

Telescopes Binoculars and the Fourth Amendment

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NOTE

TELESCOPES, BINOCULARS, AND THE FOURTH AMENDMENT

Since the Supreme Court's landmark fourth amendment¹ decision in *Katz v. United States*,² courts have considered a wide variety of cases³ involving alleged violations of defendants' "reasonable expectation of privacy."⁴ In particular, courts have experienced difficulty in evaluating evidence acquired by police through the use of telescopes and binoculars.⁵ This Note critically reviews the reasonable expectation of privacy standard as applied to evidence obtained through telescope and binocular surveillance, and suggests that police use of telescopes and

¹ The fourth amendment to the Constitution provides:

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.

² 389 U.S. 347 (1967). FBI agents in *Katz* attached an electronic listening and recording device to the outside of a public telephone booth from which the defendant made incriminating telephone calls. The Court held that this action constituted a search and seizure within the meaning of the fourth amendment, determining that the eavesdropping activities "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Id.* at 353; *see* notes 15-24 and accompanying text *infra*.

³ The exclusionary rule bars the admission of evidence secured by the police through an unreasonable search or seizure. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). Searches and seizures are reasonable when authorized by a warrant issued by a judge or magistrate 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. To meet the probable cause requirement for the issuance of search warrants, the police must show probable cause that the items sought are connected with criminal activity, and that the items will be found in the place to be searched. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 442 (1978). Before conducting a search or seizure, the government must obtain a warrant issued and based on an "informed and deliberate determination" of probable cause. *Aguilar v. Texas*, 378 U.S. 108, 110-11 (1964); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The issuance of a search warrant by a judge or magistrate upon determination of probable cause defines the point at which the governmental interest in law enforcement overrides individual interests in privacy.

Warrantless searches are per se unreasonable and therefore prohibited by the fourth amendment, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); *see* *Chimel v. California*, 395 U.S. 752 (1969) (dictum) (fourth amendment permits warrantless searches incident to an arrest if confined to area within suspect's immediate control); *Terry v. Ohio*, 392 U.S. 1 (1968) (fourth amendment does not ban warrantless limited search of person whom officer reasonably believes to be armed and dangerous); *Warden v. Hayden*, 387 U.S. 294 (1967) (Court allows evidence seized without a warrant by police in "hot pursuit" of fleeing suspect).

⁴ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see* notes 25-27 and accompanying text *infra*.

⁵ *See* 1 W. LAFAVE, *supra* note 3, at 256-62; Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154, 179-80 (1977); note 37 *infra*.

binoculars to observe activities or objects unobservable from a proper location by the "naked eye" violates an individual's expectation of privacy.

I

DEVELOPMENT OF THE REASONABLE EXPECTATION OF
PRIVACY STANDARD

The Supreme Court's 1886 landmark decision in *Boyd v. United States*⁶ triggered the ultimate development of the reasonable expectation of privacy standard. Rather than adopt a literal reading of the words "search and seizure," the Court emphasized the function and spirit of the fourth amendment⁷ and stressed the need to construe liberally constitutional provisions protecting the security of persons and property.⁸ In so construing the fourth amendment, the Court noted that the amendment

appl[ies] to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property⁹

The Court's decision in *Olmstead v. United States*,¹⁰ however, signaled a retreat from the expansive doctrine set forth in *Boyd*. In *Olmstead*, a closely divided Court held that wiretapping is not a search within the meaning of the fourth amendment.¹¹ The majority justified its conclu-

⁶ 116 U.S. 616 (1886). In *Boyd*, the Court ruled unconstitutional a statute that permitted the government to order the accused to produce invoices of goods alleged to be fraudulently imported.

⁷ The Court noted that although the compulsory production of invoices "is divested of many of the aggravating incidents of actual search and seizure, . . . it contains their substance and essence, and effects their substantial purpose." *Id.* at 635.

⁸ The Court stated: "A close and literal construction deprives [the constitutional provisions] of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Id.* Noting the interrelationship between the fourth and fifth amendments, the Court stated that "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment. . . ." *Id.* at 633; see Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 956 (1977) ("That these two amendments should independently protect a person's books and papers was [for the *Boyd* Court] all the more reason to place the individual's private communications in a special position beyond the government's reach.").

⁹ *Boyd*, 116 U.S. at 630.

¹⁰ 277 U.S. 438 (1928).

¹¹ *Id.* at 464. The Court upheld the defendant's conviction of "conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting . . . importing, . . . [and] selling intoxicating liquors." *Id.* at 435. Police obtained evidence of the conspiracy by intercepting the conspirators' telephone conversations. Without trespassing on the defendants'

sion on the ground that the police had intercepted the defendants' telephone conversations without entering their premises.¹² Justice Brandeis, dissenting, maintained that the majority erred in restricting the fourth amendment to physical trespasses on constitutionally protected areas.¹³ With an eye to the future, Justice Brandeis recognized that technological development might one day enable the government to invade a citizen's privacy without setting foot on his property or placing a hand upon his person.¹⁴

property, the officers inserted small wires along the telephone wires leading from defendants' residences and from the basement of a large office building where defendants worked. *Id.* at 456-57.

¹² *Id.* at 464-65. Moreover, the Court implied, a telephone conversation is not an "effect" protected by the fourth amendment:

in the *Boyd* case, [the Court] said that . . . the Fourth Amendment [was] to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

Id. at 465.

¹³ *Id.* at 474-79 (Brandeis, J., dissenting).

¹⁴ The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. 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. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.

Id. at 474.

After *Olmstead*, the Court initially circumvented the trespass doctrine by applying Section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1976), to government wiretapping of personal communications. In *Nardone v. United States*, 302 U.S. 379 (1937), the Court interpreted the Act to exclude in federal criminal trials evidence obtained by federal agents tapping telephone wires and intercepting messages. Fifteen years later, however, the Court held that wiretapped evidence could be admitted in state courts if obtained by state agents. *Schwartz v. Texas*, 344 U.S. 199 (1952). In 1957, the Court extended the Act to exclude illegal state-gathered wiretap evidence in federal courts. *Benanti v. United States*, 355 U.S. 96 (1957). Finally, in *Lee v. Florida*, 392 U.S. 378 (1968), the Court overruled *Schwartz*, holding that the Act prohibited the admission of state-gathered wiretap evidence in state as well as federal courts. Section 605 of the Federal Communications Act was amended in 1968. As amended, the section incorporates 18 U.S.C. §§ 2516, 2517 (1976), which permit wiretapping and the admission of evidence obtained through wiretapping under limited circumstances.

