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dant for committing the crime relating to these items, and arrest the suspect. This sequence of events would be entirely consistent with the fourth amendment. Moreover, the system which may be promulgated is consistent with recent Supreme Court decisions establishing definite and effective guidelines for police activity including invasions of privacy (*e.g.* "stop and frisk"[46] and wiretapping situations[47]). In all of these cases the Court is limiting the extent to which the police can invade an individual's privacy without prior judicial approval. Since "the number of searches made incident to arrest far surpasses the number of searches made under authority of a search warrant,"[48] *Chimel* may have a profound effect on police practices.

SUSAN LEVENBERG

CRIMINAL LAW—ELECTRONIC EAVESDROPPING-STANDING TO OBJECT TO THIRD PARTY CONVERSATIONS

Petitioners, Alderman and Alderisio, were convicted of conspiring to transmit murderous threats in interstate commerce in violation of federal law.[1] The court of appeals affirmed their convictions,[2] and the Supreme Court denied certiorari.[3] On petition for rehearing, the petitioners alleged that they had recently discovered that Alderisio's place of business had been the subject of electronic surveillance by the Government. The Government denied that it had intercepted any conversations relevant to the prosecution.[4] The Court, however, reading the Government's response as admitting that Alderisio's conversations had been overheard by unlawful electronic surveillance, granted the petition for rehearing, vacated the judgment of the court of appeals and remanded the case to the district court to determine whether the convictions were tainted.[5] Thereafter, the Government filed a motion to modify the order—the record of such illegal surveillance should be inspected by the trial judge *in camera* turning over to petitioners only those materials relevant to their prosecution. Upon hearing argument on that motion, the Supreme Court agreed to hear the case again.[6] The Court further directed the parties to brief the

46. Terry v. Ohio, 392 U.S. 1 (1968).
47. Katz v. United States, 389 U.S. 347 (1967).
48. Comment, 1966 U. ILL. L.F. 255 at 278.

1. 18 U.S.C. §§ 371, 875(c) (1964).
2. Kolod v. United States, 371 F.2d 983 (10th Cir. 1967).
3. Kolod v. United States, 389 U.S. 834 (1967).
4. In its brief for reargument, the Government asserted that no electronic surveillance was conducted at places owned by Alderisio, but rather was carried out only at premises owned by his associates or by firms which employed him; that Alderisio himself did not have desk space at the subject premises; and finally, that Alderman neither participated in any of the recorded conversations nor had any interest in the premises where the conversations were recorded. Alderman v. United States, 394 U.S. 165, 168 n.1 (1969).
5. Kolod v. United States, 390 U.S. 136 (1968).
6. Alderman v. United States, 392 U.S. 919 (1968).

issues of disclosure and standing with respect to the Government's use of evidence obtained as a result of illegal surveillance. Upon reargument, the Supreme Court vacated the judgment of the court of appeals and remanded the case to the district court. *Held,* one, whose premises have been the subject of illegal surveillance by the Government, has standing to object to the admission of evidence obtained as a result of such illegal surveillance, whether or not he was present or participated in the recorded conversation.[7] *Alderman v. United States,* 394 U.S. 165 (1969).[8]

Although the fourth amendment prohibits unreasonable searches and seizures,[9] there are no procedural methods embodied within it to insure that the prohibition will be carried out. While it may be assumed that such a prohibition would have been self-executing, *Adams v. New York*[10] proved that supposition incorrect. To give full effect to the protection required by the fourth amendment, the Supreme Court formulated the exclusionary rule[11] in the case of *Weeks v. United States.*[12] The essence of the rule is that evidence illegally obtained by federal officers is inadmissible in federal prosecutions. While the rationale behind the rule was to give some effect to the protection against unreasonable searches and seizures afforded by the Constitution,[13] for some time it was viewed merely as a rule of procedure to be followed in federal courts. Thus, in *Wolf v. Colorado,*[14] the Court held that, while the fourth amendment applies to the states through the due process clause, the exclusionary rule, as

7. As to the disclosure issue, the Court also held that any surveillance records to which any petitioner has standing to object should be turned over to him without first being submitted to the trial judge for *in camera* inspection. This note, however, will limit itself to the issue of standing.

