

# University of Pennsylvania Law Review

FOUNDED 1852

Formerly  
American Law Register

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VOLUME 127

JUNE 1979

No. 6

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## INVISIBLE SEARCHES FOR INTANGIBLE THINGS: REGULATION OF GOVERNMENTAL INFORMATION GATHERING \*

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The following tale, though it may seem something of a cross between a law school examination and a soap opera, illustrates the current scope of governmental intrusion into our private lives.

William Budd, a gentle young man of slight worldly experience, unwittingly became the enemy of Special Agent Javert, faithful minion of Uriah Heep. Whilst awaiting transportation to his Peace Corps assignment in Laos, William accidentally discovered heroin secreted in a shipment of tariff forms consigned to Uriah, a man whose career ambitions soar beyond his post as District Collector of Customs. Javert learned of William's dangerous knowledge when he overheard William telling his Aunt Hester on the telephone about his find, and Javert took countermeasures. From Uriah's computer, he immediately obtained a printout of William's personal history, which revealed some interesting data. William, better known as Billy, had associated with campus dissidents, sung ribald songs critical of the administration, occasionally smoked pot, and twice had been arrested for participating in peace demonstrations. Since college he had not been gainfully employed, but he had received substantial amounts of cash from an unidentified source. Javert also retrieved from the computer an intriguing printout of Hester's history. Hester was highly placed in the

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\* This Article is based on the Owen J. Roberts Memorial Lecture, delivered 17 October 1978, under the auspices of the Pennsylvania Chapter of the Order of the Coif, the Law Alumni Society, and the University of Pennsylvania Law School.

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conservative Tory Party, and she was Chairman of the Morals Protection League. Curiously, her tax returns showed substantial donations to such suspect organizations as the Abigail Adams Liberation Front, the Nat Turner Memorial Fund, and the Ben Franklin Free Press Association. Her file also contained reports by confidential informants who said that Hester's past was even more colorful: people in her home town claimed that youthful indiscretions had branded her with a reputation for licentiousness.

Armed with this information and his own creative imagination, Javert wrote to the Postmaster and obtained a mail cover<sup>1</sup> for all of Billy's and Hester's mail. He also persuaded an old friend who was an Internal Revenue Service agent to subpoena Hester's bank records for the purpose of uncovering possible fraud in claiming charitable tax deductions. At the same time, Uriah falsely reported to an FBI agent that he had received information from a reliable tipster that Billy and Hester were members of a conspiracy to import heroin from Laos. Upon Uriah's representations to the Justice Department, together with Javert's affidavit reporting conversations about narcotics that he said he had overheard between Billy and Hester and reciting his unsuccessful efforts to infiltrate their organization, a Strike Force attorney obtained a court order to tap Hester's and Billy's telephones and to place hidden microphones in Billy's home.

The mail covers permitted preparation of extensive dossiers identifying Billy's and Hester's friends, relatives, creditors, and banks and tabbing their associations with religious and political organizations. The titles of pamphlets, books, and magazines each had received in the mail were all recorded. Billy's bank records, including his cancelled checks, were retrieved by subpoenas. A correlation of his checks with some otherwise mysterious references in his telephone conversations, plus some routine legwork, supplied a complete picture of Billy's activities for the previous three years. Although no evidence of any criminal conduct was found, the data did disclose some meetings with a young woman under compromising circumstances. An anonymous note from Javert to Billy's fiancée revealing names, dates, and places was enough to end Billy's engagement.

With the cooperation of the Justice Department, Uriah forwarded a complete dossier on Billy to the head of the Peace Corps

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<sup>1</sup> A mail cover is a surveillance procedure by which a record is made of all information appearing on the external cover of any mail addressed to the person under investigation. 39 C.F.R. § 233.2 (1978). For a more detailed discussion of mail covers, see notes 112-29 *infra* & accompanying text.

and informed him that the matter was to be presented before a federal grand jury. Billy was thereupon asked for his resignation from the Peace Corps.

Javert produced a heroin sample for the investigators which he said he found during a routine customs search of mail addressed to Billy from Laos. In testimony before the grand jury, Javert described an incriminating conversation he said he overheard between Billy and a person later identified as Hester, and he revealed the results of the investigation of Billy's bank records showing substantial cash payments to Billy which had been traced to Hester. He also reported Billy's association with political dissident groups which cast doubt upon his loyalty to the United States. An indictment was returned against Billy for illegally importing heroin.

During pretrial proceedings, Billy was notified that his telephone had been tapped and his home bugged. One of his tape-recorded conversations contained references to "rolling stones" and "iron butterflies." In an affidavit accompanying a request for authorization to continue electronic surveillance of Billy, a DEA agent identified these terms as jargon for various kinds of narcotics. The court denied Billy's motions to suppress the recordings. The case never came to trial—the government dismissed the indictment when its star witness, Javert, disappeared somewhere in France.

In the meantime, Hester learned that she was the target of a tax investigation and that an indictment against her was imminent. An employee of the Ben Franklin Free Press Association told her that the Association's files had been searched pursuant to a warrant based on probable cause to believe that she was using the Association as a conduit for illegal political contributions. He also told her he had heard that federal agents were asking a lot of questions about her in her old home town. This news, together with the discovery that her telephones had been tapped, caused Hester to suffer a nervous collapse, and she withdrew from all public life. No indictment was ever sought against her.

Does the Constitution shield Billy or Hester from these governmental incursions into their associations, their mail, their telephone conversations, their homes, and other aspects of their lives? Is any legal redress available in the federal courts for the injuries they have suffered? The short answer to both questions is "no." They are not entitled to notice that their mail is being used to create a data bank.<sup>2</sup> They cannot quash the subpoenas of their bank

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<sup>2</sup> 39 C.F.R. § 233.2(g)(4) (1978). The subject of a mail cover is never apprised of the surveillance unless it is revealed in discovery proceedings. If the

records.<sup>3</sup> No property has been seized that they can retrieve. No evidence has been produced that they can suppress. They are not entitled to prior knowledge of the wiretaps or the buggings;<sup>4</sup> they are notified only after the damage has been done.<sup>5</sup> They are the victims of official corruption, of modern technology, of congressional malfunctions, and of judicial decisions that have whittled away protections of the first, fourth, and fifth amendments.

Zealous efforts of the Supreme Court and of Congress to protect us both from the fact of crime and the fear of crime have left law-abiding Americans today with little more protection from governmental spying, searching, and seizing expeditions than our colonial forebears had from writs of assistance and general warrants. Understanding how we got into this fix requires first a brief historical perspective.<sup>6</sup>

### I. THE COLONIAL EXPERIENCE

In 1761, James Otis, Jr. argued against the validity of writs of assistance in the common pleas court in Boston. John Adams described that argument as the electrifying event that "breathed into this nation the breath of life. . . . Every man of a crowded audience appeared to me to go away as I did, ready to take arms against writs of assistance . . . . Then and there the child Independence was born." <sup>7</sup>

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mail cover does not result in litigation, therefore, the subject never learns of it. *See* United States v. United States District Court, 407 U.S. 297, 318 (1972); United States v. Choate, 576 F.2d 165 (9th Cir.), cert. denied, 99 S. Ct. 350 (1978). *See* note 122 *infra* & accompanying text.

<sup>3</sup> United States v. Miller, 425 U.S. 435 (1976).

<sup>4</sup> 18 U.S.C. § 2518(3) (1976).

<sup>5</sup> 18 U.S.C. § 2518(8)(d) (1976); United States v. Donovan, 429 U.S. 413, 429 n.19 (1977); Katz v. United States, 389 U.S. 347, 355-56 n.16 (1967). If the government does not name the person overheard in its application for a wiretap order, the subject is entitled to notice only in the judge's discretion. Whether post-interception notice is discretionary or mandatory, however, failure to give it will not result in suppression of evidence discovered by the tap. United States v. Donovan, 429 U.S. at 439; United States v. Fury, 554 F.2d 522 (2d Cir.), cert. denied, 433 U.S. 910 (1977); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975) (notice given two years after termination of wiretap but three months before trial); United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973).

<sup>6</sup> For a detailed treatment of the history of general warrants and writs of assistance and of their relation to the origin of the fourth amendment, see J. LANDYNSKI, SEARCH AND SEIZURE IN THE SUPREME COURT (1966); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969).

<sup>7</sup> LASSON, *supra* note 6, at 59. For an account of the legal theories regarding the validity of writs of assistance and the outcome of the case, see *id.* 59-65.

Writs of assistance began their legislative life in England in 1662.<sup>8</sup> They were tax collection devices issued under the seal of the English Court of Exchequer, commanding all officers and subjects of the Crown to assist in their execution. Under such writs, any person in the company of a civil officer could search any house, shop, warehouse, or other facility to find and remove uncustomed goods. If resistance was offered, the searchers could break down the doors and open any chests or packages in seeking untaxed goods. Probable cause was not required to support issuance of the writs, and they were valid for the entire lifetime of the reigning sovereign. The writs were not returnable at all after execution. The only limitations were that the objects of the search were supposed to be uncustomed merchandise, the writs could not be used as warrants of arrest, they could not be executed in the nighttime to search any land structure, and a civil officer had to be present during their execution.<sup>9</sup>

Tax collectors have always been unpopular, but the colonial hatred for writs of assistance was based on concerns much more profound than those that motivated California taxpayers to support Proposition 13. The odious features of writs of assistance were the unbridled discretion given public officials to choose targets of the searches, the arbitrary invasion of homes and offices to execute the writs, and the inability to prevent the searches, to recover the objects seized, or to receive recompense for injuries suffered from the intrusion.<sup>10</sup>

The founders' distaste for writs of assistance was matched by their hatred for general warrants. General warrants were used to discover evidence of disloyalty or opposition to the Crown. Like writs of assistance, they were creatures of the Executive. They gave agents of the Crown unlimited discretion in choosing the persons to be searched, the things to be seized, and the means to be used in accomplishing both aims.<sup>11</sup>

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<sup>8</sup> Writs of assistance, so called because they required all officers and subjects of the Crown to assist those executing the writ, were a form of general warrant for the search and seizure of smuggled goods. They were first used during the reign of James I, although the first parliamentary authorization for writs of assistance came in 1662. While such writs were seldom used in England, they were issued frequently in the colonies. See authorities cited in note 6 *supra*.

<sup>9</sup> See LASSON, *supra* note 6, at 53-55.

<sup>10</sup> See LANDYNSKI, *supra* note 6, at 40 (Patrick Henry's views); LASSON, *supra* note 6, at 59-60 (James Otis's argument in the *Writs of Assistance Cases*), 75 (petition of the Continental Congress to George III in 1774).

<sup>11</sup> General warrants customarily authorized the King's messengers to arrest any person suspected of responsibility for the publication of offensive papers and to seize all of their books and papers from any suspected premises. Lasson cites a

Crowns have often made uneasy headrests; in 1538, royal insomnia reached such proportions as to require enactment of the first of the infamous ordinances requiring licensing of books and restricting printing and publication.<sup>12</sup> These measures proved inadequate to kill the underground press or to quell the mounting opposition to the government. The Court of Star Chamber and the Privy Council accordingly imposed more and more stringent penalties upon persons suspected of subversion and increasingly authorized searches and seizures of anyone or anything that might disturb the Crown's sense of security. The barest suspicion that a person harbored ill thoughts against the government was enough to bring the oppressive force of a general warrant upon him.<sup>13</sup>

The immediate object of a general warrant was the discovery of tangible things—books, documents, and private writings—that could be used as evidence against the author, printer, or publisher. But the ultimate aim was to discover and to suppress intangibles—ideas—those dangerous essences of the human mind. No person in the realm was immune from general warrants borne by the messengers of nervous sovereigns.<sup>14</sup>

The abuses of general warrants led to a series of lawsuits which rank among the most famous cases in English jurisprudence. One of

number of egregious examples of the limitless discretion granted to the messengers, including a Privy Council order to search for "all manner of letters and papers that may concern the State" and another "to make searche for all letters, bookes or writings whatsoever that may concern in your judgments matter that hath been or may be intended to be moved in Parliament, and especially suche notes, collections, books or papers as containe matter touching the establishment of the Crowne of England." LASSON, *supra* note 6, at 26 n.50 (quoting ACTS OF THE PRIVY COUNCIL 291, 392 (J. Dasent ed. 1895) [hereinafter cited as Dasent]). Regarding the means permitted, Lasson quotes from a warrant issued in 1593 by the Court of Star Chamber authorizing the arrest, search, and torture of the suspects "to be used at such times and as often as you see fit." LASSON, *supra* note 6, at 27 (quoting C. TUCKER-BROOKE, WORKS AND LIFE OF CHRISTOPHER MARLOWE (1930)).

