The Reasonable Expectation of Privacy— *Katz v. United States*, A Postscriptum

In *Katz v. United States*,[1] the Supreme Court said that the "Fourth Amendment protects people, not places,"[2] thus extending the fourth amendment proscription against unreasonable searches and seizures to all areas in which a person has a reasonable expectation of privacy.[3] *Katz*, in enunciating the Court's new reading of fourth amendment standards, shifted the fourth amendment inquiry away from the presence or absence of physical intrusion into a "constitutionally protected" area or enclosure and thus explicitly overruled[4] the "trespass doctrine" of *Olmstead v. United States*[5] and *Goldman v. United States*.[6] Although the reasonable expectation standard enunciated by the Court in *Katz* may seem simple on its face, the abstractness of the new standard left room for considerable interpretation and refinement by the courts. The focus of this Note will be on the applications, interpretations, and refinements of the *Katz* standard in the federal courts.

The *Katz* standard of a reasonable expectation of privacy has been applied in various criminal contexts but is best examined when viewed in connection with electronic surveillance and wiretapping. When *Katz* is considered in this area, it is customary for the courts to also consider its forerunner, *Berger v. New York*,[7] which held unconstitutional as repugnant to the fourth amendment a New York statute concerning an *ex parte* order for eavesdropping.[8]

This Note will seek to explore the fourth amendment issues which confronted the Court in *Katz* and also in *Berger* by first explaining the *Katz* case and then examining briefly the historical evolution of the "reasonable expectation" standard. Finally, an analysis of the impact of the *Katz* decision on fourth amendment inquiries in the federal courts will be presented in order to show what the reasonable expectation of privacy has come to mean some eight years after the decision in *Katz* was rendered.

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[1] 389 U.S. 347 (1967).

[2] *Id.* at 351.

[3] *Id.* at 351-52.

[4] *Id.* at 353.

[5] 277 U.S. 438 (1928).

[6] 316 U.S. 129 (1942).

[7] 388 U.S. 41 (1967).

[8] Law of April 12, 1958, ch. 676, § 1, [1958] N.Y. Laws 786 (repealed 1968). New York's legislative response to *Berger* and subsequent cases is codified in N.Y. CODE CRIM. PRO. §§ 700.05-.70 (McKinney 1971), *as amended, id.* §§ 700.05, .10 (McKinney Supp. 1975).

I. The *Katz* Case

Katz originated in the United States District Court for the Southern District of California where the defendant was convicted under an indictment charging him with violating federal law by transmitting gambling information across state lines.[9] At trial, the court admitted, over objection, evidence of the defendant's phone conversations transmitting gambling information which had been overheard by FBI agents through an electronic monitoring device attached to the outside of a telephone booth. The evidence obtained by the federal agents by means of the warrantless "bug" was sufficiently damning, and the defendant was subsequently convicted. The Ninth Circuit affirmed the conviction,[10] finding no fourth amendment violation as there had been "no physical entrance into an area occupied by the appellant"[11] since the electronic listening device had been attached to the outside of the telephone booth.

The decision of the Ninth Circuit was in accord with the then accepted fourth amendment doctrine concerning electronic search and seizure as delineated in *Olmstead v. United States.*[12] The 5-4 decision in *Olmstead* set forth two basic principles in relation to electronic searches and seizures: (1) intangibles, and thus conversations, are outside the scope of the persons and things protected by the fourth amendment; and (2) surveillance that does not involve a trespassory invasion is not an unreasonable search and seizure.[13] *Goldman v. United States,*[14] another leading pre-*Katz/Berger* fourth amendment case, continued the *Olmstead* common law property concept of shaping fourth amendment protection in terms of a physical "breaking of the close." These two principles, although eroded in substance and effect during the nearly forty years between *Olmstead* and *Katz,* were still held as controlling by the Court.[15]

Although the dissenting opinion of Justice Black in *Katz* adhered to the standards of *Olmstead* and *Goldman,*[16] the majority

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[9]18 U.S.C. § 1084 (1970).

[10]Katz v. United States, 369 F.2d 130 (9th Cir. 1966).

[11]*Id.* at 134.

[12]277 U.S. 438 (1928).

[13]*Id.* at 458-68. *See* 16 Kan. L. Rev. 549 (1968).

[14]316 U.S. 129 (1942).

[15]*See, e.g.,* Warden v. Hayden, 387 U.S. 294 (1967); Silverman v. United States, 365 U.S. 505 (1961).

[16]389 U.S. 347, 364 (1967) (Black, J., dissenting). Justice Black stated that he could not agree with the interpretation of the majority. His dissent was based on two reasons: (1) The words of the fourth amendment cannot be construed to apply to intangible verbal evidence, and (2) even though there have been staggering technological advances since the Bill of Rights was drafted, the fourth amendment should not be rewritten by the judicial branch

rejected these concepts.[17] The majority took a significant step by moving away from these anachronistic property law concepts[18] and toward a view of the fourth amendment which conformed to the realities of a modern technological society and to the developing constitutional concept of the right of privacy.

The majority opinion likewise rejected the view of *Olmstead* and *Goldman,* relied on in Justice Black's dissent, which held that the protection of the fourth amendment did not apply to conversations. The Court, citing *Silverman v. United States,*[19] said the "Fourth Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements."[20] In simplest terms, then, warrantless electronic surveillance which violates the privacy upon which a person justifiably relies is an unreasonable search and seizure, and the fruits of such a search and seizure, being placed on an equal level with tangible evidence, are inadmissible as evidence.[21]

The Court took the position that what a person seeks to preserve as private is constitutionally protected and what a person knowingly exposes to the public, even in his own home, is not within the scope of protection afforded by the fourth amendment. The position taken was the middle ground between two possible extreme readings of the fourth amendment. One extreme is that electronic eavesdropping is not covered by the amendment because under a literal reading mere words are not within its ambit.[22] The other extreme argues that fourth amendment protection indeed applies to electronic eavesdropping, and, further, that evidence from electronic eavesdropping can never be admissible into evidence even under a court-ordered search warrant because, due to the unpredictable nature of conversations, such a warrant could never meet the specificity requirement of the fourth amendment.[23]

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to bring it into harmony with the times just to reach a result the Court may deem desirable on policy grounds.

[17]Justice Stewart's majority opinion in *Katz* followed the reasoning of Justice Brennan's dissent in Lopez v. United States, 373 U.S. 427, 446 (1963).

[18]The property law concepts as formerly applied in the context of fourth amendment protection are anachronistic when viewed in light of the technological advancements which have taken place since those concepts became the controlling standard. *Cf.* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[19]365 U.S. 505 (1961).

[20]389 U.S. at 353.

[21]*See* Weeks v. United States, 232 U.S. 383 (1913). The Court held that tangible evidence secured by an unreasonable search and seizure in violation of the fourth amendment is inadmissible in the federal courts.

[22]*See* 389 U.S. at 364 (Black, J., dissenting).

[23]*See* United States v. Whitaker, 473 F. Supp. 358 (E.D. Pa. 1972);

The middle ground taken by the Court is most clearly enunciated in the concurring opinion of Justice Harlan wherein he stated, "My understanding of the rule . . . is . . . first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[24] Thus, the sole determinant of fourth amendment protection against warrantless searches and seizures by means of electronic surveillance will no longer be the presence or absence of a trespass into a "constitutionally protected area." Instead, the determination must be based upon considerations of first, whether the observed party has manifested an intent to keep his conversation private, and secondly, whether the manner in which the intent was manifested can meet an objective standard of reasonableness. The property or spatial considerations upon which the *Olmstead* standard was based cannot be entirely disregarded under the new standard, however, because they influence the determination of the objective reasonableness of the expectation.[25]

The abstractness of the "reasonable expectation" standard is readily apparent, and no set formula can be offered which will provide a simple basis for application. Rather, its application must be on a case-by-case basis. This ad hoc classification basis is not to be derided simply because its provides no hard and fast rule upon which a questionable situation may be evaluated; instead, it should be considered in light of the two interests which the Court attempted to reconcile in *Katz*: the "constitutional" right to privacy, and the belief of law enforcement officials that electronic surveillance is an effective and necessary tool in the fight against crime.[26] It is fair to say that the Court utilized an implicit balancing process in arriving at its conclusion in *Katz*, and that same balancing process should be a part of the "reasonable expectation" standard when it comes into issue in a prosecution.

Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

[24]389 U.S. at 361 (Harlan, J., concurring).

[25]United States v. Hunt, 505 F.2d 931 (5th Cir. 1974).

