supra* note 191, at 581. *See* note 340 *infra*.

tial for arbitrariness.³⁵¹ Judicial insistence on detailed and visible rules will also ensure a role for public opinion in checking the agency's power. The more specific the rules, the more likely that segments of the public will critique the rules. For example, if the police promulgate a rule that officers will or will not shoot looters during a riot, "law and order" groups will represent one viewpoint, and "libertarian" groups will represent the opposing viewpoint. Although conflicting public input may complicate the rulemaking process for administrators,³⁵² it is a necessary part of a democratic society and constitutes an important check upon unfettered discretion.³⁵³ Visibility of police rulemaking to the public and the courts would help ensure that the police act reasonably, would not unduly hamper efficiency,³⁵⁴ and could benefit the police by enhancing public awareness and understanding of the difficulties encountered in law enforcement.³⁵⁵

Although courts would remain the ultimate restraint on the government's power to search,³⁵⁶ judicial review would examine the validity of the rules rather than the reasonableness of every search on the facts of every case. Courts would cease to be the rulemaker of first instance.³⁵⁷ Emphasis on general policies appears inconsistent with the warrant clause requirement that probable cause be established with specificity, but the Supreme Court has relaxed the specificity requirement in certain situations.³⁵⁸ Relaxation is also appropriate for searches directed at broad groups or classes. Compliance with administrative rules in searches directed at groups or classes fulfills the same policies underlying the specificity requirement for searches

351. For a discussion of how meaningful rules can be drafted, see K. DAVIS, *supra* note 206, at 145-49. *But cf.* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1701 (1975) (inability of formal rules to affect policy choices).

352. The public's interest in the rule must be balanced against the agency's interest in economy and efficiency, *see* Perry v. Sindermann, 408 U.S. 593, 599 (1972); Board of Regents v. Roth, 408 U.S. 564, 570 (1972); Goldberg v. Kelly, 397 U.S. 254, 265-67 (1970).

353. *But cf.* Stewart, *supra* note 351, at 1775:

[P]ublic interest advocates have tended to scorn resort to rulemaking proceedings on the ground that participation in such proceedings may have little impact on agency policy determinations. In notice and comment rulemaking the agency is not bound by the comments filed with it, and many such comments may be ignored or given short shrift.

354. Certainly, other administrative agencies have managed to live with the notice and comment procedure, and "[m]uch experience shows that the procedure is efficient, fair, democratic, and easy." K. DAVIS, *ADMINISTRATIVE LAW* 241 (6th ed. 1977). Of course, the benefits of airing certain police rules and procedure in public are sometimes outweighed by the need for secrecy. *See* K. DAVIS, *supra* note 206, at 74; LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 33-34.

355. *See, e.g.* N.A.C. POLICE, *supra* note 193, at 9: "The ultimate goal toward which [these] standards are directed is greater public trust in the police and a resulting reduction in crime through public cooperation." *See also* McGowan, *supra* note 266, at 663.

356. McGowan, *supra* note 266, at 686.

357. *See* K. DAVIS, *supra* note 66, at 186; LaFave & Remington, *supra* note 322, at 1011.

358. "[T]he Court has now made clear what was left in doubt in *Frank*: periodic and area inspections, based on general facts instead of on evidence indicating a probability of violation in a particular building, are constitutionally permissible." LaFave, *supra* note 354, at 36. "The probable cause needed to justify issuance of a warrant for inspection is not to depend upon specific knowledge of the condition of the building in question but may be based upon the passage of time, the nature of the building, or the condition of the entire area." *Id.* at 10.

directed against individuals.³⁵⁹ The policy underpinning the requirement that police establish probable cause before a magistrate is that post hoc rationalizations for the search are undesirable.³⁶⁰ Promulgating written procedures requires the rulemaking agency to answer the same questions generally that an individual officer must answer specifically whenever he obtains a warrant. Deliberation prior to promulgation determines the scope of the search and articulates a rational basis for the search. Thus, judicial review of formal police policy regulating searches against groups or classes constitutes an adequate check on power for purposes of the limitation perspective.

Conclusion

This article has discussed two ways to analyze the fourth amendment, and has offered the limitation perspective as a distinct, theoretical alternative to the right of privacy. These alternatives are separable for purposes of exposition,³⁶¹ but in practice courts must accommodate both policies, regulation of government power and preservation of privacy rights, in fourth amendment decisions. This task is not impossible. By emphasizing the flexibility of the fourth amendment,³⁶² courts could recognize an absolute right to privacy in certain situations,³⁶³ a requirement for police to obtain a search warrant in others,³⁶⁴ and a general concept of reasonableness to limit government power in still others.³⁶⁵ The Supreme Court's dissatisfaction with the exclusionary rule³⁶⁶ clearly has eroded the legiti-

359. In the context of a search focused on an individual, "it is the function of the magistrate to weigh the facts of the particular case and determine whether it is probable that an offense has been committed and that certain seizable items connected with that offense are to be found at a specified place." LaFave, *supra* note 354, at 23. The typical magistrate is probably incapable of assessing the complex factors that arise in Category III searches. For example, under what circumstances may a police department assign additional patrolmen to a selected area in order to obtain information regarding groups within that area? Perhaps the most volatile issue is whether police may or do assign additional patrolmen to the "ghetto" because the crime rate is statistically higher there than in other locations, *see* *Washington v. United States*, 397 F.2d 705, 707 (D.C. Cir. 1968), or whether police departments provide less protection to certain areas because of their racial composition, *see* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 307-09 (1968).

360. *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

361. Goodhart, *supra* note 196, at 945.

362. *See* text accompanying notes 241-46 *supra*.

363. *See* *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976); Note, *supra* note 181, at 985-91.

364. *See* *United States v. Watson*, 423 U.S. 411 (1976) (government intrusion into private dwelling).

365. *Compare* *Gilbert v. California*, 388 U.S. 263 (1967), *and* *United States v. Wade*, 388 U.S. 218 (1967), *with* *Simmons v. United States*, 390 U.S. 377 (1968).

366. *See generally* Hufstедler, *supra* note 40. *But cf.* Dworkin, *supra* note 2, at 329. Dworkin cautions against "the easy assumption that rejecting the exclusionary rule will solve the problems of fourth amendment jurisprudence. . . . [A]ny sanction, any remedy, is only as good as the substantive law it enforces. The problem with the search and seizure cases lies with the substance, not the remedy." *Id.* at 333.

macy of the limitation perspective. Nevertheless, acceptance of the historical and theoretical validity of the limitation perspective and a recognition of the conceptual problems inherent in the individual perspective³⁶⁷ can eliminate judicial reluctance to regulate government action by using the fourth amendment.

367. See notes 174-79 *supra* and accompanying text.