Police Use of CCTV Surveillance: Constitutional Implications and Proposed Regulations

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POLICE USE OF CCTV SURVEILLANCE: CONSTITUTIONAL IMPLICATIONS AND PROPOSED REGULATIONS

The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tappings.1

The increasing use of closed circuit television (CCTV) surveillance by law enforcement bodies confirms this prediction made by Justice Brandeis over half a century ago.2 While the first fully operational system suggests the enormous potential of the system as an effective means of combating crime,3 important constitutional questions must be addressed before such systems are used more widely.

This article evaluates the constitutionality of CCTV "searches." Part I discusses the present uses being made of closed circuit technology and evaluates the merits of the CCTV surveillance system. The critical policy trade-off is the system's effectiveness in combatting crime against the resulting loss of

1 Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting). Justice Brandeis wrote:

Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?

Id.

Much later, the Court in Silverman v. United States, 365 U.S. 505, 509 (1961), warned of "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society." Justice Douglas believed that "[w]e are rapidly entering the age of no privacy, where everyone is open to surveillance at all times." Osborn v. United States, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting).

2 Police departments in the following cities have used or are currently using CCTV: Chicago; New York; Hoboken, New Jersey; Tampa, Florida; Mt. Vernon, New York; Amsterdam; Berlin; Tokyo; and Paris. The Urban Mass Transportation Administration has financed several CCTV projects in underground subway stations. See CCTV: A Private Eye on the Public's Business, Student Lawyer, Jan. 1979, at 59. See also note 15 and accompanying text infra.

3 See note 9 infra.
privacy to individual citizens.

Part II considers the constitutional implications of CCTV use in terms of three major doctrines: the Fourth Amendment prohibition against "unreasonable searches and seizures"; the constitutional right of privacy; and the First Amendment guarantees of free speech and association. This part briefly summarizes the state of the law concerning these constitutional doctrines. These separate doctrines are then applied to a hypothetical fact situation involving police use of CCTV surveillance. The conclusion is that current case law is inadequate to deal with the advanced technological capabilities of CCTV surveillance.

Part III advocates stringent regulation of police use of CCTV, despite the system's demonstrated and potential success in preventing crime, in order to stay within the constitutional parameters and to prevent abuses which unjustifiably intrude on the personal privacy of individuals.

I. PRESENT USE OF CCTV SURVEILLANCE

The private sector has made use of CCTV surveillance in shopping centers, hospitals, banks, and other commercial buildings. The first advanced system of CCTV surveillance, funded by the Law Enforcement Assistance Administration (LEAA),

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4 This idea that the law may not be keeping up with new technology has increasingly been expressed in recent years. Justice Brennan expressed his concern that "our course of decisions, it now seems, has been outflanked by the technological advances of the very recent past." Lopez v. United States, 373 U.S. 427, 471 (1963) (Brennan, J., dissenting). In Berger v. New York, 388 U.S. 41, 49 (1967), the Court stated: "The law, though jealous of individual privacy, has not kept pace with [the] advances in scientific knowledge."

See also Hearings on Surveillance Technology Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. — (1975) (statement of Senator Tunney):

Technological developments are arriving so rapidly and are changing the nature of our society so fundamentally that we are in danger of losing the capacity to shape our own destiny.

This danger is particularly ominous when the new technology is designed for surveillance purposes, for in this case the tight relationship between technology and power is most obvious. Control over the technology of surveillance conveys effective control over our privacy, our freedom and our dignity—in short, control over the most meaningful aspects of our lives as free human beings.


6 LEAA is a division of the Department of Justice which was created by the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701, 3711-3795 (1976). LEAA awards grants to states for the purpose of improving the criminal justice system. The states, in turn, award the funds to local criminal justice agencies.
was installed by the Mt. Vernon, New York police department in 1971.⁷

In the Mt. Vernon system, police officers monitor the CCTV screens and can dispatch assistance immediately when anything unusual appears on the screen. The officer on monitoring duty can adjust the camera for a better viewing angle and focus on suspected criminal activity. The most sophisticated aspect of the system, however, is a technological break-through known as light amplification ability. This feature permits the system to be used at night, thus giving constant twenty-four hour surveillance.⁸

The Mt. Vernon system has been at least partially successful in deterring crime.⁹ Its success has induced the LEAA to make

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⁷ Mt. Vernon is a suburb of New York City with a population of 80,000. The street upon which the cameras are located is characterized by Mt. Vernon police as a high business crime area. The system consists of two cameras located a block apart. The cameras are operated by remote control and are capable of a 355 degree rotation and a 120 degree tilt. The system is equipped with a video tape machine, instant replay, split screen, and slow motion apparatus. The replay feature also permits an entire twenty-four hour surveillance period to be reviewed by a monitor operator in forty-eight minutes. The cameras themselves are in steel units with windshield wipers, windshield sprayers, heaters, and ventilating fans. See Chicago Tribune, Apr. 14, 1971, § 1, at 22, col. 3; TIME, May 10, 1971, at 46; T.V. GUIDE, Aug. 13, 1971, at 8. See also Heckel & Court, The Mt. Vernon Story: The World's First Police Operated LLLTV System, at 1 (undated mimeo), cited in Note, supra note 5, at 144 n.8.

⁸ Chicago Tribune, supra note 7. See also Note, supra note 5, at 144 & 144 n.10.

⁹ The Mt. Vernon system is completely automatic, operating over a scene illumination range of 0.0001 (starlight) to 10,000 foot candles (bright sunlight). The picture on the monitor looks the same at night as it does in bright sunlight. Id. The LLLTV (low light level television) device gives a clear monitor picture, even in darkness, of automobile license plates over two blocks away. Chicago Tribune, supra note 7, at 22. During one demonstration of the system in a Mt. Vernon hotel, a dark barroom was shown on the monitor screen with LLL TV camera capability. By the naked eye no person could be made out in the bar but on the monitor screen the picture was as vivid as if the entire barroom had been brightly lit. Id.

This day and night capability constitutes separate privacy objections. With the outdated infra-red or beam emission camera systems, one can see the source of the light amplification and deduce that he or she is being monitored. In contrast, the Mt. Vernon cameras operate on an LLLTV device which does not emit any warning to the observed subject. The subject may therefore be completely unaware of the nighttime surveillance. Id. For a discussion of the legal implications of surveillance aided by light amplification, see note 71, note 68 and accompanying text infra.

For a six-month period in 1970 during which the CCTV system was not yet in place, a total of ninety-nine street crimes were reported in the range of the camera surveillance. In a comparable six-month period in 1971 after the system was operative, the number of street crimes reported dropped to forty-nine. On the basis of this one-year decline, an evaluation of the project commissioned by the LEAA concluded that crime was reduced by better than 50% in the surveillance area as a result of the CCTV system. Note, supra note 5, at 146. Furthermore, the number of street crimes was reduced by 71% for the first ten weeks of the Mt. Vernon project. T.V. GUIDE, supra note 7.

According to Mt. Vernon and LEAA officials, deterrence is the chief reason for the system and apprehension is only a secondary goal. Note, supra note 5, at 146. Even so, the potential use of CCTV surveillance as a means of apprehension and/or courtroom
similar grants to other states. Despite this initial success, however, the cost of CCTV systems, particularly in smaller towns, remains an obstacle to further use. The non-economic costs of CCTV surveillance may also influence decisions regarding its use.

In 1973, local businesspeople and the New York Times contributed $15,000 for the installation of a CCTV system in New York’s Times Square. The New York Civil Liberties Union protested. Nevertheless, these public contributions are another evidence has not, however, been lost on law enforcement personnel. According to a police prospectus in Florida:

The possibility of immediate apprehension of a criminal while in commission of a crime is the ultimate of evidence for prosecution. In the event immediate apprehension is not affected, then the [police] department would have video tape evidence of the crime and positive identification of the culprit while in the act of committing the crime.

The Nation, Nov. 23, 1970, at 520.

For a discussion of the use of video tape in the courtroom as evidence to establish criminal conduct, see 20 De Paul L. Rev. 925 (1971).

LEAA is funding CCTV surveillance projects in Hoboken, New Jersey; San Jose, California; Saginaw, Michigan; Tampa, Florida; Washington, D.C.; and Delaware. Note, supra note 5, at 150. Many states are proceeding even without help from LEAA grants. Indiana, Kansas, Georgia, Iowa, Hawaii, Texas, New Hampshire, Minnesota, New Jersey, and Alaska have all made provisions in their comprehensive plans for CCTV equipment. Id. at 150-51.

In Olean, N.Y., officials terminated the system’s operation after only one year of operation. Note, supra note 5, at 147. Local authorities believed that the high costs of CCTV were not justified given the infrequent street crime in the community. Time, May 10, 1971, at 46. Furthermore, the camera, which had no low light level capability and minimal telescopic function, did not record any criminal acts during the system’s one year of operation. Note, supra note 5, at 147.

In the Mt. Vernon system, however, the $47,000 cost for one year was not considered overly high. Mt. Vernon Police Captain Michael Court remarked that “it would take three men to patrol that area over a 24-hour period. That’s $30,000 a year so in about 19 months we break even.” Id.

Even if one were to assume equal effectiveness for CCTV and patrol officers, other considerations may weigh in the calculus. See Note, supra note 5, at 147. It may be better to retain jobs than to cause unemployment. Furthermore, the psychological factor of human presence cannot be replaced by a glass lens.

Time, Dec. 31, 1973, at 15. The cameras are attached to lightposts on 42nd, 43rd and 44th streets. Police officers monitor the area from a trailer unit located within a park one block away. See CCTV: A Private Eye on the Public’s Business, supra note 2, at 56.

