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# Criminal Procedure -- United States v. Santana: A Reinterpretation of the Katz Reasonable Expectation of Privacy Test

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Post-Conviction Hearing Act, and a permanent strain in state and federal court relations as the federal courts repeatedly discover that "no hearing of any sort was accorded petitioner . . . in the courts of North Carolina despite a modern and enlightened procedural machinery adequately designed to determine the basis of historical facts underlying constitutional questions and to review such questions."[78]

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## Criminal Procedure—United States v. Santana: A Reinterpretation of the Katz Reasonable Expectation of Privacy Test

In its application of fourth amendment protection against unreasonable searches and seizures[1] the United States Supreme Court has become increasingly sensitive to the policies that are the foundation of that amendment since the appearance of the "reasonable expectation of privacy" standard in *Katz v. United States*[2] in 1968. *Katz* represented a philosophical shift in the Court's approach to governmental intrusions into citizens' lives, moving the focus from the location and structural components of the area invaded toward a more flexible and somewhat subjective standard that requires an examination of circumstances in which an individual may justifiably rely upon an expectation of privacy.[3]

In the recent case of *United States v. Santana*[4] the Court appears to have misread and misapplied the *Katz* standards. Officers of the Philadelphia Narcotics Squad, acting on probable cause but without a warrant, had driven to defendant Santana's residence and, finding her in her doorway, proceeded to arrest her. The Court found that San-

78. Anderson v. North Carolina, 221 F. Supp. 930, 931 (W.D.N.C. 1963).

1. The full text of the amendment reads:

> 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 (1968). The phrase "reasonable expectation of privacy" comes from Justice Harlan's concurring opinion. *Id.* at 361; *see* note 51 *infra.*

3. 389 U.S. at 352-53.

4. 96 S. Ct. 2406 (1976).

tana's visibility in her doorway necessarily demonstrated that she had no expectation of privacy under *Katz* and that her doorway thereby became a "public place."[5] The arrest was therefore held to be valid under a prior ruling[6] that no warrant is necessary to arrest a suspect in a public place when there exists probable cause to arrest.[7] There was no discussion of Santana's actual expectation of privacy, or of the reasonableness of such an expectation, as the *Katz* test would seemingly have required. Although there is some question whether search criteria should be applied to arrests,[8] the importance of *Santana* is that it appears to indicate that the Court will use the *Katz* holding only in a conclusory manner following the determination of the fourth amendment issue according to pre-*Katz* standards. While the result in *Santana* appears justifiable on its facts, the decision represents a severe setback to the individual's right to privacy in an age of advanced surveillance techniques.

On August 16, 1974, an undercover agent of the Philadelphia Narcotics Squad used an intermediary to purchase several packets of heroin from defendant Santana. The agents provided the money and the impetus for the purchase. Immediately after the purchase, the intermediary was arrested within a block and a half of the purchase site (defendant's residence), providing some likelihood that word of the arrest would quickly reach defendant.[9] Acting without a warrant but with sufficient information to satisfy probable cause requirements,[10] agents returned to defendant's residence intending to arrest her.[11]

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5. *Id.* at 2409.

6. United States v. Watson, 423 U.S. 411 (1976).

7. 96 S. Ct. at 2409.

8. The three concurring Justices and the two dissenting Justices argued the case on the basis of seizure rather than search criteria. *Id.* at 2410 (White, Stevens & Stewart, JJ., concurring); *id.* at 2411-12 (Marshall & Brennan, JJ., dissenting). Given the number of state statutes, *see, e.g.*, CAL. PENAL CODE § 844 (West 1970); KY. REV. STAT. § 70.078 (1971); TENN. CODE ANN. § 40-807 (1975), federal statutes, *see, e.g.*, 18 U.S.C. § 3052 (1970) (FBI agents); 18 U.S.C. § 3056(a) (1970) (Secret Service agents); 18 U.S.C. § 3601 (1970) (post office agents); 21 U.S.C. § 878 (1970) (Drug Enforcement Administration agents), and federal court decisions, *see, e.g.*, United States v. McKinney, 379 F.2d 259 (6th Cir. 1967), that would support the action of the agents in this case, it would appear that the case would not have been decided differently under seizure-criteria. *But see* DEL. CODE ANN. tit. 11, § 2305 (1975); VT. STAT. ANN. tit. 13, §§ 4701 & 4702 (1974); ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 220.1 (3) (1975); Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 STAN. L. REV. 995 (1971).

