Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, a Man's Home Is His Fort

Richard L. Aynes
NOTES

Katz and the Fourth Amendment:
A Reasonable Expectation of Privacy
or,
A Man’s Home Is His Fort

No doubt it is comforting to be told that one’s privacy is as fully protected in a public telephone booth as it is at home. But it is less reassuring to realize that one’s privacy is no better protected at home than in a public telephone booth.¹

THE INTERPRETATION OF FOURTH AMENDMENT rights and their application to individual situations has been a troublesome problem even for the United States Supreme Court.² The Court itself has recognized that the translation of fourth amendment protection from an abstract principle into workable guidelines has been a “difficult task” over which it has been divided for many years.³

While there are a great many cases and commentaries treating fourth amendment rights, little attention has been given to the circumstances that must exist in order for it to be said that a search and seizure has taken place.⁴ The purpose of this note is to explore the issues involved in determining when the conduct of law enforcement officers constitutes a search and seizure.⁵ Consideration will be given to Katz v. United States,⁶ which established the test to be applied in

² State v. King, 191 N.W.2d 650, 654 (Iowa 1971).
⁴ This issue has received attention in Olmstead v. United States, 277 U.S. 438 (1928) and Silverman v. United States, 365 U.S. 505 (1961).
⁵ There is both conflict and uncertainty over the conduct encompassed by the words “search” and “seizure”—especially as they relate to aural and visual intrusions. The issues involved are beyond the scope of this note and the use of terms such as “search and seizure” and “fourth amendment rights” is an attempt to avoid this problem.
making this determination; to the application of *Katz* and its effect upon fourth amendment protections; to alternatives for the preservation of fourth amendment rights; and to the necessity for stringent enforcement of fourth amendment prohibitions.

**Katz and the Fourth Amendment**

The fourth amendment guarantees protection against unreasonable searches and seizures. Prior to *Katz*, the determination of fourth amendment rights involved two central questions. First, was there a governmental intrusion? Second, if there was an intrusion, was the area which was invaded one which was constitutionally protected?

The first question — whether an intrusion had in fact taken place — was given consideration only in wiretapping cases, and then only to a limited extent. But two essential elements of a search and seizure were set forth in *Olmstead v. United States*, where fourth amendment protection was said to apply only where there had been a physical trespass and then only if material things had been seized. In *Silverman v. United States*, these requirements were liberalized to require an actual intrusion in place of a physical trespass and to include intangibles within the scope of the fourth amendment.

To answer the second question a determination of constitutionally protected areas was made on an area-by-area basis. In this way a home, a business office, a store, a hotel room, an apartment, an automobile, and a taxicab were all determined to be constitutionally protected areas. In the same manner, it was settled that an open field

---

7 U.S. CONST. amend. IV.

8 There is, of course, the third question as to the reasonableness of a search and seizure which is determined to have taken place in a constitutionally protected area. But the discussion of this aspect of fourth amendment considerations is outside the scope of this note.


10 277 U.S. 438 (1928)

11 *Id.* at 464.

12 *Id.*


14 *Id.*

15 *Id.* at 512.


17 *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

18 *Amos v. United States*, 255 U.S. 313 (1921).


was not constitutionally protected\textsuperscript{23} and dicta suggested that a jail lacked the particular qualities necessary to invoke the protection of the fourth amendment.\textsuperscript{24}

It was in this historical context that \textit{Katz v. United States}\textsuperscript{25} was decided. The petitioner, Katz, had been convicted of transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute. Evidence introduced at trial included telephone conversations of the petitioner overheard by F.B.I. agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which the petitioner had placed his calls.

The Court seemed to entirely ignore the arguments of the petitioner and the government as to whether a telephone booth could be a constitutionally protected area.\textsuperscript{26} The Court indicated that there were no specific areas which could receive constitutional protection because the fourth amendment "protects people, not places."\textsuperscript{27} Thus, there are no constitutionally protected areas, only constitutionally protected people. Therefore, it would seem that the second question, is the area one which enjoys constitutional protection, was abandoned under \textit{Katz}.

But \textit{Katz} still required an answer to the first question: whether there was in fact an intrusion which amounted to a search and seizure. In making this determination in \textit{Katz} the Court concluded that there was a "'search and seizure' within the meaning of the Fourth Amendment" because the government's activities in electronically listening to and recording the petitioner's conversations violated "the privacy upon which he justifiably relied . . . ."\textsuperscript{28}

Thus, the test which \textit{Katz} sets forth to be used in determining when governmental actions constitute a search and seizure is whether the individual in question justifiably relied upon the privacy which was invaded.\textsuperscript{29} This test may be divided into two parts. First, was

\textsuperscript{23} Hester v. United States, 265 U.S. 57 (1924).
\textsuperscript{25} 389 U.S. 347 (1967).
\textsuperscript{26} \textit{Id.} at 349-351.
\textsuperscript{27} \textit{Id.} at 351.
\textsuperscript{28} \textit{Id.} at 353.
\textsuperscript{29} Other "tests" or definitions of searches and seizures typically include the intent of the government officer and, in regard to searches, some type of exploratory investigation. See United States v. Haden, 397 F.2d 460, 465 (7th Cir. 1968); Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957); United States v. Lodahl, 264 F.Supp. 927, 928 (D.Mont. 1966); United States v. Strickland, 62 F.Supp. 468, 471 (W.D.S.C. 1945); People v. Eddington, 23 Mich.App. 210, 225, 178 N.W.2d 689, 693 (1970); MODEL CODE OF PREARRAIGNMENT PROCEDURES § 88 1.01.
there in fact reliance upon privacy? Second, if there was reliance, was it justifiable? This is essentially the twofold requirement articulated by Mr. Justice Harlan in his concurring opinion:

... first... a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that expectation [must] be one that society is prepared to recognize as "reasonable."  

This test is to be applied without regard to the law of trespass because "the reach of the [Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion in any given area."  

**Katz Applied: "A Man's Home Is His Fort"**

The reaction of the commentators to *Katz* was favorable, to say the least. It was said that "[t]he rationale adopted by the Court is sound..." and that the decision was

... a correct interpretation of the fourth amendment. It does nothing more than preserve a person's fourth amendment right and prevent encroachments by the police... 

Indeed, *Katz* was said to represent "one of the advancing steps in the protection of what has been called 'the right of privacy.'" And Professor Samuel Dash, Director of the Institute of Criminal Law and Procedure at Georgetown University, found that because *Katz* and *Berger v. New York* had brought electronic surveillance within the purview of the fourth amendment, they were "landmark decisions, which should give comfort to a nation of free people."  

But it is important to realize that *Katz* did not merely extend fourth amendment protection to electronic surveillance. By redefining the basis upon which it could be said that a search and seizure had taken place, *Katz* not only extended fourth amendment protection to electronic surveillance situations, but also potentially altered all future applications of fourth amendment rights regarding searches and seizures.

---


31 389 U.S. at 353.


