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**STATE v. ALLEN: THE CONNECTION BETWEEN THE
RIGHT TO BE SECURE FROM UNREASONABLE
SEARCHES AND SEIZURES AND MONTANA'S
INDIVIDUAL RIGHT OF PRIVACY**

Stephanie Holstein*

I. INTRODUCTION

The Montana Supreme Court recently examined whether Montanans have a constitutionally protected expectation of privacy on the telephone in the electronic monitoring and search and seizure case *State v. Allen*.¹ In general, both the United States and Montana Constitutions provide the right to be secure against unreasonable searches and seizures.² Yet conflicting authority, varying standards, and fact-intensive cases make the determination of whether police practices infringe upon this right a formidable task. Indeed, “[n]o area of the law has more bedeviled the judiciary”³ Facing this challenge in *Allen*, the Court employed a privacy-enhanced search analysis under the Montana Constitution and overruled thirty years of precedent favoring warrantless electronic monitoring.⁴ *Allen* represents an important expansion of protection for Montanans, exemplifies the complexity of search analysis, and highlights the significant connection between the right to be secure from unreasonable searches and seizures and Montana’s individual right of privacy.

This note begins with an overview of the privacy and search protections afforded by the United States Constitution and the Montana Constitution as well as a history of relevant federal and state caselaw. Next, the note discusses the *Allen* decision, where the Montana Supreme Court held that despite informant consent, warrantless electronic monitoring of a telephone conversation by law enforcement constitutes an unlawful search prohibited by the Montana Constitution.⁵ Additionally, the note analyzes how the Court’s pivotal decision in *Allen* aligns with key precedent, does not greatly impair law enforcement, and accurately reflects Montana’s constitu-

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1. *State v. Allen*, 241 P.3d 1045 (Mont. 2010).

2. U.S. Const. amend. IV; Mont. Const. art. II, § 11.

3. Wayne R. LaFave, *Search and Seizure: “The Course of True Law . . . Has Not . . . Run Smooth”*, 1966 U. Ill. L. Forum 255, 255.

4. *Allen*, 241 P.3d at 1060–1061.

5. *Id.* at 1061.

tional values and goals. Finally, the note addresses Justice Nelson's special concurring opinion, which advocates for a new approach to search analysis in Montana.

II. DISCUSSION OF THE LAW PRIOR TO *STATE V. ALLEN*

A. *The Right to Be Secure from Unreasonable Searches and Seizures and the Right of Privacy in the United States and Montana Constitutions*

Over the last century, the protection of individual rights has migrated from the federal arena to the domain of the fifty states. Originally, a defendant in state court did not possess the rights bestowed by the federal Constitution because the Constitution governed only federal courts.⁶ In 1937, however, the United States Supreme Court responded to abuses by state governments by applying the Due Process Clause of the Fourteenth Amendment to the states.⁷ The Court required the states to enforce those constitutional pledges that are "implicit in the concept of ordered liberty"⁸ One such pledge was the Fourth Amendment's restriction on unreasonable searches and seizures.⁹ By the close of the 1960s, the Court had bound the states to almost all of the restraints found in the Bill of Rights.¹⁰ Thereafter, the Court's expansion of this "federal floor of protection"¹¹ subsided as it began to limit individual liberties under the federal Constitution.¹² Yet, "our federalism permits state courts to provide greater protection to individual . . . liberties if they wish to do so,"¹³ and if a state decision is based on "separate, adequate, and independent grounds," the Supreme Court will not disturb the decision.¹⁴ Thus in the face of federal withdrawal, state courts

6. James H. Goetz, *Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic*, 51 Mont. L. Rev. 289, 294 (1990).

7. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 537-538 (1986).

8. *Palko v. Conn.*, 302 U.S. 319, 325 (1937), *overruled*, *Benton v. Md.*, 395 U.S. 784 (1969).

9. Brennan, *supra* n. 7, at 539.

10. *Id.* at 540. The exclusionary rule was also incorporated onto the states during this time. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The exclusionary rule is an extension of the Fourth Amendment deeming evidence obtained in an unconstitutional search or seizure inadmissible in court.

11. Brennan, *supra* n. 7, at 550.

12. *Id.* at 547. Brennan chronicles a series of decisions that "reveal most plainly that [federal] retrenchment is following the Warren era." Among the Court's rights-limiting decisions, he lists "that we do not have a legitimate expectation of privacy in our bank records . . . ; that private diaries may be seized and utilized to convict a person of a crime; [and] that police searches are lawful when grounded on consent even if that consent is not a knowing or intelligent one" *Id.*

13. *Id.* at 551.

14. *Mich. v. Long*, 463 U.S. 1032, 1041 (1983).

have, as “coequal guardians of civil rights and liberties,”¹⁵ begun to fill the gaps created by the decisions of the Supreme Court.¹⁶

The states are best situated to protect individual rights,¹⁷ particularly when the federal Constitution does not explicitly provide for a right, such as the right of privacy.¹⁸ The principle of an implicit, federal constitutional right of privacy was first enunciated in 1928 in a dissent by Justice Brandeis. Brandeis deemed the right of privacy the very “principle underlying the Fourth Amendment”¹⁹ and declared:

[The makers of our Constitution] . . . conferred . . . the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.²⁰

In later cases, the Court held that privacy is a constitutional right, both in terms of search and seizure²¹ and personal autonomy.²² Nevertheless, the federal Constitution is intended to limit federal government, while state constitutions grant affirmative rights.²³ This dichotomy is inherent in the United States’ dual constitutional system and illuminates why many states, including Montana,²⁴ expressly grant the right of privacy through their state constitutions.

15. Brennan, *supra* n. 7, at 548.

16. *Id.* at 548–549. “Between 1970 and 1984, state courts, increasingly reluctant to follow the federal lead, have handed down over 250 published opinions holding that the constitutional minimums set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law.” *Id.* at 548.

17. States are best situated to protect individual rights because they can best accommodate their own unique cultures; respect their differing constitutional histories; impose a more immediate local authority; allow for the people to have a more direct influence; and provide expediency and finality in dispute resolution. In addition, states can act as experimental legal laboratories and historically, state constitutions provided the blueprint for the federal bills of rights. See Dorothy T. Beasley, *Federalism and the Protection of Individual Rights: The American State Constitutional Perspective*, 11 Ga. St. U. L. Rev. 681, 691–695 (1995).