8. Other petitioners, Ivanov and Butenko, were convicted of conspiring to transmit information relating to the national defense of the United States to the Soviet Union and of conspiring to have caused Butenko to act as an agent of the Soviet Union without prior notification to the Secretary of State. After their convictions had been affirmed, United States v. Ivanov, 384 F.2d 554 (3d Cir. 1967), certiorari was granted upon the allegation that illegal surveillance had occurred in connection with their convictions. Petitioners' appeals were amended to raise issues identical to those raised in the *Alderman* case, and the two cases were consolidated for argument.

9. U.S. CONST. amend. IV 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 place to be searched, and the persons or things or be seized.

10. 192 U.S. 585 (1904). Police officers searched the defendant's office and seized policy slips and private papers. They had a search warrant for the policy slips, but they did not have one for the private papers. When the defendant objected to the receipt in evidence of the private papers, the Court answered by saying that once evidence has been introduced and proven, it would "not stop to inquire as to the means by which the evidence was obtained." *Id.* at 594.

11. This has been codified into FED. R. CRIM. P. 41 (e).

12. 232 U.S. 383 (1914). A federal marshal with no warrant searched the defendant's room and found papers linking him to a lottery. The papers were admitted into evidence after a motion for return of the property had been refused.

13. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id.* at 394.

14. 338 U.S. 25 (1949).

a means of implementing the fourth amendment, does not apply to the states; and, in *Rowan v. United States*,[15] it was held that evidence illegally obtained by *state* officials was admissible in *federal* prosecutions. The principle endorsed by the Court in *Rowan* was finally overruled in *Elkins v. United States*,[16] where the Court held that any evidence illegally obtained, whether by state or federal officers, is inadmissible in a federal prosecution; and likewise, the *Wolf* decision was finally overruled in *Mapp v. Ohio*,[17] where the Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court."[18] Thus, the exclusionary rule developed as a limitation read into the fourth amendment, rather than merely a rule of procedure to be followed only in federal courts.

Just as it took the greater part of five decades for the Court to determine whether the exclusionary rule was applicable in state prosecutions as well as in federal prosecutions, it took a similar period of time to determine the scope of the protection of the fourth amendment. The first case to consider the problem of whether conversations were within the protection of the fourth amendment was *Olmstead v. United States*.[19] There, the defendant's conversations were overheard by officers who had tapped his telephone from points outside his premises. As a result of information obtained through the wiretap, the defendant was convicted. The Court, affirming the conviction, held that the fourth amendment applied only to material objects, and, without a physical invasion of the defendant's premises, the "search" was not violative of the fourth amendment. Subsequently, in *Silverman v. United States*,[20] the Court confirmed the physical invasion requirement of *Olmstead*, and reversed the convictions of the petitioners. The Court held that where, as in this case, eavesdropping is accomplished by means of an unauthorized physical penetration into premises occupied by the defendant, the evidence so obtained is inadmissible in testimony. Thus, even after *Silverman*, a person's private conversations were only brought within the protection of the fourth amendment when they had been overheard by means of surveillance which physically invaded the person's home.

In *Katz v. United States*,[21] the Court discarded the trespass doctrine of *Olmstead* and *Silverman*. In that case, federal officers had placed a listening device on the outside of a public telephone booth frequented by the defendant.

15. 281 F. 137 (5th Cir. 1922).
16. 364 U.S. 206 (1960). Defendants were indicted in a federal district court for intercepting and divulging telephone conversations. The indictments were based upon evidence unlawfully seized by Oregon law enforcement officers. The defendants moved to have the evidence suppressed, but the district court denied the motion because federal officers had not participated in the seizure.
17. 367 U.S. 643 (1961). The defendant was prosecuted in an Ohio state court for possession of lewd and lascivious materials. Evidence admitted in trial had been unlawfully obtained by police officers who had forcibly entered the defendant's house and handcuffed the defendant while they searched her house.
18. *Id.* at 655.
19. 277 U.S. 438 (1928).
20. 365 U.S. 505 (1961).
21. 389 U.S. 347 (1967).

By means of the listening device, the officers overheard conversations made by the defendant. The Court, reversing the defendant's conviction, held that the fourth amendment protects people, not simply areas, against unreasonable searches and seizures; and, where one justifiably relies upon the privacy which he seeks, it is within the protection of the fourth amendment.[22] Thus, so long as conversations were made with the expectation that they would be private, they were constitutionally protected from unreasonable seizure by the fourth amendment.