[26]"[T]he investigative technique of wiretapping was invaluable. In a substantial number [of prosecutions] . . . it was indispensable." *Hearings on H.R. 762 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. 314-15 (1955) (testimony of Frank Hogan, District Attorney of New York City).

> Organizations of police and district attorneys have constantly presented their case to the governor or legislature, claiming without hesitation that wiretapping has been their most effective weapon against organized crime.

S. DASH, R. SCHWARTZ & R. KNOWLTON, THE EAVESDROPPERS 38 (1959).

II. The Historical Precedent—Reasons for the Shift

Although *Katz* was indeed a deviation from the property law standards for determining the constitutionality of an eavesdrop as embodied in the *Olmstead* decision, the decision is supported by diverse historical precedent from the English common law.[27] The decision is further supported by increasing awareness of the necessity of protection from governmental intrusions into the private lives of the citizenry, especially when viewed in light of the ever increasing sophistication of electronic gadgetry, which enables intrusions into private lives far beyond the wildest dreams of the Framers or even those of the *Olmstead* majority.[28]

The majority in *Katz* expressly disclaimed "privacy" as a basis for its decision,[29] finding that there is no general right to privacy secured by the fourth amendment and that protection of such a right, if it is to exist at all, is to be left to the states.[30] Consequently, following this literal interpretation of the principal case, any rights of privacy which might be protected by the fourth amendment are merely incidental to its primary focus, which is protection against arbitrary governmental invasions into the lives of the people.[31] The *Katz* Court, although it expressly disclaimed a general fourth amendment right of privacy, still made it clear that what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[32] Even though a general right of privacy was disclaimed, *Katz* is clearly rooted in that concept, the issue of privacy appearing repeatedly in the majority and concurring opinions. On a root level, privacy is one of the key issues in the case and may be considered the underlying basis of the decision.

If *Katz* is viewed as part of an increasing constitutional protection of an individual's right to privacy, then the decision itself does not seem to be an abrupt departure from the past constitutional dogma of defining the scope of fourth amendment protection in terms of a physical trespass. Rather, it can be considered as part

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[27]The common law courts of England disfavored the use of eavesdropping. The age-old standards which show the disfavor of the common law courts with the practice of eavesdropping were set forth in the famous case of Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765). *See also* 4 W. Blackstone, Commentaries *168.

[28]*See generally* Note, *From Private Places to Personal Privacy: A Post-Katz Study in Fourth Amendment Protection*, 43 N.Y.U.L. Rev. 968 (1968) (discussion of the evolution of the fourth amendment in connection with eavesdropping).

[29]389 U.S. at 350.

[30]*Id.* at 350-51.

[31]*But cf.* Warden v. Hayden, 387 U.S. 294, 304 (1967) ("the principal object of the Fourth Amendment is the protection of privacy . . . .").

[32]389 U.S. at 351-52. *See also* 22 Ark. L. Rev. 518, 521 (1968).

of a flow toward recognition of a "zone of privacy created by several fundamental constitutional guarantees."[33]

Katz should not be read as a monumental shift in constitutional theory. Instead, it should be viewed as a redefinition of the scope of fourth amendment protection made in order to conform to contemporary notions of the need for recognition of a quasi-constitutional right to privacy and to place the application of the fourth amendment on a basis roughly commensurate with the scope of protection theoretically propounded by the Framers. *Katz* redefined the range of fourth amendment protection to conform to technological advances.

In this context, then, *Katz* is based on the historical precedent of the landmark fourth amendment case of *Boyd v. United States.*[34] There the Court stressed the purpose and spirit of the amendment and shied away from a literal reading of the words "search and seizure." Historically analyzing searches and seizures, the Court placed its emphasis on the rudimentary principles inherent in a free government which

> apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .[35]

The *Boyd* Court also emphasized the necessity of liberally construing constitutional provisions for the security of person and property, noting that "[a] close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance."[36]

Viewed in light of these thoughts from *Boyd, Katz* seems mandated by the fourth amendment, because to hold as did *Olmstead,* that the protection of the amendment can be invoked only when there has been a physical trespass of a "constitutionally protected area," would be to deprive the amendment of its essential meaning and purpose, which is to protect the citizenry from unreasonable searches and seizures.

In *Olmstead,* the first wiretapping case to reach the Supreme Court, Justice Brandeis recognized the practical and historical error of the majority in confining the scope of fourth amendment pro-

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[33]Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[34]116 U.S. 616 (1886).

[35]*Id.* at 630.

[36]*Id.* at 635.

tection to "constitutionally protected areas." In the application of constitutional protection, Brandeis called for the Court to look to the future, not to the past. With foresight, he speculated on the possibility of future technological developments which would enable the government to reproduce in court the private papers of a person without removing them from their supposedly secret position and thereby "expose to a jury the most intimate occurrences of the home."[37]

The Brandeis dissent followed the lead of *Boyd*, urging that the interpretation of the Constitution not be rigidly fixed by then contemporary circumstances, but rather be given an interpretation sufficiently broad and liberal so as to render the interpretation applicable even if quantum changes occur in the society or technology. Justice Murphy dissented in *Goldman v. United States*,[38] stating that it was the "duty [of the Court] to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation."[39]

Thus *Katz* follows the lead of *Boyd* and its teachings as accepted by dissenters in earlier fourth amendment cases by explicitly redefining the nature of the inquiry and implicitly increasing or expanding the scope of protection under the fourth amendment. Although the Court stated that the fourth amendment could not "be translated into a general constitutional 'right to privacy,' "[40] contrary to wishes of many writers who urged that the existence of a constitutionally protected "right to privacy" established in *Griswold v. Connecticut*[41] be expanded to protect the individual from electronic eavesdropping,[42] the *Katz* Court did, in practical effect, help move the fourth amendment into the area of "privacy," thus adding perhaps another dimension to it.[43]

The move of the Court in *Katz* toward a new interpretation of the fourth amendment, although it may be considered merely as an elevation of the teachings of *Boyd* and the Brandeis and Murphy dissents and as a repudiation of the *Olmstead* "trespass doctrine," more probably was based on practical realities. In 1967, the ease

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[37]277 U.S. at 474 (Brandeis, J., dissenting).

[38]316 U.S. 129 (1921).

[39]*Id.* at 138 (Murphy, J., dissenting).

[40]389 U.S. at 350.

[41]381 U.S. 479 (1965).

[42]The urgings of these writers are chronicled in a 1966 student article. Note, *The Constitutionality of Electronic Eavesdropping*, 18 S.C.L. REV. 835, 841-46 (1966).

[43]The fourth amendment, however, was long ago seen to be an element of the privacy concept. In 1914, the Supreme Court construed the fourth amendment as including within its penumbra a "right of privacy" not specifically enumerated in the Constitution. Weeks v. United States, 232 U.S. 383 (1914).

with which the government could employ electronic surveillance devices would have boggled the minds of the agents who tapped Olmstead's telephone.[44] As the sophistication of "bugs" and "taps" increased, giving the eavesdropper the ability to monitor conversations without even remotely committing a physical invasion of a protected area, the fourth amendment protection afforded by the *Olmstead* criterion decreased considerably. Thus viewed, *Katz* is a policy decision seeking to alleviate the erosion of fourth amendment protection caused by technological advancements. While at the same time reiterating the traditional judicial disfavor with eavesdropping dating back to *Entick v. Carrington*,[45] the Court in *Katz* and the related cases of *Berger v. New York*[46] and *Osborn v. United States*[47] recognized that electronic eavesdropping was an indispensable tool of effective law enforcement. In those three cases, however, the Court insured that insofar as electronic eavesdropping is concerned, it will not create an arena for "the dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers."[48]

In summary, *Katz* is best viewed as a case adhering to the belief that the Constitution is not a document tied to any particular era and the further belief that the content of the fourth amendment right to be free from unreasonable searches and seizures must be shaped by the context in which it is asserted. And, in the context of electronic surveillance, the tests by which protection is to be evaluated must reflect the changes of society and science.[49] The controlling principles were not new; they were only applied to a new, different, and modern set of facts.[50]

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[44]Although some of the material has become somewhat dated because of new developments in electronic gadgetry, the basic techniques and devices used in electronic surveillance and eavesdropping as well as how they are put into use are detailed in S. DASH, R. KNOWLTON & R. SCHWARTZ, THE EAVESDROPPERS 303-79 (1959) (a study sponsored by the Pennsylvania State Bar Association).

[45]95 Eng. Rep. 807 (K.B. 1765).

[46]388 U.S. 41 (1967).

[47]385 U.S. 323 (1966).

[48]On Lee v. United States, 343 U.S. 747, 758 (1951) (Frankfurter, J., dissenting).

