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Electronic Eavesdropping under the Fourth Amendment--After *Berger* and *Katz*

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COMMENTS

ELECTRONIC EAVESDROPPING UNDER THE FOURTH AMENDMENT —AFTER *BERGER* AND *KATZ*

I. INTRODUCTION

Two cases recently decided by the United States Supreme Court have effectively revised the existing law with respect to legal methods of electronic surveillance.[1] *Berger v. New York*[2] involved the use of eavesdropping devices placed by New York County law enforcement officials, pursuant to New York law, in the offices of an attorney and a prospective applicant for a liquor license. These devices were used to overhear conversations related to a conspiracy to bribe officials of the State Liquor Authority.[3] Conversations which were overheard and recorded through the use of these devices were used by the prosecution to obtain the indictment and conviction of defendant as a "go-between" for the principal conspirators. In *Katz v. United States*,[4] federal officers had attached a listening device to the outside of a public telephone booth, in order to overhear the petitioner's end of certain telephone conversations. The use of the recorded conversations at trial led to his conviction for "transmitting wagering information by telephone"[5] in violation of a federal statute.[6]

In *Berger*, the Court held the New York statute authorizing issuance of eavesdropping orders unconstitutional as permitting a trespassory intrusion into a constitutionally protected area, in violation of the fourth and fourteenth amendments. Subsequently, in reversing the petitioner's conviction in *Katz*, the Court reinterpreted its meaning of "constitutionally protected area" and rejected the traditional "trespass standard," extending the individual's right to privacy to any situation where electronic surveillance techniques were used without a proper warrant.

The purpose of this Comment is to show the impact of these decisions on the existing law regarding eavesdropping and wiretapping, and the implications arising from these decisions. Some emphasis will be given to the effect in New York State as a result of these decisions, and to proposals which have been made in an effort to comply with the mandate of the Supreme Court.

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1. Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967).
2. 388 U.S. 41 (1967).
3. The use of the devices was authorized by ex parte orders for eavesdropping obtained pursuant to N.Y. Code Crim. Proc. § 813-a (Supp. 1967). This statute provides:

> An ex parte order for eavesdropping . . . may be issued by any judge of the Supreme Court . . . upon oath or affirmation of the District Attorney . . . that there is reasonable grounds to believe that evidence of crime may be thus obtained, and particularly describing the person . . . whose communications, conversations, or discussions are to be overheard.

4. 389 U.S. 347 (1967).
5. *Id.* at 348.
6. 18 U.S.C. § 1084 (1964). This statute in part prohibits the use of a wire communication facility for "the transmission in interstate commerce . . . of bets or wagers . . . on any sporting event or contest."

II. Historical Background

During the Eighteenth Century, English law permitted the issuance of "general warrants" to assist in control over the press. These warrants permitted officers of the Crown to search premises and seize goods without specifying the purpose of the search, the name of the person whose property was the object of the search, or the materials which were to be seized.[7] The American colonies also authorized general searches by "writs of assistance" used in the regulation of trade. These writs gave colonial customs officials complete discretion to search in any suspected places for goods imported in violation of the British tax laws.[8]

The outrage and resentment caused by the general warrants in England and the writs of assistance in the colonies are reflected in the words of the fourth amendment. This amendment prohibits general searches, and establishes "the right of the people to be secure in their persons, houses, papers, and effects . . . ."[9] The United States Supreme Court expanded this purpose in *Boyd v. United States*,[10] stating that the principles of the fourth amendment

> . . . apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the . . . offence; but it is the invasion of his indefeasible right of personal security, personal liberty and personal property, where that right has never been forfeited by his conviction of some public offense. . . .[11]

The fourth amendment protection from unreasonable searches and seizures is an implicit recognition of individual freedom and privacy, declared to be essential to constitutional liberty and as imperative as the "other fundamental rights of the individual citizen. . . ."[12] The fourth amendment limits the courts and federal officials in the exercise of their power. In *Weeks v. United States*,[13] the defendant's home was searched and his personal papers seized by police acting without a search warrant. The Court stated:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no

7. *See generally* N. Lasson, The History and Development of the Fourth Amendment 18-50 (1939).

8. *Id.* at 51-78.

9. The complete text of the fourth amendment reads: "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 to be seized." For a general discussion of the history of the fourth amendment *see* J. Landynski, Search and Seizure and the Supreme Court 19-39 (1966); J. Schuster, Electronic Eavesdropping and the Fourth Amendment 5-11 (1965). *See also* Comment, 66 Colum. L. Rev. 355, 364-66 (1966).

10. 116 U.S. 616 (1886).

11. *Id.* at 630.

12. Ker v. California, 374 U.S. 23, 32 (1963); Gouled v. United States, 255 U.S. 298, 304 (1921). *Cf.* Powell v. Alabama, 287 U.S. 45, 65-68 (1932). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965). *See generally* Long, *The Right to Privacy: The Case Against the Government*, 10 St. Louis U.L.J. 1 (1965).