While it was initially felt that *Katz*’s redefinition would create a predictable approach to resolving search and seizure questions, in fact *Katz* has in some instances created confusion among the courts faced with deciding fourth amendment search and seizure issues. Nowhere is this confusion more evident than in the cases in which government agents have physically intruded into individuals’ homes. In spite of the specific language of the fourth amendment, and long-established precedent preventing the search of an individual’s home without a search warrant,37 at least two attempts at applying *Katz* to physical intrusions into individuals’ homes have resulted in findings that a physical intrusion into an individual’s home did not amount to a search and seizure.38 Furthermore, the case-by-case approach of determining when a search and seizure has occurred, as introduced by *Katz*, has produced numerous conflicts among the various courts as to whether a particular type of conduct amounts to a fourth amendment violation.39

Nevertheless, while there is confusion in some instances, an analysis of the case law since *Katz* reveals a general indication that certain expectations are justifiable. There is a consistent line of decisions finding a justifiable expectation of privacy against physical intrusions into one’s home,40 apartment,41 dormitory room,42 and of-


38 *People* v. *Mason*, 5 Cal. 3d 759, 97 Cal.Rptr. 302, 488 P.2d 630 (1971) (since the terms of probation provided for warrantless "searches," there was no subjective expectation of privacy against physical entry and hence no search); *State* v. *Iverson*, 187 N.W.2d 1 (N.D.), cert. denied, 404 U.S. 956 (1971) (since no one was in the house at the time of entry there was no intrusion upon privacy and hence no search). In a subsequent proceeding, the federal district court indicated that it did not find it necessary to comment on North Dakota’s "erroneous interpretation" of *Katz*. *Iverson* v. North Dakota, 347 F.Supp. 251, 259 (D.N.D. 1972).

39 For example, compare *State* v. *Iverson*, 187 N.W.2d 1 (N.D.), cert. denied, 404 U.S. 956 (1971), with *United States* v. *Rubin*, 343 F.Supp. 625 (E.D.Pa. 1972) (fourth amendment protection applies to a man’s home, even when the house is unoccupied) and *People* v. *Krivda*, 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971) (justifiable expectation of privacy in garbage continues until it has lost its identity by being commingled with other garbage) and with *Croker* v. *State*, 477 P.2d 122 (Wyo. 1970) (justifiable expectation of privacy in garbage ends when it is removed from owner’s premises).


fice. Further, individuals occupying public restrooms are said to enjoy a reasonable expectation of privacy against both physical intrusion and surreptitious surveillance. On the other hand, the courts have uniformly rejected all claims to a reasonable expectation of privacy in jails, open fields, and yards.

While the distinctions are not as clear as in the area of physical intrusions into individuals’ homes, similar generalizations may be made for other areas. Thus, the courts have determined that there is a justifiable expectation of privacy in material sent through the mails, items stored in rented lockers, and in the contents of one's

45 People v. Metcalf, 22 Cal.App. 3d 20, 98 Cal. Rptr. 925 (1971) (evidence of a public policy against clandestine observations of public restrooms was found in the state statutes); State v. Bryant, 177 N.W.2d 800 (Minn. 1970) (concealed surveillance through a ceiling ventilar); Buchanan v. State, 471 S.W. 2d 401 (Tex. Crim. App. 1971) (upheld surreptitious surveillance where stalls had no doors, but found it violative of the fourth amendment where the stalls had doors). But that expectation of privacy can be defeated by putting restrooms to uses for which they were not intended. United States v. Smith, 293 A.2d 856 (D.C. App. 1972) (two men in one pay stall); Kirsch v. State, 10 Md. App. 565, 271 A.2d 770 (1970) (three men occupying a restroom at a gas station for over thirty minutes).
46 United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973) (documents hidden in cell); Haplin v. Superior Ct., 20 Cal. App. 3d 223, 97 Cal. Rptr. 402 (1971), rev’d on other grounds, 6 Cal.3d 885, 101 Cal. Rptr. 375, 459 P.2d 1295 (1972) (telephone conversation); People v. Brooks, 51 Ill. 2d 156, 281 N.E.2d 326 (1972) (conversation overheard). It has been suggested that “strong claims” could be made that a justifiable expectation of privacy exists, People v. Santos, 26 Cal. App. 3d 397, 102 Cal.Rptr. 678 (1972), especially by an attorney who was working with his client on a pending case. Haplin v. Superior Court, supra.
48 People v. Bradley, 1 Cal. 3d 80, 81 Cal. Rptr. 457, 460 P.2d 129 (1969) (marijuana growing under fig tree near landlord’s backdoor and tenant’s door); People v. Ortega, 485 P.2d 894 (Colo. 1971) (narcotics hidden in a weeded area behind an apartment building); contra, Wartenburg v. United States, 388 F.2d 853 (9th Cir. 1968) (Christmas trees in the parking lot of the motel where the defendant had his residence).
garbage containers. But "reasonable" expectations of privacy do not extend to abandoned property, goods under bailment to another, or items which have been sold. The decisions also conclude that there exists no expectation of privacy, which society would deem reasonable, in the financial records of a company in bankruptcy, the records of long-distance phone calls, the vehicle identification number of an automobile, or an attorney's social security number.

The courts agree that there is no fourth amendment protection against visual intrusions into dwellings or other buildings. Moreover, the conduct of looking into a building will not be changed into


52 United States v. Edwards, 441 F.2d 749 (5th Cir. 1971) (automobile abandoned during chase); United States v. Colbert, 474 F.2d 174 (5th Cir. 1973) (brief cases which defendants claimed did not belong to them); see United States v. Abbarno, 342 F.Supp. 599 (W.D.N.Y. 1972) (items locked in a room not covered by the original lease, after the lease had expired); People v. Maltz, 14 Cal.App. 3d 371, 92 Cal.Rptr. 216 (1971) (contraband in a hole in the garage of another person).


54 Brown v. Brierley, 438 F.2d 954 (3d Cir. 1971) (ballistics test made on a gun sold to a police officer).

55 Kroll v. United States, 433 F.2d 1282 (5th Cir. 1970).

56 United States v. Fithian, 452 F.2d 205 (9th Cir. 1971).

57 United States v. Powers, 439 F.2d 373 (4th Cir. 1971), cert. denied, 402 U.S. 1011 (1971); United States v. Polk, 433 F.2d 644 (5th Cir. 1970); United States v. Johnson, 431 F.2d 441 (5th Cir. 1970). But it has been suggested that stopping an automobile to inspect its vehicle identification number may be an intrusion upon the personal privacy of the driver. United States v. Polk, supra.