18. Beasley, *supra* n. 17, at 698.

19. *Olmstead v. U.S.*, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting), *overruled in part*, *Katz v. U.S.*, 389 U.S. 347 (1967).

20. *Olmstead*, 277 U.S. at 478.

21. *Wolf v. Colo.*, 338 U.S. 25, 27–28 (1949), *overruled on other grounds*, *Mapp*, 367 U.S. 643 (applying the exclusionary rule to the states, but reaffirming the right of privacy as “Wolf’s constitutional documentation of the right to privacy . . .”).

22. *Griswold v. Conn.*, 381 U.S. 479, 485–486 (1965).

23. Brennan, *supra* n. 7, at 549.

24. “From 1968 to 1990 ‘eight states amended their respective state constitutions to provide explicit protection for a right of privacy.’” The states are Hawaii (twice), Illinois, South Carolina, Louisiana, California, Montana, Alaska, and Florida. Washington and Arizona already had provisions protecting the right to privacy.” Beasley, *supra* n. 17, at 699 (quoting John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources*, 3 Emerging Issues St. Const. L. 195, 210–212 (1990)).

Montana ratified its current constitution in 1972. With its numerous unique rights,²⁵ it has been lauded as having a “declaration of rights [that] provides perhaps the most stringent bulwark for the protection of individual liberties of any in the nation.”²⁶ Montana’s constitutional framers included protection against unreasonable searches and seizures in Article II, § 11, which is nearly identical to the Fourth Amendment.²⁷ They also provided a stand-alone right of privacy in Article II, § 10, which states: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”²⁸ Convention delegates intended § 10 to guarantee Montana citizens “the right to be let alone . . . the most important right of them all.”²⁹

Montana’s historical and judicial records demonstrate that the right to be free from unreasonable searches and seizures should be interpreted in conjunction with the right of privacy.³⁰ Shortly after territorial recognition, Montanans “vigorously asserted their independence” and demonstrated their desire for Montana’s government to “guarantee security and allow for the development of individuality.”³¹ After statehood, the Montana Supreme Court enforced the common law “right to be let alone”³² through the search and seizure provision of the 1889 Constitution,³³ equating it to a safeguard against “unnecessary or unauthorized invasion[s] of the right of privacy.”³⁴ Until the 1972 Constitutional Convention, the Court upheld the principle that the federal and state search and seizure provisions protect “persons and their right to privacy.”³⁵ Even during the Convention, “delegates clearly contemplated that the right to privacy would shield Montana citizens from unreasonable searches and seizures.”³⁶ Strong precedent supports the union

25. The Declaration of Rights in Article II of the Montana Constitution provides for the right to a clean and healthful environment in section 3, the right to dignity in section 4, the right of participation in section 8, and the right to know in section 9.

26. Goetz, *supra* n. 6, at 355.

27. Mont. Const. art. II, § 11.

28. *Id.* art. II, § 10.

29. Melissa Harrison & Peter Mickelson, *The Evolution of Montana’s Privacy-Enhanced Search and Seizure Analysis: A Return to First Principles*, 64 Mont. L. Rev. 245, 247 (2003).

30. Harrison & Mickelson, *supra* n. 29, at 247; Larry M. Elison & Dennis NettikSimmons, *Right of Privacy*, 48 Mont. L. Rev. 1, 12 (1987); William C. Rava, *Toward a Historical Understanding of Montana’s Privacy Provision*, 61 Alb. L. Rev. 1681, 1700 (1998).

31. Rava, *supra* n. 30, at 1687.

32. *Welsh v. Roehm*, 241 P.2d 816, 819 (Mont. 1952).

33. Harrison & Mickelson, *supra* n. 29, at 247.

34. *State ex rel. King v. Fourth Jud. Dist. Ct., Missoula Co.*, 224 P. 862, 865 (Mont. 1924).

35. *State v. Brecht*, 485 P.2d 47, 50 (Mont. 1971), *overruled*, *State v. Long*, 700 P.2d 153 (Mont. 1985).

36. Harrison & Mickelson, *supra* n. 29, at 247.

of §§ 10 and 11, and, when properly read together, they should provide “robust protection”³⁷ to Montanans against governmental intrusion.

B. Search and Privacy Rights in Federal and State Warrantless Participant Monitoring Jurisprudence

Federal jurisprudence on warrantless participant monitoring demonstrates the United States Supreme Court’s fluctuating protection of federal individual rights as well as a critical change in the focus of search and seizure analysis from property to privacy.³⁸ The Court decided its first warrantless participant monitoring case in 1952 in *On Lee v. United States*, where the Court held that an agent eavesdropping on a conversation between an informant and the defendant via a transmitter device worn by the informant “did not amount to an unlawful search . . . proscribed by the Fourth Amendment.”³⁹ The Court reasoned that neither the agent (standing outside the defendant’s business) nor the informant (inside with consent of the defendant) trespassed on the defendant’s property and, therefore, did not violate the defendant’s rights.⁴⁰ *On Lee* illustrates how the Court’s analysis remained firmly entrenched in property concepts through the 1950s.

In the 1960s, the Court’s focus changed from property to privacy, resulting in increased Fourth Amendment protections. In *Lopez v. United States*, where an IRS agent surreptitiously recorded a discussion with the defendant, the Court concluded that the defendant had risked that his incriminating statements would be “accurately reproduced in court, whether

37. *Allen*, 241 P.3d at 1057.