13. Weeks v. United States, 232 U.S. 383 (1914).

> sanctions in the judgments of the courts which are charged at all times with the support of the Constitution and to which people . . . have a right to appeal for the maintenance of such fundamental rights.[14]

Consequently the Court held that all evidence obtained in violation of the fourth amendment would be excluded in federal trials.[15] The Court has since demanded a strict adherence to the command of *Weeks*, and has ruled that indirect as well as direct use of tangible evidence obtained by illegal means shall be prohibited.[16] The Court, however, refused to apply this "exclusionary rule" to the states[17] until 1961, when *Mapp v. Ohio*[18] held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."[19]

The question of whether the fourth amendment applied to intangible, as well as tangible, objects was first decided in *Olmstead v. United States*,[20] the first wiretapping case to reach the Supreme Court. Telephone conversations between Olmstead and others were intercepted by law enforcement officers, who testified to the conversations at trial. Olmstead contended that wiretapping constituted an unreasonable search and seizure, and argued that the use of such evidence was a violation of the fifth amendment in that it compelled him to give evidence against himself. On the basis of the wiretap evidence, the defendants were convicted of a conspiracy to violate the National Prohibition Act. The Supreme Court held that evidence obtained through wiretapping was not a violation of the fourth amendment, saying: "The Amendment itself shows that the search is to be of *material* things—the person, the house, his papers or his effects."[21] The Court classified conversation as an intangible object not entitled to constitutional protection, and refused to extend the protection of the fourth amendment except to those cases in which the seizure of evidence was accompanied by an *actual, physical trespass* on the premises of the objecting party.[22] Although the Court refused to include conversation within the scope of the fourth amendment, it implied that Congress could enact legislation to protect the secrecy of telephone messages by making them inadmissible in federal criminal trials.[23] In 1934, perhaps as a reaction to the unpopular *Olmstead* doctrine,[24]

14. *Id.* at 392.
15. *Id.* at 398.
16. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). *See also* Marron v. United States, 275 U.S. 192, 196 (1927); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).
17. Wolf v. Colorado, 338 U.S. 25 (1949). There, the Court, after declaring that the "security of one's privacy against arbitrary intrusion by the police . . . (is) implicit in 'the concept of ordered liberty,'" *Id.* at 27, nevertheless based its decision on other considerations. It held that in a prosecution in a state court for a state crime, the fourth amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure. *Id.* at 33.
18. 367 U.S. 643 (1961).
19. *Id.* at 655.
20. 277 U.S. 438 (1961).
21. *Id.* at 464.
22. *Id.* at 464-65.
23. *Id.* at 466.
24. While some feel that the statute was passed in reaction to *Olmstead*, there is no

Congress passed the Federal Communications Act.[25] Section 605 of this Act prohibited the interception and divulgence in federal trials of evidence obtained through wiretapping,[26] and thereafter, cases involving the use of wiretapping, whether by federal or state officials, were disposed of under this section. Any further constitutional arguments concerning the use of electronic eavesdropping were delayed until 1942.[27]

Justice Brandeis, dissenting in *Olmstead*, had prophesized that

> [t]he progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?[28]

Fourteen years later, the first "electronic eavesdropping"[29] case reached the Supreme Court in *Goldman v. United States*.[30] Federal agents used a detectaphone placed against a partition wall between two offices to overhear conversations of the petitioners.[31] On the basis of evidence obtained in this manner, petitioners were convicted on a conspiracy to violate the National Bankruptcy Act. In affirming the conviction, the Supreme Court adhered to the *Olmstead* doctrine, reasoning that the use of a detectaphone to overhear conversations was not a violation of the petitioners' rights under the fourth amendment,[32] since there was no trespass[33] and no seizure of tangible evidence. The Court also discarded the petitioners' contention that the two cases should be distinguished

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evidence of such a cause-effect relationship. *See* Note, *Eavesdropping and the Constitution: a Reappraisal of the Fourth Amendment Framework*, 50 Minn. L. Rev. 378, 388 (1965).

25. 47 U.S.C. ch. 5 (1964).

26. 47 U.S.C. § 605 (1964) [hereinafter referred to as section 605] provides: "no person not being authorized by the sender shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ." *See* Nardone v. United States, 302 U.S. 379 (1937), which construed the statute, regardless of the intent of Congress in passing it, as rendering inadmissible in federal proceedings any evidence obtained through the use of wiretapping.

27. For a general discussion of wiretapping under section 605, and the development of the law under the statute, *see* S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers, 386-406, 411-16 (1959); Symposium, *The Wiretapping-Eavesdropping Problem: Reflections on The Eavesdroppers*, 44 Minn. L. Rev. 813 (1960); Westin, *The Wiretapping Problem: An Analysis and a Legislative Proposal*, 52 Colum. L. Rev. 165 (1952); *See also* J. Schuster, *supra* note 9, at 73-109, 168-202.

28. 277 U.S. 438, 474 (1928).

29. Electronic eavesdropping as used in this context is what is commonly referred to as a "bug," or any electronic device such as a microphone, designed to intercept conversations between two or more persons in one place. It is to be distinguished from wiretapping insofar as the latter method of electronic surveillance is designed to intercept telephone or telegraph communications. For a discussion of the different types of eavesdropping and wiretapping devices *see* S. Dash, R. Schwartz & R. Knowlton, *supra* note 27, at 305-79.

30. 316 U.S. 129 (1942).

31. *Id.* at 131-32.

32. *Id.* at 135.

33. The Court rejected the petitioner's contention that the evidence was tainted because of an initial trespass to install another device which subsequently failed to work, since the trespass did not aid materially in the use of the detectaphone. *Id.* at 134-35.

on the ground that the conversations were intended to be confined within the room, while in *Olmstead* the voices were to be projected beyond the room. The Court said,

> We think . . . the distinction is too nice for practical application of the Constitutional guarantee, and no reasonable or logical distinction can be drawn between what federal agents did in the present case, and state officers did in the *Olmstead* case.[34]

The rule that the fourth amendment protected only "tangible" objects was later rejected in *Irvine v. California*.[35] There, a listening device was placed in the home of petitioner, and later moved to different rooms, by a series of unlawful entries. The Supreme Court denounced the conduct of the police officers as a violation of the fourth amendment, saying that breaking into a home, secreting such a device and then listening to the conversations of the occupants was "almost incredible."[36] Yet the petitioner's conviction was upheld on the then valid ground that evidence seized in violation of the fourth amendment was nevertheless admissible in state courts.[37] The decision presaged what was to be the Court's attitude in *Silverman v. United States*.[38] In *Silverman*, the police inserted a microphone with a spike attached to it into a party wall, until it made contact with a heating duct serving the petitioners' house. Employed in this manner, the device converted their entire heating system into a conductor of sound, enabling the officers to overhear conversations taking place on both floors of the house. Testimony of the officers describing incriminating conversations overheard in this manner was admitted in evidence, and played a substantial part in the petitioners' convictions. The Supreme Court reversed the convictions, implicitly rejecting the *Olmstead* doctrine that the fourth amendment prohibits only the seizure of tangible objects. This was explicitly asserted in a later case, wherein the Court said, "It follows from our holding in *Silverman* that the fourth amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' "[39] Thus, the fourth amendment's protection was extended to intangible objects in the nature of conversasations.

