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United States v. Ruckman: The Scope of the Fourth Amendment When a Man's Cave Is Not His Castle, 20 J. Marshall L. Rev. 839 (1987)

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RECENT DEVELOPMENT

*UNITED STATES v. RUCKMAN:** THE SCOPE OF THE FOURTH AMENDMENT WHEN A MAN'S CAVE IS NOT HIS CASTLE

The fourth amendment[1] to the United States Constitution protects individuals against unreasonable searches and seizures.[2] Following the United States Supreme Court's landmark decision in *Katz v. United States*,[3] courts have taken a privacy oriented approach[4] to fourth amendment inquiries as a means of determining

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* 806 F.2d 1471 (10th Cir. 1986).

1. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The fourth amendment is encountered in proceedings to determine whether the fruits of a particular search and seizure are to be admitted into evidence. *See* 1 W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT, § 1.1 (1979). The leading case on search and seizure is Boyd v. United States, 116 U.S. 616 (1886). In *Boyd*, Justice Bradley linked the fourth and fifth amendments. *Id.* Consequently, any evidence obtained by searches and seizures in violation of the fourth amendment are inadmissible in both state and federal courts. Mapp v. Ohio, 367 U.S. 643 (1961). The major purpose of the exclusionary rule is the deterrence of unreasonable searches and seizures. *See* LAFAVE, *supra*, § 1.1.

2. The fourth amendment provides that only law enforcement practices that are classified as searches and seizures are required to be reasonable. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356 (1974). The specific commands of the warrant clause of the fourth amendment define, in part, the reasonableness of a particular search and seizure. *Id.* Accordingly, the Court continues to condemn searches and seizures made without a warrant, "subject only to a few jealously and carefully drawn exceptions." *Id.* at 358. Exceptions to the warrant requirement include consent searches, searches within the area of an arrestee's control, and emergency searches to prevent the loss or destruction of evidence. 2 W. LAFAVE, *supra* note 1, § 4.1. *Cf.* Schmerber v. California, 384 U.S. 757, 768 (1966), (fourth amendment's function is to constrain, not against all governmental intrusions, but only against those not justified under the circumstances or which are made in an improper manner).

3. 389 U.S. 347 (1967).

4. In *Katz*, the government used an eavesdropping mechanism in a public telephone booth to intercept the contents of the petitioner's telephone conversation. In determining whether this government intrusion violated the fourth amendment, the Court rejected the long-standing methods of fourth amendment analysis based on

the reasonableness of a particular search and seizure. Thus, under this approach, the thrust of the fourth amendment focuses on protecting an individual's expectation of privacy.[5] The fourth amendment, however, does not protect all privacy expectations. The touchstone of a fourth amendment analysis is whether the individual's expectation of privacy is one that society is willing to recognize as reasonable.[6]

Although it is repeatedly emphasized that the fourth amendment "protects people, not places,"[7] courts often refer to "place" in order to determine the scope of the fourth amendment in a particular situation. In past fourth amendment decisions, courts have applied the "reasonable expectation of privacy" test to places such as

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"constitutionally protected areas" and the trespass rule. *Id.* Prior to *Katz*, the Court followed the theory that the absence of a physical penetration foreclosed fourth amendment inquiries. Olmstead v. United States, 277 U.S. 438 (1928).

In *Katz*, the Court changed its position and recognized that the reach of the fourth amendment could not turn on the presence or absence of a physical intrusion, especially under the circumstances of this case. *Katz*, 389 U.S. at 352. Moreover, the *Katz* Court stated that viewing the problem under the abstract theory of "constitutionally protected areas" detracted from the real issue presented by the case. *Id.* at 351. Employing a bold sweeping statement that the "the fourth amendment protects people, not places," the *Katz* Court initiated a new privacy-oriented approach to the fourth amendment. *Id.* at 347. Justice Stewart, writing for the majority, began the formulation of the new standard based on the theory that the plaintiff had "justifiably relied" on the privacy of the telephone booth. *Id.* at 350-53. The petitioner could expect to exclude the uninvited ear despite the fact that others could view him in the booth when he closed the door and deposited his coin. *Id.* Thus, the government's violation of the plaintiff's privacy constituted a search and seizure within the meaning of the fourth amendment. *Id.*

5. In his concurring opinion, Justice Harlan expounded upon Justice Stewart's theory with the pronouncement of a two-fold requirement to determine the scope of the fourth amendment. *Id.* at 361. In order for the fourth amendment to protect an individual's privacy rights, Justice Harlan's two-pronged test required that "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.* Justice Harlan further stated that "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not protected because no intention to keep them to himself has been exhibited." *Id.* Justice Harlan's two-fold requirement has been used in fourth amendment adjudication following the *Katz* decision.

