Reconsideration of the *Katz* Expectation of Privacy Test

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A Reconsideration of the Katz Expectation of Privacy Test

When the Supreme Court decided Katz v. United States\(^1\) in 1967, some commentators viewed the case as paving the way for possible expansion of fourth amendment\(^2\) protection\(^3\) against unreasonable search and seizure.\(^4\) Subsequent developments in general fourth amendment jurisprudence, however, suggest that this hope has not been realized. Indeed, several recent cases have actually narrowed the scope of fourth amendment protection.\(^5\) Given these developments, it is once again\(^6\) appropriate to analyze the

2. 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.
3. See, e.g., The Supreme Court, 1967 Term, 82 HARV. L. REV. 63, 190 (1968) [hereinafter cited as Supreme Court].
4. The “unreasonableness clause” of the fourth amendment—which states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”—could have originally been interpreted as having meaning independent of the warrant clause. See N. LAsson, The History and Development of the Fourth Amendment to the United States Constitution 103 (1937). By the time Katz was decided, however, the Court considered the question of the unreasonableness of a search or seizure merely in terms of whether the police had met the warrant requirement of the amendment. See generally Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 HARV. L. REV. 945 (1977); Note, The Life and Times of Boyd v. United States (1886-1976), 76 Mich. L. Rev. 184, 201-03 (1977). This Note is limited to a consideration of whether the right to have expectations of privacy should prevent governmental searches in the absence of a warrant.
   For a general discussion of recent federal court decisions that arguably narrow the scope of several constitutional rights, see Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977). But cf. Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L. Rev. 1319 (1977) (suggesting that the Burger Court decisions involving criminal procedure have not eviscerated any fundamental rights of the defendant).
6. For other analyses, see Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349 (1974); Dutile, Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems, 21 CATH. U.L. REV. 1 (1971); Note, Katz and the Fourth Amendment: A Reasonable
"reasonable expectation of privacy" standard enunciated in *Katz*.

In holding that the fourth amendment "protects people, not places," the court in *Katz* indicated that the "constitutionally protected areas" or "trespass" standard applied in prior cases would no longer be controlling. Yet, if the sanctity of the home, which is the paradigm constitutionally protected area, is to continue to be recognized as a core value of the fourth amendment, then the formulation and application of the reasonable expectation of privacy test should be modified in certain respects. To ensure that the fourth amendment has some minimum content that cannot be defined away by either the government or the courts, these modifications should give paramount importance to the value of living one's daily life, particularly in one's own home, free from arbitrary and excessive governmental intrusion. Preserving this value entails recognizing that the fourth amendment does not simply protect ex-

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8. 389 U.S. at 351.
10. 389 U.S. at 353.
11. This value, as well as others, was articulated in the early landmark case of *Boyd v. United States*, 116 U.S. 616, 630 (1886), *discussed in Note*, 76 Mich. L. Rev. 184, supra note 4. The Supreme Court has continued to articulate this value. *See* text at notes 100-13 infra.

Courts have compared other areas to the home in order to determine whether they should be constitutionally protected. *See*, e.g., *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (automobiles); *Ponce v. Craven*, 409 F.2d 621, 624 (9th Cir. 1969) (motel rooms).
12. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), decided a few months prior to *Katz*, the Court said:

The basic purpose of the Fourth Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which "is basic to a free society." 387 U.S. at 528 (citation omitted).

Courts have also interpreted the fourth amendment as protecting other values, such as the right to be let alone (*United States v. Holmes*, 521 F.2d 859, 870 (5th Cir. 1975), *affd. in part and rev'd. in part per curiam on rehearing*, 537 F.2d 227 (5th Cir. 1976)), the right of individuality (*Fixel v. Wainwright*, 492 F.2d 480, 483 (5th Cir. 1974)), the security of persons and property (*Alderman v. United States*, 394 U.S. 165, 175 (1969)), the right of personal liberty (*Lopez v. United States*, 373 U.S. 427, 455 (1963) (dissenting opinion)), and the right of personal dignity (*Terry v. Ohio*, 392 U.S. 1, 17 (1968)). Common to all these characterizations is the premise that a person's daily activities are not subject to constant or arbitrary governmental scrutiny.
pectations of privacy; rather, it protects the right to have certain expectations of privacy. In short, the minimum content of the fourth amendment is the minimum set of expectations of privacy to which people are entitled.

This Note, by modifying certain aspects of the reasonable expectation of privacy test, offers a theory that attempts to identify the minimum content of the fourth amendment. In the first section, the Note examines the reasonable expectation of privacy test and considers whether it has been or can be applied in a manner that fails to protect the right to have certain minimum expectations of privacy. It analyzes both the "actual" and the "reasonable" expectation requirements, identifies weaknesses inherent in the current application of these requirements, and suggests certain ways in which they might be refined. In the second section, the Note looks beyond the literal requirements of the refined reasonable expectation of privacy test to consider whether even after modification the test adequately protects the values implicit in the fourth amendment. First observing that the Court has continued to identify the sanctity of the home as being at the core of the amendment and then observing that the pre-Katz open field-curtailment distinction continues to play a significant role in the resolution of fourth amendment cases, it demonstrates that the "constitutionally protected areas" test is not inconsistent with Katz. In the final section, the Note concludes that, rather than being viewed as retaining significance independent of the expectations test, the protected areas test should instead be viewed as defining a set of expectations that are safe from governmental encroachment because they are reasonable as a matter of law.

I. THE NATURE OF THE EXPECTATION OF PRIVACY TEST

In Katz v. United States, the petitioner appealed his conviction for transmitting wagering information over the telephone in violation of a federal antigambling statute.13 FBI agents, proceeding without a search warrant, listened to Katz's end of the conversations by attaching an electronic listening and recording device to the outside of a public telephone booth from which Katz had placed his calls. This evidence was admitted at trial over petitioner's objection. The government argued that because the agents had not physically intruded into the telephone booth, the FBI's activity did not constitute a search and seizure within the meaning of the fourth amendment. It also contended that a public telephone booth was not a "constitutionally protected area," the traditional formulation used to describe those areas protected by the amendment. The Supreme Court re-

versed Katz's conviction, holding that the fourth amendment "pro-

ects people, not places." 14 In his concurring opinion, Justice
Harlan interpreted this holding to mean that a defendant will receive
fourth amendment protection only if he has a "reasonable expectation
of privacy." 15 He explained the "reasonable expectation of privacy"
test as follows: "[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 pre-
pared to recognize as 'reasonable.'" 16

As this section of the Note indicates, each element of Justice
Harlan's test, if taken to its logical extreme, might eliminate the right
to have expectations of freedom from governmental intrusion,
thereby nullifying the safeguards of the fourth amendment. Al-
though presumably courts would never consciously manipulate the
expectations test to reach such a restrictive result, they might inad-
vertently come to conclusions at odds with the basic purposes of the
fourth amendment if the elements of the expectations test are unre-

A. The Actual Expectation Requirement

1. The Right To Have Expectations: Governmental
Manipulation of Expectations

A major difficulty with the threshold requirement that a defen-
dant have an actual expectation of privacy stems from the possibility
that the government might reduce—or even make it impossible to
have—such expectations simply by announcing prior to initiating any
investigation that it intends to conduct searches. If the right of
privacy is only as great as the expectation of privacy, then the gov-
ernment can vitiate the right simply by taking away all such expect-
tations.