However, the Court's decisions involving eavesdropping and wiretapping have, until recently, underminded only the tangibility aspect of the *Olmstead* rule. The Court's consistent refusal to reconsider other aspects of *Olmstead* and *Goldman* led to the development of a standard requiring that there be a "tres-

34. *Id.* at 135.
35. 347 U.S. 128 (1954).
36. *Id.* at 132.
37. *Id.* at 132-33. The rule applied in this case has, of course, been rendered invalid by Mapp v. Ohio, 367 U.S. 643 (1961). *See* text accompanying *supra* note 19.
38. 365 U.S. 505 (1960).
39. Wong Sun v. United States, 371 U.S. 471, 485 (1962). *See also* Lopez v. United States, 373 U.S. 427, 460 (1963) where the Court stated that "we have held that the fruits of electronic surveillance, although intangible, are within the reach of the Fourth Amendment. . . ."

pass" into a "constitutionally protected area"[40] in order to hold the subsequent eavesdropping an unreasonable search and seizure in violation of the fourth amendment. Thus, an unlawful entry in order to install an eavesdropping device would have been a trespass in violation of the fourth amendment.[41] On the other hand, a radio transmitter concealed on the person of an informer did not constitute a "trespass" under the *Olmstead* and *Goldman* doctrines.[42] At the same time as this "trespass standard" was being so tenaciously supported, it was being diluted into a most superficial doctrine, the Court having held that an unlawful entry onto the premises need not be made. A "spike mike" driven into a wall for the purpose of eavesdropping constituted an unlawful trespass into a constitutionally protected area.[43] Similarly, a "trespass" was accomplished when a listening device pierced an adjoining wall no more than a fraction of an inch.[44]

Once the use of eavesdropping coupled with a "trespass" became recognized as an unreasonable search and seizure,[45] the rule of *Mapp v. Ohio* was made applicable, excluding the use of such evidence in state as well as federal courts.[46] This "trespass standard," therefore, became the basis for decisions in state cases involving eavesdropping, wherein the courts followed the rationale of the Supreme Court.[47]

III. Rationale of *Berger* and *Katz*

A. *Unconstitutionality of Section 813-a*

In *Berger v. New York*,[48] the Court invalidated New York's eavesdropping statute[49] by holding that it did not comply with fourth amendment standards

40. What are considered to be constitutionally protected areas have been indicated in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (a business office); Silverman v. United States, 365 U.S. 505 (1960) (a home); United States v. Jeffers, 342 U.S. 48 (1951) (a hotel room); Jones v. United States, 362 U.S. 257 (1960) (an apartment); Brinegar v. United States, 338 U.S. 160 (1949) (an automobile). *See also* Hoffa v. United States, 385 U.S. 293 (1966).

41. Irvine v. California, 347 U.S. 128 (1954). The lower court's judgment of conviction was affirmed on other grounds. *See supra* note 37 and accompanying text.

42. On Lee v. United States, 343 U.S. 747 (1952). *See also* Lopez v. United States, 373 U.S. 427 (1963). The issues presented in these cases involve the use of a device by a party to the conversation to record and/or transmit the conversation to another. This type of eavesdropping has been distinguished by the Court from third-party eavesdropping, since the person whose conversation is being recorded speaks voluntarily and directly to the person doing the recording and thereby runs the risk that what he says will be repeated or testified to in court. The Court has reasoned that the victim of participant eavesdropping is a victim only of his own "misplaced confidence." See Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's*, 66 Colum. L. Rev. 1205, 1244-46 (1966).

43. Silverman v. United States, 365 U.S. 505 (1960).

44. Clinton v. Virginia, 377 U.S. 158 (1964). The Court reversed without opinion a conviction wherein evidence had been obtained through the use of a listening device which was inserted into the adjoining wall to "about the depth of a thumbtack." 204 Va. 275, 281-82; 130 S.E.2d 437, 442 (1963).

45. Silverman v. United States, 365 U.S. 505 (1960); Irvine v. California, 347 U.S. 128 (1954) (dictum); Clinton v. Virginia, 377 U.S. 158 (1964) (mem.).

46. *See supra* notes 18-19 and accompanying text.

47. *See, e.g.*, People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S.2d 266 (Co. Ct. 1965); *rev'd*, 27 A.D.2d 572, 276 N.Y.S.2d 168 (2d Dept. 1966); *rev'd*, 20 N.Y.2d 346, 229 N.E.2d 589, 287 N.Y.S.2d 12 (1967); Clinton v. Virginia, 204 Va. 275, 130 S.E.2d 437 (1963); *rev'd* 377 U.S. 158 (1964) (mem.).

48. 388 U.S. 41 (1967).