9. 96 S. Ct. at 2412 (Marshall, J., dissenting).

10. That there was a strong case for probable cause was determined by the district court. *Id.* at 2409.

11. *Id.*

When the agents arrived at defendant's residence, she was standing in her doorway; a step forward would have put her outside the house and a step back would have put her within the house.[12] The officers rushed from their van shouting "police," whereupon defendant retreated into her home where officers followed and took her into custody. A search incident to the arrest[13] turned up packets of a substance that later proved to be heroin, as well as some of the marked money that the agents had furnished the intermediary.[14]

At trial in federal district court, defendant Santana moved to suppress the evidence. In an oral opinion, the District Court for the Eastern District of Pennsylvania granted the motion on the ground that the agents failed to obtain a warrant.[15] The Court of Appeals for the Third Circuit affirmed the decision without opinion.[16] The United States Supreme Court reversed, holding that defendant Santana's doorway was a "public place," and that a warrantless arrest does not violate the fourth amendment when an individual is arrested upon probable cause in a public place.[17] The Court found support for its public place determination in language from *Katz* and *Hester v. United States*,[18] to the effect that fourth amendment protection does not extend to those things that one exposes to public view. This portion of the opinion is extremely brief, providing no explanation for the choice of these particular cases and offering scant analysis of their facts in light of their holdings. In addition, the Court avoided holding that one's doorway is a "public place."

A right of personal privacy,[19] as such, is nowhere guaranteed to the individual by the Constitution.[20] Although the Bill of Rights was intended to provide the individual with the maximum feasible pro-

12. *Id.* at 2408 n.1.

13. The packets fell to the floor as the agents apprehended Santana, *id.* at 2408; therefore their seizure of the heroin was not constitutionally invalid. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969).

14. 96 S. Ct. at 2408.

15. *Id.* at 2409.

16. *Id.*

17. *Id.*

18. 265 U.S. 57 (1924).

19. Privacy is defined in many ways, but it seems that the ability to control access to information about oneself is at the heart of the term. One's appearance, actions and thoughts may provide information about one's self. It is the ability to control access to these that gives us a sense of privacy. *See* Fried, *Privacy*, 77 YALE L.J. 475, 482-83 (1968).

20. *But see* Griswold v. Connecticut, 381 U.S. 479, 484 (1965), in which the Court found a constitutional right of privacy to be implied by at least five of the Bill of Rights amendments. *Accord*, Roe v. Wade, 410 U.S. 113 (1973).

tection against governmental intrusion into his or her private life, the right to privacy only became an issue in the courts in the late nineteenth century.[21] In *Boyd v. United States*[22] in 1886, the Court recognized that it was not the danger of physical intrusion that so concerned the drafters of the Bill of Rights, but rather it was the threat of forcible exposure of information that an individual might have expected to keep private that was of primary concern. Governmental search and seizure of personal property involves property rights,[23] certainly, but the fundamental constitutional issue concerns an individual's right to control access to information about himself.[24]

Early in the development of case law analyzing fourth amendment searches, the courts began to require that the individual take some responsibility for the protection of his privacy from governmental intrusion. In 1924 in *Hester v. United States*,[25] the Court approved the actions of government agents who, acting on reliable information, approached to within one hundred yards of defendant's farm house to observe him selling illegal whiskey. This "search" and the subsequent seizure of incriminating evidence were upheld on the ground that the fourth amendment does not protect people who act in "open fields,"[26] though the agents apparently were trespassing on Hester's land at the time of the search and were acting without a warrant.