The fourth amendment protects at least two privacy interests. First, it protects an interest in keeping information about one's self private, and second, it protects an individual's interest in being left undisturbed by others. Illinois v. Andreas, 463 U.S. 765, 775 (1982) (Brennan, J., dissenting). *See generally* Wasserstrom, *The Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 270 nn. 76-77 (1984) (discussions of various privacy interests and their relevance to the fourth amendment). *But cf.* Katz v. United States, 389 U.S. 347, 350 (1967) The fourth amendment cannot be translated into a general "right to privacy" because its protections reach further and often have nothing to do with privacy. Other provisions of the Constitution protect the individual's right to privacy and the protection of this right is largely left to the law of individual states. *Id.*

6. *See supra* note 5 for a discussion of privacy expectations under the fourth amendment.

7. *Katz*, 389 U.S. at 361.

open fields,[8] automobiles[9] and to a variety of other circumstances[10] in an effort to delineate the extent of fourth amendment protections. Recently, in *United States v. Ruckman*,[11] the Tenth Circuit Court of Appeals attempted to apply the test to government-owned land.[12] The result was yet another limitation on the reach of the fourth amendment.

The *Ruckman* court was required to apply the *Katz* test to a very unique set of circumstances. The defendant, Frank Ruckman, had been living in a natural cave on government land for approximately eight months.[13] After the government issued a warrant for his arrest in 1985,[14] six local police officers proceeded to the cave site.[15] At the cave site the officers found a closed, but unlocked, door at the entrance of the cave.[16] Ruckman was not in the vicinity.[17] The

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8. *See* Oliver v. United States, 466 U.S. 170 (1984) (no expectation of privacy in "open fields" because they are usually more accessible to the public and police in ways that a home, an office, or commercial structure would not be).

9. Historically, warrantless searches of vessels, wagons, and carriages, as opposed to fixed premises, have been considered reasonable. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 153 (1929). In *Carroll*, the Court established the automobile exception to the warrant requirement. *Id.* The Court recognized several reasons for the distinction between automobiles and other private property. These reasons were based on the inherent mobility and open nature of automobiles. *Id.* Consequently, the use and regulation of automobiles diminishes the expectation of privacy that exists in private property. *Id. Accord* United States v. Chadwick 433 U.S. 1, 12-13 (1977) (inherent mobility of automobiles often makes obtaining judicial warrant impractical); Cardwell Warden v. Lewis, 417 U.S. 583, 590-91 (1974) (lesser expectation of privacy in automobile because its function is transportation and it seldom serves as a residence or repository for personal effects); Cady v. Dombroski, 413 U.S. 433, 441(1972) (police-citizen contact with automobiles is substantially greater than police-citizen contact in a home). *Cf.* Coolidge v. New Hampshire, 403 U.S. 443 461-62 (1971) (automobile is not talismanic in whose presence the fourth amendment disappears).

10. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (no expectation of privacy where petitioner admitted he did not believe that a third person's purse would be free from governmental intrusion); United States v. Cassity, 720 F.2d 451, 456 (6th Cir. 1983) (expectation of privacy in parent's home where defendant had lived for twenty-five years, but did not own); United States v. Buckner, 717 F.2d 297, 300 (6th Cir. 1983) (no expectation of privacy in defendant's mother's apartment where defendant did not reside); United States v. Haydel, 649 F.2d 1152, 1154 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982) (expectation of privacy in parent's home where defendant kept records secreted under parent's bed even though he did not reside there).

11. 806 F.2d 1471 (10th Cir. 1986).

12. *Id.*

13. *Id.* at 1475.

14. *Id.* at 1474. Ruckman had installed the rudimentary comforts of home in the cave including a stove, a lantern, a bed and other crude furniture. *Id* at 1475. The cave was located in a remote area approximately 24 miles northeast of St. George, Utah and was under the management of the Bureau of Land Management. *Id.* at 1472. In the opinion, the court makes the distinction that the case was a "natural cave" as opposed to a "man-made cave." *Id.* The court may have made this distinction to point to the fact that the cave was part of the natural landscape, as opposed to a man-made structure erected by Ruckman.