In 1942, the Supreme Court extended the *Olmstead* trespass doctrine to permit the use of devices that, when placed against a wall, detect sounds on the other side of the wall. In *Goldman v. United States*, 316 U.S. 129 (1942), federal agents installed a listening apparatus in the defendant's office. *Id.* at 131. The listening apparatus was not functioning properly, so the agents attached a detectaphone to the wall of a room adjoining defendant's office. *Id.* Through the use of this detectaphone, the agents overheard the incriminating conversations later admitted into evidence. The Court held the evidence admissible because the trespass committed in installing the listening device "did not aid materially in the use of the detectaphone." *Id.* at 135.

Relying on the *Olmstead* trespass doctrine, in 1961 the Court did exclude a defendant's conversation on fourth amendment grounds. In *Silverman v. United States*, 365 U.S. 505 (1961), federal agents overheard incriminating conversations by means of a "spike mike" that

Nearly forty years later, in *Katz v. United States*,¹⁵ the Court repudiated the *Olmstead* trespass doctrine. In *Katz*, the defendant's conviction was based in part on evidence from phone calls he had made from a public telephone booth to which FBI agents had attached microphones without a warrant.¹⁶ On appeal, the Ninth Circuit held that the electronic surveillance did not violate the fourth amendment because the microphones had not penetrated the wall of the telephone booth.¹⁷

The Supreme Court reversed, holding that the warrantless eavesdropping violated the fourth amendment.¹⁸ The Court discarded the notion that fourth amendment privacy interests must be bound to property rights.¹⁹ Establishing that "the Fourth Amendment protects people, not places,"²⁰ and stressing the defendant's privacy interests rather than the location of the microphone,²¹ the Court formulated the general rule

they pushed through the wall of an adjoining row house so that the mike touched upon a heating duct in the defendant's house. *Id.* at 506. The mike's connection with the duct constituted "an actual intrusion into a constitutionally protected area"; the Court announced that "[w]e find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch." *Id.* at 512. Justice Douglas, however, urged in concurrence that the Court abandon its trespass distinctions founded on rigid adherence to property concepts and principles:

The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded.

Id. at 513 (Douglas, J., concurring).

¹⁵ 389 U.S. 347 (1967). See generally Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133; Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home Is His Fort*, 23 CLEV. ST. L. REV. 63 (1974); Note, *The Reasonable Expectation of Privacy—Katz v. United States, A Postscriptum*, 9 IND. L. REV. 468 (1976); Note, *supra* note 5; Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968 (1968).

¹⁶ 389 U.S. at 348. The District Court for the Southern District of California convicted defendant *Katz* under an eight-count indictment that charged him with violating 18 U.S.C. § 1084 (1976). Section 1084 proscribes the transmission of betting or wagering information by wire communication. See *Katz v. United States*, 369 F.2d 130, 131 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

¹⁷ *Katz*, 369 F.2d. at 133-34. The majority expressly relied upon *Goldman v. United States*, 316 U.S. 129 (1942).

¹⁸ 389 U.S. 347, 359 (1967).

¹⁹ *Id.* at 353. The Court noted that "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Id.* (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)). The Court concluded that the trespass doctrine formulated in *Olmstead* and *Goldman*, see note 14 *supra*, "can no longer be regarded as controlling." 389 U.S. at 353.

²⁰ 389 U.S. at 351.

²¹ *Id.* at 353. The Court stated:

The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device

that "[w]hat a person knowingly exposes to the public, even in 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."²² On the basis of this reasoning, the Court concluded that Katz had "justifiably relied" on the privacy of his conversations²³ and thus was entitled to protection from unconstitutional electronic surveillance.²⁴

In his widely quoted concurring opinion,²⁵ Justice Harlan enunciated a two-part test to determine the privacy interests that the fourth amendment protects:²⁶ (1) "a person [must] have exhibited an actual (subjective) expectation of privacy"; and (2) this "expectation [must] be one that society is prepared to recognize as 'reasonable.'"²⁷ Thus, the *Katz* Court soundly rejected the proposition that fourth amendment protection against warrantless searches and seizures extends only to physical trespass into constitutionally protected areas.²⁸ Rather, the amendment restricts warrantless government activity that invades an individual's "reasonable expectation of privacy."²⁹ A person will seldom voluntarily expose incriminating activity or objects to the public;³⁰ thus, a defendant ordinarily will be able to demonstrate that he possessed a

employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

Id.

²² *Id.* at 351-52 (footnotes omitted).

²³ *Id.* at 353; *see* note 21 *supra*.

²⁴ 389 U.S. at 359.

²⁵ *Id.* at 360-62 (Harlan, J., concurring).

²⁶ The Court has impliedly adopted Justice Harlan's test. *See* *Bell v. Wolfish*, 441 U.S. 520, 556 (1979); *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978); *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1971); Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461, 1472 n.66 (1977).

²⁷ 389 U.S. at 361 (Harlan, J., concurring).

²⁸ *Id.* at 353. Nevertheless, courts cannot entirely disregard the property considerations that underlie the *Olmstead* decision. These considerations affect the evaluation of both the defendant's subjective expectation of privacy and the reasonableness of that expectation. As Justice Harlan noted in his concurring opinion in *Katz*:

The question, however, is what protection [the fourth amendment] affords to . . . people. Generally, as here, the answer to that question requires reference to a "place" . . . Thus a man's home is, for most purposes, a place where he expects privacy . . . On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id. at 361 (Harlan, J., concurring).

²⁹ *Id.* at 353; *Bell v. Wolfish*, 441 U.S. 520, 556 (1979); *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); Amsterdam, *supra* note 26, at 384.