38. There are two points that should be understood before considering the specifics of warrantless participant monitoring. First, the Fourth Amendment protects the intangible, including conversations, *Silverman v. U.S.*, 365 U.S. 505, 511 (1961); but, it does not protect against the use of police informants, *Hoffa v. U.S.*, 385 U.S. 293, 303 (1966). Second, warrantless participant monitoring has a specific definition within the realm of electronic surveillance. Electronic surveillance by police includes both wiretapping and eavesdropping. Wiretapping is an interception between two points of communication, while eavesdropping—the focus of this note—“involves a listening device on one end of the communication.” Nicholas Matlach, *Who Let the Katz Out? How the ECPA and SCA Fail to Apply to Modern Digital Communications and How Returning to the Principles in Katz v. United States Will Fix It*, 18 *CommLaw* 421, 423 (2010). To eavesdrop, a consenting party (“participant” or “informant”) may record a conversation, use a device to transmit the conversation to a third party, or consent to a third party’s use of a device to overhear. Kent Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 *Colum. L. Rev.* 189, 190 n. 9 (1968).

39. *On Lee v. U.S.*, 343 U.S. 747, 751 (1952).

40. *Id.* at 751–753. The Court relied on the rule previously articulated in *Olmstead*, 277 U.S. at 466, and upheld in *Goldman v. U.S.*, 316 U.S. 129, 134 (1942), “that the Fourth Amendment is violated only where there has been (1) a search and seizure of the defendant’s person, (2) a seizure of his papers or his tangible material effects, or (3) an actual physical invasion of his house or curtilage for the purpose of making a seizure,” *overruled in part, Katz*, 389 U.S. 347; *see also Allen*, 241 P.3d at 1065 (Nelson, J., specially concurring).

by faultless memory or mechanical recording.”⁴¹ Although it found no unreasonable search, the Court’s exploration of how the defendant risked exposure of his private statements reveals a notable shift in its analysis from property to privacy interests.⁴²

In 1967, the Court decided the seminal search and seizure case, *Katz v. United States*.⁴³ In *Katz*, the Court found law enforcement officers violated the Fourth Amendment by recording the defendant’s conversation in a telephone booth after attaching a device to the booth’s exterior.⁴⁴ The *Katz* opinion is pivotal for two reasons. First, the Court held the Fourth Amendment “protects people, not places,”⁴⁵ fully supplanting search and seizure analysis based on property with a privacy-based analysis. Second, Justice Harlan’s concurring opinion generated the two-part “*Katz* test.” A search implicating the Fourth Amendment under this prevailing standard requires “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.’”⁴⁶ *Katz* transformed search and seizure law by establishing a heightened search standard reflective of privacy and holding that electronic monitoring constitutes a search protected by the Fourth Amendment.

Four years later, however, the Court narrowed *Katz*’s expansion by holding that *participant* electronic monitoring is compatible with the Constitution. In *United States v. White*, agents listened to conversations between an informant and the defendant via a radio transmitter worn by the informant.⁴⁷ The Court applied both the *Katz* test and conflicting pre-*Katz* law to conclude that electronic monitoring with one party’s consent is not an unreasonable search.⁴⁸ The Court reasoned that “one contemplating illegal activities must realize and risk that his companions may be reporting to the police,” and therefore, such an individual does not have a constitutionally protected reasonable expectation of privacy.⁴⁹ Thus pursuant to *White*, warrantless participant monitoring remains legal under federal law.

Montana’s warrantless participant monitoring jurisprudence shows an early adherence and recent return to expanded constitutional protections against intrusive governmental practices. Initially after ratification of the 1972 Constitution, the Montana Supreme Court used the § 10 Right of Pri-

41. *Lopez v. U.S.*, 373 U.S. 427, 430, 439 (1963).

42. Greenawalt, *supra* n. 38, at 196.

43. *Katz v. U.S.*, 389 U.S. 347 (1967).

44. *Id.* at 359.

45. *Id.* at 351.

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

47. *U.S. v. White*, 401 U.S. 745, 746–747 (1971) (plurality).

48. *Id.* at 752.

49. *Id.*

vacy to close the gap in monitoring protections left by *White*. In *State v. Brackman*, an informant transmitted a face-to-face conversation to police via a device attached to his body.⁵⁰ The Court concluded that *White* was controlling, but the recording was nonetheless unreasonable under § 10 of the Montana Constitution.⁵¹ The Court asserted: “A state is free as a matter of its own law to impose greater restrictions on police activity than those [held by] the United States Supreme Court.”⁵²

But after its initial affirmation of Montana’s privacy guarantee, the Court strayed in the 1980s and began to follow federal jurisprudence. First, in the 1980-case *State v. Hanley*, where an undercover officer secretly recorded his telephone conversation with the defendant,⁵³ the Court declined to address the Montana Constitution in its analysis and ruled that the recording was permissible under both *White* and a federal statute regarding the interception of communication.⁵⁴ Then later that year, the Court applied its *Hanley* reasoning in *State v. Coleman* and held: “Neither the Montana nor the federal constitution prohibits [electronic] monitoring where one of the participants consents.”⁵⁵ Finally, in 1988 in *State v. Brown*, an informant surreptitiously recorded both his telephone and face-to-face conversations with the defendant.⁵⁶ Fully overruling *Brackman*, the Court rendered warrantless participant monitoring legitimate in Montana for the next twenty years by upholding both the *White* rule (allowing monitoring of face-to-face conversations) and the *Coleman* rule (allowing monitoring of telephone conversations).⁵⁷

The Court made one notable deviation during the 1980s. In *State v. Solis*, an undercover officer secretly videotaped his face-to-face interactions with the defendant.⁵⁸ The Court factually distinguished *Coleman* as a telephone case and, after citing *White*, proclaimed: “This Court is not bound by decisions of the United States Supreme Court where independent grounds exist for reaching a contrary result.”⁵⁹ After examining the Constitutional Convention transcripts, the Court noted that *Coleman* “may have gone fur-

50. *State v. Brackman*, 582 P.2d 1216, 1217 (Mont. 1978), overruled, *State v. Brown*, 755 P.2d 1364 (Mont. 1988).

51. *Brackman*, 582 P.2d at 1220, 1222.

52. *Id.* at 1220.

53. *State v. Hanley*, 608 P.2d 104, 105–106 (Mont. 1980), overruled, *Allen*, 241 P.3d 1045.

54. *Hanley*, 608 P.2d at 109.

55. *State v. Coleman*, 616 P.2d 1090, 1096 (Mont. 1980), overruled, *Allen*, 241 P.3d 1045.

