

THE “REASONABLE EXPECTATION OF PRIVACY TEST” AND THE SCOPE OF PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURE UNDER SECTION 8 OF THE CHARTER OF RIGHTS AND FREEDOMS

*Kate Murray**

I. INTRODUCTION

The common law has long recognized the sanctity of the home as an enclave protected from government intrusion.¹ This principle was graphically described by William Pitt the Elder in 1763:

[T]he poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter — all his forces dare not cross the threshold of the ruined tenement.²

Until recently, Canadian courts had reflected this preoccupation with a “property approach” in their treatment of the issue of search and seizure. They had narrowly defined both search and seizure so as to require a trespassory invasion of premises or other protected places and the taking of tangible items.³ The Supreme Court of Canada’s decision in *Southam Inc.*

* Student-at-Law.

¹ See, e.g., *Entick v. Carrington*, 95 E.R. 807 (K.B. 1765); *Semayne’s Case*, 77 E.R. 194 (K.B. 1604).

² Reference re *Interception of Private Communications*, 50 A.R. 1 at 7, 5 D.L.R. (4th) 601 at 616 (C.A. 1983) (attributed to William Pitt, Earl of Chatham). For a discussion of the natural law source of the nineteenth century definition of the individual’s sphere of constitutional rights vis-a-vis the state, see *Note*, 90 Harv. L. Rev. 945 (1976-77).

³ See, e.g., *R. v. McGregor*, 3 C.C.C. (3d) 200, 145 D.L.R. (3d) 489 (Ont. H.C. 1983), where the taking of fingerprints was held not to be a seizure because a seizure required the taking of something tangible from the accused. See also *R. v. Taylor*

*v. Hunter*⁴ has changed this. By its adoption of the American "reasonable expectation of privacy" test, first enunciated in *Katz v. United States*,⁵ the Court has clearly grounded the concepts of search and seizure under section 8 of the *Canadian Charter of Rights and Freedoms*⁶ in a broad privacy doctrine.

However, the adoption of the *Katz* test by the Supreme Court of Canada does not, of necessity, entail an adoption of the confusion and chaos that have accompanied its interpretation in the United States: a situation that has been described by one author as a "mess".⁷ This is due to the difference, in a number of important respects, between the search and seizure provisions of the Canadian and American Constitutions:

Section 8

Everyone has the right to be secure against unreasonable search or seizure.

Amendment IV

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.

(unreported, B.C.S.C., 30 Dec. 1983); *R. v. Holman*, 28 C.R. (3d) 378, 16 M.V.R. 225 (B.C. Prov. Ct. 1982), *aff'd on other grounds* 17 M.V.R. 306, 143 D.L.R. (3d) 748 (B.C.S.C. 1982); *Re Copeland and Adamson*, 7 C.C.C. (2d) 393, 28 D.L.R. (3d) 26 (Ont. H.C. 1972); *Re Bell Telephone Co. of Canada*, 89 C.C.C. 196, [1947] O.W.N. 651 (H.C.); *R. v. Porter*, 9 W.C.B. 311 (B.C. Cty. Ct. 1983); *R. v. Paterson*, 11 W.C.B. 92 (Ont. Cty. Ct. 1983). For an English example, see *Malone v. Metropolitan Police Comm'r*, [1979] 1 Ch. 344. *But see, e.g., R. v. Carter*, 39 O.R. (2d) 439, 144 D.L.R. (3d) 301 (C.A. 1982); *R. v. Dymont*, 12 C.C.C. (3d) 531, 47 Nfld. & P.E.I.R. 350 (P.E.I.S.C. 1984); *R. v. De Coste*, 60 N.S.R. (2d) 170, 128 A.P.R. 170 (S.C. 1983); *R. v. Powell*, 25 Man. R. (2d) 10, 25 M.V.R. 92 (Cty. Ct. 1983).

I am not going to deal specifically with the issue of protection of intangible, as opposed to tangible, items. However, in my view, it follows that both tangibles and intangibles will be protected in the application of a broad doctrine of privacy.

