1983

Searches of Private Papers: Incorporating First Amendment Principles Into the Determination of Objective Reasonableness

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Recommended Citation
Available at: http://ir.lawnet.fordham.edu/flr/vol51/iss5/8
SEARCHES OF PRIVATE PAPERS: INCORPORATING FIRST AMENDMENT PRINCIPLES INTO THE DETERMINATION OF OBJECTIVE REASONABLENESS

INTRODUCTION

The fourth amendment\(^1\) guarantee against unlawful searches requires a threshold determination by courts whether the individual challenging the intrusion had a reasonable expectation of privacy with respect to the place that was searched.\(^2\) Since the landmark Supreme Court case of *Katz v. United States*,\(^3\) this expectation of privacy has been gauged with a two-part test. The first part of this test is subjective: Did the individual manifest an expectation of privacy by keeping the object undisclosed to others?\(^4\) The particular expectation of privacy manifested must also meet a second, objective test: Is society prepared to regard such an expectation as reasonable?\(^5\)

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1. U.S. Const. amend. IV.
4. *Id.* at 361 (Harlan, J., concurring). The subjective portion of the test generally encompasses an inquiry into the expressed state of mind of the individual at the time of the incident, Rawlings v. Kentucky, 448 U.S. 98, 104 & n.3 (1980) (petitioner admitted he did not believe the object would be free from governmental intrusion); United States v. Hawkins, 681 F.2d 1343, 1346 (11th Cir.) (unsolicited affirmative disavowal of ownership), *cert. denied*, 103 S. Ct. 354 (1982), and the nature of the precautions taken by the individual to insure privacy, United States v. Haydel, 649 F.2d 1152, 1155 (stowing box under bed in parents' home), *modified on other grounds per curiam*, 664 F.2d 84 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982).
If either question is answered in the negative, the challenged action is not a "search" within the meaning of the fourth amendment,\(^6\) and the procedural\(^7\) and substantive\(^8\) protections afforded by that amendment will generally not apply.\(^9\) If both answers are in the affirmative,

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6. J. Hall, supra note 2, § 1:6, at 10. For example, the following actions have been found not to be searches protected by the fourth amendment: 1) the canine search of school children and their belongings, Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980) (Swygert, J., dissenting) ("I am deeply troubled by this court's holding that the dragnet inspection . . . did not constitute a search under the Fourth Amendment."); cert. denied, 451 U.S. 1022 (1981); but see Horton v. Goose Creek Indep. School Dist., 690 F.2d 470, 473 (5th Cir. 1982) (per curiam) (canine sniff search of school children unconstitutional but search of belongings permissible), petition for cert. filed, 51 U.S.L.W. 3686 (U.S. Mar. 10, 1983) (No. 82-1510); 2) canine searches of personal luggage at airports, United States v. Sullivan, 625 F.2d 9, 13 (4th Cir. 1980) (dog sniffing luggage cannot be considered a search within the protection of the fourth amendment), cert. denied, 450 U.S. 923 (1981); United States v. Bronstein, 521 F.2d 459, 461-62 (2d Cir.) (same), cert. denied, 424 U.S. 918 (1976); 3) the use of an electronic beeper in an airplane to monitor its travel, United States v. Parks, 684 F.2d 1078, 1083-84 (5th Cir. 1982) (invasion of "no interest . . . the Fourth Amendment was designed to protect"); United States v. Miroyan, 577 F.2d 459, 495 (9th Cir.) ("not a search subject to fourth amendment"), cert. denied, 439 U.S. 1338 (1978); cf. United States v. Knotts, 103 S. Ct. 1081, 1087 (1983) (same, when beeper placed in chloroform drum within automobile); 4) the search of commercial property surrounded by "nothing more . . . than a barbed wire fence," United States v. Rucinski, 658 F.2d 741, 746 (10th Cir. 1981) (per curiam) (no expectation of privacy), cert. denied, 455 U.S. 939 (1982); 5) searches at established border checkpoints, United States v. Harper, 617 F.2d 35, 37 (4th Cir.) ("fourth amendment's protection . . . not implicated"), cert. denied, 449 U.S. 887 (1980); and 6) conversations intentionally overheard from an adjoining motel room, United States v. Agapito, 620 F.2d 324, 329-32 (2d Cir.) (one cannot be sure who his neighbors are, therefore no reasonable expectation of privacy), cert. denied, 449 U.S. 834 (1980).


9. See supra note 6 and cases cited therein. The manner in which the search is conducted must not offend due process for if it does, a conviction based on evidence so obtained will be invalidated. Rochin v. California, 342 U.S. 165, 172 (1952).
however, the court must then examine the challenged search in the context of the fourth amendment's requirements. A search undertaken without a warrant is presumed to be in violation of the fourth amendment, "subject only to a few specifically established and well-delineated exceptions." The Court in Katz recognized that "the Fourth Amendment protects people, not places," although, as Justice Harlan noted, the application of the test "requires reference to a 'place.'" In recent years, courts have defined a number of places as affording a person, objectively, a diminished expectation of privacy. Such places include a prison cell, a public school locker and an automobile. Neverthe-

10. If a warrant was obtained, the court decides whether the probable cause and specificity requirements were satisfied, see, e.g., United States v. Harris, 403 U.S. 573, 577 (1971) (plurality opinion) (probable cause); Marcus v. Search Warrant, 367 U.S. 717, 732 (1961) (specificity); United States v. Hubbard, 493 F. Supp. 209, 217-21, 221-28 (D.D.C. 1979) (probable cause and specificity), aff'd per curiam sub nom. United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982), and whether the search was conducted in a reasonable manner, Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971) (plurality opinion) (disapproval of a nighttime search); Sabbath v. United States, 391 U.S. 585, 586 (1968) (knock-and-announce rule); Fed. R. Crim. P. 41(c)(1) (fixing a time limit on the execution of a warrant). If no warrant was secured, the court must determine whether the government has shown that one of the well-established exceptions to the warrant requirement applies. See infra note 12 and accompanying text.


12. Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted). Government agents may legally search without a warrant if: 1) the item is in plain view, that is, the police are lawfully on the premises and they inadvertently discover something the incriminating nature of which is immediately apparent, Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) (plurality opinion); but see Texas v. Brown, 51 U.S.L.W. 4361, 4364-65 (U.S. Apr. 19, 1983) (plurality opinion) (officer needs only probable cause to believe object discovered is incriminating); 2) the items are seized incident to a lawful arrest, Chimel v. California, 395 U.S. 752, 762-63 (1969); 3) there are exigent circumstances, such as hot pursuit or danger of imminent destruction of evidence, Vale v. Louisiana, 399 U.S. 30, 35 (1970); ALI Model Pre-Arraignment Code § 260.5 (1975); or 4) the suspect has consented, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). See generally Tenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1979-1980, 69 Geo. L.J. 211, 233-49 (1980) [hereinafter cited as Criminal Procedure].


14. Id.

15. Bell v. Wolfish, 441 U.S. 520, 556-57 (1979); United States v. Chamorro, 687 F.2d 1, 2-4 (1st Cir.), cert. denied, 103 S. Ct. 462 (1982); Olson v. Klecker, 642 F.2d...
less, the Supreme Court has recognized that at times, the nature of the object searched, not its location, controls the scope of the search. This Note contends that such recognition is acutely important whenever those objects are private papers, which embody ideas and ex-

1115, 1116-17 (8th Cir. 1981) (per curiam); Bonner v. Coughlin, 517 F.2d 1311, 1317 (7th Cir. 1975); see Lanza v. New York, 370 U.S. 139, 143 (1962) ("[A] jail shares none of the attributes of privacy of a home.").


18. See United States v. Miller, 425 U.S. 435, 442 (1976); Couch v. United States, 409 U.S. 322, 335 (1973); cf. United States v. Ross, 102 S. Ct. 2157, 2172 (1982) (scope of the warrantless search defined by the physical characteristics of the object searched and the places in which there is probable cause to believe that it may be found).

19. Private papers, as used in this Note, include writings that reflect personal thoughts, plans and memories and are meant—at least when written—only for the author's eyes. The term also includes the modern equivalents of these writings, such as tape recordings and videotapes. The essential characteristic shared by these items is that they are manifestations of thought not meant to be revealed to any party at the time they were composed. The most common examples of such documents are diaries and notes. It is clear that diaries enjoy a premium protection from intrusion. Couch v. United States, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting) ("Diaries . . . that record only their author's personal thoughts lie at the heart of our sense of privacy."); United States v. Bennett, 409 F.2d 888, 897 (2d Cir. 1969) ("[W]e shrink from allowing a personal diary to be the object of a search."); united denied, 402 U.S. 984 (1971); United States v. Hinckley, 525 F. Supp. 1342, 1362-63 (D.D.C. 1981) (seizure of diary unreasonable invasion of privacy), aff'd per curiam, 672 F.2d 115 (D.C. Cir. 1982); see Nixon v. Freeman, 670 F.2d 346, 354 (D.C. Cir.) (privacy interest in diary or other personal communications), cert. denied, 103 S. Ct. 445 (1982); Bradley, Constitutional Protection for Private Papers, 16 Harv. C.R.-C.L. L. Rev. 461, 480-81 (1981) (Diary, notes and tape recordings "are nothing less than the record of one's own thinking and should be considered as private as the thoughts themselves."); McKenna, The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment, 53 Ind. L.J. 55, 55 n.1 (1977) (private papers are those that relate to private rights or interests recognized by the Supreme Court to be fundamental); Note, The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States, 95 Harv. L. Rev. 683, 694 n.64 (1982) (Intimate communications like diaries and unmailed letters are "personal papers.") [hereinafter cited as Aftermath]; Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 988-89 (1977) (presumption of privacy attaches to one's diary); cf.
pressions protected under the first amendment. When, as in this instance, the nature of the document itself is relevant, rather than the place in which it is located, the objective portion of the Katz test must incorporate this notion.

This Note first summarizes the status of the fourth amendment reasonable expectation of privacy test and then discusses several ways in which the scope of that expectation has been narrowed. The constitutional status of personal papers is then examined, initially under the fourth amendment, then under the first amendment and finally, under the two amendments in tandem. This Note illustrates the practical application of first amendment interests to the objective reasonableness analysis in three contexts in which objective expectations of privacy are traditionally diminished, concluding that both current case law and the underlying purposes of the first and fourth amendments mandate consideration of these first amendment interests.

I. THE SCOPE OF PROTECTION AFFORDED BY THE FOURTH AMENDMENT

A. Defining the Scope

Until 1967, courts construed the fourth amendment as protecting only tangible items and governing only those intrusions involving an actual physical trespass into a protected area. Messages passing over telephone wires, for example, were not within the protection of the fourth amendment; the interception of such messages was not deemed to be a search. The decision in Katz v. United States explicitly expanded the coverage of the fourth amendment by rejecting the notion that a constitutionally cognizable search required a physical trespass.

Fisher v. United States, 425 U.S. 391, 401 n.7 (1976) ("Special problems of privacy . . . might be presented by subpoena of a personal diary.").


LaFave, supra note 7, § 2.1, at 229; see The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 187 (1968).

389 U.S. at 352-53.
In *Katz*, the FBI’s placement of a wiretap on the outside of a public telephone booth\(^2\) was held to be a search because it was an intrusion into a reasonable expectation of privacy.\(^2\) Because the FBI had neither obtained a search warrant nor met the burden of showing that an exception to the warrant requirement applied,\(^2\) the search was held unconstitutional.\(^2\)

After *Katz*, the threshold question in fourth amendment analysis is whether the individual challenging the alleged search had a reasonable expectation of privacy with respect to the place that was searched.\(^3\) Decisions subsequent to *Katz* have incorporated Justice Harlan’s reference to a place and focused on this expectation of privacy.\(^3\) Some of these courts have concluded that certain areas presumptively afford an individual an objectively diminished reasonable expectation of privacy.\(^3\)

**B. The Scope is Narrowed**

The reasonable expectation of privacy test of *Katz* was adopted to broaden the constitutional protection of individual liberty against searches by the government.\(^3\) Recently, however, courts have moved