59 United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971) (nine inch gap between the doors of a garage); United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971) (uncovered garage window); United States v. Vilhott, 323 F.Supp. 425 (S.D.N.Y. 1971) aff'd in part, 425 F.2d 1186 (2d Cir. 1971) (gaps between boards covering garage window); Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969) (open bathroom window in motel); People v. Beruto, 71 Cal. 89, 77 Cal. Rptr. 89, 77 Cal. Rptr. 217, 453 P.2d 721 (1969) (aperture in curtains over window); People v. McGahey, 500 P.2d 977 (Colo. 1972) (uncovered front window); State v. Clarke, 242 So.2d 791 (Fla. App. 1970) (uncovered window open to view from fire escape); see United States v. Elder, 446 F.2d 587 (9th Cir. 1971) (tent); contra, Texas v. Gonzalez, 388 F.2d 145 (5th Cir. 1968) (side and back windows of a house); Lorenzana v. Superior Ct., (Continued on next page)
a search and seizure simply because of the use of binoculars\textsuperscript{60} or artificial light.\textsuperscript{61} In spite of conflict in other areas, the concensus of opinion is that there is no justifiable expectation of privacy against eavesdropping.\textsuperscript{62} Further, though Katz demonstrated that there is a protectable expectation of privacy against electronic eavesdropping,\textsuperscript{63} the Supreme Court has determined that such an expectation does not exist where one party to the overheard conversation gives his consent to such eavesdropping.\textsuperscript{64}

A careful comparison of the preceding cases with the purpose of the fourth amendment raises serious doubt as to how much "comfort" Katz in fact gives Mr. Dash's "nation of free people." Mr. Justice Stewart, writing for the majority in Silverman, pointed out that at the very core of the fourth amendment "stands the right of a man to retreat into his own home and there be free from unreasonable intrusion."\textsuperscript{65} Justice Stewart did not describe the kind of house one would be required to own in order to enjoy that freedom from intrusion, but that information is provided by the courts which have applied Katz.

To begin with, such a house would have to be isolated, away from both the street\textsuperscript{66} and the proximity of other houses.\textsuperscript{67} If the house were to have windows, they could not be left uncovered without

(Continued from preceding page)


\textsuperscript{60} 48 A.L.R. 3d Observation Through Binoculars as Constituting Unreasonable Search, 1178, 1181, collects the cases on binoculars used in searches.


\textsuperscript{62} Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969) (listening through motel door from hallway); United States v. Llanes, 398 F.2d 880 (2d Cir. 1968), cert. denied, 393 U.S. 1038 (1968) (listening through improperly hung apartment door from public hallway); United States v. Perry, 339 F.Supp. 209 (S.D. Cal. 1972) (listening through interconnecting doors between motel rooms); People v. Foster, 19 Cal. 3d 649, 97 Cal. Rptr. 94 (listening through apartment door from hallway); People v. Todd, 26 Cal. App.3d 15, 102 Cal. Rptr. 539 (1972) (recording conversations of suspects who were alone in police car); People v. Guerra, 21 Cal. App. 532, 98 Cal. Rptr. 627 (1971) (listening by placing ear against apartment door); Ray v. United States, 288 A.2d 239 (D.C. App. 1972) (listening from adjoining apartment room); see United States v. Fuller, 441 F.2d 756 (4th Cir. 1971) (telephone booth); contra, United States v. Case, 435 F.2d 766 (7th Cir. 1970) (government agents eavesdropping from area not open to the public).

\textsuperscript{63} 389 U.S. 347 (1967).

\textsuperscript{64} United States v. White, 401 U.S. 745 (1971).

\textsuperscript{65} 365 U.S. 505, 511 (1961).

\textsuperscript{66} See People v. Maltz, 14 Cal. App.3d 381, 92 Cal. Rptr. 216 (1971).

\textsuperscript{67} See People v. Sirhan, 7 Cal.3d 710, 102 Cal. Rptr. 385, 497 P.2d 1121 (1972).
abandoning fourth amendment protection.\textsuperscript{68} It would not be enough to merely construct windows that no one could see through from the ground level, because ladders or adjoining structures could be used as observation points.\textsuperscript{69} Nor would it be possible to make any provision for sunlight by openings or windows in the roof, because of the possibility of using a helicopter as a means of observation.\textsuperscript{70}

Even an extensive area of land surrounding the house would not prevent government agents from trespassing onto the land and peeping through the windows, because the fourth amendment prohibits unreasonable searches and seizures, not trespasses.\textsuperscript{71} Furthermore, agents could survey the house from positions off the premises by making use of telescopes and binoculars.\textsuperscript{72}

Thus it becomes clear that the windows must be covered. But curtains would not be enough, because any opening, no matter how small or how inadvertent, would destroy any hopes of maintaining a reasonable expectation of privacy.\textsuperscript{73} Even boarding up the windows would not be protection enough, because any small crack could be considered an invitation for agents to peek into the house.\textsuperscript{74} None of this would change, of course, simply because of darkness. There could be no opening of the gates, nor uncovering of the windows, because the surveillance could continue with the use of artificial light.\textsuperscript{75} Apparently, the only way to maintain privacy would be to construct a windowless house.

However, even though the house may be windowless, there is still the problem of the door, which must be perfectly hung.\textsuperscript{76} Furthermore, the entire house, including the door, must be soundproof, because any noise or conversations that could be heard from outside, even by placing one's ear against different parts of the house, would not be protected.\textsuperscript{77}


\textsuperscript{74} See United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971).


\textsuperscript{76} See United States v. Llanes, 398 F.2d 880 (2d Cir. 1968); cert. denied, 393 U.S. 1032 (1968).

\textsuperscript{77} See People v. Guerra, 21 Cal. App.3d 534, 98 Cal. Rptr. 627 (1971).
Finally, the house could never be left empty without abandoning fourth amendment protection,\(^7\) and the inhabitant of the house might well be required to live alone in order to maintain his expectation of privacy.\(^7\)

Thus, we have the specter of a fourth amendment which protects any man who retreats into his home to be free from unreasonable intrusion. Any man, that is, who is wealthy enough to afford a windowless, soundproof house, built on an extensive area of land, and surrounded by high fences,\(^8\) and a man who is willing to live the life of a hermit, staying inside his house at all times, prepared to take affirmative action to counter any new technological methods of intrusion with which the government might be equipped.

Alternatives to Life in a Fort

Neither *Katz* nor the fourth amendment requires life in a fort in order to preserve one's security against arbitrary governmental intrusion. There are a number of alternatives by which the privacy and security guaranteed under the Constitution can be safeguarded. These alternatives include the recognition of a constitutionally-protected general right of privacy; the use of an objective emphasis in determining whether there exists a justifiable expectation of privacy; recognition that different expectations of privacy may be justifiable in regard to different classes of people, and different types of intrusions; and the stringent enforcement of the limitations of the Plain View Doctrine.

A General Right of Privacy

It is at least arguable that there is in fact a general right of privacy guaranteed by the Constitution that prohibits much of the surreptitious surveillance which has been appoved in the name of *Katz*. Although Mr. Justice Stewart, writing for the majority in *Katz*, expressed the opinion that there is no general right of privacy guaranteed by the Constitution,\(^8^1\) this disclaimer is questionable.