³⁰ In addition, the fourth amendment does not distinguish between an individual's privacy from the government and his privacy from the public. Indeed, if a person exposes his actions to other private citizens, such actions cease to be private, and the fourth amendment no longer protects them from government observation. *Katz*, 389 U.S. at 351.

subjective expectation of privacy.³¹ The more difficult question for courts is the reasonableness of the defendant's subjective expectation. This question usually can be resolved by determining whether the defendant should have foreseen that his activity or objects could be seen,³² heard,³³ or even smelled³⁴ by a reasonably curious member of the public at large.³⁵ If so, then the defendant's expectation is unreasonable, and police observation or detection would not violate the fourth amendment.³⁶

II

POST-KATZ DECISIONS

A. *Telescope and Binocular Surveillance Cases*

Since *Katz*, many federal and state courts have considered whether the use without a warrant of binoculars or telescopes to view private activity and objects violates the fourth amendment.³⁷ Although the

³¹ This would fulfill the first requirement of the *Katz* two-part test. See note 27 and accompanying text *supra*.

³² *Cf. Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (One has a diminished expectation of privacy in an automobile because "[i]t travels public thoroughfares where both its occupants and its contents are in plain view.").

³³ *Cf. United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969) (no reasonable expectation of privacy as to conversations carried on in tone of voice audible to person standing outside their home).

³⁴ *Cf. United States v. Johnston*, 497 F.2d 397, 398 (9th Cir. 1974) (action of narcotics agent in "sniffing" strong odor of marijuana coming from suitcase did not violate reasonable expectation of privacy because defendant should have expected that railway employees or fellow passengers would handle luggage).

³⁵ One commentator characterizes the "reasonably curious person" as follows: first, an individual with normal motives for inquiring into others' affairs. He (or she) is neither a voyeur nor a member of a class with unusually strong incentives for investigation (such as business competitors or newspaper reporters). Second, a reasonably curious person seeks to satisfy his curiosity by employing means of discovery that other members of the public with similar motives would be likely, as an empirical matter, to use. Such an individual neither resorts to illegal methods nor uses means that, although legal, are uncommon. Finally, the reasonably curious person may be purposeful in his investigation, but only to the extent that normal curiosity impels.

Note, *supra* note 26, at 1482.

³⁶ Of course, the fourth amendment may in some situations allow police observation of private activity even though the defendant would not anticipate that his activity could be seen, heard, or smelled by a reasonably curious member of the public—for example, where a defendant burglarizes a summer cabin during the off-season. See *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978). See also *Kitch*, *supra* note 15, at 136 ("It is not the nature of the search, however, [that determines whether or not it is constitutionally protected] but the relationship between the area and the person incriminated by the search . . .").

³⁷ See, e.g., *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980) (agents used telescope to observe defendant preparing cocaine in his apartment); *United States v. Minton*, 488 F.2d 37 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (police used binoculars to observe defendant unloading illegal liquor from truck outside his warehouse); *United States v. Grimes*, 426 F.2d 706 (5th Cir. 1970) (police used binoculars to observe defendant loading illegal liquor into truck parked in front of his home); *Fullbright v. United States*, 392 F.2d 432 (10th Cir.),

Supreme Court has never squarely addressed this issue, dicta in two cases preceding *Katz* suggest that binocular and telescope surveillance is not a search within the meaning of the fourth amendment.³⁸ These decisions, however, applied the *Olmstead* trespass doctrine³⁹ to alleged fourth amendment violations and thus are inapplicable to a post-*Katz* analysis.⁴⁰

Lower federal courts and state courts in cases decided since *Katz* have examined this issue in a variety of ways. Some courts have ignored *Katz*. In *United States v. Grimes*,⁴¹ for example, the defendant contended that the police violated his fourth amendment rights by the warrantless use of binoculars to observe him placing boxes of illegal liquor into a vehicle parked in front of his home.⁴² The Fifth Circuit, without mentioning *Katz*, held that the police did not violate the fourth amendment because the special investigator made the observations from a neighbor's field, not from the defendant's property.⁴³ In *State v. Thompson*,⁴⁴ the Nebraska Supreme Court also apparently ignored *Katz* in upholding police use of binoculars to observe, through a ground floor alley window,

cert. denied, 393 U.S. 830 (1968) (agents used binoculars to observe defendants operating illegal still in shed); *United States v. Kim*, 415 F. Supp. 1252 (D. Hawaii 1976) (FBI agents used telescope to observe illegal gambling in apartment); *People v. Arno*, 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979) (police used binoculars to observe illegal pornographic materials in eighth floor office); *Commonwealth v. Ortiz*, 376 Mass. 349, 380 N.E.2d 669 (1978) (police used binoculars to observe heroin exchange on public street); *State v. Thompson*, 196 Neb. 55, 241 N.W.2d 511 (1976) (police used binoculars to observe defendant using drugs through ground floor window); *Commonwealth v. Hernley*, 216 Pa. Super. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971) (FBI agent used binoculars to observe printing of "Las Vegas" football gambling forms in defendants' printshop); *State v. Manly*, 85 Wash. 2d 120, 530 P.2d 306, *cert. denied*, 423 U.S. 855 (1975) (detective using both the naked eye and binoculars observed defendant's marijuana plants).

³⁸ *United States v. Lee*, 274 U.S. 559, 563 (1927) ("Such use of a searchlight is comparable to the use of a marine glass or a field glass [and it] is not prohibited by the constitution."); *On Lee v. United States*, 343 U.S. 747, 754 (1952) ("The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions.").

³⁹ See notes 10-14 and accompanying text *supra*.

⁴⁰ In *Lee*, the Court held that the Coast Guard's use of a searchlight to observe the defendant's boat was lawful because the officers did not physically enter the boat. 274 U.S. at 563. In *On Lee*, the use of a transmitter and receiver to hear a federal agent's discussion with the defendant on the defendant's premises was not an illegal search and seizure because the agent committed no trespass when he entered the defendant's premises. 343 U.S. at 751-54.

