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## THE SHORT HAPPY LIFE OF *BERGER v. NEW YORK*

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OF PRIME CONCERN to those who have spoken, written,<sup>1</sup> or even thought about *Berger v. New York*,<sup>2</sup> wiretapping and electronic eavesdropping, the proper scope of the Fourth Amendment, and the penumbral sphere or zone of privacy constructed by recent judicial logic,<sup>3</sup> must be the subsequent New York judicial reaction to the *Berger* decision, as well as the United States Supreme Court's further efforts in the area of the constitutionality of electronic surveillance.

In *Berger v. New York*, the Supreme Court held, five to four, that the obtaining of a court order does not purify an otherwise unconstitutional physical invasion and electronic search where the enabling statute is invalid due to its allowance of eavesdropping for "general purposes" and without the belief that a crime is being

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<sup>1</sup> See Greenwalt, *Wiretapping & Bugging: Striking a Balance between Privacy and Law Enforcement*, 72 Case & Com. 3 (1967); Solomon, *Wiretapping and Bugging: A Counter Proposal*, 40 N.Y.S.B.J. 94 (1968); and Arthur Keeffe's column on eavesdropping in 54 A.B.A.J. 204 (1968).

<sup>2</sup> *Berger v. New York*, 388 U.S. 41 (1967).

<sup>3</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965), which is responsible for such a penumbral zone. A "right" of privacy has likewise been found to be one of the liberties embodied in Due Process. See *Silverman v. United States*, 275 F.2d 173, 179 (D.C. Cir. 1960) (dissenting opinion of Washington, J.). Note also the breadth of Mr. Justice Douglas' view of privacy. Douglas, *The Right of the People 57 et seq.* (Pyramid ed. 1962). King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 Geo. Wash. L. Rev. 240, 267-9 (1964), similarly suggests that a "composite of liberties" rather than any specific amendment or group of amendments should be utilized for dealing with eavesdropping. Examine further, Semerjian, *Proposals on Wiretapping in Light of Recent Senate Hearings*, 45 B.U.L. Rev. 216 (1965).

committed for a protracted period of time. The Court carefully remained within the structure of the Fourth Amendment, but unfortunately made reference to an "exigent circumstances" exception, apparently leaving open an escape hatch in its construction of a harmful half-way house, limiting police eavesdropping activity, yet apprehensively refraining from an honest recognition of complete individual freedom.

On December 7, 1967, in *People v. Kaiser*,<sup>4</sup> the New York Court of Appeals, presented with an opportunity for applying the learning of *Berger*, held proper a court order authorizing the tap of telephones in certain bars for the purpose of gathering leads to the individual who had allegedly threatened a businessman's daughter via telephone in an extortion plot.

The New York court's decision was followed only 11 days later by the United States Supreme Court's only electronic surveillance case since its *Berger* decision, *Katz v. United States*.<sup>5</sup> In *Katz*, the conviction of Charles Katz of the federal offense of "interstate transmission by wire communication of bets or wages"<sup>6</sup> was reversed because FBI agents had monitored Katz's incriminating phone calls from a public telephone booth and the Government had been permitted to introduce evidence of Katz's end of the conversations at the trial. However, as will be seen upon later examination, the *real* meaning of *Katz* may be extremely difficult to ascertain at first, second and maybe even third glance!

Are *Kaiser* and *Katz* inconsistent with one another? Does either represent a repudiation of *Berger*? What is the constitutional status of electronic eavesdropping after *Katz*? Does and will the New York court agree? These are just a few of the questions which this article hopes to answer.

The New York court in *Kaiser* was confronted simply with the problem of retroactive application of *Berger* to an eavesdrop which antedated the Supreme Court's decision in that case. However, it is quite clear that the New York court did not make an

<sup>4</sup> 233 N.E.2d 818 (N.Y.C.A. 1967).

<sup>5</sup> 389 U.S. 347 (1967).

<sup>6</sup> 18 U.S.C. 1084 (1961).

effort to confine its opinion to this narrow issue; rather, the court went out of its way<sup>7</sup> to salvage *for application even* after its own death<sup>8</sup> a statute which the Supreme Court in *Berger* previously found "deficient" and unconstitutional "on its face."<sup>9</sup>

The New York eavesdropping statute struck down in *Berger* and resurrected by the court in *Kaiser* provides, in essence, for court-order eavesdropping upon a prosecutor's or police affidavit that there exists reasonable grounds to believe that evidence of a crime may be obtained, with the order particularly describing the subjected person or persons and the purpose of the eavesdrop.<sup>10</sup>