[49]Two years after *Katz* was decided, Justice Harlan crystallized these thoughts.

> It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined by a blend of historical understanding and the adaption of purpose to contemporary understanding.

Williams v. Florida, 399 U.S. 78, 124-25 (1969) (Harlan, J., concurring in part, dissenting in part).

[50]*See* Muny v. Beto, 434 F.2d 697, 716 (5th Cir. 1970) (Gervin, J., concurring in part, dissenting in part).

III. *Katz* Refined and Applied by the Courts

Since *Katz* represented what was and is considered to be a clear break with much of the constitutional dogma pertaining to searches and seizures, and because the "holding" of the case[51] was couched in rather general terms, *Katz* has been relied upon in various contexts. The years since *Katz* have found the courts laboring with its holding in attempting to ascertain its full meaning and the effects the case has on matters outside the fact situation presented in *Katz*. Additionally, Congress and the legislatures have rewritten and amended wiretap statutes in order to conform to the constitutional principles elaborated in *Katz*.[52]

This section will examine the post-*Katz* case law under four broad headings: prospective and retroactive application, standing to utilize the *Katz* ruling, court-ordered surveillance, and "reasonable expectations." The subsections will focus on the practical effect of the post-*Katz* cases as well as their position in relation to the general trend of development of fourth amendment law. Additionally, each of the subsections will attempt to analyze the position of the post-*Katz* cases vis-à-vis the twin policy considerations which the Court attempted to balance in *Katz*.

A. Prospective and Retroactive Application

A discussion of retroactive application may seem to be irrelevant since over eight years have passed since *Katz* was decided, and therefore, few prosecutions would be pending which would rely upon evidence obtained from pre-*Katz* investigations. Further, it is unlikely that any prisoner petitions now outstanding would turn on the question of retroactive application of *Katz*. However, the factors involved in the prospective/retroactive determination serve as a further illustration and elaboration of the policy considerations behind *Katz*.

As *Katz* was a substantial change from prevailing fourth amendment standards, and as there were any number of warrantless electronic surveillances which took place before that decision which did not lead to prosecutions until after the decision, it was inevitable that the Court would have to pass on the retroactivity of the new standard. The leading case is *Desist v. United States*.[53] The defendants were convicted in the Southern District of New York of conspiring to import and conceal heroin in violation of fed-

[51] "[T]he Fourth Amendment protects people, not places." 389 U.S. at 351.

[52] Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970) (the congressional response to the principles of *Katz* and *Berger*).

[53] 394 U.S. 244 (1968).

eral law.[54] Tapes of conversations in a hotel room among several of the defendants were made by federal agents in an adjacent room via an electronic monitoring device. The device did not physically intrude into the room occupied by the defendants. The district court allowed the tapes to be introduced into evidence, and the Second Circuit affirmed, rejecting the argument that the evidence was inadmissible on the ground that the eavesdrop violated the fourth amendment rights of the defendants.[55]

Ostensibly, the facts in *Desist* were such as to provide a simple, straightforward application of *Katz*, which would require a holding that the tapes were inadmissible since they were obtained in violation of the fourth amendment protection against unreasonable searches and seizures. The defendants obviously had a subjective intent that their conversations were to be private, and surely their expectation of privacy was reasonable under the circumstances. If *Katz* were to be given retroactive effect by the Court, *Desist* was the vehicle for doing so. The Court said, "However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past."[56] The Court then held that "to the extent *Katz* departed from previous holdings of this Court, it should be given wholly prospective application."[57]

Over the dissents of Justices Harlan[58] and Douglas,[59] the majority reasoned that the exclusion of electronic eavesdropping evidence seized before *Katz* would increase the burden of administering justice, overturn convictions based on fair reliance upon pre-*Katz* decisions, and, significantly, would not serve to deter similar searches and seizures in the future.[60] Thus *Desist* continued the balancing of the individual rights guaranteed by the Constitution and the needs of law enforcement in this sensitive area.[61]

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[54]21 U.S.C. §§ 173-74 (1970).

[55]Desist v. United States, 384 F.2d 889 (2d Cir. 1968).

[56]394 U.S. at 248.

[57]*Id.* at 246.

[58]*Id.* at 259 (Harlan, J., dissenting).

[59]*Id.* at 255 (Douglas, J., dissenting).

[60]*Id.* at 253.

[61]The decision of the Supreme Court to give only prospective effect to *Katz* seems to be a correct application of the three-pronged test developed by the Court for a determination of retroactivity. *See* Stovall v. Denno, 388 U.S. 293, 297 (1967). The three elements of this test are: (1) The purpose to be served by the new standard, (2) the extent of reliance by law enforcement officials on prior standards, and (3) the effect on the administration of justice in giving retroactive effect. Among the three factors, primary weight must be accorded to the "purpose" of the new standard. Desist v. United States, 394 U.S. 244, 249 (1968). The "purpose" element is broken down into two broad categories: (1) Decisions designed to deter unconstitutional action, and (2) decisions announcing rules fashioned to correct flaws in the fact-finding process at trial. Stovall v. Denno, 388 U.S. 293, 298 n.12 (1969);

In the face of the holding in *Desist*, in one of the appeals taken from the cases connected with the Bobby Baker prosecutions,[62] the appellee-defendant argued that *Desist* did not foreclose the issue of pre-*Katz* nontrespassory electronic surveillance. The contention was that even without *Katz*, precedents prior to that decision justified the suppression. The District of Columbia Circuit labeled that argument "a dubious proposition at best . . . made only more so by the Supreme Court's recognition in *Desist* that *Katz* represented 'a clear break with the past.' "[63]

B. Standing to Utilize the Katz *Ruling*

The baseline consideration in determining the standing of a defendant to utilize the "reasonable expectation of privacy" concept set forth in *Katz* is found in the earlier case of *Jones v. United States*,[64] which held that to qualify as a person aggrieved by an unlawful search and seizure and thus to meet the standing requirement, he must have been the person against whom the search was directed, as distinguished from one who claims prejudice as a consequence of a search directed against someone else. The standing requirement of *Jones* requires a party who seeks to challenge the legality of a search, in order to suppress relevant evidence, to allege and establish that he himself was the victim of an invasion of privacy.[65]

In *Alderman v. United States*,[66] the first case to reach the Court after the *Katz* decision where warrantless electronic surveillance performed on others was urged to be inadmissible as to the defendants, the *Jones* approach was adhered to by the majority of the Court, which held that suppression of the product of a fourth

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Bannister v. United States, 446 F.2d 1176, 1179 (3d Cir. 1971). The purpose of the *Katz* ruling was to deter unconstitutional state action in the form of unreasonable searches and seizures. Since that purpose could be effected only with respect to future action, retroactive application was unnecessary to further that purpose. Consequently, *Katz* as interpreted by *Desist* follows the general pattern of denial of retroactive effect. United States v. Ligouri, 438 F.2d 663, 675 (2d Cir. 1971) (Appendix: Summary of Supreme Court Decisions After *Linkletter* on Question Whether New Rulings Holding Certain Criminal Procedures Unconstitutional Should Be Applied Retroactively).

[62]United States v. Jones, 433 F.2d 1176 (D.C. Cir. 1970). In this case the Government appealed under 18 U.S.C. § 3731 from the grant of the district court, after an evidentiary hearing, of a pretrial motion to suppress. In ruling on the motion to suppress, the district court relied primarily on its reading of *Katz* as invalidating on fourth amendment grounds all monitoring of conversations which had not been approved in advance by judicial authority. United States v. Jones, 292 F. Supp. 1001 (D.D.C. 1968).

[63]433 F.2d at 1179.

[64]362 U.S. 257 (1960).

[65]*Id.* at 261.

[66]394 U.S. 165 (1968).

amendment violation can be successfully urged only by those whose rights were violated by the search.[67]

In *Alderman,* Justice White, writing for the majority, and Justices Harlan[68] and Fortas[69] debated the finer points in the area of standing with respect to the *Katz* ruling. It was the opinion of Justice White that *Katz,* by holding that the fourth amendment protects people and their conversations, did not withdraw any of the protection which that amendment extends to the home or overrule the doctrine of *Silverman v. United States,*[70] which held that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home.[71] Under this view a defendant would be entitled to suppression not only where he himself was a party to conversations obtained by surveillance violative of the fourth amendment, but also where the conversation occurred on his premises, whether or not he was present or a party thereto.