<sup>12</sup> See LASSON, *supra* note 6, at 24.

<sup>13</sup> To cite one example, a Privy Council warrant was issued in 1596 for the apprehension of a certain printer, upon information "which maye touche" his allegiance, with authority to search for and seize "all bookes, papers, writings, and other things whatsoever that you shall find in his house to be kept unlawfully and offensively, that the same maie serve to discover the offense wherewith he is charged."

*Id.* 26, 27 (quoting Dasent, *supra* note 11, at 425).

<sup>14</sup> The arrest of John Wilkes, then a member of Parliament, and the seizure of his books and papers under a general warrant provided the occasion for one of the most celebrated cases in the law of search and seizure. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (1763). See *Money v. Leach*, 3 Burr. 1692, 97 Eng. Rep. 1050 (1765); *Huckle v. Money*, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763). Issuance of general warrants against members of Parliament was not unusual. See LASSON, *supra* note 6, at 31-32.

them, *Entick v. Carrington*,<sup>15</sup> became a cornerstone of American constitutional law. In 1762 Lord Halifax, Secretary of State, issued a warrant which was specific regarding the person to be searched, John Entick, but general in terms of the papers to be sought. Entick's home was ransacked pursuant to this warrant and his private papers taken. Entick brought an action against the searchers and won a great victory, not only for himself, but also for the cause of freedom. In his classic opinion, Lord Camden observed that it was intolerable that a person's "house is rifled" and "his most valuable secrets are taken out of his possession, before the paper, for which he is charged, is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper."<sup>16</sup> Defense counsel argued that the warrant should be upheld because it served as "a means of detecting offenders by discovering evidence."<sup>17</sup> Lord Camden rejected the argument, stating that even in crimes "more atrocious than libeling," the law "provided no paper-search . . . to help forward the conviction."<sup>18</sup> He added:

"It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; . . . [a] search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."<sup>19</sup>

## II. THE EARLY HISTORY OF THE FOURTH AMENDMENT

From the carefully documented history of the adoption of the fourth amendment,<sup>20</sup> we know that the draftsmen were well aware of the travails and triumphs of Entick and the ordeals suffered under the tyrannical reign of the Privy Council and the Court of Star Chamber. The amendment was also rooted in the colonial experience with arbitrary governmental action, which had surfaced not only in rummaging searches by customs officers, but also in other deprivations of freedom.

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<sup>15</sup> 19 How. St. Tr. 1029 (1765). A shorter version is reported at 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765).

<sup>16</sup> *Id.* 1064.

<sup>17</sup> *Id.* 1073.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, quoted in *Boyd v. United States*, 116 U.S. 616, 629 (1886).

<sup>20</sup> See, e.g., authorities cited in note 6 *supra*.

The founding fathers had never heard the phrase "the right to be let alone,"<sup>21</sup> and they could not anticipate the invention of telephones, computers, data banks, or any of the electronic miracles of potential mischief surrounding us. They were, however, fully sensitive to the dangers to a free people caused not only by clumsy execution of writs and warrants, but also by the chilling knowledge of the existence of unbridled official power to break and enter, to spy, to probe, and to seize papers and personal effects.<sup>22</sup> They valued property, but they also valued intangibles. The men who sought to assure us an inalienable right to pursue happiness could not possibly have been oblivious to the needs of the human spirit.

History can never reveal the founding fathers' thoughts about electronic surveillance, but history does warn us of the dangers of oppression and the fragility of freedom when the dominant members of society, rightly or wrongly, believe themselves threatened.

The language of the fourth amendment is both familiar and elusive. The warrant clause assures us that warrants will not issue without probable cause, supported by oath or affirmation, particularly describing the places to be searched and the persons or things to be seized. "Probable cause" is nevertheless a highly elastic concept. Even more elasticity is supplied by the reasonableness clause.

History can illuminate some aspects of the draftsmen's intent in writing these glorious ambiguities, but history alone cannot teach us how to make the fourth amendment a living force in a constantly changing world. The vitalizing principle must always be the effort to adapt those constitutional concepts to the ever-changing demands of a complex, pluralistic society.

Until the late nineteenth century, the Supreme Court was called upon only rarely to interpret the fourth amendment.<sup>23</sup> The sparsity of decisions is not at all surprising. Police activities were conducted almost entirely by state and local police, and the fourth amendment was not applied to such state action until 1949.<sup>24</sup> Federal law enforcement officers formed a tiny band; they were primarily customs and revenue agents. Many decades were to pass

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<sup>21</sup> Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

<sup>22</sup> See Hufstедler, *The Directions and Misdirections of a Constitutional Right to Privacy*, 26 RECORD A.B. CITY N.Y. 546 (1971).

<sup>23</sup> The Supreme Court dealt with the fourth amendment in only five cases prior to the October term of 1885: *Ex parte Jackson*, 96 U.S. 727, 733 (1877); *Ex parte Milligan*, 71 U.S. 2, 119 (1866); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855); *Smith v. Maryland*, 59 U.S. 71, 76 (1855); *Luther v. Borden*, 48 U.S. 1, 67 (1849).

<sup>24</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).



before their number would be swelled by thousands. Moreover, remedies for fourth amendment violations had yet to be developed.

That picture changed in 1886 when the Supreme Court decided *Boyd v. United States*.<sup>25</sup> The Court held that compelled production of incriminating documentary evidence was a violation of the fourth amendment, that introduction of the evidence in a criminal proceeding was a violation of the fifth amendment, and that evidence unconstitutionally obtained was inadmissible at trial. Although *Boyd* was a great constitutional case, its factual setting was ordinary. The government instituted a forfeiture proceeding against the defendants for importing merchandise in violation of the revenue laws. Under a customs statute, the government obtained a court order requiring the defendants to produce a business invoice for previously imported merchandise. The statute required the defendants either to produce the invoice or to confess the charge against them.<sup>26</sup>

The Court held unanimously that the statute was an unconstitutional violation of the privilege against self-incrimination. The document was produced by compulsion, and its use at a quasi-criminal trial made the subject of the court order a witness against himself.<sup>27</sup> The Court divided, however, on the fourth amendment point. The concurring Justices did not believe that the order for production authorized any unreasonable search or seizure of the defendants' "house, papers, or effects."<sup>28</sup> Mr. Justice Bradley, speaking for a majority of the Court, held that the compulsory production of the defendants' private papers was a search and seizure within the meaning of the fourth amendment even though the government did not physically intrude in any way onto the defendants' premises.<sup>29</sup>

In supporting his expansive reading of the fourth and fifth amendments, Mr. Justice Bradley recited the history that preceded adoption of the fourth amendment, relying heavily on Lord Camden's opinion in *Entick v. Carrington*.<sup>30</sup> His eloquent exposition of the fourth and fifth amendments became one of the most fre-

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<sup>25</sup> 116 U.S. 616 (1886).

<sup>26</sup> *Id.* 619-20.

<sup>27</sup> *Id.* 634-35.

<sup>28</sup> *Id.* 638-41.

<sup>29</sup> *Id.* 634-35.

<sup>30</sup> 19 How. St. Tr. 1029 (1765). See *Boyd v. United States*, 116 U.S. 616, 626-31 (1886).

quently quoted and least often followed judicial opinions in American constitutional history.<sup>31</sup> He said:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of . . . [Lord Camden's] judgment. In this regard the Fourth and Fifth Amendments run almost into each other.<sup>32</sup>

Mr. Justice Bradley justified his conclusions with a lesson in constitutional interpretation:

A close and literal construction deprives . . . [constitutional provisions] of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.<sup>33</sup>

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<sup>31</sup> For example, Mr. Justice Bradley's ringing words in *Boyd v. United States*, 116 U.S. 616 (1886), were quoted by the majority opinions in *Stone v. Powell*, 428 U.S. 465, 482 (1976) (federal habeas corpus relief not available for claim that evidence obtained in unconstitutional search or seizure was introduced at trial); *Andresen v. Maryland*, 427 U.S. 463, 471 (1976) (introduction of business records seized in search of office did not violate fifth amendment); *Bellis v. United States*, 417 U.S. 85, 87 (1974) (fifth amendment privilege against self-incrimination does not prohibit subpoena of business records of dissolved partnership from former partner; although the issue in *Boyd* itself was a notice to produce a partnership business record, the *Bellis* Court concluded that its predecessors in *Boyd* had not fully understood the significance of that decision and had treated the invoice at issue there as a private business record, *id.* 95 n.2); *United States v. Dionisio*, 410 U.S. 1, 7 n.6 (1973) (compelled production of voice exemplars constitutional); *Couch v. United States*, 409 U.S. 322, 330 (1973) (compelled production of business records from accountant not barred by fifth amendment); *Wyman v. James*, 400 U.S. 309, 316 (1971) (home visitation prerequisite for welfare eligibility did not violate fourth amendment); *Warden v. Hayden*, 387 U.S. 294, 301 (1967) ("mere evidence" rule overturned); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 205 n.33 (1946) (subpoena for production of corporate records does not violate fourth or fifth amendment); *Feldman v. United States*, 322 U.S. 487, 490 (1944) (fifth amendment does not forbid use in federal court of self-incriminating testimony compelled in state court).

<sup>32</sup> *Boyd v. United States*, 116 U.S. 616, 630 (1886).

<sup>33</sup> *Id.* 635.

## III. THE LITERALIST APPROACH—PROPERTY CONCEPTS

The warning became a prophecy. Although it took almost a hundred years to destroy Mr. Justice Bradley's constitutional edifice, narrow and literal readings of the language of both amendments began the erosion decades earlier. No encroachments on the rights which the Court sought to preserve for our citizens in *Boyd v. United States*<sup>34</sup> have been more stealthy than those thrust upon us by the government's invisible searches for intangible things.

A striking illustration of the Supreme Court's recurring attacks of literalism is *Olmstead v. United States*,<sup>35</sup> decided in 1928. Mr. Chief Justice Taft, writing for the majority, held that telephone tapping violated neither the fourth nor the fifth amendments. A telephone tap could be neither a "search" nor a "seizure" because an eye or an ear could not trespass.<sup>36</sup> The fourth amendment's reference to "houses, papers, and effects" could not justifiably be enlarged to include telephone wires because those "wires are not part of his house or office anymore than are the highways along which they are stretched."<sup>37</sup> Moreover, the warrant clause was not applicable to intangible things. No fifth amendment issues were involved because the tappees were not compelled by the tap to talk over their telephones: they simply were voluntarily transacting their business without knowledge of the interception.<sup>38</sup>

Justices Holmes, Brandeis, Butler, and Stone dissented. Mr. Justice Holmes wanted the courts to play no role "in such dirty business," and he thought it "a less evil that some criminal should escape than that the Government should play an ignoble part."<sup>39</sup> Mr. Justice Brandeis' opinion echoed both the words and the spirit of Mr. Justice Bradley. He firmly eschewed the crabbed interpretation of the majority, and, in resonant prose, he described the fourth and fifth amendments' protections of humanistic values and intangible things:

The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs,

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<sup>34</sup> 116 U.S. 616 (1886).

<sup>35</sup> 277 U.S. 438 (1928).

<sup>36</sup> *Id.* 464.

<sup>37</sup> *Id.* 465.

<sup>38</sup> *Id.* 462.

<sup>39</sup> *Id.* 470 (Holmes, J., dissenting).

their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, 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. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.<sup>40</sup>

Mr. Chief Justice Taft's reasoning in *Olmstead* had many attractions. Confining the fourth amendment to tangibles made its construction and application far easier, especially for judges who were trained to think in common law property concepts. The reverence for property ownership, of course, must be understood in terms of a far older tradition in Western culture in which property ownership was virtually synonymous with membership in the dominant class. Property defined all kinds of social relationships and hierarchies of power. A manor house, for example, was not simply a financial asset, but an enclave of privilege and protection for the owner and all the other inhabitants whom he brought within the curtilage. Trespassory concepts were thus an adequate although imperfect way to give the dominant members of society security for themselves, their houses, papers, and effects. Mr. Chief Justice Taft did not foresee that intangible assets and intangible values would soon become as crucial to the rich as the land which the law so zealously protected. A man whose assets consisted of one hundred thousand shares of blue chip securities would find no shelter from prying eyes or eavesdropping ears by standing behind his computer printouts. Focusing on tangibles kept the Court on familiar terrain and at the same time avoided the distressing necessity of recognizing and ordering intangible interests on the uncertain scales of reasonableness.