ACLU Assistant Director Barbara Shack warned: “Once you make a jump from a patrolman to technical devices, you’re very much on the way to 1984.” Time, Dec. 31, 1973, at 15. According to David Hamlin, former director of the Midwest Chapter of the American Civil Liberties Union, “[o]ur experience, especially in Chicago, is very bad as far as ethical police behavior and photographic techniques go. We want the police out of the surveillance business, not further into it.” CCTV: A Private Eye on the Public’s Business, supra note 2, at 57. References to George Orwell’s classic 1984 and the ever-present Big Brother in the country of Oceania appear frequently in the CCTV literature. The idea of a faceless, unknown observer was taken to the extreme in Orwell’s novel and depicted the system’s effect on human behavior. The police use of the television surveillance system in Oceania, as described in 1984, is strikingly similar in several respects to
indication of the perceived effectiveness of CCTV use in crime prevention.\footnote{16} Other cities outside of the United States have also begun operation of CCTV surveillance units.\footnote{16}

Clearly, our major urban areas are using closed circuit television surveillance increasingly as a means of combating street crime. With rapid acceptance and rapid technological improvement, CCTV surveillance may become as indispensable a part of police forces as squad cars. Yet, even though many communities favor police use of CCTV surveillance, serious constitutional questions must be confronted and answered before this Big Eye gets any wider.

II. CONSTITUTIONAL IMPLICATIONS OF POLICE CCTV SURVEILLANCE SYSTEMS

Three major constitutional doctrines potentially control the permissibility of CCTV observation by law enforcement personnel. The Fourth Amendment prohibition against “unreasonable

use of present CCTV surveillance:

There was, of course, no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire, was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.

G. ORWELL, 1984 (1949) at 7 (pt. I, ch. 1) (emphasis added). Note that with the development of LLLTV capability, it is possible to have one’s “every moment scrutinized” even in darkness.

Modern technological paraphernalia which aid in the fight against crime and which enhance the nation’s security are thought by civil libertarians to bring us closer and closer to the life described in 1984. Absent a complete prohibition of such technology, means must be taken to uphold basic constitutional protections. See Part III infra.

For a contrary literary allusion dealing with the social impact of over-efficient police surveillance, see Niven, Cloak of Anarchy, Analog Mar. 1972, reprinted in L. NIVEN, TALES OF KNOWN SPACE: THE UNIVERSE OF LARRY NIVEN 111 (1975). Niven describes a time when all activity in a “free park” is beneficially subject to surveillance free from the “cop on the beat”:

"Twice the usual number of cops-eyes floated overhead, waiting. Gold dots against blue, basketball-sized, twelve feet up. Each a television eye and a sonic stunner, each a hookup to police headquarters, they were there to enforce the law of the Park. No violence." Id.

\footnote{16} A spokesperson for the Times Square business district said “[m]ost people I’ve talked to don’t mind the cameras out there because they feel a little safer.” TIME, supra note 13, at 15. People generally believed that CCTV made downtown safer. Id. Mt. Vernon residents strongly approved of their CCTV project. See Note, supra note 5, at 152 & 197.

\footnote{16} Tokyo, Berlin, and Amsterdam are presently using CCTV. Paris employs the largest system in the world with 150 street intersections monitored back at the station house. CCTV: A Private Eye on the Public’s Business, supra note 2, at 57.
searches and seizures"17 is the departure point. The rapidly developing and expanding constitutional right of privacy also must be considered in evaluating the validity of remote camera observation.18 Finally, First Amendment protections must be examined in light of the "chilling effect" that police surveillance may have on freedom of speech and association.19

A. Fourth Amendment Prohibition Against "Unreasonable Searches and Seizures"

The practical effect of a judicial determination that a government search is unreasonable is to exclude the evidentiary fruits of the search from the defendant's criminal trial.20 The Supreme Court has held that evidence will not be excluded at a criminal trial where the search and seizure was reasonably made incident to a lawful arrest,21 during a vehicular impoundment,22 in "hot pursuit" of a criminal suspect,23 by the consent of the defendant,24 or at the country's border.25 The landmark decision of

17 The fourth amendment states:
The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. Amend. IV. See Part II A infra.
18 See Part II B infra.
19 See Part II C infra.
20 In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court held that a search which does not satisfy the requirements of the Fourth Amendment will result in the evidence of such illegal search being excluded at trial in the federal courts. The "exclusionary rule" was extended to the states through the Fourteenth Amendment in Mapp v. Ohio, 367 U.S. 643 (1961) (warrantless search of home by police officers required that the seized materials be excluded from appellant's trial). For a discussion of the recognized "reasonable" searches, see notes 21-25 and accompanying text infra.
21 The majority of CCTV "searches" would not involve the securing of a judicial warrant. Because the use of CCTV in public areas is principally to counter street crime, there would be insufficient time to obtain a warrant in most cases. In addition, public use of CCTV for continuous monitoring makes discussion of a warrant moot since the "search" is already in progress.
Accordingly, the operation of the CCTV system must be constitutionally validated prior to continuous monitoring. The constitutionality of the practice thus turns upon the court's evaluation of its "reasonableness" as a whole rather than with respect to specific periods of monitoring.
Katz v. United States\textsuperscript{26} eliminated the need to determine if a particular spot was a constitutionally protected one and developed instead the "reasonable expectation of privacy" doctrine. In addition, a search is reasonable if the evidence was in "plain view"\textsuperscript{27} of the police officer who was standing where he had a legal right to be. The Katz and plain view standards are essentially distinct, although some courts have used the Katz standard to invalidate searches which would have been upheld on plain view grounds alone by finding that the defendant had a reasonable expectation of privacy.\textsuperscript{28}

As a vehicle for applying these Fourth Amendment doctrines to the police use of CCTV surveillance, the following hypothetical scenario is employed. In a residential neighborhood with a high crime rate, the local police set up a sophisticated CCTV system by attaching a camera to a corner lamppost twenty feet off the ground.\textsuperscript{29} The camera relays the view to a screen at police headquarters where a police monitor operator is in continuous twenty-four hour surveillance.\textsuperscript{30}

After the system had been operational for one year,\textsuperscript{31} the monitor operator observed at 2:00 a.m.\textsuperscript{32} two persons on a patio behind a residence inhaling a white substance which he believed was cocaine. The patio is enclosed by an eight-foot fence.\textsuperscript{33} The police secure a warrant on the basis of the monitor operator's

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\textsuperscript{26} 389 U.S. 347 (1967).
\textsuperscript{27} See Part II A 1, infra.
\textsuperscript{28} See note 77 and accompanying text infra.
\textsuperscript{29} It is common practice in setting up a CCTV system to use existing public structures. For example, the Times Square system uses cameras attached to lightposts at 42nd, 43rd and 44th Streets. CCTV: A Private Eye on the Public's Business, supra note 2, at 56.

Attaching the camera unit at a point twenty feet off the ground raises the question whether it would be permissible for a police officer to climb a lightpost so that his view would be twenty feet off the ground. The system would more easily fit within the "inadvertence" requirement of the plain view rule if the camera were six feet off the ground, which would correspond to the view a police officer would have when standing on the street corner. For a discussion of the inadvertence requirement of the plain view rule, see notes 61-62 and accompanying text infra.

\textsuperscript{30} For a discussion of the continuous character of the surveillance, as opposed to periodic viewing or physical observation, see note 81 and accompanying text infra.
\textsuperscript{31} The one year stipulation permits a presumption that the defendants knew that the camera was in their neighborhood. See note 50 and accompanying text infra.
\textsuperscript{32} The nighttime observation brings into play the light amplification ability of the CCTV camera units. See note 11 and accompanying text supra. The plain view ramifications of nighttime observation are discussed in note 71 and accompanying text infra.
\textsuperscript{33} The height of the fence, which would preclude the patio from being observed by passers-by, indicates the defendant's desire for privacy. See note 52 and accompanying text infra.
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and proceed to search the residence, where they discover large quantities of cocaine. The defendant now seeks to exclude the evidence at trial, claiming that it was obtained through an unreasonable search and seizure.

1. The Katz reasonable expectation of privacy standard—Prior to Katz, the Fourth Amendment prohibition against unreasonable searches and seizures applied only to "private places"; only a trespassory invasions were constitutionally forbidden. This theory was based on Olmstead v. United States, in which the Supreme Court held that a telephone conversation intercepted outside of the defendant's house did not constitute an unreasonable search and seizure because there had been no physical invasion of the house. The "constitutionally protected areas" approach to search and seizure applied traditional notions of property law to the rapidly advancing technology of the day. Under the Olmstead "private places" standard courts found no search if there had been no unconstitutional physical entry into the private place.

a. The formation of the reasonable expectation of privacy standard. Katz expressly rejected the constitutionally protected areas/trespass approach. In Katz, the defendant was convicted of transmitting betting information by telephone. The government introduced at trial evidence of telephone conversations which had been overheard by FBI agents using an electronic listening and recording device attached to the outside of the public telephone booth from which defendant made the calls. In holding that the trial court erred in permitting the use of this evidence and that, henceforth, prior judicial approval must be received before the government undertakes similar electronic surveillance measures, the Court stated:

The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in

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34 The police may obtain a warrant from a judicial officer to search private premises by establishing that there exists probable cause to believe a crime is being or has been committed. In United States v. Lefkowitz, 285 U.S. 452, 464 (1932), the Supreme Court stated: "[T]he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests."


36 277 U.S. 438 (1928).

37 Apparently, this phrase was first used by Judge Frank in a dissenting opinion in United States v. On Lee, 193 F.2d 306, 314 (2d Cir. 1951), aff'd, 343 U.S. 747 (1952).

his own home or office is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.\(^39\)

The Court thus shifted the focus of Fourth Amendment protection away from property interests toward personal security.\(^40\)

The standard which has emerged from *Katz* requires a two-fold determination of the defendant's reasonable or objective expectation of privacy and the actual or subjective expectation of privacy.\(^41\) If both of these requirements are met, any warrantless search by police is constitutionally prohibited.\(^42\) That is, the


\(^{40}\) *Katz*, however, did not eliminate the importance of property interests in determining an individual's Fourth Amendment protection. See *Alderman v. United States*, 394 U.S. 165, 180 (1969), where the Court stated:

Nor do we believe that *Katz* . . . was intended to withdraw any of the protection which the [Fourth] Amendment extends to the home or to overrule the existing doctrine . . . 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.