In the recent abortion decision,\(^8^2\) Mr. Justice Blackmun collected the cases dealing with the right of privacy, indicating that the court or individual Justices had found at least the roots of a right of

---


\(^7\) See People v. Sirhan, 7 Cal.3d 710, 102 Cal. Rptr. 385, 497 P.2d 1121 (1972).


\(^8^1\) 389 U.S. at 350-351.

privacy in the first amendment, in the fourth and fifth amendments, in the penumbras of the Bill of Rights, in the ninth amendment, and in the concept of liberty guaranteed by the first section of the fourteenth amendment.

It seems rather anomalous that the unwritten, unspoken right of privacy is pervasive enough to extend constitutional protection to marriage, procreation, a woman’s decision on the termination of a pregnancy, family relationships, and childrearing and education, but lacks the potency to protect the right of a family to be free from surreptitious surveillance in its own home. Indeed, it is questionable whether these aspects of personal privacy involving family life do in fact enjoy meaningful protection when government agents, without cause, without reason, and without prior judicial supervision, can intrude upon the privacy of any home and place such home and family life under arbitrary surveillance at their whim. This anamoly recalls the words of Mr. Justice Douglas, speaking for five members of the Court in Griswold v. Connecticut:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

But marital bedrooms have windows through which conversations can be overheard, and curtains susceptible to apertures through which government agents can peer.

Clearly, a constitutional right of privacy which has the power to protect the many family functions catalogued in Roe v. Wade

83 Id. at 152, citing Stanley v. Georgia, 394 U.S. 557, 564 (1969).
88 See generally Loving v. Virginia, 388 U.S. 1, 12 (1967).
94 381 U.S. 479 (1965).
95 Id. at 483-86.
96 410 U.S. 113 (1973).
must also have the power to provide that family with security from peeping, eavesdropping government agents. As the Supreme Court of New Hampshire has concluded:

If the peeping Tom, the big ear and the electronic eavesdropper (whether ingenious or ingenuous) have a place in the hierarchy of social values, it ought not to be at the expense of a married couple minding their own business in the seclusion of their bedroom . . . .

An Objective Emphasis

When faced with an allegation that an illegal search and seizure has taken place, there are two approaches that the courts have taken. The first has been to determine whether government conduct did in fact constitute a search and seizure. The second approach has been to assume that a search and seizure has taken place, and to determine whether it was reasonable. It is this first approach in which the Katz test was designed to operate and it is this approach which deserves detailed consideration.

The cases which determine whether governmental conduct constitutes a search and seizure can be divided into two categories: those which utilize an objective emphasis and those which utilize a subjective emphasis. For purposes of definition, it may be said that the objective emphasis approach is one in which it is decided or assumed that the aggrieved party had an actual expectation of privacy; the inquiry of the court is then whether that expectation was justifiable. The subjective emphasis approach is one in which the primary inquiry of the court is whether the aggrieved party had an actual, subjective expectation of privacy without considering whether the expectation was justifiable.

The Subjective Emphasis Approach

Those courts that employ the subjective emphasis approach have taken different avenues in determining whether the aggrieved party had an actual, subjective expectation of privacy. However, even though the courts have taken different avenues, each of the different avenues is problematic in that each has yielded unrealistic results.


98 This approach was taken in United States v. Vilhotti, 323 F.Supp. 425 (S.D.N.Y. 1971) and People v. Malitz, 14 Cal. App. 3d 381, 92 Cal. Rptr. 216 (1971). See United States v. Brooker, 461 F.2d 990 (6th Cir. 1972); United States v. Wickizer, 465 F.2d 1154 (8th Cir. 1972). The fallacy in such an approach is that the test of a "justifiable expectation of privacy" was not designed to determine the reasonableness of a search and seizure, but to answer the prior question of whether there was any search and seizure at all.

99 Divided in this manner, there are forty-one cases which use the objective approach and fifty-two which follow the subjective approach. The cases in each category are too numerous to list, but examples are included in the textual discussion which follows.
One avenue taken by the courts has been to make an objective determination as to the existence of a subjective expectation of privacy.\textsuperscript{100} In State v. Clarke,\textsuperscript{101} for example, police officers had mounted a fire escape directly outside the defendant's second floor apartment for purposes of looking through the defendant's window. The court, in finding that there was no actual expectation of privacy, stated that other tenants had the right to use the fire escape and that:

Those inside the apartment must be held to an expectation that those using the common facilities of the building would come across the window and look inside.\textsuperscript{102}

The obvious problem with this approach is that the court is supposedly using a subjective standard for determining whether the aggrieved party had an expectation of privacy; but in fact, the court by using an objective avenue to a supposedly subjective approach, is effectively using an objective approach overall.

Another difficulty arises when the court's determination as to the existence of a subjective expectation of privacy conflicts with the aggrieved party's actual expectation of privacy. In People v. Sirhan\textsuperscript{103} the defendant was held to have no expectation of privacy in an envelope that was found lying in a box of trash in his back yard. The reasons given for this lack of expectation of privacy were twofold. First, the mother and brother of the defendant were living in the same house and undoubtedly went into the back yard.\textsuperscript{104} Second, there were houses on either side of the house in which the defendant lived, and these houses were in close proximity.\textsuperscript{105} Not only is it likely that there was a contrary actual expectation in Sirhan, but if its criteria were applied to everyone, it is questionable whether anyone in an urban area could possibly demonstrate a subjective expectation of privacy.

A third problem with the subjective approach is that it focuses the court's inquiry upon the specific point at which an individual's privacy is invaded. The problem is that it fails to give consideration to the individual's total efforts in attempting to maintain his privacy. An example of the problem created by this approach can be seen in People v. Berutko,\textsuperscript{106} where a police officer obtained evidence which provided the basis for the arrest of the defendant, by peering through

---

\textsuperscript{100} This determination is made by the court because the issue is raised in a suppression hearing.

\textsuperscript{101} 242 So.2d 791 (Fla.App. 1970).

\textsuperscript{102} Id. at 794.

\textsuperscript{103} 7 Cal. 3d 710, 102 Cal. Rptr. 385, 497 P.2d 1121 (1972).

\textsuperscript{104} Id. at 742-43, 102 Cal. Rptr. at 403, 497 P.2d at 1143.