Property concepts aside, however, the result was irresistible to those who disliked the exclusionary rule, quietly adopted in *Boyd* and firmly declared in 1914 in *Weeks v. United States*.<sup>41</sup> For decades after *Olmstead*, judges and lawyers focused on trespass and explored the subtler points of ownership, custody, and control of real and personal property.<sup>42</sup> Interest in these fine distinctions was surely

<sup>40</sup> *Id.* 478-79 (Brandeis, J., dissenting).

<sup>41</sup> 232 U.S. 383 (1914).

<sup>42</sup> *E.g.*, *Silverman v. United States*, 365 U.S. 505 (1961) (inserting "spike mike" halfway through party wall was unreasonable search; distinguishing *Goldman*

enhanced by recognition of their usefulness in preventing the wicked from finding protection in the fourth and fifth amendments. Innocent victims of improper searches which yielded nothing did not appear in the legal process.

#### IV. ABANDONING THE TRESPASS DOCTRINE

Dissatisfactions with *Olmstead v. United States*<sup>43</sup> arose repeatedly as scholars and judges recognized that the mechanical approach was hopelessly simplistic in coping with the real world of developing technology.<sup>44</sup> As Mr. Justice Brandeis predicted in *Olmstead*, “[s]ubtler and more far-reaching means of invading privacy have become available to the Government.”<sup>45</sup> One such method was to equip a government undercover agent with broadcasting or recording equipment to transmit or capture conversations with a suspect in his home or office. In *Lopez v. United States*<sup>46</sup> and *On Lee v. United States*,<sup>47</sup> the Court held that, as long as the government agent obtained admission to the home or office by

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v. United States, 316 U.S. 129 (1942), in which microphone was merely attached to surface of opposite side of wall); *Johnson v. United States*, 228 U.S. 457 (1913) (no fifth amendment privilege against use of papers which defendant no longer owned because of transfer in title during bankruptcy proceedings).

“Guests” and “invitees” were not permitted to object to searches of premises, e.g., *Gaskins v. United States*, 218 F.2d 47, 48 (D.C. Cir. 1955); *In re Nassetta*, 125 F.2d 924 (2d Cir. 1942), although a “lessee or licensee,” *United States v. De Bousi*, 32 F.2d 902 (D. Mass. 1929), or a person with “dominion” had standing, *Steeber v. United States*, 198 F.2d 615, 617 (10th Cir. 1952); *McMillan v. United States*, 26 F.2d 58 (8th Cir. 1928). Trespassers did not have standing, but tenants by sufferance did. *Klee v. United States*, 53 F.2d 58 (9th Cir. 1931). Employees, who though in “control” or “occupancy” lacked “possession,” could not object to a search of business premises. *United States v. Conoscente*, 63 F.2d 811 (2d Cir. 1933); *Connolly v. Medalie*, 58 F.2d 629, 630 (2d Cir. 1932). In fact, an employee could not object to the search of his own desk. *United States v. Ebeling*, 146 F.2d 254 (2d Cir. 1945). An officer, manager, or custodian of corporate records could not object to their seizure, *Wilson v. United States*, 221 U.S. 361 (1911), even if he was the sole shareholder of the corporation and the papers would have been protected had he not incorporated, *Lagow v. United States*, 159 F.2d 245 (2d Cir. 1946).

Perhaps the most finely drawn distinction denied fourth amendment protection to the owner of a car, when the car was in the possession of a bailee for hire, a garage near defendant’s hotel, and the defendant did not claim ownership of the unlicensed radio equipment seized from the car. *Casey v. United States*, 191 F.2d 1 (9th Cir. 1951), *rev’d on other grounds*, 343 U.S. 808 (1952).

<sup>43</sup> 277 U.S. 438 (1928).

<sup>44</sup> See *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting; Holmes, J., dissenting); S. DASH, R. KNOWLTON, & R. SCHWARTZ, *THE EAVES-DROPPERS* (1959); Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel’s View*, 44 MINN. L. REV. 855 (1960).

<sup>45</sup> *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

<sup>46</sup> 373 U.S. 427 (1963).

<sup>47</sup> 343 U.S. 747 (1952).

guile and deception and not by breaking or entering or any kind of technical trespass, warrantless electronic eavesdropping did not violate the fourth amendment. Justices Burton and Frankfurter, dissenting in *On Lee*, abjured the trespass rationale, and forthrightly expressed their view that the "Fourth Amendment's protection against unreasonable searches and seizures is not limited to the seizure of tangible things. It extends to intangibles, such as spoken words."<sup>48</sup>

Restlessness with *Olmstead* was even more pronounced in 1961 when the Court decided *Silverman v. United States*.<sup>49</sup> Although the majority opinion nominally turned on trespass because the spike mike in that case had penetrated a part of Silverman's home, the Court also hinted that fourth amendment rights were not "inevitably measurable in terms of ancient niceties of tort or real property law."<sup>50</sup>

The trespass doctrine was finally abandoned in 1967 in *Katz v. United States*,<sup>51</sup> and *Olmstead's* fourth amendment holding was expressly overruled. *Katz* established a new formula of fourth amendment protection: "Wherever an individual may harbor a 'reasonable expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion."<sup>52</sup> *Katz* held inadmissible

<sup>48</sup> *Id.* 765 (Burton, J., dissenting).

<sup>49</sup> 365 U.S. 505 (1961).

<sup>50</sup> *Id.* 511.

<sup>51</sup> 389 U.S. 347 (1967).

<sup>52</sup> *Terry v. Ohio*, 392 U.S. 1, 9 (1967) (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Mr. Justice Stewart's opinion for the majority in *Katz* did not use the words "reasonable expectation of privacy," but said, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* 351-52. Mr. Justice Harlan's quotable phrase has come to be accepted as "the *Katz* test," although it is more restrictive than the approach of the majority and has been persuasively criticized. *E.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). See TAYLOR, *supra* note 6, at 110-14; Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U.L. REV. 1 (1971); Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home Is His Fort*, 23 CLEV. ST. L. REV. 63 (1974); Note, *The Reasonable Expectation of Privacy—Katz v. United States, A Postscriptum*, 9 IND. L. REV. 468 (1976); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protections*, 43 N.Y.U. L. REV. 968 (1968); Note, *Types of Property Seizable Under the Fourth Amendment*, 23 U.C.L.A. L. REV. 963 (1976).

"Privacy" is itself an elusive concept. The Court has often used the term to refer to a right of personal autonomy in making certain kinds of important decisions free from governmental regulation. *E.g.*, *Whalen v. Roe*, 429 U.S. 589 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See Fried, *Privacy*, 77 YALE L.J. 475 (1968); Henkin, *Privacy and Autonomy*, 74

incriminating evidence obtained without a warrant by fixing a bug to the outside of a public telephone booth. The Court was explicit that a "search" within the meaning of the fourth amendment is not limited to physical intrusions to search for tangible things. Instead, a "search" is anything that invades the interests protected by the amendment.<sup>53</sup> The concept of "seizure" was also broadened according to the specifications of the majority in *Boyd* to include recording of oral statements.<sup>54</sup>

Let us leave the ghost of Mr. Justice Bradley enjoying a toast to privacy with Mr. Justice Brandeis's shade. Other developments will make their festivities brief. We turn to another part of the fourth amendment forest to observe the life cycle of the mere evidence rule.

### V. THE MERE EVIDENCE DOCTRINE

Both in England and in the colonies before adoption of the Constitution, searches for evidence of crime were primarily undertaken by ordinary citizens who either caught a felon red-handed or followed him in hot pursuit, occasionally assisted by a local constable.<sup>55</sup> Organized police forces did not exist. Judicially au-

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COLUM. L. REV. 1410 (1974); Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976). Commentators who have attempted to define "privacy" in the fourth amendment sense have most often spoken of the ability to control disclosure of information about oneself. E.g., A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."); Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693, 709 (1972) ("Privacy is the condition enjoyed by one who can control the communication of information about himself."); Warren & Brandeis, *supra* note 21, at 198 ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."). See Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253 (1966); Miller, *Personal Privacy in the Computer Age*, 67 MICH. L. REV. 1089 (1969). The fourth amendment is not, however, only a constitutional limitation on the government's accumulation or disclosure of information about its citizens. It also defines the relationship between government and individual, limiting the government's power to intrude arbitrarily into people's lives. The fourth amendment protects not only a right of nondisclosure, but, in a more fundamental sense, the "right to be let alone," Warren & Brandeis, *supra* note 21, at 193, by imposing "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself." *Watts v. Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring and dissenting). See generally *Amsterdam, supra*.

<sup>53</sup> "[T]he Fourth Amendment governs all intrusions by agents of the public upon personal security. . . ." Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968). See Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461, 1479 (1977) ("*Katz* stands for the proposition that . . . an invasion of Fourth Amendment rights . . . occurs whenever the functional effect of the government's investigation is to gain access to matters otherwise protected.").

<sup>54</sup> 389 U.S. 347, 353 (1967). See text accompanying note 29 *supra*.

<sup>55</sup> See TAYLOR, *supra* note 6, at 28, 39.

thorized warrants to enforce criminal law were extremely limited.<sup>56</sup> They were used generally to arrest a felon and to search for stolen goods or other fruits of his crime, weapons used in the crime, and clothes or other identifying objects. Although general warrants issued by the executive branch of government were used to seize private papers and personal effects, judicial warrants were not issued for that purpose. Indeed, in *Entick v. Carrington*, Lord Camden denied that magistrates had the power to authorize the seizure of private papers.<sup>57</sup>

Although nothing in the English or colonial experience gave the draftsmen of the fourth amendment any reason for concern about judicially authorized seizure of private papers, they were extremely anxious to protect the citizenry from the indignities of general warrants which, among other things, were specifically aimed at discovering suspicious or incriminating private documents. The Court in *Boyd v. United States*,<sup>58</sup> relying both upon that history and upon Lord Camden's analysis in *Entick*, concluded that private papers were beyond the reach of judicially authorized process even when the document involved was a business document as impersonal as an invoice.<sup>59</sup>

From *Boyd* arose the constitutional doctrine that "mere evidence" was not a legitimate object of a governmental search and seizure. The doctrine was made even more explicit thirty-five years later in *Gouled v. United States*.<sup>60</sup> Until the Espionage Act of 1917,<sup>61</sup> Congress had not authorized the issuance of federal search warrants for property. In *Gouled*, a search warrant had been issued under the 1917 statute to seize papers which were then intro-

<sup>56</sup> See *id.* 44-46.

<sup>57</sup> Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none . . . .

. . . .

There is no process against papers in civil causes. . . . In the criminal law . . . there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.

<sup>19</sup> How. St. Tr. 1029, 1066, 1073 (1765).

<sup>58</sup> 116 U.S. 616 (1886).

<sup>59</sup> *Id.* 627-32.

<sup>60</sup> 255 U.S. 298 (1921).

<sup>61</sup> Act of June 15, 1917, Pub. L. No. 24, ch. 30, 40 Stat. 217, 228.



duced as evidence against the owner in a trial for conspiracy to defraud the government. The Supreme Court unanimously held that the warrant violated both the fourth and fifth amendments. Because the government wanted Gouled's papers "only to use . . . as evidence"<sup>62</sup> against him, the search warrant violated the fourth amendment, and the use of the papers at trial violated his fifth amendment privilege against self-incrimination. Under the reign of *Gouled*, the mere evidence limitation on the scope of search warrants became an integral part of both the fourth and fifth amendments.

The mere evidence rule was, however, too encompassing and too uncertainly moored to retain indefinite adherence. It forbade seizure of all kinds of evidence and thus had little or no relationship to the privacy notions that had given the rule birth.<sup>63</sup> Moreover, it made neither constitutional nor common sense that mere evidence seized with a warrant was inadmissible, but evidence of conversations captured by wiretapping or surreptitious electronic recording could be admitted without any warrant at all. The whole purpose of wiretapping and electronic surveillance was to gather evidence to be used against the speaker. The rule soon sprouted a bewildering variety of exceptions, many of which were framed in technical property concepts.<sup>64</sup>

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<sup>62</sup> *Gouled v. United States*, 255 U.S. 298, 310 (1921).