It appears that the Court in Katz began to recognize this diffi-
culty, for it stated that people are entitled to know that they are
protected from unreasonable searches and seizures. 17 Yet, by
defining "unreasonableness" in terms of what a person knows—since
expectations are based on knowledge or belief—the Court ultimately
failed to recognize any such entitlement. If the government can
condition citizens to expect that certain intrusive searches and
seizures will occur, then those searches and seizures, by definition,

14. 389 U.S. at 351.
15. 389 U.S. at 360.
16. 389 U.S. at 361 (emphasis added).
17. "Wherever a man may be, he is entitled to know that he will remain free
from unreasonable searches and seizures." 389 U.S. at 359.
would not be unreasonable. This analysis suggests that, by manipu-
lating actual, subjective expectations of privacy, the government could
determine whether a particular search and seizure is unreasonable.
Professor Amsterdam emphasizes this criticism of Katz by posing an
Orwellian hypothetical in which the government flashes messages on
television informing its citizens that they are subject to constant sur-
veillance—in such a situation, no one can be said to possess an actual
expectation of privacy.18 Placing this amount of power in the hands
of the government is clearly inconsistent with the fourth amend-
ment's purpose of circumscribing the ability of the government to
intrude into people's lives.

A test based on actual expectations not only allows the govern-
ment to determine the reasonableness of its own agents' searches and
seizures but also makes it impossible to evaluate the constitutionality
of laws that authorize such conduct. Suppose, for example, that a
statute were enacted requiring occupants of automobiles on toll high-
ways to submit to extensive searches of the vehicles, their persons,
and their luggage at selected toll booths. The statute is so well pub-
licized that no one can actually expect to travel on a toll road with-
out being thoroughly searched. If the "unreasonableness" of a
search is defined in terms of actual expectations, then the searches
allowed by the statute cannot be said to be unreasonable. Therefore,
the statute itself, let alone particular searches conducted pursuant to
it, cannot be held invalid on fourth amendment grounds.

Although no case has yet involved a breach of fourth amend-
ment rights as blatant as that in either the Amsterdam or the toll road
hypothetical, in some cases it has been argued, occasionally success-
fully, that the fourth amendment does not protect a citizen when the
government has given advance notice of the investigative activity.
One category of advance-notice cases presents the issue of whether
the existence of prior frequent searches vitiates expectations of pri-
vacy with respect to later, similar searches. In People v. Superior
Court19 (hereinafter cited as Stroud, the name of the real party in
interest), police officers discovered stolen automobile parts in the
backyard of the defendant's home while circling over the area in
a helicopter. In rejecting the defendant's contention that he had
been subjected to an unreasonable search and seizure, the court
noted that police helicopters had routinely patrolled the area "for

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18. Amsterdam, supra note 6, at 384. The outcome of the application of the
actual expectation criterion to this extreme situation leads to the conclusion that the
phrase "reasonable expectation of privacy" makes sense only if it is a label for a re-
sult rather than a test by which a result is reached. Thus, Professor Amsterdam sug-
gests that Katz and the fourth amendment be analyzed in terms of what citizens
should demand from their government, rather than in terms of what they actually
expect. Id. at 385.

some time." Accordingly, it ostensibly concluded that the defendant must have been cognizant of the patrols and therefore could not have had an expectation of privacy. This analysis, of course, would support results in the Amsterdam and toll road hypotheticals that would seriously erode fourth amendment protection. A better approach is found in *United States v. Davis,* where an airport search of the defendant's carry-on briefcase revealed a concealed gun. The court rejected the government's argument that the defendant could not have had a reasonable expectation of privacy. In adding that the government could not, for example, avoid the restrictions of the fourth amendment simply by notifying the public that all telephone lines would be tapped or that all homes would be searched, the *Davis* court apparently recognized, as the *Stroud* court did not, that the amendment protects the right to have expectations of privacy.

A second category of advance-notice cases involves situations in which the search in question was conducted pursuant to a regulation, a contractual provision, or a posted notice specifically brought to the attention of the defendant. In *Commonwealth v. McCloskey,* law enforcement officers, accompanied by university officials, searched a student's dormitory room and discovered marijuana. The university dormitory contract, which the defendant had signed, provided that the university reserved the right to inspect the room "under the regular procedures of the University" and that the defendant granted permission for such inspections. The court rejected the government's contention that under these circumstances the defendant could not have had a reasonable expectation of privacy regarding his room. Analogizing a dormitory room to an apartment or hotel room, the court concluded that, even though the university had a right to check the room for damages and for violation of safety regulations, the defendant was still entitled to have a reasonable expectation of privacy regarding the room. Furthermore, the court held that the defendant's contractual undertaking did not evidence his consent to

20. 37 Cal. App. 3d at 839, 112 Cal. Rptr. at 765.
21. 37 Cal. App. 3d at 839, 112 Cal. Rptr. at 765. Without questioning the defendant's assertion that he had an actual expectation of privacy, the court said that he could not have had a reasonable expectation of privacy. That is, even if the frequent aerial observations had not succeeded in altering the defendant's actual expectation, they had altered the reasonableness of his expectation.
22. 482 F.2d 893 (8th Cir. 1973).
23. 482 F.2d at 905.
26. 217 Pa. Super. Ct. at 436, 272 A.2d at 273. The court's statement here is significant in light of this Note's position that an expectations analysis of the fourth amendment is on the right track only if courts recognize the distinction between having an expectation and having the right to have an expectation. Accord, Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971). See text at notes 53-55 infra.
the police search or his authorization of the university to consent to such searches on his behalf. 27

In other contexts, however, courts have accepted the argument that fourth amendment protection may be defeated by explicit reservation of the right to search. Wilson v. Commonwealth 28 upheld the validity of a police department's search of the locker of a former member of the department. The defendant knew that the department kept keys to all lockers and asserted the right to search them at any time. In State v. Bryant, 29 a department store employee and a police officer observed homosexual activities by positioning themselves over a ventilator in the ceiling above a department store restroom. Although the court held that this search was invalid under Katz, it indicated that the store could have prevented an expectation of privacy, and thus could have validly undertaken the search, if signs had been posted warning anyone using the facilities that he was apt to be under surveillance. 30

The approach used in Wilson and Bryant, like that used in Stroud, is troublesome. By simply concluding that advance notice can vitiate expectations of privacy, these courts provide no principled method for distinguishing the Amsterdam and toll road hypotheticals. Although there may be ways to distinguish the factual settings in Wilson and Bryant from the facts of each of these hypotheticals, such efforts fail to come to grips with the basic weakness of an actual expectations standard: the inability of the test to distinguish situations in which a reduction in actual expectations of privacy is justified from those situations in which it is not.

A third category of advance-notice cases involves situations in which the defendant has a special status that in effect gives him

The law enforcement officers in McCloskey, unlike those in Katz, had a search warrant. The fourth amendment problem arose because they entered defendant's room without announcing their identity and purpose. 217 Pa. Super. Ct. at 434, 272 A.2d at 272. Holding that the amendment's prohibition against entering private premises without such notice, in the absence of exigent circumstances, applied to dormitory rooms, the court found it unnecessary to determine whether the warrant was valid. 217 Pa. Super. Ct. at 437, 272 A.2d at 274.
28. 475 S.W.2d 895 (Ky. 1971).
29. 287 Minn. 205, 177 N.W.2d 800 (1970).
30. 287 Minn. at 211, 177 N.W.2d at 804. For a discussion of this case and other related cases, see 55 MINN. L. REV. 1255 (1971).
31. This Note argues that property interests should constitute the basis for a minimum content of fourth amendment protection. See text at notes 126-33 infra. However, the argument that Bryant and Wilson can be justified on the basis of the absence of property interests—that the defendants were not protected because they did not have property interests in the areas searched—suggests that such interests would constitute a maximum content for fourth amendment protection. This test would severely limit the scope of fourth amendment protection and, in addition, would be extremely difficult to apply in cases in which there are divided property interests.
prior notice that he is subject to warrantless searches, thereby reducing his expectation of privacy. This notion of special status has appeared in cases involving probationers and parolees, where courts have viewed the peculiar status of the defendant as giving the government an extraordinary interest in supervising his activities. Courts have held that this interest can justify warrantless searches that would not have been allowed in the absence of the individual's special status. For example, in *People v. Mason* the Supreme Court of California upheld the constitutionality of the terms of the defendant's probation, which required him to submit to a warrantless search by the police at any time and place. The court indicated that the defendant's special status entitled him to only a "reduced expectation of privacy."

