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Katz – Variations on a Theme by Berger

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Introduction

Nearly forty years of controversy concerning government electronic eavesdropping on private conversations apparently was settled last year when the Supreme Court decided Berger v. New York and Katz v. United States. The effect of these decisions locks both government electronic bugging and wiretapping practices within the requirements of the search and seizure provisions of the fourth amendment of the United States Constitution.

Berger specifically held unconstitutional a New York statute authorizing court-ordered electronic eavesdropping on private conversations, on the ground that it did not require adherence to the appropriate standards or limitations compelled by the search and seizure provisions of the fourth amendment. The Court emphasized that the statute's outstanding omission was its failure to maintain adequate probable cause standards for judicial review of an eavesdropping application. The requirement of a specific description of the conversation to be overheard was a standard particularly found lacking.

In Katz, the Court imposed fourth amendment requirements on electronic eavesdropping, even though there the government surveillance carefully avoided physical intrusion into the place where the private conversation occurred. The government had placed a listening device on the outside of a telephone booth and had monitored the one-sided telephone conversation of a surveilled suspect.

Although both Katz and Berger dealt with fact situations involving bug-
ging (the use of a concealed microphone to overhear private conversations in a particular place), as distinguished from wiretapping (the interception of a telephone conversation occurring between two places), both decisions clearly are applicable to wiretapping as well. This is particularly true of Katz, which specifically overruled Olmstead v. United States, the case that began the controversy in 1928 by holding that wiretapping was not within the purview of the fourth amendment.

The Olmstead Doctrine

In Olmstead, two troublesome issues were presented; Mr. Justice Black in his dissent in Katz vigorously insisted that the first listed below remains controlling. These issues are: (1) whether the specific language of the fourth amendment limits its protection to tangible articles, and (2) whether actual physical entry into a constitutionally protected space must be shown to render a government search and seizure illegal. Faced with these questions in 1928, Mr. Justice Taft, speaking for the majority in Olmstead, ruled that the specific language of the fourth amendment applied only to material objects subjected to government search and seizure accompanied by a trespass.

The majority in Olmstead ignored the argument that electronic advances could lead to a form of search more fearsome and disruptive of privacy than physical intrusion, for electronic search is an invisible invasion of the room—perhaps from a distance of many miles—and the seizure of incidents of privacy more precious than tangible items. Mr. Justice Brandeis, dissenting in Olmstead, perceived this danger, and predicted that technological advances would further facilitate future invasions of privacy. These predictions have unfortunately come true today. Brandeis noted that when the fourth amendment was adopted, force and violence were the only

3. 277 U.S. 438 (1928) (5-4 decision).
5. Olmstead v. United States, supra note 3, at 464. But see Boyd v. United States, 116 U.S. 616 (1886), and Ex parte Jackson, 96 U.S. 727 (1877), where the Court found a violation of the fourth amendment despite a lack of trespass. In Boyd, the Court declared unconstitutional a law taking allegations as admitted if certain documents were not produced, while in Jackson it applied the fourth amendment to sealed letters intercepted in the mail. The Olmstead Court distinguished letters from telephone conversations since the government has a duty to protect sealed letters in its custody. Olmstead v. United States, supra note 3, at 464. But Mr. Justice Brandeis countered:

There is, in essence, no difference between the sealed letter and the private telephone message. . . . The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject . . . may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him.

Id. at 475-76 (dissenting opinion).
available means of violating its prohibitions; for this reason, trespass was the criterion of violation. But he urged that the interpretation of the Constitution must keep pace with technology, which was making available to the government increasingly sophisticated devices. Echoing Chief Justice Marshall—"we must never forget, that it is a constitution we are expounding"—Brandeis warned that the Court must recognize the underlying rights protected by the Constitution. "To protect [the right to be let alone], 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." (Emphasis added.)

The Law of Wiretapping—A Product of Statutory Interpretation

After Olmstead, the Court did not decide another wiretapping case on a constitutional basis since Congress, partially out of dissatisfaction with Olmstead, passed the Communications Act of 1934. Section 605 of the Act provides in pertinent part:

[N]o person not being authorized by the sender shall intercept any communication [by wire or radio] and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . and no person having received such intercepted communication . . . shall divulge or publish . . . any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto . . . .

In Nardone v. United States (Nardone I), the Court held that Section 605 prohibited wiretapping, and that "the phrase 'no person' comprehends federal agents . . . ." It further held that the introduction at trial of wiretap evidence is a "divulgence" within the meaning of the statute. Two years later, in Nardone II, the use of wiretap evidence for "leads" was also forbidden as "fruit of the poisonous tree." Thus, both direct and de-

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7. Olmstead v. United States, supra note 5, at 478 (dissenting opinion).
11. Id. at 381.
12. Id. at 382.
14. Id. at 341. The "fruit of the poisonous tree" doctrine originated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), a search and seizure case, where Mr. Justice Holmes elaborated: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Id. at 392. Yet the difficult burden of showing wiretapping use falls on its victim, who must work in the dark. Since carefully
derivative evidence obtained by wiretapping is prohibited by Section 605, though the section itself contains no specific exclusionary rule. Section 605 was further applied to the interception of telephone conversations over intrastate wires. This result followed not only from Congress' failure to restrict the section to interstate communications, but also from the fact that messages of interstate and intrastate character pass indiscriminately over the same wires; a wiretapper cannot, therefore, make a distinction. The only way to protect interstate messages from interception and divulgence is to prohibit interception of all messages.