<sup>63</sup> See, e.g., *Hayden v. Warden*, 363 F.2d 647 (4th Cir. 1966), *rev'd*, 387 U.S. 294 (1967) (articles of clothing used to identify defendant); *Morrison v. United States*, 262 F.2d 449 (D.C. Cir. 1958) (handkerchief bearing tangible evidence of homosexual act); *United States v. Lerner*, 100 F. Supp. 765 (N.D. Cal. 1951) (identification bracelet and documents connecting defendant with crime of harboring a fugitive). Telford Taylor suggested that privacy interests would be better protected by permitting searches for evidence but creating an exception for testimonial documents ("operational" documents would be seizable). TAYLOR, *supra* note 6, at 63-71.

<sup>64</sup> "Seizable property" consisted of contraband and fruits and instrumentalities of crime, a definition traditionally explained by the sovereign's superior property interest in these categories of items. A thief had no interest in stolen goods, the fruits of crime, and the sovereign had a superior claim of title to contraband, whose very possession was illegal. An instrumentality of crime was deodand and subject to immediate forfeiture. See, e.g., *Boyd v. United States*, 116 U.S. 616, 623-24 (1886); *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926). See also *Warden v. Hayden*, 387 U.S. 294, 303 (1967).

Courts were inventive in finding that items of evidentiary value were also fruits or instrumentalities of crime. E.g., *Abel v. United States*, 362 U.S. 217 (1960) (forged birth certificate was means of committing espionage); *Harris v. United States*, 331 U.S. 145 (1947) (forged draft cards were means of violating Selective Service Act); *Zap v. United States*, 328 U.S. 624 (1946) (cancelled check used to defraud the government); *Marron v. United States*, 275 U.S. 192, 199 (1927) (business ledger and utility bills part of "outfit or equipment" used in operating illegal bar); *United States v. Guido*, 251 F.2d 1 (7th Cir. 1958) (shoes worn by bank robber were instrument of crime because necessary to escape); *United States v. Pardo-Bolland*, 229 F. Supp. 473 (S.D.N.Y. 1964) (passport, airline tickets, foreign

The mere evidence ruled died in 1967 when the Court decided *Warden v. Hayden*.<sup>65</sup> As is so often true, the factual setting of the case gave little inkling of the far-reaching consequences that would follow the destruction of the mere evidence rule. Police were in hot pursuit of a robber whose clothing had been described by an eyewitness. The robber disappeared into a house, and the police followed in order to arrest him. While searching the house for the robber, the police found a jacket and trousers of the type the fleeing man was said to have worn. The court of appeals reversed Hayden's conviction on the ground that the clothing should have been excluded from evidence under the mere evidence rule. The Supreme Court, however, upheld Hayden's conviction and overruled *Gouled*. Mr. Justice Brennan, writing the majority opinion, recognized that "the principal object of the Fourth Amendment is the protection of privacy rather than property,"<sup>66</sup> but he did not foresee the extent to which abandonment, rather than modification, of the mere evidence rule would dismantle protection of privacy. He assumed that the fourth amendment would safeguard "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure,"<sup>67</sup> and he also assumed that the fifth amendment, as explicated in *Schmerber v. California*,<sup>68</sup> would prevent seizure of testimonial or communicative evidence.<sup>69</sup> With those assumptions, Mr. Justice Brennan not surprisingly also believed that the warrant requirement would adequately protect persons from unreasonable governmental incursions upon privacy.

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currency, and checkbooks were instrumentalities of narcotics offense); *People v. Thayer*, 63 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780 (1965) (medical records instrumentalities of fraudulent billings). See Comment, *Limitations on Seizure of "Evidentiary" Objects—A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319 (1953); Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593 (1966).

For a discussion of the narrowing of the mere evidence rule, see Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 190-95 (1977).

<sup>65</sup> 387 U.S. 294 (1967).

<sup>66</sup> *Id.* 304.

<sup>67</sup> *Id.* 303.

<sup>68</sup> 384 U.S. 757, 761 (1966).

<sup>69</sup> *Warden v. Hayden*, 387 U.S. 294, 302-03 (1967). See McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55 (1977-78); Comment, *Protection of the Right of Privacy in One's Personal Papers*, 1970 LAW & SOC. ORDER 269; Comment, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 LOY. L.A.L. REV. 274 (1973); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977); Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184, 200 (1977); Note, *Papers, Privacy and the Fourth and Fifth Amendments: A Constitutional Analysis*, 69 NW. U.L. REV. 626 (1974).

He did not foresee that both assumptions would soon prove invalid, nor did he anticipate the extent to which the demise of the mere evidence rule would affect not only the kinds of things subject to seizure, but also the persons and places subject to governmental invasions, with or without a search warrant. The lone dissenter, Mr. Justice Douglas, balefully warned: "the practice of rummaging through one's personal effects could destroy freedom. . . . [T]he choice of opening . . . [one's] private effects . . . to the police or keeping their contents a secret and their integrity inviolate . . . is the very essence of the right of privacy" that the fourth and fifth amendments were intended to protect.<sup>70</sup>

## VI. THE FOURTH AMENDMENT TODAY

Although the Supreme Court after *Warden v. Hayden*<sup>71</sup> has continued to suggest that a core of tangible or intangible things may exist "whose very nature precludes them from being the object of a reasonable search and seizure,"<sup>72</sup> the majority of the Court has thus far failed to find any of them. With constitutional impunity, investigating officers armed with a warrant, a summons, a subpoena, or acting "reasonably" without a warrant or other judicial process, can seize one's conversations,<sup>73</sup> checks,<sup>74</sup> bank records,<sup>75</sup> papers consigned to one's accountant or lawyer,<sup>76</sup> the contents<sup>77</sup> and even the substance of one's body.<sup>78</sup>

<sup>70</sup> *Warden v. Hayden*, 387 U.S. 294, 324, 325 (1967) (Douglas, J., dissenting).

<sup>71</sup> 387 U.S. 294 (1967).

<sup>72</sup> *Id.* 303. See *Fisher v. United States*, 425 U.S. 391, 407 n.9 (1976).

<sup>73</sup> *E.g.*, *Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967); *Osborn v. United States*, 385 U.S. 323 (1966); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Silverman v. United States*, 365 U.S. 505 (1961).

<sup>74</sup> *United States v. Miller*, 425 U.S. 435, 442 (1976).

<sup>75</sup> *Id.* 437.

<sup>76</sup> *Fisher v. United States*, 425 U.S. 391 (1975) (attorney); *Couch v. United States*, 409 U.S. 322 (1973) (accountant).

<sup>77</sup> Although the Supreme Court has held that the use of evidence obtained by forcibly pumping defendant's stomach violates the due process clause, *Rochin v. California*, 342 U.S. 165 (1952), stomach pumping has withstood fourth amendment challenge in some courts of appeals. *United States v. Owens*, 475 F.2d 759, 760 (5th Cir. 1973) (police "acted in good faith to prevent further harm" to apparently semi-conscious suspect); *Blefare v. United States*, 362 F.2d 870, 875-76 (9th Cir. 1966) (*Rochin* distinguished because officers there used excessive force, rather than merely "necessary" force). Rectal and genital cavities may be searched and the contents seized, *e.g.*, *United States v. Lilly*, 576 F.2d 1240 (5th Cir. 1978); *Daugherty v. Harris*, 476 F.2d 292 (10th Cir. 1973); *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967). Even surgical removal of evidence from a person's body has been permitted. *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 1062 (1977).

<sup>78</sup> *Schmerber v. California*, 384 U.S. 757 (1966).

The expectation that the effect of the destruction of the mere evidence rule would be softened by the privilege against self-incrimination has also been dashed. The holding that compulsion within the meaning of the fifth amendment is supplied by the force of a search warrant, a subpoena, or a court order to produce has been overruled. The link between the fourth and fifth amendments established by *Boyd v. United States*,<sup>79</sup> *Gouled v. United States*,<sup>80</sup> and *Schmerber v. California*<sup>81</sup> was severed by the Supreme Court in *Andresen v. Maryland*<sup>82</sup> and *Fisher v. United States*.<sup>83</sup> Indeed, the Court in both cases suggested that testimonial compulsion in the fifth amendment sense exists only when the government forces the person to utter incriminating words.<sup>84</sup> If the Supreme Court adopts the full reach of the implications of *Fisher*, the fifth amendment provides no protection at all to a person who has rashly committed to his diary observations or thoughts which a government official may later decide might be incriminating.

Nevertheless, does not the reasonableness clause or the warrant clause of the fourth amendment create a barrier against governmental rummaging into our homes and lives, especially when *Katz v. United States*<sup>85</sup> has assured us that we have zones of privacy which cannot be entered? Has not the Supreme Court also promised us that "a judicial officer, not . . . a policeman or government enforcement agent" decides "[w]hen the right of privacy must reasonably yield to the right of search,"<sup>86</sup> and, while exceptions to the warrant requirement do exist, "those exceptions are few in number

<sup>79</sup> 116 U.S. 616 (1886).

<sup>80</sup> 255 U.S. 298 (1921).

<sup>81</sup> 384 U.S. 757 (1966).

<sup>82</sup> 427 U.S. 463 (1976) (seizure of incriminating business records not violative of fourth or fifth amendment).

<sup>83</sup> 425 U.S. 391 (1976) (IRS summonses directing attorneys to produce tax records incriminating their clients not violative of fifth amendment).

<sup>84</sup> [T]he preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence . . . . [U]nless the Government has compelled the subpoenaed person to write the document, . . . the fact that it was written by him is not controlling with respect to the Fifth Amendment issue.

*Id.* 409-10, 410 n.11. See *Andresen v. Maryland*, 427 U.S. 463, 473 (1976); Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977); authorities cited in note 69 *supra*. Moreover, the government can, without offending the fifth amendment, compel the making of certain records for the express purpose of data banking. *Whalen v. Roe*, 429 U.S. 589 (1977).

<sup>85</sup> 389 U.S. 347 (1967).

<sup>86</sup> *Johnson v. United States*, 333 U.S. 10, 14 (1948).

and carefully delineated?"<sup>87</sup> These guarantees are extremely comforting until one examines the fine print, which makes clear that the exclusions from coverage vastly exceed the protections which we and our forebears who drafted the fourth amendment thought we had bought and paid for. I do not for a moment suggest that these promises were not made in good faith. The encroachments came, as Mr. Justice Bradley predicted,<sup>88</sup> by gradual depreciation of the rights secured by the fourth amendment.<sup>89</sup> It is fair to say, I believe, that the majority of the Court, deciding one case at a time, did not fully appreciate the synergistic effect of the erasure of the mere evidence rule, the diminution of the warrant requirement, the impact of third-party searches, the redrafting of the privacy zones, the shrinkage of the fifth amendment, and the onrush of technology.<sup>90</sup>

### A. Bank and Government Records

To illustrate what has happened, let us recall the troubles of Hester and Billy. The government obtained a mine of information

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<sup>87</sup> *United States v. United States District Court*, 407 U.S. 297, 318 (1972).

<sup>88</sup> See text accompanying note 33 *supra*.

<sup>89</sup> Erosion of fourth and fifth amendment privacy protections has prompted courts and commentators to resort to the guarantees of the ninth amendment and state constitutions. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *State v. Glass*, 583 P.2d 872 (Alas. 1978) (electronic monitoring of wired informant violates state constitutional right of privacy); *State v. Brackman*, 582 P.2d 1216 (Mont. 1978) (same); *People v. Beavers*, 393 Mich. 554, 227 N.W.2d 511 (1975) (same); *White v. Davis*, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (police officers posing as students and recording discussions in university classes violated students' state constitutional right of privacy); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Clark, *The Ninth Amendment and Constitutional Privacy*, 5 U. TOL. L. REV. 83 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

<sup>90</sup> The Court has continued to constrict the zone of fourth amendment protection by imposing stricter "standing" requirements. In *Rakas v. United States*, 99 S. Ct. 421 (1978), the Court abandoned the rule of *Jones v. United States*, 362 U.S. 257, 267 (1960), that anyone "legitimately on [the] premises" at the time of a search has standing to raise the fourth amendment issue. Mr. Justice Rehnquist's opinion for the majority places property relationships on a high fourth amendment plane. Despite disclaimers by both Mr. Justice Rehnquist, *id.* 431 n.12, 434 n.17, and by Mr. Justice Powell in his concurring opinion, *id.* 434, it is difficult to allay the dissenters' fear that the majority has resurrected Mr. Chief Justice Taft's reasoning in *Olmstead v. United States*, 277 U.S. 438 (1938). *Rakas v. Illinois*, 99 S. Ct. 421, 440 (1978) (White, J., dissenting). See text accompanying notes 35-37 *supra*.