Although the rationale underlying *Mason* is not easily discerned, the court might have viewed probation as a privilege that must be accepted on whatever terms it is offered. The court did speak in terms of consent, which suggests that it might have thought that the defendant was not entitled to expect privacy because he had acquiesced in the terms of his probation. If *Mason* is based upon the distinction between a privilege and a right, the correctness of the result could be challenged. The right-privilege distinction has been significantly eroded in other areas of constitutional law, and it is questionable whether this is a tenable basis for determining whether one is entitled to expect privacy.

Instead of justifying the results in this category of cases on the notion that probation is a privilege for which the right to expect privacy must be traded, it is better to explain them on the ground that the right to expect privacy must be given less weight when the particular defendant can be identified as being peculiarly dangerous to society. When such an individual was convicted and sentenced to serve time in prison, the judicial process determined that the defendant's activities so threatened society that he had forfeited his liberty. Presumably society can justify releasing a dangerous prisoner on probation only if it has the right to supervise him without obtaining a warrant. Thus, the rationale underlying cases such as *Mason* appears to embody a balancing process: the interest in protecting

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33. 5 Cal. 3d at 764, 488 P.2d at 633, 97 Cal. Rptr. at 305.
34. For a more detailed discussion of the role of consent in advance-notice cases, see text at notes 46-63 infra.
society from the defendant is weighed against the interest of the defendant in his own privacy. Greater weight attaches to the former interest if there is a particular reason to suppose that the defendant may be dangerous to society. In *Mason* and similar cases, this particular reason is found in the defendant’s special status as one who has been convicted of a crime.

An example of the balancing approach is found in *Latta v. Fitzharris*, which upheld a warrantless search of a parolee’s house by parole officers. In that case, the Ninth Circuit reasoned that, since a parolee is subject to restrictions not applicable to the population as a whole, his right to an expectation of privacy is reduced. To explain why this reduction in expectations is justified, the court analogized the search of a parolee to an administrative search. It cited *United States v. Biswell*, where the Supreme Court upheld a warrantless search of a pawnshop operator’s locked gun storeroom pursuant to the Gun Control Act of 1968. In *Biswell*, the Court stated that inspections to check compliance with the Gun Control Act did not infringe the gun dealer’s justifiable expectations of privacy. According to the Court in *Biswell*, when a dealer chooses to engage in a pervasively regulated business and accepts a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to inspection. The Ninth Circuit in *Latta*, after analogizing Biswell’s status as a licensee of a regulated business to Latta’s status as a parolee, found that in both situations the individual’s expectation of privacy is justifiably reduced.

Thus, it appears that the special-status cases ultimately rely upon the “balancing” approach typically used in the administrative search cases: the defendant’s interest in freedom from governmental intrusion is balanced against the interest of society in conducting searches for the public health, safety, and welfare. Of course, searches of probationers and parolees, like administrative searches, involve an invasion of privacy. The warrant requirement

36. 521 F.2d 246 (9th Cir.) (en banc), cert. denied, 423 U.S. 897 (1975), discussed in 60 MINN, L. REV. 805 (1976).
37. 521 F.2d at 250. However, in United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975) (en banc), which was decided on the same day as *Latta*, the same court invalidated a warrantless search of a parolee’s house conducted by law enforcement officers rather than by parole officers.
40. 406 U.S. at 316.
41. 521 F.2d at 251.
42. See note 43 infra.
43. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), the Court held that regulatory inspections for compliance with municipal codes are “searches” within the meaning of the fourth amendment and thus are subject to its warrant requirement.
of the fourth amendment was designed to ensure that such searches do not occur without probable cause. In administrative search cases like Biswell, courts have concluded, after balancing the relevant interests, that warrantless administrative searches for limited purposes do not constitute invasions of privacy that the fourth amendment was designed to prevent. Hence, in these cases the government can legitimately reduce the actual expectations of privacy.

The balancing approach appears to be operative in the special-status cases as well. The search of a probationer or parolee is less arbitrary than the search of a criminal suspect because the special status of the probationer or parolee identifies him as someone in whom the government has a particularized interest that is stronger than the general state interest in preventing crime. After balancing this particularized interest against the individual's privacy interest, courts have determined that warrantless searches of these special classes of individuals do not constitute invasions prohibited by the fourth amendment, and thus the government may properly reduce the actual privacy expectations held by such persons.

Although the courts have devised an appropriate rationale to support the reduction in expectations of privacy found in the special-status cases, they have not developed adequate theories to justify reducing these expectations in two other types of advance-notice cases—those involving frequent uses of an investigative technique and

however, the police need not demonstrate the existence of probable cause to believe that the conditions of a particular building violate the code; rather, they need show only probable cause to believe that a code violation exists somewhere within the area in which that building is located. In such cases the determination that probable cause exists is made by balancing the government's need to inspect with the invasion of the individual's privacy. Thus, although the probable cause requirement for obtaining a warrant for an administrative search is less particularized than that for obtaining a warrant for a search for evidence of a crime, the Court was still guarding against arbitrary invasions of privacy by requiring that a warrant be obtained. For a discussion of the balancing approach employed in these cases, see United States v. White, 401 U.S. 745, 782 (1971) (Harlan, J., dissenting).

In See the Court cautioned that it did not question commonly accepted regulatory techniques such as licensing programs that require inspections prior to operating a business or marketing a product, and it stated that any constitutional challenge to such programs could be resolved only on a case-by-case basis. 387 U.S. at 546. Thus, the Court left itself the option of limiting the Camara-See warrant requirement in the future. In Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972), the Court exercised this option and provided lower courts with a vehicle for further limiting the requirement. In Colonnade, the Court granted a motion to suppress evidence obtained by a warrantless search of the locked storeroom of a licensed liquor dealer on the ground that the imposition of a fine was the exclusive sanction under the statute authorizing inspection. But the Court implied that Congress could have passed a valid statute authorizing warrantless searches of licensed liquor establishments. See 397 U.S. at 76-77.

In Biswell, the Court distinguished See, stating that periodic inspection sufficed in that case, and thus requiring a warrant would involve little threat to the effectiveness of the inspection system. In Biswell, however, unannounced and perhaps fre-
those involving a regulation or posted notice. Upholding warrantless searches in these cases without justifying the concomitant reduction in expectations of privacy appears to weaken the content of the fourth amendment. If expectations can be eliminated simply through advance notice of the search, then the searches in the Amsterdam and toll road hypotheticals could be deemed consistent with the fourth amendment. So long as any person may be deprived of his actual expectations of privacy, there is no warrantless governmental search that falls within the category of "unreasonable" searches prohibited by the fourth amendment.

The above analysis suggests that some situations deserve fourth amendment protection notwithstanding the absence of an actual expectation of privacy. As a matter of logic as well as policy, any test of what constitutes an unreasonable search and seizure must go further than merely recognizing the rights of individuals only when they possess actual expectations of privacy. Such a test must recognize the more basic right to have expectations of privacy. The test must recognize that the advance notice that certain searches will be conducted is an intrusion in itself. Even though such an announcement may reduce actual expectations, it will not validate the search, since the notice itself violates the individual's right to have expectations of privacy.

2. Actual Expectations and Consent

Several courts have decided advance-notice cases on the theory that inspections were essential to detect and to deter violations of the Gun Control Act. After balancing the relevant interests, the Court determined that regulatory inspections that further urgent federal interests and do not seriously threaten privacy may proceed without a warrant where specifically authorized by statute. 406 U.S. at 317.