Justice Harlan pointed out the deficiency in Justice White's analysis. If there had in fact been no physical trespass upon the premises, Justice Harlan could not understand how traditional theory permitted the owner to complain about a monitored conversation in which he did not participate because he could not argue for suppression under the theory that the conversations were the "fruits" of an unconstitutional invasion of his property rights. However, Justice Harlan noted that the "fruits" theory would require a different result if the conversations were monitored through the use of a device which did physically trespass on the defendant's premises. Since that theory depended completely upon the presence or absence of a physical trespass, Justice Harlan was of the opinion that "the entire theoretical basis of standing law must be reconsidered in the area of conversational privacy."[72]

Justice Harlan further argued that the approach of the majority was contrary to the spirit and basis of *Katz* in that even though *Olmstead* and the property law concepts tied to that decision were purportedly overruled in *Katz,* they would be resurrected in the law of standing. He urged that the property concepts be entirely rejected and that the law of standing be reinterpreted so as to conform with the substantive principles announced in *Katz.*

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[67] We adhere . . . to the general rule that Fourth Amendment rights are personal rights which, unlike some other constitutional rights, may not be vicariously asserted.

Id. at 174.

[68] *Id.* at 190 (Harlan, J., concurring in part, dissenting in part).

[69] *Id.* at 200 (Fortas, J., concurring in part, dissenting in part).

[70] 365 U.S. 505 (1961).

[71] 394 U.S. at 179.

[72] *Id.* at 190 (Harlan, J., concurring in part, dissenting in part).

He would have granted standing "to every person who participates in a conversation he legitimately expects will remain private,"[73] and, following the rule in *Jones v. United States,*[74] he would have denied standing to property owners attempting to assert a fourth amendment claim in this area because "granting property owners standing does not permit them to vindicate intrusions upon their own privacy but simply permits criminal defendants to intrude into the private lives of others."[75]

Justice Fortas took an extreme approach to the standing question in *Alderman.* He criticized the majority's use of *Jones* as contextual[76] and stated that, considering the rejection of property concepts in *Katz, Jones* requires inclusion within the category of those who may have standing to object to the introduction of illegally obtained evidence any of those against whom the search is directed. To Justice Fortas the fact that government agents conducted their unlawful search and seizure for the purpose of obtaining evidence to use against a person was sufficient to give that person standing. The rights of the citizen were violated when the government "seeks to deprive him of his liberty by unlawfully seizing evidence in the course of an investigation and using it against him at trial."[77]

Of the three viewpoints, it is apparent that Justice Harlan took not only the most logically consistent approach, but also the approach which most clearly conforms to the spirit and rationale of *Katz.* The majority opinion overlooked the rejection in *Katz* of property law concepts. Justice Fortas' opinion did not attempt to strike the balance between "privacy" and the needs of law enforcement for which the post-*Katz* decisions have striven.

Indeed, the soundest approach to the standing question in the context of conversational privacy is simply to apply the substantive *Katz* test in a straightforward manner. If the party objecting to the introduction of records of conversations did not participate in those conversations, that party could not have had an expectation of privacy with respect to those conversations that society would be prepared to recognize as reasonable.[78] If the thrust of *Katz* is to expand *personal* privacy, one should not be given standing to object to the invasion of someone else's privacy. The vindication of

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[73] *Id.* at 191.

[74] 362 U.S. 257 (1960).

[75] 394 U.S. at 192 (Harlan, J., concurring in part, dissenting in part).

[76] *Id.* at 207-08 (Fortas, J., concurring in part, dissenting in part).

[77] *Id.* at 209.

[78] United States v. Kane, 450 F.2d 77 (5th Cir. 1971); United States v. Cataldo, 433 F.2d 40 (2d Cir. 1970); Kroll v. United States, 433 F.2d 1282 (5th Cir. 1970).

the invasion of that right should be left to the aggrieved party.[79] The drawback to this approach, however, is that it seemingly sanctions what may well be overzealous activity by government agents if the party whose privacy was in fact invaded does not seek recourse against that invasion.

C. Court-Ordered Electronic Surveillance

Katz held that searches conducted without prior judicial or magisterial approval were, subject to a few well established and delineated exceptions, per se unreasonable under the fourth amendment.[80] Thus, although the Court in *Katz* recognized the needs of the individual to freedom from the uninvited ear, it tempered its holding by legitimizing electronic surveillance if sanctioned in advance by a neutral judicial authority. That a duly authorized magistrate could constitutionally grant permission for electronic surveillance was established a year before *Katz* in *Osborn v. United States.*[81] *Katz,* then, when considered in connection with *Osborn,* means that one's "reasonable expectation of privacy" can be overcome by court-ordered electronic surveillance.

The court-ordered surveillance is, however, subject to the limitations imposed upon such judicial action by *Berger v. New York,*[82] the often-cited companion case to *Katz. Berger,* as *Katz,* hinged on the balancing of individual freedoms against the interests of law enforcement and took a positive stand in favor of individual freedom in light of the threat of electronic eavesdropping.[83] Although the Supreme Court did not in *Berger,* nor elsewhere, specifically enumerate the criteria which, if met, would enable an electronic surveillance statute to withstand constitutional scrutiny, several of the circuits and a number of commentators have viewed

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[79]The Supreme Court has recognized a federal cause of action under the fourth amendment for which damages are recoverable upon proof of injury from government agents' violation of that amendment. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[80]389 U.S. at 357.

[81]385 U.S. 323 (1966).

[82]388 U.S. 41 (1967).

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> [W]e cannot forgive the requirement of the Fourth Amendment in the name of law enforcement. This is no formality that we require today, but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While the requirements of the Fourth Amendment are not inflexible to the legitimate needs of law enforcement, it is not asking too much that officers be required to comply with the basic commands of the Fourth Amendment, before the innermost secrets of one's home or office are invaded. Few threats exist which are greater than that posed by the use of electronic devices.

Id. at 62-63.

the flaws found in the New York wiretap statute by the majority of the Court in *Berger*, taken in connection with the principles of *Katz* and *Osborn*, as constituting criteria for making that determination.[84] The Eighth Circuit viewed *Katz*, *Berger*, and *Osborn* as setting forth certain requirements for court-ordered electronic surveillance under an applicable statute.[85]

It being clear from *Katz*, *Osborn*, and *Berger* that a statute authorizing electronic surveillance which contains sufficient prior safeguards is constitutionally permissible,[86] Congress enacted such a statute in Title III of the Omnibus Crime Control and Safe Streets Act of 1968[87] as a response to cases such as *Katz* which redefined the constitutional parameters of fourth amendment protection.[88] The various challenges to Title III in the courts provide further insight into the constitutional basis of "privacy" under the fourth amendment and into the delicate balance between individual freedom and the need for effective law enforcement.

Title III was held unconstitutional by the United States District Court for the Eastern Division of Pennsylvania in *United States v. Whitaker*.[89] Even though the statute seemed to be drafted in conformity with *Katz* and *Berger* and roughly approximated the guidelines thought to be mandated by those decisions, the *Whitaker* court held the statute unconstitutional on the following grounds: (1) The time of the intrusion called for by the statute, thirty days, was not precise, carefully circumscribed, or sufficiently limited; (2) the

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[84]United States v. Tortorello, 480 F.2d 764 (2nd Cir. 1973); United States v. Bobo, 477 F.2d 974 (4th Cir. 1973); United States v. Whitaker, 474 F.2d 1246 (3d Cir. 1973); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433 (1969); 16 KAN. L. REV. 549, 551-52 (1968); 9 WM. & MARY L. REV. 1167 (1968).

[85]These requirements are: (1) That the applicant procure from a neutral and detached authority (a judicial officer) an order permitting the surveillance; (2) that to procure the order or a renewal thereof, the applicant must show probable cause that an offense has been or is being committed; (3) that the applicant state with particularity the offense being investigated; (4) that the applicant state with particularity the place being searched (the telephone being "tapped" or the premises being "bugged"); (5) that the applicant state with particularity the things (conversations) being seized; (6) that the order be executed with dispatch; (7) that the surveillance not continue beyond the procurement of the conversation and thereby become a series of intrusions, searches, and seizures pursuant to a single showing of probable cause; (8) that the order overcome the lack of notice by a showing of exigency as a precondition to the order; and (9) that the order require a return on the warrant. United States v. Cox, 462 F.2d 1293 (8th Cir. 1972).

[86]United States v. Bobo, 477 F.2d 974 (4th Cir. 1973).

[87]18 U.S.C. §§ 2510-20 (1970).

[88]*Cf.* United States v. Eastman, 465 F.2d 1057, 1062 n.11 (3d Cir. 1972).