Nevertheless, the Court has, so far, stood firm in preserving significant protections of the home from warrantless intrusions. *Mincey v. Arizona*, 437 U.S. 385 (1978) (state's "murder scene" exception to warrant requirement unconstitutional); *Michigan v. Tyler*, 436 U.S. 499 (1978) (warrant required for entry to investigate cause of fire). One's home does not begin, however, until the dweller steps beyond the doorway. *United States v. Santana*, 427 U.S. 38 (1976).

from subpoenas of their bank records. Mr. Justice Powell, speaking for the Court in *United States v. Miller*,<sup>91</sup> explained why Billy and Hester have no fourth amendment protection from their bankers' releasing, either voluntarily or involuntarily, their bank records and copies of their personal checks. First, all bank records, including microfilmed checks, are the property of the bank, whose customers have no standing to complain about what the bank does with its own property.<sup>92</sup> Second, like the narcotics dealers in *On Lee v. United States*<sup>93</sup> and *United States v. White*,<sup>94</sup> bank customers volunteer this information to the bank and its employees. To be sure, these customers may believe that the information will be used only to conduct banking transactions, but they must assume the risk that information given for one purpose will be used for another.<sup>95</sup> Finally, no one can have an expectation of privacy in banking affairs, because Congress has made banks reporting agents for the government. Congress took this step because bank records "have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings."<sup>96</sup>

The *Miller* reasoning is disturbing. Reliance upon property concepts is a retreat from *Katz v. United States*<sup>97</sup> and a reversion to *Olmstead v. United States*.<sup>98</sup> More troublesome, however, the property analysis is based on an assumption that the interest sought to be protected is tangible property; in fact, the interest to be protected is intangible, namely, all the biographical information that can be gleaned from examination of the documents. At least so far, neither the bank nor the government has a property interest in the details of our personal lives. Of course, it is an outright legal fiction that a person who uses a bank voluntarily reveals to the

<sup>91</sup> 425 U.S. 435 (1976).

<sup>92</sup> *Id.* 440-41.

<sup>93</sup> 343 U.S. 747 (1952).

<sup>94</sup> 401 U.S. 745 (1971).

<sup>95</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976). The Court had held previously, in *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974), that the maintenance of these bank records did not invade fourth amendment rights of the depositors.

<sup>96</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976) (quoting 12 U.S.C. § 1829b(a)(1) (1976)). Cf. 31 U.S.C. § 1051 (1976) (similar congressional purpose of requiring reports to aid in criminal investigations relating to currency and foreign transactions). The Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (Supp. 1979), was enacted as a congressional response to *Miller*. [1978] U.S. CODE CONG. & AD. NEWS 9273, 9306. The Act is, however, too recently enacted to know its actual impact.

<sup>97</sup> 389 U.S. 347 (1967).

<sup>98</sup> 277 U.S. 438 (1928).

public or to the government all information that can be obtained from checks and other bank documents.<sup>99</sup>

Especially unsettling is the *Miller* Court's use of the *White* and *On Lee* rationale that the betrayal of confidence is a risk we must assume:

This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.<sup>100</sup>

If Billy and Hester must assume that their banks will report confidential information to the government, must they not also assume that the information they have voluntarily or involuntarily disclosed to one department of government, with a promise of confidentiality, will be betrayed by the government itself?<sup>101</sup> Has trust in one's government become constitutionally irrelevant?

Misuse even of data visibly collected should cause us grave concern. Although no comprehensive statistics exist to tell us how

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<sup>99</sup> Even more important than original recording of "public" activities is what is done with the information recorded. . . . If this information is systematically stored, . . . it is "obtained" in a much more permanent sense and obtained in a way that may bother a person who had no objection to its being known in the trivial sense. Moreover, if pieces of similar information . . . are systematically stored and collated, "new" information may be obtained . . . that would be unavailable to any of the people who have learned only one or a few of the pieces of information.

K. GREENAWALT, LEGAL PROTECTIONS OF PRIVACY 39 (1975) (final report to the Office of Telecommunications Policy, Executive Office of the President).

<sup>100</sup> *United States v. Miller*, 425 U.S. 435, 443 (1976) (citations omitted). The analogy of the false friend who turns out to be an informer is inapplicable to the case of the friend forced by the government to reveal information given in confidence. In the latter case, it is the government, not the friend, who has betrayed a trust. The government's role is even more ignoble when the breach of trust, and indeed the compilation of the information, is routinely required as an incident of government regulation of businesses such as banks. See 12 U.S.C. § 1829b(a)(1) (1976). We may be able to avoid telling secrets to friends, but we cannot avoid writing or receiving checks. As one commentator has remarked:

The difference between the risk of faithlessness that we all run when we choose our friends and the risk of faithlessness we run when government foists a multiplying army of bribed informers on us may well be a matter of degree; but of such degrees is liberty or its destruction engineered.

In any event, it is not betrayal against which the fourth amendment protects us: it is the privacy of a free people living free lives.

Amsterdam, *supra* note 52, at 407.

<sup>101</sup> For a discussion of governmental data sharing, see *Miller*, *supra* note 52, at 1180-93. See note 109 *infra*.

many agencies of the federal government have records about us, we do know that the amount of information thus gathered is staggering. In 1976, a report of the Senate Subcommittee on Constitutional Rights estimated that eighty-five federal agencies maintain over 6700 record systems containing 3.8 billion records about individual Americans.<sup>102</sup> In addition to information stored in governmental memory banks, private industries and institutions other than banks maintain billions more records.<sup>103</sup>

At the present time, with both statutory and constitutional impunity, members of the executive branch of the government can delve into these data banks without our knowledge to acquire all kinds of information about us, and we have no recourse.<sup>104</sup> Al-

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<sup>102</sup> STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., SURVEILLANCE TECHNOLOGY 17 (Comm. Print 1976). See *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (recognizing "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files"); *Federal Data Banks, Computers and the Bill of Rights, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971); E. LONG, *THE INTRUDERS* (1966); A. MILLER, *THE ASSAULT ON PRIVACY* (1971); A. WESTIN & M. BAKER, *DATABANKS IN A FREE SOCIETY* (1972) (report of the Project on Computer Databanks of the Computer Science and Engineering Board, National Academy of Sciences); WESTIN, *supra* note 52, at 298-326; Miller, *supra* note 52, at 1129-40; *Computerized Criminal Justice Information Systems: A Recognition of Competing Interests*, 22 VILL. L. REV. 1171 (1977).

<sup>103</sup> A study by the Office of Telecommunications of the Department of Commerce estimated that, in 1967, 46% of the gross national product, measured by the value added method, originated in "information activity." M. PORAT, *THE INFORMATION ECONOMY* 8 (1977) (U.S. Dep't of Commerce, Office of Telecommunications, Special Pub. No. 77-12(1)). (Information activity is defined as "resources consumed in producing, processing and distributing information goods and services," including both market and non-market transactions; information is defined as "data that have been organized and communicated." *Id.* 2.) "Information workers" accounted for 45% of the total work force and received 53% of total compensation. *Id.* 8. In 1940, the number of industrial workers was twice that of information workers; by 1967, the figures were reversed. See Miller, *supra* note 52, at 1140-54 (abuses of computerized credit information).

<sup>104</sup> See Note, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229 (1976). An agency's power to inspect records is not limited if the custodian voluntarily complies with an informal request. Most agencies have more forceful means at their disposal, although determining how many government agencies have subpoena powers is practically impossible. Chief Judge Wright has listed 47 agencies with power to subpoena telephone company billing records. *Reporters Comm. for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1086 n.18 (D.C. Cir. 1978) (Wright, C.J., dissenting), *cert. denied*, 99 S. Ct. 1431 (1979). Information furnished by the American Law Division of the Library of Congress indicates that, as of December 22, 1977, 74 federal agencies had subpoena powers. The Privacy Protection Study Commission, created by section 5 of the Privacy Act of 1974, 5 U.S.C. § 552a (1977), reviewed more than 160 separate statutes empowering federal authorities to compel production of documents or records and concluded that "[w]hatever the nature of the summons power in a particular case, . . . it is uniformly given to administrative bodies who have enforcement or oversight responsibilities—in other words, to virtually every agency of



though we have no way of knowing the extent to which private institutions voluntarily respond to informal requests for information by government agents seeking evidence of wrongdoing or simply satisfying their curiosity, we have good reason to believe that these invisible intrusions are commonplace. At least a hint of the extent to which government agencies acquire information from these sources appears in the revelation by an American Airlines computer expert that the airline permits ten to fifteen government investigators a day to retrieve information from the airline's computer about travelers' movements.<sup>105</sup> The computer will obligingly spew out flights traveled, seat numbers, telephone contacts, hotel reservations, automobile reservations, and even fellow passengers. Of course, the capability of an airline's computer to reveal private information is miniscule compared with the snooping capacities of such technological marvels as optical scanners, which can ingest and return fantastic quantities of reading matter.<sup>106</sup>

### B. *The Mail*

Even if we must assume that information that we knowingly disclose to one department of government will be disclosed to another without our knowledge, do we not have an expectation of privacy in the transmission of letters through the mail? In 1877, the answer was clear. The Supreme Court told us in *Ex parte Jackson*:

Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by

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government." PRIVACY PROTECTION STUDY COMMISSION, *PERSONAL PRIVACY IN AN INFORMATION SOCIETY* 367 (1977).

The Omnibus Right to Privacy Act of 1977, H.R. 10076, 95th Cong., 1st Sess. (1977), would establish a Federal Information Practices Board charged with oversight of government data collection practices. Title III of the bill requires a showing of reasonable cause to believe that personal information about individuals is material to a violation of federal law before it can be obtained by subpoena from a third party. The bill further requires that the individual be given notice of these subpoenas and an opportunity to object to release of the information. Individuals would also be notified about the kinds of data federal agencies were collecting about them and the intended uses of the information. The bill has been referred to committee. 123 CONG. REC. H12,316 (daily ed. Nov. 11, 1977).

<sup>105</sup> Miller, *supra* note 52, at 1120. In 1977, the Bell Telephone system furnished to federal agencies the billing records of 20,565 customers. Caine, *Computers and the Right to Be Let Alone—A Civil Libertarian View*, 22 VILL. L. REV. 1181, 1183 (1977).

<sup>106</sup> See Miller, *supra* note 52, at 1120-22. For a discussion, though somewhat dated, of technological advances in surveillance techniques, see WESTIN, *supra* note 52, at 65-89 (listening and watching devices), 158-68 (data surveillance).

the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.<sup>107</sup>

As of last year, Billy has no constitutional complaint if Javert opened his letter-class mail from Laos. In *United States v. Ramsey*,<sup>108</sup> the Supreme Court held that customs officials, acting entirely on their own, can open such mail if they have reasonable cause to suspect a violation of customs laws.<sup>109</sup> Mr. Justice Rehnquist, speaking for the majority, reasoned that we are no more entitled to expect privacy with respect to letters that enter our country than we are to expect that the contents of our suitcases will be free from customs examination when we return from abroad.<sup>110</sup> The majority of the Court was unmoved by Mr. Justice Stevens' observation in dissent that, "[i]f the government is allowed to exercise the power it claims, the door will be open to the wholesale, secret examination of all incoming international letter mail. No notice would be necessary either before or after the search."<sup>111</sup>

Do Billy and Hester have any better protection against the institution of mail covers? The Supreme Court has not yet addressed this issue, but the portent for privacy enthusiasts is not encouraging. A mail cover is the process by which a record is made of any data

<sup>107</sup> 96 U.S. 727, 733 (1877).

<sup>108</sup> 431 U.S. 606 (1977).