⁴¹ 426 F.2d 706 (5th Cir. 1970) (per curiam).

⁴² *Id.* at 708. The Fifth Circuit affirmed the defendant's conviction for possessing and illegally transporting distilled spirits in containers lacking the appropriate tax stamps. *Id.* at 707. The defendant was convicted on the basis of evidence discovered through the warrantless use of binoculars by the police.

⁴³ *Id.* at 708. The Fifth Circuit cited *Hester v. United States*, 265 U.S. 57 (1924), in which the Supreme Court held that an open field is not a constitutionally protected area. *Id.* at 59.

⁴⁴ 196 Neb. 55, 241 N.W.2d 511 (1976).

the defendant using drugs.⁴⁵ The court noted that "[t]he officers had a right to be in the alley and there was nothing unlawful in their use of binoculars."⁴⁶

A second group of courts,⁴⁷ although citing *Katz*, have failed to examine adequately the defendant's expectation of privacy at the time of surveillance. These courts focus on the property issue of where the police were located when conducting the surveillance, rather than focusing on *Katz*'s broader expectation of privacy standard. Although these courts cite *Katz*,⁴⁸ their reliance on antiquated notions of property rights ignores *Katz*'s lesson that "the Fourth Amendment protects people, not places."⁴⁹

Finally, several courts have conducted extensive analyses of the rea-

⁴⁵ *Id.* at 56-57, 241 N.W.2d at 512-13. The court found that observation of a marijuana party in progress gave police reasonable cause to enter the defendant's house, arrest him, and seize the drugs as evidence. *Id.* at 57, 241 N.W.2d at 513.

⁴⁶ *Id.* One dissenting judge, however, found that *Katz* applied to make the police activity an unreasonable search and seizure. *Id.* at 57-58 (Grant, J., dissenting).

⁴⁷ In *United States v. Minton*, 488 F.2d 37 (4th Cir. 1973) (per curiam), *cert. denied*, 416 U.S. 936 (1974), police used binoculars to view the defendant unloading illegal liquor from a truck located outside the defendant's warehouse. *Id.* at 38. The Fourth Circuit, citing *Katz*, noted that in view of the time of day and all the surrounding circumstances, defendant had no reasonable expectation of privacy. *Id.* The court also observed that the police observation did not take place within the "curtilage" of the defendant's property. The court concluded that the police observation did not violate the fourth amendment and affirmed the defendant's conviction for possession, transportation, and removal of illicit liquor. *Id.* at 38.

In *Fullbright v. United States*, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968), the police, from a distant point on a farm owned by one of the defendants, used binoculars to view the defendants operating a still inside a shed. 392 F.2d at 433. The Tenth Circuit cited *Hester v. United States*, 265 U.S. 57 (1924), *see* note 43 and accompanying text *supra*, to support its conclusion that because the police made the observations while located outside the curtilage, there was no fourth amendment violation. 392 F.2d at 434-35. The court briefly acknowledged that, in light of *Katz*, a situation might arise in which surveillance from outside the curtilage would constitute an illegal search, but that this was not such a case. *Id.* at 435.

⁴⁸ *Minton*, 488 F.2d at 38; *Fullbright*, 392 F.2d at 435.

⁴⁹ 389 U.S. at 351. Several state courts have also engaged in cursory analyses of this problem. In *Commonwealth v. Ortiz*, 376 Mass. 349, 380 N.E.2d 669 (1978), the police used binoculars to observe a heroin exchange on a public street. *Id.* at 350, 380 N.E.2d at 671. Although the court held that the defendant had no reasonable expectation of privacy during the period of the surveillance, *id.* at 352, 380 N.E.2d at 672, it never expressly explained why the defendant could not have maintained such an expectation on a public street. In *State v. Manly*, 85 Wash. 2d 120, 530 P.2d 306, *cert. denied*, 423 U.S. 855 (1975), policemen used binoculars to observe from a public sidewalk marijuana plants in the window of the defendant's second floor apartment. *Id.* at 121, 530 P.2d at 307. The officers observed the plants from a distance of 40 to 50 feet. *Id.* Although the officers first saw the plants without the aid of binoculars, they used the binoculars to confirm their earlier observations. *Id.* at 124, 530 P.2d at 309. The court, in holding that the binocular surveillance did not violate the fourth amendment, concluded that the failure to curtail a window negates any reasonable expectation of privacy from visual observation. *Id.* Similarly, in *Commonwealth v. Hernley*, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971), an FBI agent climbed a four foot ladder to observe the illegal printing of gambling sheets in the defendant's print shop. *Id.* at 178, 263 A.2d at 905. The agent had used binoculars to look into the shop's side window, which was 30 to 35 feet away. *Id.* at 179, 263 A.2d at 905. In rejecting the defendant's fourth amendment arguments, the court reasoned that the defendant could have cur-

sonable expectation of privacy test in the context of binocular and telescope surveillance. In *People v. Arno*,⁵⁰ the police used binoculars to observe illegal pornographic materials on the eighth floor of an office building.⁵¹ The California Supreme Court, relying on *Katz*,⁵² overturned a conviction:

So long as that which is viewed or heard is perceptible to the naked eye or unaided ear, the person seen or heard has no reasonable expectation of privacy in what occurs. Because he has no reasonable expectation of privacy, governmental authority may use technological aids to visual or aural enhancement of whatever type available. However, the reasonable expectation of privacy extends to that which cannot be seen by the naked eye or heard by the unaided ear.⁵³

The court concluded that because the police would not have been able to view the materials without the use of visual aids, the evidence was inadmissible under the exclusionary rule.⁵⁴

In *United States v. Kim*,⁵⁵ FBI agents located one quarter of a mile from the defendant's building used a telescope to view illegal gambling activities in the defendant's high-rise apartment.⁵⁶ The court noted that sophisticated visual aids used for government surveillance can intrude on a person's privacy to the same extent as the electronic surveillance in *Katz*.⁵⁷ The court determined that an unaided "plain view of defendant's apartment was impossible, [and that] only an aided view could penetrate."⁵⁸ Therefore, the court excluded the evidence that the agents would have been unable to obtain without the aid of a telescope.⁵⁹

tained the window and thereby manifested an expectation of privacy. *Id.* at 181-82, 263 A.2d at 907.