56. *Brown*, 755 P.2d at 1366, overruled, *State v. Goetz*, 191 P.3d 489 (Mont. 2008).

57. *Brown*, 755 P.2d at 1369. In his dissent, Justice Hunt expressed that the decision was “indeed a sad one for the citizens of the state of Montana.” *Id.* at 1372 (Hunt, J., dissenting).

58. *State v. Solis*, 693 P.2d 518, 519 (Mont. 1984) (plurality).

59. *Id.* at 520–521.

ther than the . . . delegates intended” and held that the video recordings were unreasonable searches under § 10.⁶⁰ The Court acknowledged:

This area of [search and seizure] law is confusing because of the numerous approaches to the right of privacy issue in the case law. There has been unnecessary emphasis placed on distinguishing right to privacy cases from search and seizure cases. The right to privacy is the cornerstone of protections against unreasonable searches and seizures.⁶¹

This progressive application of §§ 10 and 11, however, was not controlling precedent.⁶²

Thus it was not until the late 1990s that the Court fashioned a search framework reflective of Montana’s privacy mandate and began to exhibit a renewed effort to broaden search and seizure protections. In the 1997 electronic surveillance case *State v. Siegal*, the Court extended the *Katz* test to include a third prong, which incorporated § 10, requiring a demonstration of a compelling state interest for warrantless searches.⁶³ Thereafter, the Court applied this standard to create a heightened privacy right in numerous search and seizure contexts including open fields,⁶⁴ the automobile exception,⁶⁵ search incident to arrest,⁶⁶ and canine-sniff.⁶⁷

The Court revisited warrantless participant monitoring in light of this newly extended *Katz* test for the first time in 2008. In *State v. Goetz*, the Court conducted a thorough examination of face-to-face participant monitoring jurisprudence and determined that the line of cases from the 1980s and early 1990s was flawed.⁶⁸ The Court analyzed the issue anew by employing the extended *Katz* test⁶⁹ and held that, under the Montana Constitution, warrantless participant monitoring of a face-to-face conversation is an unreasonable search, and is not justified by an informant’s consent.⁷⁰ The Court revisited warrantless participant monitoring two years later when it analyzed a telephone conversation in *State v. Allen*.

60. *Id.* at 522.

61. *Id.*

62. “[S]ince there was not a majority of the Court addressing the protections of the Montana Constitution in *Solis*, it [is] not controlling precedent.” *Allen*, 241 P.3d at 1056.

63. *State v. Siegal*, 934 P.2d 176, 191–192 (Mont. 1997), *overruled in part on other grounds*, *State v. Kuneff*, 970 P.2d 556 (Mont. 1998).

64. *State v. Bullock*, 901 P.2d 61, 75–76 (Mont. 1995).

65. *State v. Elison*, 14 P.3d 456, 470 (Mont. 2000).

66. *Sate v. Hardaway*, 36 P.3d 900, 915 (Mont. 2001).

67. *State v. Tackitt*, 67 P.3d 295, 302–303 (Mont. 2003).

68. *Goetz*, 191 P.3d at 497.

69. *Id.*

70. *Id.* at 504.

III. DISCUSSION OF *STATE V. ALLEN*A. *Factual and Procedural Background*

After drinking at a bar in Havre, Montana, on January 27, 2008, Brian Allen (“Allen”) asked Kristin Golie (“Golie”) to drive him to a trailer house where they could find Louis Escobedo (“Escobedo”), whom Allen claimed owed him money.⁷¹ Once there, Allen and Golie lured Escobedo into the car and Allen pointed a pistol at him, demanding the money.⁷² When Escobedo failed to produce the money, Allen bludgeoned him with the pistol.⁷³ During the altercation, Escobedo briefly lost consciousness, Allen allegedly threatened to kill Golie, and Allen shot a hole through the rear window.⁷⁴ Allen eventually released Escobedo, and the parties went home.⁷⁵ Unbeknownst to Allen, Golie had been aiding the local drug task force in an investigation of him.⁷⁶ Without a search warrant, the task force recorded cell phone calls between Allen and Golie, including conversations following the assault on Escobedo.⁷⁷ Allen was arrested and charged with four related felony counts of assault with a weapon and one felony count of criminal endangerment.⁷⁸

Before trial, Allen moved to suppress the warrantless telephone recordings because the task force had violated both his right of privacy and his right to be free from unreasonable searches and seizures under the Montana Constitution.⁷⁹ The State opposed the motion, responding that recording the calls did not constitute a search.⁸⁰ At the suppression hearing, Golie testified she recorded calls with Allen at the behest of law enforcement and that background noises on the call indicated Allen was in a public setting.⁸¹ Allen testified that he did not know Golie recorded their calls, that he believed the calls were private because he never heard background noises, and that he thought he could detect whether someone was listening via speaker phone or extension line.⁸² Applying the *Katz* test, the district court denied Allen’s motion, concluding that no search had occurred because, although he had a subjective expectation of privacy, society was unwilling to recog-

71. *Allen*, 241 P.3d at 1048.

72. *Id.*

73. *Id.* at 1048–1049.

74. *Id.* at 1049.

75. *Id.*

76. *Id.*

77. *Allen*, 241 P.3d at 1049.

78. *Id.* at 1048.

79. *Id.* at 1049.

80. *Id.*

81. *Id.*

82. *Id.*

nize it as reasonable.⁸³ The trial court reasoned that “a party to a telephone conversation can never be sure who may be listening to the conversation on the other end. . . . and that left [Allen] at risk that someone would hear them or Golie would be recording them.”⁸⁴ The State subsequently presented the recording at trial, and the jury convicted Allen of two counts of assault with a weapon and one count of criminal endangerment; he received a 30-year prison sentence.⁸⁵

Allen appealed his conviction to the Montana Supreme Court,⁸⁶ urging it to overrule *Coleman* and *Brown* and reexamine warrantless participant monitoring by telephone in light of *Goetz*.⁸⁷ The State countered that well-established precedent permits law enforcement to electronically monitor telephone conversations without a warrant “so long as one party to the conversation consents, even if the consenting party is an informant.”⁸⁸ The State further argued no search occurred and, alternatively, if one did, Golie’s consent authorized it.⁸⁹

B. Majority Holding

In a 5–2 majority opinion written by Justice Leaphart, the Court reversed Allen’s conviction and remanded for a new trial.⁹⁰ The Court addressed the issue of whether the district court erred when it denied Allen’s motion to suppress the warrantless recording of his telephone conversations with Golie.⁹¹ Agreeing with Allen, the Court concluded that “the reasoning in *Coleman* was flawed and that, in light of *Goetz*, [the Court] should reassess [its] jurisprudence on this topic.”⁹² The Court then examined *Coleman*’s complete progeny and found the existing precedent “wanting.”⁹³ Accordingly, the Court analyzed the issue anew, applying Montana’s extended

83. *Allen*, 241 P.3d at 1049.

