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Eavesdropping is a practice as old as society itself. Historically, physical barriers limited the efficacy of most eavesdropping efforts. Developments in electronic technology, however, have now eliminated most of those impediments, making third-party interception of communications relatively simple. The use of various eavesdropping techniques by law enforcement officials to gather information and evidence has long been the focus of much controversy, both as to its social and constitutional implications.

Following a legal debate lasting over forty years, the Supreme Court in *Katz v. United States* partially resolved the constitutional question, hold-
ing that eavesdropping constituted a “search and seizure” under the fourth amendment and was thus subject to the warrant requirement. The Court did, however, sanction eavesdropping under circumstances in which the government first secured a warrant. Such court-ordered surveillance is the subject of a new text, *Wiretapping and Eavesdropping* by Clifford S. Fishman. Professor Fishman is well-qualified to write on this subject. As a prosecutor under the late Frank S. Hogan, the District Attorney of Manhattan, New York City, the author drafted and litigated the validity of more than forty eavesdrops.

The principle focus of the text is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which is the primary statute regulating eavesdropping. But before examining the legal ramifications of eavesdropping, Professor Fishman first explores an extremely difficult problem: when should the prosecutor exercise his discretion to seek an eavesdropping order? It is commendable that the author raises this perplexing question without purporting to answer it fully. Too often, prosecutors plunge into the area of electronic surveillance without seriously considering whether the surveillance will be productive, whether needed evidence can be obtained from other sources, and most importantly, whether the surveillance is worth its potentially enormous costs.

Title III prescribes a rigid warrant procedure. Although some areas of the law can adequately be learned through experience, as the author correctly points out, the law of eavesdropping cannot. *Wiretapping and Eavesdropping*, therefore, will serve as a valuable resource tool. In separate chapters, Professor Fishman fully explores the ingredients of a properly drafted eavesdropping application, establishment of a listening post, the eavesdropping warrant and its execution, and the litigation of a

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7. United States, 316 U.S. 129 (1942), as the touchstone for determining whether a “search and seizure” had occurred within the meaning of the fourth amendment.
9. States were authorized to enact similar legislation which could not be more permissive than Title III. 18 U.S.C. § 2516(2) (1976). For a collection of state statutes regulating eavesdropping, see Fishman, supra note 1, at 6 n.14.
10. These costs include the staffing needed to execute the eavesdrop, the other types of surveillance that might be required, and the possibility of time-consuming hearings at which prosecutors may be required to show the absence of taint; that is, that unlawfully obtained evidence did not contribute to the target’s conviction.
11. Fishman, supra note 1, at 61-146.
12. Id. at 177-92.
13. Id. at 147-76.
14. Id. at 193-270.
motion to suppress eavesdropping evidence. Additionally, the text examines basic problems of probable cause, the requirement that the warrant particularize both the persons and communications to be overheard, standing to contest eavesdropping violations, and taint.

Professor Fishman has included a separate chapter on the use of eavesdropping evidence in connection with the grand jury. Emphasis is placed on the grand jury's use of such evidence to investigate a crime and the questioning of potentially hostile witnesses. Two chapters, although somewhat repetitive, are devoted to the special problems associated with the introduction of tapes and transcripts at trial. The author also includes some investigatory tips for prosecutors and motion and trial strategies for litigators. The latter, however, is too simplified to be a useful resource for the experienced practitioner.

Professor Fishman asserts that he has provided a critique on the subject of electronic surveillance. But, except for the material on minimization, the text is primarily expository. Nevertheless, if the practitioner wants to know when information received from an informer will establish probable cause or when the accused can obtain a hearing on minimization, the text will provide the answer. Moreover, the author's expertise in the area is revealed by his suggestion, for example, on how to use seemingly unfavorable information — the acquittal of the target on an unrelated indictment — in establishing probable cause sufficient to procure an eavesdropping warrant. Numerous helpful suggestions like this appear throughout the book, and sample forms have been provided illustrating how to comply with Title III's warrant procedure.

Unfortunately, Professor Fishman does not discuss the development of the law of wiretapping and eavesdropping. An historical perspective is central to an understanding of Title III's purposes because the law was enacted shortly after the Supreme Court's decisions in *Katz v. United States* and *Berger v. New York*. In essence, Title III was an attempt by

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15. This aspect of eavesdropping is treated in two separate chapters: the legal grounds for suppression, id. at 367-84, and the actual litigation of the suppression motion. Id. at 385-438.
16. Id. at 317-44.
17. Id. at 439-85, 487-516.
Congress to comply with the constitutional considerations identified by the Court in those cases.\textsuperscript{23} \textit{Katz} is particularly important because the Court placed \textit{all} communications for which there is an actual and reasonable expectation of privacy under the protection of the fourth amendment.\textsuperscript{24} In the forty years between \textit{Katz} and \textit{Olmstead v. United States},\textsuperscript{25} there was no legal requirement to obtain a warrant for surveillance unless it was carried out by means of a trespass into the target's quarters.\textsuperscript{26} If the eavesdropping equipment was sophisticated enough to allow conversations to be overheard without committing a trespass, the courts were completely deprived of control over the nature and extent of the surveillance, a consideration which spurred a movement to abolish electronic surveillance altogether. Although placing eavesdropping under certain constitutional constraints, \textit{Katz} nevertheless acknowledged that eavesdropping can be accommodated under the fourth amendment and thus returned its control to the courts.