The first limitation upon the coverage of Section 605 appeared in Goldstein v. United States, where the Court decided that one not a party to the intercepted conversation had no standing to object to the use of wiretap information. Mr. Justice Murphy took issue with the majority's analogy to search and seizure cases, by distinguishing the fourth amendment's preservation of personal rights from protection of certain communications media under Section 605.

Although Section 605 contains no express provision which would permit wiretapping when one party to the conversation consents to this interception, the Supreme Court, in Rathbun v. United States, held that listening in via an extension telephone in an adjoining room with one party's consent was not an interception and divulgence under Section 605. This executed taps usually go undetected, law enforcement officials continue using them to obtain leads. For this reason it has been suggested that a prosecutor be required to respond under oath that a wiretap was not employed. See Sullivan, Wiretapping and Eavesdropping: A Review of the Current Law, 18 Hastings L.J. 59, 70 (1966).

15. Evidence procured through wiretapping by a private citizen likewise is inadmissible under Section 605. United States v. Stephenson, 121 F. Supp. 274 (D.D.C. 1954), appeal dismissed, 223 F.2d 336 (D.C. Cir. 1955); but wiretap evidence can be admitted in prosecutions for violation of Section 605, United States v. Gris, 247 F.2d 860, 864 (2d Cir. 1957). Furthermore, the fact that federal officials obtained identical information by wiretapping would not destroy or taint evidence otherwise lawfully acquired, United States v. Coplon, 91 F. Supp. 867 (D.D.C. 1950), rev'd on other grounds, 191 F.2d 749 (D.C. Cir. 1951), for the prosecution has "ample opportunity . . . to convince the trial court that its proof had an independent origin." Nardone v. United States (Nardone II), supra note 13, at 341.

17. 316 U.S. 114 (1942).
18. Id. at 126-27 (dissenting opinion).
20. The consent must be voluntary. However, it is not involuntary if one is awaiting sentence and hopes to receive leniency by his cooperation. See United States v. Zarkin,
rationale was based on an assumption of risk theory.\(^2\) Although Rathbun emphasized the use of a normal extension phone, subsequent lower court decisions have held that consent is the important factor, regardless of the type of device used.\(^2\) Rathbun, furthermore, was only concerned with the act of listening, not with recording. Later cases have admitted such recordings into evidence where there was consent by one party to the recording.\(^2\)

Another major question is the effect of Section 605 on state wiretapping. Despite the all-inclusive wording of the section, many states do have permissive wiretap legislation.\(^2\) The Supreme Court first considered this question in 1952 in Schwartz v. Texas,\(^2\) where it held that, although intercepted communications would be inadmissible as evidence in a federal court, it does not follow that such evidence is inadmissible in a state court. Relying on Wolf v. Colorado,\(^2\) the Court emphasized that even evidence seized unlawfully in violation of the fourth amendment could nevertheless be admitted in a state court. The Court concluded that Congress did not intend to impose a rule of evidence on the state courts, since rules of evidence are

\(^{250}\) F. Supp. 728 (D.D.C. 1966), in which the court said that the same standards which are required to validate a consent in search and seizure should apply to the consent required to intercept a telephone conversation.


\(^{21}\) Rathbun v. United States, supra note 19, at 111:

Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, interception, has not occurred. A contrary result would have meant that a secretary violates the statute and is subject to the penal sanction in Section 501 when she is instructed by her boss to listen in and take notes on a conversation.

\(^{22}\) See, e.g., McClure v. United States, 332 F.2d 19 (9th Cir. 1964), cert. denied, 380 U.S. 945 (1965) ("twin-phone" attachment connected to regular earpiece by means of a rubber tube); United States ex rel. Dixon v. Pate, 330 F.2d 126 (7th Cir.), cert. denied, 379 U.S. 891 (1964) (extension telephone); United States v. Williams, 311 F.2d 721 (7th Cir.), cert. denied, 374 U.S. 812 (1965) (by amplifier of a tape recorder); Carnes v. United States, 295 F.2d 598 (5th Cir. 1961), cert. denied, 359 U.S. 861 (1962) (attachment placed on earpiece of receiver).

\(^{23}\) United States v. Ballou, 348 F.2d 467 (2d Cir. 1965); Wilson v. United States, 316 F.2d 212 (9th Cir. 1963), cert. denied, 377 U.S. 960 (1964); United States v. Williams, supra note 22; Ferguson v. United States, 307 F.2d 787 (10th Cir. 1962), remanded on other grounds, 375 U.S. 962 (1964).


\(^{25}\) 344 U.S. 199 (1952).

\(^{26}\) 338 U.S. 25 (1949). This decision, which held that the federal exclusionary rule did not apply to the states, was later overruled by Mapp v. Ohio, 367 U.S. 643 (1961). Thus, it has been suggested that Schwartz must be considered with care as a precedent in light of Mapp. See Runft, supra note 24, at 38.
formulated by state power. Five years later, the Supreme Court, in distinguishing Schwartz, said in Benanti v. United States that evidence obtained as the result of state wiretapping, without participation by federal authorities, is inadmissible in a federal court since the federal court is not obliged to abide by state rules of evidence. Benanti basically reaffirmed the Nardone cases, but Chief Justice Warren added:

[K]eeping in mind [the] comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy. (Emphasis added.)

This passage can hardly mean anything other than that all state laws permitting wiretapping are invalid. In Pugach v. Dallinger, however, the defendant sought to use Benanti in petitioning a federal district court to enjoin a state district attorney from using wiretap evidence in an impending state proceeding. The Court, in a per curiam opinion, affirmed the denial of the petition on the authority of Schwartz.