⁵⁰ 90 Cal. App. 3d 505, 153 Cal. Rptr. 624 (1979).

⁵¹ *Id.* at 509, 153 Cal. Rptr. at 626. The magistrate issued a warrant on the basis of these observations. Execution of the warrant resulted in the seizure of pornographic films and various business documents. *Id.* at 510, 153 Cal. Rptr. at 626. This evidence led to the defendants' conviction for possession with intent to distribute obscene films. *Id.* at 508, 153 Cal. Rptr. at 625.

⁵² *Id.* at 511, 153 Cal. Rptr. at 627. The court stated: "We thus view the test of validity of the surveillance as turning upon whether that which is perceived or heard is that which is conducted with a reasonable expectation of privacy and not upon the means used to view it or hear it." *Id.*

⁵³ *Id.* at 511-12, 153 Cal. Rptr. at 627.

⁵⁴ *Id.* at 512, 153 Cal. Rptr. at 628.

⁵⁵ 415 F. Supp. 1252 (D. Hawaii 1976).

⁵⁶ *Id.* at 1254. The FBI used observations made through this telescopic surveillance to establish probable cause for approval of a wiretap on defendant's phone. *Id.*

⁵⁷ *Id.* at 1255-56.

⁵⁸ *Id.* at 1256.

⁵⁹ *Id.* The court noted, however, that binocular surveillance of the defendant's activities on the balcony of the apartment probably did not violate his reasonable expectation of privacy. *Id.* at 1257. Nevertheless, the court excluded all the evidence, including that relating to the balcony activity, refusing to "split hairs" to determine which evidence was obtained solely from the surveillance of the balcony. *Id.* at 1257-58.

In *United States v. Taborda*,⁶⁰ the police, stationed in an apartment across the street from the defendant's apartment, used a telescope to observe the defendant preparing cocaine, apparently for a street sale.⁶¹ The Second Circuit concluded that

observation of objects and activities inside a person's home by unenhanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy. However, any enhanced viewing of the interior of a home does impair a legitimate expectation of privacy and encounters the Fourth Amendment's warrant requirement⁶²

The court, therefore, remanded the case to determine whether the admissible evidence obtained without the use of a telescope provided sufficient probable cause for issuance of the search warrant.⁶³

B. *Analogous Applications of the Katz Standard*

Courts have applied the reasonable expectation of privacy test in situations analogous to telescopic and binocular surveillance. In *United States v. Fisch*,⁶⁴ police officers, located in an adjacent motel room, overheard incriminating conversations between the defendants.⁶⁵ The Ninth Circuit, holding evidence pertaining to the conversations admissible, emphasized that the police had not overheard the defendants through electronic means; rather, the conversations were audible by the "naked ear."⁶⁶ The defendants, the court noted, could not have had a reasonable expectation of privacy as to conversations easily overheard by persons in adjoining rooms.⁶⁷

⁶⁰ 635 F.2d 131 (2d Cir. 1980).

⁶¹ *Id.* at 133-34. The agents used the information they had obtained through telescopic as well as naked eye surveillance to establish probable cause for a search warrant authorizing a search of defendant's apartment. *Id.* The district court granted the defendant's motion to suppress the evidence obtained during the search of defendant's apartment. 491 F. Supp. 50, 53 (E.D.N.Y. 1980).

⁶² 635 F.2d at 139.

⁶³ *Id.* at 141.

⁶⁴ 474 F.2d 1071 (9th Cir.) (per curiam), *cert. denied*, 412 U.S. 921 (1973).

⁶⁵ *Id.* at 1074. The evidence obtained through this eavesdropping led to the arrest and conviction of defendants on charges of importing, possessing, and intending to distribute marijuana. *Id.* at 1073.

⁶⁶ *Id.* at 1076. The court noted that "[t]he officers were exercising their investigative duties in a place where they had a right to be and they were relying upon their naked ears." *Id.*

⁶⁷ The court, emphasizing the second prong of the *Katz* two-prong test, *see* note 27 and accompanying text *supra*, mentioned certain factors that courts should consider in determining whether a defendant's expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" 474 F.2d at 1077 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). These factors include "the non-trespassory origin of the information received, the absence of artificial means of probing, . . . the gravity of the offense involved, . . . [and the] type of information received" 474 F.2d at 1078. The court concluded that in this case, "the expectations of the defendants as to their privacy, even were such

Under this view, persons should not be deemed to have a reasonable expectation of privacy as to activities and objects that others can see without the use of visual aids.⁶⁸ On this basis, the government's warrantless use of an electronic tracking device is not an illegal search under the fourth amendment.⁶⁹ The rationale for such holdings is that this device merely facilitates what police could accomplish with the naked eye.⁷⁰ Similarly, fourth amendment protection should not extend to binocular or telescope observations that could otherwise be made with the naked eye.⁷¹

Courts have employed similar reasoning to uphold police use of illumination devices that expose objects and activities concealed by the dark.⁷² Because a flashlight merely enables police to view the same ob-

expectations to be considered reasonable despite their audible disclosures, must be subordinated to the public interest in law enforcement." *Id.*

Other courts have also held that defendants have no expectation of privacy as to motel room conversations heard by the unaided ears of police officers lawfully occupying adjoining rooms. *E.g.*, *United States v. Agapito*, 620 F.2d 324, 329-32 (2d Cir. 1980) (individual who speaks in "normal" tones but is still overheard by the naked ear has no reasonable expectation of privacy); *United States v. Jackson*, 588 F.2d 1046, 1051-53 (5th Cir. 1979) ("[C]onversations in a motel room which are audible to one in an adjoining room constitute words exposed to the 'plain view' of others."); *cf.* *United States v. Eisler*, 567 F.2d 814, 816-18 (8th Cir. 1977) (defendants had no expectation of privacy with respect to conversation in hallway of their apartment building); *United States v. Llanes*, 398 F.2d 880, 883-84 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969) (individual who speaks in tone audible to person outside his door has no reasonable expectation of privacy).