<sup>7</sup> The New York court made this "straining" effort by resorting, first, to its "traditional policy" of, "construing statutes in such a manner as to uphold their constitutionality," 233 N.E.2d at 828, citing, *inter alia*, *People v. Epton*, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967); *Matter of Coates*, 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 797 (1961); and *People ex rel. Morriale v. Branham*, 291 N.Y. 312, 52 N.E.2d 881 (1943). Granting the validity of this "policy" for argument purposes only, the conclusion is unavoidable that its mandate and the cases cited are directed toward the New York court's *own* striking down of a statute enacted by its legislature as unconstitutional and are quite irrelevant to that court's treatment of a case arising subsequent to a decision by the United States Supreme Court striking down a New York state statute as unconstitutional on its face. Secondly, the court found it necessary to resort to *Dombrowski v. Pfister*, 380 U.S. 479 (1964), for authority of a state court to rehabilitate a statute found unconstitutional "on its face" by the Supreme Court. It should be noted that the Supreme Court's language in *Dombrowski* is quite inapposite to the *Berger-Kaiser* type situation since the Court in *Dombrowski* was concerned with an entirely different set of circumstances—*i.e.*, where petitioners have obtained *injunctive relief* against future prosecutions under the statute found unconstitutional "on its face" by the Court.

<sup>8</sup> Chief Judge Fuld, in registering the lone dissent in *Kaiser*, recognized the inappropriateness of *Dombrowski*, *supra* note 7, in the following manner:

Here, in sharp contrast (to *Dombrowski*), the applicable statute had been authoritatively construed by this court in *Berger* . . . and had, on the basis of that construction, been held unconstitutional on its face by the Supreme Court. . . . I have come on no case, and none has been called to our attention, in which a State court has presumed to resuscitate a statute by a retroactive re-interpretation after the United States Supreme Court had (as it has done here) declared it constitutionally dead. 233 N.E.2d at 832.

<sup>9</sup> *Berger v. New York*, *supra* note 2, at 55.

<sup>10</sup> Section 813-a of the New York Code of Criminal Procedure specifically provides as follows:

An ex parte order for eavesdropping as defined in . . . the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public inter-

Such a court order was issued by Justice Spitzer, a New York trial judge, effective July 1, 1964 until August 29, 1964, authorizing the District Attorney of Nassau County to tap and record the telephone communications of Salvatore Granello, Dino Conte and *anyone else* over the phone located in the Headline Bar at 255 West 43rd Street, New York City.<sup>11</sup> The two individuals specified above had allegedly made a concerted effort in early June 1964 to extort \$25,000 and a 25% share of the business of a New York executive; and on June 30, 1964, a threatening phone call was made to the businessman's pregnant daughter. The tap as authorized was for the purpose of obtaining evidence to identify the person who made the threatening telephone call, and it did, in fact, record Kaiser's conversations on July 3 and 5 with Dino Conte, clearly implicating him as a co-conspirator.<sup>12</sup>

The New York Court of Appeals first proceeded to note that *Berger* was concerned solely with "bugging" and that the Court's opinion in that case nowhere held wiretapping to fall within the purview of the Fourth Amendment,<sup>13</sup> although any such distinction between bugging and tapping as a measure of the precious constitutional rights of the individual involved was quickly abandoned by the New York court for purposes of deciding Kaiser's appeal.<sup>14</sup>

The vice of *Olmstead v. United States*<sup>15</sup> was precisely this same type of repulsive distinction—there in terms of an "accompanying physical invasion."<sup>16</sup> The blatant stupidity of permitting precious individual liberties to rest upon distinctions between the types of equipment used to intrude with or without invading is ably illustrated by the unbelievable subtlety of modern eavesdrop devices, as highlighted by the displays and demonstrations presented before

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est. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein . . . .

<sup>11</sup> 233 N.E.2d at 820.

<sup>12</sup> *Id.* at 820-1.

<sup>13</sup> *Id.* at 822.

<sup>14</sup> The court stated: "[W]hile we hold that the conditions set forth in *Berger* should, as a matter of policy, apply to future wiretapping orders issued under the statute, we believe that a reversal of the appellant's conviction is neither mandated by *Berger* nor by the prophylactic purpose of the exclusionary rule to which wiretap evidence obtained in violation of the Fourth Amendment is now subject." *Ibid.*

<sup>15</sup> 277 U.S. 438 (1928).

<sup>16</sup> *Id.* at 457, 464, and 466, where the absence of "physical penetration" was highlighted to foreclose the application of the Fourth Amendment.