Also missing from Professor Fishman's work is an examination of the protection afforded to the privacy of communications by \textit{Katz} and whether such protection differs from that afforded by Title III. Commentators have generally neglected this important area and its constitutional ramifications.

The most comprehensive sections of \textit{Wiretapping and Eavesdropping} concern minimization. Under Title III, law enforcement officers executing an eavesdrop warrant are required to "minimize the interception of communications not otherwise subject to interception."\textsuperscript{27} Concluding that this provision was included to safeguard the privacy rights of innocent persons and to comply with the constitutional prerequisites specified in \textit{Berger v. New York},\textsuperscript{28} Professor Fishman identifies and analyzes four varieties of minimization: extrinsic; intrinsic; dual recorder; and after-the-fact.\textsuperscript{29} Pro-


\textsuperscript{24} 389 U.S. at 350-53. Although the Supreme Court in \textit{Berger v. New York}, 388 U.S. 41 (1967), carved out important protections to be incorporated into the warrant procedure whenever surveillance constituted a search and seizure, it was not until \textit{Katz} that the Court squarely decided that the applicability of the fourth amendment depends upon the nature of the conversations overheard, rather than the manner of eavesdropping.

\textsuperscript{25} 277 U.S. 438 (1928). \textit{Olmstead} involved wiretapping which, although not accomplished by a trespass, was a federal crime whose fruits were always inadmissible in federal trials. \textit{See} Nardone v. United States, 302 U.S. 279 (1937). In 1968, the Supreme Court overruled \textit{Schwartz v. Texas}, 344 U.S. 199 (1952), and held that such wiretapping evidence was inadmissible in state trials as well. \textit{Lee v. Florida}, 392 U.S. 378 (1968).


\textsuperscript{28} 388 U.S. at 54-60.

\textsuperscript{29} FISHMAN, supra note 1, at 203-06.
Professor Fishman has devised a comprehensive set of instructions for use by monitoring officers to secure compliance with the minimization requirement. These sample instructions are a model for all prosecutors to follow and are themselves highly informative.

In the first years after Title III's enactment, many lawyers feared that, without a tough minimization requirement, facially valid eavesdropping orders would be converted into general warrants during the execution process. Controlling the officer's execution of an eavesdrop by requiring him to follow minimization instructions was thought to be the best means of establishing that there was a good faith effort to minimize. A number of courts held proof of good faith to be essential for demonstrating compliance with the minimization requirement.

But subjective good faith is no longer legally relevant. In Scott v. United States, the Supreme Court held that, in deciding whether there was compliance with the minimization requirement, courts must judge the officer's conduct by an objective standard, taking into account all the facts and circumstances of the particular case. The author's despair in analyzing this development prevents him from observing the obvious: by rejecting the requirement that officers document the existence of their good faith in attempting to minimize, the Supreme Court may have abandoned the best evidence available concerning whether there was in fact minimization. Only by requiring good faith can courts ever be assured that there was any minimization at all. Thus, the Supreme Court's abandonment of the good faith requirement in favor of an objective test may have been a self-defeating gesture.

There is virtually no treatment of the crucial question of whether prosecutors must show that the surveillance will achieve a proper, ascertainable objective in order to limit the extent of the eavesdropping conducted. Title III is silent on this point, simply providing that the eavesdropping order must terminate when the authorized prosecutor's objective is obtained. There is no statutory requirement that the applicant define the objective of the eavesdropping or communicate it to the court. If prosecutors are not required to state a reasonably ascertainable objective, eavesdropping can last interminably — until the prosecutor, in effect, gets what he wants. This may render the eavesdropping process vulnerable to a con-

30. Id. at 232-40.
31. See authorities cited in id. at 230-31 n.1.
33. The author does, however, advocate delineating the goals of the eavesdrop in the application to the court. Fishman, supra note 1, at 116-18.
stutional attack since it resembles a general warrant.\textsuperscript{35}

Even if the applicant \textit{can} be required to set forth the ultimate objective of the surveillance, what then constitutes a valid objective: simply obtaining evidence of a crime; the indictment of the target; or the location of other potential targets? Moreover, may an authorized objective merely be the subject of the prosecutor's fantasies, or must the objective be reasonably ascertainable based on the existing facts? The courts and commentators have not yet explored these questions, and they are clearly ripe for analysis.

\textsuperscript{35} See, \textit{e.g.}, Berger v. New York, 388 U.S. 41, 54-60 (1967).