27. In attempting to preserve this state power, the Schwartz Court recognized that it was actually condoning the commission of a federal crime:

The problem under § 605 is somewhat different [than an unreasonable search in violation of the fourth amendment] because the introduction of the intercepted communications would itself be a violation of the statute, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts.

Schwartz v. Texas, supra note 25, at 201.


31. 365 U.S. 458 (1961), aff'g 277 F.2d 739 (2d Cir. 1960).

32. The Pugach Court also relied on Stefanelli v. Minard, 342 U.S. 117 (1951), which upheld a denial of an injunction sought to prevent state police from using the fruits of an unlawful search and seizure in a state criminal prosecution. Since the violation of defendant's constitutional right in Stefanelli had already taken place, however, its rationale might properly rest on the authority of Wolf that the states have the power to formulate their own rules of evidence. But in Pugach it was the very introduction of the evidence that constituted the federal crime, and yet the Court refused to enjoin.

Since Pugach was decided only four months after Mapp v. Ohio, 367 U.S. 643 (1961), which overruled Wolf, two courts have held that Mapp neither read the exclusionary rule into Section 605 violations nor overruled Schwartz. Williams v. Ball, 294 F.2d 94 (2d Cir. 1961), cert. denied, 368 U.S. 990 (1962); People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406, cert. denied, 371 U.S. 877 (1962).
Despite Section 605, federal wiretapping continued under an interpretation consistently followed by every United States Attorney General since 1941, with the exception of the present Attorney General, Ramsey Clark. In that year, Attorney General Jackson, speaking for the Department of Justice, advised the House Judiciary Committee that Section 605 did not prohibit the mere act of "intercepting," but rather required both an interception and a divulgence. Jackson further announced that since the Department of Justice was a unity, divulgence of a wiretapped conversation within the Department was not a "divulgence" forbidden by the statute. The Supreme Court has not passed on the question of whether a tap alone violates Section 605. Jackson's interpretation clearly appears erroneous in view of the clause forbidding any "use" of the intercepted message, whether divulged or not. Furthermore, the position that inter-departmental communication is not divulgence defies the plain words of the statute that "no person" shall divulge or use the communication. Such an interpretation extends "the license to wiretap beyond the halls of the Justice Department to the populace as a whole." 

**Bugging**

Electronic eavesdropping by bugging represents an invasion of privacy even more dangerous than wiretapping. Fears of the "big ear" overhearing what is being said in the bedroom, the confessional, the lawyer's office, or even the


It is not surprising, in the wake of the Jackson interpretation, that state law enforcement officials felt free to wiretap with impunity:

The status of state laws authorizing wiretapping is in doubt. It would seem that they are all invalid... But then again, no one really cares. Evidence obtained by state officers and introduced in state courts is admissible under *Schwartz v. Texas*. The fact that it is a crime does not mean that a state officer will be prosecuted for it. Certainly, the state will not prosecute its own officer. It seems equally unlikely that the Department of Justice, at least so long as it continues itself to tap, will vindicate the rights of the unfortunate tapee.

judge's chambers sometimes are well founded. Although carried on since the early days of primitive microphones, bugging has become increasingly insidious through modern electronic developments, notably the miniaturization of radio transmitting equipment. Tiny microphones now appear disguised as suit jacket buttons or as normally friendly olives in martinis.

Unfortunately, the law has not kept pace with modern technology. No federal statute regulates or controls the use of electronic devices. Only seven states prohibit such surreptitious surveillance, and six of these permit court-order eavesdropping. The roots of the Olmstead doctrine grew deeply, and regrettably spread to the first bugging case to reach the Court. In Goldman v. United States conversations overheard by federal agents by means of a "detectaphone" in an adjoining room were admitted as evidence. Since the federal agents were rightfully in the adjoining room, the Court noted that no physical trespass on petitioners' premises took place, so use of the detectaphone, in light of Olmstead, was not violative of the fourth amendment.

Goldman thus extended a trespass-nontrespass distinction to electronic eavesdropping; later cases involving the use of similar devices which required no physical penetration found no violation of the fourth amend-

40. The Federal Communications Commission recently handed down a ruling forbidding the use in eavesdropping of a transmitting device required to be licensed by the FCC, and providing a sanction for its violation. See 47 C.F.R. § 2.701 (1967). Law enforcement officials acting under "lawful authority," however, are excluded from the scope of the regulation. Also excluded are wiretaps, hidden "mikes" and tape recorders, and long distance eavesdropping devices.
41. CAL. PEN. CODE §§ 653h-653j (West 1956); ILL. REV. STAT. ch. 38, §§ 14-1 to 14-7 (1963); MD. ANN. CODE art. 27, § 125A (1957); MASS. GEN. LAWS ANN. ch. 272, § 99 (Supp. 1966); NEV. REV. STAT. § 200.650 (1963); N.Y. PEN. LAW § 738 (McKinney 1967); ORE. REV. STAT. § 165.540(1) (1967). Illinois does not permit court-order eavesdropping. See S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers 430-37 (1959) for a discussion of these statutes.
42. 316 U.S. 129 (1942). Preliminarily, the Court held that overhearing one side of a telephone conversation was not violative of Section 605, since it was neither a "communication" nor an "interception" within the meaning of the act. Id. at 134.
43. The federal agents in Goldman originally planned to overhear conversations by means of an apparatus installed in a small aperture in a partition wall. They obtained access to petitioner's office at night for the installation. Thus, there actually was a trespass involved. When the apparatus failed to work the next day, they employed the detectaphone. Yet the Court found no fourth amendment violation, since the "antecedent" trespass did not aid materially in the use of the detectaphone. Id. at 134-35.
Petitioners in Goldman sought to distinguish Olmstead on the ground that when one speaks on the telephone, he intends his voice to leave the room, while they intended their conversations to be confined within the four walls of the room. The Court thought the distinction "too nice for practical application of the Constitutional guarantee . . . ." Id. at 135.
ment. Nearly twenty years passed before weaknesses appeared in the *Goldman* distinction. In *Silverman v. United States*, police inserted a "spike" microphone under a baseboard and through a crevice, extending it several inches into the other side of a party wall. The microphone's spike made contact with petitioners' heating duct, converting the entire heating system into a sound conductor. The Court concluded that admission of the conversations overheard violated the fourth amendment, "[f]or a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners." The Court stressed that the "decision here...is based upon the reality of an actual intrusion into a constitutionally protected area... We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch." The Court therefore deemphasized the trespass requirement in favor of a "constitutionally protected area" test.