\(^{41}\) Justice Harlan briefly explained the "reasonable expectation of privacy" test: "[T]here is a two-fold requirement, 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.'" *Katz* v. United States, 389 U.S. at 361 (Harlan, J., concurring).


Although no Supreme Court case has expressly adopted Harlan's "two-fold" test, it has been cited with approval several times. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court cited *Katz* in stating that "wherever an individual may harbor a reasonable 'expectation of privacy' . . . he is entitled to be free from unreasonable governmental intrusion." *Id.* at 9. See also *United States v. White*, 401 U.S. 745, 751-52 (1971) (plurality opinion) ("Our problem, in terms of the principles announced in *Katz*, is what expectations of
Fourth Amendment prohibition applies where one reasonably or "justifiably" relies upon freedom from government intrusion in the course of a particular activity. The standard also necessitates a factual determination as to the defendant's actual expectation of privacy under the specific circumstances. Both these questions must be resolved in favor of the defendant in order for *Katz* to apply.

*Katz* made clear that even a public area such as a telephone booth can become private for a period of time so that Fourth Amendment protections are applicable. Since *Katz*, for example, the clandestine surveillance of homosexual activity in public restrooms has been largely invalidated. Other recent cases indicate that privacy are constitutionally 'justifiable'.

The Supreme Court has cited Harlan's reasonable expectation of privacy test frequently in the course of discussing the applicability of the exclusionary rule to materials seized without a warrant. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 458 (1977). (President had "legitimate expectation of privacy in such [personal presidential papers] ... *Katz* v. United States, ... "); *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (plurality opinion) ("we fail to comprehend what expectation of privacy was infringed."); *United States v. Dionisio*, 410 U.S. 1, 14 (1973) ("No person can have a reasonable expectation of privacy that others will not know the sound of his voice"); *Couch v. United States*, 409 U.S. 322, 336 n.19 (1973) (defendant lacked "the necessary expectation of privacy to launch a valid Fourth Amendment claim").

*Katz* v. United States, 389 U.S. at 353.

The Court explained: "The point is not that the booth is 'accessible to the public' at other times ... but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable." 389 U.S. at 361.

These restroom surveillance cases are particularly valuable in establishing contours of the *Katz* standard. The pre-*Katz* decisions uniformly held the evidence of deviant sexual behavior admissible in court where such activity could be observed by any member of the public in normal use of the restroom.

The typical fact situation in these cases involved use of a plainclothes police officer making normal use of the urinal or washing facilities. Where the toilet stall had no door on it, then the reasonable expectation of privacy standard would result in the officer's testimony being admissible at trial since the defendant could not possibly have entertained any notion of privacy or freedom from public view. Thus, the same result was reached as when the earlier courts applied the plain view rule. See Part II A 2 *infra* for a discussion of the plain view rule. See *Poore v. Ohio*, 243 F. Supp. 777 (N.D. Ohio 1965); *State v. Coyle*, 181 So. 2d 671 (Fla. App. 1966); *People v. Young*, 214 Cal. App. 2d 131, 29 Cal. Rptr. 492 (1963); *People v. Norton*, 209 Cal. App. 2d 173, 25 Cal. Rptr. 676 (1962).

The same result was reached in pre-*Katz* cases where the stall was enclosed and police conducted clandestine surveillance either from a vantage point above or through peepholes in the wall. Closed stall surveillance by police of homosexual activity was held admissible in *Smayda v. United States*, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966), where the defendants were convicted of violating the California Penal Code prohibition against oral copulation. The evidence included a police officer's observation and photograph taken through a camouflaged hole in the ceiling over the enclosed public toilet. The court held that the surveillance was not an "unreasonable search" within the ambit of the Fourth Amendment because the police had reasonable cause to believe that the toilet stalls were being used in the commission of crimes. *Id.* at 257. Though acknowledging that "there is a right of privacy," *id.* at 256, the court went on to
cate that courts are ready to expand the reasonable expectation of privacy standard to settings in which the plain view rule would have clearly permitted such evidence.46

Katz has not yet yielded a clear set of workable rules. Subjective determinations by the factfinder have contributed to the ambiguity of the current rules. As can be seen in the restroom surveillance cases,47 many courts continue to focus on one or two significant facts in applying the reasonable expectation of privacy standard. This has resulted in a tendency to categorize the facts into legal compartments because the factual determination

say:

We also think, however, that the nature of the place, the nature of the criminal activities that can and do occur in it, the ready availability therein of a receptacle for disposing of incriminating evidence, and the right of the public to expect that the police will put a stop to its use as a resort for crime all join to require a reasonable limitation upon the right of privacy involved. Id. at 257 (emphasis added).

Circuit Judge Browning, however, wrote in dissent that “[p]ersons using the toilet stalls in the Camp Curry restroom did so with the reasonable expectation of partial privacy.” Id. at 260 (Browning, J., dissenting). Before Katz, resort to the “plain view” doctrine alone resulted in a lesser degree of Fourth Amendment protection than the “reasonable expectation of privacy” doctrine provides. See notes 73-77 infra.

State v. Bryant, 287 Minn. 205, 177 N.W.2d 800 (1970), was the first case involving police surveillance of public enclosed restrooms after Katz. In Bryant, the defendant was convicted of consensual sodomy on the basis of an officer’s observation of the activity while stationed over a ventilator in the ceiling above the restroom. The court compared the instant facts with those in Katz and concluded that “surely [the reasonable expectation of privacy] applies here, where the facilities provided assure the user of privacy as much as a telephone booth does.” Id. at 210-11, 177 N.W.2d at 803. See also People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973) (observations by police officers of doorless toilet stalls held unlawful even though defendant could have easily been seen by any member of the public who entered the restroom).

See also Buchanan v. State, 471 S.W.2d 401 (Tex. Crim. App. 1971) (surveillance of stalls with doors violated the Fourth Amendment).

"In State v. Kent, 20 Utah 2d 1, 432 P.2d 64 (1967), decided the same year as Katz, a police officer obtained the permission of a motel manager to hide in the attic from where he observed defendant’s criminal activity in the bathroom and bedroom. Even though the officer was in a lawful place, the testimony was held inadmissible. Other cases have found that the Katz standard will protect the individual who has a reasonable expectation of privacy even if the police are in a legal position. In Vidaurri v. Superior Court, 13 Cal. App. 3d 550, 91 Cal. Rptr. 704 (1970), the court in dicta hinted at an eventual retreat from the plain view doctrine:

A person who surrounds his back yard with a fence, and limits entry with a gate, locked or unlocked, has shown a reasonable expectation of privacy for that area . . . [and does] not give up [that] reasonable expectation of back yard privacy simply because a trespassing police officer might . . . look over the gate into their yard. . . .

Id. at 553, 91 Cal. Rptr. at 706 (emphasis added). See also Kirby v. Superior Court, 8 Cal. App. 3d 591, 87 Cal. Rptr. 577 (1970) (the reasonableness of the police officer’s search was affected by the defendant’s reasonable expectation of privacy in his van).

47 See note 45 and accompanying text supra.
is framed in polar terms. Such artificial categorization is at odds with the difficult task of carefully scrutinizing the relevant facts in each particular case in order to determine whether the defendant's belief of privacy was reasonable. Although factual compartmentalization may aid judicial convenience, it does little for the evolution of a more generally applicable rule of law.

b. The Katz standard applied to CCTV surveillance. One walking along a public sidewalk or standing in a public park cannot reasonably expect that his activity will be immune from the public eye or from observation by police. Where police use CCTV to observe such public areas there is no basis for a defendant to claim a reasonable expectation of privacy.

In nonpublic areas, knowledge of a nearby CCTV unit would conceivably effect the reasonableness of one's expectation of privacy. An individual's expectation is based on belief or knowledge. If one knows that he or she is the subject of CCTV surveillance, then the Katz standard cannot provide protection because the individual had no actual, subjective expectation that his or her conduct would be private. The extent to which the government could manipulate persons to expect searches is not clear. The foregoing analysis leads to the possibility that Katz

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46 The Fourth Amendment search and seizure area contains several doctrines which illustrate this categorization technique. The technique first involves labeling a fact situation as one of several (usually two) types; which legal standard applies depends on how the fact is categorized. The reasonableness of warrantless searches and seizures depended, at one time, on whether the searched area was "curtilage"—property within the immediate vicinity of the home—or "open fields." The latter was not given full Fourth Amendment protection. See, e.g., Hester v. United States, 265 U.S. 57, 59 (1924) (the constitutional protection afforded to "persons, houses, papers and effects" did not extend to "open fields."). Such an approach reduces the tendency and the need for courts to scrutinize Fourth Amendment violations by examining the facts on a case-by-case basis.

In Olmstead v. United States, 277 U.S. 438 (1928), the Supreme Court distinguished wiretapping surveillance on the basis of "trespassory" versus "nontrespassory" intrusions. Id. at 464-65. Where the listening device did not physically invade the "constitutionally protected area," Chief Justice Taft reasoned that there had been no search within the meaning of the Fourth Amendment. Id. at 466.

49 The application of the Katz reasonable expectation of privacy standard to a novel fact situation requires the singling out of several important factors in order for the fact-finder to determine the defendant's actual and objective expectations. See note 42 supra. Initially, the fact-finder might inquire whether anything about the defendant or the way in which the defendant handled his or her property manifested a desire and/or an expectation of privacy from visual surveillance. Delving further into this expectation would require evaluation of the possibility of visual surveillance of the defendant's activity and the type of physical area in which the expectation was claimed. Finally, the extent to which the police go beyond normal public observation should be considered in determining the applicability of Katz. But see Rakas v. Illinois, 439 U.S. 128 (1978) (Court suggests in dictum that the reasonable expectation doctrine may be contracted).

50 Several cases have hinted that one's subjective knowledge of a police observation
could restrict rather than expand Fourth Amendment protection. Such is clearly not the intent of Katz; if it were, the government would be able to conduct a warrantless search of any person or property by announcing its intention to do so well in advance and making sure that the individual knew of the impending search.