[89]343 F. Supp. 358 (E.D. Pa. 1972).

statute lacked specific guidelines restricting the discretion of the executing officers; and (3) it provided for unreasonable searches and seizures by not requiring prompt notice after the authorized surveillance was completed. Chief Judge Joseph S. Lord III of the Eastern District of Pennsylvania said in *Whitaker*, "[T]he act does not command a constitutional order, it permits an unconstitutional one."[90] Although Chief Judge Lord's decision in *Whitaker* was rejected by the Third Circuit,[91] it does raise some significant questions which bear on the balancing test applied by the Supreme Court between individual freedom and law enforcement needs.

Many of these same questions were raised in an article even more critical of court-ordered electronic surveillance than the position taken by Chief Judge Lord in *Whitaker*.[92] Professor Spritzer argued that *Katz*, in sanctioning electronic surveillance with prior judicial approval, violated the fundamental precepts of the fourth amendment and the reasons for which that amendment was redrafted before inclusion in the Bill of Rights by the Committee of Eleven. His contention was that certain things are inviolate under the fourth amendment, one of which is conversation. In the alternative, Spritzer took the tack of Chief Judge Lord in *Whitaker* and argued that there can be no constitutional search warrants issued for electronic surveillance.

In strictest logic, the idea that there can be no search warrant issued for conversations under the fourth amendment is not without merit. The specificity requirement cannot be met since there is no possible way to specifically describe the conversations to be

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[90]*Id.* at 363. In United States v. Cafero, 473 F.2d 489 (3d Cir. 1973), the Third Circuit, per Judge Aldisert, rejected Judge Lord's position that Title III was not precise or limited, citing United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972), which upheld Title III as being in accordance with the mandate of *Berger*. The *Cox* court noted that Congress, in enacting Title III, had dealt with the problem about as well as could be expected considering the nature and character of the subject matter and its incidents. 449 F.2d at 687. *Cafero* also rejected Judge Lord's day-counting approach, finding that it overlooked the congressional intent that the length of the interception be judicially determined on a case-by-case basis and that the interception be terminated whenever the objective of the authorization is achieved; so that while there is a 30-day maximum, each interception has the potential of a much earlier conclusion. Pointedly, the Third Circuit rejected the contention that Title III vests too much discretion in the executing officer because of an unavoidable lack of precision in describing the proposed object of the surveillance, noting that suppression under 18 U.S.C. § 2515 (prohibition of use as evidence of intercepted wire or oral communications) remains the appropriate remedy when imprecisions in an application or warrant attain constitutional dimensions or when execution of the warrant is improper.

[91]United States v. Whitaker, 374 F.2d 1246 (3d Cir. 1973), *rev'g* 343 F. Supp. 358 (E.D. Pa. 1972).

[92]Spritzer, *Electronic Surveillance by Leave of Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

seized because they are not in existence at the time the application is ruled upon. There is also merit in the attack on court-ordered electronic surveillance based on the idea that there is too much discretion given to the executing officers. During the course of the surveillance, many of the conversations monitored will be irrelevant to the particular investigation; therefore the privacy of the individual under surveillance will be compromised.

However, these attacks on Title III and on court-ordered electronic surveillance overlook the underlying aim of the *Katz/Berger* cluster of cases which give a contemporary application to fourth amendment protection: maximizing individual freedom while at the same time not denying law enforcement a recognizedly effective means of investigation. Just as the devoted champions of individual freedom and security do not believe that the newer standards of the *Katz* line of cases give sufficient protection to the individual and are repugnant to the dictates of the Constitution, the law enforcement authorities argue that the newer standards constrict them in their enterprise, likewise a protection of the individual.

The Court in *Katz* and *Berger* compromised these two extremes by sanctioning electronic surveillance only when made pursuant to a court order which meets the guidelines set forth in *Berger*, issued by a neutral and detached judicial authority. This compromise is in line with the often cited words of Justice Jackson who, commenting on the fourth amendment, said

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . . The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[93]

The compromise arrived at by the Court in providing that the judiciary act as a buffer between law enforcement authorities and

[93]Johnson v. United States, 333 U.S. 10, 13-14 (1948).

the citizenry as regards electronic surveillance thus conforms to historical tradition.[94]

If one is to grant the legitimacy of the need of law enforcement officers to utilize electronic surveillance in investigations, then it seems that the standards flowing from *Katz* and *Berger* provide adequate assurances to the public that there is little room for abuse of electronic surveillance techniques on the part of law enforcement if the judiciary continues to maintain a neutral, detached, and independent posture and if the guidelines as incorporated into statutes are rigidly adhered to and strictly construed.[95] Rigid adherence and strict construction, however, are not to be taken to such extremes so as to totally limit the efficacy of an electronic surveillance. If the guidelines and statutes are read in their narrowest context, it could be argued that court-ordered eavesdrops would be so circumscribed under the specificity requirement of the fourth amendment as to allow only the so-called "rifle shot" eavesdrop—one pertaining only to a single conversation. The courts have not so held; instead, they have analogized the eavesdrop situation to that of a search of a building. Just as the search of a building for tangible evidence perhaps will involve seeing and hearing irrelevant things, an electronic search extending over a period of several days will necessarily involve overhearing irrelevant conversations.[96] Under Title III, protection against introduction of evidence not within the specific confines of the warrant is built in by an evidentiary bar against reception of contents of communications received in violation of the fourth amendment.[97] Further protection is afforded in Title III by the availability of suppression for the contents of any wire or oral communications, or evidence derived therefrom, if the communication was unlawfully obtained by a warrantless eavesdrop.[98]

An additional process of analogy has also slightly broadened the scope of court-ordered electronic surveillances. *Katz* held that

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> It has long been the rule that the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried actions of officers.

Perkins v. United States, 432 F.2d 612, 614 (D.C. Cir. 1970) (Bazelon, C.J., dissenting).

[95]The courts have strictly construed electronic surveillance statutes such as Title III. *See* United States v. George, 465 F.2d 772 (6th Cir. 1972); United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972); United States v. Giordano, 469 F.2d 522 (3d Cir. 1972). *But see* United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972), where the court reversed suppression ordered by the district court, finding substantial compliance with the statute.

[96]United States v. Cox, 462 F.2d 1293 (8th Cir. 1972).

[97]18 U.S.C. § 2515 (1970).

[98]18 U.S.C. § 2518(10)(a)(i) (1970).

searches conducted without prior judicial approval are per se unreasonable under the fourth amendment, subject to only a few exceptions.[99] Among those exceptions is the "plain view" doctrine, which has been held applicable in the area of electronic searches.[100] However, it must be noted that, when attempting to apply the exceptions that may justify warrantless searches and seizures, the exceptions are strictly construed. Those who seek exemption from the rule that warrantless searches and seizures are per se unreasonable must show that their course was made imperative by the exigencies of the situation.[101]

Even with all the purported protection emanating from *Katz* and *Berger*, when the total number of state and federal electronic surveillances authorized by court order[102] is examined, one naturally becomes skeptical about whether in practical effect those cases have really increased the scope of fourth amendment protection. In 1969 the total number of state and federal eavesdrops was 302, in 1970 the number increased to 597, and in the following year, 1971, the number again rose dramatically to 816. The number increased not so rapidly in 1972 to 855.[103] While this nearly threefold increase in three years time may be viewed as the result of more aggressive law enforcement, stemming from the "law and order" emphasis of that period, it nevertheless is a figure striking on its face and may have far-reaching implications. Even though the searches must be judicially approved, and, under Title III the request must also be approved by a "politically responsible" official in the Department of Justice,[104] it could be argued that the num-

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[99]389 U.S. at 357.

[100]United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1970); United States v. Escander, 319 F. Supp. 295 (S.D. Fla. 1970). In the *Sklaroff* case, Judge Cabot wrote:

> It is well settled law in search and seizure cases that certain items not named in the search warrant may be seized if discovered in the course of a lawful search. By analogy, the same rule should apply to conversations, which are "seizures" under the *Katz* case. 18 U.S.C. § 2517 provides that, when approved by a court of competent jurisdiction, intercepted conversations relating to other crimes may be used as evidence or divulged, provided the original interception itself was authorized by lawful court order. This is only a re-statement of the existing case law, adapted to fit the electronic surveillance situation.

323 F. Supp. at 307 (citations omitted).

[101]Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

[102]*See* Holmes v. Burr, 486 F.2d 55, 63 n.3 (9th Cir. 1973) (Hufstedler, J., dissenting) (table of federal and state authorized wiretapping and electronic surveillance).

[103]*Id.*

[104]United States v. Giordano, 469 F.2d 55 (3d Cir. 1972); *cf.* United States v. Ceraso, 467 F.2d 647 (3d Cir. 1972).

ber of eavesdrops alone and the attitude implied by such widespread utilization warrants consideration of further restraint on their use.[105]

D. What Expectations Are Reasonable?

Although the "reasonable expectation" standard set forth by the Supreme Court in *Katz* is clearly an abstraction, the subsequent cases have lent some degree of precision to the standard by either expressly holding that there can be no reasonable expectation of privacy in a certain situation or finding the *Katz* standard applicable and thus suppressing or barring evidence.