What the Court meant by this test was clarified somewhat in *Lanza v. New York*, a decision that a public jail was not such an area because it lacked the "attributes of privacy." *Clinton v. Virginia* then made the physical


In *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) custom agents employed a "scintillator," a device sensitive to radiation, in the hallway outside defendant's apartment. Defendant subsequently was convicted of concealing smuggled watches which had radium-treated dials. Defendant contended the walls of his apartment were penetrated and his apartment searched by means of the scintillator, but the court, finding no physical penetration or trespass, sustained the use of this device. Even *Katz*, which overruled the *Goldman* concept of a fourth amendment trespassory requirement, might not reach the *Corngold* case. It is unlikely that *Katz* goes beyond overheard conversations.


46. Id. at 500.

47. Id. at 512. Justice Douglas, concurring in *Silverman*, could see no difference between the invasion of privacy here and in *Goldman*. He noted: "[O]ur sole concern should be with whether the privacy of the home was invaded." Id. at 513. Following *Silverman*, Cullins v. Wainwright, 328 F.2d 481 (5th Cir.), cert. denied, 379 U.S. 845 (1964), held that lowering a microphone into a ventilating shaft surrounded by the interior walls of defendant's apartment, was an invasion of a constitutionally protected area and violated fourth amendment rights of persons whose conversations were overheard.

48. Id. at 511: "In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law." The Court thus reiterated what it had said a year earlier in *Jones v. United States*, 362 U.S. 257, 266-67 (1960) (search and seizure). See also *Chapman v. United States*, 365 U.S. 610, 617 (1961).

49. 370 U.S. 139 (1962).

trespass requirements a *reductio ad absurdum*. Relying on *Silverman*, *Clinton* held inadmissible conversations overheard by an amplifying device stuck in a partition wall with a thumb tack, citing it as a physical penetration into a constitutionally protected area; had it merely been taped to the wall, the conversations would have been admissible under *Silverman*.

Well before its decisions in *Berger* and *Katz*, the Court had occasion to review the police practice of using an informer or undercover police agent to engage a suspect in conversation while secretly recording or transmitting the conversation. The Court first considered this practice in *On Lee v. United States*;52 there, a federal agent stationed outside petitioner's laundry overheard incriminating conversations between petitioner and an old acquaintance who was an informer for the Narcotics Bureau. The informer carried a pocket microphone which transmitted the conversations to a receiver operated by the federal agent. On the authority of *Goldman*, the Court held that this was not an unlawful search and seizure since there was no trespass.53

Later, in *Lopez v. United States*,54 the Court restated the controlling consideration. There, an Internal Revenue agent had a wire recorder in his pocket at a meeting with petitioner to discuss a cabaret tax return. An offer of a bribe was recorded and admitted at trial. The admission was held proper since the petitioner should have been aware that the agent could testify to the bribe offer in any event. The Court stated: "Once it is plain that [the agent] could properly testify about his conversation with Lopez, the constitutional claim relating to the recording of that conversation emerges in proper perspective.... *Indeed this case involves no 'eavesdropping' whatever in any proper sense of that term.*"55 (Emphasis added.)


51. 377 U.S. 158 (1964) (per curiam).
52. 343 U.S. 747, *rehearing denied*, 344 U.S. 848 (1952). Mr. Justice Frankfurter, dissenting, urged that *Olmstead* be overruled. *Id.* at 761. Also dissenting, Mr. Justice Douglas admitted he was wrong in voting with the majority in *Goldman*. *Id.* at 762.
53. Cases subsequent to *On Lee* have followed it in similar factual situations, citing it in connection with the nontrespass doctrine of *Goldman*. See *Hunter v. United States*, 339 F.2d 425 (9th Cir. 1964); *United States v. Walker*, 920 F.2d 472 (6th Cir.), *cert. denied*, 875 U.S. 984 (1963); *United States v. Miller*, 316 F.2d 81 (6th Cir.), *cert. denied*, 375 U.S. 955 (1963), *rehearing denied*, 375 U.S. 989 (1964); *United States v. Finazzo*, 288 F.2d 175 (6th Cir. 1961); *United States v. Vittoria*, 284 F.2d 451 (7th Cir. 1960). See *Hajdu v. State*, 189 So. 2d 230 (Fla. Ct. App. 1966), where defendant was convicted of unlawful medical practice upon a detective's testimony as to conversations transmitted to him from a sender hidden in a "front's" purse while she submitted to a medical examination. In reversing, the Florida court found the introduction of his testimony violative of the fourth amendment as applied to the states through the fourteenth.
55. *Id.* at 438-39.
Thus, where an informer or agent secretly records his conversation with a suspect, an assumption of risk reasoning is employed; there is an element of choice involved which is lacking in surreptitious electronic eavesdropping. One risk a person faces in engaging in an incriminating conversation is that the person to whom he is speaking may turn out to be an informant. The Court has long sustained the use of informers in criminal investigations. The defendant cannot really argue an invasion of privacy—he can only complain that his trust in another had been misplaced.