⁶⁸ See *Gil v. Beto*, 440 F.2d 666 (5th Cir. 1971) (no fourth amendment violation where police looked in unobstructed motel room window from common hallway and observed narcotics possession).

⁶⁹ See *United States v. Hufford*, 539 F.2d 32, 33-35 (9th Cir. 1976) (installation of electronic tracking device did not violate defendants' reasonable expectation of privacy); *United States v. Frazier*, 538 F.2d 1322, 1326 (8th Cir. 1976) (Ross, J., concurring) ("The intrusion on defendant's privacy was no greater [through use of a beeper] than an intrusion created by manual, visual surveillance of the ear's location, which is clearly permissible irrespective of fourth amendment considerations.").

⁷⁰ See *United States v. Hufford*, 539 F.2d 32, 34-35 (9th Cir. 1976) ("[T]he device only augments that which can be done by visual surveillance alone."); *cf.* Christie, *Government Surveillance and Individual Freedom: A Proposed Statutory Response to Laird v. Tatum and the Broader Problem of Government Surveillance of the Individual*, 47 N.Y.U. L. REV. 871, 885 n.68 (1972) ("When 'surveillance' involves the observation of the public activities of an individual . . . it is hard to pin down any fourth amendment rights that have been violated.").

Some courts, however, hold that the warrantless use of "beepers," even though merely facilitating what police could accomplish with the naked eye, does constitute a fourth amendment violation. See, *e.g.*, *United States v. Holmes*, 521 F.2d 859, 864-67 (5th Cir.), *aff'd in part on rehearing*, 537 F.2d 227 (5th Cir. 1976). See generally Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461 (1977).

⁷¹ The reasoning of the electronic tracking device cases, see notes 69-70 *supra*, implies that if these devices enable the government to gather evidence that is beyond the perception of the naked eye, the government activity constitutes a search under the fourth amendment. Analogously, the fourth amendment should extend to observations made possible only by visual enhancement devices, such as binoculars or telescopes.

⁷² *E.g.*, *United States v. Lara*, 517 F.2d 209, 211 (5th Cir. 1975) (use of searchlight to view contents of vehicle does not preclude application of plain view doctrine to such observation); *United States v. Johnson*, 506 F.2d 674, 676 (8th Cir. 1974), *cert. denied*, 421 U.S. 917

jects that they could have seen in daylight, courts find such searches consistent with the fourth amendment.⁷³ The use of binoculars or telescopes, however, may enable police to view objects and activities not otherwise observable. Thus, the use of binoculars and telescopes more closely resembles government use of magnetometers and x-ray machines,⁷⁴ which courts have held to be searches under the fourth amendment.

Two recent Supreme Court decisions support the position that the fourth amendment extends to the warrantless use of visual aids to view activities not readily observable by the naked eye. In *United States v. Miller*,⁷⁵ the Court held that a government subpoena of bank records is not a search under the fourth amendment because a depositor has no reasonable expectation of privacy in the financial information that he conveys to a bank.⁷⁶ In *Smith v. Maryland*,⁷⁷ the Court held that because a person has no reasonable expectation of privacy in the telephone number he dials, police installation of a pen register⁷⁸ to record the numbers dialed is not a search within the meaning of the fourth amendment.⁷⁹ In both cases, the Court emphasized that a person has no expectation of privacy as to information he voluntarily conveys to others.⁸⁰

(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."); *United States v. Lewis*, 504 F.2d 92 (6th Cir. 1974); *United States v. Hood*, 493 F.2d 677 (9th Cir. 1974); *United States v. Walling*, 486 F.2d 229 (9th Cir. 1973); *United States v. Booker*, 461 F.2d 990 (6th Cir. 1972); *Walker v. Beto*, 437 F.2d 1018 (5th Cir. 1971); *Marshall v. United States*, 422 F.2d 185 (5th Cir. 1970); *People v. Waits*, 196 Colo. 35, 580 P.2d 391 (1978); *Redd v. State*, 242 Ga. 876, 243 S.E.2d 16 (1978); *People v. Whalen*, 390 Mich. 672, 213 N.W.2d 116 (1973).

⁷³ See, e.g., *United States v. Booker*, 461 F.2d 990, 992 (6th Cir. 1972) ("since it would not constitute a search for the officer to observe objects in plain view in the automobile in daylight, it ought not to constitute a search for him to flash a light in the car as he was walking past it in the night"); *Marshall v. United States*, 422 F.2d 185, 189 (5th Cir. 1970) ("When . . . the police officer's observation would not have constituted a search had it occurred in daylight, then the fact that the officer used a flashlight to pierce the nighttime darkness does not transform his observation into a search."); *People v. Whalen*, 390 Mich. 672, 213 N.W.2d 116, 120 (1973).

⁷⁴ Courts have held that it is a search within the meaning of the fourth amendment to use an x-ray machine or radiographic scanner to project electronic emanations through an object and reveal, in picture form, the shape of objects within the container examined. See *United States v. Albarado*, 495 F.2d 799, 803 (2d Cir. 1974). See also *People v. Fritschler*, 81 Misc. 2d 106, 364 N.Y.S.2d 801 (Sup. Ct. 1975).

⁷⁵ 425 U.S. 435 (1976).

⁷⁶ *Id.* at 441-43. The defendant had moved to suppress microfilms of his checks, deposit slips, and other records that the bank maintained.

⁷⁷ 442 U.S. 735 (1979).

⁷⁸ A pen register is a "device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released." 442 U.S. at 736 n.1. See generally Note, *The Legal Constraints upon the Use of the Pen Register as a Law Enforcement Tool*, 60 CORNELL L. REV. 1028 (1975).

⁷⁹ 442 U.S. at 742-46.