1. Informers and Consensual Eavesdropping.—The technique of using plants or informers is a standard investigation tactic utilized by police. With the advent of small wireless FM transmitters, this tactic became closely related to the other types of electronic surveillance which involve no direct contact between the investigators and the suspected lawbreakers. By utilizing an informer outfitted with such a transmitter, incriminating conversations, thought to be in confidence, may be recorded, for potential courtroom use, in a remote location. Closely related to the "wired informer" problems are those encountered where one party to a conversation consents either to a "tap" of his telephone, or to the placing of a transmitter on his premises or person, thereby transmitting the contents of his conversations with suspected criminals to police tape recorders.

Prior to *Katz*, the fourth amendment questions as to informers were controlled by *United States v. On Lee*,[106] which held that government use of informers who may reveal the contents of conversations with an accused does not violate the fourth amendment guarantee against unreasonable searches and seizures. The questions of "consent" were governed by *Lopez v. United States*,[107] which held as constitutional warrantless consent eavesdropping. It was opined by some that the broad preference for search warrants (court-ordered surveillance) expressed in *Katz*[108] would lead the

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> If America permits fear and its failure to make basic social reforms to excuse police use of secret electronic surveillance, the price will be dear indeed. The practice is incompatible with a free society.

United States v. White, 401 U.S. 745, 764 (1971) (Douglas, J., dissenting), *quoting from* R. CLARK, CRIME IN AMERICA 287 (1970).

[106] 343 U.S. 747 (1952).

[107] 373 U.S. 427 (1963).

[108] 389 U.S. at 357.

Court to reverse itself on these issues and require judicial approval for all electronic eavesdrops.[109]

The signal post-*Katz* decision regarding informers and consent is *United States v. White.*[110] The respondent was convicted of narcotics violations, with incriminating statements made by the defendant admitted at trial. This evidence was obtained by means of warrantless electronic eavesdropping by a government informer during a meeting with the defendant. At trial the informer could not be located, but Judge Hoffman of the Northern District of Illinois overruled objections to the testimony of the agents who listened in on the conversations. The Seventh Circuit, reading *Katz* as overruling *On Lee,* held that the testimony was inadmissible and reversed the conviction.[111]

The Supreme Court, Justice White writing for the majority, in addition to holding that the Seventh Circuit erred in not adjudicating the case by the standards of *On Lee* since *Desist* held *Katz* not retroactive, concluded that the use of agents by law enforcement authorities, who themselves reveal the contents of the conversations with an accused, does not violate the fourth amendment and that *Katz* did not disturb the rationale of *On Lee* and require a different result because the agent uses electronic equipment to transmit the conversation to other agents. The Court narrowly construed *Katz* to fact situations involving no revelations to agents of the government, and the Court further noted that there was no indication in *Katz* that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.[112]

The Court cited *Hoffa v. United States,*[113] which held that an undercover police agent may write down for official use his conversations with a criminal defendant and then testify concerning them without a warrant authorizing his encounters with the defendant and without otherwise violating the defendant's fourth amendment rights.[114] In *White,* the Court said:

> For constitutional purposes, no different result is required if the agent instead of immediately transcribing his con-

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[109]United States v. Bryant, 439 F.2d 642, 644 n.2 (D.C. Cir. 1971).

[110]401 U.S. 745 (1971).

[111]United States v. White, 405 F.2d 838 (7th Cir. 1969).

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> However strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities.

401 U.S. at 749.

[113]385 U.S. 293 (1966).

[114]*Id.* at 300-03.

> versations with the defendant either (1) simultaneously records them with electronic equipment he is carrying on his person, or (2) carries radio equipment which simultaneously transmits the conversation either to recording equipment located elsewhere or to other agents monitoring the transmitter frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversation made by the agent or others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.[115]

Thus the majority placed little independent significance upon the presence or absence of electronic surveillance in such cases and instead placed the risk that the conversation will subsequently be divulged upon the party speaking. In other words, there is no reasonable expectation that such conversations will remain private.

Justice Douglas, dissenting in *White*,[116] took the opposite tack and attached great significance to the presence of electronic devices, noting that "electronic surveillance is the greatest leveler of privacy ever known."[117] He advocated that a prior judicial determination be made before any electronic surveillance devices are used at all. In the overall area of electronic surveillance, Justice Douglas found first amendment issues intertwined with the relevant fourth amendment issues.[118]

Justice Harlan, also dissenting in *White*,[119] stated that there was a significant difference between subjecting a person to the risk that participants in a conversation will subsequently divulge the contents of the conversation to others and foisting upon him the risk that unknown third parties may be simultaneously listening in. The *Katz/Berger* line of cases, to Justice Harlan, "left no doubt that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited un-

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[115] 401 U.S. at 751 (citations omitted).

[116] *Id.* at 756 (Douglas, J., dissenting).

[117] *Id.* *See also* Cioffi v. United States, 419 U.S. 917, 918-19, *denying cert. to* 493 F.2d 1111 (2d Cir. 1974) (Douglas, J., dissenting).

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> Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste, but is not free if there is surveillance.

401 U.S. at 762 (Douglas, J., dissenting).

[119] *Id.* at 768 (Harlan, J., dissenting).

supervised 'bugging.'"[120] Justice Harlan also advocated the necessity of judicial interposition before electronic surveillance devices could be constitutionally utilized by police in investigations.[121]

The position taken by the majority in *White*, that fourth amendment protection does not extend to "wired informers," was applied to the consensual wiretaps (where one party to a telephone conversation consents to its being monitored and recorded by agents acting without a warrant),[122] even where the consenting party or informer initiated the conversation with the defendant and thus was in a position to shape the conversation.[123]

Although the *White* rationale has been consistently applied by the circuits,[124] both before and after the decision, if one places any importance and independent significance upon electronic surveillance which threatens one of the basic freedoms, privacy, then the *White* rationale misses the mark and mistakes the issue by centering its focus on the interests of a particular person instead of examining the impact of the practice "on the sense of security that is the true concern of the Fourth Amendment's protection of privacy."[125]

To require a court order for any electronic surveillance, as advocated by the dissenters in *White*, would seem to be the next

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[120] *Id.* at 779.

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> The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.
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> This question must, in my view, be answered by addressing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of the Fourth Amendment liberties, I am of the view that more than self-restraint by law officers should be necessary.

Id. at 786 (Harlan, J., dissenting).

[122] Hudson v. United States, 429 F.2d 1311 (5th Cir. 1970), *cert. denied*, 402 U.S. 965 (1971).

[123] Williamson v. United States 450 F.2d 585 (5th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972).

[124] United States v. Buchert, 507 F.2d 629 (3d Cir. 1975); Holmes v. Burr, 486 F.2d 55 (9th Cir. 1973); United States v. Quintana, 457 F.2d 874 (10th Cir. 1972); United States v. Holmes, 452 F.2d 259 (7th Cir. 1971); White v. Schneckloth, 451 F.2d 1317 (9th Cir. 1971); United States v. Caracci, 446 F.2d 173 (5th Cir. 1971); United States v. Anthony, 444 F.2d 484 (9th Cir. 1971); United States v. Skillman, 442 F.2d 542 (8th Cir. 1971); United States v. Smith, 442 F.2d 448 (9th Cir. 1971); United States v. Coley, 441 F.2d 1299 (4th Cir. 1971); United States v. Puchi, 441 F.2d 697 (9th Cir. 1971); United States v. Viviano, 437 F.2d 295 (2d Cir. 1971).

[125] 401 U.S. at 768 n.24 (Harlan, J., dissenting).

logical step in the redefinition of fourth amendment protection and one which would not tip the balance between the twin needs for individual freedom and security and for effective law enforcement measurably away from the interests of law enforcement. Since any surveillance of the wired informer or consensual participant type takes time to gear up, establish contacts or confidences, and set the surveillance into operation, to require a court order for such surveillance would not be such an onerous burden on law enforcement as to outweigh the need for individual security and privacy.