49. N.Y. Code Crim. Proc. § 813-a [hereinafter referred to as section 813-a].

of particularity. Justice Harlan, in delivering the opinion of the Court, maintained that particularity as to conversations and the particular offense involved is especially necessary in an eavesdropping warrant (or ex parte order) because such a technique necessarily "involves an intrusion on privacy that is broad in scope."[50] New York's statute, which authorized ex parte orders for eavesdropping, rather than requiring such specificity so as to prevent unauthorized invasions of privacy, actually permitted general searches by electronic devices. Not only was the statute lacking in the particularity requirements, but it was held to be defective in other respects. The statute failed to require a new showing of probable cause for each extension of the order and failed to require a termination of the authorization once the conversation sought was seized. Furthermore, the statute did not require that notice of the eavesdropping be served upon the aggrieved party, not did it require any showing of special facts which would overcome the necessity for such notice.[51] The Court did not reach the question of the validity of eavesdropping performed without a trespass. In fact, the Court refused to reconsider its holding in *Goldman*, simply citing it as an example of the valid use of an eavesdropping device, sustained by the Court in previous cases.[52]

Consequently, while the *Berger* Court seemingly held to the traditional standards, in holding to the trespass standard, the significance of the case seems to be the fact that underlying the rationale of the decision is a recognition of a constitutional right to be free from unwarranted governmental intrusion on one's privacy.

B. *Rejection of the Trespass Theory*

The advance of electronics has led to the development of highly effective means of eavesdropping which do not require a physical trespass onto a suspect's property in order to intercept his conversations.[53] The trespass standard of *Olmstead* and *Goldman* is inadequate when viewed in light of these modern methods of electronic surveillance and in light of the *Silverman* and *Clinton* decisions.[54]

The Supreme Court faced this problem squarely in *Katz v. United States*,[55] wherein Justice Stewart, speaking for the majority, held that this "trespass standard" is no longer controlling. This decision, in effect, entirely overrules

50. 388 U.S. 41, 56 (1967).
51. *Id.* at 58-60. The Court refused to consider the petitioner's contention that the statute authorized a general search for "mere evidence," stating that this contention was disposed of in Warden v. Hayden, 387 U.S. 294 (1967). *Id.* at 44 n.2. *See* Note, 17 Buffalo L. Rev. 213 (1967). The question of whether the statute contained a satisfactory probable cause requirement was not considered for two reasons. The petitioner and state agreed that the "reasonable ground" requirement of the statute was equivalent to the fourth amendment's "probable cause" requirement. Also, the question did not have to be determined since the statute was deficient on its face in other respects. *Id.* at 55.
52. 388 U.S. at 63.
53. S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers 330-70, (1959).
54. *See* text accompanying *supra* notes 43-44.
55. 389 U.S. 347 (1967).

Goldman, and negates what was the only remaining significance of that case and the *Olmstead* case. In discarding the theory that some areas are constitutionally protected, Justice Stewart held that the fourth amendment protects *people*, not *places*: "what a person knowingly exposes to the public . . . is not a subject of fourth amendment protection" regardless of his presence in what might be termed a constitutionally protected area. However, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[56] Once it is recognized that the fourth amendment protects people, not "areas," "it becomes clear that the reach of [the fourth] amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[57] That is, the absence of a physical trespass has no constitutional significance where the government's activity results in an unreasonable interference with the privacy on which the individual justifiably relied, and where there is no court authorized warrant to justify the search.[58]

IV. Implications of the Rationale

The language of the Court in *Katz*, in rejecting the trespass standard, raises fundamental questions with respect to judging the validity of eavesdropping by law enforcement officials. Undeniably, the individual has a right to be free from unreasonable intrusion on his privacy. However, the question of what is "unreasonable" can no longer be decided in terms of the presence or absence of an unlawful trepass by law enforcement officers seeking to obtain information through electronic surveillance.[59]

In neither *Berger* nor *Katz* did the Court formulate a general "constitutional right to privacy," so as to preclude the use of eavesdropping as a means of law enforcement. In fact, Justice Stewart in *Katz* specifically denied that the fourth amendment guarantees the individual such a general right to privacy.[60] Practically speaking, virtually every governmental action directed against an individual interferes with his privacy to some extent. The question in each case, said Judge Stewart, "is whether that interference violates a command of the Constitution."[61]

Inherent in both the *Berger* and *Katz* decisions is the proposition that the reasonableness of the eavesdropping depends on the existence of a valid warrant in compliance with the fourth amendment, analogous to a search warrant for tangible goods.[62] The Court in both cases ruled that if an eavesdropping warrant is to comply with fourth amendment standards, it must contain all the procedural safeguards currently required for a search warrant for tangible goods. These include the necessity of probable cause for the issuance of the warrant and

56. *Id.* at 351, 352.
57. *Id.* at 353.
58. *Id.*
59. *Id.*
60. *Id.* at 350, 351.
61. *Id.* at 350, n.5.
62. 388 U.S. at 58-59, 63. 389 U.S. at 355-59.

a particular description of the "thing" to be seized.[63] It has been argued that no eavesdropping warrant could describe with sufficient particularity the conversations to be seized since the conversations have not yet come into existence.[64] On the contrary, it is submitted that a carefully drawn warrant could contain the specificity required by the "warrants clause" of the fourth amendment. Like the search warrant, it can describe the object of the search by specifically stating the nature of the conversations sought, and the crime to which they will relate, thereby reducing the danger of an indiscriminate search for incriminating evidence.