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21. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). "In very early times . . . the 'right to life' served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; . . . now the right to life has come to mean the right to enjoy life,—the right to be let alone . . . ." *Id.* at 193. *See also* Union Pac. Ry. v. Botsford, 141 U.S. 250 (1891). "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251.

22. 116 U.S. 616 (1886). The Court reversed a circuit court decision requiring that defendant turn over invoices to federal revenue agents and finding that such compulsory production violated the fourth and fifth amendments. Referring to Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765), a case that was viewed as partially responsible for the inclusion of the fourth amendment in the Bill of Rights, the Court said:

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

*Id.* at 630.

23. Katz v. United States, 389 U.S. 347, 350 n.4 (1967) (citing Griswold v. Connecticut, 381 U.S. 479, 509 (Black, J., dissenting)).

24. *See* note 19 *supra*; Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 978 (1968).

25. 265 U.S. 57 (1924).

26. *Id.* at 59.

The open fields doctrine is one of the more conservative applications of the fourth amendment. The appellation "open fields" is misleading, since Hester was actually within the yard of his farmhouse;[27] therefore, in *Hester* the Court restricted fourth amendment protections at least to enclosed spaces, and probably to the home of an individual.[28] The trespass of the searchers in no way invalidated the search,[29] and the line of cases drawing authority from *Hester* has upheld the use of searchlights, high powered field glasses and other surveillance technology.[30]

*Olmstead v. United States*,[31] decided in 1928 in conjunction with *Hester*, provided the analytical framework for fourth amendment cases for nearly forty years. Out of *Hester* came the line of cases delineating those areas that were subject to fourth amendment protection, while *Olmstead* provided the rationale for dealing with fourth amendment violations of those areas. In *Olmstead*, the Court held that a physical invasion of an area subject to fourth amendment protection was necessary to sustain a violation, and thus, words that leave a home via telephone wires are beyond protection.[32]

The *Hester-Olmstead* cases led to a fairly rigid framework into which the Court had to fit subsequent search and seizure cases. Following *Hester* and *Olmstead* the courts determined, first, whether the area in question could be termed a constitutionally protected area[33] and, second, whether a trespass upon that area had been committed. Under this rationale, constitutionally protected areas came to include,

27. Subsequent case law has held that the area in and around the home is protected from a *trespassory* search. *See* United States v. Molkenbur, 430 F.2d 563, 566 (8th Cir.), *cert. denied*, 400 U.S. 952 (1970); Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968); Texas v. Gonzales, 388 F.2d 145 (5th Cir. 1968); Care v. United States, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956).

28. Justifying the seizure of evidence, the Court said, "This evidence was not obtained by the entry into the house . . . ." 265 U.S. at 58.

29. *Id.*

30. United States v. Lee, 274 U.S. 559 (1927), first approved the use of a searchlight, and analogized it to the use of field glasses, paving the way for a large number of cases that would approve the use of technology-assisted visual searches. *See* United States v. Minton, 488 F.2d 37 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Fullbright v. United States, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968); Care v. United States, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956); Commonwealth v. Hernley, 216 Pa. Super. Ct. 177, 263 A.2d 904, *cert. denied*, 401 U.S. 914 (1970). On the use of field glasses and binoculars for searches see On Lee v. United States, 343 U.S. 747 (1952); Annot., 48 A.L.R.3d 1178 (1973).

31. 277 U.S. 438 (1928).

32. *Id.* at 464-66.