44. An acute example of the failure to provide a justification for reducing actual expectations is United States v. Bynum, 485 F.2d 490 (2d Cir. 1973), vacated and remanded, 417 U.S. 903 (1974), prior judgment reinstated, 513 F.2d 333, cert. denied, 423 U.S. 952 (1975). In that case, the defendant was aware, through a "contact" in the telephone company, that his telephone was being tapped. Given his awareness, the court found it inconsistent for him to advert to an expectation of privacy. But since no justification was offered for tapping his phone, no justification was offered for the reduction in expectation of privacy.

45. It might be argued that one who has no actual expectation of privacy regarding a certain place can take precautions to ensure that he will not be observed conducting an illegal activity there: even though he cannot prevent the manipulation of his expectations, he can prevent the observation of incriminating activity. The response to this argument is that it is itself an intrusion for the government to create the necessity of taking such precautions. For further discussion of precautions, see text at notes 64-77 infra.
that, by having advance knowledge that a search would be conducted, the defendant implicitly consented to be searched. In *United States v. Davis*,\(^\text{46}\) for example, the court rejected the government's argument that the frequency of airport searches had negated any expectation of privacy, but it then remanded the case on the issue of consent. Because consent is a well-known exception\(^\text{47}\) to the fourth amendment's prohibition against unreasonable searches, advance-notice cases might be resolved by finding that the defendant consented to the search, eliminating any need to reach the expectations issue. Yet, if a defendant can be deemed to have consented to any search of which he had some sort of advance notice, then the result will be the same as if the court had decided that the government can avoid the fourth amendment's requirements by controlling his expectations.

Although the concepts of consent and expectation can both be used to describe the scope of the fourth amendment,\(^\text{48}\) the two concepts are not functionally identical. Giving consent, unlike having an expectation, requires knowing and voluntary conduct. In *Schneckloth v. Bustamonte*,\(^\text{49}\) the Supreme Court explained the voluntariness requirement of a “consent search” as follows:

> [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances.\(^\text{50}\)

At times it is difficult to determine whether the consent to a given search is voluntary.\(^\text{51}\) For example, it is questionable whether voluntariness exists if one must accede to a search of his luggage in order to board an airplane. Although an individual might avoid the requisite search by using another mode of transportation, this alternative may not be possible or practical.

\(^{46}\) 482 F.2d 893 (9th Cir. 1973).


\(^{48}\) As seen earlier, the concept of expectation, which is a function of belief or knowledge, is used to describe the privacy interests protected by the fourth amendment. The scope of the belief or knowledge determines the scope of fourth amendment protection. See text at note 17 supra. Similarly, “the constitutional protection against unreasonable search or seizure widens or narrows, depending on the difficulty or ease with which the prosecution can establish that the defendant has ‘consented’ to what would otherwise be an unconstitutional invasion of his privacy.” Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 339 (4th ed. 1974).


\(^{50}\) 412 U.S. at 248-49.

These difficulties with the consent concept are apparent in the dormitory cases discussed earlier, where university officials by regulation or dormitory contract provision had reserved the right to enter and search rooms "for inspection purposes." In *Piazzola v. Watkins*, the court rejected the government's argument that, because the students were aware of the regulation, they had consented to a search by law enforcement officers for the purpose of obtaining evidence for a criminal prosecution. The court concluded that the students had "voluntarily" consented to being searched for limited inspection purposes only. Similarly, in *Commonwealth v. McCloskey*, the court distinguished consent to a search by university officials from consent to a search by the police. Disagreeing with the government's argument that the student had consented to the latter, the court also rejected the argument that he had given the university the authority to consent to the police search.

Cases such as *Piazzola* and *McCloskey* recognize that it is possible to consent to a search for a limited purpose without altogether relinquishing the right to fourth amendment protection. In such cases it may be said that the protection afforded the defendant is diminished only to the extent that he has voluntarily carved out an exception to the warrant requirement.

But there are other cases that have failed to recognize that, when an individual consents to searches of part or all of his premises by certain persons for specified purposes, the individual waives his expectations of privacy only in regard to those areas, people, and purposes. *Katz* failed to address whether such explicit distinctions can be drawn upon the scope of the defendant's consent, stating only that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not the 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."
Nevertheless, the expectation of privacy test developed in that case certainly is not inconsistent with differentiating between activities and areas about which an individual has yielded his expectation and those about which he has not.

In another class of decisions—the "plain view" cases—the issue is whether the defendant has revealed his activities in such a way that he has waived all expectation of privacy. If an individual exposes his activities to the possibility of public view, then it follows that he is no longer entitled to expect those activities to be private—in effect, he has simply surrendered his interest in privacy by consenting to public observation of his conduct. Thus, if a police officer views activities of the defendant in plain view from a place in which he has a right to be, the defendant cannot claim that he enjoyed a reasonable expectation of privacy with respect to those activities. As stated by Justice Harlan in his concurring opinion in *Katz*, "objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."

In another class of cases, the individual has yielded certain expectations of privacy but has not surrendered them entirely. As noted earlier, an individual may allow a particularized segment of the population to view his activities for a limited purpose while retaining his expectations of privacy with respect to others. For example, suppose that an individual invites his neighbors to his backyard—which is hidden from public view—to engage in an illegal activity. Clearly the individual does not expect to maintain privacy from those whom he invites. It does not necessarily follow, however, that the individual has voluntarily surrendered his expectations of privacy regarding the public or the police.

59. The "plain view" doctrine, as described by the Supreme Court, provides 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." *Harris v. United States*, 390 U.S. 234, 236 (1968) (per curiam). *See generally* J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 92-93 (2d ed. 1975).

60. 389 U.S. at 361.

61. *See text at notes 53-58 supra.*

62. In this regard, consider the factual setting of *Recznik v. City of Lorain*, 393 U.S. 166 (1968). Petitioner conducted a gambling operation on his own property, and large numbers of people entered the apartment to engage in this activity. Police officers, noting the large number of cars near the apartment, climbed the apartment stairs, entered unannounced through the back door, arrested everyone present, and seized the gambling devices. The Court held that this entry violated the fourth amendment, holding that the large number of people entering and leaving the apartment did not make it a public establishment. It might be said that the petitioner surrendered his expectations of privacy only with respect to those that he allowed upon his property. Had the gambling activity been in plain view, petitioner would have surrendered all his expectations, and the police entry would have been permissible.
dormitory cases noted earlier are within this category. In summary, the concept of consent is closely linked to the actual expectation requirement of the \textit{Katz} test. By consenting to a search, an individual surrenders his expectations of privacy. Similarly, by voluntarily exposing his activities to the public, an individual consents to public view of, and hence surrenders his expectations of privacy with respect to, those activities.

B. \textit{The Reasonable Expectation Requirement}

Thus far, this Note has suggested that, if the expectation of privacy test is to provide adequate protection of fourth amendment interests, limitations must be placed upon the actual expectation requirement. As this section indicates, these limitations would have little significance unless they were complemented with limitations on the second part of Justice Harlan's test—"that the expectation be one that society is prepared to recognize as reasonable." 64

In determining whether an expectation is reasonable, courts have often considered whether the efforts of a defendant to preserve the privacy of his activities are reasonably calculated to achieve that result. The expectation of privacy is considered reasonable only if the defendant's efforts to preserve privacy involve the taking of "sufficient" precautions 65—if a reasonable person would have preserved his privacy by taking precautions that the defendant did not implement, then the defendant's expectation of privacy is not reasonable. Embodied in this approach to defining the reasonableness of expectations is the notion that a defendant who has failed to take sufficient precautions has assumed the risk that the police will detect his activities. 66

The above result is consistent with the misplaced confidence cases. \textit{See} note 66 \textit{infra} and accompanying text.

63. \textit{See} text at notes 53-55 \textit{supra}.