In *Osborn v. United States*, the Court encountered another situation similar to those in *On Lee* and *Lopez*. The petitioner was convicted of attempting to bribe a federal juror. He had engaged an off-duty policeman friend to offer the bribe, but the policeman had a recorder in his pocket and his conversation with petitioner was recorded and later admitted into evidence. The use of this recorder was judicially authorized by two federal judges upon a sworn affidavit by the policeman regarding a similar conversation held previously with the petitioner. Rather than directly resting its decision on *Lopez*, the Court based its holding on these precise circumstances, including the validity of the judicial authorization. However, the Court did not in any way retreat from *Lopez*.

An analogous case, but one not involving the use of an electronic device, is *Hoffa v. United States*. There, a government informer was successful in

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56. *Id.* at 459. Mr. Justice Brennan, dissenting, took issue with this point. He said, "On *Lee* assumed the risk that his acquaintance would divulge their conversation; *Lopez* assumed the same risk vis-à-vis Davis. The risk inheres in all communications which are not in the sight of the law privileged. . . . But the risk which both *On Lee* and today's decision impose is of a different order. It is the risk that third parties, whether mechanical auditors like the Minifon or human transcribers of mechanical transmissions as in *On Lee* . . . may give independent evidence of any conversation." *Id.* at 450. Mr. Chief Justice Warren filed a concurring opinion in *Lopez*, but he stated that *On Lee* was wrongly decided. *Id.* at 441. He distinguished *Lopez* from *On Lee* in that here, the recording was used to corroborate the testimony of a public servant, whereas in *On Lee*, it was used to obviate the need to put a shady informer on the stand. The four dissenting justices also voted to overrule *On Lee*. Thus, a majority of the Court was ready to overrule *On Lee*.

57. An analogous situation appears in cases arising under Section 605 of the Communications Act of 1934 regarding conversations intercepted with consent of one of the parties to the conversation. See cases cited supra notes 19, 22, and 23. The recent ban imposed by the Federal Communications Commission on the use of radio-transmitter microphones to overhear conversations requires the consent of both parties to the conversation before the regulation can be disregarded. See 47 C.F.R. § 2.701 (1967).


60. See 52 Cornell L.Q., supra note 58, at 989: "[T]o the extent that the Supreme Court in *Osborn* disclaims any intention of overruling *Lopez*, it appears that no warrant is necessary for the recording or electronic transmission of a conversation, where a party to that conversation has consented thereto."

becoming a party to the private conversations between the defendant and others in a hotel room. The defendant argued that the informer was in effect a human "bug," planted by the government to overhear the conversations of defendant and his confidants. The Court rejected this argument, emphasizing that the defendant invited the informer to the hotel room, knew at all times that the informer was listening to his conversations, and took the risk that his confidence would be betrayed.62

The Demise of Olmstead

The first aspect of the Olmstead doctrine to be later rejected by the Court was the requirement that the subject of a search and seizure under the fourth amendment must be something tangible. In 1954, the Court in Irvine v. California,63 an eavesdropping case, indicated that intangible conversations may also be seized. A concealed microphone had been placed by state officials successively in the hall, bedroom, and closet of petitioner's home. Since each of these entries involved a trespass, Olmstead did not control, and the eavesdropping was held violative of the fourth amendment. The only objects seized in Irvine, however, were the incriminating conversations. Although the Court recognized that intangible words can be the subject of a search and seizure, the evidence was not excluded because of Wolf v. Colorado. In Silverman, the Court again implicitly recognized that the spoken word is protected by the fourth amendment. Finally, in Wong Sun v. United States,64 the Court explicitly so held, stating:

The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman v. United States [Citations omitted.] that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects."65

The second aspect of the Olmstead rationale, the trespass requirement, was first undermined by Silverman, and later by Clinton. The Katz case ex-

62. Id. at 302:

In the present case, however, it is evident that no interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements . . . [H]e was relying upon his misplaced confidence that [the informer] would not reveal his wrongdoing . . .

Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

The Court in Hoffa cited Lopez as authority.

65. Id. at 485.
pressly overruled both *Olmstead* and *Goldman*, and held that trespass was not a precondition to a violation of fourth amendment rights.\(^6\)

Furthermore, *Katz* found the "constitutionally protected area" test of *Silverman* an inadequate measure of fundamental fourth amendment rights, for once a court found that defendant was in a constitutionally protected area, actual intrusion into that area would still have to be proven by the defendant. The rule may have been merely a corollary to the trespass-nontrespass distinction. In any event, the rule proceeded on the assumption that an individual's right of privacy could be turned on and off like a faucet—there were some areas where a person had a right of privacy and others where no such right existed. Just as the trespass rule depended on the location of the device, the constitutionally protected area rule was contingent on the location of the suspect. The Court held in *Katz* that the "Fourth Amendment protects people, not places."\(^7\)

*Fourth Amendment Standards and the Electronic Search*

Once the Supreme Court ruled in *Silverman* that private conversations were protected by fourth amendment search and seizure provisions, the unanswered question of whether there could be a reasonable search and seizure by electronic eavesdropping became a compelling one. Later, in *Berger* and *Katz*, the Court found that electronic eavesdropping constituted an unreasonable search and seizure in most instances, leaving a narrow opening for court-order eavesdropping in factual situations similar to that of the *Osborn* case—or like the *Katz* case itself. The ability to describe specifically the conversations to be overheard and the fact that only a brief period of eavesdropping time was required highlight these factual settings.