33. The phrase itself did not appear until 1951 in United States v. On Lee, 193 F.2d 306, 314 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952).

in addition to one's home,[34] a business office,[35] a store,[36] a hotel room,[37] an apartment,[38] a garage,[39] an automobile,[40] and a taxi cab;[41] trespass came to include governmental intrusion in person,[42] or by microphone or surveillance device.[43]

The inflexibility of this rationale led to a hair splitting analysis that centered upon the physical location of defendant.[44] *Katz v. United States*[45] presented the Court with an excellent opportunity to alter the "constitutionally protected areas" rationale. FBI agents had recorded conversations that were a part of defendant's illegal betting operation by placing an electronic recording device on the outside of a phone booth that was occasionally used for defendant's illegal purposes. Writing for the majority, Justice Stewart noted that the Court would no longer allow the issues to be formulated in terms of invasion of constitutionally protected areas.[46] Laying the foundation for his new framework, Stewart noted that the fourth amendment protects citizens against certain kinds of governmental *intrusion*[47] but that it "protects people, not places."[48] The public-private dichotomy was not to be

34. Olmstead v. United States, 277 U.S. 438 (1928); United States v. Lee, 274 U.S. 559 (1927); United States v. Hester, 265 U.S. 57 (1924).

35. Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

36. Davis v. United States, 328 U.S. 582 (1946); Amos v. United States, 255 U.S. 313 (1921).

37. Parks v. United States, 386 U.S. 940, 951 (1966); Hoffa v. United States, 385 U.S. 293, 301 (1966); United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949).

38. *See* Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 362 U.S. 257 (1960); McDonald v. United States, 335 U.S. 451 (1948).

39. Taylor v. United States, 286 U.S. 1 (1932).

40. Gambino v. United States, 275 U.S. 310 (1927).

41. *See* Rios v. United States, 364 U.S. 253 (1960).

42. *Id.*; Gambino v. United States, 275 U.S. 310 (1927).

43. Silverman v. United States, 365 U.S. 505 (1961); On Lee v. United States, 343 U.S. 747 (1952).

44. In 1964 the Court found that a trespass had been committed when a microphone the size of a thumbtack had been put in a common wall. Clinton v. Virginia, 377 U.S. 158 (1964) (concurring opinion), *rev'g per curiam* Clinton v. State, 204 Va. 275, 130 S.E.2d 437 (1963). Earlier, the Court had held that a microphone placed *against* a partition wall to monitor conversations was not a trespass, Goldman v. United States, 316 U.S. 129 (1942), but that the penetration of a tiny "spike mike" through a wall required the application of the fourth amendment protections. Silverman v. United States, 365 U.S. 505 (1961). Clearly, the intrusion issue became outdated with the advanced surveillance technology developed during this forty year period.

45. 389 U.S. 347 (1967).

46. *Id.* at 349-53.

47. But Justice Stewart also stated that fourth amendment protections are not aimed at guaranteeing a general right to privacy, the protection of which is generally left to the individual states. *Id.* at 350-51.

48. *Id.* at 351.

based upon prior determinations of which enclosed areas were constitutionally protected, but rather upon what an individual knowingly exposed to the public and what he sought to preserve as private.[49] Physical intrusion was no longer an essential factor.[50] Under the new rationale an individual was due the protection of the fourth amendment whenever he justifiably relied upon an expectation of privacy.[51]

In *Santana*, the Court found support for the arrest by looking to another recent case, *United States v. Watson*,[52] in which it was held that the warrantless arrest of an individual in a public place upon probable cause does not violate the fourth amendment. Under the *Watson* rationale, therefore, if the state can show that defendant Santana's doorway is a public place, then the attempted arrest is justifiable, as are the pursuit of defendant Santana into her home in order to complete the arrest[53] and the seizure of the heroin packets spilled

49. *Id.* at 351-52.

50. The Court specifically overruled the trespass requirements stated in Olmstead v. United States, 277 U.S. 438 (1928), and Goldman v. United States, 316 U.S. 129 (1942). 389 U.S. at 353.