⁸⁰ In *Miller*, the Court determined that the defendant had "voluntarily conveyed" the financial information to the bank's employees. 425 U.S. at 442. In *Smith*, the defendant had

Those who engage in private activity that others can see with the naked eye may "voluntarily" be exposing such activities to others. Activities visible only through the use of telescopes or binoculars, however, are not voluntarily exposed to anyone—people do not ordinarily anticipate that other citizens carry telescopes and binoculars to observe other's activities.

III

ANALYSIS OF TELESCOPE AND BINOCULAR SURVEILLANCE

A. *Comparison of Telescope and Binocular Surveillance to Electronic Wiretapping*

Government use of electronic devices to hear and record telephone conversations constitutes a search under the fourth amendment;⁸¹ consequently, such searches are unconstitutional if undertaken without a warrant.⁸² Police use of telescopes and binoculars to observe private activity not otherwise visible is potentially more intrusive than the use of electronic aids to monitor telephone conversations.

First, telephone conversations are occasionally interrupted by operators or by the crossing of lines, and by definition involve more than one person. Thus an individual's expectation of privacy as to the contents of a discussion may be diminished, knowing that others can always pass on its contents to third persons.⁸³ Finally, police interception of telephone conversations can be more easily limited⁸⁴ than can visual surveillance of private activity. If the conversation is obviously not of a criminal

"voluntarily conveyed" the information to the telephone company and its employees. 442 U.S. at 744. The *Smith* Court cited *Hoffa v. United States*, 385 U.S. 293, 302 (1966), in which the overhearing of the defendant's incriminating discussions by the defendant's friend, who, unbeknownst to the defendant, was a government informer, was found not to be a search and seizure. Cf. *United States v. Hoffa*, 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971) (no expectation of privacy as to calls made from inobile telephone units in automobiles because anyone tuned to same frequency might overhear calls); *United States v. Choate*, 576 F.2d 165 (9th Cir. 1978) (looking at mail covers not fourth amendment search because persons voluntarily expose this information to postal employees).

⁸¹ See *Katz v. United States*, 389 U.S. 347, 353 (1967); *Berger v. New York*, 388 U.S. 41, 51 (1967).

⁸² See *Katz v. United States*, 389 U.S. at 357.

⁸³ The Supreme Court's decision in *Hoffa v. United States*, 385 U.S. 293 (1966) implies that there is such a diminished expectation of privacy. The Court held that the government's placement of the defendant's friend to listen to incriminating discussions between the defendant and his associates was not an illegal search and seizure under the fourth amendment. 385 U.S. at 300-03. The Court stated that the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. The Court reaffirmed *Hoffa* in the post-*Katz* decision of *United States v. White*, 401 U.S. 745, 749 (1971).

⁸⁴ Certain techniques are required to reduce the interception of communications that are not authorized for interception. See *Berger v. New York*, 388 U.S. 41, 57 (1967); 18 U.S.C. § 2518(5) (1976).

nature, the police must end the interception.⁸⁵ Visual surveillance, however, often requires constant observation of private activity.⁸⁶

B. *A Standard for Analyzing Telescope and Binocular Surveillance*

Under *Katz*, courts must examine the defendant's expectation of privacy in determining the admissibility of evidence obtained through the use of telescopes or binoculars.⁸⁷ Although one might expect a reasonably curious person to witness activity visible to the naked eye, one does not expect him to observe activity from a distant location with a telescope or binoculars. Hence, warrantless government use of telescopes or binoculars to view activity or objects not otherwise observable from a proper location⁸⁸ violates the subject's reasonable expectation of privacy, and thus contravenes the fourth amendment. Incriminating evidence obtained in this manner therefore must be suppressed.⁸⁹

Thus, courts should consider carefully the facts of cases in which

⁸⁵ 18 U.S.C. §§ 2516, 2518(5) (1976).

⁸⁶ See Note, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?*, 3 HASTINGS CONST. L.Q. 261, 287 (1976).

⁸⁷ See notes 28-35 and accompanying text *supra*.

⁸⁸ Courts have addressed the issue of proper location by determining whether the police had a legal right to be in the place where they perceived the private activity. See, e.g., *United States v. Bellina*, 665 F.2d 1335, 1343 (4th Cir. 1981) (police did not violate fourth amendment by using step ladder to peer inside window of airplane parked on runway of public airport because they made observation from position rightfully occupied); *United States v. Agapito*, 620 F.2d 324, 331 (2d Cir. 1980) (no violation when police overheard conversations in adjacent motel room because they had legal right to be there); *United States v. Orozco*, 590 F.2d 789, 792 (9th Cir. 1979) (police did not violate fourth amendment when they looked through windows of car parked on public street because they made observation from rightfully occupied position); *Smith v. Slayton*, 484 F.2d 1188, 1190 (4th Cir. 1973) (no violation when police looked through windows of car parked in public lot because observation made from rightfully occupied position). The critical factor in making this determination is whether the police "intruded onto private property." *United States v. Bush*, 647 F.2d 357, 369 (3d Cir. 1981). Of course, the absence of a trespass will not automatically validate the search. *Katz v. United States*, 389 U.S. 347, 353 (1967) ("the reach of [the Fourth] Amendment cannot turn on the presence or absence of a physical intrusion into any given enclosure").

⁸⁹ For example, if the police use binoculars to observe the defendant's activity on a public street, where any passerby could easily view the activity, then the defendant generally cannot assert a violation of his reasonable expectation of privacy. On the other hand, a defendant in a tenth floor apartment, not observable from the street or a neighboring building with the naked eye, would possess a reasonable expectation of privacy. This standard differs from the plain view doctrine discussed in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The *Coolidge* Court stated:

An example of the applicability of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character. . . . Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. . . . What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of

the government has obtained incriminating evidence through the use of telescopes and binoculars. If the government could not have acquired the evidence without the use of a visual aid,⁹⁰ the court should require a warrant. One factor relevant to this determination is whether the area was such that a person properly situated could have observed the activities or objects with the naked eye.⁹¹ In addition, the distance from which the observation took place may indicate whether the police could have seen the activity or objects without a telescope or binoculars.⁹² Finally, the location of the activity or objects, although not controlling,⁹³ may be helpful in determining the admissibility of such evidence.⁹⁴ For example, activity taking place in a commercial establishment is often readily observable by customers or employees,⁹⁵ whereas activity in a person's home ordinarily would be seen only by its inhabitants.