\textsuperscript{105} Id.

a small aperture in the curtains that were covering the defendant's apartment window. The court emphasized the failure of the defendant to close the curtains completely, finding that when

... a person by his own action or neglect allows visual access to his residence by providing an aperture adjacent to a common area, he may not complain that police officers who were lawfully present in that area have utilized that aperture to detect the commission of crime within.\textsuperscript{107}

It was of no importance that the defendant was in his own apartment, at his own table, with his door shut and his curtains drawn. Nor did it matter that an individual walking by—or even walking up to the window without crouching down—could not have seen through the window. What was of importance was that there existed an aperture through which several square inches of the interior of the apartment could be seen when the officer stooped to peek through the window.\textsuperscript{108}

A fourth problem with the subjective approach is that it nearly always contains an unspoken presumption that the defendant has no expectation of privacy; this places the burden of rebutting that presumption upon the defendant. Thus, courts following this approach are concerned with whether the defendant has "exhibited a reasonable expectation of privacy,"\textsuperscript{109} has taken actions "calculated" to keep his possessions private,\textsuperscript{110} has made efforts "to insure" the privacy of a given area,\textsuperscript{111} or has "taken reasonable steps" to keep conversations and transactions private.\textsuperscript{112}

The dangers of a presumption that the defendant has no expectation of privacy are readily apparent from a reading of \textit{Commonwealth v. Hernley}.\textsuperscript{113} A government agent wanted to look through windows of a certain printing firm to determine whether illegal football gambling forms were being printed there; however, he faced the particular problem that the windows of the building in which the firm was located were so constructed that from the ground level outside, neither he nor anyone else could see through the windows. His

\begin{footnotesize}
\textsuperscript{107} \textit{Id.} at 95, 77 Cal. Rptr. at 222, 453 P.2d at 726.

\textsuperscript{108} \textit{Id.}


\textsuperscript{110} United States v. Wright, 449 F.2d 1355, 1364 (D.C. Cir. 1971).


\textsuperscript{112} United States v. Case, 435 F.2d 766, 768 (7th Cir. 1970); United States v. Haden, 397 F.2d 460, 465 (7th Cir. 1968).

\end{footnotesize}
solution to this problem was to use binoculars, during the night, to look through the windows from a vantage point on top of a ladder which had been placed on a railroad grade behind the print shop.

In spite of the construction of the windows, the court placed the burden of establishing a desire for privacy upon the defendant, finding that it was "incumbent upon the suspect to preserve his privacy from visual observation."\(^{114}\) It was not enough that the agent's initial attempt at peering through the windows was defeated by their construction, for the court found that since the windows were not curtained and since the agent was ultimately able to penetrate the privacy offered by the building, the defendant had indicated that he had "little regard for his privacy."\(^{115}\)

A fifth difficulty is the application of what might be called the "persistent policeman" rule; that is, unless the defendant takes enough precautions to defeat the attempted intrusions of a persistent policeman, the defendant had no actual, subjective expectation of privacy. In *People v. Guerra*,\(^ {116}\) for example, the police suspected Guerra had a "stash pad" and that several people would go there at night to cut up heroin. On learning that someone was in the apartment, police officers went to the building and entered the hallway that led to Guerra's door, but from their location in the public hallway, the police officers were unable to "understand what was being said inside . . . ."\(^ {117}\) Having been frustrated in their attempt to overhear the conversations, one of the officers placed his ear to the door and was able to overhear at least part of the conversation.

Under these circumstances, the court concluded that there was no subjective expectation of privacy because

... if an individual desires that his speech remains private, he can easily assure himself of privacy by whispering, so that even a person in [the officer's] position cannot hear him.\(^ {118}\)

Carried to its logical conclusions, such an approach would mean that the success of an intrusion in gaining evidence or information would itself establish that there was no subjective expectation of privacy.

A sixth problem with the subjective approach is that it can be logically extended to defeat all fourth amendment protections. The argument is simple enough. There can be no subjective expectation of privacy if it is announced in advance that surveillance or an inspection is to be conducted. If there is no subjective expectation of

\(^{114}\) *Id.* at 907.

\(^{115}\) *Id.*


\(^{117}\) *Id.* at 537, 98 Cal. Rptr. at 629.

\(^{118}\) *People v. Guerra*, 21 Cal. App. 3d 534, 538, 98 Cal. Rptr. 627, 629 (1971).
privacy, then there is no intrusion upon privacy and hence no search and seizure. Thus, by proclamation, announcement, or posted sign, the subjective expectation of privacy could be discounted at the whim of government officials.

The germ of this type approach can be found in at least three of the cases which have applied Katz to issues of search and seizure. In People v. Mason\(^{119}\) the defendant’s terms of probation included the stipulation that he would be subject to warrantless search at any time. Under these conditions, the court determined that he could have no subjective expectation of privacy that would make the subsequent warrantless search illegal.\(^{120}\) While the resulting decision is no departure from other decisions regarding the rights of probationers, what is significant is that the court grounded its decision on the lack of a subjective expectation of privacy on the part of the defendant, and paid scarce attention to the more traditional approaches of determining a probationer’s rights.\(^{121}\)

A similar lack of an actual expectation of privacy was found in Wilson v. Commonwealth.\(^{122}\) wherein it was said that a policeman who was suspended from the department had no reasonable expectation of privacy in the locker that had been assigned to him by the police department. Among the reasons given to show that the defendant had no expectation of privacy were the facts that all the policemen understood that the department had the right to inspect the lockers, that the right of the department to inspect lockers had been explained in recruiting school, and that the defendant knew that when he left the police force, the contents of his locker had to be removed immediately.\(^{123}\)

Of even greater concern is State v. Bryant,\(^{124}\) wherein it was found that there existed an actual expectation of privacy in regard to doored enclosures in a public restroom; however, the court suggested that this actual expectation of privacy could be defeated and that surreptitious surveillance would be constitutionally permissible if signs were posted “warning anyone using the facilities that they were apt to be under surveillance.”\(^{125}\) Though this particular application of Katz has been developed no further, it is perhaps the one application which offers not only possibility of abuse, but also the potential demise of the fourth amendment.

\(^{119}\) 5 Cal.3d 759, 97 Cal. Rptr. 302, 488 P.2d 630 (1971).

\(^{120}\) Id. at 765, 97 Cal. Rptr. at 305, 488 P.2d at 633.

\(^{121}\) Id.

\(^{122}\) 475 S.W.2d 895 (Ky. App. 1971).

\(^{123}\) Id. at 898.

\(^{124}\) 287 Minn. 205, 177 N.W.2d 800 (1970).

\(^{125}\) Id. at 211, 177 N.W.2d at 804.
The Objective Emphasis Approach

The objective approach is by far the better test. This is not to say that it is not subject to abuse, or that there have not been questionable decisions under the objective approach. It does, however, eliminate the specific abuses which have occurred under the subjective approach and offers a more predictable standard by which fourth amendment rights can be measured.

Furthermore, it would appear that it was the objective approach which was enunciated by the Supreme Court in Katz. Indeed, Mr. Justice White, writing for the majority in United States v. White, interpreted Katz in the following way:

Our problem is not what the privacy expectations of particular defendants in particular situations may be... Our problem, in terms of the principle announced in Katz, is what expectations of privacy are constitutionally "justifiable" — what expectations the Fourth Amendment will protect in the absence of a warrant.