For cases after *Southam* discussing the seizure of intangibles and samples of physiological characteristics, see *R. v. Alderton*, 49 O.R. (2d) 257, 7 O.A.C. 12 (C.A. 1985) (hair samples); *R. v. Pohoretsky*, 45 C.R. (3d) 209, 17 D.L.R. (4th) 268 (Man. C.A. 1985) (leave to appeal to the S.C.C. granted 13 May 1985) (blood and urine samples); *R. v. Rowbotham*, 12 C.C.C. (3d) 189, 42 C.R. (3d) 164 (Ont. H.C. 1984) (a case that predates *Southam* by ten days but is premised on a privacy analysis concerning electronic eavesdropping); *R. v. Playford*, 17 C.C.C. (3d) 454 (Ont. H.C. 1984); *R. v. Ramage*, 16 C.C.C. (3d) 182 (Man. Q.B. 1984) (blood samples); *R. v. Taylor*, 34 M.V.R. 308 (Ont. Prov. Ct. 1985); *R. v. Keating*, 31 M.V.R. 100 (Ont. Cty. Ct. 1984) (breath and urine samples). *But see Lunney v. M.H.*, 58 A.R. 231, [1985] 2 W.W.R. 444 (Q.B. 1984).

⁴ [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641. In *Southam* the Court struck down the search and seizure powers of the Director of Investigation and Research under s. 10 of the *Combines Investigation Act*, R.S.C. 1970, c. 23.

⁵ 88 S. Ct. 507 (1967).

⁶ *Constitution Act, 1982*, Part 1, enacted by the *Canada Act, 1982*, U.K. 1982, c. 11.

⁷ R. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 329 (1973).

It is largely with these differences in mind that I have limited the paper to a consideration of the *scope* of protection afforded under a "reasonable expectation of privacy" test. It is not necessary to deal with either the morass of American cases dealing with standing that culminated in *Rakas v. Illinois*⁸ and *Rawlings v. Kentucky*,⁹ or the manipulation of the warrant and probable cause requirements that developed in response to the demands of an absolute exclusionary rule in the United States. These include warrantless car and closed container searches, inventory and border searches, the development of a notion of general reasonableness to replace the *per se* warrant and probable cause requirements and the discussion of a good faith exception to the exclusionary rule itself. Many of these issues need not plague the interpretation of "unreasonable" in section 8 as they have under the Fourth Amendment because of the presence of subsection 24(2) in the *Charter*. There is also no justification for watering down the protection afforded the individual under section 8 as law enforcement considerations are given full attention in the balancing process under subsection 24(2).¹⁰ The Court in *R. v. Pohoretsky* recognized the virtue of this relationship:

A finding that s. 8 Charter rights have been infringed or denied does not, of itself, render evidence inadmissible. The interpretation of s. 8 does not, for that reason, require the creation of exceptions to its application. Canadian courts do not have to say that an unlawful search or seizure, otherwise unreasonable, is not unreasonable because it was carried out in circumstances that constituted only a minimal interference to the person and posed no risk to his health or safety. Canadian courts do not have to approve unreasonable conduct because it is not "shocking", "gross", "brutal", "offensive", or "flagrant". Those are concerns that would be better considered in an application to exclude under s. 24(2).¹¹

⁸ 99 S. Ct. 421 (1978).

⁹ 100 S. Ct. 2556. For a discussion of standing under s. 8, see *Re Church of Scientology and The Queen*, 12 C.R.R. 257 (Ont. H.C. 1985).

¹⁰ For a recent discussion of sub. 24(2), see *R. v. Therens*, [1985] 1 S.C.R. 613, [1985] 4 W.W.R. 286.

¹¹ *Supra* note 3 at 284, 45 C.R. (3d) at 227. However, Canadian courts face their own problems with the interpretation of s. 8. Many of the s. 8 cases since *Southam* have dealt with the exclusion of evidence under sub. 24(2). See, e.g., *R. v. Cameron*, 16 C.C.C. (3d) 240 (B.C.C.A. 1984) which followed *R. v. Hamill*, [1984] 6 W.W.R. 530, 41 C.R. (3d) 123 (B.C.C.A.) (a case whose conclusions were brought into question by *Southam*) on the grounds that *Southam* did not deal with exclusion of evidence; *Ramage*, *supra* note 3; *R. v. Mehdi*, 65 N.S.R. (2d) 389, 147 A.P.R. 389 (Cty. Ct. 1984); *Keating*, *supra* note 3. For critical annotations, see D. Stuart, *Annot.: R. v. Hamill*, 41 C.R. (3d) 124 (1984); D. Stuart, *Annot.: Southam Inc. v. Hunter*, 41 C.R. (3d) 98 (1984).