<sup>109</sup> The customs officials were acting under the authority of 19 U.S.C. § 482 (1976). Cf. *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978) (CIA's disclosure to FBI of information obtained by surreptitious opening of international letter-class mail was beyond its authority and gave rise to state law cause of action for invasion of privacy).

<sup>110</sup> *United States v. Ramsey*, 431 U.S. 606, 620 (1977). For a history of the Court's treatment of border searches, which have been held "reasonable" and not subject to the warrant requirement, see *id.* 616-20.

<sup>111</sup> *Id.* 632 (Stevens, J., dissenting).

appearing on the outside cover of any class of mail in order to obtain information about the addressee.<sup>112</sup> An employee of any state or federal law enforcement agency or governmental department<sup>113</sup> may obtain a mail cover simply by asking the Postal Service investigative division. Requests need not be supported by affidavits or any supporting evidence.<sup>114</sup> The Postal Service has unfettered discretion to grant or to deny the request.<sup>115</sup> Under existing federal regulations, a request is honored initially for thirty days, but can then be extended;<sup>116</sup> in one case, a mail cover was continued for

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<sup>112</sup> 39 C.F.R. § 233.2(c)(1) (1977). See generally *The Matter of Wiretapping, Electronic Eavesdropping, and Other Surveillance: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., pt. 1, at 325, 352-54 (1975) [hereinafter cited as *Hearings on Surveillance*]; *Postal Inspection Service's Monitoring and Control of Mail Surveillance and Cover Programs: Hearings Before the Subcomm. on Postal Facilities, Mail, and Labor Management of the House Comm. on Post Office and Civil Service*, 94th Cong., 1st Sess. (1975); *Invasions of Privacy (Government Agencies): Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

<sup>113</sup> Law enforcement agencies include any federal, state, or local unit "one of whose functions is to investigate the commission or attempted commission of acts constituting a crime." 39 C.F.R. § 233.2(c)(4) (1978). Requests for mail covers have been honored from such entities as the Coast Guard, the Royal Canadian Mounted Police, and the Departments of Interior, Labor, HEW, and Agriculture. *Hearings on Surveillance*, *supra* note 112, at 334 (exhibit B).

<sup>114</sup> 39 C.F.R. § 233.2(d)(2)(ii) (1978). The request must specify "the reasonable grounds that exist which demonstrate the mail cover is necessary to (A) protect the national security, (B) locate a fugitive, or (C) obtain information regarding the commission or attempted commission of a [felony]," but the requesting agency need not attest to the truth of these grounds or produce supporting evidence. *Id.* "The regulations simply do not require the specification of the factual predicate upon which the requesting agency bases its conclusion . . ." *United States v. Choate*, 576 F.2d 165, 172 (9th Cir.), *cert. denied*, 99 S. Ct. 350 (1978). The court held there that the statement, "[i]t is felt that . . . Choate and the source [of narcotics] correspond by mail," was sufficiently particular. *Id.* The district court had been concerned that, "if an agency's mere 'feeling' that criminal activity is afoot is sufficient to provide the needed showing, . . . [the reasonable grounds requirement] will have been read out of existence." 422 F. Supp. 261, 266 (C.D. Cal. 1976). The majority opinion dismissed this statement as a "hypertechnical nicety[ly]," 576 F.2d at 173, and did not address the issue of the intentional falsity of the agent's representations.

<sup>115</sup> The procedure is neither authorized nor controlled by any act of Congress. No judicial officer is involved in any stage of the proceedings, and records are kept by the Postal Service only. See *United States v. Choate*, 576 F.2d 165, 187, 190 (9th Cir.), *cert. denied*, 99 S. Ct. 350 (1978) (Hufstедler, J., concurring & dissenting). Prior to 1965 amendments, these records were destroyed after two years. Current regulations extend the period to eight years. 39 C.F.R. § 233.2(g)(5) (1978).

<sup>116</sup> 39 C.F.R. § 233.2(f)(4)-(5). The maximum period of extension is 120 days, unless a further extension is personally approved by the Chief Postal Inspector. Statistics prepared by the Postal Service for 1973 and 1974 reveal that most domestic mail covers averaged 30 days while national security mail covers averaged as many as 119.4 days. *Hearings on Surveillance*, *supra* note 112, at 332-35 (letter of William J. Cotter, Chief Postal Inspector).

ten years.<sup>117</sup> Although a mail cover does not permit a postal employee to open first-class mail,<sup>118</sup> lesser classes of mail may be opened.<sup>119</sup>

When all of these data are compiled, a veritable treasure trove of information unfolds before the curious eyes of the government. As we learned from the history of Billy and Hester, significant clues are provided to the identities and addresses of one's bank, creditors, political parties, churches, friends, and relatives.<sup>120</sup> Also revealed is one's taste in magazines, books, and other reading matter. Persons whose mail is covered are not entitled to any notice.<sup>121</sup> The whole process is therefore completely invisible to the scrutinee unless he stumbles on it by accident or by a lucky discovery motion if the investigation turns up incriminating evidence.<sup>122</sup>

Lower courts have rarely perceived that any interest protected by the fourth amendment is implicated by mail covers.<sup>123</sup> In part,

<sup>117</sup> United States v. Bianco, 534 F.2d 501, 507-08 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976).

<sup>118</sup> 39 C.F.R. § 233.2(f)(1) (1978).

<sup>119</sup> 39 C.F.R. § 233.2(c)(1) (1978).

<sup>120</sup> The only correspondent exempted from a mail cover is the subject's "known attorney-at-law." 39 C.F.R. § 233.2(f)(2) (1978). Once the identities of correspondents are known, the investigating agency can discover further information about the subject from the correspondents' files, for example, bank accounts and credit information. Furthermore, mail covers often lead to investigations of the correspondents themselves, as was the case with Billy's Aunt Hester. *E.g.*, United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976) (150 persons who received mail from Switzerland without a return address were investigated by IRS for possible income tax evasion); Paton v. La Prade, 524 F.2d 862 (3d Cir. 1975) (FBI investigated everyone who wrote to Socialist Workers Party); *see* Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967), and United States v. Schwartz, 283 F.2d 107 (3d Cir. 1960), *cert. denied*, 364 U.S. 942 (1961) (Post Office contacted all correspondents with mail fraud suspects to see if they had been defrauded).

<sup>121</sup> 39 C.F.R. § 233.2 (1978).

<sup>122</sup> *See* United States v. United States District Court, 407 U.S. 297, 318 (1972). 39 C.F.R. § 233.2(g)(4) (1978) provides: "Any data concerning mail covers shall be made available to any mail cover subject in any legal proceeding through appropriate discovery procedures." The regulations do not, however, appear to permit discovery by senders of information gathered through a mail cover of the recipient.

In United States v. Choate, 576 F.2d 165 (9th Cir.), *cert. denied*, 99 S. Ct. 350 (1978), although incriminating evidence was discovered through a mail cover, the existence of the mail cover was not disclosed in response to a pretrial discovery motion. The mail cover was revealed inadvertently almost two years later at a suppression hearing when the investigating agent spontaneously disclosed the mail cover in an attempt to show that the cover, and not prior illegal searches, was the source of most of his leads. *Id.* 187 n.14 (Hufstедler, J., concurring and dissenting).

<sup>123</sup> United States v. Merz, 580 F.2d 342, 345 (8th Cir. 1978); Lustiger v. United States, 386 F.2d 132, 139 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); Canaday v. United States, 354 F.2d 849, 856 (8th Cir. 1966); United States

this is due to recurring attacks of *Olmsteadism*: no trespass is involved, no search or seizure occurs when the eye registers the impressions from the outside of an envelope or the hand records the information. The fact that the object of the mail cover is to create a data bank has almost entirely escaped judicial attention, and, for that reason, courts have not applied the *Katz v. United States*<sup>124</sup> expectation of privacy concept to mail covers. Equally rare is recognition that "the mails [are] almost as much a part of free speech as the right to use our tongues"<sup>125</sup> and that other first amendment values permeate this subject as well. For example, the use of a mail cover to obtain the membership lists of the Abigail Adams Liberation Front, the Tory party, or the NAACP may be somewhat more awkward than a court order to produce the lists, but it is every bit as effective.<sup>126</sup>

At this time the Supreme Court's views on mail covers are not known. If the Court adopts the rationale of *Miller v. United States*<sup>127</sup> to resolve the problem, fourth amendment protection will be nonexistent.<sup>128</sup> On the other hand, if the Court characterizes the questions as implicating first amendment values<sup>129</sup> as well as constitutionally protected rights of privacy, the Court may also perceive that the collection of personal data by a mail cover is also

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v. Schwartz, 283 F.2d 107 (3d Cir. 1960), *cert. denied*, 364 U.S. 942 (1961); *United States v. Costello*, 255 F.2d 876, 881 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *United States v. Isaacs*, 347 F. Supp. 743, 750 (N.D. Ill. 1972), *aff'd on other grounds*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

<sup>124</sup> 389 U.S. 347 (1967).

<sup>125</sup> *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

<sup>126</sup> See *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). In a civil suit brought by a 16-year-old student who became the subject of a full-scale FBI investigation after she wrote to the Socialist Workers' Party (SWP) as part of a high school civics assignment, national security mail covers were held unconstitutional under the first amendment. *Paton v. La Prade*, No. 1091-73 (D.N.J. Nov. 29, 1978). The FBI considered the party a subversive organization and conducted investigations of all SWP correspondence, including that of the plaintiff, to identify new members, sympathizers, financial contributors, and employees. The district court found that the regulation permitting national security mail covers was invalid on its face because "an investigation can be initiated on the assertions of an over-zealous public official who disagrees with the unorthodox, yet constitutionally protected political views of a group or person." *Id.*, slip op. at 17-18.

<sup>127</sup> 425 U.S. 435 (1976).

<sup>128</sup> See *United States v. Choate*, 576 F.2d 165, 175-76 (9th Cir.), *cert. denied*, 99 S. Ct. 350 (1978). For a criticism of the application of the analysis of *Miller v. United States*, 425 U.S. 435 (1976), to mail covers, see *Choate*, 576 F.2d at 204-05 (Hufstedler, J., concurring and dissenting).

<sup>129</sup> See *Paton v. La Prade*, No. 1091-73 (D.N.J. Nov. 29, 1978) (first, but not fourth, amendment rights violated by national security mail covers), discussed in note 126 *supra*. But see *United States v. Choate*, 576 F.2d 165, 180-81 (9th Cir.), *cert. denied*, 99 S. Ct. 350 (1978) (rejecting first amendment argument).

a violation of the liberty interests protected by the fourth amendment under *Katz*.

### C. *Electronic Surveillance*

Although privacy rooters do not have much to cheer about in the constitutional protection accorded to users of the mails, should they not join the round of applause for the protection that *Katz v. United States*<sup>130</sup> gave us from invisible electronic searches for intangible things? Alas, no. *Katz* assures us that, without a warrant, law enforcement agents cannot plant a bug outside a public telephone booth to listen to Billy's conversation with his aunt. But the fourth amendment supplies no protection to Billy in the same phone booth if the recording device is in Hester's hand during the conversation. The presence of an unknown governmental ear at the other end of the telephone line, rather than on the outside of the telephone booth, makes all the constitutional difference, even though the effect of the invisible eavesdropping is identical as far as Billy is concerned. Capturing Billy's conversation by electronic means in the hands of Hester is no intrusion at all even if the entire performance is for the government's benefit.<sup>131</sup>

If Billy chooses his friends and relatives carefully, doesn't *Katz* assure him that he will not be the victim of electronic surveillance without the protections of a warrant? All that we can tell Billy today is, if you will excuse the expression, "don't bank on it." The Supreme Court has not yet squarely confronted the question whether the electronic surveillance procedure authorized by the Omnibus Crime Control and Safe Streets Act<sup>132</sup> is adequate to meet fourth amendment standards. Despite its name, the Act has nothing to do with safe streets and has only a collateral effect upon crime control.<sup>133</sup> The Act is an effort to control electronic bugging and eavesdropping by private persons, but it purports to give very broad powers to federal and state law enforcement officers to undertake such surveillance techniques. Under the procedures of the Act, a federal court order to bug or to wiretap can be obtained, following authorization by the United States Attorney General or his designee,

<sup>130</sup> 389 U.S. 347 (1967).