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26. Id. at 348.
27. Id. at 359.
28. Id. at 356; see Chimele v. California, 395 U.S. 752, 762 (1969) (burden on those seeking exemption to show the need for it); Bumper v. North Carolina, 391 U.S. 543, 548 (1968) (burden on government to prove individual freely and voluntarily consented to search); United States v. Kelly, 529 F.2d 1365, 1371 (8th Cir. 1976) (burden on government to show applicability of a legitimate exception to the warrant requirement); J. Hall, supra note 2, § 26:28, at 707 & n.18 (survey of federal and state jurisdictions placing burden on government to justify warrantless search by proving applicable exception).
29. 389 U.S. at 357-59.
30. See supra note 2 and accompanying text.
towards constricting the protections of the fourth amendment by reading the two clauses of the fourth amendment disjunctively, and thus construing more narrowly the concept of a reasonable expectation of privacy.\textsuperscript{34} If the two clauses of the fourth amendment are interpreted as separate and distinct restrictions on the power of the state, the scope of protection may be narrowed.\textsuperscript{35} The first clause establishes the right of the people to be secure against unreasonable searches and seizures.\textsuperscript{36} The second clause, which is grammatically disjunctive,\textsuperscript{37} states: "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."\textsuperscript{38}

Although it has long been recognized that some searches require no warrant to be reasonable,\textsuperscript{39} courts have generally adhered strictly to

\textsuperscript{34} Additionally, the "automatic standing" rule established in Jones v. United States, 362 U.S. 257 (1960), overruled, United States v. Salvucci, 448 U.S. 83, 95 (1980), which had permitted defendants charged with crimes of which possession is an element to challenge a search merely by showing they were "legitimately on [the] premises," \textit{id.} at 267, was weakened in the 1978 Supreme Court decision in Rakas v. Illinois, 439 U.S. 128 (1978). The \textit{Rakas} Court shifted fourth amendment standing analysis away from whether the defendant was "legitimately on the premises" to the \textit{Katz} reasonable expectation of privacy test. \textit{id.} at 142-43. The Court thus merged the concept of standing with the underlying substantive fourth amendment rights. \textit{id.} at 140. Because fourth amendment rights are personal and may not be vicariously asserted, \textit{id.}, the Court explained its decision as more truly reflective of the answer to whether the disputed search "infringed an interest . . . which the Fourth Amendment was designed to protect." \textit{id.} The effect of \textit{Rakas}, and the 1980 decision in United States v. Salvucci, 448 U.S. 83 (1980), which explicitly overruled the "automatic standing" doctrine, was to narrow the scope of the fourth amendment itself by reducing the class of individuals that can contest a search and seizure. \textit{See id.} at 89-95; Slobogin, \textit{Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones}, 18 Am. Crim. L. Rev. 387, 388-89 (1981); \textit{Reconsidering Katz}, supra note 33, at 154 n.5.

\textsuperscript{35} McKenna, \textit{ supra} note 19, at 81-82; \textit{see J. Hall, supra} note 2, \textsection 1:3, at 7-8. The Supreme Court has stated: "The Fourth Amendment does not denounce all searches . . . but only such as are unreasonable." Carroll v. United States, 267 U.S. 132, 147 (1925); \textit{Reconsidering Katz}, \textit{ supra} note 33, at 154 n.4.

\textsuperscript{36} U.S. Const. amend. IV.

\textsuperscript{37} Although modern texts show the clauses separated by a comma, 1 Stat. 21 (1789) uses a semi-colon. J. Hall, \textit{ supra} note 2, \textsection 1:15, at 20.

\textsuperscript{38} U.S. Const. amend. IV.

the warrant requirement, subject to the established exceptions. If the clauses of the amendment are interpreted independently, however, a search warrant would not be a prerequisite to a valid search unless the intrusion was first found to be unreasonable under the first clause.

The disjunctive reading has resulted in the expansion of the category of reasonable warrantless searches. Searches of prison cells and their contents have been upheld, even though the exigent circumstances usually required to justify warrantless intrusions were not present, because the intrusion was not considered objectively unreasonable. Similarly, searches of public school lockers have been found constitutional under the fourth amendment because the lockers afford objectively diminished expectations of privacy.

The automobile exception to the warrant requirement has also been expanded. Although it was initially predicated upon an exigent cir-


41. In certain instances, reasonableness, instead of being defined solely by reference to the warrant clause, is determined using a balancing test. Fourth amendment reasonableness is thus not synonymous with the warrant requirement. Stelzner, supra note 40, at 47-48.

42. See Mincey v. Arizona, 437 U.S. 385, 392-93 (1978); McDonald v. United States, 335 U.S. 451, 456 (1948); United States v. Brock, 667 F.2d 1311, 1318 (9th Cir. 1982).


45. Prior to the Supreme Court's decision in United States v. Ross, 102 S. Ct. 2157 (1982), warrantless searches of movable containers located within an automobile were unconstitutional, though the vehicle itself was the subject of a well-established exception to the warrant requirement. Robbins v. California, 453 U.S.
cumstance—the inherent mobility of the automobile—more recently courts have justified the exception by stating that an automobile affords its owner or operator a diminished expectation of privacy. For example, in United States v. Ross, the Court established that because of the lesser expectation of privacy one enjoys in an automobile, the permissible scope of a warrantless search therein was to be guided "by the object of the search and the places in which there is probable cause to believe it may be found." 

In determining whether an objectively reasonable expectation of privacy exists, courts balance the interest of the government in accurate, efficient and safe law enforcement against the interest of the individual in privacy, security and dignity. Decisions that have narrowed the contours of a reasonable expectation of privacy have tended to look only to the individual's privacy interest in the place of the search, and have overlooked the privacy interest in the object itself.

