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THE FOURTH AMENDMENT AND EVIDENCE OBTAINED BY A GOVERNMENT AGENT'S TRESPASS

Charles H. Rogers*

INTRODUCTION

The fourth amendment to the United States Constitution states that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." The United States Supreme Court has held that in order to protect this right, evidence obtained by an unreasonable search and seizure conducted by agents of any governmental body in the United States (hereinafter referred to as government agents) may be suppressed in any criminal proceeding, by a defendant whose rights were invaded by the search.¹ In each case the crucial issue becomes one of defining and determining what constitutes an unreasonable search and seizure. The test established by the United States Supreme Court is whether or not there has been an unauthorized physical encroachment within a constitutionally protected area.²

First, an examination of the Supreme Court's decisions using this test will be made. The indiscriminate use or non-use of local and common law standards in the Court's application of the rule has rendered the results very inharmonious, and the results in any future case where the test is applied unpredictable at best.

Second, an examination will be made of three lines of cases or routes which the lower federal courts have followed in determining which areas are within the fourth amendment's protection from unauthorized encroachments. The purpose of this is to ascertain which route is the most conducive to decisions which follow the spirit as well as the letter of the fourth amendment guarantees.

Third, what constitutes an unauthorized encroachment will be determined. It will be noticed that most of the decisions have been based upon the common law distinctions of tort and real

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¹ *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

² *Silverman v. United States*, 365 U.S. 505 (1961).

property, distinctions which have not been defined to any extent by the Supreme Court.

Lastly, a recent case in the federal court of appeals will be examined to see why there is a need for the Supreme Court to establish some workable standards in this area.

In conclusion, it will be shown that the present test should be delineated in a specific manner in order to insure uniformity and certainty in its application by all courts. Additional standards necessary to insure that the fourth amendment guarantee of a right of privacy is an actual, rather than a theoretical, right will also be delineated.

I. THE PRESENT TEST

To illustrate the current test, it is necessary to examine a recent Supreme Court decision, *Silverman v. United States*,³ and a remarkably similar case therein distinguished, *Goldman v. United States*.⁴ In both cases a federal officer obtained evidence against a defendant by the use of an electronic listening device in an adjoining room. The evidence was held admissible in *Goldman*, inadmissible in *Silverman*. The one significant difference (at least in the eyes of the Court) was that, while the listening device in *Silverman* penetrated one-fifth of an inch into the common wall, the device in *Goldman* merely was attached to the government's side of the wall. Mr. Justice Stewart, speaking for the majority in the *Silverman* case, distinguished *Goldman* on the ground that "[T]he eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area."⁵ On the issue of whether or not the "encroachment" was "unauthorized," the Court refused to apply the local law of the District of Columbia.⁶ According to the Court, "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property."⁷ Thus, in this case the Court found a trespass because there was an encroachment in the narrowest sense of the word (one-fifth of an inch), even though entry would have been authorized under local law.

³ *Ibid.*

⁴ 316 U.S. 129 (1942).

⁵ *Silverman v. United States*, 365 U.S. 505, 510 (1961).

⁶ Technically, there was no trespass in *Silverman* because the entry was into a party wall. See *Fowler v. Koehler*, 43 App. D.C. 349 (Sup.Ct. 1915).

⁷ *Silverman v. United States*, 365 U.S. 505, 511 (1961).

It may be that the Court was dissatisfied with the *Goldman* decision and simply refused to extend it—even one-fifth of an inch; the same reluctance to apply local law in determining whether or not the encroachment was authorized can be seen in *Chapman v. United States*.⁸ In *Chapman* the landlord consented to (and even urged) the entry of the officers into a house occupied by Chapman. Under state law, it was questionable whether this entry was “unauthorized.” The Court concluded that it was unauthorized. The majority opinion indicated that the law surrounding a constitutional right should not include fine distinctions; thus, the Court, in effect, refused to apply local law. Mr. Justice Clark, in dissenting,⁹ asserted that local law should be applicable. To this writer, a local standard is inadequate. First, local property law was not formulated for the purpose of protecting the constitutional right of privacy. Secondly, local law would not provide the uniformity essential to secure equal constitutional rights to every citizen of the United States. The rights of a citizen of Georgia would be different from the rights of a citizen in each of the other forty-nine states, and constitutional rights could be abridged or altered by the state legislatures.