Even though the exclusionary rule is a means of implementing the rights set out in the fourth amendment, an individual must establish that he has the requisite standing to invoke the exclusionary rule. Standing is a procedural concept which provides that a person cannot challenge the action of another party unless he can show that he has been injured or that he is threatened with injury.[23] In general, the result of standing has been to limit judicial review. The courts have developed an exclusionary rule to give substance to the rights guaranteed by the fourth amendment yet have applied the concept of standing to limit its application and to avoid deciding constitutional issues.

Historically, standing to suppress evidence unreasonably seized has been based upon the permise that fourth amendment rights are personal rights, and as such, can be invoked only by those whose rights have been violated.[24] Traditionally, the courts have required that the aggrieved person claim some proprietary or possessory interest in either the premises searched or the articles seized before he had standing to suppress evidence at trial.[25] A strict application of the requirement of a proprietary or possessory interest in the premises searched gave only an owner, lessee, or a lawful occupant of the premises standing.[26] Employees[27] and corporate officials[28] were usually denied standing. The essential test was whether or not the person dwelled in the premises: if he did, standing was granted; if he did not, it was denied.[29] A strict application of the requirement of having a possessory or proprietary interest in the articles seized

22. "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.* at 353.

23. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); Massachusetts v. Mellon, 262 U.S. 447 (1923).

24. Goldstein v. United States, 316 U.S. 114 (1942); Coon v. United States, 36 F.2d 164 (10th Cir. 1929).

25. Shurman v. United States, 219 F.2d 282 (5th Cir. 1965), *cert. denied*, 349 U.S. 921 (1955); *In re* Nassetta, 125 F.2d 924 (2d Cir. 1942).

26. Kelley v. United States, 61 F.2d 843 (8th Cir. 1932); Coon v. United States, 36 F.2d 164 (10th Cir. 1929).

27. Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932); Wida v. United States, 52 F.2d 424 (8th Cir. 1931).

28. United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946); Newingham v. United States, 4 F.2d 490 (3d Cir. 1925).

29. United States v. Conoscente, 63 F.2d 811 (2d Cir. 1933); Kelley v. United States, 61 F.2d 843 (8th Cir. 1932).

created a dilemma. If a person claimed an interest in the articles seized, thereby meeting the standing requirement under the fourth amendment, he automatically waived his fifth amendment right against self-incrimination by admitting that he had an interest in those articles.[30] Where a defendant was charged with possession of an item, in order to claim the benefits of the exclusionary rule, he was forced to admit his guilt by claiming an interest in the specified item. However, where a person wished to preserve his right against self-incrimination, he was required to disclaim any interest in the seized articles, thereby failing to meet the standing requirement imposed under the exclusionary rule.[31]

In *Jones v. United States*[32] the Court liberalized the traditional standing requirements. There the Court held that a person had standing to have evidence suppressed when he was legitimately on the premises searched or when the offense charged hinged on the possession of the seized item. The Court eliminated the rigid requirements of either being an owner, lessee, or lawful occupant of the premises searched. By granting standing to seek suppression of an item, the possession of which was the offense charged, the Court did away with the anomaly of forcing a person either to claim or disclaim some interest in the seized article. No longer was one required to choose between his fourth or fifth amendment rights.

Significant in the standing cases is that they each involved situations where only tangible property was seized. While *Katz* was the first case to bring conversational privacy within the protection of the fourth amendment, *Alderman* is the first case to determine *when* a person's conversational privacy has been invaded.

In the instant case, the Court expressed reluctance to depart from the existing rule that neither evidence obtained by unlawful wiretapping or eavesdropping nor its fruits may be used against the person aggrieved by such an invasion of privacy.[33] Thus the Court reasoned that anyone would be entitled to the suppression of evidence which is obtained as a result of electronic surveillance in violation of the individual's fourth amendment rights.[34] Inasmuch as the fourth amendment now protects a person's private conversations as well as tangible property, the Court analogized private conversations to tangible property. The Court reasoned that the fruits of an illegal search are equally in-

30. "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

31. Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932). "Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma." *Id.* at 630.

32. 362 U.S. 257 (1960). District of Columbia police officers searched the apartment that the defendant was staying at under the authority of a warrant. Upon finding narcotics on an outside awning, the defendant was charged with possession of narcotics. The defendant's motion to suppress was overruled on the ground that he had no standing.