15. *Id.* at 1472. The state arrest warrant was issued when Ruckman failed to appear in state court to answer to a misdemeanor charge.

16. *Id.* at 1474.

officers entered the cave without a search warrant and seized several weapons.[18] Upon his arrival at the cave, the police arrested and jailed Ruckman.[19]

Eight days after Ruckman's incarceration, local authorities returned to the cave again without a search warrant,[20] and seized thirteen antipersonnel booby-trap devices.[21] Ruckman was subsequently charged with possession of an unregistered firearm.[22] Before trial, Ruckman moved to suppress the evidence seized in the warrantless search of his "home."[23] The trial court denied the motion[24] and Ruckman was convicted of the charge.[25]

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the conviction.[26] In its analysis of whether the government-owned cave fell within the ambit of the fourth amendment's protections against unreasonable searches and seizures,[27] the *Ruckman* court refused to consider the cave a "home" for purposes of protection under the fourth amendment.[28] Rather, the court fo-

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17. *Id.* at 1472. Ruckman had attempted to enclose the cave by making a crude door from wooden boards and other materials. *Id.*

18. *Id.*

19. *Id.* at 1472, 1474. Upon entering the cave, the officers seized three weapons. *Id.* at 1474. Ruckman arrived approximately one hour later and informed the officers of a fourth weapon in the cave. *Id.* These four weapons constituted the evidence supporting four of five counts of the federal indictment instituted against Ruckman. *Id.* In the first four counts, he was charge with violating 18 U.S.C. § 1021(a)(1)(1982) which provides in pertinent part:

> Any person who - (1) has been convicted by a court of the United States or of a State of any political subdivision thereof of a felony . . . and who receives, possesses or transports in commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Id.

Ruckman had been convicted of a felony in 1952 in Illinois and this felony was the underlying crime for purposes of §1201(a)(1). *Ruckman*, 806 F.2d at 1475. These first four counts were dismissed during trial for reasons not related to the search at issue.

20. *Id.* at 1474.

21. *Id.* at 1472.

22. The fifth count of Ruckman's indictment was possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d)(1982), which provides in pertinent part: "It shall be unlawful for any person - (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record . . ." *Id.* The penalty for violating this provision is found in 26 U.S.C. § 5871.

23. *Ruckman*, 806 F.2d at 1472.

24. *Id.*

25. *Id.*

26. *Id.* at 1471.

27. *Id.*

28. *Id.* at 1473. The court relied on a very literal interpretation of the term "houses," stating that "the fourth amendment itself proscribes, *inter alia*, an unreasonable search of houses. Without belaboring the matter, we decline to hold that the instant case comes within the ambit of the Fourth Amendment." *Id. But see* Amsterdam, *supra* note 2 at 357 (for fourth amendment purposes, "houses" have been expanded to include apartments, hotel rooms, garages, and also to include business offices, stores, and warehouses, to the extent that they are closed to the public).

cused its attention on Ruckman's status as a trespasser[29] and on the government's regulatory power over its land.[30] Because Ruckman's living arrangements were tentative, and because the government had the power to oust Ruckman at any time,[31] the court concluded that Ruckman did not have a reasonable expectation of privacy.[32]

Although the *Ruckman* court's decision was correct, in overemphasizing the government's regulatory power over its land, the court failed to adequately address the longstanding "reasonable expectation of privacy" test.[33] Moreover, the court failed to consider the

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29. *Ruckman*, 806 F.2d at 1472-73. Although the court stated that "Ruckman was admittedly a trespasser on federal lands," the court failed to explain why Ruckman was trespasser.

In his dissent in the *Ruckman* case, Judge McKay suggested that certain Bureau of Land Management lands are not "Designated Entrance Fee Areas" under 36 C.F.R. § 71.3 (1985), and it was likely that the area in question was of this nature. *Ruckman*, 806 F.2d at 1476. The Secretary of the Interior has issued regulations which state that "no land use authorization is required under the regulation of this part for casual use of public lands." 43 C.F.R. § 2920 1(d) (1985). "Casual use" is defined as "any short term noncommercial activity which does not cause appreciable damage or destruction to the public lands, their resources, or improvements, and which is not prohibited by closure of the lands to such activities." *Id.* § 2920.0-5(k). Ruckman's eight-month residency in the cave may arguably constitute short-term activity based on the statement from Ruckman's attorney that Ruckman was "just camping out there for an extended period of time." *Ruckman*, 806 F.2d at 1473.