64. It is elementary that the term "reasonableness," as used in tort law, includes the concept of foreseeability. As applied to the expectation of privacy test, however, the term refers to the \textit{justifiability} of the expectation. The following example illustrates the distinction between these concepts. Although it may be improbable, based on past experience, that a police officer with a flashlight will be strolling through a desolate corner of Central Park in the middle of the night, the expectation of privacy of narcotics peddlers who rely on this improbability by conducting an illegal transaction in that desolate corner is not justifiable. One commentator has asserted that, in such situations, justifiability should be determined by factors such as the nature of the intended area of private control, the kind of information sought to be preserved as private, and the means of governmental intrusion, as well as by foreseeability of intrusion. \textit{See} Note, 43 N.Y.U.L. Rev. 968, \textit{supra} note 6, at 982-86.

It should be noted that \textit{Katz} speaks in terms of justifiability, 389 U.S. at 353, as does United States v. White, 401 U.S. 745, 752 (1971).


66. This notion of assumption of risk also underlies the pre-\textit{Katz} misplaced con-
An inquiry that focuses on precautions provides an objective means of determining whether a defendant has manifested an intention to keep his activities to himself. Even so, however, such an inquiry does not advance the analysis of whether fourth amendment protection should be granted in a given case. By shifting the question of whether a search is reasonable from a consideration of expectations to a consideration of precautions, courts are simply substituting one objective criterion for another, with no resulting refinement of the "reasonableness" concept. If taking precautions against particular kinds of intrusions is either unduly burdensome to the defendant or wholly inconsistent with basic notions of individual autonomy, it cannot be said that his failure to take the precaution is unreasonable and that as a result he has no reasonable expectation of privacy. In short, the fourth amendment only insists that an individual take reasonable precautions; simply insisting on precautions does not advance the analysis of what is reasonable.

An example of how an analysis that focuses on precautions can be misapplied is found in Commonwealth v. Hernley. FBI agents made warrantless nocturnal observations with binoculars through the windows of the defendant's print shop while standing on a four-foot ladder situated on abutting railroad tracks thirty-five feet from the shop. The height of the shop's window sills exceeded the height of an average man, and thus no one who was standing on the ground outside the building could have observed activities within the shop. Even so, the court refused to find an unreasonable search within the meaning of the fourth amendment, determining that the defendant's expectation was not reasonable because he could have curtained his windows. Even though the court conceded that the defendant had an actual expectation of privacy, it deemed this expectation un-
reasonable since he had failed to guard against the possibility that law enforcement officers might look through his windows with the assistance of a ladder and binoculars. Clearly the court failed to evaluate the reasonableness of possible precautions in light of the nature of the intrusion. As one writer has argued, this sort of reasoning, if taken to its logical extreme, would afford fourth amendment protection only to those who live within windowless, soundproof forts. 69

It thus seems clear that the reasonableness of requiring an individual to take a given precaution in order to receive fourth amendment protection should depend upon the circumstances of the particular situation. United States v. Holmes 70 illustrates this point. In that case, narcotics agents found and seized marijuana on the defendants' farm. The government argued that the defendants had no reasonable expectation of privacy because they had failed to post "no trespassing" signs, erect fences, or undertake other measures to conceal the marijuana from passersby. 71 The Fifth Circuit rejected this argument, stating that it ignored the character of the farm property. The court reasoned that, although a homeowner in a densely populated urban area might have to take greater precautions to protect his activity from detection by a casual passerby, a resident of a rural area whose property is surrounded by a dense growth "need not anticipate" 72 that government agents might crawl through the underbrush and therefore need not post signs warning such agents to stay away. Holmes thus recognized that only reasonable precautions should be demanded and that what is reasonable must be assessed in light of the character of the area being searched. 73

Justice Harlan, in his dissent in United States v. White, 74 recog-

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69. Note, 23 CLEV. ST. L. REV. 63, supra note 6, at 72. Compare the view of Judge J. Skelly Wright:

Is it not important to our American way of life that when a citizen does as much as ordinary care requires to shield his sanctuary from strangers his constitutional right to maintain his privacy should not be made to depend upon the resources of skillful peepers and eavesdroppers who can always find ways to intrude?


70. 521 F.2d 859 (5th Cir. 1975), affd. in part and revd. in part on rehearing, 537 F.2d 227 (5th Cir. 1976) (per curiam).

71. 521 F.2d at 869-70.

72. 521 F.2d at 870.

73. Yet, the reference to what the homeowner "need not anticipate" sounds like nothing more than a reference to what he should reasonably expect. If the court is determining the necessity for taking precautions by reference to reasonable expectations, then the analysis is circular.

nized the weakness of an inflexible expectation of privacy test. He argued that proper analysis must go beyond the search for subjective expectation and for assumption of risk through the failure to take precautions, because expectations and the risks assumed are largely reflections of laws that embody the customs and values of the past and present.\(^{75}\) Therefore, to determine whether a warrant should be required, Justice Harlan suggested that the nature of a particular police practice and its probable impact on an individual's sense of security be balanced against the utility of the practice as a law enforcement technique.\(^{76}\) Justice Harlan's point is that the fourth amendment entitles persons to have certain minimum expectations of privacy. If \textit{Katz} is applied without this notion in mind, then the expectation of privacy test might be used to undercut the very essence of the right of privacy that it purports to protect.\(^{77}\)

\section*{II. The Role of Constitutionally Protected Areas After \textit{Katz}}

Thus far this Note has suggested that an expectations analysis cannot adequately protect fourth amendment interests unless the test accounts for the government's ability to manipulate actual expectations and unless courts, when determining the reasonableness of the expectation, insist only upon reasonable precautions. In essence, courts must recognize that the core of the fourth amendment contains a minimum set of expectations to which all persons are entitled. It is to two crucial aspects of this analysis—the limits of this minimum set of expectations and the weight accorded the privacy interest in situations where other factors demand recognition—that this Note now turns.

\subsection*{A. Privacy Versus Property Interests: The Implications of \textit{Katz}}

\textit{Katz} rejected the view that the validity of a warrantless search can be determined by referring to the traditional "constitutionally protected area" standard,\(^{78}\) instead holding that the fourth amendment "protects people, not places."\(^{79}\) This approach generated con-

\footnotesize
75. 401 U.S. at 786. Justice Douglas made a similar point in his dissent to denial of certiorari in \textit{United States v. Williamson}, 405 U.S. 1026, 1029 (1972): "Obviously citizens must bear only those threats to privacy which we decide to impose."
76. 401 U.S. at 786.
77. Justice Douglas has argued that the very essence of the right of privacy is the right of the individual to choose whether to reveal his possessions to the police. \textit{Warden v. Hayden}, 387 U.S. 294, 323-25 (1967) (dissenting opinion).
One commentator has defined privacy as the control we have over information about ourselves. Fried, \textit{Privacy}, 77 \textit{Yale L.J.} 475, 482 (1968).
78. 389 U.S. at 350-51.
79. 389 U.S. at 351.
fusion about the degree of protection afforded certain areas—such as the home—traditionally thought to be at the core of the amendment. Moreover, the extent to which property concepts would continue to have vitality was not clear, for, as Justice Harlan noted in his concurring opinion, the key question is what protection the fourth amendment affords people, and generally the answer to that question requires reference to a place.

The difference between the constitutionally protected areas standard and the reasonable expectation of privacy standard can be characterized as a dichotomy between property interests and privacy interests. Since the Katz decision expresses a clear preference for privacy interest analysis over property interest analysis, the pertinent question after Katz is what role, if any, property interests play in defining fourth amendment protection.

One possible interpretation is that the Katz expectations test has totally displaced the protected areas standard. Under this view, the traditional notion that certain areas are protected retains vitality only insofar as expectations of privacy in those areas are deemed reasonable. Property interests are, in effect, "incorporated" into the expectations test. A second possible interpretation is that the protected areas standard retains independent significance. Under this view, the expectations test supplements the protected areas test.
in situations where the latter does not sufficiently protect the defendant.  