84. *Id.*

85. *Id.* at 1051.

86. *Id.*

87. Br. of Appellant, 31, *State v. Allen*, 241 P.3d 1045 (Mont. 2010).

88. Br. of Appellee, 15, *State v. Allen*, 241 P.3d 1045 (Mont. 2010).

89. *Id.* at 22, 35.

90. *Allen*, 241 P.3d at 1048.

91. *Id.* at 1053. There were three issues on appeal: (1) “Whether the District Court abused its discretion when it denied Allen’s challenge for cause”; (2) “Whether the District Court erred when it denied Allen’s motion to suppress a warrantless recording of a telephone conversation between Allen and a confidential informant”; and (3) “Whether the District Court abused its discretion when it denied Allen’s request for a jury instruction on accomplice testimony.” *Id.* at 1048. This note focuses solely on the second issue.

92. *Id.* at 1053.

93. *Id.* at 1056; *see also supra* nn. 50–70.

Katz test to determine whether the recordings infringed upon Allen's constitutional rights.⁹⁴

First, the Court concluded that Allen had expressed a subjective expectation of privacy that Golie was not surreptitiously recording his conversations.⁹⁵ Citing *Katz* and *Goetz*, the Court stated: "The touchstone of subjective expectations of privacy is not some physical location, but rather an individual's desire to keep some aspect of his . . . life secure from the perception of the general public."⁹⁶ The Court reasoned that Allen sought to preserve the privacy of his conversation with Golie because he used a telephone, he moved while conversing with her, and he limited his speech when he passed through public areas.⁹⁷ Therefore, the Court found that by recording his conversation, law enforcement "far exceeded the degree to which Allen knowingly exposed this conversation to the public."⁹⁸

Next, the Court concluded that society is willing to recognize as reasonable the expectation that government agents are not surreptitiously recording private cell phone conversations.⁹⁹ The Court stated that the inquiry required an evaluation of Montana's "constitutional values and goals."¹⁰⁰ Consequently, it turned to the Constitutional Convention transcripts and found:

[T]he protections of the right to privacy were intended to be dynamic. Delegate Campbell introduced the right to privacy as a means of bolstering the protections against unreasonable searches and seizures by ensuring that those protections would be able to keep pace with and not be outstripped by technological developments.¹⁰¹

The Court concluded that "the delegates would not have countenanced warrantless monitoring of private telephone conversations at the time they drafted Montana's constitution."¹⁰² To bolster that conclusion, the Court discussed the central role of cell phones in today's society, noted the importance of protecting free and spontaneous discourse, and mentioned Montana's statutory ban on surreptitiously recorded telephone conversations.¹⁰³ Although contrary to *Coleman* and its progeny, the Court decided "the citizenry of this state would not tolerate such unrestrained government conduct today."¹⁰⁴

94. *Allen*, 241 P.3d at 1056.

95. *Id.* at 1058.

96. *Id.*

97. *Id.* at 1057–1058.

98. *Id.*

99. *Id.*

100. *Allen*, 241 P.3d at 1058 (citing *Goetz*, 191 P.3d at 499).

101. *Allen*, 241 P.3d at 1059.

102. *Id.* at 1060.

103. *Id.* at 1059–1060 (citing Mont. Code Ann. § 45–8–213(1)(c) (2009)).

104. *Allen*, 241 P.3d at 1060.

Finally, since the recording constituted a search under the Montana Constitution, the Court considered whether the search was “justified by a narrowly tailored, compelling state interest or subject to adequate procedural safeguards.”¹⁰⁵ To address Golie’s consent—the only potentially applicable exception to the warrant requirement—the Court followed its own reasoning in *Goetz* that when both parties are present, the consent exception requires both parties’ consent.¹⁰⁶ The Court concluded that in a telephone conversation, both parties are “present” even though they are not necessarily at the same physical location.¹⁰⁷ Since law enforcement did not obtain Allen’s consent, recording the cell phone conversation was unreasonable and in violation of the Montana Constitution.¹⁰⁸ Consequently, in Montana, law enforcement must now obtain a warrant to electronically monitor a telephone conversation between an informant and a suspect. Alternatively, law enforcement or the informant may testify regarding a conversation in lieu of presenting an actual recording at trial.¹⁰⁹

C. *Special Concurring Opinion*

Justice Nelson concurred with the majority that the warrantless recording violated the Montana Constitution; however, he argued that because the *Katz* approach to search and seizure analysis is flawed, Montana should no longer follow it.¹¹⁰ After a thorough discussion of relevant federal and state caselaw,¹¹¹ Justice Nelson criticized the *Katz* “expectations” approach as circular because society’s expectation of privacy is the product of what the law allows, while the law is the product of society’s expectations.¹¹² Next, he asserted that it is nearly impossible to know what society accepts as reasonable, and therefore this determination ultimately comes down to the expectations of the individual Court members.¹¹³ He then argued that the focus of search and seizure analysis should be on what the government is doing rather than what society accepts as reasonable.¹¹⁴ Finally, he dis-

105. *Allen*, 241 P.3d at 1061 (citing *Goetz*, 191 P.3d at 497–498).

106. *Allen*, 241 P.3d at 1061 (citing *Goetz*, 191 P.3d at 501–502 in turn citing *Ga. v. Randolph*, 547 U.S. 103, 121–122, 126 (2006) (“the consent of a co-tenant to a search of shared premises is valid if the other co-tenant is absent, but such consent is not valid if the other co-tenant is physically present and objects to the search.”)).