Unfortunately, the courts have often neglected to flesh out the meaning of s. 8 before turning to the exclusionary issue. Guidelines must be clearly established in the treatment of sub. 24(2) if the protections afforded the individuals under the fundamental rights provisions are not to be bleached of content. For example, if evidence is excluded under sub. 24(2) only in situations of *gross* invasion of privacy, see, e.g., *R. v. Chapin*, 43 O.R. (2d) 458, 2 D.L.R. (4th) 538 (C.A. 1983); *R. v. Gibson*, 37 C.R. (3d) 175, 11 W.C.B. 7 (Ont. H.C. 1983), it is conceivable that protection of a reasonable expectation of privacy under s.

II. THE KATZ TEST

In *Katz* the petitioner had been convicted of transmitting wagering information in violation of a federal statute. The conviction was based, in part, on evidence obtained by warrantless electronic surveillance of a public telephone booth. On appeal, the Court abandoned much of the doctrine that had hitherto governed Fourth Amendment interpretation. A series of electronic surveillance cases had been the catalyst for the change. The difficulties inherent in the earlier literal interpretation and limitation of the scope of Fourth Amendment protection to tangible discoveries made pursuant to physical trespass¹² had led to a judicial redefinition of protection, derived from property concepts, that emphasized the privacy of certain *places*, constitutionally protected enclaves where individuals could enjoy immunity from government interference. Foremost among these enclaves was one's private home. Protection was also extended to areas enjoying similar attributes, such as offices,¹³ apartments,¹⁴ hotel rooms¹⁵ and cars.¹⁶ However, although it was recognized that intangible effects fell

8 may, in practice, lose all meaning. Fortunately, the Court in *Therens*, *supra* note 10, appears to have rejected the "community shock" test originally formulated in *Rothman v. The Queen*, [1981] 1 S.C.R. 640, 121 D.L.R. (3d) 578, preferring to adhere more closely to the wording of sub. 24(2).

For a general discussion of standing under the Fourth Amendment, see M. Dambrot, *Section 8 of the Canadian Charter of Rights and Freedoms*, 25 C.R. (3d) 97 at 101 (1982); I. Mickenberg, *Fourth Amendment Standing after Rakas v. Illinois: From Property to Privacy and Back*, 16 New Eng. L. Rev. 197 (1981). For a discussion of *Rakas v. Illinois*, see G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 Vand. L. Rev. 1289 (1981); P. Dixon, *Standing to Invoke the Exclusionary Rule Narrowed by New Use of Privacy Expectation Standard*, 64 Cornell L. Rev. 752 (1978-79); M. Schabacher, *Scope of Fourth Amendment Protection in Search and Seizure Cases to be Determined by Reference to One's Legitimate Expectation of Privacy*, 10 Cum. L. Rev. 237 (1979-80); R. Williamson, *Fourth Amendment Standing and Expectations of Privacy: Rakas v. Illinois and New Directions for Some Old Concepts*, 31 U. Fla. L. Rev. 831 (1979).

For an excellent discussion of recent developments under Fourth Amendment law, see S. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257 (1984). For a different view of the same events, see D. Harris, *The Return to Common Sense: A Response to "The Incredible Shrinking Fourth Amendment"*, 22 Am. Crim. L. Rev. 25 (1984). See also P. Connelly, *The Fourth Amendment and Section 8 of the Canadian Charter of Rights and Freedoms: What has been Done? What is to be Done?*, 27 Crim. L.Q. 182 (1985); E. Ewaschuk, *Search and Seizure: Charter Implications*, 28 C.R. (3d) 153 (1982). A. Reid & A. Young, *Administrative Search and Seizure Under the Charter*, 10 Queen's L.J. 392 (1985); A. Reid, *Some Constitutional Boundaries of Administrative Search and Seizure* (unpublished paper prepared for the Annual Department of Justice Seminar on Administrative Law, 1986).

¹² See, e.g., *Olmstead v. United States*, 48 S. Ct. 564 (1928).

¹³ *Gouled v. United States*, 41 S. Ct. 261 (1921).

¹⁴ *Jones v. United States*, 80 S. Ct. 725 (1960).

¹⁵ *Lustig v. United States*, 69 S. Ct. 1372 (1949).