II. PERSONAL PAPERS UNDER THE CONSTITUTION

A. Personal Papers and the Fourth Amendment

Prior to the enunciation of the Katz reasonable expectation of privacy test, private papers occupied a discrete, constitutionally pro-


47. South Dakota v. Opperman, 428 U.S. 364, 367 (1976) ("[T]he expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."); Cardwell v. Lewis, 417 U.S. 533, 590 (1974) (plurality opinion) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."); United States v. Garza-Hernandez, 623 F.2d 496, 500 (7th Cir. 1980) ("[T]he reasonable expectation of privacy that persons may have in their autos is usually of a lesser magnitude than privacy expectations that inhere in other types of property."); see J. Hall, supra note 2, § 9:8, at 281 ("Because of the peripatetic nature of automobiles ... and the fact the interior is commonly subject to view ... the Supreme Court has held that owners and operators of automobiles have a lesser expectation of privacy in them.").
49. Id. at 2172; accord United States v. Rivera, 684 F.2d 308, 310 (5th Cir. 1982).
tected area under the fourth amendment. The Supreme Court continued to recognize the validity of this special protection after Katz. In United States v. Miller, the Court validated, over the petitioner’s fourth amendment claim of privacy, a subpoena directed toward the production of financial records held by a bank. After examining the nature of the documents, the Court was unable to perceive a legitimate expectation of privacy in the contents because the documents were not “confidential communications.” Implicit in the Court’s analysis in Miller is that if the documents had in fact been private papers, they would not have been subject to production, notwithstanding the petitioner’s lack of a reasonable expectation of privacy in the place in which the papers were kept.

51. Prior to Katz, the privacy interests involved in private papers were given special consideration under a rationale outlined in Boyd v. United States, 116 U.S. 616, 622-23 (1886). This special protection afforded private papers was embodied in the “mere evidence” rule. See Gouled v. United States, 255 U.S. 298, 312 (1921), overruled, Warden, Md. Pen. v. Hayden, 387 U.S. 294, 304-06 (1967). The rule forbade seizure of any private papers that were mere evidence and not the instrumentality of a crime. Id. at 309-10.

Although the Supreme Court has examined the nature of the documents demanded in determining the validity of a subpoena, United States v. Miller, 425 U.S. 435, 442 (1976), later cases focus on the reasonable expectation of privacy in the place searched, rather than whether there is an intrusion into a constitutionally protected area, see Bell v. Wolfish, 441 U.S. 520, 556-57 (1979); DiGuiseppe v. Ward, 698 F.2d 602, 605 (2d Cir. 1983); United States v. Hitchcock, 467 F.2d 1107, 1108 (9th Cir. 1972) (per curiam), cert. denied, 410 U.S. 916 (1973). But see United States v. Vallez, 653 F.2d 403, 406 (9th Cir.) (court recognized that prisoners have a reasonable expectation of privacy in a sealed letter but justified warrantless search of letter because guard suspected it may contain escape plans), cert. denied, 454 U.S. 904 (1981).

The Supreme Court discarded the “mere evidence” rule in 1967, Warden, Md. Pen. v. Hayden, 387 U.S. 294, 301-02 (1967), thus enlarging the area of permissible searches. In doing so, the Court cautioned that “the intrusions are nevertheless [to be] made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of ‘a neutral and detached magistrate . . . .’” Id. at 309-10 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)). The Court thus reiterated the concept that the presence of probable cause is insufficient to validate a search; a neutral magistrate must issue a warrant in the absence of a recognized exception to the warrant requirement.


53. Id. at 437. The Court had previously held, in California Banker’s Ass’n v. Shultz, 416 U.S. 21 (1974), “that the mere maintenance of the records [pursuant to statutory requirements] invade[s] no Fourth Amendment right . . . .” Id. at 54. The respondent in Miller argued, however, that the combination of the statutory record-keeping requirements and the issuance of a subpoena permitted the government to circumvent the fourth amendment. 425 U.S. at 441.

54. 425 U.S. at 442.

55. Id.
Many courts, however, have not analyzed the nature of the object searched but have instead focused solely on the place. This analysis sufficiently protects private papers when the place searched is accorded the full protection of the fourth amendment. Nevertheless, when reasonable expectations of privacy in the place are diminished, the proper analysis must include examination of the particular object of the search in order to give substance to the Supreme Court's long-standing protection of private papers under the fourth amendment. In Rakas v. Illinois, the Supreme Court recognized that an objectively reasonable expectation of privacy must have a source outside the fourth amendment. When the object of a search is private papers, that source is the first amendment.

B. Private Papers and the First Amendment

Society's concern for first amendment guarantees is embodied in the "preferred position" these guarantees are afforded in the hierarchy of individual rights. For example, speech may not be subjected to a prior restraint unless it clearly and immediately endangers national security. When the government seeks to silence a speaker or author,

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57. A search of an individual's house for personal papers, for example, requires a warrant because an individual has a reasonable expectation of privacy in his house. See Chimel v. California, 395 U.S. 752, 766-77 (1969); Lanza v. New York, 370 U.S. 139, 142-43 (1962); Johnson v. United States, 333 U.S. 10, 17 (1948); Agnello v. United States, 269 U.S. 20, 32 (1925); United States v. Agapito, 620 F.2d 324, 331 (2d Cir.), cert. denied, 449 U.S. 834 (1980); cf. Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978) ("[T]he preconditions for a warrant—probable cause, specificity with respect to the place to be searched . . . and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.").


59. Id. at 144 n.12; see United States v. Jacobson, 647 F.2d 990, 993-94 (9th Cir.), cert. denied, 454 U.S. 897 (1981); United States v. Mannino, 635 F.2d 110, 114 (2d Cir. 1980).