Aside from the problem of meeting the probable cause standard of the fourth amendment, at the time of *Silverman* another obstacle preventing issuance of a warrant for eavesdropping seemed unassailable. This obstacle was founded in the rule laid down by the Supreme Court in *Gouled v. United States*\(^8\) that a reasonable search and seizure could be conducted only where the government had a paramount right to possess the objects sought in the search, such as in the case of stolen property, the instruments of a crime, or contraband. Under the *Gouled* rule, the search for mere evidence was invalid. Clearly, electronic eavesdropping for the purpose of overhearing and

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\(^6\) *Katz v. United States*, 389 U.S. 347, 353 (1967): "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that 'trespass' doctrine there enunciated can no longer be regarded as controlling... The fact that the electronic device employed... did not happen to penetrate the wall of the booth can have no constitutional significance."

\(^7\) Id. at 351.

\(^8\) 255 U.S. 298 (1921).
recording private conversations usually could serve no other purpose than the collection of evidence and did not fit into the Gouled formula.

But recently, in Warden v. Hayden, the Court rejected the long standing Gouled rule. Emphasizing that the only pertinent consideration for reviewing a search and seizure's legality was its reasonableness under fourth amendment standards, the Court dismissed as irrelevant the question of property interests in the objects to be seized.

This left one remaining question: whether government agents could meet the probable cause standard of the fourth amendment in seeking judicial authorization to eavesdrop electronically on private conversations. In other words, could a police officer seeking court permission to conduct an electronic surveillance ever describe with the requisite particularity the conversation he seeks to seize?

New York experimented for a considerable length of time with court-supervised wiretapping. By constitutional amendment in 1938, New York revised the search and seizure provision of its constitution to include interception by telephone communications within its purview. Then, by enabling legislation in 1942, it set out specific statutory provisions authorizing court-order wiretapping. In 1957 this legislation was amended to include electronic eavesdropping.

After the Silverman and Hayden decisions, the New York statute was ripe for challenge. Berger v. New York provided the setting. Berger was convicted on a charge of conspiring to bribe the chairman of the New York State Liquor Authority. An eavesdropping order was obtained from a justice of the New York Supreme Court, as required by statute. The order permitted the installation of a recording device in an attorney's office for a period of 60 days. On the basis of leads obtained from this eavesdropping, a second order was granted permitting the installation of a device in another office for a similar period. In this way, the conspiracy was uncovered, and Berger was convicted after the recordings were admitted into evidence at his trial.

The United States Supreme Court measured the New York statute and the kinds of surveillance procedures it authorized against traditional standards of reasonable search and seizure under the fourth amendment. These standards include: (1) a showing of probable cause; (2) a description with specificity of the object to be seized; (3) notice to the subject of the search.

70. N.Y. Const. art. 1, § 12.
71. LAWS OF N.Y., ch. 924 (1942).
72. LAWS OF N.Y., ch. 879, § 1 (1957).
73. 388 U.S. 41 (1967).
(4) a determined limitation on the time of the search; and (5) a return to the magistrate specifying the items seized. The Court found that the New York statute complied with none of these standards, emphasizing especially its failure to require police agents to describe with specificity the conversation sought to be obtained. Indeed, the Court found that, with rare exceptions, it seemed impossible to comply with this specificity requirement, since the conversations to be overheard would not yet have occurred at the time of the application, and their occurrence in the future was only suspected.

Owing to the extreme difficulty in most cases of determining in advance a conversation's content, the Court concluded that an order issued under the circumstances would amount to nothing less than a general warrant in the nature of a dragnet and, therefore, would be incompatible with fourth amendment principles. Yet such a conclusion, the Court noted, does not lead to absolute exclusion:

It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the "fruits" of eavesdropping devices are barred under the Amendment. On the other hand . . . [t]he Fourth Amendment does not make the "precincts of the home or the office . . . sanctuaries where the law can never reach." . . . But it does prescribe a constitutional standard that must be met before official invasion is permissible.

Justice Douglas, however, warned:

It is, of course, possible for a statute to provide that wiretap or electronic eavesdrop evidence is admissible only in a prosecution for the crime to which the showing of probable cause related. . . . But such a limitation would not alter the fact that the order authorizes a general search. Whether or not the evidence obtained is used at a trial for another crime, the privacy of the individual has been infringed by the interception of all of his conversations. And, even though the information is not introduced as evidence, it can and probably will be used as leads and background information.

Berger thus left the door open to reasonable searches and seizures by electronic eavesdropping, pointing to Osborn as illustrative of circumstances where police activity complied with fourth amendment standards.