The difference between these two interpretations is significant. Underlying the view that the expectations standard wholly displaces the protected areas test is the assumption that a defendant's expectation of privacy in a traditionally protected area—such as his home—is only prima facie reasonable. A warrantless search of such an area is presumed unreasonable, but this presumption can be rebutted with evidence that the defendant had no actual expectation of privacy or that, because he failed to take certain precautions, he had no objectively reasonable expectation of privacy. But under the view that the protected areas test retains independent force, searches that do not fall within any of the standard exceptions to the fourth amendment warrant requirement are per se unreasonable: if a warrantless search occurs in a traditionally protected area, evidence regarding both actual expectations and precautions is irrelevant in determining the reasonableness of the search. Thus, the privacy value of a traditionally protected area receives greater recognition under the second interpretation than it does under the first. In essence, allowing the protected area standard to have independent force adds an extra dimension to the expectation of privacy standard by protecting the right to have certain expectations.

Because the expectations test formulated in *Katz* does not draw distinctions based on property concepts, it might seem inconsistent with that case to allow the protected areas test to retain any independent force. The language and context of *Katz*, however, indicate that no such inconsistency exists. *Katz* involved a nontrespassory surveillance of a public telephone booth, and it was in that setting that the Court concluded that the correct solution of fourth amendment problems is "not necessarily promoted by incantations of the phrase 'constitutionally protected area.' "89 The Court went on to state that, although the amendment protects individual privacy

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86. See, e.g., *Fixel v. Wainwright*, 492 F.2d 480 (5th Cir. 1974); *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975). In *Fixel*, the Fifth Circuit noted that it would have reached the same result under either the constitutionally protected areas test or the reasonable expectation of privacy standard. 492 F.2d at 483-84.

87. As Justice Harlan said in his concurring opinion in *Katz*, "a man's home is, for most purposes, a place where he expects privacy." *Katz*, 389 U.S. at 361.

88. This qualification is necessary because there are a number of well-known exceptions to the prohibition against warrantless searches, regardless of where they may occur. Among these exceptions are search incident to a lawful arrest (*Chimel v. California*, 395 U.S. 752 (1969)); consent (*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); hot pursuit of a fleeing felon (*Warden v. Hayden*, 387 U.S. 294 (1967)); search to prevent the destruction or removal of evidence (*Johnson v. United States*, 333 U.S. 10 (1948)).

89. 389 U.S. at 350 (emphasis added).
against certain kinds of governmental intrusion, "its protections go further, and often have nothing to do with privacy at all."\(^{90}\)

The Court in \textit{Katz} concluded that the underpinnings of two cases that had invoked the constitutionally protected areas test—\textit{Olmstead v. United States}\(^{91}\) and \textit{Goldman v. United States}\(^{92}\)—had been so eroded by subsequent decisions that the "trespass" doctrine\(^{93}\) of those cases could no longer be regarded as controlling.\(^{94}\) Yet it is one thing to assert that a doctrine is no longer controlling and another to contend that it has been entirely displaced.\(^{95}\) Thus, it might be the case that the Court merely intended that intrusion into a traditionally protected area would no longer be a \textit{necessary} condition for invoking fourth amendment protection, rather than intending that such intrusion would no longer be a \textit{sufficient} condition for invoking that protection.

This reading of \textit{Katz} is supported by other arguments. \textit{Katz} has been characterized as a policy decision designed to expand fourth amendment protection to cases in which the government's nontrespassory intrusion was effectuated by modern technological means.\(^{96}\) The expectations test was established in \textit{Katz} simply to cover a contingency that the traditional test could not handle. Furthermore, because \textit{Katz} involved neither a search undertaken by physical intrusion nor a search of an area in which the defendant had a property interest, the case can be read as standing for the proposition that property concepts are useful in some factual settings but are inconsequen-

\(^{90}\) 389 U.S. at 350 (footnote omitted). The Court added that it had never suggested that the protected areas concept would provide a "talismanic solution to every Fourth Amendment problem." 389 U.S. at 351 n.9. In this regard, Professor Amsterdam has argued that "[a]n opinion which sets aside prior formulas with the observation that they cannot 'serve as a talismanic solution to every Fourth Amendment problem' should hardly be read as intended to replace them with a new talisman." Amsterdam, \textit{supra} note 6, at 385.

\(^{91}\) 277 U.S. 438 (1928).

\(^{92}\) 316 U.S. 129 (1942).

\(^{93}\) The constitutionally protected areas doctrine has also been called the trespass doctrine, because in cases such as \textit{Olmstead} and \textit{Goldman}, which involved electronic eavesdropping committed without trespass into a traditionally protected area, the Court found that there had been no search and seizure within the meaning of the fourth amendment. \textit{See generally} J. \textit{Israel} \& W. \textit{LaFave}, \textit{supra} note 59, at 88, 168.

\(^{94}\) 389 U.S. at 347.

\(^{95}\) \textit{Olmstead} and \textit{Goldman} were based on the notion that eavesdropping was not a search or seizure as well as on the fact that no trespass had been committed. In \textit{Silverman v. United States}, 365 U.S. 505 (1961), the Court determined that eavesdropping could constitute a search within the meaning of the fourth amendment. In that case, however, the police had effectuated the eavesdropping by inserting a "spike mike" into the party wall between the defendant's house and the house occupied by the police, and the Court did not indicate clearly whether this physical penetration into the defendant's premises was a fact crucial to its decision. \textit{See} J. \textit{Israel} \& W. \textit{LaFave}, \textit{supra} note 59, at 170-71.

\(^{96}\) Note, 9 \textit{Ind. L. Rev.} 468, \textit{supra} note 6, at 475.
tial in others. In short, it does not necessarily follow from \textit{Katz} that the values underlying the old protected areas test were intended to be displaced by the new expectations test, and therefore it is not inconsistent with that case to allow the constitutionally protected areas test to retain independent force.

Given that both tests \textit{can} coexist, the question remains whether the protected areas test \textit{should} retain vitality. \textit{Katz} has been viewed as expanding the scope of fourth amendment protection.\textsuperscript{97} Yet, if \textit{Katz} renders impotent the protected areas standard and if the expectations standard is applied without adequate limitations, a defendant could receive less protection after \textit{Katz} than he would have received before it.\textsuperscript{98} One critic has remarked that, although it may be reassuring to be told that one's privacy will receive as much protection in a phone booth as in one's home, it is not so reassuring to realize that one's privacy will receive as little protection in one's home as in a phone booth.\textsuperscript{99} An interpretation of \textit{Katz} that retains the constitutionally protected areas test as an independent standard would provide a more secure safeguard against intrusive government searches. Under this view, certain areas—those at the core of the fourth amendment—would exist where a person would know that he is secure from intrusive governmental activities regardless of the extent to which the government manipulates an individual's expectations and regardless of the precautions against intrusion that courts determine he should have taken.

\section*{B. Defining a Minimum Content of the Fourth Amendment}

1. \textit{The Home as a Core Value}

The home is an obvious starting point in the search for the minimum content of the fourth amendment, for the wording of the amendment makes clear the great emphasis it places upon the right of the people to be secure in their houses. On several occasions, the Supreme Court has expressly stated that the sanctity of the home is a core value of the amendment. In the landmark case of \textit{Boyd v. United States,}\textsuperscript{100} the Court said that the fourth amendment serves to protect

\begin{itemize}
  \item \textsuperscript{97} Even Professor Amsterdam, who has rather severely criticized the lack of precision in the \textit{Katz} opinion, \textit{see, e.g.,} text at note 18 \textit{supra}, has stated that, "as a doctrinal matter, it seems clear that the effect of \textit{Katz} is to expand rather than generally to reconstruct the boundaries of fourth amendment protection." Amsterdam, \textit{supra} note 6, at 385.
  \item \textsuperscript{98} Professor Amsterdam has recognized this possibility. \textit{See} Amsterdam, \textit{supra} note 6, at 460 n.349.
  \item \textsuperscript{99} T. TAYLOR, \textit{supra} note 82, at 114.
  \item \textsuperscript{100} 116 U.S. 616 (1886).
\end{itemize}
"the sanctity of a man's home and the privacies of life." In Silverman v. United States,102 the Court said that a person's right to be free from unreasonable governmental intrusion while in his own home is at the very core of the fourth amendment.103 Significantly, the Court in Silverman acknowledged the sanctity of the home even though it rejected the view that fourth amendment rights are inevitably defined by technical trespass law.104 Although Silverman was ultimately decided on the ground that the police had made a physical invasion of the premises, Katz viewed Silverman as discrediting the trespass doctrine and as providing a precedent for the Court's shift in emphasis from property to privacy concepts.105

The theme of the sanctity of the home has continued in post-Katz case law, as illustrated by two of the major post-Katz electronic surveillance cases. In United States v. United States District Court,106 the Court stated that its decision in Katz had refused to limit the fourth amendment to instances of actual physical trespass, although "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."107 According to the Court, the amendment's "broader spirit"108 now shields private speech from unreasonable surveillance. Thus, in this opinion the Court viewed Katz as expanding the scope of the amendment's protection rather than simply replacing the standard for measuring its scope.