¹⁶ *Rios v. United States*, 80 S. Ct. 1431 (1960).

within the scope of the Fourth Amendment,¹⁷ some form of trespass, no matter how slight,¹⁸ was still necessary to trigger its protection.¹⁹

In *Katz*, the Court rejected this trespass rationale. Mr. Justice Stewart stated: "the Fourth Amendment protects people, not places."²⁰

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 employed to achieve that end did not happen to penetrate the booth can have no constitutional significance.²¹

Yet, Mr. Justice Stewart rejected the view that a general right to privacy existed under the Fourth Amendment.²² Thus, it is only if an interest is found to be protected under the test, that is, only if the individual has justifiably relied upon privacy, that the secondary issue will arise as to whether the intrusion is reasonable.

Given that investigative intrusions which do not violate constitutionally protected privacies are not subject to any Fourth Amendment constraints,²³ the significance of identifying the boundaries of the *Katz* test becomes apparent. What precisely is the meaning of "justifiable reliance"? What are the nature and parameters of the privacy to be protected?

It is Mr. Justice Harlan's concurring opinion in *Katz* that has been treated as the "judicial lodestar"²⁴ of the new privacy doctrine.²⁵ He

¹⁷ *Silverman v. United States*, 81 S. Ct. 679 (1961).

¹⁸ See, e.g., *Clinton v. Virginia*, 84 S. Ct. 1186 (1964), where a finding of trespass was based on an impression, similar to that made by a thumbtack, left on a wall by a listening device.

¹⁹ *Silverman*, *supra* note 17; *Goldman v. United States*, 62 S. Ct. 993 (1942).

²⁰ *Supra* note 5 at 351. With *Katz*, a "search", therefore, became anything that invaded interests protected by the Amendment. This position had become increasingly predictable. See *Camara v. Municipal Court*, 87 S. Ct. 1741 (1967); *Warden v. Hayden*, 87 S. Ct. 1642 (1967); *Berger v. New York*, 87 S. Ct. 1873 (1967); *Hoffa v. United States*, 87 S. Ct. 1583 (1966).

²¹ *Supra* note 5 at 512.

²² *Id.* at 510.

²³ See, e.g., *United States v. Place*, 103 S. Ct. 2637 (1983), where sniff tests of closed containers by trained dogs were held not to be searches within the Fourth Amendment and presumably, therefore, do not even require reasonable suspicion. See also *United States v. Knotts*, 103 S. Ct. 1081 at 1085 (1983), where the Court held that electronic monitoring of a drum of chemicals that allowed tracing of the movements and location of a car was not a "search" under the Fourth Amendment because "a person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another".

²⁴ *Smith v. Maryland*, 99 S. Ct. 2577 at 2579 (1979).

²⁵ A majority of the Court adopted the Harlan formula in *Terry v. Ohio*, 88 S. Ct. 1868 at 1873 (1968). In *United States v. Dionisio*, 93 S. Ct. 764 at 768 (1973), the formula was accepted by Mr. Justice Stewart. The Court has subsequently used the terms "legitimate", "justifiable" and "reasonable" interchangeably. See *supra* note 24 at 2580.

interpreted the Court's statement that "the Fourth Amendment protects people, not places" to mean that a defendant will be protected if he has a "reasonable expectation of privacy".²⁶ The defendant must have exhibited an actual (subjective) expectation of privacy and society must be prepared to recognize that expectation as reasonable.²⁷

III. SOME DIFFICULTIES WITH THE INTERPRETATION OF KATZ AND PROPOSED SOLUTIONS

A. *The Orwellian Scenario*

There are undoubtedly problems with this interpretation of the *Katz* test. Most notably, the emphasis on subjective expectation fails to distinguish situations where a reduction in an actual expectation of privacy is justified and cases where it is not. In other words, the requirement of a subjective expectation of privacy in the formulation of the *Katz* test led to concerns that a scenario might arise where the government could manipulate subjective expectations. For example, Professor Amsterdam has suggested that the government could diminish "each person's subjective expectation of privacy merely by announcing half-hourly on television . . . that we were all forthwith being placed under comprehensive electronic surveillance".²⁸ He notes, with more than a touch of cynicism, that "for many of us, the announcement would be gratuitous".²⁹

As a result, he and other critics have suggested that a preferable approach to interpreting the Fourth Amendment is that reasonable expectations of privacy "tell us what we should demand of government" not "what we expect of government".³⁰ In other words, the *Katz* test should be seen as recognizing the right to have certain minimum expectations of privacy³¹ and that these expectations are entitlements that may not be

²⁶ *Supra* note 5 at 516.