Although *Katz* was a case involving electronic surveillance, the impact of its holding that "what a person knowingly exposes to the public, even in his own home is not a subject of Fourth Amendment protection. . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"[126] goes beyond the electronic surveillance cases and into the area of searches and seizures generally.[127]

2. No Reasonable Expectation Found.—In connection with matters relating to conversations, it is helpful in discerning the scope of the *Katz* holding that "what a person knowingly exposes"[128] to focus on several situations where the circuits have found no reasonable expectation of privacy. In a case involving much popular attention, the Seventh Circuit held that there was no expectation of privacy protected by the fourth amendment as to calls made from mobile telephone units in automobiles, since the calls were exposed to anyone who possessed an FM receiver which could be tuned into the same frequency.[129] Presumably then, there is no reasonable expectation of privacy with respect to any conversation transmitted on any wavelength to which the public or law enforcement has access.

There is no reasonable expectation of privacy as to conversations within a confined area, such as a motel room or telephone booth, which, although intended to be private, are of such volume as to enable the electronically unassisted ear to overhear them.

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[126]389 U.S. at 351-52.

[127]*But cf.* United States v. Wright, 449 F.2d 1355, 1363 (D.C. Cir. 1971) (per curiam). The *Wright* decision would, in effect, constrict the application of *Katz* in situations other than those involving secret electronic surveillance. The court explained that *Katz* broadly hints at a basic principle that the fourth amendment protects from invasions by the police the actions and conversations that the ordinary person would expect to be *strictly* private and escape the perception of others, regardless of location.

[128]389 U.S. at 351-52. The passage is quoted in text accompanying note 126 *supra.*

[129]United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971).

In such a case, the individual's subjective expectation of privacy is not sufficient to encompass it within the scope of fourth amendment protection.[130] A clear illustration of the reasonable expectation of privacy test was found where the defendant's own thoroughness deprived himself of potential fourth amendment protection.[131] The potential protection was lost because the defendant was made aware of a wiretap on his line through a contact at the telephone company. The Second Circuit said, "It is incongruous therefore to advert to an expectancy of privacy . . . ."[132] These cases serve to lend further meaning to the objective and subjective standards of the *Katz* test if one is to attack the problem using Justice Harlan's approach.

Utilizing the Harlan criteria for determining the existence of a reasonable expectation of privacy, the Ninth Circuit held that a prisoner in a jail cell has no reason to consider such area private, and thus, although the prisoner had exhibited the requisite subjective intent, his expectation was not reasonable under the circumstances.[133] The reasoning of the Supreme Court in *Lanza v. New York*[134] mandated such a conclusion. In *Lanza,* the Court noted that "it is obvious that a jail cell shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day."[135] Although the force of *Lanza* in this context might appear to be eroded since "the Fourth Amendment protects people, not places,"[136] *Lanza,* as applied in this context, bears upon the objective determination of reasonableness. The Ninth Circuit also came to the same conclusion as to conversations between co-defendants positioned in a police station interrogation room, finding no ex-

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[130]United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973); United States v. Elder, 446 F.2d 587 (9th Cir. 1971); United States v. Fuller, 441 F.2d 755 (4th Cir. 1971). In *Fisch,* the Ninth Circuit couched its opinion in the following terms:

> Upon balance, appraising the public and private interests here involved, we are satisfied that the expectations of the defendants as to their privacy, even were such expectations to be considered reasonable despite their audible disclosures, must be subordinated to the public interest in law enforcement. In sum, there has been no justifiable reliance, the expectation of privacy not being "one that society is prepared to recognize as reasonable."

474 F.2d at 1078-79.

[131]United States v. Bynum, 485 F.2d 490 (2d Cir. 1973).

[132]*Id.* at 501.

[133]United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972). *See also* United States v. Savage, 482 F.2d 1371 (9th Cir. 1973); United States v. Kelley, 393 F. Supp. 755 (W.D. Okla. 1975).

[134]370 U.S. 139 (1962).

[135]*Id.* at 143.

[136]389 U.S. at 351.

pectation of privacy.[137] However, the question remains whether there can be a constitutionally protected expectation of privacy as to the conversations between a prisoner and a person visiting him.[138]

3. Reasonable Expectations on Government Property.—Two other cases, however, illustrate when one may entertain a justifiable expectation of privacy on government property. In one, the Fifth Circuit held that a university regulation authorizing entry into student dormitory rooms for purposes of making a search was constitutional so long as the search was limited in its application to the furtherance of the university's function as an educational instition. Once the regulation was applied so as to authorize a search of rooms for criminal evidence, however, it was found to constitute an unreasonable attempt to require students to waive their fourth amendment protection as a condition to their occupancy of rooms.[139] Although the decision is more applicable to and is based upon questions of waiver of rights, the undertones of *Katz* and privacy are evident in this decision. The decision also demonstrates a fine line on one side of which expectations of privacy will not be considered reasonable as they have been effectively waived, and on the other side of which the students' expectation of privacy may warrant protection notwithstanding the waiver.

In a liberal application of *Katz*, the Seventh Circuit held that the fourth amendment prohibited the receipt of evidence obtained through an electronic listening device placed, without a warrant, to overhear conversations of a government employee in his office.[140] The court said, "The key is whether the defendant sought to exclude 'the uninvited ear.' Under this rationale, it is immaterial that the conversation took place in an Internal Revenue Service office."[141] Quoting *Katz*, the Seventh Circuit continued, "The Fourth Amendment applies 'wherever a man may be.'"[142]

4. Spatial Considerations and the Reasonable Expectation Standard.—The Seventh Circuit also dealt with another post-*Katz* spatial question in *United States v. Case*.[143] Government agents overheard conversations among the defendants who were behind closed doors in a print shop. The agents were stationed in a nonpublic hallway in the building in which the print shop was located.

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[137]Williams v. Nelson, 457 F.2d 376 (9th Cir. 1972).

[138]Christman v. Skinner, 468 F.2d 723, 729 (2d Cir. 1973) (Feinberg, J., concurring in part, dissenting in part).

[139]Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

[140]United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968).

[141]*Id.* at 716.

[142]*Id., quoting from* 389 U.S. at 359.

[143]435 F.2d 766 (7th Cir. 1970).

The court accepted the finding of the trial court that the hallway where the agents overhearing the conversations were stationed either was private in that the agents had to get a key from the landlord in order to obtain access to the hallway or, in the alternative, that the hallway was not such a public area as to consider it not protected. Applying *Katz,* the Seventh Circuit found that the surreptitious listening by the agents in the hallway invaded the defendants' right to privacy in that the defendants subjectively sought to keep their conversations private and, as to the objective consideration, that the defendants could not have reasonably expected that the agents would have so positioned themselves. Quoting from an earlier case decided in the same circuit, the court said. " 'One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from government intrusion . . .' "[144] It seems that the Seventh Circuit has taken an approach slightly more oriented to the privacy side of the balance between privacy and law enforcement than the approaches of the other circuits.[145] However, neither approach is to be faulted on either conceptual or policy grounds as it must be remembered that the *Katz* standard is a vague test depending greatly on context and that even though *Katz* might well be considered a pro-privacy decision, its underlying rationale is to effect a balance between the personal interest in privacy and the public interest in effective law enforcement.

Although *Terry v. Ohio*[146] firmly established that the "right of personal security belongs as much to the citizens on the streets of our cities as to the homeowner closeted in his study to dispose of his personal affairs,"[147] the fourth amendment "is not a shield against the inevitable loss of privacy which accompanies one's decision to go out into the world and mingle with his fellow man."[148] Thus, a visitor in someone else's home is not protected from the risk that the owner will consent to the entry of the police.[149] His expectation of privacy in such circumstances is not reasonable.[150] The expectations of privacy asserted in the house of complete strangers as to intercepted oral communications were not reasonable when the defendants had made several suspicious visits to the premises and had obtained entry by false representations.[151]

[144] *Id.* at 768, *quoting from* United States v. Haden, 397 F.2d 460, 464 (7th Cir. 1968).

[145] See text accompanying notes 127-37 *supra.*

[146] 392 U.S. 1 (1968).

[147] *Id.* at 9.

[148] Bowles v. United States, 439 F.2d 536, 540 (D.C. Cir. 1970). *But cf.* Kroehler v. Scott, 391 F. Supp. 1114 (E.D. Pa. 1975).

[149] 439 F.2d at 540-41.

[150] See text accompanying notes 109-24 *supra.*

[151] United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir. 1973).

In a private club, no expectation of privacy reasonably existed when the doors were not locked and no doorman was present to bar the entry of nonmembers and where the members had acquiesced in the entry of detectives on two previous occasions.[152] Seemingly then, one's expectation of privacy becomes less reasonable the further he ventures from his own abode. This reasoning is, in fact, quite logical and rests on centuries of experience. Even though *Katz* rejected the "trespass doctrine" of *Olmstead,* the rejected property concepts retain considerable vitality in determining the objective reasonableness of one's expectation of privacy.