Since the standard of unreasonableness is seemingly based upon a “trespass-upon-protected-area” test, the courts have found it necessary to apply some law of trespass. The Supreme Court would seem to be the proper body to designate which law of trespass should apply; however, the opinions discuss trespass in only a general manner. In two landmark search and seizure cases, *Olmstead v. United States*,¹⁰ and *On Lee v. United States*,¹¹ the Court applied a common law trespass notion. In two other cases, *Jones*

⁸ 365 U.S. 610 (1961).

⁹ *Id.* at 619.

¹⁰ 277 U.S. 438 (1928). In the *Olmstead* case the Supreme Court refused to apply the sanctions of the fourth amendment against evidence obtained by wire tapping when there was no physical trespass upon the defendant's premises.

¹¹ 343 U.S. 747 (1952). The majority opinion in *On Lee v. United States* stated: “[N]o trespass was committed.” The agent went into the petitioner's place of business “with the consent, if not by the implied invitation, of the petitioner.” This wording was quoted in *Silverman v. United States*, 365 U.S. 505, 510 (1961).

*v. United States*¹² and *United States v. Jeffers*,¹³ the Court refused to apply the common law trespass rules, and yet found no necessity to distinguish the prior cases. So far the Court has dealt specifically with each aspect of, or exception to, the general law of trespass. This method is wholly unsatisfactory since there are multitudinous exceptions in the law of trespass which are given multifarious treatment by the many common law jurisdictions.

II. DEFINING THE CONSTITUTIONALLY PROTECTED AREA

A. CASES FOLLOWING THE RULE OF *HESTER V. UNITED STATES*¹⁴

Hester v. United States is the leading case analyzing the admissibility of evidence obtained by trespassing governmental agents. Be it rightly or wrongly interpreted, *Hester* has been a most prolific source of federal court rulings as to the illegal possession of narcotics and liquor. The facts of the case are fairly simple and, if taken at face value, the case would have been of little moment in the law of search and seizure.

Hester was convicted of concealing distilled spirits. He appealed to the United States Supreme Court on the ground that the testimony of two federal agents was obtained in contravention of the fourth amendment and should have been omitted under the exclusionary rule of *Weeks v. United States*.¹⁵ The two agents were revenue officers who had concealed themselves fifty to one hundred yards away from a house owned by Hester's father. When the alarm was given, Hester ran, dropping the jug he was carrying. The two agents testified as to the contents of the broken jug. The agents further testified as to the contents of a broken bottle which was thrown by Hester's cohort, and a broken jug found outside the home. The Supreme Court upheld the lower court's refusal to exclude the testimony. Mr. Justice Holmes, speaking for the Court,

¹² 362 U.S. 257 (1960). Jones complained of an illegal search of an apartment. The Court refused to hold that he had no standing to complain on the ground that he was merely an invitee or guest. It said, "We are persuaded . . . that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law . . ." *Id.* at 266.

¹³ 342 U.S. 48 (1951). Here the evidence was illegally seized from a hotel room occupied by the defendant's aunt. The Court held that the respondent, nevertheless, had standing to complain. See *People v. Martin*, 382 Ill. 192, 46 N.E.2d 997 (1942).

¹⁴ 265 U.S. 57 (1924).

¹⁵ 232 U.S. 382 (1914).

said, "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226."¹⁶

Many of Mr. Justice Holmes' contemporaries would have limited the *Hester* opinion to the facts on which it was based and the authority which it cited. For example, Cornelius, in his treatise on search and seizure, refers to *Hester* in the following manner:¹⁷

In a recent case decided by the United States Supreme Court, it was held that the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields, although the observations of the court on this point were largely dicta, as the search under consideration took place upon the premises of the father of the defendant.

Also, the dissenting circuit judge in *Schulte v. United States*¹⁸ carefully distinguished the facts of the *Hester* case from a situation where federal officers entered the defendant's garage.

It would seem that the *Hester* doctrine could and should be severely limited in its stare decisis effect. The case could readily be distinguished in the future if: (1) the original entry upon the land were into the curtilage (the space and buildings immediately surrounding a dwelling house) rather than merely upon the open fields;¹⁹ (2) the entry were upon the defendant's own land; (3) the property examined had not been first abandoned;²⁰ or (4) the entry had been into any type of close rather than out in the open. The interpretations of *Hester* have, however, been quite the contrary. The federal judges, in their zeal to enforce the prohibition laws, found no such distinctions. In contrast to Mr. Justice Holmes'

¹⁶ *Hester v. United States*, 265 U.S. 57, 59 (1924).