²⁷ *Id.*

²⁸ A. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 at 384 (1974).

²⁹ *Id.* That these concerns are not unwarranted is evidenced by *People v. Superior Court (Stroud)*, 37 Cal. App. 3d 836 (1974), where a police discovery of stolen goods in the defendant's backyard, following a routine helicopter patrol, was held not to be an unreasonable search because frequent aerial observations must have altered the defendant's reasonable expectation of privacy. In *State v. Bryant*, 177 N.W. 2d 800 (Minn. 1970) the Court stated, in *obiter*, that an expectation of privacy in the cubicles of store restrooms could have been prevented if the store had posted signs warning of surveillance. See *United States v. White*, 91 S. Ct. 1122 at 1143 (1971), for a re-evaluation of the requirement of a subjective expectation of privacy in response to such concerns.

³⁰ A. Amsterdam, *supra* note 28 at 384. See also Note, 76 Mich. L. Rev. 154 (1977).

³¹ Therefore, the Orwellian type of advance notice postulated by Amsterdam would itself violate this right. This view is suggested in *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

diminished.

The Court in *Southam*³² recognized this notion of a "claim of right" in its adoption of the Katz test, particularly when it identified the right guaranteed by section 8 as "freedom from unreasonable search and seizure" or an *entitlement* to a "reasonable expectation of privacy".³³

B. *The Doctrine of Assumed Risk*

Assuming the existence of a right to expect certain minimum privacies, the manipulation of which would threaten established political and social values, the next question that arises is whether an individual must make a claim to that right by his own actions or else be deemed to have waived constitutional protection.

American jurisprudence has floundered in this area. Much of the caselaw has had the effect of defeating claims to constitutionally protected privacy on the basis of a doctrine of assumed risk or reckless disregard as to whether privacy is maintained. This doctrine, derived from statements made in *Katz*,³⁴ places the onus on the defendant, as in a waiver or estoppel situation, to show why he did not take precautions sufficient to make police detection of his activities impossible.³⁵

Yet, this view of what "society is prepared to recognize as reasonable"³⁶ begs the question of whether certain individual expectations of privacy *should* be legitimated in the interest of the security of the collective, regardless of the existence of a subjective claim of right. Harlan J.'s re-evaluation of this aspect of the *Katz* test in *United States v. White* provides a key to the answer:

³² *Supra* note 4.

³³ *Id.* at 159, 11 D.L.R. (4th) at 652.

³⁴ Mr. Justice Stewart states:

What 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.

Supra note 5 at 511.

³⁵ *Commonwealth v. Hernley*, 263 A.2d 904 (Penn. 1970), *cert. denied* 91 S. Ct. 886 (1971), is an example of how absurd this doctrine can become when pushed to its limits. In that case, a warrantless search made by agents with binoculars who stood on a ladder to enable them to see through windows that did not allow observation from ground level was held valid for the reason that the defendant could have curtained his windows. See generally R. Aynes, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home is His Fort*, 23 Clev. St. L. Rev. 63 at 66 (1974), where the author suggested that this doctrine would only protect the reasonable expectation of someone living in a windowless, soundproof fort. See also *United States v. Miller*, 96 S. Ct. 1619 (1976), where it was held that a bank depositor voluntarily exposed his affairs to bank employees and, therefore, assumed the risk that they would reveal the information contained in his bank records to the government; *Smith*, *supra* note 24, where the Court held that a phone user has no legitimate expectation of privacy in the information revealed in outgoing calls that he voluntarily exposes to the telephone company's equipment.

³⁶ *Supra* note 5 at 516.