This objective approach, with a presumed subjective expectation of privacy and a focus upon the issue of the justifiability of that expectation, was taken by the Supreme Court in Mancusi v. DeForte, wherein it was determined that there was a justifiable expectation of privacy in papers kept in an office shared with other employees. What is most significant about Mancusi is that the court had the opportunity to use the subjective approach and chose not to. The argument that there was no subjective expectation of privacy could have been based on several grounds: the papers did not belong to DeForte, but to the union for which he worked; DeForte's superiors had not only access to but control over the documents; and the office in which the papers were seized was shared by DeForte with a number of other individuals, all of whom could have examined the documents. Though arguments for the subjective approach appear to have been raised by the government, the court chose to ignore them and focus its attention upon the nature of privacy that can justifiably be expected in any office.

Two logical corollaries to the objective emphasis approach are the doctrine of constitutionally protected areas and the trespass doctrine. Each is an objective form of determining fourth amendment violations and each could have a substantial impact upon the preservation of fourth amendment rights.

127 Id. at 751.
129 These facts and arguments are discussed id. at 367-370.
Katz did not specifically overrule Silverman, nor did the court in Katz indicate that the use of the concept of constitutionally protected areas was to be abandoned. What Katz did say was that the phrase "constitutionally protected areas" did not necessarily promote a correct solution to fourth amendment problems, that the court had never suggested that the concept could "serve as a talismanic solution to every fourth amendment problem," and that the fourth amendment protects "people — and not simply places." Implicit in each statement is the potential that the concept of constitutionally protected areas may still serve a useful function, that it does promote correct solutions to fourth amendment problems in some instances, that it is in itself a solution to at least some fourth amendment problems, and that in addition to protecting persons, the fourth amendment also encompasses the right of those persons to have places protected from arbitrary governmental intrusion.

The continued vitality of the "constitutionally protected areas" doctrine can be argued from a number of grounds. It has been utilized in at least four post-Katz decisions. Though not by name, it seems to have been applied by the Supreme Court in Mancusi, wherein the court first indicated that there would be standing to challenge the search of a hypothetical private office and then concluded that "... the situation was not fundamentally changed because DeForte shared an office with other union officials." In interpreting Katz, the court indicated that fourth amendment protections depend upon "whether the area was one in which there was a reasonable expectation of freedom from government intrusion."

Furthermore, since the "open fields" doctrine appears to be a conceptual corollary of the concept of constitutionally protected areas, the decisions attesting to the continued importance of Hester v. United States add credibility to the argument that constitutionally protected areas is still a viable concept.

131 389 U.S. at 350.
132 Id. at 351, n. 9.
133 Id. at 353.
136 Id. at 369.
137 Id. at 368.
138 265 U.S. 57 (1924).
The continued use of the constitutionally protected areas concept would have at least two benefits. First, it would offer stability and certainty in search and seizure cases involving physical entry into areas which have previously been determined to enjoy fourth amendment protection. Second, in search and seizure cases not involving physical entry, the concept could be used to establish a rebuttable presumption of reasonableness in expecting privacy in a given area.

There is also dispute as to whether Katz determined that a trespass does not always constitute a search, or only that a trespass is not necessary to a search.\(^{140}\) It has been suggested that the matter was left open by the court,\(^ {141}\) but there is also authority to the contrary, holding that Katz did not overturn the rule that "evidence is inadmissible because obtained by a physical trespass or actual intrusion into a constitutionally protected area."\(^ {142}\)

Under either view it is possible to argue that any evidence gained as a result of a trespass is inadmissible. Such an approach would offer greater and more predictable fourth amendment protection, reaffirming the traditional protections against physical entry into dwellings and re-establishing certain protected areas against eavesdropping and searches by peep.

**Different Expectations of Privacy**

It has been suggested in a number of cases that activity by government agents was justified because they were simply doing what any private citizen would be permitted to do.\(^ {143}\) Such a justification is untenable for a number of reasons.

First, it is highly questionable whether private citizens could, without incurring tort liability, engage in window peeping or eavesdropping.\(^ {144}\) Furthermore, the conduct of private citizens is not the standard by which police conduct is to be measured. The requirements of the fourth amendment are "independent of and superior to the federal or state statutory or common law of torts and crimes . . . ."\(^ {145}\)

---

\(^ {140}\) United States v. Polk, 433 F.2d 644, 647, n. 1 (5th Cir. 1970). The statements of the Supreme Court regarding the affect of trespasses on fourth amendment protections, including the conclusion that fourth amendment protections do not turn upon the "presence or absence" of a physical intrusion, are set forth in *Katz*, 389 U.S. at 352-353.

\(^ {141}\) United States v. Polk, 433 F.2d 644, n. 1 (5th Cir. 1970); 82 HARV.L.REV. 63 (1968). In light of this opinion, the Fifth Circuit chose to abandon the trespass rule and allow the concept of a reasonable expectation of privacy "its full scope."


\(^ {144}\) See 'The Plain View Doctrine, *infra.*

\(^ {145}\) MODEL CODE OF PREARRAIGNMENT PROCEDURE §SS 1.01, note.
Indeed, the prohibitions of the fourth amendment are specifically designed to prevent governmental intrusion.\textsuperscript{146}

Second, an individual may be entitled to have different expectations of privacy with respect to different classes of people. It has been suggested, for example, that while a person may have no expectation of privacy against children playing in his backyard, he may nonetheless be entitled to expect privacy against policemen conducting a dragnet search of a whole neighborhood.\textsuperscript{147} Similarly, students who have no expectation of privacy against an inspection of their rooms pursuant to university regulations do have a justifiable expectation of privacy against an intrusion made for the purpose of obtaining evidence in a criminal investigation.\textsuperscript{148}

Third, even as to the same individual, there may be different but justifiable expectations of privacy with respect to different types of intrusions. This was the position taken in \textit{Katz}, wherein it was indicated that even though the petitioner was visible and subject to visual observation, he was still protected against the uninvited ear, which he sought to exclude.\textsuperscript{149}

The determination of fourth amendment rights would be enhanced if it were recognized that the prohibitions are against governmental intrusions, that there are justifiable differences in expectations of privacy with respect to different classes of individuals, and that even as to the same person, there are justifiable expectations of privacy which differ according to the type of intrusion.