The defendant in the hypothetical scenario presented earlier could successfully prevent the police introduction of the cocaine at trial under the Katz reasonable expectation of privacy doctrine. He conducted himself in such a way as to manifest a desire for and expectation of complete privacy.

The defendant’s construction of an eight-foot fence on his property indicated his ness also indicated that the defendant did not want his actions to be observed either by members of the public or by police officers. In addition, the defendant’s assumption that the minute particles of matter which he had laid out on the patio table could not be observed with unassisted vision was reasonable.

The method of CCTV surveillance in this context is itself a factor in the determination of the reasonableness of the defendant’s expectation of privacy. CCTV, aided by light amplifica-
tion and telescopic magnification, extends far beyond observation which would normally be made by the public. In the instant case, no one could have observed the defendant’s activity even in broad daylight and without the fence because of the distance; the cocaine would not have been visible but for the extrasensory visual device.

The foregoing application of the Katz reasonable expectation of privacy standard to the hypothetical scenario is illustrative of the process courts should use in ruling on the admissibility of evidence obtained by use of a CCTV system. The totality of the circumstances should be considered in determining whether the defendant’s expectation of privacy in a given situation is reasonable, and thus within the protection of Katz.

2. The plain view rule—The plain view rule results from interpretation of the term “search” in the Fourth Amendment.\(^4\) If a police officer merely sees incriminating articles from a location where he or she has a right to be and makes no active attempt to uncover or find the articles, the officer may immediately seize the incriminating evidence.\(^5\) The rule is one of the well-recognized exceptions\(^6\) to the warrant requirement of the Fourth Amendment because police may seize evidence of illegal activity without prior judicial approval.\(^7\) It must, however, be “immedi-

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\(^5\) The plain view doctrine originated in Hester v. United States, 265 U.S. 57 (1924), where the Court held that a warrantless seizure of evidence by police is “reasonable” when the officer inadvertently discovers material of an “incriminating character.” For the rule to be applicable, however, the officer must have prior justification to be in the position to have the view.

An excellent description of this rationale was made in United States v. Davis, 423 F.2d 974, 977 (5th Cir. 1970). The court there stated:

The main consideration in applying the rule is to determine whether the observing officer had “a right to be in the position to have that view.” Many of the cases involving the “plain view” doctrine concern evidence recovered from automobiles located in public places. The rule lends itself to application in these situations because the observing officer is not required to trespass on private property in order to have a clear view of articles inside an automobile.

\(^6\) The other well-recognized exceptions to the warrant requirement are discussed in the text accompanying notes 21-25 supra.

\(^7\) In Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971), the Court stated: “It is well established that under certain circumstances [‘prior justification’ for view and ‘immediately apparent’ evidence of crime] the police may seize evidence in plain view without a warrant.” (emphasis added).

See also Moylan, The Plain View Doctrine: Unexpected Child of the Great “Search Incident” Geography Battle, 26 MERCER L. REV. 1047, 1049 (1975). Judge Moylan argues:
ately apparent” to the officer that the articles within his view constitute relevant evidence of criminal activity.\(^58\)

a. Parameters of the plain view rule. In *Harris v. United States*,\(^6^9\) the Supreme Court held that the plain view rule applies only when an object or act is an inadvertent *discovery*, not when it is found after a deliberate *search*.\(^6^0\) Most courts accept the inadvertent discovery requirement,\(^6^1\) although in *Coolidge v. New Hampshire*,\(^6^2\) only a plurality of the Court voted to uphold

The plain view doctrine is a newly recognized exception to a fundamental proposition. That proposition is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”

*Id.* (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

\(^5^8\) See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where the Court stated: Of course, the extension of the original justification [in “plain view” cases] is legitimate only where it is *immediately apparent* to the police that they have evidence before them; the ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

*Id.* at 460 (emphasis added). See also cases cited in *United States v. Scios*, 590 F.2d 956, 974 (D.C. Cir. 1978).

\(^6^0\) 390 U.S. 234 (1968).

\(^6^1\) In *Harris*, the defendant’s automobile had been observed leaving the scene of a robbery. After the defendant’s arrest, police impounded the automobile. It began to rain and a police officer opened one of the doors in order to roll up the windows. He did not have a search warrant for the car. While rolling up the window he saw a registration card which bore the name of the robbery victim laying on the metal stripping below the door.

The Court, affirming Harris’ robbery conviction in a per curiam opinion, stated:

The sole question for our consideration is whether the officer discovered the registration card by means of an illegal search. We hold that he did not. The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. . . . [T]he discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.

*Id.* at 236.


\(^6^3\) 403 U.S. 443, 453 (1971). The majority held that a warrant authorizing an automobile search was invalid because it was issued by the State Attorney General and not a “neutral and detached” magistrate. Only a plurality of the Court voted to uphold the inadvertent discovery requirement. *Id.* at 445, 453-73. Justice Stewart, writing for the plurality, stressed the importance of that condition in maintaining the true intent of the warrant requirement. Without it, he argued, there would be no incentive for policemen to seek a warrant in many situations and the extent of the search would no longer be limited to a “‘particular description’ of the things to be seized.” *Id.* at 467. (Stewart, J., plurality opinion).

The uncertainty as to the requirement of inadvertence after *Coolidge* has led Professors Lewis and Mannle to warn that “the present status of the plain view doctrine may invite subterfuge seizures and false testimony by the police.” Lewis & Man-
The inadvertent discovery requirement is essential to the analysis of CCTV surveillance. Without it, police could deliberately place CCTV cameras with telescopic capabilities in positions which are legal, but where persons are not likely to be, even inadvertently. The plain view rule could thus be used, for example, to justify CCTV telescopic surveillance of an apartment several blocks away so long as the camera unit itself is in a legal position. That is, if the viewer is legally permitted to occupy a certain spot, anything seen from that spot which establishes probable cause of criminal activity enables police to obtain a search warrant. Where it is immediately apparent that the evidence viewed is illegal, it may be seized under the plain view rule without first obtaining a judicial search warrant. According to Warrantless Searches and the "Plain View" Doctrine: Current Perspective, 12 CRIM. L. BULL. 5, 24 (1976).


Evidence seized as a direct result of being viewed by a policeman from a spot in which he had no legal right to be is subject to the exclusionary rule. See McDonald v. United States, 335 U.S. 451 (1948), where the Court invoked the exclusionary rule to prevent a police officer's testimony as to gambling devices he saw over the top of a transom in the defendant's bedroom after he had broken into the house. The officer did not gain the "view" from a position where he had a right to be. See also Brock v. United States, 223 F.2d 681 (5th Cir. 1955), where the Fifth Circuit stated: "Whatever quibbles there may be as to where the curtilage begins and ends, it is clear that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone.'" Id. at 685 (footnote omitted).

A potential argument against CCTV surveillance is that the cameras are not in "legal positions." Attaching the camera unit to a lamppost or the side of a building extends the requirement of "legal position" to the limit. If a police officer climbed a lamppost to better view the area, a court could decide he had a legal right to do so. If he accidentally observed unlawful activity in a nearby apartment as a result, he would be within the parameters of the plain view rule because of his legal position. See note 55 supra.

An issue likely to arise in connection with the plain view rule is whether the "viewer" in a legal position can be remote-controlled camera. Because of the Court's treatments of such technological devices as mere aids and substitutes for human effort, the camera unit itself, if attached to a spot where it had a legal right to be, would not bar use of the plain view rule. See notes 73-78 and accompanying text infra for a discussion of the courts' treatment of extrasensory visual aid devices.

Street crime will constitute the bulk of illegal activity observed by a police CCTV monitor operator. In such situations there is insufficient time to obtain a judicial search warrant. Indeed, the recognized exceptions to the warrant requirement all involve circumstances where the procuring of a warrant is impracticable or unnecessary. See text accompanying notes 21-25 supra. Since the activity has been directly observed by the monitor operation, plain view will justify immediate arrest of the suspect and/or seizure of the incriminating evidence. Although "exigent circumstances" may also be present which justify an immediate warrantless search and seizure, this article will not evaluate...
ingly, the determination of whether the camera unit is in a legal position is an important first step in applying the plain view rule to CCTV surveillance by police.

The second issue is the constitutionality of extrasensory visual surveillance devices as substitute "eyes" of law enforcement officers. Most courts make no distinction between techniques used to gain views. The earliest cases of this type involved the use of artificial light at night or in dark places. In United States v. Lee, the Supreme Court ruled that the Coast Guard's use of a search light to see a ship at sea was constitutionally permissible, stating: "Such use of a search light is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." The law is the same one-half century later. Most courts

that exception's application to CCTV surveillance because of the infrequent occasion for its use in CCTV surveillance operations and the much broader coverage of the plain view rule. For a discussion of the "exigent circumstances" exception to the warrant requirement of the Fourth Amendment, see Robb, The Carroll Case: The Expansion of the Automobile Exception in Warrantless Search and Seizure Cases, 15 WILAMETTE L. REV. 39, 49-54 (1978).

In some situations, however, where no immediate necessity exists for intervention or arrest, and the criminal activity suggests the presence of hidden illegal material, the police may opt to secure a warrant based on probable cause in order to conduct a broader search than otherwise permissible under the plain view rule alone. The police must have probable cause to believe that there is unlawful contraband in the possession or control of the defendant. In Brinegar v. United States, 338 U.S. 160, 175-76 (1949), the Court stated:

[Probable cause] has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

The standard of probable cause has been attacked as the equivalent of mere suspicion by police officers. Others have expressed concern that a shift from probable cause to a mere suspicion test would grant unjustified discretion to police. According to Justice Douglas, the suspicion test "permits the police to interfere . . . with a multitude of lawabiding citizens, whose only transgression may be a nonconformist appearance or attitude." United States v. Brignon-Ponce, 422 U.S. 873, 889 (1975) (Douglas, J., concurring).