107. *Allen*, 241 P.3d at 1061.

108. *Id.*

109. *Id.* at 1061 n. 2.

110. *Id.* at 1062 (Nelson, J., specially concurring).

111. *Id.* at 1076; see also *supra* nn. 39–70.

112. *Allen*, 241 P.3d at 1077.

113. *Id.* at 1078.

114. *Id.* at 1078–1079.

agreed with “the proposition that the right of ‘privacy’ and the right against unreasonable ‘searches’ are one in the same.”¹¹⁵

Justice Nelson proposed that “rather than engage in subjective line-drawing about . . . privacy expectations,” the Court should “apply the constitutional language according to its plain meaning.”¹¹⁶ He urged the Court to adopt the new rule: “[A] search occurs where a government agent looks over or through, explores, examines, inspects, or otherwise engages in conduct or an activity designed to find, extract, acquire, or recover evidence.”¹¹⁷ Then, when such a search “implicates an individual’s person, papers, home, or effects, the government must first procure a warrant (absent an exception to the warrant requirement).”¹¹⁸ Justice Nelson offered three caveats to his proposed standard. First, he would distinguish situations where the suspect knows he is speaking to a government agent from situations where the agent’s connection to the government is kept hidden.¹¹⁹ Second, he did not propose that all police monitoring be outlawed, but instead that when police search according to the above definition, they must procure a warrant, absent a recognized warrant exception.¹²⁰ Finally, he would “continue to recognize [the greater protections provided by § 10] when conducting search analysis under § 11.”¹²¹ Under his proposed standard, Justice Nelson concluded that a search occurred in *Allen* because the police “endeavor[ed] to find something (in particular, Allen’s thoughts and communications about illegal activity).”¹²²

D. Dissenting Opinion

Justice Rice dissented from the majority opinion on the warrantless recording issue.¹²³ He argued that, by talking to Golie on the telephone while in the presence of other people, Allen knowingly exposed his admissions about the assault and thus lacked a reasonable expectation of privacy.¹²⁴ Under both *White* and “long-standing and well-established Montana precedent,”¹²⁵ Justice Rice argued the police do not violate the Mon-

115. *Id.* at 1078.

116. *Id.* at 1064.

117. *Id.* at 1079.

118. *Allen*, 241 P.3d at 1064.

119. *Id.* at 1079.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1082 (Rice, J., concurring and dissenting).

124. *Allen*, 241 P.3d at 1082.

125. *Id.*

tana Constitution when they “electronically monitor and record telephone conversations with the voluntary consent of one of the parties.”¹²⁶

IV. ANALYSIS OF *STATE V. ALLEN*

A. *Allen Embodies a Significant and Due Expansion of Montana’s Privacy Rights*

Allen repairs inconsistencies in Montana’s jurisprudence and grants its citizens heightened privacy. Yet considerable arguments oppose both the consequences and reasoning of the majority opinion. Nevertheless, in weighing governmental and individual interests, the Montana Supreme Court correctly decided *Allen* because it aligns with key precedent, does not impair law enforcement, and accurately reflects Montana’s constitutional values and goals.

First, although it overrules thirty years of participant-monitoring precedent,¹²⁷ *Allen* is well founded because, within Montana’s complete search and seizure history, *Coleman* and its progeny are an anomaly. As discussed above, the increased protections against governmental intrusion provided by *Allen* echo the value that Montanans have placed on individual rights since becoming a state. *Allen* upholds what the Court deemed the common-law “right to be let alone” implicit in the 1889 Constitution, and it reflects the Court’s decisions just before and just after ratification of the 1972 Constitution. The *Allen* opinion supports the constitutional framers’ intent for combined interpretation of §§ 10 and 11. It also aligns warrantless participant monitoring of telephone conversations with the increased protections the Court has provided in other search contexts since the 1990s. Most importantly, the Court employed its extended *Katz* test in *Allen*, which affords Montanans greater protection of individual rights than those provided by the Fourth Amendment.¹²⁸

Second, although *Allen*’s prohibition of warrantless participant monitoring may appear to frustrate law enforcement, individual privacy interests outweigh possible consequences for police. Proponents of police monitoring contend first, that informants need to be “wired” for their own protection,¹²⁹ second, that monitoring allows police to corroborate conversations,¹³⁰ and third, that recording preserves a conversation should the informant become absent.¹³¹ While these reasons explain the tactic’s utility

126. *Id.* at 1085.

127. *Coleman*, 616 P.2d at 1096.

128. *Supra* nn. 25–37, 49–69.

129. *Brackman*, 582 P.2d at 1221–1222.

130. *Lopez*, 373 U.S. at 439; Greenawalt, *supra* n. 38, at 212–213.

131. *White*, 401 U.S. at 753–754.

and prevalent use,¹³² they do not provide sufficient justification because the Court has not outlawed monitoring when required for safety, confirmation, and preservation purposes.¹³³ Police may still wire informants and record conversations without a warrant; they simply cannot use the recordings or other evidence obtained through such practices at trial.¹³⁴ Above all, by merely obtaining a warrant or articulating an adequate exception, law enforcement can still reap the benefits of participant monitoring and avoid potential pitfalls.¹³⁵

Finally, the *Allen* holding overrules long-standing precedent because, as the majority recognized under the second prong of the extended *Katz* test, Montanans are willing to recognize as reasonable Allen's expectation of privacy in his cell phone conversations.¹³⁶ According to the Court, this inquiry requires an examination of Montana's "constitutional values and goals" and "[w]e must remember in making this determination that the privacy of all people in Montana is at stake, not merely the privacy of those people known or suspected of breaking the law."¹³⁷ As outlined below, the arguments against finding the expectation of privacy in a telephone call reasonable do not measure up to the Court's current interpretation of §§ 10 and 11.