¹⁷ CORNELIUS, SEARCH & SEIZURE 6 (2d ed. 1930).

¹⁸ 11 F.2d 105 (5th Cir. 1926). The court said, "The above reference to the 'open fields' is more euphemious than accurate, and not at all necessary to the decision rendered [in the *Hester* case], but at that it is a far cry from the 'open fields' to a shed within leaping distance of a man's bedroom." *Id.* at 107.

¹⁹ 4 BL. COMM. 224 which states: "And if the barn, stable, or warehouse be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall."

²⁰ Two cases involving abandoned property and premises are *Abel v. United States*, 362 U.S. 217 (1960) and *Feguer v. United States*, 302 F.2d 214 (8th Cir. 1962).

fear that fourth amendment protection might be extended to the open fields, the open fields doctrine was extended into the area formerly protected by the fourth amendment. In a long line of cases extending from *Hester* to date, a dichotomy between house and non-house has been the general rule in search and seizure cases in the federal courts. This is supported by neither the *Hester* case nor any body of common law.²¹

*Giacona v. United States*²² aptly illustrates the present interpretation of the *Hester* rule. There, the defendant was convicted of unlawful possession of marijuana. The evidence in question had been concealed on a foundation block supporting the sill of a grocery store operated by the defendant. It was discovered by a federal officer who searched the area by reaching under the store building. Nevertheless the court held that the evidence was admissible because "the top of a foundation block, is only a foot or two removed from the 'open fields' which are not within the protection of the Fourth Amendment."²³ This logic seems particularly inappropriate in light of the *Silverman* one-fifth inch rule. The court also quoted from the *Hester* opinion as follows: "It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search and seizure."²⁴ It seems obvious that this was not an unqualified statement since a trespass upon an area protected by the fourth amendment is unquestionably an unreasonable search.²⁵ In support of its holding the court cited many of the cases which purportedly follow the *Hester* rationale.

Earlier discussions in accord with the *Hester* rule include situations where: federal officers hid behind the defendant's hog house and watched the back porch of the defendant's house;²⁶ searched the defendant's garage after entering upon his land because they smelled whiskey;²⁷ searched the defendant's hen house;²⁸ searched a dugout on the defendant's enclosed ranch;²⁹ searched

²¹ See note 19 *supra*. See also *United States v. Vlahos*, 19 F. Supp. 166 (D. Ore. 1937).

²² 257 F.2d 450 (5th Cir. 1958).

²³ *Id.* at 456.

²⁴ *Hester v. United States*, 265 U.S. 57, 58 (1924).

²⁵ *Silverman v. United States*, 365 U.S. 505, 510 (1961).

²⁶ *Janney v. United States*, 206 F.2d 601 (4th Cir. 1953).

²⁷ *Schulte v. United States*, 11 F.2d 105 (5th Cir. 1926); cf. *Russell v. State*, 37 Okla. Cr. 68, 256 Pac. 758 (1927).

²⁸ *Carvalho v. United States*, 54 F.2d 232 (1st Cir. 1931).

²⁹ *Raine v. United States*, 229 Fed. 407 (9th Cir. 1924); cf. *Wolf v. State*, 110 Tex. Cr. 124, 9 S.W.2d 350 (1928).

the defendant's cabin;³⁰ searched a cave on the defendant's land;³¹ and peeked through the cracks in the defendant's house.³² In not one of these cases did the judge discuss curtilage as should have been done, and the rationale was always that of *Hester*.

B. OTHER TRESPASS CASES

Two other lines of cases concern the *Hester* area, and they are seemingly irreconcilable with it. First, one line of federal cases takes into consideration the distinctions of curtilage and the sanctity of buildings as such. Secondly, there are a few cases in which judges have read into the fourth amendment a right of privacy guarantee.