C. *A Closer Look at the Reasonable Expectation of Privacy Standard*

Because the use of telescopes and binoculars is not widespread in our society, citizens maintain a reasonable expectation of privacy for activity and objects not readily observable by the naked eye. This analysis, however, suggests that a substantial increase in the use of telescopes and binoculars to monitor private activity could conceivably render unreasonable this expectation of privacy.⁹⁶ Moreover, the reasonable expectation of privacy standard is susceptible to another, more troubling

which he came inadvertently across a piece of evidence incriminating the accused.

Id. at 465-66 (emphasis added). The *Coolidge* Court identified two requirements for police seizure of items that are not legitimate objectives of the search: (1) there must be a prior valid intrusion and (2) the discovery of the undescribed evidence must be inadvertent. *Id.* at 468-71. See also Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1073-78, 1081-88 (1975).

⁹⁰ The government may want to use telescopes or binoculars to observe activity or objects visible from a closer location without visual aids to avoid the greater risk of discovery.

⁹¹ For example, activity undertaken by a person near an uncurtained window of a ranch-style home would probably be visible to a person standing on a sidewalk in front of the home. *Cf.* *State v. Thompson*, 196 Neb. 55, 241 N.W.2d 511 (1976) (court approved police use of binoculars from alley behind defendant's home to observe criminal activity through ground floor window); notes 44-46 and accompanying text *supra*.

⁹² Hence, private activity observed from a distance of only 100 feet might be observable without a visual aid, whereas activity observed from a distance of 1,000 feet probably would be unobservable without some technological aid. *Cf.* *United States v. Taborda*, 635 F.2d 131, 135 (2d Cir. 1980) (police, stationed in adjacent building, viewed activity in defendant's apartment from distance of 190 feet); notes 60-63 and accompanying text *supra*; *cf.* *United States v. Kim*, 415 F. Supp. 1252 (D. Hawaii 1976) (police viewed defendant with telescope from distance of one quarter mile). See also notes 59-63 and accompanying text *supra*.

⁹³ See notes 15-35 and accompanying text *supra*.

⁹⁴ See note 28 *supra*.

⁹⁵ See note 49 *supra*; *cf.* *Commonwealth v. Hernley*, 216 Pa. Super. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971) (police used binoculars to view activity in defendant's print shop).

⁹⁶ Moreover, the use of more sophisticated and highly technological devices might increase to such a level that citizens, subject to surveillance of unprecedented degree, could not

influence. The government has the means to manipulate the privacy expectations of its citizens and may choose to exercise these means. For example, the government could eliminate reasonable expectations of privacy "merely by announcing half-hourly on television that 1984 was being advanced . . . and that we were all forthwith being placed under comprehensive electronic surveillance."⁹⁷ Justice Harlan, the author of the reasonable expectation of privacy test,⁹⁸ has since expressed serious doubts about the test's soundness:

The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.⁹⁹

As Justice Harlan observes, courts can best avoid improper fourth amendment analysis by injecting policy considerations into their analysis. They should seriously evaluate whether a particular investigative technique, although not infringing upon a particular individual's expectation of privacy, is one that our society is willing to tolerate. Courts should weigh the affront to society of the investigative technique against the cost to law enforcement. If the threat to "the aims of a free and open society"¹⁰⁰ outweighs the benefits of the technique, fourth amendment protection must be afforded. On the other hand, if a highly effective investigative technique poses only a slight threat, the fourth amendment would not be implicated.¹⁰¹

This analysis suggests that the government's warrantless use of visual aids to observe objects and activities not perceptible with the naked eye contravenes the fourth amendment. Indeed, if the government's use of these devices was unrestrained, the practical implications for private citizens would be unsettling. Patrolling policemen, equipped with high powered telescopes or binoculars, could scan the interiors of houses and apartments in search of wrongdoing.¹⁰²

A prohibition against warrantless use of telescopes and binoculars

reasonably expect privacy in even the most intimate of settings. *See generally* Note, *supra* note 86, at 266-69.

⁹⁷ Amsterdam, *supra* note 26, at 384.

⁹⁸ *See* notes 25-27 and accompanying text *supra*.

⁹⁹ *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

¹⁰⁰ *See* Amsterdam, *supra* note 26, at 403.

¹⁰¹ *Cf. United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) ("This question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.")

¹⁰² The lack of restrictions on police use of telescopes and binoculars does not merely threaten those engaged in criminal activity. If the police are permitted to obtain evidence by using telescopes and binoculars to view activities not observable by the naked eye without first establishing probable cause, surveillance with visual aids of *all* activity—both criminal and noncriminal—could become prevalent.

to view activities and objects not observable by the naked eye would not significantly impair effective law enforcement. Police may continue to use visual aids to enhance observation of objects and activities visible with the unaided eye. Moreover, the police are always free to use telescopes and binoculars to view private activity if they first secure a warrant by showing probable cause.¹⁰³ It is the existence of probable cause that signals the point at which the government's interest in law enforcement outweighs the threats posed to society by the use of telescopes and binoculars to observe private activity.

CONCLUSION

The Supreme Court's decision in *Katz v. United States* requires that courts determine whether government activity has violated a defendant's reasonable expectation of privacy. The use of telescopes or binoculars to observe activity or objects that a person could not have viewed from a lawful location without the use of these aids violates reasonable expectations of privacy; evidence so obtained must be excluded. The development of the reasonable expectation of privacy standard since *Katz*, and a comparison of telescope and binocular surveillance to electronic wiretapping, supports this conclusion. Because the government can manipulate expectations of privacy, courts should weigh the threat to a free and open society posed by visual enhancement devices, against the utility of the techniques to law enforcement. The limited impairment to law enforcement of a requirement that police first obtain warrants before using telescopes and binoculars to view private activity unobservable by the naked eye is a small price to pay for the significant privacy interests that such a requirement would promote.

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¹⁰³ See note 3 *supra*.