In Alderman v. United States,109 the Court indicated that it did not intend to increase protection of privacy at the expense of protection of property. In that case, the Court held that a defendant has standing to assert a personal fourth amendment defense to a search and seizure of conversations that occurred in his house even if he was not present or did not participate in them. The Court said that the "security of persons and property remains a fundamental value which law enforcement officers must respect."110 It rejected the argument that a person has no standing to seek to exclude evidence of conversations overheard in his home unless his own conversational privacy is invaded; instead the Court concluded that the person may object because the conversations were the fruits of an unauthorized search

101. 116 U.S. at 630.
103. 365 U.S. at 511.
104. 365 U.S. at 511.
107. 407 U.S. at 313.
108. 407 U.S. at 313.
110. 394 U.S. at 175.
of his house, the privacy of "which is itself expressly protected by the
Fourth Amendment." Referring to the "express security for the
home provided by the Fourth Amendment," the Court stated that
it did not believe "that Katz, by holding that the Fourth Amendment
protects persons and their private conversations, was intended to
withdraw any of the protection which the amendment extends to the
home." In short, it appears that the privacy standard articulated in
Katz is not inconsistent with defining the protection of the fourth amend­
ment by reference to a place. One area that can be described in
such geographic terms is the home—and it has been shown that the
sanctity of the home appears to be at the very core of the fourth
amendment. To the extent that the home has this protected status,
the constitutionally protected areas standard and its reliance upon
property concepts retain vitality after Katz.

2. The Distinction Between Open Fields and Curtilage

The continued vitality of the open field-curtilage distinction,
which was first recognized in pre-Katz cases, also supports the notion
that property concepts embraced by the constitutionally protected
areas test retain vitality after Katz. In 1924, the Supreme Court
held in Hester v. United States that the fourth amendment did not
protect activities or objects in an open field even if a defendant had
property rights in the field and the government agents who discov­
ered the incriminating evidence had technically committed a trespass
upon the property. In the interim between Hester and Katz, the
courts further illuminated the protected areas concept by extending
the protection of the fourth amendment to the house’s curtilage,
based on the notion that the curtilage was—just as an open field was
not—an extension of a traditionally protected area, the house. Thus,
prior to Katz, actual trespass upon an individual’s property by

111. 394 U.S. at 117.
112. 394 U.S. at 179.
113. 394 U.S. at 180.
114. 265 U.S. 57 (1924).
115. See, e.g., Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); Walker
v. United States, 225 F.2d 447 (5th Cir. 1955). One court has defined curtilage
as including "all buildings in close proximity to a dwelling, which are continually
used for carrying on domestic employment; or such place as is necessary and con­
venient to a dwelling, and is habitually used for family purposes." United States v.
Potts, 297 F.2d 68, 69 (6th Cir. 1961).
In McDowell v. United States, 383 F.2d 599 (8th Cir. 1967), the court refused
to extend fourth amendment protection to open fields even though the defendant had
posted "no trespassing" signs. Under the precautions analysis of Katz, it could cer­
tainly be argued that the defendant had manifested a reasonable expectation of priv­
governmental officials was a necessary—but not a sufficient—
condition of fourth amendment protection.

Although Katz announced that privacy is an appropriate concept
by which to measure the scope of fourth amendment protection, the
continued reference in decisions to the distinction between open fields
and curtilage116 not only suggests the continued vitality of a protected
areas test but also provides support for the proposition that the home
and those areas functionally related to it are at the core of the
amendment. Unfortunately, the coexistence of the open field-
curtilage distinction and the expectation of privacy test has not
always been harmonious: as the following discussion indicates, the
two doctrines can lead to disparate results under identical factual
situations.

Wattenburg v. United States117 illustrates a situation in which the
protected areas test and expectation of privacy test reach identical
results. In that case, government officials entered the defendant's
land and searched a stockpile of cut trees located thirty-five feet
from a lodge in which he and a co-defendant resided. The court,
citing Hester, held that the defendants were protected by the fourth
amendment because the stockpile was within the curtilage.118 The
court then stated that "a more appropriate test [than the one based
on curtilage] in determining if a search and seizure adjacent to a
house is constitutionally forbidden is whether it constitutes an intru-
sion upon what the resident seeks to preserve as private even in an
area which, although adjacent to his home, is accessible to the pub-
lic."119 Finally, the court concluded that the search of the stockpile
was illegal under this test as well.120 Wattenburg thus demonstrates
that when a law enforcement officer enters the curtilage and con-
ducts a warrantless search, he can be viewed not only as invading
a property area protected by the fourth amendment but also as in-
truding upon the defendant's reasonable expectations of privacy
regarding objects and activities hidden from view within the curtilage.

In other situations, however, courts could reach conflicting
results by applying the expectations test and the protected areas test.

116. See, e.g., in addition to the cases discussed in the text at notes 117-23 infra,
State v. Crea, 305 Minn. 342, 345, 233 N.W.2d 736, 739 (1975).

It should be noted that Justice Harlan alluded to the open field-curtillage distinc-
tion in his concurring opinion in Katz, when he interpreted the Court's opinion as
holding that an enclosed telephone booth is an area like a home, but unlike a field,
in which a person has a constitutionally protected reasonable expectation of privacy.
389 U.S. at 360.

117. 388 F.2d 853 (9th Cir. 1968).
118. 388 F.2d at 857.
119. 388 F.2d at 857.
120. 388 F.2d at 858.
The contradictory holdings in *Fullbright v. United States*¹²¹ and *United States v. Kim*¹²² are illustrative of this possibility. In *Fullbright*, the court upheld the admissibility of evidence that federal agents had gathered by using binoculars to observe the defendants' activities inside a shed that was a part of the curtilage of a defendant's house. In making their observations, the agents had stood outside the curtilage in an open field owned by a defendant. The court refused to declare the search unreasonable, noting that the observations by the agents would have been proscribed had they physically breached the curtilage. The court did note that, in light of *Katz*, some circumstances might exist—though the court did not discuss what they might be—in which observation from an open field would violate the fourth amendment. Even so, it relied on *Hester* in concluding that the observations in the instant case could not be deemed an unreasonable search.¹²³

In *Kim*, the court applied the expectations test and reached the opposite result on nearly identical facts. In that case, FBI agents used a telescope to observe gambling activities in the defendant's apartment. Even though the agents had not physically breached the curtilage, the court suppressed the evidence. The court stated that it is inconceivable that the government can intrude so far into a person's home that it can detect the material he is reading and still not be considered to have engaged in a search that violates the fourth amendment.¹²⁴

The result in *Fullbright* under the protected areas test is troubling because the officers, while positioned in a place where they had a right to be, were able to observe the defendants' activities only by using binoculars. This use of a device that increased their sensory perception in effect transplanted the agents into a location within the curtilage, where their unaided observation would have violated the fourth amendment.¹²⁵ Thus, in order to protect the values underlying the fourth amendment, courts should recognize that certain property interests—such as the home and surrounding areas functionally related to it—carry with them corresponding expectations of privacy from any kind of intrusion. The final section of this Note more fully explains the implications of this proposed standard.