In the curtilage cases, the courts do not usually mention *Hester*, whereas state decisions are often cited.³³ Situations held by this doctrine to be under the ambit of fourth amendment protection include: narcotics thrown into an enclosed back yard where an agent was waiting for just such a happenstance,³⁴ officers following the defendant's car onto his farm,³⁵ officers entering the defendant's garage,³⁶ a search of the defendant's Finnish bathhouse,³⁷ entrance into the defendant's smoke house,³⁸ and a search of the defendant's barn.³⁹ The usual rationale of these cases has been that, since the

³⁰ *Dulek v. United States*, 16 F.2d 275 (6th Cir. 1926); cf. *Bare v. Commonwealth*, 122 Va. 783, 94 S.E. 168 (1917).

³¹ *Stark v. United States*, 44 F.2d 946 (8th Cir. 1930); cf. *Childers v. Commonwealth*, 198 Ky. 848, 250 S.W. 106 (1923).

³² *Martin v. United States*, 155 F.2d 503 (5th Cir. 1946). The Court here said, "The Fourth Amendment secured the people against not all, but only unreasonable searches and seizures of their persons, houses, papers and effects. Enclosed or unenclosed grounds or open fields around their houses are not included in the prohibition." *Id.* at 505. Then the Court cited *Hester v. United States*, 265 U.S. 57 (1924).

³³ The state cases almost universally discuss the question of curtilage. See notes 27, 29, 30 and 31, *supra*.

³⁴ *Hobson v. United States*, 226 F.2d 890 (8th Cir. 1955); cf. *Fugate v. Commonwealth*, 294 Ky. 410, 171 S.W.2d 1020 (1943).

³⁵ *Kroska v. United States*, 51 F.2d 330 (8th Cir. 1931).

³⁶ *Temperani v. United States*, 299 Fed. 365 (9th Cir. 1924). This case, however, was not reversed because the error was said to be harmless in the light of the defendant's own incriminating testimony.

³⁷ *Wakkuri v. United States*, 67 F.2d 844 (6th Cir. 1933). This case cited the unreversed *Temperani* case above for its authority.

³⁸ *Roberson v. United States*, 165 F.2d 752 (6th Cir. 1948).

³⁹ *United States v. Di Corvo*, 37 F.2d 124 (D. Conn. 1927). See *Russell v. State*, 37 Okla. Cr. 68, 256 Pac. 758 (1927).

standard is to be trespass against a dwelling house, and under any common law system this includes curtilage, the curtilage must be within the fourth amendment protection. This would seem to be a logical analysis of the problem.

*Brock v. United States*⁴⁰ is the leading case exemplifying a constitutional right of privacy in search and seizure situations. Its rationale is based upon the spirit of the fourth amendment to a greater degree than any other line of cases. In *Brock*, federal agents stood outside the defendant's bedroom window and induced him to make incriminating statements in his sleep. Citing *McDonald v. United States*⁴¹ (which hardly touches on the issue existing in the *Brock* case) the court held that this was a violation of the defendant's right to be let alone.

The court refused to determine the *Brock* case on a technical trespass basis. Instead it asserted:

Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment.

In addition to the *McDonald* case, the dissent in *Olmstead v. United States*⁴² was cited for this proposition.

Subsequent cases have not gone as far as *Brock*. Three majority opinions⁴³ and three dissents⁴⁴ have cited *Brock* for its fourth amendment proposition. In the latest of these cases, *Polk v. United States*,⁴⁵ the court was faced with the question of whether an officer's entry into a covered passageway between the defendant's house and another residence constituted an invasion of the defendants' fourth amendment rights. The court was able to fit together all three lines of search and seizure cases—*Hester*, the line recognizing curtilage, and the right of privacy cases. They were all placed in one continuum⁴⁶ by a careful choice of cases from each

⁴⁰ 223 F.2d 681 (5th Cir. 1955).

⁴¹ 335 U.S. 451 (1948).

⁴² 277 U.S. 438 (1928) (see note 10 *supra*).

⁴³ *Polk v. United States*, 291 F.2d 230, 232 (9th Cir. 1961); *United States v. Gordon*, 236 F.2d 916, 920 (2d Cir. 1956); *Hobson v. United States*, 226 F.2d 890, 894 (8th Cir. 1955) (see note 34 *supra*); *cf. Harris v. State*, 203 Md. 165, 99 A.2d 725 (1953).

⁴⁴ *Smith v. United States*, 234 F.2d 385, 397 (5th Cir. 1956); *United States v. Greenwald*, 233 F.2d 556, 582 (2d Cir. 1956); *Bowers v. United States*, 226 F.2d 424, 442 (8th Cir. 1955).