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 the laws that translate into rules the customs and values of the past and present.³⁷

An individual's right to expect privacy is rooted, therefore, in values fundamental and common to society. Polyviou has described it in the following way:

[W]hether expectations of privacy are legitimate within the language of *Katz* and subsequent cases depends neither on the subjective anticipations of privacy or freedom from intrusion entertained by an individual nor on the risks he assumes or must be presumed to have accepted, but on the expectations of privacy he *should be credited with* and on the risks of involuntary disclosure and surveillance he *must be saddled with* and thus *forced to assume* in a free and open society. . . . This means, and in turn has the effect, that in defining the reach of the individual's Fourth Amendment rights and in examining the desirability of forcing society to accept certain risks courts must not only bear in mind the need to foster a sense of individual and collective security without which there can be no political freedom but must also examine and evaluate the character of particular official investigative practice with reference to basic constitutional (and societal) values.³⁸

I would suggest, therefore, that a right or entitlement to privacy that society warrants as legitimate and deserving of protection must transcend purely individual expectations in the interest of the sense of security of the collective. It follows from this that a subjective expectation of privacy should not be a necessary precondition to constitutional protection in a search situation that complies with such social legitimation. Under such conditions, although a clear waiver of a subjective expectation of privacy, such as a case where an individual knowingly or indifferently exposes his words or acts to the public or an abandonment situation, may preclude constitutional protection, no subjective claim to privacy should be required to trigger it.

This approach is particularly important because the scope of protection afforded society as a whole under the American *Constitution* and the fundamental rights section of the *Charter* must necessarily be hammered out in the context of violations of rights of individuals. To define the content of collective rights only in terms of individual subjective expectations without reference to a broader notion of social entitlement that transcends individual expectations is to risk having the substance of those rights disappear through the gaps and interstices of individual cases.

Prowse J.A. of the Alberta Court of Appeal recognized in *Southam* the public character of a socially defined right to an expectation of privacy:

It [section 8] deals with one aspect of what has been referred to as a right of privacy which is the right to be secure against encroachment upon the *citizens'* reasonable expectation of privacy in a *free and democratic society*.³⁹

³⁷ *Supra* note 29 at 1153.

³⁸ P. Polyviou, *Search and Seizure: Constitutional and Common Law* 90 (1982).

³⁹ [1983] 3 W.W.R. 385 at 391, 147 D.L.R. (3d) 420 at 426 (emphasis added).

Dickson J. (as he then was) characterized Mr. Justice Stewart's description of the right to privacy as "the right to be let alone by other people",⁴⁰ reflecting the "public's interest in being left alone by government"⁴¹ crystallized for the purpose of section 8 as "a broad and general right to be secure from unreasonable search and seizure".⁴²

C. The Standardless Privacy Test

Even if one accepts that certain individual expectations of privacy *should* be legitimated by broader social values regardless of the existence of a subjective claim of right, the problem still remains that the definition in *Southam*, like that in *White*, that reasonable expectations are those which society is prepared to accept as reasonable, is standardless.⁴³ One must ask, then, what is the nature of the interests to be protected under the *Southam* decision? Is there any way of providing some kind of objective reference for application of a notion of constitutional protection in individual cases?

One legal wag has said that:

[N]o doubt it is comforting to be told that one's privacy is as fully protected in a public telephone booth as it is at home. But it is less reassuring to realize that one's privacy is no better protected at home than in a public telephone booth.⁴⁴

This reflects a view, commonly held, that *Katz* displaced the traditional protection afforded certain areas. In fact, *Katz* said only that "this Court has occasionally described its conclusion in terms of 'constitutionally protected areas' . . . but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem".⁴⁵

⁴⁰ *Supra* note 4 at 159, 11 D.L.R. (4th) at 652.

⁴¹ *Id.*

⁴² *Id.* at 158, 11 D.L.R. (4th) at 651.

⁴³ The fact that maintenance of a liberal interpretation of protection under the Fourth Amendment, pursuant to a fluid notion of privacy, requires that the interpretation be made by a liberal court has become only too clear in recent years. For example, by creating a graduated hierarchy of expectations of privacy (*see Note*, 91 Yale L.J. 313 (1981)) and by restricting standing to individuals having property or possessory rights in the area searched, the Burger court has succeeded in reducing the protection granted by the Fourth Amendment to less than what it was before *Katz*. (See dissent in *Rawlings*, *supra* note 9 at 2566.) This demonstrates that a right to privacy affords little protection unless it provides for a identifiable set of minimum expectations to which all people are entitled and which may not be whittled down by the vagaries of political appointments. *See S. Wasserstrom*, *supra* note 11, both for a discussion of trends in the United States Supreme Court decisions in the years following *Katz* as well as a study of the internal politics of individual decision-making in the Supreme Court.