30. *Ruckman*, 806 F.2d at 1473 (quoting United States v. Osterlund, 505 F. Supp. 165, 167 (D. Colo. 1981), *aff'd*, 671 F.2d 1267 (10th Cir. 1982). "With respect to its own lands the government has the rights of an ordinary landowner, *i.e.*, to maintain its possession and to prosecute trespassers." *Id.*

The court also cited United States v. San Francisco, 310 U.S. 16 (1940), as support for the proposition that Congress' power over public land is derived from Article IV of the Constitution, and accordingly "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2.

In addition, the *Ruckman* court noted that included in the government's regulatory power of its lands is "the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights." *Ruckman*, 806 F.2d at 1473 (quoting Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917)).

31. *Ruckman*, 806 F.2d at 1473. The court stated that the cave could not be considered a permanent residence in light of the fact that Ruckman could have been ousted at any time by BLM authorities. *Id.* Furthermore, Ruckman's counsel described Ruckman as "just camping out there for an extended period of time." *Id.*

32. *Id.*

33. In its analysis, although the court did discuss the *Katz* test, it did not consider cases involving public telephone booths, *see* Katz v. United States, 389 U.S. 347 (1967), or public restrooms, *see* People v. Triggs, 95 Nev. 436, 506 P.2d 232 (1972), to have any relevance to Ruckman's situation. The *Ruckman* court did examine several "open fields" cases and found them to be more relevant. It apparently was not convinced that these cases were dispositive of the inquiry into Ruckman's situation. *See also* Oliver v. United States, 466 U.S. 170 (1984) (no expectation of privacy in "open fields" because they are usually more accessible to the public and police in ways that a home, an office, or a commercial structure would not be); United States v. Ruscinski, 658 F.2d 741 (10th Cir. 1981) (no expectation of privacy on one's own property that is surrounded by barbed wire fence and No Trespassing signs are posted), *cert. denied*, 455 U.S. 939 (1982). The court also cited several New York cases in its analysis. *See* People v. Smith, 113 Misc.2d 176 448 N.Y.S. 2d 404 (1982) (defendant could

dangerous consequences of its decision. In contrast to other fourth amendment cases, courts have referred to the particular "place" involved when applying the *Katz* test. In these cases, generally the outcome conforms with societal expectations. For example, the Supreme Court has held that the fourth amendment does not protect activities and conduct in open fields because such areas are accessible to the public and to the police.[34] Similarly, the Court has also held that there is a reduced expectation of privacy in automobiles because of their open nature and inherent mobility.[35] This consistent line of cases indicates that judicial focus is not generally on the

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not derive rights from a squatter who had no rights); People v. Sumlin, 105 Misc.2d 134, 431 N.Y.S. 2d 967 (1980) (no expectation of privacy as a trespasser who was wrongfully on premises).

In its conclusion, the court determined that Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) had the greatest relevance to Ruckman's situation. In *Amezquita*, the defendants, as squatters, moved onto land owned by the Commonwealth of Puerto Rico and built structures thereon. *Id.* at 9. The squatters brought a civil rights action against the government when threatened with ejectment. *Id.* The district court ruled for the squatters and the First Circuit reversed on appeal. *Id.* The court held that under the circumstances of that case, a claim that the squatters had an expectation of privacy was "ludicrous." *Id.* at 11. In the court's consideration of what constitutes a "home" for fourth amendment purposes, the First Circuit stated:

> But whether a place constitutes a person's "home" for this purpose cannot be decided without any attention to its location or the means by which it was acquired; that is, whether the occupancy and construction were in bad faith is highly relevant. Where the plaintiffs had no legal right to occupy the land and build structures on it, those *faits accomplis* could give rise to no reasonable expectation of privacy even if the plaintiffs did own the resulting structures.

Id. at 12.

Similarly, in Ruckman's case, the court was willing to assume that Ruckman had a subjective expectation of privacy even though he never made a statement to that fact. The court went on to state, however, that Ruckman's subjective expectation of privacy was unreasonable because he was a trespasser and accordingly, the BLM authorities could have ousted him at any time. *Ruckman*, 806 F.2d at 1473.