⁴⁵ 291 F.2d 230 (9th Cir. 1961).

⁴⁶ The Court said, "It has been held that such protection [of the fourth amendment] does not extend to open fields, *Hester v. United States*,

group. The difficulty with this plan is that certain cases (such as *Giacona v. United States, supra*) do not fit within the continuum.

Brock, although having little case law support, is probably the most forward looking decision in the search and seizure area to date—not because of the fact situation upon which the decision was written, but because of the terms in which the statement of the rationale is couched. The decision speaks of “the basic principles which underlie these [fourth and fifth amendment] rights,” and it finds that these principles include: (1) the “decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect”; and (2) the authority of the courts “to oblige the government to control itself.”⁴⁷ A blind following of the words of the fourth amendment without first considering its underlying principles makes little sense in the light of the fact that our Constitution was written over a century ago by men who, like ourselves, were forced to translate their ideas in terms of their own times.

III. TRESPASS AND THE GOVERNMENT AGENT'S STATUS UPON THE LAND—AUTHORIZED ENCROACHMENTS

Thus far this article has dealt only with the problem of defining the areas to be given fourth amendment protection. There is also a question of the government agent's status upon the land. Once an officer is found to be a trespasser upon a constitutionally protected area, he is thereupon unable to again obtain a non-trespassory status⁴⁸ which would render admissible any evidence

1924, 265 U.S. 57; not to a cabin 230 feet from a dwelling, *Dulek v. United States*, 16 F.2d 275 (6th Cir. 1926); but it has extended to an enclosed back yard, *Hobson v. United States*, 226 F.2d 890, 894 (8th Cir. 1955); and spying through a transom from a common hallway after breaking into a rooming house has been held a violation of the Fourth Amendment, *McDonald v. United States*, 1948, 335 U.S. 451; so has standing on a man's premises and looking in his bedroom window, *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955); and searching a locked cupboard in a common hallway, *United States v. Lumia*, 36 F. Supp. 552 (W.D.N.Y. 1941).” *Id.* at 232.

⁴⁷ *Brock v. United States*, 223 F.2d 681, 684 (5th Cir. 1955).

⁴⁸ In *Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957), the officers went into the vestibule of a rooming house without invitation. Information which was received by watching the defendant go outdoors and put a package containing narcotics into the garbage was held inadmissible. It is noteworthy that the same information could have been obtained had they waited across the street and procured the package later from the garbage man. Evidence gained in the latter manner would undoubtedly have been admissible.

An analogous result was reached in *United States v. Watson*, 189

seized. For example, if the officer enters a protected area with a defective warrant, anything he takes is illegally seized.⁴⁹ Likewise, if he enters that portion of the defendant's land which is constitutionally protected while falsely claiming a right to enter, or under any other false pretense, anything he may thereby learn is inadmissible. Some cases reach this result in terms of the so-called "unlawful collateral purpose" doctrine,⁵⁰ while others reach the same decision without referring to the doctrine by name.⁵¹

The prosecution has still another out. Even though the area in question is entitled to fourth amendment protection, if the officer's presence is not through a trespass (and he retains the status of non-trespasser), any evidence obtained is admissible. An officer has no duty to close his eyes to such evidence.⁵² The courts simply say that there was *no* search,⁵³ let alone an illegal one.⁵⁴ This

F. Supp. 776 (S.D. Cal. 1960), where the defendant voluntarily handed over a can of marijuana after the agents broke into his apartment. The evidence was excluded. The court said that the illegal entry tainted every step of the journey. See also, dissent in *Wong Sun v. United States*, 288 F.2d 366, 372 (9th Cir. 1961), for like reasoning.

⁴⁹ *Mattingly v. Commonwealth*, 197 Ky. 583, 247 S.W. 938 (1923).

⁵⁰ *United States v. Evans*, 194 F. Supp. 90 (D.D.C. 1961).

⁵¹ In *Marron v. United States*, 8 F.2d 251 (9th Cir. 1925), where police entered saying they were sanitary inspectors, and thereby discovered illegal liquor, the evidence and testimony were held inadmissible.

Also, in *United States v. Mitchneck*, 2 F. Supp. 225 (M.D. Penn. 1933), where officers gained entrance into the defendant's house by saying they were refrigerator salesmen, and by the use of a note to the defendant purporting to be from the defendant's employer, but with the employer's signature forged upon it, the evidence seized later with a warrant was held inadmissible.