While it may be possible for an eavesdropping warrant to provide the requisite protections under the warrants clause, the initial invasion of privacy necessitates additional protections within the traditional framework. Electronic surveillance is a method of search and seizure which the framers of the Constitution could not have considered, and society's demand for effective means of law enforcement is at least as insistent as the individual's right to be "let alone."[65] The standard by which the Supreme Court has traditionally distinguished the reasonableness of the invasion of privacy by electronic means, *i.e.*, the presence or absence of a physical trespass, is no longer valid as a result of *Katz*. Consequently, a new standard is necessary by which to judge the reasonableness of the search by electronic means. An expanded concept of probable cause might provide such a standard.[66] It would not be unreasonable to require that law enforcement officers, in applying for a warrant, assert facts showing that the information sought is necessary in the investigation of a specified crime, that all other reasonable alternative means of obtained the information have been exhausted, and that there is a strong probability that the information sought will be obtained through the use of electronic surveillance techniques. Justice Stewart hinted at such a standard in his concurring opinion in *Berger*. He recognized that "the need for particularity and evidence of reliability in the showing [of probable cause] required when judicial authorization is sought for electronic eavesdropping is especially great."[67] According to Justice Stewart, the fourth amendment requires that the showing of justification match the degree of intrusion. Since electronic eavesdropping is such a broad invasion of privacy, the showing of probable cause must therefore meet a "precise and rigorous standard."[68] A requirement that the government's need to use electronic surveillance be demonstrably superior to the individual's right to be free from such an invasion of privacy would effectively limit its use to those few cases where such a showing could be made. It is suggested that a total prohibition

63. U.S. Const. amend. IV.

64. *See* Note, 18 S.C.L.Q. 835 (1966); *But see* Comment, 66 Colum. L. Rev. 355, 375 (1966). *See also*, Katz v. United States, 389 U.S. 347, 365 (1967) (Black, J., dissenting).

65. Olmstead v. United States, 277 U.S. 438, 476 (1927); (Brandeis, J., dissenting).

66. It should be noted that the probable cause question, certified for review in the Berger case, was not discussed to any great extent. The constitutionality of N.Y. Code Crim. Proc. § 813-a was decided on other grounds.

67. 388 U.S. at 69. *Cf.* Camara v. Mun. Ct. of San Francisco, 387 U.S. 523 (1967).

68. 388 U.S. at 69.

of electronic eavesdropping could provide little more protection for the individual than an expanded application of such a probable cause standard in the issuance of the eavesdropping warrant. In fact, a total prohibition would deprive the government of a useful tool of law enforcement in those cases where the need for its use could be clearly demonstrated.

V. Possible Extension of the Rationale

With the rejection of the trespass standard, there appears to be reason to extend the fourth amendment's protection to search and seizure by means of wiretapping and some forms of participant eavesdropping.[69]

A. *Wiretapping*

Wiretapping was distinguished from third-party eavesdropping solely by reason of the trespass standard. That is, since there was no actual, physical, trespass into a constitutionally protected area, a search by this method, even without a warrant, was not an unreasonable search and seizure in violation of the fourth amendment.[70] *Katz* indicates, however, that because the trespass standard no longer governs, such a distinction is no longer valid. Therefore, it can be argued that wiretapping should be made subject to the same standards as third-party eavesdropping.

While wiretapping evidence is inadmissible in federal courts by reason of section 605 of the Federal Communications Act,[71] this exclusionary rule has not been extended to the states.[72] In *Schwartz v. Texas*,[73] the Supreme Court stated that although introduction of wiretap evidence in the state courts would be a violation of a federal statute, this was simply a factor for states to consider in formulating rules of evidence for their own use.[74] Yet the Court held that any interception and divulgence by the states of telephone communications, without the authorization of the sender, was a violation of section 605.[75] However, under the *Olmstead* rule, such wiretapping was not an unreasonable search and seizure in violation of the fourth amendment, and therefore, though committing a federal crime, the states have been permitted to use wiretap evidence in cases in state courts. It is submitted that *Katz*, in rejecting the trespass doctrine, has brought wiretapping within the purview of the fourth amendment, thus making state wiretapping unconstitutional as well as illegal, unless pursuant to a valid warrant. Consequently, apart from section 605, wiretapping would be an unreasonable search and seizure, in violation of the fourth amend-

69. *See supra* note 42 for a distinction between participant eavesdropping and third-party eavesdropping.
70. Olmstead v. United States, 277 U.S. 438 (1927).
71. Nardone v. United States, 302 U.S. 379 (1937). *See supra* notes 25-26 and accompanying text.
72. *See, e.g.*, People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689 (1962), *cert. denied*, 371 U.S. 877; Schwartz v. Texas, 344 U.S. 199 (1952).
73. 344 U.S. 199 (1952).
74. *Id.* at 201.
75. *Id.* at 203.

ment, unless accomplished pursuant to a valid warrant. However, since the use of wiretapping evidence by the states is illegal, in violation of section 605,[76] it would appear that no valid legal warrant can possibly be obtained in order to comply with the requirements of the fourth amendment. Consequently, it is suggested that *all* wiretapping is an unreasonable search and seizure, and is forbidden in both state and federal practice by virtue of the fourth amendment and section 605.

B. *Participant Eavesdropping*

Participant eavesdropping is that manner of electronic surveillance wherein a party to a conversation with another either records the conversation, or electronically transmits it to a third party.[77] In one type of participant eavesdropping case,[78] an acquaintance engaged the petitioner in conversation. This acquaintance was an informer, which fact was unknown to petitioner, and was equipped with a miniature microphone which transmitted the conversation to a government agent outside the premises who would not otherwise have been able to overhear the conversation. This agent, who was not a participant to the conversation, testified to the conversation at trial. In this case, the Court held that there was no trespass involved, since the petitioner spoke voluntarily to the informer. That the informer betrayed the petitioner's confidence by transmitting the conversation to a third person was of no significance. It is suggested that the rationale of *Katz* could logically be extended to a case of this nature, where the person who testified as to the conversation, was able to overhear it only by virtue of the electronic device employed by the informer. Undoubtedly the petitioner sought to engage in a private conversation with his acquaintance, and under the *Katz* rationale, such a conversation could be protected under the fourth amendment, unless the informer and agent were acting pursuant to a valid search warrant.