One distinguished commentator believes that the suspicion test is really not a test at all but simply constitutional permission for police to assess the facts as they wish. Professor Admsterdam points out: "To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim." Amsterdam, supra note 51, at 395 (emphasis added) (citing Amicus Curiae Brief for the N.A.A.C.P. Legal Defense & Educ. Fund, Inc. at 56-57; Terry v. Ohio, 392 U.S. 1 (1968)).

See notes 72-73 and accompanying text infra.

See, e.g., cases cited in note 71 infra. There is a technical difference between use of artificial illumination in the form of flashlights and similar aids which illuminate the observed area and LLLTV devices which illuminate the area on the monitor screen only. This distinction, however, is not likely to be legally significant.

274 U.S. 559 (1927).

Id. at 563.
sustain use of artificial illumination on the basis of the plain view rule.\footnote{See Note, Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment, 1977 U. ILL. L.F. 1167, 1172-77 (1977). See also United States v. Johnson, 506 F.2d 674, 676 (8th Cir. 1974), cert. denied, 421 U.S. 917 (1975) ("The fact that the contents of the vehicle may not have been visible without the use of artificial illumination does not preclude such observation from application of the 'plain view' doctrine"); People v. Whalen, 390 Mich. 672, 679, 213 N.W.2d 116, 120 (1973) ("[T]he plain view rule does not slink away at sunset to emerge again at the break of day.").}

To date the courts have treated telescopic surveillance cases as within the plain view rule.\footnote{See, e.g., People v. Vermouth, 42 Cal. App. 3d 353, 362, 116 Cal. Rptr. 675, 680 (1974) ("Application of the plain view doctrine is unaltered by an officer's employment of artificial illumination... and we see no reason to invoke a different rule where the visual aid employed is optical.") (emphasis added).} The use of binoculars or other telescopic devices by the police does not affect the application of

Many courts have allowed use of these visual aids on the ground that police need to view activity in the dark. See Dorsey v. United States, 372 F.2d 928 (D.C. Cir. 1976):

We do not think the need to employ a visual aid at night in the form of a flashlight converts this from lawful to unlawful conduct... If policemen are to serve any purpose of detecting and preventing crime... they must be able to take a closer look at challenging situations as they encounter them. \textit{Id.} at 931. See also Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 170), where the court said, "[t]he plain view rule does not go into hibernation at sunset."

Many courts in the "flashlight" cases have continued to require "inadvertence" even after \textit{Coolidge}. These cases have, for the most part, relied on the Court's statement in \textit{Harris} v. United States, 390 U.S. 234 (1968), that "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." \textit{Id.} at 236 (emphasis added).

\textit{See also} United States v. Cody, 390 F. Supp. 616 (E.D. Tenn. 1974), where police searched the defendant's car with a flashlight and found contraband. The court held that the seizure was illegal because the inadvertence requirement of plain view was not met. The court stated: "One of the limitations upon the application of this [plain view] doctrine is that the discovery... must be inadvertent." \textit{Id.} at 617 (citing \textit{Coolidge} v. New Hampshire, 403 U.S. 449, 469 (1971)) (footnote omitted).

In using the plain view rule of uphold telescopic searches, most courts appear to treat the device as a mere extension of the viewer's own senses. See, e.g., Hodges v. United States, 243 F.2d 281 (5th Cir. 1957). In \textit{Hodges} the defendant was convicted of illegal possession of a still. The search warrant which led to the seizure of his wares was obtained by a federal agent's testimony based on activities he saw with the use of binoculars in the defendant's chicken house. The court barely acknowledged the agent's use of binoculars and affirmed the defendant's conviction.

The language of the Supreme Court in \textit{On Lee} v. United States, 343 U.S. 747 (1952), although dictum, has continued to influence lower courts and is noteworthy for its unambiguous treatment of extrasensory visual surveillance devices: "The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search and seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions." \textit{Id.} at 754. \textit{See also} Note, supra note 71, at 1180-81; Note, \textit{Telescopic Surveillance as a Violation of the Fourth Amendment}, 63 IOWA L. REV. 708, 709 (1978); Comment, Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy, 11 CAL. W.L. REV. 505, 514-15 (1975); and Note, Constitutional Law, Use of Binoculars as Constitutional as Unreasonable Search, 27 OKLA. L. REV. 254 (1974).
the rule. In clearly public areas such as downtown business dis-

tricts where CCTV surveillance is most often used, the *Katz*
reasonable expectation of privacy standard would not effect the re-

sult since one could not have a reasonable expectation of privacy in

that area. In nonpublic areas, however, many courts hold that

where activity is in plain view of police there is no reasonable

expectation of privacy.73 These courts have often relied on Justi-

ce Harlan’s statement in *Katz*74 that “objects, activities, or

statements that [one] exposes to the ‘plain view’ of outsiders are

not ‘protected’ [under the *Katz* test] because no intention to

keep them to himself has been exhibited.”75 In addition, courts

which deny the existence of a reasonable expectation of privacy

if the activity or evidence is in plain view make no distinction

between an unaided view and a telescopic one.76

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73 See United States v. Conner, 478 F.2d 1320, 1323 (7th Cir. 1973) (policeman could

seize a stolen car because the inside of defendants’ garage was visible from outside the

building and “[u]nder these circumstances, the defendants had no reasonable expec-
tation of privacy”); United States v. Wilson, 472 F.2d 901 (9th Cir. 1972), cert. denied, 414

U.S. 688 (1973) (defendant had no reasonable expectation of privacy when the door of

his apartment was left wide open); Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969)

(“Ponce’s reliance on privacy in his motel room was not reasonable under the circum-
stances. If he did not wish to be observed he could have drawn his blinds. The officers
did not intrude upon any reasonable expectation of privacy in this case by observing
with their eyes the activities visible through the window.”); People v. Bradley, 1 Cal. 3d

80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969) (warrantless seizure of marijuana plants from

fenced yard upheld because plain sight by officer cancels any reasonable expectation of

privacy); Wallace v. State, 84 Nev. 532, 533, 445 P.2d 29, 29-30 (1968) (seizure of mari-

juana from defendant’s yard legal because plants were in plain view).

Several cases apply the plain view rule in similar nonpublic situations without even

considering the applicability of the reasonable expectation of privacy standard. See, e.g.,

United States v. Johnson, 506 F.2d 674, 675 (8th Cir. 1974), cert. denied, 421 U.S. 917

(1975) (“Under the ‘plain view’ doctrine, a plain view observation by a police officer from

a position where the officer is entitled to be is not a ‘search’ within the meaning of the

Fourth Amendment. Consequently, the restrictions of the Fourth Amendment are not

applicable.”); Gil v. Beto, 440 F.2d 666, 666 (5th Cir. 1971) (per curiam) (police officers

observed drugs through an open motel room window; held no Fourth Amendment rights

violated when police officers merely observe what is in plain view).

74 399 U.S. 347, 360 (1967) (Harlan, J., concurring).

75 Id. at 361. Many lower courts have interpreted the language to mean that the fact

that an activity is in plain view established knowledge or at least carelessness by the

defendant that his activity would be subject to observation. On the basis of this analysis,
simply leaving a window slightly open, a door slightly ajar, or a window shade partially
up establishes that the defendant cannot have a reasonable expectation of privacy. See,

e.g., United States v. Fisch, 474 F.2d 1071, 1078 n.15 (9th Cir. 1972), cert. denied, 412

U.S. 921 (1973), quoting with approval State v. Smith, 37 N.J. 481, 496, 181 A.2d 761,

769 (1962), cert. denied, 374 U.S. 835 (1963) ("It is the duty of a policeman to investi-
gate, and we cannot say that . . . the Fourth Amendment itself draws the blinds the

occupant could have drawn but did not.").

76 See United States v. Minton, 488 F.2d 37 (4th Cir. 1973), cert. denied, 416 U.S. 936

(1974) (use of binoculars by officers to observe unloading of illicit liquor on plain

view grounds where there was no reasonable expectation of privacy under the circum-
Several courts have rejected the proposition that an individual has no reasonable expectation of privacy merely because his activity was within plain view of police; this appears to be the trend.\textsuperscript{77} Thus, the plain view rule would uphold the use of


In State v. Thompson, 196 Neb. 55, 57, 241 N.W.2d 511, 513 (1976), \textit{Katz} was not even mentioned in the majority opinion. In \textit{Thompson}, the defendant was sitting in the living room of his home with the curtains drawn. By using binoculars, police observed a guest in the room smoking marijuana through a window in an adjoining room which was covered by a sheer curtain and partially blocked by potted plants. The court held that since the officer has a legal right to be in the alley behind the house there was nothing improper about their use of binoculars to gain the view.

The courts which have failed to find a reasonable expectation of privacy where the defendant's activity was in plain view of police officers using telescopic aids have not discussed whether the possibility of an observation unaided by telescopic devices is required. Thus, it is unlikely that these courts require the activity to be observable by the unaided eye. In most of the cases, an examination of the facts suggests that the view could not have been possible without the telescopic devices. \textit{See} United States v. Minton, 488 F.2d 37 (4th Cir. 1973), \textit{cert. denied}, 416 U.S. 936 (1974) (use of binoculars to identify cartons of illicit liquor); Fullbright v. United States, 392 F.2d 432 (10th Cir.), \textit{cert. denied}, 393 U.S. 830 (1968) (use of binoculars to identify distilling apparatus from a distance of more than seventy-five yards away); Commonwealth v. Hernley, 216 Pa. Super. Ct. 177, 180-81, 263 A.2d 904, 906 (1970), \textit{cert. denied}, 401 U.S. 914 (1971) (use of binoculars to identify forms as football parlay sheets). \textit{See also} State v. Thompson, 196 Neb. 55, 241 N.W.2d 511 (1976); People v. Vermouth, 42 Cal. App. 3d 353, 362, 116 Cal. Rptr. 675, 680 (1974). In these two cases the court did expressly determine that an unaided observation was possible but did not state that the absence of such an unaided observation would have resulted in the suppression of the evidence. However, even where it is expressly noted that an unaided view would not have been possible, courts have not excluded such evidence. \textit{See, e.g.,} State v. Manly, 85 Wash. 2d 120, 124, 530 P.2d 306, 309 (1975) (trial court found that binoculars were necessary to identify illegal activity with reasonable certainty).