61. New York Times Co. v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) ("[O]nly . . . proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."); Near v. Minnesota, 283 U.S. 697, 716 (1931) (suggesting a military security exception to the general prohibition against prior restraints).
it bears the heavy burden\textsuperscript{62} of showing that the "substantive evil" is extremely serious and that the "degree of imminence" is extremely high.\textsuperscript{63}

The first amendment also protects freedom of thought.\textsuperscript{64} To make this protection more than a mere facade, personal papers must also enjoy the protections of the first amendment:\textsuperscript{65} "[I]ndividuals [must] have some sanctuary where private reflections and inspirations may be created or recorded without fear that the state will broadcast them."\textsuperscript{66} Even the threat of disclosure of thoughts expressed in private papers may have a chilling effect on their author, and may inhibit cautious thinkers.\textsuperscript{67} As one commentator has noted: "If unpopular statements on subjects like politics and religion are omitted from personal papers out of fear that the government may eventually see

\begin{itemize}
\item \textsuperscript{63} Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978). Although the Supreme Court discredited in Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam), the mechanistic application of the clear and present danger test first articulated by Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919), courts subsequent to Brandenburg continue to employ the clear and present danger test. E.g., Crowder v. Lash, 687 F.2d 996, 1003 (7th Cir. 1982); Kirksey v. City of Jackson, 663 F.2d 659, 661-62 (5th Cir. 1981); Wilkinson v. Skinner, 462 F.2d 670, 672-73 (2d Cir. 1972).
\item \textsuperscript{65} Control over who will have knowledge concerning an individual's life is a basic part of the right to shape the self that one presents to the world. L. Tribe, American Constitutional Law 966 (1978). Certain techniques of information gathering offend the first and fourth amendments. \textit{Id.; see Aftermath, supra} note 19, at 699-700. Thus, while one court has found it contradictory to invoke the first amendment to protect thoughts that were never meant to reach the public forum, DiGuisepppe v. Ward, 698 F.2d 602, 605 (2d Cir. 1983), the intimate nature of private papers requires that they be afforded increased protection. \textit{Aftermath, supra} note 19, at 699-700.
\item \textsuperscript{66} \textit{Aftermath, supra} note 19, at 699 (footnote omitted).
\item \textsuperscript{67} \textit{See id.} at 696; Fisher v. United States, 425 U.S. 391, 420 (1976) (Brennan, J., concurring) ("The ability to think private thoughts, facilitated as it is by pen and paper, and the ability to preserve intimate memories would be curtailed through fear that those thoughts or the events of those memories would become the subjects of criminal sanctions . . . .").
\end{itemize}
them, the values served by the first amendment are unquestionably eroded."

Because of the preferred position accorded first amendment guarantees, the protections afforded by that amendment must not be overlooked when a search is conducted in a place governed by diminished objectively reasonable expectations of privacy. Nevertheless, some courts have presumed that the protections afforded by the two amendments are always coextensive.

**C. The Coextensivity Doctrine**

When the full scope of fourth amendment protection applies, as in a search of an individual's home, the protective zone of privacy afforded by the first amendment is coextensive with that provided by the fourth. In *Zurcher v. Stanford Daily,* the Court of Appeals for the Ninth Circuit held that a search of a newspaper's files pursuant to a warrant had a chilling effect on the freedom guaranteed to the press by the first amendment. The Supreme Court reversed, holding that the Constitution requires only that when first amendment values are at stake, courts apply the warrant requirement with "scrupulous exactitude." According to *Zurcher,* the prior judicial scrutiny required by the fourth amendment sufficiently protects first amendment interests.

Unfortunately, *Zurcher* has been extended to situations in which the fourth amendment does not mandate prior judicial approval of searches. In *Reporters Committee v. American Telephone and Telegraph Co.,* Circuit Judge Wilkey, relying on *Zurcher,* stated that first amendment protections were no greater than those afforded by the fourth amendment, even in situations in which the fourth amendment warrant requirement did not apply.

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68. *Aftermath, supra* note 19, at 696 (footnote omitted).

69. See *supra* note 57 and accompanying text.

70. 550 F.2d 464 (9th Cir. 1977), aff'g per curiam 353 F. Supp. 124 (N.D. Cal. 1972), rev'd, 436 U.S. 547 (1978).

71. *Id.* at 464.


73. *Id.; id.* at 570 (Powell, J., concurring). The Court suggested that if an extra degree of protection was desirable, the legislature was free to provide such special protection. *Id.* at 567. Congress did, in fact, provide this additional protection, in the form of the Privacy Protection Act, 42 U.S.C. § 2000aa (Supp. IV 1980).


75. *Id.* at 1054-60. The fourth amendment did not apply in *Reporters Committee* because the plaintiff journalists had no reasonable expectation of privacy in business records held by a third party. *Id.* at 1043-44; see United States v. Miller, 425 U.S. 435 (1976). Judge Wilkey characterized the plaintiffs' contention as whether journalists enjoy a greater zone of first amendment privacy than other citizens. He concluded that they did not. 593 F.2d at 1054. But see *id.* (first amendment may give
Circuit Judge Robinson, who concurred in part, disagreed with Judge Wilkey's analysis of the interplay of the two amendments.\textsuperscript{76} Judge Robinson recognized that "the analysis appropriate for First Amendment issues concentrates on the burden inflicted on protected activities, and the result may not always coincide with that attained by application of Fourth Amendment doctrine."\textsuperscript{77} Similarly, the dissenting opinion pointed out that Judge Wilkey's reliance on Zurcher was misplaced, because Zurcher turned explicitly on the determination that the prior judicial approval was sufficiently protective, and not on the principle that first amendment rights, like fourth amendment rights, fluctuated depending upon the level of intrusion.\textsuperscript{78} Thus the magnitude of the burden on first amendment rights must be balanced against the legitimate interests of the government.\textsuperscript{79}

The Supreme Court has repeatedly and clearly indicated that first amendment protections do not shrink commensurately with those of the fourth amendment.\textsuperscript{80} Prisoners, for example, have substantial first amendment rights\textsuperscript{81} but their fourth amendment rights are severely diminished in scope.\textsuperscript{82} Similarly, while a public school must operate within the confines of the first amendment,\textsuperscript{83} at least one lower court, although not yet the Supreme Court, has recognized that full fourth amendment protections do not apply in the school environment.\textsuperscript{84}