Senator Edward V. Long's Subcommittee on Administrative Practice and Procedure.<sup>17</sup> These devices included a "thumbnail mike" transmitter, a cigarette lighter and box transmitting set, an "olive" bug punctured with a "toothpick" transmitter and antenna able to broadcast three blocks away while immersed in a martini, a telephone monitor activated by a blow on a small harmonica, and a *laser* (light amplification by stimulated emission by radiation) beam modulated with telephone or television signals for reflection through a window in another building.<sup>18</sup> Heaven only knows how close to the Orwellian<sup>19</sup> prophecy of full view and audio by Big Brother of every motion and activity in our daily lives we will come in future years if eavesdropping, both governmental and private,<sup>20</sup> is not soon checked. Experts have forecasted an even more rapid development and widespread use of such devices in future years.<sup>21</sup> Private remedial tort actions are not the answer;<sup>22</sup> what is needed is a forthright judicial recognition of the existing constitutional ban.

After apparently abandoning the distinction between bugging and wiretapping as a means for avoiding the mandate of *Berger*, the New York court alluded to its maintenance of similar standards governing eavesdrops as had been applied in the case of ordinary searches.<sup>23</sup> This parallel was obviously noted for the purpose of

<sup>17</sup> *Hearings on Invasions of Privacy Before Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., pt. 1 (1965).

<sup>18</sup> See a more detailed presentation of the intricacies of these subtle devices in Long, *The Right to Privacy: The Case Against the Government*, 10 St. Louis U.L.J. 1, at 12-14 (1965).

<sup>19</sup> George Orwell, in his novel *1984*, forecasted a "telescreen" which "received and transmitted simultaneously" so that there was "no way of knowing" whether one was being observed at any given moment and one had to live "in the assumption that every sound (he) made was overheard and, except in darkness, every movement scrutinized."

<sup>20</sup> Legislation has been suggested for placing limits on eavesdropping by private parties through prohibition on the sale of the tainted equipment. This could be further augmented by making possession of such equipment a criminal offense. See Comment, 38 So. Cal. L. Rev. 622 (1965).

<sup>21</sup> Such prospects have been elaborately outlined by Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's*, 66 Colum. L. Rev. 1003 (Part I), 1205 (Part II) (1966).

<sup>22</sup> Although the litigated cases are sparse, to say the least, probably because of a desire by the subject individual to avoid publicity, electronic eavesdropping has been held to give rise to an actionable tort of invasion of privacy. See *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958); and *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1964). Examine an early formulation of the elements of this cause of action by Nizer, *The Right of Privacy*, 39 Mich. L. Rev. 526 (1941).

<sup>23</sup> The court illustrated these parallel criteria by its holding of insufficiency of an affidavit supporting an eavesdrop order in *People v. McCall*, 17 N.Y.2d 152, 269 N.Y.S.2d

demonstrating the continuous imposition of a probable cause prerequisite to eavesdrop orders,<sup>24</sup> which, in turn, could buttress a conclusion that the order in Kaiser's case complied with a meaningful standard of "reasonableness." However, the ludicrous nature of the "warrant device" as a measure of reasonableness in the area of eavesdrops has been clearly demonstrated in a comment advocating the constitutional impermissibility of even *restricted* uses of electronic eavesdrops because of the impossibility of meeting the requirement that a warrant particularly describe what is sought.<sup>25</sup>

The New York court could not avoid the defective conditions of the order in failing to adequately specify the precise conversations sought to be monitored,<sup>26</sup> failing to provide for notice,<sup>27</sup> as in the case of conventional warrants, and lacking a sufficient time limitation—all condemned by the Supreme Court in *Berger*.<sup>28</sup> Thus, the only course open to the New York court for rejecting the specificity, notice and time limitation contentions of appellant Kaiser rested on a nonretroactivity interpretation of the *Berger* mandate.

The retroactivity argument, seen in this light, should be much

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396, 216 N.E.2d 570 (1966); its finding of standing to challenge a wiretap order by a defendant not a party to the conversation in *People v. McDonnell*, 18 N.Y.2d 509, 277 N.Y.S.2d 257, 223 N.E.2d 785 (1966); and its general adherence in *Matter of Sarisohn*, 21 N.Y.2d 36, 286 N.Y.S.2d 255, 233 N.E.2d 276 (1967).

<sup>24</sup> It is extremely interesting to note what one commentator had to say as recently as 1965 about the police eavesdropping situation in New York:

It is small wonder that most of the wiretapping done in New York is accomplished without the benefit of court order. The evidence is accepted in state criminal trials regardless of how obtained. Kent, *Wiretapping: Morality and Legality*, 2 Houston L. Rev. 285, at 311 (1965).

These comments should certainly cause one to pause for reflection upon the contrary picture painted by the majority in *Kaiser*.

<sup>25</sup> Note, *Electronic Eavesdropping: Can It Be Authorized?*, 59 Nw. U.L. Rev. 632, 639 (1964), where the student author concludes:

It seems unlikely if not impossible for conversation to be particularly described. Even if one could adequately describe the conversations sought, the search, of necessity, would go far beyond what is described, for eavesdropping is of its nature indiscriminate. Innocent, as well as incriminating, conversations would be overheard.