⁵² *Ellison v. United States*, 206 F.2d 476 (D.C. Cir. 1953); cf. *People v. Schmoll*, 383 Ill. 280, 48 N.E.2d 933 (1943).

⁵³ See *People v. Albea*, 2 Ill. 2d 317, 118 N.E.2d 277 (1954). In *Paper v. United States*, 53 F.2d 184 (4th Cir. 1931), the officers, while searching for the defendant on his premises under a lawful arrest warrant, accidentally found liquor in the cellar. The evidence was held admissible because the officers were "lawfully on the premises."

⁵⁴ In *Ellison v. United States*, 206 F.2d 476 (D.C. Cir. 1953), police officers sought to question the defendant. While they were on his front porch, they saw bottles from the drugstore which had been burglarized lying in the front yard. The evidence was held admissible on the ground that there was no search and that the officers were not required to close their eyes to evidence in plain sight.

Likewise, in *Cradle v. United States*, 178 F.2d 962 (D.C. Cir. 1949), there was held to have been no search where the officer merely stood in an area open to the public and observed gambling activity through an open door.

conclusion seems to stem from the fact that a police officer entering upon the land in the performance of his lawful duty is a licensee—the license being conferred by law.⁵⁵ By the same reasoning, an officer who comes into a shop or public place is not a trespasser and may obtain evidence which will be held admissible in court.⁵⁶

Authority to go upon the constitutionally protected area has been based, for the most part, upon common law tort and property standards. This problem is in the same state of ambiguity as are the issues of delimiting the protected area, and determining what constitutes an encroachment thereon.

IV. THE END PRODUCT OF THE TRESPASS-PROTECTED AREA TEST

The most recent case illustrating the difficulty in this area, and emphasizing the varied and inconsistent approaches to the problem, is *Foster v. United States*.⁵⁷ Two federal officers came upon the defendant's land to question him. Twice previously Foster had refused to answer questions and had ordered other officers off the land. Nevertheless, the officers went onto the porch and rang the bell. Foster came to the door and, when the officers were identified, ordered them to "get the hell from the property." When the officers persisted in their attempts to talk to him, Foster produced a rifle and the officers left. He was convicted of interfering with United States officials. The Court of Appeals upheld the conviction, citing two cases contrary to Foster's contention that the evidence was inadmissible as having been obtained in contravention of the fourth amendment.⁵⁸ It cited the *Giacona* case⁵⁹ which is the tortured result of the line of cases based on *Hester*, and in which this same court found no distinction between the open fields and the very cornerstone of a building. The second case cited was *Hester*.⁶⁰ With one of two findings the appeal would have gone in the defendant's favor. First, the court could have recognized some

⁵⁵ PROSSER, TORTS 461 (2d ed. 1955).

⁵⁶ See *Fisher v. United States*, 205 F.2d 702 (D.C. Cir. 1953); *On Lee v. United States*, 343 U.S. 747 (1952).

⁵⁷ 296 F.2d 65 (5th Cir. 1961).

⁵⁸ Foster's contention in the appellate proceeding was that the officers were trespassers because: (1) he had previously told other officers to stay off his land; and (2) he told the officers in question to get off the land. See *State v. Frizzelle*, 243 N.C. 49, 89 S.E.2d 727 (1955).

⁵⁹ *Giacona v. United States*, 257 F.2d 450 (5th Cir. 1958); see *State v. Egan*, 272 S.W.2d 719 (Mo. App. 1954).

⁶⁰ *Hester v. United States*, 265 U.S. 57 (1924).

of the niceties of trespass law and held that a licensee who stays upon the premises when he is ordered to leave becomes a trespasser.⁶¹ Or, the court could have recognized that a trespass upon the porch is a trespass against the home under the common law concept of curtilage. The first ground is almost universally held to be a part of tort law; and the second is recognized in all jurisdictions (with the possible exception of the federal court finding in reliance upon *Hester*,⁶² that the front porch is an open field). The end result seems to be that, since the Supreme Court has vacillated between use and non-use of common law and local law, some federal courts have developed and followed hard and fast dichotomies without adequately considering the possible impairment of a defendant's rights.