\textbf{The Plain View Doctrine}

The "plain view doctrine," simply stated, provides that objects falling into the plain view of a police officer are subject to seizure and may be introduced in evidence.\textsuperscript{150} The limitations on the plain view

\begin{flushleft}
\textsuperscript{149} 389 U.S. at 352.
\textsuperscript{150} Harris v. United States, 390 U.S. 234, 236 (1968). The cases which have applied \textit{Katz} to fourth amendment issues have made a number of assumptions concerning the plain view doctrine. These include: (1) the plain view doctrine applies to information that is heard as well as to information that is seen; (2) both the aural and visual gathering of information can constitute a "search and seizure" within the plain view doctrine; (3) the statement of \textit{Katz} at 351 — "What a person knowingly exposes to the public... is not a subject of Fourth Amendment protection..." has no independent significance and is merely a restatement of the plain view doctrine. These same assumptions will be made in the discussion to follow, since the resolution of the issues involved is beyond the scope of this note.
\end{flushleft}

https://engagedscholarship.csuohio.edu/clevstlrev/vol23/iss1/35

20
doctrine are two in number. First, the officer must have the right to be in the area from which he obtains the view.\textsuperscript{151} Second, the discovery of the evidence must be inadvertent.\textsuperscript{152}

While the plain view doctrine has been widely used\textsuperscript{153} in conjunction with the \textit{Katz} test to determine whether a search and seizure has taken place,\textsuperscript{154} such an approach is often inappropriate because the "inadvertence" requirement is not met. For example, it can hardly be argued that an officer on his hands and knees, rummaging among the trash with his flashlight in hand, has inadvertently discovered capsules containing LSD.\textsuperscript{155} Nor can it be argued that a policeman who had driven to a specified house, pulled into the driveway, and purposely looked through a window to check the validity of an informant's tip that marijuana was being grown in a planter inside the house, has inadvertently discovered contraband.\textsuperscript{156}

The other limitation on the plain view doctrine is that the officer must have the right to be in the area from which he obtains the view.\textsuperscript{157} It seems clear that in cases involving technical or actual trespass,\textsuperscript{158} visual intrusions,\textsuperscript{159} and non-electronic eavesdropping,\textsuperscript{160} law enforcement officers have no right to be in positions from which they gather incriminating information.

That the law enforcement officers do not have the right to be in positions from which they can gather incriminating information by means of technical or actual trespass, visual intrusion, or non-electronic eavesdropping seems clear from a study of the developing law in the area of the right to privacy. A trespass gives rise to an action in tort, even through no actual damage was suffered.\textsuperscript{161}


\textsuperscript{152} Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971).


\textsuperscript{154} \textit{But see} Brown v. State, 15 Md. App. 584, 292 A.2d 762 (1972) for an example of the confusion, in the area of the plain view doctrine, which as occurred subsequent to the \textit{Katz} decision.

\textsuperscript{155} People v. Malitz, 14 Cal. App. 3d 381, 92 Cal. Rptr. 216 (1971).

\textsuperscript{156} People v. McGahey, 500 P.2d 977 (Colo. 1972).


\textsuperscript{161} W. PROSSER, LAW OF TORTS § 13 (4th ed. 1971).
common law, eavesdropping was a nuisance and an indictable offense.\(^{162}\) It is prohibited by criminal statute in at least five states,\(^{163}\) and by the right of privacy which is guaranteed by constitution or statute in four other states.\(^{164}\) Furthermore, in modern tort law eavesdropping gives rise to an action for interference with privacy,\(^{165}\) or more specifically, an action for intrusion upon seclusion.\(^{166}\) Such an action would lie irrespective of an actual or technical trespass since it is independent of "common rights of property, contract, reputation, and physical integrity."\(^{167}\) The tort of intrusion upon seclusion also includes peeping into windows.\(^{168}\) Such conduct is further prohibited by the guarantees of a general right of privacy in four states\(^{169}\) and by criminal statutes in at least thirteen states.\(^{170}\)

Thus, many of the cases invoking the plain view doctrine — including a number of cases which do not do so by name — cannot comply with the requirement that police officers have a right to be in the areas from which they obtained their view. Perhaps this stems


\(^{163}\) GA. CODE ANN. § 26-2002 (Harrison Supp. 1968); N. D. CENT. CODE §12-42-05 (Smith Supp. 1973); OKLA. STAT. ANN. tit. 21, § 1202 (West 1958); S. C. CODE ANN. § 16-554 (Michie 1962) (§ 16-555 states that § 16-554 shall not be interpreted to diminish the existing powers of law enforcement officers); S. D. COMPIL. LAWS ANN. §22-21-1 (Smith 1967).

\(^{164}\) ARIZ. CONST. art. 2, § 8; HAWAI'I CONST. art. I, § 5; ILL. CONST. art I, § 6; ARK. STAT. ANN. § 41-1426 (1947).

\(^{165}\) RESTATEMENT (SECOND) OF TORTS § 652 (Tent. Draft No. 13 1967). There have been over three hundred cases on privacy and that right has been clearly recognized in about thirty-five jurisdictions. It has been rejected in Nebraska, Rhode Island, Texas, and Wisconsin. There are statutes in New York, Oklahoma, Utah, and Virginia limiting the right of privacy to the commercial use of a name or likeness. See RESTATEMENT OF TORTS § 867 (1939); W. PROSSER, LAW OF TORTS § 117 (4th ed. 1971).

\(^{166}\) RESTATEMENT (SECOND) OF TORTS § 652B, Intrusion Upon Seclusion, comment b (Tent. Draft No. 13 1967): "The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself.... It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs...."


\(^{168}\) RESTATEMENT OF TORTS, supra note 165.

\(^{169}\) ARIZ. CONST. art. 2, § 8; HAWAI'I CONST. art. I, § 5; ILL. CONST. art I, § 6; ARK. STAT. ANN. § 41-1426 (1947).

\(^{170}\) ALA. CODE tit. 14, § 436(2) (1958) (prohibits a male, during the nighttime, from looking into a room occupied by a female); CAL. PENAL CODE § 647(g) (West 1970) (the prohibition is against visual intrusions which involve trespass in the nighttime); GA. CODE ANN. § 26-2002 (Harrison Supp. 1971); IND. ANN. STAT. §§ 10-4910 to 4912 (Burns 1956); LA. REV. STAT. § 14:284 (Supp. 1973); ME. REV. STAT. ANN. tit. 17, § 3960 (1964) (the prohibition is against visual intrusions which involve trespass in the nighttime); MD. ANN. CODE art. 27, § 580 (1971) (the prohibition is against visual intrusions which involve trespass); MICH. COMP. LAWS ANN. § 750.167 (Supp. 1972); N. C. GEN. STAT § 14-202 (1969) (prohibits persons from peering into a room occupied by a female); OKLA. STAT. ANN. tit. 21, § 1171 (Supp. 1972); S. C. CODE ANN. § 16-554 (1962) (§ 16-555 states that § 16-554 shall not be interpreted to diminish the existing powers of law enforcement officers); TENN. CODE ANN. § 39-1212 (1955); VA. CODE ANN. § 18.1-174 (1950) (the prohibition is against visual intrusion which involves trespass in the nighttime).
from the confusion which *Katz* has caused in the area of plain view, or perhaps it is the result of the term "plain view." Whatever the reason, the strict enforcement of the limitations placed on the plain view doctrine would minimize the abuse which accompanies eavesdropping and search by peep.

**The Necessity of Stringent Enforcement of Fourth Amendment Prohibitions**

There is a necessity that fourth amendment rights be jealously guarded and that fourth amendment prohibitions be strictly enforced. The methods by which fourth amendment rights can be given vitality are not only attainable, but desirable for a number of important policy considerations.