Even though the telephone facilitates eavesdropping and parties cannot see activity on the other end,¹³⁸ technology should not provide the basis from which to measure privacy expectations.¹³⁹ The telephone played a vital role in private communications forty years ago in *Katz*,¹⁴⁰ and since then, it has evolved into a "necessary instrument[] for self-expression, even self-identification."¹⁴¹ As technology advances, society's understanding of what is reasonable in relation to its use also progresses.¹⁴² The claim that the telephone deprives an individual of his privacy expectations undermines the present-day meaning of free and spontaneous discourse.¹⁴³ The Court in *Allen* properly determined that the Montana Constitution demonstrates a

132. *Id.* at 770 (Harlan, J., dissenting); Greenawalt, *supra* n. 38, at 211–212.

133. *White*, 401 U.S. at 782 n. 19.

134. *Allen*, 241 P.3d at 1061.

135. Rarely in warrantless participant monitoring cases has there been insufficient time or other exigent circumstances that prevented law enforcement from first obtaining a warrant. See *e.g. Brown*, 755 P.2d at 1372 (Hunt, J., dissenting).

136. *Allen*, 241 P.3d at 1061.

137. *Id.* at 1058.

138. *Id.* at 1049, 1060.

139. Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DePaul L. Rev. 837, 902 (1998).

140. *Katz*, 389 U.S. at 352.

141. *Allen*, 241 P.3d at 1059 (quoting *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010)).

142. Bast, *supra* n. 139, at 902.

143. *Id.* at 900–902.

reasonable expectation of privacy in private communication, which is “in no way limited to face-to-face conversations and logically extends to [the] telephone.”¹⁴⁴

Although the use of informants is not an unconstitutional practice,¹⁴⁵ and an individual does not know what another might “do” with his words once he verbalizes his thoughts, the mere fact that an individual risked the repetition of his words does not render his expectation of privacy unreasonable per se. “The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”¹⁴⁶ If an individual chooses to converse with a friend, family member, or cohort, an uninvited ear greatly exceeds what he knowingly chose to expose. The same is true of a recording, which is far more damaging at trial than an informant’s live testimony, which is limited by fallible memory and subject to credibility challenges.¹⁴⁷ No reasonable expectation of privacy in conversations would allow for unimpeded electronic monitoring simply because individuals choose to communicate. In a society with rapidly-advancing technology, the possibility of such widespread monitoring contravenes the “greater protections against governmental intrusions” that Montanans have come to enjoy.¹⁴⁸

Regardless of an individual’s desire to engage in criminal activity, he is nevertheless entitled to a reasonable expectation of privacy in his private communications. The argument for warrantless participant monitoring based on a lack of a reasonable expectation of privacy for wrongdoers¹⁴⁹ presumes that all individuals are guilty of criminal activity. Applying this standard, law enforcement could monitor any telephone call. This argument “turns the presumption of innocence on its head.”¹⁵⁰ The rights of privacy and freedom from unreasonable searches and seizures protect the guilty as well as the innocent.¹⁵¹ As the Court appropriately stated in *Allen*, “our presumption must be that persons conversing on phones are doing so legitimately and thus they have a reasonable expectation of privacy.”¹⁵²

144. *Allen*, 241 P.3d at 1058–1059.

145. *White*, 401 U.S. at 751–752.

146. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890).

147. *White*, 401 U.S. at 787–789 (Harlan, J., dissenting).

148. *Id.* at 790; *Allen*, 241 P.3d at 1079 (Nelson, J., specially concurring) (quoting *State v. Graham*, 175 P.3d 885, 888 (2007)).

149. *White*, 401 U.S. at 752 (majority).

150. *Allen*, 241 P.3d at 1060 (majority).

151. *White*, 401 U.S. at 789–790 (Harlan, J., dissenting).

152. *Allen*, 241 P.3d at 1060.

*B. Search Analysis in Montana Must Continue to Include
the § 10 Right of Privacy*

“[Reasonable] men simply cannot agree on what is an unreasonable search.”¹⁵³ In his special concurrence, Justice Nelson suggested that Montana abandon *Katz* when analyzing search cases and proposed an alternative test based on the plain-meaning of the word “search.”¹⁵⁴ While his proposed plain meaning test has merit, it falls short because it fails to explicitly incorporate Montana’s heightened-privacy mandate.

Justice Nelson is not alone in opining that the *Katz* test is insufficient, and his proposed plain meaning test has some positive attributes. For forty years, legal scholars have criticized the *Katz* test as circular, imprecise, inadequate for determining society’s actual privacy expectations, and ill-adapted to respond to technological advances.¹⁵⁵ Even Justice Harlan expressed misgivings about his concurring opinion’s two-part test.¹⁵⁶ As for Justice Nelson’s proposed alternative to *Katz*, satisfactory plain meaning tests are common in search and seizure law—courts have had few difficulties identifying an unreasonable seizure based on its plain meaning definition.¹⁵⁷ With the myriad of factors presented by search cases,¹⁵⁸ a bright-line rule focusing on the government’s activity, rather than the interests protected, seems favorable. Additionally, Justice Nelson’s test reflects a heightened standard, which would presumably increase protections against unreasonable searches.

But despite *Katz*’s inadequacies and the merits of a plain meaning test, the Montana Supreme Court should be cautious of abandoning its extended *Katz* test. The *Katz* test has been accepted precedent for more than forty years. It is applicable to all search contexts¹⁵⁹ and is grounded in principles

153. LaFave, *supra* n. 3, at 255 (quoting James R. Thompson, *Illinois Search and Seizure Law—The New Frontier*, 11 DePaul L. Rev. 27 (1961)).

154. *Allen*, 241 P.3d at 1079 (Nelson, J., specially concurring).

155. See generally Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 Sup. Ct. Rev. 133 (1968); *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 Yale L.J. 1461 (1976–1977); Michael Campbell, *Defining a Fourth Amendment Search: A Critique of the Supreme Court’s Post-Katz Jurisprudence*, 61 Wash. L. Rev. 191 (1986); Rex R. Perschbacher, *Welcoming Remarks: “Katz v. U.S.: 40 Years Later”*, 41 U.C. Davis L. Rev. 775 (2008); Christian M. Halliburton, *Letting Katz Out of the Bag: Cognitive Freedom and Fourth Amendment Fidelity*, 59 Hastings L.J. 309 (2007).