Perhaps to be distinguished from this reasoning is the rationale of *Lopez v. United States*.[79] This case involved a conversation between the petitioner and a known government agent, in which the agent recorded the conversation. The recording was entered into evidence at petitioner's trial, in order to substantiate the agent's testimony as to the conversation. The Court held that in this case, there was really no "eavesdropping" involved. The Court reasoned that the government did not use the device to overhear conversations it could not otherwise have heard. The device was used "only to obtain the most reliable evidence possible of a conversation in which the government's own agent was a participant and which that agent was fully entitled to disclose."[80] The Court based

76. *Id.* at 201, 203; Benanti v. United States, 355 U.S. 96, 99, 105 (1957). *See also* Pugach v. Dollinger, 365 U.S. 458, 460 n.2 (Douglas, J., dissenting).

77. *See* On Lee v. United States, 343 U.S. 747 (1952); Lopez v. United States, 373 U.S. 427 (1963).

78. On Lee v. United States, 343 U.S. 747 (1952).

79. 373 U.S. 427 (1963).

80. *Id.* at 439, 440.

its reasoning on the fact that the petitioner had consented to speak with the agent and the risk he took in offering a bribe to the agent "included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."[81]

It is highly improbable that the *Katz* rationale would be extended to this type of situation, where the participant to the conversation himself is the person who discloses the contents of that conversation. This is a situation analogous to one in which the party to the conversation is not equipped with any electronic devices, but simply discloses a private conversation between himself and another. Certainly it is a betrayal of a confidence, but it is doubtful that the fourth amendment could be extended to make such action unlawful.[82] It can be argued, however, that the *Katz* rationale can be applied where a third party is enabled to testify as to the nature of the conversation by reason of the use of an electronic device by a participant to the conversation.

VI. Eavesdropping in New York

A. *Historical Analysis*

New York State has been regulating the use of electronic devices for the interception of communications since 1938, by means of a state constitutional provision[83] which prohibited wiretapping except pursuant to a court order or warrant. In 1942, section 813-a was added to the Code of Criminal Procedure[84] in order to implement this section of the Constitution, by providing procedural requirements under which such a warrant could be obtained. Both provisions were directed solely to the regulation of wiretapping techniques. However, in 1957, an amendment to the Penal Law made it a crime for any person except a law enforcement officer "while acting lawfully and in his official capacity in the investigation, detection or prosecution of crime . . ."[85] to use electronic devices such as microphones or tape recorders to overhear any conversation at which he was not present.[86] While these additions served to curtail the private

81. *Id.*

82. *Cf.* Hoffa v. United States, 385 U.S. 293 (1966) wherein the Court based its decision on grounds similar to those relied on in *Lopez, i.e.*, that the fourth amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Id.* at 302. *See* Osborne v. United States, 385 U.S. 323 (1966) wherein the Court indicated that the use of the recorder was a valid means of surveillance because it was judicially authorized. This may imply that under similar circumstances, the Court would invalidate the use of such a recorder without any court authorization.

83. N.Y. Const. art. I, § 12, provides:

> [T]he right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable grounds to believe that evidence of crime may be thus obtained, and identifying the particular means of communication and particularly describing the person or persons whose communications are to be intercepted and the purposes thereof.

84. N.Y. Code Crim. Proc. § 813-a (1942), *as amended,* [1958] N.Y. Sess. Laws ch. 676, § 1.

85. [1957] N.Y. Sess. Laws ch. 881, § 1.

86. *Id.*

use of eavesdropping techniques, there was as yet no provision controlling the *official* use of such methods.[87] During the following year the Penal Law provisions were revised to remedy this problem, by deleting the blanket authority in favor of law enforcement officers from the prohibtion against eavesdropping, permitting it only if "pursuant to an ex parte order granted pursuant to section 813-a of the Code of Criminal Procedure."[88] Moreover, section 813-a was made applicable to eavesdropping as well as wiretapping.[89] Regardless of the illegality of the means of obtaining evidence, however, the common law rule of admissibility remained unchanged, *i.e.*, evidence, including eavesdropping evidence, obtained by an officer without an order, or with a defective order, was nevertheless admissible in a state criminal proceeding.[90] This rule was revoked in 1962, partially under the influence of *Mapp*,[91] when evidence obtained through unlawful eavesdropping was excluded from any "criminal action, proceeding or hearing" as well as from civil causes tried in state courts.[92]

B. *Application of Berger Rule to Wiretapping Under Section 813-a*

The Court in *Berger* invalidated section 813-a, at least as it applied to eavesdropping orders issued under the statute. Whether the *Berger* rule applied also to wiretapping orders, issued under the same statute, was recently decided by the New York Court of Appeals in *People v. Kaiser*.[93] Judge Keating, speaking for the majority, held that the *Berger* decision affected only that language of section 813-a which permitted a "trespassory invasion of the home by general warrant, contrary to the Fourth Amendment."[94] The court ruled that the Supreme Court's language in *Berger* does not *require* the prohibition of wiretapping orders issued under the statute. However, as a matter of *policy*, the conditions set forth in *Berger* would be applied to wiretapping cases which arise in the future. The main problem in *Kaiser* was the retroactivity issue. The *Kaiser* court rejected any contention that the exclusionary rule of *Mapp* should be given retroactive effect to cases on direct appeal at the time of the *Berger* decision. The court's rationale behind this rule was that the purpose of the exclusionary rule, to which eavesdropping evidence is subject, "is deterrence of future police conduct,"[95] and applying *Berger* retroactively would not "undo the violation of the defendant's rights which have already taken place."[96] There-

87. Also in 1957, § 345-a was added to the N.Y. Civ. Prac. Act, excluding the use in a civil case of any evidence obtained through illegal wiretapping.