33. Instant case at 175-76.

34. *Id.* at 176.

admissible whether they are of overheard third party conversations or tangible property belonging to persons other than a homeowner.[35] The Court follows the *Katz* rule that a person's private conversations are within the protection of the fourth amendment. In addition, the Court extends standing to the owner of premises whenever the Government invades the privacy of his premises, regardless of whether the intrusion is carried out by a physical search and seizure or by electronic surveillance, and regardless of whether the owner of premises is present.

Mr. Justice Harlan dissented in the opinion, reasoning that the traditional rules of standing employed by the Court are totally inapplicable to situations involving infringements of conversational privacy.[36] Justice Harlan would hold, therefore, that standing should be granted only to those who actually participated in the conversations which were illegally overheard.[37] In addition, Mr. Justice Harlan pointed out that inasmuch as the Court extended standing to the owner of premises, to avoid future confusion, it should at least explain the interest required to invoke the special standing being granted.[38]

Mr. Justice Fortas concurred with the Court, but submitted that it should have gone further in its holding. Justice Fortas viewed standing merely as a legal technicality by which the courts allow governmental activity to circumvent the fourth amendment.[39] To completely discard the principle of standing would be directly contrary to precedent; accordingly, he reasoned that the Court should at least follow past decisions fully and grant standing to anyone against whom a search is directed.[40] Inasmuch as the Government conducts an unlawful search and seizure in order to obtain evidence against such a person, Justice Fortas concluded that such a person is surely aggrieved and a victim of an invasion of privacy.[41]

The exclusionary rule as originally announced in *Weeks* provided that one whose premises were subject to an unreasonable search and seizure had standing to object to the admission of evidence seized as a result of such a search. That rule was limited to physical objects, and the Court, in deciding cases involving unauthorized wiretapping and eavesdropping, developed a trespass doctrine to invoke the benefits of the exclusionary rule. *Katz* marked the first instance in which the Court finally discarded the trespass doctrine and recognized that an individual has a right to his conversational privacy. The principal case represents a further application of the requirement of standing to invoke the benefits of the exclusionary rule, thus extending both the scope of standing and constitutional protections afforded to conversational privacy as enunciated in *Katz*. Where under prior law the owner of premises had to show that there

35. *Id.* at 180.
36. *Id.* at 189.
37. *Id.*
38. *Id.* at 195-96.
39. *Id.* at 201.
40. *Id.* at 206-07.
41. *Id.* at 208-09.

had been a physical invasion of his premises before the fourth amendment was deemed to protect conversations occurring on his premises,[42] now he need only show that such conversations had been unlawfully overheard there. Although the decision broadens the scope of those who have standing, thereby giving greater effect to the exclusionary rule, it fails to set down standards in the area as it relates to electronic surveillance. In reaching its decision, the Court fails to adequately discuss the consequences of its holding. Although the Court indicated a willingness to adhere to the rule that fourth amendment rights are personal rights,[43] granting the owner of premises standing where his conversational privacy has not been directly violated at the same time implies a willingness to depart from the personal rights rule. The Court appears to have merged traditional property requirements with an individual's right to conversational privacy as established in *Katz*. While the effect of the decision is to extend the protection afforded to conversations, the Court failed to discuss the apparent conflict between its present and past decisions. Although the Court indicated that the owner of premises has standing to object to conversations unlawfully overheard on his premises, it failed to define the nature of the property interest required to invoke standing. The reasonable consequence is that the lower courts must now determine the nature of that interest. This will not be an easy task. The courts must first determine and understand the rationale behind the present decision which is not apparent. The burden of the lower courts will be further compounded by past decisions which have rejected the requirement that one must have a possessory interest in the premises subjected to an unreasonable search and seizure before he may invoke the exclusionary rule. It seems clear that a person who has only a right to be on the premises cannot claim prejudice or a violation of privacy if he is not a participant in any overhead conversations. Whatever the decision of the lower courts, it is clear that they should have been given more definite guidelines by the Court. It is apparent, therefore, that principles developed for invoking the exclusionary rule in connection with physical property cannot simply be extended to apply to conversations without creating conflicting results. Thus, as electronic surveillance becomes more sophisticated, the Court will undoubtedly have to reconsider its previous position on the standing necessary to invoke the exclusionary rule.

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42. Silverman v. United States, 365 U.S. 505 (1961); Olmstead v. United States, 277 U.S. 438 (1928).

43. Instant case at 174.