¹²¹ 392 F.2d 432 (10th Cir.), cert. denied, 393 U.S. 830 (1968).
¹²³ 392 F.2d at 434-35.
¹²⁴ 415 F. Supp. at 1256.
¹²⁵ Under the plain view doctrine adopted in *Harris v. United States*, 390 U.S.
III. PROPERTY INTERESTS AS A PRIORI REASONABLE EXPECTATIONS

Thus far, this discussion has suggested that the distinction between the protected areas standard and the expectation of privacy standard could be characterized as a dichotomy between property and privacy interests. The significance of the apparent dichotomy is evidenced by the fact that courts have sometimes applied these standards to similar factual settings and reached different results. This discussion has also demonstrated that the home is a protected area at the core of the fourth amendment. Given these two considerations, this Note submits that the fourth amendment will provide more principled protection if the expectations-protected areas distinction is no longer viewed as dichotomous. Rather, fourth amendment doctrine should recognize that certain property interests constitute expectations that should be predefined as "reasonable" and thereby immunized from reduction through advance notice or through insistence upon unreasonable precautions.

It is important to recognize that the protected areas standard as well as the expectations standard is rooted in considerations of privacy. The purpose of the fourth amendment is not to protect property per se; rather, houses are protected, as are papers and effects, not merely because of a possessory or ownership interest but also because of an interest in keeping them private. As the

234 (1968), an observation within the plain view of a police officer who is positioned in a place where he has a right to be is not conceptually a "search" within the meaning of the fourth amendment. In Fullbright, the observations were made from a place where the federal agents had a right to be, since an officer may enter private property when his duties so require even though his conduct is technically a trespass. See United States v. Capps, 435 F.2d 637, 640 n.4 (9th Cir. 1970). However, the agents would not have been able to observe the defendants' illegal activities from the field if they had not used binoculars. Because the activities were in "plain view" only with the aid of devices that had the effect of transplanting the agents into a place where they had no right to be, it is questionable whether the plain view doctrine is applicable to the facts of Fullbright. In this regard it is noteworthy that the Kim court limited the plain view doctrine to an unaided plain view and thus held it inapplicable to the facts of that case. 415 F. Supp. at 1256.

The plain view doctrine, with or without accounting for the added factor of devices that increase sensory perception, can be reconciled with both the protected areas and the reasonable expectation of privacy tests. Under the former, plain view observations are made outside protected areas; under the latter, there can be no reasonable expectation of privacy where such observations are possible. Moreover, either test can be used to determine whether the place from which the observation is made is a place where the police officer has a right to be. For an example of the use of the reasonable expectation of privacy test in making such a determination, see United States v. Johnson, No. 73-2221 (D.C. Cir. Jan. 12, 1977) (Leventhal, J., concurring). It is noteworthy that Judge Leventhal determined the reasonableness of the expectation by reference to the open field-curtailage distinction, which indicates the continuing vitality of that protected areas concept.

126. As Justice Marshall has noted, the property concepts that shaped early fourth amendment law attempted to define a sphere of personal privacy. Couch v. United States, 409 U.S. 322, 349 (1973) (dissenting opinion).
Supreme Court stated in *Silverman v. United States*:\(^{127}\)

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizeable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.\(^{128}\)

Moreover, the protected areas standard is concerned with *expectations* of privacy. To say that one knows that his home is an area protected from public scrutiny is to say that one knows that his expectations of privacy in his home will be fulfilled. Thus, the difference between the expectations test and the protected areas test need not be characterized as involving a choice of protecting either property or privacy interests. Rather, the two standards are distinguishable on the basis of the protection each accords to fundamental expectations of privacy: the protected areas standard defines a set of expectations that, because people are entitled to hold them, receive protection regardless of governmental manipulation of actual expectations or judicial assessment of the adequacy of precaution, whereas the reasonable expectation of privacy standard leaves the protected set of expectations undefined. This analysis suggests that property notions should be used to define the *minimum* content of forth amendment protection since the expectations test, standing alone, leaves the scope of protected expectations undefined and subject to manipulation by the government. If privacy as well as property is to be protected adequately, people need to be secure in the knowledge that some areas exist that can never be subject to warrantless searches without a violation of the fourth amendment.\(^{129}\)

People need to know that the government cannot eliminate expectations of privacy for these areas through advance notice that the area is not protected, and they should be assured that they need not take unduly burdensome precautions to prevent every conceivable kind of investigative technique.

If the difference between the protected areas test and the expectation of privacy test is characterized as this Note suggests, then it is possible to protect both property interests and privacy interests simultaneously. Once it is recognized that the fourth amendment

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\(^{128}\) 365 U.S. at 511 n.4 (quoting with approval United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting)), *aff'd.*, 343 U.S. 747 (1952).

\(^{129}\) Justice Douglas went so far as to insist that the fourth amendment creates a zone of privacy that police cannot enter even with a proper warrant. Warden v. Hayden, 387 U.S. 294, 325 (1967) (dissenting opinion). *See generally* Note, 90 HARV. L. REV. 945, supra note 4.
protects the right to have certain expectations of privacy—those associated with the home and other areas functionally related to it—it is no longer necessary to view property interests and privacy interests as dichotomous. Thus, by deeming the expectation of privacy in traditionally protected areas to be a priori “reasonable,” because the holder of the property interest has a right to expect privacy, both the protected areas test and the expectations test are satisfied.

Of course, it might be argued that even activities occurring in a protected area should not always be protected by the warrant requirement of the fourth amendment. If an individual reveals his activities to the plain view of the public, it might be said that the individual has no right to an expectation of privacy. Furthermore, a police officer who perceives an activity in a protected area without trespassing upon the curtilage or enhancing his sensory abilities by resorting to artificial devices should not be subject to the fourth amendment. Thus, the set of expectations to which one is entitled may be predefined—in the same sense that the term “search” is predefined not to include observations of evidence in plain view—\textsuperscript{130} to exclude those observations that are accomplished without either trespass or artificial devices.\textsuperscript{131}

This Note suggests that the minimum content of the fourth amendment can be determined under the traditional constitutionally protected areas test. Thus, the Note proposes a two-stage test to determine the constitutionality of warrantless searches. First, the court must inquire whether the search occurred in a constitutionally protected area. If so, the court’s inquiry must end and the search must be declared invalid, unless it falls under one of the recognized exceptions to the warrant requirement.\textsuperscript{132} If the search was conducted elsewhere, the court then must apply the two-part test suggested by Justice Harlan’s concurring opinion in \textit{Katz} with the modifications suggested in section I above. In effect, the test proposed by this Note corrects the fundamental flaw of the \textit{Katz} test by recognizing that persons are entitled to have certain expectations of privacy.

Professor Amsterdam has suggested that the courts should

\textsuperscript{130} See note 125 supra.

\textsuperscript{131} It might appear that merely dropping the requirement that a defendant have a subjective expectation of privacy would be sufficient to ensure adequate protection for the right to have certain expectations. Under this analysis, the reasonableness requirement would by itself be sufficient to protect fourth amendment rights without insisting that certain expectations be predefined as reasonable. This test, however, would still allow courts to make ad hoc judgments of reasonableness concerning searches in the home, and thus the right to have expectations of privacy in the home would not receive recognition as a core value of the fourth amendment.

\textsuperscript{132} See note 88 supra.
approach fourth amendment issues by asking what we as members of society want to demand from government. This Note suggests a similar approach: courts should decide fourth amendment issues by asking what we are entitled to expect from the government, rather than by asking what the government will allow us to expect.

133. Amsterdam, supra note 6, at 384.