88. N.Y. Pen. Law §§ 739, 741 (now §§ 250.00, 10.00, respectively).

89. At the same time, N.Y. Code Crim. Proc. § 813-b, *as amended* (1957), was revised in its entirety, allowing for electronic eavesdropping without a court order under certain circumstances.

90. People v. Defore, 242 N.Y. 13, 150 N.E.2d 585 (1926); People v. Adams, 176 N.Y. 351, 68 N.E. 636 (1903), *aff'd*, 192 U.S. 585 (1904); People v. Katz, 201 Misc. 414, 114 N.Y.S.2d 360 (Co. Ct. 1952).

91. 367 U.S. 643 (1961).

92. N.Y. Civ. Prac. Act § 345-a (now N.Y. CPLR § 4506).

93. 21 N.Y.2d 86, 233 N.E.2d 818, 286 N.Y.S.2d 801 (1967).

94. *Id.* at 101, 233 N.E.2d at 827, 286 N.Y.S.2d at 813.

95. *Id.* at 98, 223 N.E.2d at 825, 286 N.Y.S.2d at 811.

96. *Id.*

fore, the court decided it would apply the *Berger* rationale only "to those cases in which the wiretapping or eavesdropping orders were issued after the date of that decision."[97]

Apart from the retroactivity problem of *Kaiser* it is apparent that the Court of Appeals has dealt with *Berger* as applying only to the eavesdropping provisions of section 813-a. Section 813-a, according to the Court, is valid as it applies to wiretapping. However, it is suggested that this rationale is invalid when viewed in light of *Katz*.[98] If *Katz* can be viewed as bringing wiretapping within the purview of the fourth amendment, the state's practice of permitting wiretapping and the use of wiretap evidence pursuant to court order would not only be a violation of a federal statute and therefore illegal,[99] but would amount to an unreasonable search and seizure under the fourth amendment, since no valid, legal warrant could be obtained. It is suggested, therefore, that even if *Berger* did not apply to wiretapping under section 813-a, the *Katz* decision may very well extend to such wiretapping practices.

C. *New York's Proposal: Article 370*

While the Supreme Court in *Berger* implied that a valid eavesdropping statute could be drafted to comply with the fourth amendment requirements,[100] it did not delineate any specific guidelines for drafting such a statute. Therefore, the essential requirements of any such statute are indicated only by the defects in section 813-a as noted by the Court.

The proposed Criminal Procedure Law would replace section 813-a with an article setting forth the procedures to be followed at each phase of eavesdropping, from application through termination.[101] The article is not restricted solely to remedying the defects of section 813-a, but includes as well a number of restrictions not specifically demanded by the *Berger* decision.[102] The article stresses particularity of description, even to the point of requiring a description of the nature of the conversation sought to be overheard.[103] There must be reasonable ground to believe that a particular crime is involved and that a conversation of a particular person will occur. This conversation must constitute "cogent evidence of such crime"[104] and be material to a particular investi-

97. *Id.* at 99, 233 N.E.2d at 825, 286 N.Y.S.2d at 811. *See also* People v. Morehouse, 21 N.Y.2d 66, 77, 233 N.E.2d 705, 711, 286 N.Y.S.2d 657, 665 (1967). In refusing to give retroactive effect to *Berger*, the court overruled People v. Grossman, 20 N.Y.2d 346, 229 N.E.2d 589, 283 N.Y.S.2d 12 (1967).

98. *See* text accompanying *supra* note 76.

99. Benanti v. United States, 355 U.S. 96 (1957), Schwartz v. Texas, 344 U.S. 199 (1952).

100. 388 U.S. at 63.

101. Proposed N.Y. Crim. Proc. Law art. 370.

102. The revisers' notes state that one such restriction is the requirement that there be no reasonable alternative means for obtaining this information. *But see* Statement of Dist. Att'y Frank S. Hogan, N.Y. County, on July 12, 1967, at the *Hearings on S. 675 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967), where he stated that this restriction is implicitly required by *Berger*, in the Court's treatment of "exigent circumstances."

103. N.Y. Proposed Crim. Proc. Law § 370.15, 2(c).

104. It should be noted that the word "cogent" has never been used in previous

gation or prosecution.[105] The article seeks to limit the eavesdropping to certain stated hours, and in any event terminates at the end of fifteen days.[106] The authority to eavesdrop under Article 370 automatically terminates once the described conversations have been heard and recorded, notwithstanding the fifteen day limit. This reduces the length of time an eavesdropping device may be used if the described conversations are immediately overheard.[107] Any renewal of the warrant must be based on a present showing of necessity.[108] The article requires that return of the warrant be made to the issuing judge,[109] though no such service of return need be made on the aggrieved party.[110]

Another point to be considered as an element of a valid search and seizure is notice. Section 813-a contained no requirement for notice of any kind, and the Supreme Court in *Berger* considered this a defect in the statute. The proposed Criminal Procedure Law attempts to remedy this defect by including a requirement that notice be given in every eavesdropping case.[111] This required notice must be served on the "owner, lessee, or occupant of the premises in which the eavesdropping device is to be installed,"[112] though the person served with notice need not be the person whose conversations are to be overheard. For example, a hotel owner may be served with notice that an eavesdropping device is to be installed in a room on the premises. It is submitted that this provision is inadequate, insofar as it does not require notice to be served on the aggrieved party. However, this defect is partially remedied by another provision requiring that the aggrieved party be served with notice prior to trial if the information obtained is to be used as evidence at trial, and would be suppressible if unlawfully obtained.[113] One of the major purposes of a notice requirement is to afford the aggrieved party an opportunity to move to suppress evidence unlawfully obtained. This provision of the Criminal Procedure Law may adequately serve that purpose and yet not render electronic eavesdropping totally ineffectual, as would be the result if notice to the aggrieved party were required in every case before the "search and seizure" took place. The proposed statute permits prior notice to be postponed in those instances where a showing of exigent circumstances can be made to justify such postponement.[114] There seems to be no reason why notice may not be postponed when the necessity for such postponement is clearly shown to the court, assum-

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statutes as a modification of the word evidence, and there may be question as to the intention of the Committee in inserting this adjective into the proposed statute.