First, there are considerations as to the safety of law enforcement officers engaged in surreptitious activities. In times when the crime rate is high and a great many citizens are armed, there is a great personal danger to the lives of police officers who go about peeking through windows, peering into closed buildings, and crawling on the ground near garages, especially when such activity occurs at night. These situations recall the words of Mr. Justice Jackson in speaking of the possibility that frightened citizens might shoot police officers who attempted to break into a dwelling:

... [A] plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.171

A similar situation exists today with law enforcement officers sneaking around people's homes, peeking through windows and trying to overhear conversations, all the while trying to conceal not just their identity but their very presence. With the exception of the no-knock laws, it is hard to imagine a more reckless or more dangerous policy of law enforcement.

Second, there are serious considerations as to judicial integrity. Few would argue that respect for the judiciary is gained as a result of permitting surreptitious peeping and eavesdropping. However, a more serious consideration is the effect on the integrity of the judiciary, and indeed, the effect on the integrity of the entire criminal justice system, when information is admitted into evidence that was ob-

tained only by committing torts such as common law trespass or intrusion upon seclusion. The seriousness of condoning such conduct, by allow such information to be admitted into evidence, was suggested by Mr. Justice Brandeis:

Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for the law . . . .

But the most compelling reason for protecting fourth amendment rights lies in the nature of the protections that the fourth amendment was designed to offer. Long before the Constitution and the Bill of Rights, the security of an individual's privacy was considered fundamental to all liberty, and this belief was expressed in the common law maxim that "every man's home is his castle." The depth to which this security was prized is best found in the words of Lord Chatham:

. . . [T]he 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 cannot enter — all his forces dare not cross the threshold of the ruined tenement.

This maxim, that a man's home is his castle, was made a part of the constitutional law of this nation in "the clauses prohibiting unreasonable searches and seizures . . . ." The fourth amendment stands as recognition of the fact that in this nation individual liberty depends in large part upon freedom from unreasonable intrusion by those in authority.

---

174 United States v. Three Tons of Coal, 28 F. Cas. 149, 151 (No. 16,515) (D.C.E.D. Wisc. 1875). This statement has also been attributed to William Pitt the Elder in BARTLETT'S FAMILIAR QUOTATIONS 426 (14th ed. 1967).
176 Trupiano v. United States, 334 U.S. 699, 700 (1948). See In re Pacific Ry. Comm'n, 32 F. 241, 250 (C.C.N.D. Cal. 1887), where Mr. Justice Field indicated that without the right of personal security, all other rights "would lose half their value."
Indeed, the fourth amendment, is regarded as "the very essence of constitutional liberty . . ." 177

So important are fourth amendment rights that they are to be liberally construed in order to prevent unconstitutional practices which "get their footing . . . by silent approaches and slight deviations from legal modes of procedures." 178 But perhaps the full extent of the protections afforded by the fourth amendment was best offered by Mr. Justice Brandeis, who indicated that the makers of the constitution

". . . conferred, as against the government, the right to be left 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 4th Amendment." 179

The practices sought to be justified in the name of Katz: the warrantless searches of a man's home when he is in the custody of law enforcement officers, the peeping through his windows, the eavesdropping outside his door, the use of binoculars and artificial light to see that which would otherwise be hidden from view, and the suggestion that fourth amendment protections can vanish with the posting of signs warning of surveillance or searches, are nothing more than a new manifestation of arbitrary governmental intrusion which the fourth amendment was designed to prohibit. It is inconceivable that the fourth amendment would prohibit arbitrary governmental intrusions in one form, only to allow the very same abuse to take place in another form. Indeed, this is the very point which Mr. Justice Bradley made when speaking of the purpose of the fourth amendment and the intentions of the founding fathers:

The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred. 180

177 Gouled v. United States, 255 U.S. 298, 304 (1921). In Brinegar v. United States, 338 U.S. 160, 180 (1949), Mr. Justice Jackson, dissenting, stated that "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."


179 Compare Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), with Boyd v. United States, 116 U.S. 616, 630 (1886), where Mr. Justice Bradley concluded that fourth amendment protection applied to prohibit "all invasions on the part of the government and its employees of the sanctity of a man's home and the privileges of life."

180 Boyd v. United States, 116 U.S. 616, 630 (1886).
That "old grievance" of arbitrary governmental intrusion must not be tolerated simply because it is now disguised in a different form, for whether caused by the knock at the door and the serving of the hated general warrants, by arbitrary surreptitious surveillance, or by the use of signs and arguments to defeat a subjective expectation of privacy, the result is the same:

... [N]ot one man but a whole nation can become cowed and frigid. Without privacy the soul of man withers. This right is the atmosphere of our freedom; it is like the air we breathe, enveloping, invisible, yet sustaining, so long as it is there. Without it other rights will perish, especially free speech and assembly. What is the right of free speech and free assembly if Big Brother is listening?\(^{181}\)

Conclusion

The problem of fourth amendment protections has been a troublesome one for the courts. While there are a great many decisions and commentaries dealing with fourth amendment rights, there had been little consideration, prior to Katz, of the issues involved in determining whether a search and seizure had taken place. Under Olmstead, a search and seizure required a trespass and the seizure of tangible items. In Silverman, the trespass requirement was replaced by a necessity for an actual intrusion, and the scope of the fourth amendment was extended to include intangible items.

Katz established the test under which it was held that there was a violation of fourth amendment rights if the conduct of government agents violated the privacy upon which an individual justifiably relied. The cases subsequent to Katz give at least a general outline of the expectations of privacy which are and are not justifiable. These cases may generally be divided into two groups: those which utilize a subjective emphasis approach and those which utilize an objective emphasis approach. It is the former approach which is open to most abuse and which, as such, has received the most attention in this note.

For the purpose of ensuring the privacy and security which are guaranteed under the Constitution, a number of alternatives to current practices have been presented. It is suggested that some or all of these alternatives are necessary for the personal safety of law enforcement officers and the preservation of judicial integrity. But the most compelling reason to strengthen fourth amendment protections is the nature of the evil which the fourth amendment was designed to prevent and the key role which fourth amendment rights play in the preservation of all our other liberties.

Fourth amendment protections and the liberties that flow with them are not conditioned upon having the wealth to build a police-proof fortress in which to hide, or upon the willingness to sacrifice such natural rights as fresh air and sunshine. Justice Stewart was right; the fourth amendment does in fact mean that every man has the right to retreat into his own home and there be free from unreasonable intrusion. And that freedom is not simply freedom from physical intrusion, but freedom from "every unjustified intrusion by the government upon the privacy of the individual, whatever means employed . . . ."182

As Justice Bradley explained over eighty years ago:

It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .183

It is this fourth amendment purpose, to protect the personal security and personal liberty of the people, that compels an application of Katz that will prohibit all arbitrary governmental intrusions, no matter what form they may take.

Richard L. Aynest†

183 Boyd v. United States, 116 U.S. 616, 630 (1886).
† Law Review Editor; second year student, the Cleveland State University College of Law.