<sup>131</sup> *United States v. White*, 401 U.S. 745 (1971); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952). See Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133; Long, *The Right to Privacy: The Case Against the Government*, 10 ST. LOUIS U.L.J. 1 (1965); Note, *Tracking Katz: Beepers, Privacy and the Fourth Amendment*, *supra* note 53.

<sup>132</sup> 18 U.S.C. §§ 2510-2520 (1976).

<sup>133</sup> See text following note 154 *infra*.

upon a showing of probable cause to believe that the person to be surveilled has committed a crime or is about to commit a crime and that other methods of gathering evidence have not been successful.<sup>134</sup> All this has a very familiar ring. The question is whether the sound is the chime of a fourth amendment warrant or the knell of a general warrant or writ of assistance.<sup>135</sup>

Electronic bugging and wiretapping is always indiscriminate despite some spattering of specifics in authorization orders. The order specifies the telephone to be tapped or the home or office to be bugged.<sup>136</sup> But, unless the person subjected to scrutiny is addicted to soliloquy and telephonic monologues, conversations of others unknown in advance will be captured as well. Recording can be selective, but interception cannot. The choice is necessarily left to the interceptor, and not to the court. The thing to be seized can never be specifically described because the evidence sought is not in existence when the order is issued. Moreover, the court's function is not that of a neutral magistrate undertaking a preliminary step in an adjudicative process, but rather that of an adjunct of the executive branch. The court acts as the sovereign's messenger, not the impartial arbiter, because the target of the interception has no notice of the execution of the order and no opportunity to challenge it. The "return" is merely a report of the progress of the investigation;<sup>137</sup> an incorporeal product can no more be redelivered to the persons from whom it was taken than smoke can be restored to a flaming log. The effectiveness of electronic surveillance depends upon the invisibility of the entire process and the lack of notice to the persons affected.<sup>138</sup>

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<sup>134</sup> 18 U.S.C. § 2518(3) (1976).

<sup>135</sup> See *Osborn v. United States*, 385 U.S. 323, 353 (1966) (Douglas, J., dissenting); Taylor, *supra* note 6, at 71-91.

<sup>136</sup> 18 U.S.C. § 2518(4) (1976).

<sup>137</sup> The court order authorizing an interception "may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception." 18 U.S.C. § 2518(6) (1976). In addition, the contents of intercepted communications "shall, if possible, be recorded on tape or wire or other comparable device . . . . Immediately upon the expiration of the period of the order, . . . such recordings shall be made available to the judge issuing such order and sealed under his directions." 18 U.S.C. § 2518(8)(a) (1976).

<sup>138</sup> Wiretapping is not the only method of gleaning information from telephone monitoring. Use of a pen register permits the recording of all numbers dialed from a person's telephone. Information obtained by a pen register is closely analogous to that obtained by a mail cover. The Supreme Court held recently that fourth amendment protections do not extend to the use of pen registers. *Smith v. Maryland*, 47 U.S.L.W. 4779 (U.S. June 20, 1979) (No. 78-5374). The majority, noting that the defendant's property itself was not invaded and that pen registers have only limited surveillance capabilities, *id.* 4780, held that persons have no reasonable

The synergistic effect of the multiple erosions of *Boyd v. United States*<sup>139</sup> should now be evident. These electronic intrusions are aimed precisely at gathering "mere evidence" for the purpose of incriminating the object of the surveillance, preferably from the scrutinee's own mouth. The fifth amendment compulsion formerly found in fourth amendment searches is gone. Persons surveilled "voluntarily" bare thoughts not only to their families and closest friends, but to governmental ears, mechanically activated, with or without attachment to the government's cybernetic mind. Intrusions of the mail, whether examination of the exterior by a human eye or by an optical scanner or examination of the contents by hand or by mechanical means which sidestep the nuisance of slitting envelopes, are also collections of mere evidence.

#### D. *Zurcher v. Stanford Daily*

This combination of ingredients was the background of the Supreme Court's decision last term of *Zurcher v. Stanford Daily*.<sup>140</sup> During a student demonstration on the Stanford campus, some demonstrators and nine policemen were injured. The student newspaper covered the story and published photographs of the incident. The local district attorney obtained a search warrant for an immediate search of the newspaper's offices and files for negatives, film, and pictures which could possibly lead to the identification of persons who assaulted the peace officers. The newspaper's photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched,<sup>141</sup> but the search uncovered no evidence.

The lower courts held that the warranted search was unreasonable because the newspaper was completely innocent, and because the government had made no showing that a less intrusive means,

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expectation of privacy in the telephone numbers they dial. *Id.* 4781. The majority relied on the rationale of *Miller v. United States*, 425 U.S. 435 (1976), and held that the telephone company's ability to record numbers dialed is common knowledge so that individuals using the telephone assume the risk that this information will be turned over to the government. *Id.* Justices Stewart, Brennan, and Marshall, in dissent, argued that persons are entitled to an expectation of privacy regarding the telephone numbers they dial. *Id.* 4782 (Stewart, J., dissenting); 4782-83 (Marshall, J., dissenting). Justices Marshall and Brennan criticized also the majority's assumption of risk theory. According to that analysis, they predicted, the government could define the scope of fourth amendment protections "simply by announcing their intent to monitor the content of random samples of first class mail or private phone conversations," thereby "put[ting] the public on notice of the risks they would thereafter assume in such communications." *Id.* 4783 (Marshall, J., dissenting).

<sup>139</sup> 116 U.S. 616 (1886).

<sup>140</sup> 436 U.S. 547 (1978).

<sup>141</sup> *Id.* 551.



such as a subpoena, would not have been as effective.<sup>142</sup> The Supreme Court reversed, upholding the search against both fourth and first amendment attacks. Not only is an innocent person subject to a warranted search for evidence incriminating someone else, but also "a less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor."<sup>143</sup> In other words, an innocent person has less fourth amendment protection than a crook who keeps incriminating evidence to himself. The innocent person who objects to the search has no remedy at all.<sup>144</sup> If anything incriminating is discovered, the person incriminated may not have standing to complain even if the warrant is defective.<sup>145</sup> The majority of the Court was unmoved by Mr. Justice Stevens' dissenting opinion which pointed out that

[c]ountless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The *ex parte* warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object.<sup>146</sup>

Mr. Justice Stevens questioned whether the benefits to law enforcement efforts outweighed the offensive intrusions upon the privacy of law-abiding citizens.<sup>147</sup>

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<sup>142</sup> 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd per curiam*, 550 F.2d 464 (9th Cir. 1977).

<sup>143</sup> *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978).

<sup>144</sup> The Court regarded the innocent person's inability to challenge the search as of no consequence: "We reject totally the reasoning of the District Court that additional protections are required to assure that the Fourth Amendment rights of third parties are not violated because of the unavailability of the exclusionary rule as a deterrent to improper searches of premises in the control of nonsuspects." *Id.* 562-63 n.9. See also Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) (inadequacy of civil remedies for constitutional torts).

<sup>145</sup> See *Rakas v. Illinois*, 99 S. Ct. 421 (1978), discussed at note 90 *supra*.

<sup>146</sup> *Zurcher v. Stanford Daily*, 436 U.S. 547, 579 (1978) (Stevens, J., dissenting) (footnote omitted). Police searched the *Stanford Daily's* photographic laboratories, filing cabinets, desks, and wastebaskets. A prior adversary hearing would have given the newspaper "an opportunity to demonstrate to the court what the police ultimately found to be true—that the evidence sought did not exist." *Id.* 576 (Stewart, J., dissenting).

<sup>147</sup> *Id.* 581-82 (Stevens, J., dissenting). See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (citations omitted):

[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investiga-

## VII. HOW DID WE GET HERE, AND WHAT DO WE DO NOW?

Beneath the surface of the opinions from *Boyd v. United States*<sup>148</sup> to *Zurcher v. Stanford Daily*<sup>149</sup> are value judgments, rarely articulated, about the appropriate relationships between the state and the individual and about the role of law, particularly constitutional law, in maintaining an acceptable balance between private rights and public good. In *Stanford Daily*, the Justices' value judgments are very nearly explicit.<sup>150</sup> The majority, speaking through Mr. Justice White, believes that, as long as some procedural niceties are followed, public interest in enforcing criminal laws outweighs societal interests in preserving individual privacy and at least some of the values protected by the first amendment.<sup>151</sup> The dissenting Justices do not accept that evaluation on first amendment grounds or fourth amendment grounds or both.

*Stanford Daily* puts the question rather starkly: How much freedom are we willing to trade for "security" against crime? How much "protection" from whom have we bought and at what price? Unfortunately, in our national hysteria about crime, we

tion of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

<sup>148</sup> 116 U.S. 616 (1886).

<sup>149</sup> 436 U.S. 547 (1978).

<sup>150</sup> See, e.g., 436 U.S. 547, 561-62, n.8 (1978) (use of subpoena unlikely to "result in the production of evidence with sufficient regularity to satisfy the public interest in law enforcement" because recipient of a subpoena, "[u]nlike the individual whose privacy is invaded by a search, . . . may assert the Fifth Amendment privilege against self-incrimination"). See Chase, *The Burger Court, The Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518 (1977).

<sup>151</sup> This view is also the source of hostility toward the exclusionary rule. Professor Kaplan observes, "[i]t is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment." J. KAPLAN, *CRIMINAL JUSTICE* 216 (2d ed. 1978). The large number of convictions lost on motions to suppress indicates a high degree of disregard for the prohibition of unreasonable searches. As Professor Kamisar has pointed out, the outraged reaction of many law enforcement officials to *Mapp v. Ohio*, 367 U.S. 643 (1961), indicates that prior to *Mapp* the police customarily ignored the substantive commands of the fourth amendment. *Mapp*, of course, worked no change in the substantive reach of the fourth amendment: it pertained only to the evidentiary use of illegally seized evidence. See Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 70, 71 (1978). The problem is not that the exclusionary rule doesn't "work," that is, doesn't deter illegal searches, but that critics believe that catching criminals is more important than preserving freedom from unreasonable searches—as long as the target is someone other than the critic.

have not compared very closely how much we are paying with how little we are receiving in return. The benefits of the bargain cannot sensibly be examined without identifying the different kinds of interests that we have in eradicating different kinds of crime. For example, the societal interests in controlling securities frauds are very different from the societal interests in preventing muggings. Moreover, the means used both to prevent and to detect white collar crime, like securities fraud, are obviously very different from those used in fighting street crime, like mugging. Mail covers, electronic surveillance, and examination of bank records may have some utility in capturing white collar crooks, but are virtually useless in controlling street crime.

The level of public anxiety is extremely high when the subject is street crime, crimes against the person and against property within the home. On the other hand, the level of concern about white collar crime is low, almost to the point of indifference, even though the dollar losses from muggers, burglars, robbers, and other kinds of so-called "real criminals" are insignificant in comparison to the billions of dollars that white collar criminals "rip off."<sup>152</sup> The difference in our responses to the two kinds of crime is by no means irrational. We have perfectly sound reasons for fearing crimes that threaten us with personal violence or with intrusions into our living space, while we can view impersonal white collar crimes with equanimity. No one is afraid to walk by the offices of Equity Funding, even at night.<sup>153</sup>

The sales pitch for electronic surveillance is evidenced by congressional use of the title "Omnibus Crime Control and Safe Streets Act."<sup>154</sup> The implication is that when we have yielded our freedom from electronic intrusion we have bought safety in the streets. A few moments' reflection will convince you that the assumption is nonsense. Electronic surveillance, wiretapping, and data bank gathering are effective in crime control only in areas in which some kind of communication is an indispensable ingredient of the crime itself or at least a highly useful adjunct to criminal activity. Crimes of this type are certain kinds of white collar crimes, narcotics traf-

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<sup>152</sup> United States Chamber of Commerce, *White Collar Crime: The Problem and its Import*, in 1 CRIME AND JUSTICE 314-55 (L. Radzinowicz & M. Wolfgang eds. 2d ed. 1971). "The yearly cost of embezzlement and pilferage reportedly exceeds by several billion dollars the losses sustained throughout the nation from burglary and robbery." *Id.* 315.

<sup>153</sup> See C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE (1978). Silberman's penetrating discussion of the sources and solutions of the problem of violent crime is accompanied by an exhaustive bibliography.