As discussed above, Osborn dealt with an informer's secret recording of his own conversation with the petitioner. Although apparently unneces-

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76. Id. at 64. The use of general warrants and writs of assistance, first condemned in Entick v. Carrington, 19 How. St. Tr. 1029 (1765), was outlawed by the framers in drafting the fourth amendment. See Boyd v. United States, 116 U.S. 616, 626-27 (1886).
77. Id. at 63-4.
78. Id. at 66 (concurring opinion).
sary under *Lopez*, the use of the recording device was judicially authorized by two federal judges upon the informer's sworn affidavit. The specificity requirement was easily met since the informer had previously discussed the question with the petitioner. The recording was held admissible into evidence, partly because the judges' authorization was supported by "a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice in the federal court for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations."*79* Because of these "precise and discriminate circumstances, circumstances which fully met the requirement of particularity,"*80* the Court said: "There could hardly be a clearer example of "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment"' as 'a precondition of lawful electronic surveillance.'"*81*

The *Osborn* case, on its facts, was not the best vehicle for a close examination of the constitutionality of an eavesdropping court-order system. The circumstances were indeed precise and discriminate. The conversation overheard could be described with particularity in advance. The fact that the warrant application alleged an affront to the administration of justice, *i.e.*, the attempt to bribe a federal juror, undoubtedly influenced the judges' decision to sanction the secret recording. Yet, since one of the parties to the conversation in *Osborn* had consented to its being monitored, such prior court approval actually was unnecessary, as the *Lopez* case illustrates.

*Osborn* presents a rare fact situation, one that is atypical of police investigations. If it is to be the guideline for the type of eavesdropping cases which will qualify for court order supervision, then the interpretation that *Berger* eliminates nearly all police electronic eavesdropping is compelling. Indeed, there seems to be no other conclusion.

**Berger and Katz—A Reconciliation**

This effect of *Berger* is unchanged by the Supreme Court's decision in *Katz*, despite some public reaction expressing the view that the Court has retreated from its strict ruling in *Berger*. Indeed, this reaction is supported by the dissenting opinion of Mr. Justice Black.*82* In *Katz*, however, the Supreme Court took the logical step that was required to complete what it had begun in *Silverman* and *Berger*. *Katz* resolved the question of whether police violated fourth amendment provisions by attaching an electronic

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80. *Id.* at 329.
81. *Id.* at 330.
eavesdropping device to the outside of a telephone booth, thus permitting them to overhear a conversation without physical entry into the area in which the conversation was taking place. Silverman obviously preserved the fiction of physical penetration, even though the basis of the trespass was an absurdity. It seemed clear after Silverman that the Court would no longer base a constitutional right upon the happenstance of a spike microphone protruding a few inches into an area that was considered to be constitutionally protected. In Katz, the Court specifically abandoned any pretense of requiring this form of trespass and held that the fourth amendment protects persons, not places. In so ruling, the Court came full circle to a direct confrontation with Olmstead, and having rejected the underlying basis of that decision, finally overruled it. At the same time, and for the same reasons, the Court overruled Goldman.

But in applying the fourth amendment to search and seizure by electronic eavesdropping where there was no physical trespass, the Court did not abandon the basic restrictions established in Berger for the issuance of a court order authorizing such eavesdropping. Yet the Court recognized that the notice requirement, applicable in physical search and seizure situations, was not feasible in the secret type of surveillance carried on through electronic eavesdropping.83

The Court therefore dispensed with the notice requirement in electronic eavesdropping cases by specifically stating that a court order could have been obtained under the facts of the Katz case, for the nature of the surveillance there was strictly confined,84 could be described with particularity, and was therefore consistent with the standards enunciated in Berger and Osborn. The Court, therefore, has not retreated in the slightest from limiting authorized electronic eavesdropping only to those situations exemplified by the Osborn case, when the conversation to be overhead can be described in advance with that degree of specificity which will meet the probable cause standards of the fourth amendment.

It is interesting that the Supreme Court in Katz cited the Osborn case as an illustration of the kind of fact situation which would justify the issuance of a court order. As indicated earlier, there was no need for court supervision in Osborn, since it did not involve electronic eavesdropping. The Court's reliance on Osborn perpetuates some confusion between the two

83. Id. at 358 n.22.
84. Id. at 354 n.14: "Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations concerning the placing of bets and the receipt of wagering information."
types of cases. The probable explanation for the Court's consistent reference to Osborn is, frankly, that it is the only available case which on its facts can demonstrate to governmental authorities the kind of investigative situation where the nature of the conversation was fully known in advance and could be described to a magistrate with the specificity required by Berger.

It is important to note that both Berger and Katz dealt with bugging situations and not wiretapping. Katz reaches wiretapping by overruling Olmstead, but nothing in Katz authorizes wiretapping by court order, even if this form of eavesdropping is now under the fourth amendment and even if the conversation to be tapped can be described with specificity, for Section 605 of the Communications Act of 1934 prohibits wiretapping in both federal and state investigations. Clearly no court would find reasonable a form of search and seizure which has been outlawed by Congress.

To avoid this problem, bills have been introduced in Congress to legalize court-supervised wiretapping and bugging for law enforcement investigative purposes.85 In addition, the American Bar Association Project on Minimum Standards for Criminal Justice proposes to offer for acceptance by the American Bar Association standards to achieve the same purpose. These efforts are based on the assumption that court-supervised electronic eavesdropping is feasible and that Katz is an invitation to the legislators to take this step. The narrow confines of this invitation have been discussed. As to the feasibility of court supervision in this area, there has already been one experiment which has been a demonstrated failure.