For a discussion of a reduced expectation of privacy where there exists the possibility of telescopic observation, see \textit{Note}, \textit{A Reconsideration of the Katz Expectation of Privacy Test}, 76 Mich. L. Rev. 154, 168-71 (1977).

\textsuperscript{77} \textit{See} United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976). In \textit{Kim}, FBI agents used an 800 millimeter telescope to observe suspected gambling activities in defendant's apartment from a building a quarter of a mile away. The agents were able to observe the defendant making phone calls while reading the "J.K. Sports Journal." This information enabled the FBI to procure a wiretap on the defendant's phone. The defendant later moved to suppress certain evidence arguing that the artificial viewing aids constituted an unreasonable search without a judicial warrant. The court stated: "There can be no question . . . that the protection recognized by \textit{Katz} includes protection against unreasonable visual intrusions. Visual intrusions can interfere with an individual's right to be left alone just as powerfully as the eavesdropping at issue in \textit{Katz}." \textit{Id.} at 1254 (citations omitted).

\textit{See also} People v. Arno, 90 Cal. App. 3d 505, 511, 153 Cal. Rptr. 624, 627 (1970) (police officers used ten-power binoculars to observe defendant handling obscene materials within office building suite where activity would not otherwise be observable by the naked eye; the test of validity of the surveillance held to turn on whether there was a "reasonable expectation of privacy and not upon the means used to view it"); People v. Chiochon, 23 Ill. App. 3d 363, 366, 319 N.E.2d 332, 335 (1974) ("We can find no distinction in law between overhearing conversations by means of electronic devices and observ-
CCTV surveillance in public areas because courts would rarely find a reasonable expectation of privacy;\(^7\) in nonpublic areas, however, courts would more likely find such an expectation.

b. *Plain view applied to CCTV surveillance.* If a court finds that a defendant had a reasonable expectation of privacy then the plain view rule does not affect the result.\(^7\) Where the defendant had no reasonable expectation of privacy, however, the plain view rule could be used to uphold the validity of the warrantless search.\(^8\) In this regard, several distinctions can be drawn in support of the position that CCTV surveillance is not susceptible to application of the plain view rule. First, most systems in current operation maintain continuous twenty-four hour surveillance, whereas most cases to date have involved only relatively short-term or periodic observation.\(^8\)

Courts have also found a reasonable expectation of privacy where artificial illumination was used to obtain the plain view. See, e.g., LaDuke v. Castillo, 455 F. Supp. 209, 211 (E.D. Wash. 1978) ("There could be no 'plain view' search of plaintiff's home, as it was allegedly too dark to view the inside of the premises without the aid of a flashlight . . . . Individuals enjoy a reasonable expectation of privacy in the confines of their home, and such privacy is protected by the fourth amendment from government intrusion.").

Police helicopter surveillance cases illustrate the application of the reasonable expectation of privacy standard to situations long governed solely by the plain view rule. For a discussion of how helicopters are used in law enforcement, see Comment, *Police Helicopter Surveillance*, 15 Ariz. L. Rev. 145, 146-49 (1973). Despite the widespread use of helicopter surveillance by law enforcement personnel, very few cases have involved the issue of inadmissibility of evidence as an improper search and seizure. In one such case, People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973), the court rejected the state's argument that the helicopter surveillance was merely a plain view case, and granted the defendant's motion to suppress the evidence thus obtained. Id. at 542-43, 545, 108 Cal. Rptr. at 151, 153.

In Dean v. Superior Court, 35 Cal. App. 3d 115, 110 Cal. Rptr. 585 (1973), the court considered the *Katz* reasonable expectation of privacy standard in ruling on the admissibility of evidence obtained by means of aerial helicopter surveillance: "Expectations of privacy are not earthbound. The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion." Id. at 116, 110 Cal. Rptr. at 588. The court nevertheless found that the defendant's expectation of privacy was unreasonable since he could not have expected his marijuana crop to be hidden from an aerial view. Id. at 118, 110 Cal. Rptr. at 590.

See also People v. Superior Court ex rel. Stroud, 37 Cal. App. 3d 836, 112 Cal. Rptr. 674 (1974), in which the court held that defendants had no reasonable expectation of privacy in their backyard from police helicopter surveillance.

\(^7\) See Part II A 1 b supra for a discussion of the reasonable expectation of privacy standard applied to CCTV used in public areas.

\(^8\) See cases cited at note 77 supra.

\(^9\) See cases cited at notes 75-76 supra.

\(^8\) See, e.g., United States v. Minton, 488 F.2d 37 (4th Cir. 1973), cert. denied, 416
CCTV surveillance does not necessarily take it out of the permissible contours of the plain view rule. Courts would probably not abandon the rule even if actual physical observation were conducted in a continuous manner. Nonetheless, it is doubtful whether such continuous observation can be characterized as inadvertent.\(^{82}\)

The videotape capability of CCTV does not invalidate use of the system on plain view grounds. Merely transforming a legally permissible observation by police into a permanent record fails to take CCTV surveillance outside of the plain view rule.

Placing the camera unit in a position where nonpublic areas in addition to permissible public areas are observed will not permit the defendant to challenge the search's constitutionality based on the plain view rule although this distinction is important for determination of a reasonable expectation of privacy. Since this article concludes that the defendant in the hypothetical scenario presented earlier\(^{88}\) had a reasonable expectation of privacy, the plain view rule would not affect this result.\(^{84}\) If a court determined, however, that the defendant's expectation of privacy was


The continuous surveillance by CCTV is normally made by scanning the subject area. The camera unit is normally adjusted to provide the monitor operator with a wide angle of visibility and this entails use of the panning feature. See note 7 supra. There are, however, some systems which have fixed camera units. See Time, supra note 13, at 15.\(^{81}\)

For a discussion of inadvertence and its current standing in the lower courts see notes 61-62 and accompanying text supra; Note, "Plain View" — Anything But Plain; Coolidge Divides the Lower Courts, supra note 61, at 507-13. In addition to lower court division as to the requirement of inadvertence, these courts differ markedly as to the standard of inadvertence—that is, how inadvertent a search must be in order to qualify as a "plain view." See id. at 717.

Where surveillance is as planned and deliberate as CCTV observation, it seems inaccurate to argue that illegal activity was inadvertently discovered. However, because the CCTV system is presumably set up and operated without focusing upon one person or group, the activity which does fall within range of the camera lens can be considered inadvertent in the broad sense. See, e.g., United States v. Welsch, 446 F.2d 220 (10th Cir. 1971), where the court held that the inadvertence requirement means that the police had no sufficient pre-existing knowledge to permit issuance of a warrant. The Welsch definition of inadvertence would justify the use of CCTV surveillance based on the plain view rule.

A situation can easily be analogized to CCTV surveillance in the context of the continuous search characteristic. If three police officers maintained eight-hour shifts successively in one twenty-four hour period on the same street corner, the effect would be much the same. It is unlikely that plain view would be held inapplicable in such a scenario because the officers would be where they have a legal right to be. See note 63 supra.\(^{82}\)

See text at notes 29-34 and accompanying text supra.\(^{82}\)

See note 77 and accompanying text supra.
not reasonable because he knowingly or carelessly exposed his activity to plain view, then the admissibility of the cocaine at defendant's trial would depend on whether the CCTV surveillance can be upheld under the plain view doctrine. The police might argue as follows: the plain view rule permitted the visual surveillance of defendant's property; the CCTV camera, as the police officer's "eye," was in a legal position, and light amplification and magnification are within the plain view rule. In the hypothetical scenario if the court determined that the defendant had no reasonable expectation of privacy, the plain view rule would uphold the validity of the police use of CCTV surveillance.

B. The Constitutional Right of Privacy

There is an inevitable spill-over effect resulting from the use of a CCTV surveillance system. Law-abiding citizens who have an apartment, home or office building within the magnification and tilt range of a CCTV system may not be willing to forego private activity for the sake of preventing street crime. Incidental surveillance of law-abiding citizens engaged in private, lawful activity presents a critical constitutional issue.

The constitutional right of privacy is an aggregate of many distinct rights specifically enumerated in the Bill of Rights. Since Griswold v. Connecticut, the right of privacy has been

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85 See notes 75-76 and accompanying text supra.
86 See notes 71-72 and accompanying text supra.
87 See notes 63-64 and accompanying text supra.
88 See note 76 and accompanying text supra.
90 381 U.S. 479 (1965). In Griswold the Supreme Court held that the rights guaranteed in the First, Third, Fourth, Fifth, and Ninth Amendments form together the "pnumbra" of a constitutional right.

In Monell v. Department of Social Servs., 436 U.S. 658 (1978), the Court determined that local governments and municipal corporations are subject to liability under 42 U.S.C. § 1983 for violating a person's federally protected rights. This statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citi-
subsequently extended to First Amendment, sexual, and family activities.91

There are two principal roadblocks to the effective use of the right of privacy against the spill-over effect of CCTV surveillance of nonpublic activity. The first is the observed citizens’ need to establish a justiciable controversy; the second is the narrow scope of the constitutional right of privacy. Both of these factors pose obstacles to the citizen plaintiff suing police for monitoring his private, legal activity.

In order to obtain injunctive relief from government activity which allegedly violates one’s constitutional rights, the plaintiff must show concrete evidence of actual injury or the likelihood of actual harm in the future so as to present a justiciable controversy.92 Since the injury must be in the form of physical harm or mental anguish, the CCTV plaintiff would at least need to show that he or she has experienced extraordinary mental or economic suffering as a result of the surveillance—an extremely difficult fact to prove.93

42 U.S.C. § 1983 (1976). The extension of the right of privacy to unwarranted CCTV observations would provide the plaintiff with a cause of action under this federal statute.