<sup>154</sup> 18 U.S.C. §§ 2510-2520 (1976).

ficking, gambling, seditious libel, and conspiracies to commit those offenses. The ultimate question is this: does our societal interest in possibly preventing or detecting the commission of such crimes outweigh the societal interest in being free from incorporeal intrusions into our offices, homes, and private lives? We cannot evaluate the price of the trade-off without some idea of the effectiveness of these intrusions in preventing those crimes or in revealing the offenders. Nor can we decide how much we have paid for this protection unless we also know how many innocent people we have hurt in the process. If we knew, for example, that for every heroin dealer we caught by electronic surveillance, one hundred Billy Budds suffered injury, would we say that we had made a good societal bargain?

The truth is that we have no idea about the effectiveness of these insidious intrusions in controlling the few crimes to which the techniques can conceivably be relevant. We have the illusion that electronic surveillance is effective because the only cases we ever see are those in which some kind of incriminating evidence is ultimately produced. The innocent victims, like Hester and Billy, may never find out that the causes of their distress were invisible searches and, even if they later learn the cause, no redress is available.

When a tangible interest is weighed against a tangible interest, the scale is relatively easy to read. When the interests on both sides of the scale are not only intangible, but often invisible, however, the weighing process is a very chancy affair. How many grams of societal interest in the privacy of our mail does it take to outweigh the societal interest in using the mails to try to find and to convict a securities swindler? Does public anxiety about narcotics trafficking outweigh the public interest in untapped telephones?

The answers to questions like these are always easy if one assumes that the liberty given up belongs to someone else. For instance, a brief flurry of congressional interest in mail covers occurred after reports that some Senators and Congressmen had been subjected to mail covers.<sup>155</sup> Until then, members of Congress, like members of the general public, shared the happy assumption that none of these governmental intrusions would ever be turned against them. Myths, like that one, have endured because they are so comfortable. Is it not soothing to believe that crime control is simply a matter of hiring enough policemen and giving them enough hardware to deal with the situation? Would it not be unsettling to

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<sup>155</sup> See Note, *Invasion of Privacy: Use and Abuse of Mail Covers*, 4 COLUM. J.L. & Soc. PROB. 165, 166 (1968).

realize that control of street crime depends primarily upon exterminating racism and employing adolescents gainfully rather than removing soft-headed judges who apply exclusionary rules?

From the mass of publicity about our crime problems, one might think that the nation consists of millions of innocent victims held hostage by an alien band of criminals. Such observations contain a bacterium of truth if they are confined to the mindless and often savage attacks by young, disorganized thugs. But the perception is wildly off the mark with respect to such crimes as gambling, dealing in stolen property, prostitution, loan sharking, and all kinds of predatory economic crime. Organized crime and professional criminals could not make their indecent livings by selling their wares to one another. The fact is that the patrons of pornographic arts, of prostitutes, of fences, and of all kinds of gambling and vice are members of the so-called straight society.<sup>156</sup> The crooks who pander to our vices, who profit from our searches for goods and services at prices too good to be true, and who otherwise appeal to our baser instincts, may be our number one public enemies, but we have found public enemy number two, and the enemy is us.

If we are to make any progress in protecting ourselves from further diminution of our own liberties, we must shed our reliance upon mythology. We must acknowledge that we do not know very much about behavior modification. We must be aware that there is no simple solution to the "crime problem" because crime is not a single "disease" affecting only a few of our citizens; it is a complex, pandemic phenomenon. Efforts to eradicate crime by yielding more and more of our freedom to the government are exercises in futility.

We cannot sit back doing nothing and awaiting enlightenment, nor can we be idle while anticipating the reincarnations of Justices Holmes, Brandeis, and Bradley to deliver us from our follies. The encroachments on rights protected by the fourth and fifth amendments have taken a century, and revaluation of these rights by the Supreme Court will be a long and arduous process. Meanwhile, we have judicial systems and legislatures in fifty states, as well as a national legislature, which can begin the restoration task.<sup>157</sup>

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<sup>156</sup> See SILBERMAN, *supra* note 153, at 99-111.

<sup>157</sup> Several bills dealing with the right of privacy have been introduced in Congress: S. 855, 96th Cong., 2d Sess., 125 CONG. REC. S3791 (daily ed. Apr. 2, 1979) (proposed by President Carter to limit the effect of *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), with respect to "persons involved in First Amendment activities"); H.R. 10076, 95th Cong., 1st Sess., 123 CONG. REC. H12,316 (daily ed. Nov. 11, 1977); H.R. 8279, 95th Cong., 1st Sess., 123 CONG. REC. H7070 (daily ed. July 13, 1977), and H.R. 1347, 95th Cong., 1st Sess., 123 CONG. REC. H216 (daily ed. Jan. 6, 1977).

The first step is to recognize that we must have zones of individual privacy which cannot be penetrated by the government, because no societal interest can be as compelling as the need of the individual citizen for preservation of autonomy of personality.<sup>158</sup> One of those zones of privacy protects one's home from any invisible governmental presence.<sup>159</sup> This protection is not an invention of Anglo-American jurisprudence. For thousands of years, the home has been protected from intrusions because enclaves of privacy are essential to fill some of our most basic human needs.<sup>160</sup> Physical

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<sup>158</sup> [P]rivacy is not just one possible means among others to insure some other value, but . . . it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable.

Fried, *supra* note 52, at 477. See WESTIN, *supra* note 52, at 23-25, 32-39, 42-51 (functions of individual and organizational privacy); Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968); Note, *A Reconsideration of the Katz Expectation of Privacy Test*, *supra* note 52, at 156 (fourth amendment "protects the right to have certain expectations of privacy," regardless of governmental manipulation of actual expectations of privacy). See also Levi, *Confidentiality and Democratic Government*, 30 REC. A.B. CTRY N.Y. 323 (1975) (government's need for "privacy"). Westin suggests that

personal information, thought of as the right of decision over one's private personality, should be defined as a property right, with all the restraints on interference by public or private authorities and due-process guarantees that our law of property has been so skillful in devising. Along with this concept should go the idea that circulation of personal information by someone other than the owner or his trusted agent is handling a dangerous commodity in interstate commerce, and creates special duties and liabilities on the information utility or government system handling it.

WESTIN, *supra*, at 324-25.

<sup>159</sup> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961) (citations omitted). *Katz v. United States*, 389 U.S. 347 (1967), should not be read to diminish this right. That case rejected the notion in *Olmstead v. United States*, 277 U.S. 438 (1928), that the fourth amendment was not violated unless a trespass occurred. The purpose of *Katz* was to expand, not to contract, protection from searches and seizures. *Alderman v. United States*, 394 U.S. 165 (1969) (fourth amendment violation to enter person's home to install wiretap even though none of his conversations were recorded; *Katz* not intended to withdraw any fourth amendment protection of the home). See Note, *A Reconsideration of the Katz Expectation of Privacy Test*, *supra* note 52; Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, *supra* note 53.

<sup>160</sup> See LASSON, *supra* note 6, at 14-19.

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

entry has been permitted for limited purposes if the government meets stringent procedural requirements. Invisible government presence in our homes is, however, unacceptable and should be flatly prohibited.

Procedural protections to control physical entrance into the home are useless as shields from an intangible presence. A knock on the door never announces an incoming bug, a hyperbolic microphone, or a laser beam. A microphone concealed on a visitor does not beep its presence, announce its mission, or seek our invitation. The fact of an incorporeal presence in our homes is diabolical no matter how that presence made its entry nor which mechanical contrivance was the means.<sup>161</sup> The fear of that presence is just as sinister. We do not need a sophisticated study or a carefully calibrated scale to tell us that acceptance of invisible searches of our homes is too high a price for the innocent to pay to seek out the guilty. A common burglar is bad enough, but an invisible governmental burglar is intolerable.

We should promptly enact statutes restricting governmental intrusion into our mail to searches undertaken pursuant to a warrant. Whether the mail originates from across the sea or from across town, governmental eyes should not be permitted to read the contents of our letters, absent strongest justification. We have no reason for confidence in the speed with which our mail will be delivered, but we should have the assurance that the journey of our letters, no matter how slow, will not be interrupted by governmental spying. Mailmen should be our messengers, not the state's newsgatherers.<sup>162</sup> Whether the ideas we send through the mail are

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Silverman v. United States, 365 U.S. 505, 511-12 n.4 (1961) (quoting United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952)). See note 52 *supra*.

<sup>161</sup> Technologically assisted visual surveillance is at least equally intrusive as electronic eavesdropping, but courts have been less willing to find it unreasonable. *E.g.*, Commonwealth v. Hernley, 216 Pa. Super. Ct. 177, 263 A.2d 904 (1970), *cert. denied*, 401 U.S. 914 (1971) (no reasonable expectation of privacy because defendant could have drawn blinds, though agent had to climb ladder and use binoculars to see into window). *But see* United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976) (use of high powered telescope from distance of one-quarter mile to see into apartment was unreasonable search; use of binoculars from 160 feet to observe outside terrace was permissible); People v. Arno, 153 Cal. Rptr. 624 (Ct. App. 1979) (use of binoculars and telescopes to enhance vision of something visible with naked eye not a per se violation of federal or state constitution, though use to enable sight of something not so visible unconstitutionally invades reasonable expectation of privacy). See Note, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?*, 3 HASTINGS CONST. L.Q. 261 (1976); Comment, *Telescopic Surveillance as a Violation of the Fourth Amendment*, 63 IOWA L. REV. 708 (1978).

<sup>162</sup> See COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT (1975); SENATE SELECT COMM. TO STUDY GOVERNMENTAL OP-

as lofty as biblical exegesis, as essential for democratic process as political debate, or as trivial as gossip, communication of those ideas free from unreasonable governmental intrusion is an essential value in a free society. Societal interests in discovering criminal acts and in identifying criminals through warrantless searches of the mail are not great enough to justify sacrificing the privacy of our mail. Monitoring our mail for the purpose of creating data banks, as well as opening our letters in search of incriminating evidence, should be forbidden by statute, in the absence of a real warrant issued upon old-fashioned probable cause to believe that specific mail contains evidence of an identified crime committed by the sender or the receiver. A warrant requirement would also permit both addressees and senders a genuine opportunity to challenge the validity of the intrusion.

Statutory repairs should be undertaken promptly to protect innocent persons from corporeal or incorporeal searches to discover evidence implicating others in criminal activity. Governmental searches are extremely unpleasant, whether they are conducted pursuant to a warrant or without such procedural amenities. Innocent persons should not be subjected to the pain and indignity of a search unless the invasion is justified by a compelling need which cannot reasonably be satisfied by less intrusive methods. Warrantless searches are unreasonable per se. No warrants should issue to search an innocent person's home or office absent a showing, supported by affidavit, that the particularly described evidence incriminating another would be lost or destroyed if the government were required to proceed by way of a summons or subpoena. Whether the subject of a third-party search is the Ben Franklin Free Press Association or plain old Ben, the third-party search confounds the innocent with the guilty and suffers from many of the infirmities that caused our colonial forebears to take up arms against writs of assistance and general warrants.

Governmental and private peeping toms and eavesdroppers will not vanish by passing laws against such conduct. But the law itself will no longer be tarnished by approving this "dirty business."<sup>163</sup> Excluding the fruits of such illegal conduct will relieve the judiciary of continuing to play an ignoble role.

History is a great teacher, but we are not always apt pupils. "In times of unrest, whether caused by crime or racial conflict or

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ERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS (1976) (final report).

<sup>163</sup> *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).



fear of internal subversion,"<sup>164</sup> those who feel the most threatened, whether they are crowned heads or ordinary people, have always wanted to turn the forces of the state against those who are seen as enemies, no matter how sorely freedoms are trampled. Protecting those whom we despise from arbitrary intrusions by officialdom appears unrealistic or even extravagant. The bitter lesson of history, though, is that each time we diminish the freedom of our neighbor, even a wicked neighbor, we likewise diminish our own.

In times not altogether unlike our own . . . [the authors of our fundamental constitutional concepts] won . . . a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.<sup>165</sup>

In a harshly materialistic world, intangible values assume even greater significance. Without the fuel for the spirit supplied by intangible values, no energy exists to pursue happiness or to carry on the never-ending search for justice. The price to be paid for freedom must always be extravagant because it is a rare and precious jewel in our treasury of intangible things.

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<sup>164</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

<sup>165</sup> *Id.* (footnotes omitted).