\textsuperscript{76} Id. at 1071 n.4 (Robinson, J., concurring in part, dissenting in part).
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 1080 (Wright, J., dissenting).
\textsuperscript{79} Id. at 1089-90 (Wright, J., dissenting).
\textsuperscript{80} Competing interests under both the first and fourth amendments are determined with a balancing of interests test, but the relative weight of the factors balanced is determined differently under each. In the fourth amendment area, the touchstone is reasonableness. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); Terry v. Ohio, 392 U.S. 1, 21-22, 27 (1968); Criminal Procedure, supra note 12, at 217. The first amendment however, requires a more stringent test; the government has "the burden of either coming within one of the narrow categorical exceptions [to the first amendment] or showing that the regulation is necessary to further a 'compelling state interest.' " L. Tribe, supra note 65, at 602; see Thomas v. Collins, 323 U.S. 516, 530 (1945) (rational connection between legislation and substantive evil is insufficient); Bridges v. California, 314 U.S. 252, 262-63 (1941) (same).
\textsuperscript{82} Bell v. Wolfish, 441 U.S. 520, 556-57 (1979).
\textsuperscript{83} Board of Educ. v. Pico, 102 S. Ct. 2799, 2813 (1982) (Blackmun, J., concurring) ("beyond dispute that schools . . . must operate within the confines of the First Amendment"); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506 (1969) (Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").
\textsuperscript{84} Doe v. Renfrow, 475 F. Supp. 1012, 1020 (N.D. Ind. 1979), aff'd in part, rev'd in part on other grounds per curiam, 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981).
by blindly adhering to the assumption that fourth amendment procedural requirements always protect substantive first amendment interests, courts overlook the situation in which fourth amendment procedural safeguards are not present because substantive fourth amendment rights are diminished. In the context of private papers, recognizing the distinct interests attached to the papers as opposed to the interests in the place in which the papers are kept is particularly important.

III. Refocusing Fourth Amendment Analysis

A. Recognizing First Amendment Interests

Distinctions have been made between the reasonableness of the fourth amendment expectation of privacy in a particular place and the first amendment right to privacy that attaches to a tangible object within that area. Two recent cases illustrate the disparate results achieved when the place, rather than the object therein, has been the focus of the court's analysis.

In DiGuiseppe v. Ward, the district court found a constitutional violation when a prison guard seized and read the plaintiff's diary during a security check two days after a riot. The court found that the prisoner retained a modicum of fourth amendment rights in prison and that "prisoners both have and should have an expectation [of privacy] in the contents of a personal diary."9

The court evidently recognized the first amendment values implicated by the seizure and reading of the prisoner's diary. The issue was


86. United States v. Rabinowitz, 176 F.2d 732, 735 (2d Cir. 1949), rev'd, 339 U.S. 56 (1950). In his opinion for the Second Circuit, Judge Hand stated that although a privacy interest in a place has been lost, that interest is "altogether separate from the interest in protecting ... papers from indiscriminate rummage, even though both are customarily grouped together as parts of the 'right of privacy.'" Id. Judge Hand's view was ultimately vindicated in Chimel v. California, 395 U.S. 752 (1969), in which the Supreme Court specifically disapproved its decision in Rabinowitz. Id. at 768 (overruling United States v. Rabinowitz, 339 U.S. 56 (1950)). The Court subsequently relied on Judge Hand's statement for its holding in Walter v. United States, 447 U.S. 649, 659 n.13 (1980) (plurality opinion).


88. Id. at 503-04.

89. Id. at 505.
briefed by both sides in the memoranda submitted to the court and the court evaluated the state’s actions under the first amendment doctrine of clear and present danger. Thus, by focusing on both the nature of the prison surroundings and the object of the search, the district court was able to protect the prisoner’s fundamental first amendment privacy interests.

The Court of Appeals for the Second Circuit reversed, finding the clear and present danger standard inapposite to the case. Applying the Katz two-part test, the court rejected arguments that the search implicated first amendment interests, instead holding the search reasonable under the diminished fourth amendment rules applicable in the prison context. By focusing on the place searched and disregarding the object therein, a less protective result than that of the district court was reached.

In contrast is Walter v. United States, in which the Supreme Court recognized and accorded primacy to the presence of first amendment interests in the context of a fourth amendment search. In Walter, FBI agents lawfully acquired possession of a dozen cartons of motion pictures and then viewed these films without first obtaining a

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The Morgan court's opinion was framed in terms of the sixth amendment right to counsel, 516 F.2d at 1372, and therefore does not speak to any possible 'privilege' a diary may enjoy under the first amendment. Cf. Stanley v. Georgia, 394 U.S. 557, 565-66 (1969) (controlling content of person's thoughts is wholly inconsistent with the first amendment). The Supreme Court, in Wolff v. McDonnell, 418 U.S. 539 (1974) stated that the opening of a prisoner's incoming mail in the presence of the inmate would not constitute censorship in violation of the first amendment unless the mail was to be read as well. See id. at 577. Thus, contrary to the government defendants' assertion in DiGuiseppe, the inference may be drawn that the actual reading of mail may indeed impinge on the first amendment.

91. DiGuiseppe v. Ward, 514 F. Supp. 503, 505 (S.D.N.Y. 1981) (further search proper only if it was reasonable to expect that diary contained information concerning imminent danger), rev'd, 698 F.2d 602 (2d Cir. 1983).


93. See id. at 605.

94. Id. at 605. The DiGuiseppe court applied Bell v. Wolfish, 441 U.S. 520, 556-57 (1979) to determine the reasonableness of the search. 698 F.2d at 605. Bell used the reasonable expectation of privacy test and determined that any reasonable expectation of privacy retained would necessarily be of a diminished scope in the prison environment. 441 U.S. at 557.

warrant.96 Reversing the defendants' conviction on obscenity charges, the Court held the warrantless screening of the films to be a violation of their fourth amendment rights.97

Although nongovernment parties opened the containers without viewing the film, thereby partially frustrating the defendants' expectation of privacy, the defendants' expectation of privacy in the films was not defeated.98 The authority of an officer to possess a package is distinct from his authority to examine its contents, which derives only from a search warrant or an exception thereto. The Walter Court stated that "[w]hen the contents of the package are . . . arguably protected by the First Amendment . . . it is especially important that this requirement be scrupulously observed."99

B. First Amendment Protections As a Factor in Objective Reasonableness

Under the test employed subsequent to Katz v. United States,100 an individual must first have manifested a subjective expectation that the private paper searched would remain confidential and must have acted in accordance with this belief.101 It is tautological to state that an individual has a subjective expectation of privacy in a diary or personal notes.102 The expectation of privacy manifested must also be objectively reasonable; one that society is prepared to recognize.103 The preferred status of the first amendment in the hierarchy of personal rights104 clearly indicates such a recognition.105

96. Id. at 651 (plurality opinion). The cartons in which the films were packed had been opened by a private party, but that party did not view the films. Id. at 656 (plurality opinion). Furthermore, the labels on the film boxes gave them probable cause to believe that the films were obscene. Id. at 656 (plurality opinion).