Another fourth amendment area in which the *Katz* doctrine has found considerable application and impact is that of abandonment of physical evidence. In *United States v. Stroble,*[153] *Katz* was used to establish the admissibility of inventory tags left lying by the side of garbage cans adjacent to the street curb and observed by police while they were still on a public street. The Sixth Circuit found that there can be no reasonable expectation of privacy in respect to such items when they are left in such a manner as to place them in "plain view."[154] The exposure of physical evidence to the plain view of the public indicates such a lack of expectation of privacy that to seize it is inoffensive to the constitutional protection of the fourth amendment.[155] The California Supreme Court took the opposite view, however, and, citing *Katz* as authority, upheld a citizen's expectation of privacy as to the contents of a trash can placed on a public sidewalk awaiting pickup by municipal trash collectors.[156] The First Circuit rejected this application, stating that "[i]mplicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned."[157] The rationale of the First Circuit has been applied to automobiles abandoned on public highways[158] and to parcels left on sidewalks which contained tangible evidence seized by police officers in the course of duty.[159] The right to fourth amendment protection of property against unreasonable search and seizure is lost when property is abandoned. Further, the same reasoning has been extended to situations where the particular item in question has

[152]Ouimette v. Howard, 468 F.2d 1363 (1st Cir. 1972).

[153]431 F.2d 1273 (6th Cir. 1970).

[154]*Id.* at 1276. *See also* United States v. Johnson, 469 F.2d 970 (1st Cir. 1972); United States v. Jackson, 448 F.2d 963 (9th Cir. 1971).

[155]Smith v. Slayton, 484 F.2d 1188, 1190 (4th Cir. 1973).

[156]People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 67 (1971), *vacated,* 409 U.S. 33 (1972).

[157]United States v. Johnson, 469 F.2d 970, 972 (1st Cir. 1972).

[158]United States v. Edwards, 441 F.2d 749 (5th Cir. 1971).

[159]United States v. Colbert, 474 F.2d 749 (5th Cir. 1973).

been sold[160] or loaned[161] to another; once possession of the property has been relinquished there can be no legitimate continuing expectation of privacy as to the item.[162] Similarly, even where contrabrand was secreted on wastelands to such an extent that it could not be argued that it was abandoned, the reasonableness of searches of boxes containing the contraband did not depend upon the subjective intent of the party who secreted the contraband, but rather was determined by the objective reasonableness of the expectation that no one would find the boxes. The court found that the only justified expectation was that the property would remain secure against intrusion only so long as it remained undiscovered.[163]

The Supreme Court has held that writing[164] and speech[165] exemplars are without the scope of fourth amendment protection. These holdings are based on the *Katz* reasoning that "what a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[166] Since handwriting and speech are constantly exposed to the public, there can be no reasonable expectation of privacy as to the characteristics of one's handwriting or voice pattern.

5. The Katz *Standard and National Security.*—A question left open by the majority in *Katz* concerned the standards governing the constitutionality of electronic surveillance in connection with gathering intelligence information necessary for the conduct of international affairs and protection of national security.[167] Justice White was of the opinion that such surveillance was not violative of the fourth amendment if the President or Attorney General authorized the surveillance after considering the requirements of national security.[168] The Court addressed itself to the issue[169] in *United States v. United States District Court.*[170] Three defendants were

[160]Brown v. Brierly, 438 F.2d 954 (3d Cir. 1971).

[161]Nelson v. Moore, 479 F.2d 1192 (1st Cir. 1972).

[162]The proper test for abandonment is not whether all formal rights have been relinquished, but whether the relinquishing party retains a reasonable expectation of privacy in the articles alleged to be abandoned. United States v. Wilson, 472 F.2d 901 (9th Cir. 1972). The cases, however, bear out that when the property is abandoned, there is no reasonable expectation of privacy.

[163]United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972).

[164]United States v. Johnson, 410 U.S. 19 (1973).

[165]United States v. Dionisio, 410 U.S. 1 (1973).

[166]389 U.S. at 351-52.

[167]*Id.* at 358 n.3.

[168]*Id.* at 367 (White, J., concurring).

[169]The *Katz* Court framed the issue as whether safeguards other than prior authorization by a magistrate would satisfy the fourth amendment in a situation involving the national security. *Id.* at 358 n.3.

[170]407 U.S. 297 (1971).

charged with conspiracy to destroy government property.[171] At pretrial, the defendants moved to compel the Government to disclose electronic surveillance information and for the court to conduct a hearing to determine whether the information obtained from the surveillance "tainted" the information upon which the indictment was based. In response, the Government filed an affidavit acknowledging that there was electronic surveillance and that the Attorney General had approved the wiretaps. The contention of the Government was that the surveillance was lawful as a reasonable exercise of the President's power to protect the national security even though it was conducted without the prior judicial approval that *Katz, Berger,* and Title III would require. The district court ruled that the surveillance violated the fourth amendment rights of the defendants.

The Government then moved for a writ of mandamus in the Sixth Circuit to vacate the order of the district court directing the Government to make a full disclosure of the monitored conversations. The Sixth Circuit held that when dealing with the threat of domestic subversion, the executive branch is subject to fourth amendment limitations on electronic surveillance,[172] rejecting the argument of the Government that such procedure was within the inherent executive power.[173]

When the case reached the Supreme Court, the decision turned on the application of Title III to the national security context as related to the inherent powers of the executive branch. Justice Powell, writing for the Court, found that Title III[174] conferred no such power but was merely intended to provide that the Act[175] was not to

[171]18 U.S.C. § 371 (1970).

[172]United States v. United States District Court, 444 F.2d 651 (6th Cir. 1971).

[173]The Sixth Circuit, in rejecting the "inherent power" argument, made these telling remarks:

> An additional difficulty with the inherent power argument in the context of this case is that the Fourth Amendment was adopted in the immediate aftermath of the abusive searches and seizures directed against the American colonists under the sovereign and inherent powers of King George III. The United States Constitution was adopted to provide a check upon the "sovereign" power. The creation of three coordinate branches of government by that Constitution was designed to require sharing in the administration of that awesome power.
>
> It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this nation overthrew King George's reign.

Id. at 665.

[174]Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970).

[175]18 U.S.C. § 2511(3) (1970).

be interpreted to limit or disturb whatever powers the executive branch may have under article II of the Constitution. Finding that the fourth amendment freedoms could not be adequately guaranteed if electronic surveillance for domestic security purposes could be conducted solely within the discretion of the executive branch, the Court held that the shields protecting private speech, as set forth in *Katz* and *Berger*, must apply in the national security context.[176] The Court utilized the balancing process running throughout the *Katz* related cases, substituting safeguarding the domestic security for the need for effective law enforcement. The Court thus posed the question: "[W]hether the needs of citizens for privacy and free expression may not be protected by requiring a warrant [from a neutral and detached magistrate] before such surveillance is undertaken."[177] Answering in the affirmative, the Court, using a balancing approach with an historical bent, said, "[U]nreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech."[178]

IV. Conclusion

Katz must be viewed as both a milestone and a touchstone. *Katz* must be considered a milestone in that it rejected the property-based analysis of *Olmstead* and returned to an approach based more upon the theoretical intent of the Framers. *Katz* must also be viewed as a touchstone in that the standards for fourth amendment protection enunciated in the decision were relatively void of clear content which would make application of the reasonable expectation standard mechanical, and, therefore, the application and refinement of the standard were left for future determination to fit the context in which they arise.

The decisions construing *Katz* and its progeny, although they may seem to be superficially at odds, still bear out the underlying thrust of the *Katz* decision—the necessity of finding a contemporary balance between the personal interest in privacy or security and the broad public interest in effective law enforcement.

Since *Katz* and *Berger* can be considered as standards enabling legal protection to conform to changing times and technology, the reasonable expectation standard should be able to withstand the tests of time and continue to evolve, meeting, in application, the demands and necessities of succeeding generations. Just as *Katz* arose out of the necessity of redefining fourth amendment protection in light of extensive use of electronic surveillance techniques

[176] 407 U.S. at 313-16.

[177] *Id.* at 315.

[178] *Id.* at 317.

and the invasion into private lives which the use of such techniques entails, so might a further redefinition be necessary if some unforeseen development constricts the scope of the reasonable expectation standard when viewed against the vague constant of "privacy." However, given the intended abstractness of the *Katz* standard, it seems that a further redefinition would not be warranted unless future developments rob the *Katz* focus of any meaning in relation to the concepts embodied in the fourth amendment. It is to be expected, therefore, that the standard of the reasonable expectation of privacy set forth in *Katz v. United States* will continue to be the signal consideration as to unreasonable searches and seizures well into the future.

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