156. Elison & NettikSimmons, *supra* n. 30, at 23.

157. A seizure requires “some meaningful interference with an individual’s liberty or possessory interests.” Thomas M. Finnegan, *Scope of the Fourth Amendment*, 74 Geo. L.J. 499, 509 (1986).

158. Warrantless participant monitoring cases, for example, require consideration of the relationship of the parties, location of the conversation, intent of the informant, method of monitoring, and use of the transmission or recording. Greenawalt, *supra* n. 38, at 223–225.

159. Harrison & Mickelson, *supra* n. 29, at 250.

that adapt to societal change.¹⁶⁰ After finding the *Katz* test necessary but insufficient, the Court appropriately extended it to reflect § 10.¹⁶¹ Since that extension, the Court has consistently used it to increase individual rights and effectively diverge from federal doctrine. As Justice Nelson astutely noted: “[T]here is no distinct ‘search’ analysis under Montana law Yet there should be.”¹⁶² For Montana to avoid federal scrutiny and honor its own constitution and laws, the Court needs a fully independent analysis for determining whether particular police practices are searches as contemplated by the Montana Constitution.¹⁶³ Admittedly, the extended *Katz* test is based on a federal standard, but with its third prong it provides independent state grounds for the Court’s decisions. Justice Nelson’s test, on the other hand, reflects only the language of § 11, which is nearly identical to the Fourth Amendment. Without explicit analysis under § 10, future search decisions based on the plain-meaning test may be susceptible to federal review.¹⁶⁴

Furthermore, the Court should be reticent to adopt Justice Nelson’s plain meaning test as it stands. Justice Nelson said he would “recognize” § 10 when conducting a search analysis under § 11;¹⁶⁵ however, he did not define a rule for such a recognition. While the implication of “papers, homes, and effects”¹⁶⁶ could equate to privacy interests, the Montana Constitution contains an explicit right of privacy. Thus, articulating an implicit privacy right within the search and seizure provision is unnecessary and may be unduly burdensome.¹⁶⁷ Moreover, Justice Nelson proclaims: “[I]t is

160. Matlach, *supra* n. 38, at 422 at 423.

161. “[T]he protection of a person’s general right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States.” *Katz*, 389 U.S. at 350–351.

162. *Allen*, 241 P.3d at 1078 (Nelson, J., specially concurring).

163. *Elison & NettikSimmons*, *supra* n. 30, at 21–24; David M. Skover, *Address: State Constitutional Law Interpretation: Out of “Lock-Step” and Beyond “Reactive” Decisionmaking*, 51 Mont. L. Rev. 243, 252 (1990).

164. *State v. Jackson*, 672 P.2d 255, 256 (Mont. 1983) (on remand from the United States Supreme Court, whether prior judgment was based on federal or state constitutional grounds, or both), *overruling recognized by*, *State v. Schneider*, 197 P.3d 1020, 1025 (Mont. 2008) (when analyzing parallel provisions between the U.S. and Montana Constitutions, the Court must conduct an independent review by looking to the text’s plain meaning, the legislative intent, relevant state precedent, and finally, federal precedent to avoid marching lock-step with the United States Supreme Court). “More than any other case, *Jackson* demonstrated . . . that a state court must expressly disavow even casual reliance on federal law if the integrity of a state judgment is to be respected by the Court.” Ronald K.L. Collins, *Reliance on State Constitutions—the Montana Disaster*, 63 Tex. L. Rev. 1095, 1107 (1985).

165. *Allen*, 241 P.3d at 1079.

166. *Id.* at 1064 (quoting Mont. Const. art. II, § 11).

167. See generally Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. Ill. L. Rev. 215 (1989). The author discusses various interpretive approaches taken by those states with explicit state constitutional privacy provisions and advocates for state court recognition and reliance on those independent provisions.

error to treat [§§ 10 and 11] as creating just one single right of privacy.”¹⁶⁸ But it is also error to treat them as completely separate. Since the late 1800s, privacy has become the cornerstone of search analysis,¹⁶⁹ and Montanans have adamantly demonstrated in the face of invasive practices that they “cherish their privacy.”¹⁷⁰ Even though the Montana Constitution treats search and privacy rights under separate sections, the provisions should be interpreted together.¹⁷¹ Removing privacy from search analysis undermines the framers’ intent to grant the privacy right “unquestioned constitutional significance”¹⁷² and narrows Montana’s constitutional protections against governmental intrusion.

V. CONCLUSION

The Montana Supreme Court took an important step toward protecting Montanans’ privacy rights in *State v. Allen*. The Court, in holding that warrantless participant monitoring is an unlawful search prohibited by the Montana Constitution, used Montana’s independent privacy clause to grant greater protection to its citizens than is provided by the Fourth Amendment. This decision rectified faulty state caselaw and aligned monitoring jurisprudence with state constitutional intent. Without greatly frustrating law enforcement, it represents an accurate and contemporary interpretation of Montana’s constitutional rights. Most importantly, it declares Montanans’ expectation of privacy in telephone calls reasonable and private conversations deserving of constitutional protection.

While the plain meaning search test proposed by Justice Nelson is noteworthy, its lack of an explicit § 10 analysis renders it incomplete. But search tests proposed in concurring opinions have been known to become the seminal standard,¹⁷³ and if Montana is truly a guardian of heightened individual rights, it must establish its own distinct analyses. Therefore, should the Court choose to follow Justice Nelson’s suggestion and establish a heightened standard based on fully-independent state grounds, the Court must broaden the plain meaning test with a provision expressly reflective of Montana’s constitutional privacy mandate. Only by retaining a privacy-enhanced search and seizure analysis may the Court achieve both independent state grounds for providing greater protection to Montanans and a properly construed individual right of privacy.

168. *Allen*, 241 P.3d at 1069.

169. *Supra* nn. 19–20, 34–35, 41–46, 50–52, 58–70, 146.

170. Rava, *supra* n. 30, at 1716.

171. *Supra* nn. 30–37.

172. Elison & NettikSimmons, *supra* n. 30, at 1.

173. *See e.g.* Justice Harlan’s “Katz test.” *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