97. Id. at 654 (plurality opinion)(reversing United States v. Sanders, 592 F.2d 788 (5th Cir. 1979)).

98. Id. at 658-59 (plurality opinion); accord United States v. Haes, 551 F.2d 767, 771 (8th Cir. 1977); see United States v. Barry, 673 F.2d 912, 920 (6th Cir.), cert. denied, 103 S. Ct. 238 (1982).


100. 389 U.S. 347 (1967).

101. See supra note 4 and accompanying text.


103. See supra note 5 and accompanying text.

In places presently regarded as affording a diminished expectation of privacy, objects protected by the first amendment, such as personal papers, must be analyzed separately. Such analysis is in accord with that employed by the Supreme Court in United States v. Miller, in which the Court considered the alleged confidentiality of the documents searched in determining the protections to be afforded them.

Under the proper fourth amendment analysis in the context of such a diminished expectation, the court must ascertain whether the object searched in that place is protected by the first amendment. If a first amendment expectation of privacy exists, the fourth amendment's warrant requirement applies, even if a warrant would not otherwise be required to search the place in which the object is located. Addi-

105. Additional factors in the reasonable expectation of privacy test include: 1) a common-law property interest, United States v. Briones-Garza, 680 F.2d 417, 420 (5th Cir.), cert. denied, 103 S. Ct. 229 (1982); United States v. Haydel, 649 F.2d 1152, 1154-55, modified on other grounds per curiam, 664 F.2d 84 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982); 2) the power to exclude others, Rakas v. Illinois, 439 U.S. 128, 149 (1978); and 3) possession of the area searched or the property seized, United States v. Lochan, 674 F.2d 960, 965 (1st Cir. 1982).

106. The presence of first amendment interests "calls for a higher hurdle in the evaluation of reasonableness." Roaden v. Kentucky, 413 U.S. 496, 504 (1973); see United States v. Kelly, 529 F.2d 1365, 1372 (8th Cir. 1976) ("The Fourth Amendment should be read in conjunction with the First Amendment, rather than 'in a vacuum.'") (quoting Roaden v. Kentucky, 413 U.S. 496, 501 (1973)). Furthermore, "[I]logically, a person's protectable expectation of privacy must extend both to places and objects." Id. at 1369 (emphasis in original).

McKenna discusses the need in fourth amendment analysis for a more protective standard and a hierarchical view, which he describes as "content-based." McKenna, supra note 19, at 71. The author calls for a higher standard of probable cause. Id. at 73-76. This Note, however, recognizes that some intrusions do not require probable cause to be legal and therefore the first amendment element must be introduced into the inquiry at an earlier stage. McKenna realizes the importance of this result, id. at 81-84, but his proposal to ameliorate the problems was formulated prior to the Supreme Court's reversal of the Ninth Circuit in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), and therefore his reliance on the Ninth Circuit's holding, McKenna, supra note 19, at 71, 83, is misplaced.


108. See supra notes 52-55 and accompanying text.

109. This is not to say, however, that the court should focus exclusively on the nature of the item. Rather, the nature of the item should be examined in conjunction with an examination of the expectations of privacy in the place within which the item is located. Focusing exclusively on the nature of the item may, in fact, limit the protection of the fourth amendment rather than enlarge it, for an individual cannot be said to have a reasonable expectation of privacy in contraband. United States v. Emery, 541 F.2d 887, 890 (1976), overruled on other grounds per curiam, United States v. Miller, 636 F.2d 850, 854 (1st Cir. 1980). The conclusion then would be that all searches for illegal substances are not within the fourth amendment. United States v. Brock, 667 F.2d 1311, 1320 n.9 (9th Cir. 1982).
tionally, all of the exceptions to the warrant requirement other than that of plain view, apply.

The plain view exception to the warrant requirement, which permits police who are legitimately on the premises, and who inadvertently discover an object, the incriminating nature of which is immediately apparent, to seize it without first obtaining a warrant, will seldom apply. The incriminating nature of private papers will not be immediately apparent to officers without their first being read. The reading of papers, as opposed to the mere seizing of them, is identical to the activity of viewing films without a warrant, a practice held unconstitutional in Walter v. United States.

If the police establish that the papers are in imminent danger of destruction they may hold them, without reading them, until a warrant is obtained. The only conceivable imminent danger that would justify a warrantless reading of them would be the reasonable belief of the police that the papers contained information relevant to an ongoing or future crime. The issuance of the warrant must be based

110. See supra note 12 and accompanying text.
111. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) (plurality opinion); Harris v. United States, 390 U.S. 234, 236 (1968) (per curiam). A police officer may be legitimately on the premises if he has a warrant for another object, is in hot pursuit, or is searching incident to a lawful arrest. J. Hall, supra note 2, § 3:13, at 68; id. § 3:12, at 66.
112. Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971) (plurality opinion); J. Hall, supra note 2, § 3:13, at 68.
117. Generally, the emergency exception to the warrant requirement is applied when a suspect is fleeing or likely to take flight, the search is of a movable vehicle or the contraband is threatened with removal or destruction. Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); Warden, Md. Pen. v. Hayden, 387 U.S. 294, 298-300 (1967); United States v. Jeffers, 342 U.S. 48, 51-52 (1951); Johnson v. United States, 333 U.S. 10, 14-15 (1948).
upon the knowledge the police had prior to the seizure, not based upon information acquired in the course of reading them.\textsuperscript{119}

Moreover, the Supreme Court has suggested that the plain view doctrine will not support the seizure of materials presumptively entitled to first amendment protection.\textsuperscript{120} Lower courts have clearly rejected the plain view exception in first amendment contexts.\textsuperscript{121} This view is in accord with the Supreme Court’s decision in \textit{Roaden v. Kentucky},\textsuperscript{122} in which the Court recognized that fourth amendment doctrines applicable to one type of material may be unreasonable in another setting.\textsuperscript{123}