105. N.Y. Proposed Crim. Proc. Law § 370.15, 2(a-c).
106. *Id.* §§ 370.15 2(e), 370.35.
107. *Id.* § 370.35.
108. *Id.* § 370.40.
109. *Id.* § 370.50.
110. However, if the aggrieved party is a defendant, he must be notified of the prosecution's intention to use eavesdropping evidence, before the commencement of trial. N.Y. Proposed Crim. Proc. Law § 375.30.
111. N.Y. Proposed Crim. Proc. Law § 370.50.
112. *Id.* § 370.50(1).
113. *Id.* § 375.30(1).
114. *Id.* § 370.50(2).

ing, of course, that such notice *will* be served on the aggrieved party sometime prior to trial, to afford him an opportunity to move for suppression of evidence which he contends was illegally obtained. It is submitted, however, that a strict standard of necessity must be developed by the courts in determining the justification for postponement of notice. Otherwise, the "exigent circumstances" rule would be nothing more than a mere sham, and would not be a remedy for the "no notice" defect in section 813-a as mentioned by the Court in *Berger*.

It should be realized that any eavesdropping device will necessarily intercept the conversations of all persons who speak within its range. This will be true regardless of how carefully the statute is limited or the use of the device is supervised. The necessity of describing the particular conversations sought will serve to limit the *evidentiary* use of the recorded conversations.[115] However, statutory protection must be provided to prohibit any use of the unrelated conversations which are also intercepted. Particularity in a search warrant for tangible items is required to prevent the seizure of one thing under a warrant describing another.[116] Similarly, under an eavesdropping warrant, police must be prevented from using, directly or indirectly, the conversations of persons not named in the warrant, for information obtained thereby would be the "fruit" of an illegal search.[117] This requirement is an elusive one, and probably the most difficult to enforce. That is, it would be most difficult to discover whether these unrelated conversations had been used in the indirect manner, and therefore the "general invasion of privacy" which would accompany the execution of any eavesdropping warrant might be a fatal defect in many cases.

VII. Conclusion

With the decisions in *Berger* and *Katz*, the Supreme Court has, in essence, modernized the law applicable to electronic eavesdropping. In doing so, it has swept away old standards and clarified others. Yet the decisions leave certain questions unanswered, such as the questions of wiretapping and participant eavesdropping. It is evident from the development of the law and the course the Court is taking on this subject that the Supreme Court has been, and is still, struggling with the concept of a right of privacy for the individual, and whether this right is guaranteed by the Constitution. In this age of little privacy when many see an Orwellian "Big Brother" in every governmental intrusion on one's privacy, the Supreme Court is faced with a difficult task in attempting to achieve the delicate balance between society's need for effective law enforcement and the individual's right to be free from governmental intrusion on his privacy. The number of cases in which eavesdropping or wiretapping evidence is admitted is but a fraction of the total number of eavesdrops or wiretaps accom-

115. N.Y. CPLR § 4506 will exclude the use as evidence of any conversations overheard which were not described in the warrant.

116. Marron v. United States, 275 U.S. 192 (1927). *But see* Harris v. United States, 331 U.S. 145, 155 (1947).

117. *Cf.* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

plished by law enforcement officers throughout the country. The real victim of an invasion of privacy is the person whose home has been "bugged" or whose telephone has been "tapped," where the information obtained evidences no criminal activity, and offers no leads to the police in crime detection. To avoid this problem, and to protect the individual from less than diligent methods of law enforcement, the strictest standards must be established if eavesdropping is to be permitted. While a certain amount of inconvenience will result from a more restricted use of electronic methods of surveillance, the individual will be assured of the protection of his right to be "let alone."

MARY E. BISANTZ

MEDICAL MALPRACTICE—THE MEDICAL AND LEGAL ASPECTS OF THE POST-PROSTATECTOMY URINARY INCONTINENCE SUIT

INTRODUCTION

John Starr had worked as a carpenter and then as a carpenter foreman in Florida, Georgia and Virginia for over twelve years. In 1956 he had become afflicted with mild prostatitis, an inflammation of the prostate gland, and had been treated successfully with antibiotics by his family doctor. When the condition recurred in 1960, Starr went to see Dr. Albert Fregosi, who also treated him conservatively with antibiotics, but the symptoms soon returned. Dr. Fregosi determined that an obstruction of the urinary tract might be the cause of Starr's illness, and he decided upon surgery. In early May of 1961, when Starr was forty-six years of age, the doctor performed a transurethral resection, by which he removed part of Starr's prostate gland, the apparent cause of the obstruction. Following the operation Starr was unable to urinate. Fregosi determined that, because of tissues which had not been removed during the course of the first operation, a second surgical procedure was necessary. Subsequent to this procedure, performed in late May of 1961, Starr complained consistently of urinary incontinence, the inability to hold his water, both at home and at work. He had to wear a plastic bag, diapers and pads, and a penile clamp. However, he found that there was leakage even through the clamp when he was under stress.[1]

During the next year and one half, Starr continued to have intermittent prostate infection and incontinence. He saw a number of doctors and urologists about his condition. Two of the doctors treated him with drugs for about eight months, but they were unable to determine the reason for Starr's urinary incontinence. Finally Starr was sent to Dr. Tom Florence, an Atlanta, Georgia

1. Brief for Appellant at 7-13, Starr v. Fregosi, 370 F.2d 15 (5th Cir. 1966).