Since 1942, New York has had a statute authorizing court-supervised wiretapping.86 It was this very statute which Berger struck down. But in the many years of electronic eavesdropping in New York prior to Berger, an opportunity was offered to evaluate the statute's effectiveness. In 1957, this author studied New York's experience87 and found that the greater amount of wiretapping by New York plainclothesmen was carried on without compliance with statutory requirements. Even where court orders were requested, as in the case of wiretapping by investigators of the District Attorney's

85. In the 1961 congressional sessions, four separate bills authorizing wiretapping and electronic eavesdropping were introduced in the Senate: S. 1495 (the Dodd Bill), S. 1086, S. 1822, S. 1221 (the Keating Bill), 87th Cong., 1st Sess. For a discussion of the Dodd and Keating Bills, see Kent, Wiretapping: Morality and Legality, 2 Houston L. Rev. 285, 314-26 (1965). In the 1962 congressional sessions, an Administration-backed bill, S. 2813, 87th Cong., 2d Sess., was introduced, and in 1963, was reintroduced as S. 1908, 88th Cong., 1st Sess. See Hearings on Wiretapping and Eavesdropping Legislation Before a Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st and 2d Sess., at 243 (1961-62). For a discussion on these committee hearings, see Semerjian, Proposals on Wiretapping in Light of Recent Senate Hearings, 45 B.U.L. Rev. 216 (1965).
86. N.Y. C.R.M. PROC. § 813a (McKinney 1958).
office, there was no realistic court supervision; favored judges granted applications for warrants as a matter of form.

As the Supreme Court found in Berger, the applications for court orders were vague and unspecific with regard to the conversations sought to be overheard. Wiretap and bugging installations frequently were left operating for months while the investigators listened to literally thousands of conversations of many different persons—most of whom were not suspected of any criminal activity. The courts made no effort to restrict this eavesdropping activity. In effect, the investigators were conducting a wide-ranging, unlimited, and judicially unsupervised search in the hope of obtaining incriminating statements from the suspect.

Another consequence of Katz is the overruling sub silentio of Schwartz. Prior to Katz, evidence obtained by wiretapping was admissible in state courts in accordance with state rules of evidence. This practice not only condoned the commission of a federal crime; it also constituted the commission of a separate federal crime by the prosecutor, the witness, and the judge. Now that wiretapping has been brought within the purview of the fourth amendment, the Court's ruling in Mapp v. Ohio\(^8\) applies to exclude all evidence obtained by wiretapping.

**Conclusion**

*Katz* and *Berger* are landmark decisions which should give comfort to a nation of free people. It was highly important to place electronic eavesdropping within the coverage of the fourth amendment, for such surveillance techniques constitute an extraordinary form of search and seizure. They are terribly frightening probes into man's innermost thoughts as expressed in speech. Indeed, if it were generally believed that eavesdropping practices were widespread, there would probably be significant inhibition of speech.\(^9\)

It is fitting that the Court should recognize in *Berger* and *Katz* that for electronic eavesdropping, concededly within the fourth amendment, to be lawful, the standard of particular and specific description of the conversations to be searched for and seized must be strictly adhered to. As indicated earlier, this probably means that such investigative techniques will rarely be available to law enforcement officers. With the guidelines now set by the Supreme Court, it is to be expected that law enforcement practices will be

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9. Donald King has argued that electronic eavesdropping presents a prior restraint on expressions and is therefore violative of the first amendment. King, *Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 Dick. L. Rev. 17, 24-30 (1961). He submits "that expression becomes less free and is indirectly curtailed by the fear of such surveillance." Id. at 25. He also suggests that electronic eavesdropping imposes a *direct* restraint, since "certain expression is of a traditionally secret nature." Id. at 29.
kept within the requirement of the fourth amendment. Otherwise, prosecutions will fail and public confidence in the system of justice will be weakened. In recent cases, the Solicitor General has set an example by advising the Court that wiretapping or eavesdropping was practiced at some point in the investigation.90

Encouragement has also come from the present administration's announced choice to enforce the law without using techniques incompatible with a free society. In his 1967 State of the Union Address, President Johnson said:

We should protect what Justice Brandeis called the “right most valued by civilized men”—the right to privacy. We should outlaw all wiretapping—public and private—wherever and whenever it occurs, except when the security of this Nation itself is at stake—and only then with the strictest governmental safeguards. And we should exercise the full reach of our Constitutional powers to outlaw electronic “bugging” and “snooping.”91

The Right to Privacy Act of 1967 would accomplish this objective.92 The only exceptions to the bill’s general prohibition of electronic eavesdropping are those where one of the parties to the conversation consents or where the President authorizes it for the protection of national security.

In the wake of Berger and Katz, it is likely that Congress will pass something less than the law called for by the President. It is to be predicted that a wiretap bill will succeed in Congress which will allow for some court-supervised electronic eavesdropping by law enforcement officers under the formula set out in Berger and Katz. Nevertheless, this should accomplish the President’s purpose if the law is strictly enforced, since such permissive eavesdropping would be applicable only in the rarest of law enforcement situations. A major question yet to be answered is to what extent the Court will expand the narrow invitation for court-order electronic eavesdropping as extended in Berger and Katz. The advances made by the Court in this vital area of individual privacy have been truly significant. However, recent public discussion and efforts in Congress indicate that the dust has not yet settled; the future course of the law is not altogether clear. It is hoped that the Court, now that it has accepted Justice Brandeis’ warnings in Olmstead, will resist any efforts to dilute its recent, long awaited decisions.

92. S. 928, 90th Cong., 1st Sess. (1967) (Long Bill). This bill was added to the Safe Streets Act by the Senate subcommittee. The Safe Streets Act has passed the House, and was approved by the Senate subcommittee.
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