34. Oliver v. United States, 466 U.S. 170, 177-181 (1983). In *Oliver*, the Court held that the government's intrusion into an open field is not an unreasonable search even in the presence of barbed wire, or "No Trespassing" signs, or fences, because the public is not barred from viewing the open fields and the asserted expectation of privacy is not one that society recognizes as reasonable. *Id.* The Court further held that the test of the legitimacy of privacy expectation is "not whether the individual chooses to conceal the assertedly private activity, *but whether the government's intrusion infringes upon the personal and societal values protected by the Amendment.*" *Id.* at 182-83. (emphasis added). *But cf.* Katz v. United States, 389 U.S. 347, 361 (1967) ("what a person seeks to preserve as private, even in an area accessible to the public may be constitutionally protected").

35. In United States v. Chadwick, 433 U.S. 1 (1976), the Court articulated a variety of factors which reduce automobile privacy: states' registration and licensing requirements, extensive codes regulations, and frequent police contact as a means of ensuring public safety. *Id.* at 12-13.

Another explanation for the diminished expectation of privacy in automobiles lies in the fact "that its function is transportation and it seldom serves as one's residence or as the repository of personal effects." Cardwell v. Lewis, 417 U.S. 583, 590 (1974). *See also supra* note 9 for a discussion of the automobile exception to the warrant requirement.

"place," but rather on whether the individual can reasonably expect privacy under a given set of circumstances. Admittedly, when in an automobile or an open field, an individual cannot expect the same degree of privacy that he or she expects in a home.[36] As a result, warrantless searches in these cases, are generally not unreasonable because "what one knowingly exposes to the public is not a subject of fourth amendment protection."[37]

The rationale of the open fields cases or the automobile cases would provide more appropriate justification for the warrantless search of the cave. Although Ruckman took precautions to protect his privacy,[38] when he lived in the open he knowingly exposed himself to the public. And accordingly, he could make no justifiable claims for fourth amendment protections. Rather than basing its decision on such a logical analysis, the *Ruckman* court relied on the government's interest in its land and upon Ruckman's lowly status as a trespasser to support its conclusion that Ruckman had no reasonable expectation of privacy.

In its holding, the court not only further delineated individual privacy expectations, but it also introduced a disturbing proposition. The underlying implication of the court's holding suggests that the government's interest in its land is superior to individual privacy interests. Such a proposition has serious repercussions where campers and outdoor enthusiasts are concerned. Consider the plight of a camper who may very well expect some degree of privacy in his tent, in his backpack, or in his sleeping bag. Based on the *Ruckman* court's holding, a camper whose permit has expired may be subjected to an unreasonable search simply because he is "trespassing" on government land.[39] This implication diminishes the importance of individual privacy interests, without giving credence to the "reasonable expectation of privacy" test, which has been the touchstone of fourth amendment adjudications during the past two decades.

In sum, the basis of the *Ruckman* court's holding was inappropriate. The court's reference to the government's regulatory power

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36. *Katz*, 389 U.S. at 351. The rule espoused in *Katz* has as its basis the "plain view" doctrine which permits a warrantless seizure of private possessions when three requirements are met. First, the initial intrusion into the particular area must be lawful. Second, the evidence must be discovered inadvertently. Finally, the items observed must be immediately identifiable as objects of crime or otherwise subject to seizure. Texas v. Brown, 460 U.S. 730, 736-37 (1983). The seizure of property in plain view involves no invasion of privacy. *Id.* at 738. Furthermore, it is a well-settled rule that weapons or contraband found in a public place are subject to a warrantless seizure. Payton v. New York, 445 U.S. 573, 587 (1980).

37. *Katz*, 389 U.S. at 351.

38. Ruckman enclosed the entrance to the cave by fashioning a crude door from boards and other material. *Ruckman*, 806 F.2d at 1472.

39. In a dissenting opinion, Justice McKay discussed such a possibility. *Id.* at 1477 (McKay, J., dissenting).

over its land was relevant. This reference, however, should not have been dispositive of the entire inquiry into whether Ruckman's expectation of privacy was reasonable. If courts place limitations on the extent of fourth amendment protections, they must be sure that these limitations are based upon sound legal reasoning resulting from consistent applications of the "reasonable expectation of privacy" test.

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