⁴⁴ T. Taylor, *Two Studies in Constitutional Interpretation* 114 (1969). *See also, e.g., State v. Iverson*, 187 N.W. 2d 1 (N.D.), *cert. denied* 92 S. Ct. 332 (1971), where a physical intrusion into someone's house was held not to be an intrusion upon privacy and, therefore, not a search because no one was in the house at the time of the entry.

⁴⁵ *Supra* note 5 at 511. As Amsterdam points out:

An opinion which sets aside prior formulas with the observation that they cannot

The question becomes: did *Katz* displace the tests derived from property concepts or simply expand those earlier boundaries of protection? Does the individual now have only a *prima facie* expectation of privacy within what were traditionally viewed as protected areas or may property and possessory notions be used to define a *minimum* content of constitutional protection that individuals have a right to expect, with the undefined privacy standard only entering into the equation where the violation at issue occurs outside traditionally protected areas?⁴⁶ Nothing in *Katz* suggests that intrusion into a traditionally protected area would not be a sufficient condition to invoke Fourth Amendment protection. It simply states that it is not a *necessary* condition.⁴⁷

The Court in *Southam*, I would suggest, like the one in *Katz*, did not displace these property-based concepts of protection. Prowse J.A. stated that the roots of the right to be secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society were embedded in the common law.⁴⁸ Dickson J. (as he then was) commenting on *Katz*, said that: "Justice Stewart rejected any *necessary* con-

"serve as a talismanic solution to every Fourth Amendment problem" should hardly be read as intended to replace them with a new talisman.

Supra note 28 at 385. However, the Burger court, to a chorus of criticism, has used *Katz* to reduce the scope of Fourth Amendment protection by treating privacy as the only protectable interest. *See, e.g., Illinois v. Andreas*, 103 S. Ct. 3319 (1983), where a warrantless re-opening by police of a sealed container that had been previously opened by customs agents, found to contain marijuana, resealed and delivered to the defendant in an imperfectly controlled drop, was held not to be a "search" within the meaning of the Fourth Amendment. Although there had been a forcible intrusion into the defendant's property, it was held not to invade a protected privacy interest. Similarly, in *Rawlings*, *supra* note 9 at 2565, a standing case, the Court held that ownership of goods seized does not automatically confer standing because ownership is not a "substitute for a factual finding that the owner of the goods has a legitimate expectation of privacy in the area searched".

⁴⁶ *Note*, 86 Yale L.J. 1461 at 1477 (1977), suggests that a privacy analysis is not necessary where a traditional property approach exists, that the privacy test is simply a supplementary standard. It further notes that a privacy form of analysis should replace the traditional property approach in only two situations: where the government uses "non-physical" methods of search and where pertinent privacy interests themselves lack physical characteristics. *Id.* at 1482. *See also supra* note 30; D. Miraldi, *The Relationship Between Trespass and Fourth Amendment Protection after Katz v. United States*, 38 Ohio St. L.J. 709 (1977). Surely, this view is most consistent with the original intention of the Court in *Katz*, to address the concerns originally raised by Brandeis J. in dissent in *Olmstead*, *supra* note 12 at 570, about the inadequacy of traditional analysis of the Fourth Amendment to deal with the spectre of electronic surveillance.

⁴⁷ As Mr. Justice Stewart stated:

[T]he reach of that [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling.

Supra note 5 at 512.

⁴⁸ *Supra* note 39.

nection between that [the Fourth] Amendment and the notion of trespass. With respect, I believe this approach is equally appropriate in construing the protections in s. 8 of the *Charter of Rights and Freedoms*.”⁴⁹

He further stated:

In my view the interests protected by s. 8 are of a wider ambit than those enunciated in *Entick v. Carrington*. . . . There is further nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.⁵⁰

Assuming that the privacy test under *Katz* and *Southam* is simply a standard supplementary to traditional property and possessory concepts of protection, how may the notion of privacy be invested with any objectively definable content? Again, one possible solution to the problem lies in *Katz* where Harlan J., in his concurring opinion, recognized that the Fourth Amendment protection of people, not places, generally requires reference to a “place”.⁵¹ Clearly, spatial considerations must influence the determination of the objective reasonableness of a standard. Reasonableness could be determined by a number of factors unrelated to property concepts, such as, the nature of the intended area of private control, the right to exclusive use of such an area and the degree to which society honours the intimacy and privacy of the activity normally carried on in such a place.⁵² Furthermore, in this context of reference to a “place”, it would not be difficult to apply to the privacy test a “reasonable person” approach similar to that used in substantive criminal⁵³ and tort law.⁵⁴

⁴⁹ *Supra* note 4 at 159, 11 D.L.R. (4th) at 652 (emphasis added).