91 See Stanley v. Georgia, 394 U.S. 557 (1969) (a person has the right to receive information and ideas, including pornography, in the privacy of his home); Roe v. Wade, 410 U.S. 113 (1973) (right to abortion during early pregnancy); Doe v. Bolton, 410 U.S. 179 (1973) (same).

In Eisenstadt v. Baird, 405 U.S. 438 (1972), the Court upheld the right to contraceptives by unmarried persons: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Id. at 453 (emphasis in original).

See also Loving v. Virginia, 388 U.S. 1 (1967) (right to interracial marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to decide child’s upbringing and education).

92 See Laird v. Tatum, 408 U.S. 1 (1972), where the Court refused to enjoin military surveillance of the respondents because they could show no “specific present objective harm or a threat of specific future harm.” Id. at 13-14. In Laird the Court relied upon the test for justiciability laid out in Ex parte Levitt, 302 U.S. 633, 634 (1937): It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he was merely a general interest common to all members of the public.


93 See Comment, supra note 92, at 357. The author, however, argues that the requirement of “direct injury” fails to reflect adequately the dangers of government observation
The Supreme Court and the lower courts have thus far extended the right of privacy to family, sexual, and First Amendment pursuits but have left unprotected other fundamentally private activities not within those parameters. Lower courts have rigidly held to the strict substantive limitations on the constitutional right of privacy announced by the Supreme Court. Unless the Supreme Court significantly expands the current application of the constitutional right of privacy to additional areas, the doctrine will be of little use to a plaintiff seeking to enjoin police CCTV surveillance of activity in the home.

It would be equally unwise for a criminal defendant to rely on the right of privacy to deter or exclude police CCTV surveillance. The Supreme Court supported this contention by basing the Katz reasonable expectation of privacy standard upon the of private activity:

Present encroachments on privacy inflicted by general governmental surveillance represent so grave a danger to constitutional guarantees that society should not be forced to remain without adequate protection while courts capable of providing protection fail to do so. If the right of privacy is to be enjoyed citizens must be able to regulate the access of others to knowledge about their personal lives.

*Id.* at 357.

*See also* Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972) (plaintiff unable to establish "justiciable injury" from local police surveillance of public meetings); ACLU v. Westmoreland, 323 F. Supp. 1153 (N.D. Ill. 1971) (plaintiff failed to prove "chilling effect" on freedom of speech as a direct injury resulting from Army spying); Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970) (showing of direct injury caused by police reporting system of potential civil disorders held too speculative).

*See note 91 and accompanying text supra.*

*See, e.g.,* California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974) (Constitution does not prohibit all requirements that information be made available to the government); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (zoning ordinance restricting land use to one-family dwellings does not infringe upon "non-family's" "fundamental" right of privacy); Tosh v. Buddies Supermarkets, Inc., 482 F.2d 329 (5th Cir. 1973) (constitutional right to privacy does not prohibit a state agency from furnishing arrest information to those who present a legitimate need for it); Travers v. Paton, 261 F. Supp. 110, 113-14 (D. Conn. 1966) ("Thus far, only the basic core elements of privacy ... are clearly constitutionally protected. Protection does not extend to all possible ramifications of privacy."). *But see* Davidson v. Dill, 503 P.2d 157 (Colo. 1972) (even without legislation, judicial control may be used to protect a citizen from what might develop upon its facts to be an unconstitutional invasion of the right of privacy). *See also Note, The Constitutional Right of Privacy; supra note 89, at 284-94 (1974).*

*The most common response to a proposed extension of the privacy theory advanced in the lower courts is, “[t]hus far only the most intimate phases of personal life have been held to be thus constitutionally protected.” Rosenberg v. Martin, 478 F.2d 520, 524-25 (2d Cir. 1973). See, e.g., Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973); Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972); Note, supra note 94, at 294.


*See generally Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U. L. Rev. 968 (1968).*
Fourth Amendment's unreasonable search and seizure provision rather than the broader right of privacy, thereby indicating that the Fourth Amendment provides the clearer standard and more effective means for redress of harm.

C. The First Amendment Guarantees of Free Speech and Association

The principal danger from government actions which inhibit free speech and association is the indirect or "chilling effect" resulting from uncertainty as to what is prohibited activity. A state law is constitutionally prohibited if it forces individuals to conform their free speech and association activity only to what is clearly permitted by the statute.

The Supreme Court has framed a balancing test to weigh the interest and need for the state to regulate certain conduct against the extent to which the state statute interferes with an individual's First Amendment rights. As long as the state can demonstrate a sufficiently compelling interest, government restrictions which may inhibit free speech and association are al-

** See United States v. Robel, 389 U.S. 258, 264-66 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965). The Dombrowski Court explained: "Because of the sensitive nature of constitutionally protected expression, we have not required that all those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendental value to all society and not merely to those exercising their rights—might be the loser." Id. at 486.

The courts have consistently ruled against any governmental action which threatens the free exercise of First Amendment rights. Even actions which indirectly inhibit free speech or association are prohibited. See, e.g., United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967):

The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech . . . as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were erected for the purpose of dealing with some evil without the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

Id. at 222 (emphasis added).


100 In Younger v. Harris, 401 U.S. 37, 51 (1971), the Supreme Court stated:

[T]he existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.

(emphasis added).
The outcome of the balancing test in these First Amendment cases thus depends significantly upon how much weight is assigned to the compelling state interest.

CCTV surveillance would be subject to First Amendment attack in the following hypothetical scenario. A political demonstration involving a socially unpopular cause is held in a public park or city street subject to CCTV surveillance. The plaintiffs claim that the use of CCTV constitutes a disincentive for attendance by those fearful of government surveillance and request injunctive relief and damages. Under current case law, however, such a claim would probably fail because the use of camera surveillance would be compared to past methods of government surveillance using photographs and undercover agents. The greatest obstacle for defendants in the area of CCTV surveillance is that such observation normally occurs in clearly public areas such that any member of the public would easily be able to view the activity.

101 In Tatum v. Laird, 444 F.2d 947 (D.C. Cir.), rev'd, 408 U.S. 1 (1971), a group of political activists filed a declaratory judgment action seeking to hold the Army’s undercover surveillances of their activity unconstitutional and sought an injunction to prohibit future surveillance. The appellants claimed, inter alia, that the Army’s undercover surveillance operation created a “chilling effect” which abridged their First Amendment rights. Although the court held that the Army had a “legal basis for the collection of intelligence information relevant to its constitutional and statutory mission,” id. at 956, the opinion noted in dictum that such surveillance by non-military civilian criminal law enforcement agencies is also constitutionally permissible. Id. at 957.

102 The plaintiffs’ argument would be unpersuasive given the insignificant difference between CCTV and photography. In Donohoe v. Duling, 330 F. Supp. 308 (E.D. Va. 1971), the plaintiffs brought suit to enjoin police from photographing persons participating in political demonstrations. The plaintiffs contended that police photographers had “a ‘chilling effect’ upon their presence, as well as on others who may [have wished] to participate.” Id. at 309-10. The court rejected this argument and determined “that the practices of the Richmond police as heretofore described are not only permissible and constitutional, but they are also commendable and should be encouraged.” Id. at 311 (emphasis added). The Fourth Circuit Court of Appeals affirmed, Donohoe v. Duling, 465 F.2d 196 (4th Cir. 1972), relying upon the lack of “justiciable controversy” doctrine.

See also Clark, Constitutional Sources of the Penumbral Right to Privacy, 19 VILL. L. REV. 833, 841-55 (1974) (discussing the protection of political privacy); Meisel, Political Surveillance and the Fourth Amendment, 35 U. PITT. L. REV. 53 (1973); Note, First and Fourteenth Amendments — Right to Privacy, 43 TENN. L. REV. 689 (1976). For a general discussion of civil liability for nonconsenting photography, see Cavallo, Photography: Law in Focus, 14 TRIAL 22 (1978).

103 There is currently no statutory or case law to prevent law enforcement officers from photographing people in public places. See Note, supra note 5, at 195 & 195 n.278. See also Anderson v. Sills, 106 N.J. Super. 545 (1969), rev’d and remanded, 56 N.J. 210, 265 A.2d 678 (1970), where the New Jersey Supreme Court held that the state has a legitimate interest in scrutinizing criminal suspects which outweighs the First Amendment objections of the suspect. The appellate court held: “[T]he constitutional doctrine requires that we consider any burden placed upon First Amendment rights that might reasonably be expected to interfere or to prevent their exercise as constituting an imper-
III. PROPOSED REGULATIONS OF LAW ENFORCEMENT USE OF CCTV SURVEILLANCE SYSTEMS

Existing case law does not adequately limit police use of CCTV surveillance. Even though these systems have successfully deterred street crime, their potentially great abuse warrants specific limitations even absent constitutional considerations. Constitutional standards, however, are the minimum standards which users of CCTV are required to meet. The inadequacy of the Fourth Amendment exclusionary rule in affording a proper remedy and the difficulty courts have in formulating precise regulations indicate that statutory law and administrative regulations are more appropriate means of controlling CCTV use.