C. Applying the First Amendment Factor in the Objective Reasonableness Test

First amendment interests must be most carefully safeguarded when objects are located in places in which fourth amendment protections are diminished. Three such settings are the prison,\textsuperscript{124} the public school\textsuperscript{125} and the automobile.\textsuperscript{126}

The Supreme Court has recognized that a prisoner’s first amendment rights, though necessarily restricted by penological requirements, do not stop at the prison gate.\textsuperscript{127} A prisoner’s fourth amend-

\begin{footnotes}
\item[119] Andresen v. Maryland, 427 U.S. 463, 492-93 (1976) (Brennan, J., dissenting); Terry v. Ohio, 392 U.S. 1, 21-22 (1968); McKenna, supra note 19, at 79 n.124; see McCray v. Illinois, 386 U.S. 300, 304 (1967).
\item[120] Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 & n.5 (1979). Because the material portions of the document will not become apparent until and unless the private paper is read, allowing the plain view exception to govern in this context violates the proscription against the general search warrant. Stanley v. Georgia, 394 U.S. 557, 571-72 (1969) (Stewart, J., concurring); Stanford v. Texas, 379 U.S. 476, 480 (1965); Marron v. United States, 275 U.S. 192, 196 (1927); Comment, “Plain View”—Anything But Plain: Coolidge Divides the Lower Courts, 7 Loy. L.A.L. Rev. 489, 500-02 (1974).
\item[121] United States v. Sherwin, 572 F.2d 196, 199 (9th Cir. 1977), cert. denied, 437 U.S. 909 (1978); United States v. Kelly, 529 F.2d 1365, 1372 (8th Cir. 1976); accord Parish of Jefferson v. Bayou Landing Ltd., 350 So. 2d 158, 165 (La. 1977); cf. United States v. Underwood, 693 F.2d 1306, 1314 n.26 (9th Cir. 1982) (“The Supreme Court has recognized only one exception to the search warrant requirement for nonconsensual law enforcement entries into private residences, and that is when exigent circumstances justify an entry.”).
\item[122] 413 U.S. 496 (1973).
\item[123] \textit{Id.} at 501.
\item[124] See supra note 15.
\item[125] See supra note 16.
\item[126] See supra note 17.
\end{footnotes}
ment rights, however, are diminished because he has no reasonable expectation of privacy in his jail cell. The treatment accorded first amendment interests by the district court in DiGuiseppe both properly protected the prisoner's interests and furthered the interest of society in rehabilitating inmates. This dichotomy should be incorporated into any determination of the objective reasonableness of a prisoner's expectation of privacy in his personal papers.

Similarly, although a public school student has no objectively reasonable expectation of privacy in his locker, the first amendment rights of students do not stop at the schoolhouse gate. A court considering the legality of a locker search involving an examination of private papers must use the first amendment as a factor in determining the objective reasonableness of an expectation of privacy in those papers. This focus on the object searched, in addition to the place, would give substance to the often-quoted phrase that schools are "educating the young for citizenship [and must scrupulously protect the] Constitutional freedoms of the individual . . . and teach youth [not] to discount important principles of our government as mere platitudes." Because there is no well-established, specific exception
to the warrant requirement for schools, once courts recognize that a student has an objectively reasonable expectation of privacy in the diary within his locker, school authorities will almost always need a warrant to search a diary found therein. This would change the minimum standard for this intrusion from the reasonable suspicion standard that now governs to one of probable cause.

In the context of an automobile search, probable cause is currently required for a warrantless search of a car and its contents. If the police are legitimately searching a car and inadvertently discover a diary, they would, arguably, be permitted under current law to read it because of the diminished expectation of privacy afforded by a car. If, however, the court looks beyond the place searched to the object, and incorporates the first amendment as a factor in its analysis, a warrant would be required before the police read the diary.

Fourth amendment protections for private papers based on first amendment interests will not unduly burden law enforcement ef-
A far heavier burden is currently imposed when the government seeks a warrant to search for large quantities of allegedly obscene materials for the sole purpose of destroying them. In such a situation, the Supreme Court has held that a pre-seizure adversarial hearing is required to avoid abridging the right of the public to unobstructed circulation of nonobscene books. If the court determines that the materials are in fact obscene, they are outside the scope of the first amendment and a warrant will be issued. This procedural requirement is absent, however, when the materials sought are narcotics or gambling paraphernalia, which are plainly outside the scope of the first amendment. Similarly, in situations in which privacy expectations are diminished, officers may look for contraband without first obtaining a warrant; they may riffl e a prisoner's diary or a


Even when police are attempting to seize a single copy of an allegedly obscene film for the bona fide purpose of using it as evidence in a criminal proceeding, the first amendment requires a prompt post-seizure adversarial hearing and permitting the exhibitor to continue showing the film until that hearing is held. 413 U.S. at 492-93; G.I. Distribs. v. Murphy, 490 F.2d 1167, 1168 (2d Cir. 1973), cert. denied, 416 U.S. 939 (1974).


Some commentators have suggested that private papers should be absolutely immune from seizure, with or without a warrant, because of the magnitude of the intrusiveness of such a search. See, e.g., J. W. LaFave, supra note 7, § 2.6, at 395-96; T. Taylor, supra note 20, at 63-71. Proper consideration of the merits of such a proscription is beyond the scope of this Note.


student's notebook to see if the contraband is concealed therein but they may not, without first obtaining a warrant, read the material seized.

**Conclusion**

Private papers unquestionably enjoy the protection of the first amendment. This protection, however, is not adequately ensured under current fourth amendment analysis. This analysis requires a threshold determination whether a reasonable expectation of privacy has been infringed upon. In part, this determination turns on whether the expectation manifested is one society regards as reasonable. With respect to private papers, the protections afforded by the first amendment are evidence of society's regard for such values.

Application of the first amendment as a factor in determining objective reasonableness requires that courts look beyond the expectation of privacy in the place wherein the object is located, to the expectation of privacy associated with the object itself. Proper incorporation of the first amendment factor at the threshold stage of fourth amendment inquiry will more fully serve the underlying purposes of both these amendments.

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