⁵⁰ *Id.* at 158, 11 D.L.R. (4th) at 651. Note as well that Dickson J. (as he then was) made a point of stating that “the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy. . . .” *Id.* at 159, 11 D.L.R. (4th) at 652.

⁵¹ *Supra* note 5 at 516.

⁵² *Note*, 43 N.Y.U.L. Rev. 968 at 983, 984 (1968). Other factors may include the type of information seized and the means of intrusion as well as the foreseeability of intrusion. *Id.* at 986. See also J. Bush & R. Bly, *Expectation of Privacy Analysis and Warrantless Trash Reconnaissance after Katz v. United States*, 23 Ariz. L. Rev. 283 at 288 (1981).

⁵³ See C. Howard, *The Reasonableness of Mistake in The Criminal Law*, 4 U. of Queensland L.J. 45 (1961), where a “reasonable” act is one that a person of “ordinary care, skill and prudence would do under similar circumstances”. This statement was quoted in S. Douse, *The Concept of Privacy and the Fourth Amendment*, 6 U. of Mich. J. of L. Ref. 154 at 174 (1972).

⁵⁴ See, e.g., *United States v. Vilhotti*, 323 F. Supp. 425 at 431 (S.D.N.Y. 1971). See also S. Douse, *supra* note 51, who distinguishes the “reasonableness” of an individual’s expectations from the “reasonableness” of an accomplished search and seizure, which:

[I]nstead of applying either actual or ideal standards of conduct which are part of the fabric of social and cultural patterns of life in the community . . . requires a balancing of the interests and rights involved in order to reach what is seen as an optimal accommodation of the competing interests of personal privacy and law enforcement.

Id. at 179. It should be noted that this distinction lies at the core of the problem of the

IV. CONCLUSION

Although the most immediate impact of the Supreme Court decision in *Southam* has centered around its discussion of the requirements of a valid warrant to safeguard the individual's expectation of privacy,⁵⁵ the significance of the case lies in the definition of the scope of protection provided under section 8, upon which the safeguards depend.

Southam clearly extends the protection against unreasonable search and seizure beyond trespass and the taking of tangible items to include a violation of a reasonable expectation of privacy. But what are the parameters of this expectation of privacy? Does the Court in *Southam* set any objective standards to be applied in its use of the *Katz* test? It is suggested that the Court acknowledged problems identified with the *Katz* test and remedies suggested by those who have studied the *Katz* legacy. *Southam* speaks of an *entitlement* to an expectation of privacy, thus, foreclosing the possibility of unjustifiable government manipulation of subjective expectations. The Supreme Court appears to have recognized the problems inherent in a doctrine of assumed risk by identifying broader social values that assist in the definition of "reasonable" expectations of privacy. Finally, the Court appears to have given constitutional protection against unreasonable search and seizure a minimum content, thus maintaining continuity with traditional property and possessory concepts while extending protection to include "privacy", a concept which remains sufficiently fluid to encompass future advances in methods of intrusion.⁵⁶

Burger court's identification of a "reasonable" expectation of privacy with one that is "legitimate". The "reasonable" expectation of privacy formula requires an examination of the individual's subjective expectation of privacy set against societal norms, always keeping in mind the need to preserve a collective sense of security while, as Wasserstrom points out:

[The word legitimate] will necessarily tempt courts to focus on the particular intrusion at issue from the perspective of the guilty defendant with something to hide. The Court is almost certain to rule, therefore, that no search has occurred. After all, how can a criminal have a *legitimate* expectation of privacy when he has concealed contraband or evidence of crime?

S. Wasserstrom, *supra* note 11 at 386.

⁵⁵ As evidenced by the use of s. 443 of the *Criminal Code*, R.S.C. 1970, c. C-34 as a substitute for the powers of s. 10 of the *Combines Investigation Act*, R.S.C. 1970, c. 23, and the introduction to and passage by Parliament of the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, S.C. 1984-85, c. 26, which amends powers of entry and inspection, and entry and search under numerous federal acts.

⁵⁶ This concept echoes the original intention behind the adoption of the privacy test in *Katz*.