Another route of reversal open to the court in the *Foster* case was the *Brock* right of privacy concept.⁶³ Under this doctrine, any unreasonable invasion of Foster's right of privacy would bring the testimony under the exclusionary rule based upon the fourth amendment. This route does not seem to present as strong a case for Foster as the points mentioned above because the questions of reasonableness and the extent of his right are still open to the court. Nevertheless, it would seem that if officers can come upon Foster's porch and remain there against his wishes, he has been denied the right of privacy to which he is constitutionally entitled.

The Supreme Court, however, although deciding many times that the right of privacy is at the core of the fourth amendment guarantee,⁶⁴ has shown surprising reluctance to decide cases such as *Foster* in terms of this rationale.

V. CONCLUSIONS

The test of unauthorized physical encroachment within a constitutionally protected area is a good beginning in the search and seizure area for, if any court finds such encroachment, the question

⁶¹ PROSSER, TORTS 62 (2d ed. 1955).

⁶² *Hester v. United States*, 265 U.S. 57 (1924).

⁶³ *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955). This route was attempted in the *Giacona* case, *supra* note 59, but the court distinguished the *Brock* case on the fact that the building involved in *Brock* was a home, while the one involved in *Giacona* was a grocery store open to the public. Such a distinction hardly seems reasonable when it can be implemented only by holding that the area on top of a cornerstone under a building is also open to the public.

⁶⁴ *Silverman v. United States*, 365 U.S. 505 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

can be decided and set aside with no more ado. It is quite evident that the terms of the test must be defined, and that the United States Supreme Court must make that definition. Constitutional questions should not turn upon state or local law; otherwise constitutional rights will be diverse and uncertain.

As to delimiting the constitutionally protected area, the Supreme Court needs only to state that this means those areas treated by the public as being private.⁶⁵ This is a standard which is workable. It is true that there would be a question in each case of whether or not the area searched had been treated as private, but judges, litigants, and police officers can at least understand the concept of privacy. The judge would not be forced to turn to ancient local law to decide a case, or be forced to decide that any area which he believed to be outside the protection of the fourth amendment was a part of the open fields.

The question of whether the encroachment is unauthorized can be settled just as easily. The Supreme Court could simply rule that an officer has no authority to go upon the protected area unless: (1) he has a warrant; (2) he has been given authority to do so by the voluntary act of the person in control of such area; or (3) he has personal knowledge that the subject of his search is within the constitutionally protected area, and probable cause to believe that such subject would be destroyed or removed before he could obtain a warrant.

Such a rule would cause the exclusion of evidence obtained by peering into the defendant's window, standing upon his porch contrary to his wishes, searching the very foundation of his building, and surreptitiously moving about on the defendant's own premises.

This would be a good start. But after the initial application of the trespass test, the Court must look even further to see if the defendant's fourth amendment rights have been violated, for it is evident that science will soon eliminate the need for one man to go physically onto another's property in order to pry into his private

⁶⁵ See *Lanza v. State of New York*, 82 Sup. Ct. 1218 (1962), where in what Mr. Justice Brennan characterized in his opinion in that same case as a "gratuitous exposition of several grave constitutional issues confessedly not before us." Mr. Justice Stewart set out some of the cases which have delineated the scope of the fourth amendment. He then refused to attempt "either to define or predict the ultimate scope of the Fourth Amendment protection"; stated that it was "obvious that a jail shares none of the attributes of a home, an automobile, an office, or a hotel room"; and decided the case on other grounds. It was not necessary to reach the constitutional question in deciding the case.

and most intimate affairs.⁶⁶ A test similar to that used in the *Brock* case⁶⁷ might be employed. Regardless of whether or not there has been a physical encroachment, the defendant's rights may be effectively denied, as they have been in the wire-tap area.⁶⁸ The test should be that, even if there has been no physical encroachment, if the same effect is obtained by the use of a device developed in scientific technology, the evidence must be excluded.

This additional qualification would, in all courts,⁶⁹ exclude evidence obtained by long range listening devices, telescopes, wire-tapping, and other spying equipment.

⁶⁶ See Mr. Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928).

⁶⁷ *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955).

⁶⁸ *Silverman v. United States*, 365 U.S. 505 (1961). See Mr. Justice Douglas' concurring opinion *id.* at 512.

⁶⁹ Under *Mapp v. Ohio*, 367 U.S. 643 (1961), the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914) is binding upon state court proceedings and is on a constitutionally guaranteed basis. See Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1961).