The first consideration is which lawmaking body is best able to implement the necessary restrictions on urban police use of CCTV systems. The LEAA has the power to attach reasonable conditions to a state's use of its grant funds and the LEAA must evaluate the effectiveness and impact of that use in order to provide continued funding. LEAA normally channels funds

104 According to one government official, "Generally, no legal limitations on electronic surveillance of large public areas exist. The challenge is wide open." Note, supra note 7, at 152 (citing Barkan, Big Brother Won't Wait Until 1984, GUARDIAN 2, Feb. 2, 1972, at 3).
105 For an account of the "psychologically taxing" effect on observed individuals by an authority figure, see A. WESTIN, PRIVACY AND FREEDOM 58-63 (1970).
106 42 U.S.C. §§ 3701-3739 (1976). 42 U.S.C. § 3733(a) provides in pertinent part: (a) The Administration shall make grants under this chapter to a State planning agency if such agency has on file with the Administration an approved comprehensive State plan. . . . No State plan shall be approved as comprehensive unless the Administration finds that the new plan provides for the allocation of adequate assistance to deal with law enforcement and criminal justice problems in areas characterized by both high crime incidence and high law enforcement and criminal justice activity. No State plan shall be approved as comprehensive, unless it includes a comprehensive program, whether or not funded under this chapter, for the improvement of juvenile justice. . . . [It must] (3) adequately take into account the needs and requests of the units of general local government in the State and encourage local initiative in the development of programs and projects for improvements in law enforcement and criminal justice. . . . [It must] (5) incorporate innovations and advanced techniques and contain a comprehensive outline of priorities for the improvement and coordination of all aspects of law enforcement and criminal justice, . . . .
107 Id. § 3733(b) (1976). This section provides:

(b) Prior to its approval of any State plan, the Administration shall evaluate its likely effectiveness and impact. No approval shall be given to any State plan unless and until the Administration makes an affirmative finding in writing that
to state agencies for use in specific ways. Therefore, where LEAA funds are used in whole or part by states to purchase surveillance equipment the LEAA may impose stringent regulations on the states as to how these systems are used. Since nearly all CCTV surveillance projects have thus far been funded substantially or entirely by the LEAA, this approach is likely to be effective.

Federal statutory treatment of CCTV could be more far-reaching than the administrative response because a state is not bound by Department of Justice regulations concerning remote camera surveillance if that state did not rely on LEAA funding for the purchase or maintenance of its surveillance equipment. This approach, however, appears less likely to be sustained in light of a recent Supreme Court decision curtailing Congress' commerce power where it directly interferes with a state's freedom to structure its integral operations.

Even without the capability of reaching all local police use of CCTV surveillance, Congress may enact procedural laws which: (1) prohibit the introduction into federal courts of any evidence which was seized with the aid of a non-federally approved CCTV system; and (2) disallow any testimony by the monitor operator based on observation of criminal activity on such unapproved systems.

State legislatures could adopt their own restrictions on CCTV use. Though this has the obvious potential for different standards of protection, the success of uniform state laws may carry

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108 See, e.g., LEAA Grant # 70-DF-170, where the LEAA gave the Florida Inter-Agency Law Enforcement Planning Council $150,000 to create a selective enforcement unit of ten videotape-equipped vehicles in Tampa, Florida. The LEAA granted $50,000 to Washington, D.C., for purposes of implementing the Mayor's Command Center Television System. For an additional discussion of the LEAA's role in funding local police departments' use of modern law enforcement technology, see Goulden, Tooling Up for Repression: The Cops Hit the Jackpot, THE NATION, Nov. 23, 1970, at 520.

109 See Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

110 National League of Cities v. Usery, 426 U.S. 833 (1976). In Usery, the Supreme Court held that Congress cannot impair certain essential attributes of state sovereignty. Id. at 851-52. The Court expressly mentioned a state's ability to provide police protection as falling within those "services . . . which the States have traditionally afforded their citizens." Id. at 839.
over to such regulations. Another possible means of restricting CCTV use is by constitutional amendment. Although the difficulty of refining precise standards by the process of judicial decision-making would remain, the constitutional amendment route would indicate a strong commitment to personal privacy whether ratified on the federal or state level. The amendment might provide "The right of the people to be free from clandestine electronic surveillance by the State shall not be abridged other than by a judicial search warrant, showing probable cause, by oath or affirmation, that the observed party has committed or is committing a criminal act." Although the language is broad, courts would hopefully guard more zealously the freedom of individual against unwarranted governmental surveillance, filling in the gaps which such general language inevitably leaves.

No matter which method of implementation is chosen, a comprehensive licensing procedure should apply to the use of any type of CCTV surveillance system. Such a license should be issued to police departments by either a federal or state licensing authority only on the basis of a demonstrated need. In order

111 The key to successful adoption of a uniform state law is approval by the National Conference of Commissioners on Uniform State Laws [hereinafter cited as N.C.C.U.S.L.]. Uniform state laws normally deal with important subject matters and are drafted with great care such that they take on an importance not normally equalled by other state acts. In addition, the acts serve to maintain the federal-state structure because "[w]ithout them, interstate chaos and confusion would inevitably produce a popular demand for federal legislation in many legal areas that are traditionally within the function of state law." Leflar, Maurice H. Merrill and Uniform State Law, 25 Okla. L. Rev. 501, 502 (1972).

Uniform state laws which have been approved by the N.C.C.U.S.L. include:
Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (1949); Anti-Discrimination Act (1968); Code of Military Justice (1963); Uniform Commercial Code (1961); Amendments (1970); Consumer Credit Code (1969); Criminal Extradition Act (1949); Deceptive Trade Practices Act (1965); Declaratory Judgments Act (1961); Fraudulent Conveyances Act (1965); Limited Partnership Act (1951); Narcotic Drug Act (1953); Negotiable Instruments Act (1909); Partnership Act (1955); Perjury Act (1965); and Post-Conviction Procedure Act (1970).

Id. at 504-05.

111 But see A. Westin, supra note 105, at 394-95, where Professor Westin argues against a constitutional amendment for the protection of privacy. He notes that the advantage to such an amendment would be that direct federal regulation of state police practices and evidentiary procedures would be permitted. Id.

113 Unless there is a significant crime problem in the proposed surveillance area, the license should not be granted. Above this threshold, a community would be free to implement CCTV surveillance. A threshold is needed to prevent the majority from overriding individual rights in the absence of a compelling interest in crime prevention. The privacy rights of individuals would be subordinate to the majority desire for CCTV protection where there is a street crime problem. This interest-balancing is necessary to
to procure the license, a police department should have to submit a detailed proposal as to the intended use of the CCTV system and its expected effectiveness in deterring crime in a given area.\textsuperscript{114} Licenses should only be granted for remote cameras in areas which have significant street crime problems or where there is substantial likelihood of such street crime.\textsuperscript{116} A public hearing should be held before the final issuance of the license in order to solicit public comments and suggestions. The law should have a provision for a community veto by the neighboring merchants and residents if there are widespread objections to CCTV use.\textsuperscript{116}

The law should specify certain technological restrictions which the equipment must have in order for a system to be licensed.\textsuperscript{117} The prohibition of videotaping would avoid one of the greatest objections to CCTV surveillance. Without taping, the potential for abuse by doctoring film for political embarrassment, comprehensive citizen location-registration, and deceptive courtroom use is reduced. Furthermore, the licensee should be required to post notice of CCTV surveillance. Such notices should be conspicuously placed and the camera units must be clearly identified.\textsuperscript{118}

In order to retain its license a police department should periodically be required to submit to the CCTV licensing authority a report detailing the past period's use of the equipment and any

provide constitutional protection while also giving a broad control to the majority.

\textsuperscript{114} These effectiveness tests could be modeled on those used in the Mt. Vernon project. \textit{See} note 7 \textit{supra}.

\textsuperscript{115} The determination of a "significant" crime problem is best left to a state or local licensing board. \textit{See} note 113 \textit{supra}.

\textsuperscript{116} The veto would be similar to a neighborhood veto of liquor establishment licensing. The voting unit might consist of a political ward or township. A school district may, in some instances, be an appropriate voting unit. Included within the idea of a neighborhood or community veto is a provision for a community recall if the neighborhood so desired to revoke the department's license for that surveillance area.

\textsuperscript{117} The tilt and rotational range of camera units could be restricted to avoid the possibility of observing essentially private areas such as inside windows of apartments and homes. Another technological limitation might be on the telescopic capability of the system. There is no overriding justification for being able to see what a pedestrian is reading or saying. Light amplification should be retained because of the high incidence of street crime at night. Within a specified distance, for example, thirty feet, the telescopic capability of the camera unit could be rendered inoperable. This would prevent unjustified personal intrusions while still permitting long-range observation.

\textsuperscript{118} Posting notice would serve as a further deterrent to criminal activity in the surveillance area.

In the private sector, many supermarkets, banks, and other establishments have increased public awareness of their security cameras by taking advantage of the human desire to appear on television. Monitor units could, accordingly, be placed in the vicinity of CCTV cameras to familiarize the public with the system.
significant benefits arising from its operation. As a further control, the authority should have full responsibility for investigating all complaints. Moreover, the authority should employ inspectors who would make unannounced visits to monitoring stations and camera posts to verify compliance.

Finally, stiff penalties should be imposed for violations of the regulations in addition to suspension or revocation of the police department’s license. In appropriate circumstances, a plaintiff could make use of a statutory provision in the regulations granting a civil action to any person whose constitutional rights have been violated.

**Conclusion**

CCTV surveillance operations by police deter street crime and aid in the detection and apprehension of criminal suspects. Nevertheless, the use of this advanced technology should not be exempt from the constitutional prohibitions formulated during a less advanced era. If civil liberties are to remain strong, the courts and legislatures must not allow the modern technology to circumvent current statutory and case law safeguards.

This article has traced the current constitutional doctrines potentially applicable to police use of CCTV surveillance and, in applying the doctrines to a hypothetical scenario, has concluded that there are some uses of CCTV to which no existing law applies. CCTV surveillance is too beneficial a tool to be prohibited altogether, but the harms of its unlimited use outweigh that benefit. A compromise is necessary: CCTV surveillance should be used, but only if tightly regulated. Then, and only then, can its significant advantages be obtained, while at the same time safeguarding the fundamental rights of the citizenry.

—Gary C. Robb

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119 In discussing appropriate penalties of wiretapping statutes by federal officials, Professor Westin has suggested that criminal sanctions be imposed against violators with imprisonment for one to three years and that evidence obtained as a result of the illegal act be suppressed. A. Westin, *supra* note 105, at 393.

120 See note 91 *supra*. Although the plaintiffs whose constitutional rights had been violated may have a civil action pursuant to 42 U.S.C. § 1983 (1976), a specific statutory grant providing a cause of action for CCTV abuses by police would provide more certain coverage. Such a statute would avoid the uncertainties of applying the civil rights statute to actions against the sovereign. The statute could provide for an injunction and damages for proven violations of the regulations. The possibility of civil liability would also encourage police departments to comply more carefully with the licensing and operational regulations.