51. *Id.* In a concurring opinion, Justice Harlan laid out a two-pronged test that has become commonly used to determine whether an individual justifiably relied on an expectation of privacy: "first, that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). While the test appears to have two parts, it seems unlikely that a court will often make use of the first criterion. It can be assumed that an expectation will be alleged in most cases, and that it will be found lacking only when an individual does something that would clearly undermine that claim, such as the display of contraband in a crowded public area. The second criterion should be determinative in most cases, however. The alleged expectation must appear reasonable in light of the surrounding circumstances and in light of societal values, a standard that is very close to the reasonable man standard found in tort law. *See* Note, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J. LEGAL REF. 154, 178-79 (1972).

The use of societal values as a standard in the determination provides substantial flexibility in the application of the test, although the obvious difficulties of arriving at an adequate definition of so broad a phrase insured that the Court would rely on the previously determined "constitutionally protected areas" as a starting point for analysis. A particularly good discussion of the *Katz* standards can be found in United States v. Vilhotti, 323 F. Supp. 425 (S.D.N.Y. 1971).

> [T]o ascertain what constitutes an unreasonable search the court must evaluate a person's efforts to ensure the privacy of an area or activity in view of both contemporary norms of social conduct and the imperatives of a viable democratic society. . . .
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> . . . .
>
> . . . [U]nder *Katz*, an agent is permitted the same license to intrude as a reasonably respectable citizen would take. Therefore, the nature of the premises inspected—e.g., whether residential, commercial, inhabited or abandoned—is decisive; it determines the extent of social inhibition on natural curiosity and, inversely, the degree of care required to insure privacy.

*Id.* at 431.

52. 423 U.S. 411 (1976).

53. *See* Warden v. Hayden, 387 U.S. 294, 298-300 (1966); McDonald v. United States, 335 U.S. 451, 456 (1948).

in the process.[54] Accordingly, the entire case turns on the characterization of defendant's doorway.

On the face of it, the description of the threshold of a residence as a public place appears rather bizarre. A doorway is not a place one expects strangers to cross or gather without having some legitimate business to conduct with the occupant. While not actually within the confines of the "home" a doorway is directly attached to it, and in this case, separated from the public path by some fifteen feet of property that might also be considered private.[55] A comparison with the public place involved in *Watson* adds no greater strength to the *Santana* rationale. Watson was arrested in a public restaurant during the lunch hour, a place where one's claim to a specific spot is temporary, and where one can expect to be surrounded by a substantial number of unknown persons.[56]

To justify the Court's decision in *Santana*, Justice Rehnquist distinguished the private-public dichotomy as it is applied in a common law property context from its application in a fourth amendment context.[57] The common law protected one's home and its immediate grounds from physical trespass because they were considered private. Under *Hester*, Justice Rehnquist indicated, what is not hidden from the view, hearing and touch of the world around the individual is not protected by the fourth amendment.[58] The cases that follow *Hester* support that position,[59] and further, support the proposition that government agents have at least the same right to visual search as would a disinterested citizen since the agents are allowed to trespass upon an individual's property to obtain a view of the "open field." Given this interpretation of *Hester*, Santana's doorway would hardly be a protected area, as she was fully visible from a public street only five feet away. There are, however, no limits that can be drawn on visual (and presumably aural and olfactory)[60] searching under the *Hester* rule. In an age of highly advanced surveillance techniques and equip-

54. *See* note 13 *supra*.
55. 96 S. Ct. at 2408.
56. 423 U.S. at 413.
57. 96 S. Ct. at 2409.
58. The Court could use *Hester* to define the type of "place" in which the defendant was found, because the *Katz* case, while clearly overruling the *Olmstead-Goldman* line of cases, did not overrule the line of cases defining "constitutionally protected areas." *See* 389 U.S. at 352.
59. Fullbright v. United States, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968); Hodges v. United States, 234 F.2d 281 (5th Cir. 1957); Care v. United States, 231 F.2d 22 (10th Cir.), *cert. denied*, 351 U.S. 932 (1956).
60. *See* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

ment, a simple extension of the *Hester* ruling would require that an individual spend a good deal of his life closing shades and curtains, whispering or writing messages rather than conversing, and burning any trash or garbage that could be marginally incriminating.[61] In contrast, *Katz* offers a more balanced approach to the questions of public versus private places. While not eliminating the locational aspects of the issue altogether, it focuses on the reasonableness of an individual's expectation of privacy. Katz, although in a public place and exposed to public view, could reasonably expect his conversations to remain private.[62]

Rehnquist's use of the *Katz* case in *Santana* indicates that he reads *Katz* as a mere extension of the *Hester* rationale. He quotes, out of context, the rule that "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection,"[63] never recognizing that in *Katz*, the Court accompanied that rule by another: that "[w]hat [a man] seeks to to preserve as private, even in an area accessible to the public, may be constitutionally protected."[64] There was no discussion in the opinion of whether Santana might have justifiably relied upon an expectation of privacy as mandated by *Katz*, but rather the opinion contained only a simple statement that Santana was not in an *area* where she had any expectation of privacy.[65] The predication of her expectation of privacy upon the area in which she was located looks very much like the application of the "constitutionally protected areas" rationale that was discredited in *Katz*.

Failure to use the *Katz* rationale in this case seems odd. Had *Katz* been applied in full, the Court would probably have reached the

61. An extensive survey of state and federal cases involving governmental surveillance has led one author to conclude that

> we have the specter of a fourth amendment which protects any man who retreats into his home to be free from unreasonable intrusion. Any man, that is, who is wealthy enough to afford a windowless, soundproof house, built on an extensive area of land and surrounded by high fences, and a man who is willing to live the life of a hermit, staying inside his home at all times, prepared to take affirmative action to counter any new technological methods of intrusion with which the government might be equipped.

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, 72 (1974). *See also* Comment, *Police Helicopter Surveillance and Other Aided Observations: The Shrinking Reasonable Expectation of Privacy*, 11 CASE W. RES. L. REV. 505 (1975).

62. "[W]hat he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." 389 U.S. at 352.

63. 96 S. Ct. at 2409 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

64. 389 U.S. at 351-52.

65. 96 S. Ct. at 2409.

same result. Assuming that Santana had an expectation of privacy, the question becomes whether that reliance was justified. Santana was arguably within her home, an area that is specifically mentioned in the fourth amendment and that the courts have treated as uniquely deserving of protection,[66] but the greater number of cases that argue for special protection for the home are concerned with trespassing rather than visual searches.[67] It could have been argued that while Santana could expect certain types of privacy as she stood in her doorway, she certainly could not expect that her person would not be noticed and identified by the public some fifteen feet away. Katz justifiably relied upon a right to privacy in his conversations, though he could not reasonably expect to be free from visual search. Santana's failure to make any effort to conceal her person destroys any claim to visual privacy that she might have had. Once that privacy is lost, even under *Katz*, her arrest would likely be held valid given the existence of probable cause.[68]

The central issue in *Santana* was not analyzed sufficiently to support the Court's determination; the factual basis for the classification of defendant's doorway as a public place was not discussed in substantial detail, and the *Katz* case was not accurately represented in support of the Court's decision. On the particular facts of *Santana*, the Court's mistreatment of the *Katz* precedent was unnecessary since the Court could have reached the same decision under a strict application of the *Katz* test. The result is one that appears to clear the way for increased governmental surveillance of individuals' lives.

EDWIN P. CHESTER

66. Camara v. Municipal Ct., 387 U.S. 523, 530-31 (1967) ("even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority"); Lewis v. United States, 385 U.S. 206, 211 (1966) ("the home is accorded the full range of Fourth Amendment protections"); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); Weeks v. United States, 232 U.S. 383, 389-91 (1914) (invasions of the home without a properly attested warrant should find no sanction in the courts).

67. This factor, of course, would have been far more important had the Court not chosen to analyze this case in terms of cases which deal with non-trespassory search.

68. *But see* authorities cited to the contrary in note 8 *supra*.