<sup>26</sup> The court itself noted (233 N.E.2d at 824, N.2) that the order authorized wiretaps of the conversations of "all those who communicated over" the Headline Bar telephone and that: "It is precisely because eavesdropping poses such a threat to the right of privacy that it should be undertaken under strict judicial supervision and subject to the severest constitutional restraints."

<sup>27</sup> See note 56 *infra*.

<sup>28</sup> *Berger v. New York*, 388 U.S. 41, 59-60 (1967).

more skeptically regarded by the legal observer.<sup>29</sup> Quite simply, the New York court reasoned that the learning of *Berger* should apply only to cases in which orders were issued or the actual eavesdrop took place after the date *Berger* was decided<sup>30</sup> because: (1) retroactive application would not "undo the violation of the defendant's rights" and, hence, the *Berger* purpose of "deterrence of future police conduct" could not be furthered;<sup>31</sup> (2) the admission of wiretap evidence has no effect upon the "integrity of the fact-finding process"<sup>32</sup> or, in other words, we have in such a case an *obviously guilty* defendant; and (3) administrative inconvenience would result from retroactive application, since thousands of orders had been issued in reliance upon the statute.<sup>33</sup> In connection with this last reason, the majority of the court put to itself the following questions:

[I]f we hold that the particular police conduct is now violative of an individual's constitutional rights, how can we say that the same conduct in the past did not likewise offend against his rights? Similarly if the offensive police conduct was authorized by a statute which is now found to be unconstitutional, how can we say that past conduct authorized thereunder was not equally violative of the defendant's rights?<sup>34</sup>

The court's answer to these two questions is, at best, logically weak and most certainly, in light of the precious individual liberties

<sup>29</sup> Such skepticism should be even further heightened by the fact that the very statute held unconstitutional by the Supreme Court had, as noted by Chief Judge Fuld's dissent (see note 8 *supra*), already been "authoritatively construed" by this very same New York court in *People v. Berger*, 18 N.Y.2d 638, 272 N.Y.S.2d 782, 219 N.E.2d 295 (1966).

<sup>30</sup> 233 N.E.2d at 825.

<sup>31</sup> This conclusion forced the New York court to repudiate its own doctrine of retroactivity announced in *People v. Loria*, 10 N.Y.2d 368, 223 N.Y.S.2d 462, 179 N.E.2d 478 (1961), which retroactively applied the *Mapp v. Ohio*, 367 U.S. 643 (1961), exclusionary rule. In addition, this holding necessitated the repudiation of a long series of cases supporting retroactive effect cited in *Loria* and again by the *Kaiser* court, 233 N.E.2d at 825.

<sup>32</sup> This somewhat hindsighted argument which, to say the least, ignores the effect of the admission of such tainted evidence upon the "climate" of the trial and the defendant's trial strategy is the same rationale for non-retroactivity which caught the fancy of the Supreme Court in *Linkletter v. Walker*, 381 U.S. 618 (1964), when faced with the prospect of releasing literally thousands of prisoners who were deprived of their Sixth Amendment right to counsel at their trials.

<sup>33</sup> This administrative expediency contention also served as the basis for the New York court's non-retroactive application of *Miranda v. Arizona*, 384 U.S. 436 (1965), in *People v. McQueen*, 18 N.Y.2d 337, 274 N.Y.S.2d 886, 221 N.E.2d 550 (1966). Chief Judge Fuld's dissent noted the peculiarities of the police interrogation problem presented by *Miranda* as well as the absence of an intimation in *McQueen* that "our prior practice in search and seizure cases should be modified." 233 N.E.2d at 831.

<sup>34</sup> 233 N.E.2d at 825.



which hang in the balance, jurisprudentially brazen and repulsive.<sup>35</sup> The court's answer was: "logic must sometimes give way to 'reason(s) of practicality and necessity.'" <sup>36</sup>

The New York court then proceeded to reject the defendant's argument bottomed on section 605 of the Federal Communications Act.<sup>37</sup> He, in effect, asked for a repudiation of the rationale of *Schwartz v. Texas*,<sup>38</sup> where the Supreme Court held that the Federal Communications Act did not supersede the exercise of state power in the absence of a clear manifestation of a Congressional intent to so deal and, consequently, that *state* gathered wiretap evidence can be allowed by a *state* court in a *state* prosecution, notwithstanding the mandate of section 605 of the Act.<sup>39</sup>

After reaffirming *its* belief in the validity of *Schwartz* and noting the announced federal policy of refusing to enforce section 605 violations against state officials who acted under the authority of a state wiretap law<sup>40</sup> for the purpose of justifying its rejection of defendant's section 605 argument, the court finally proceeded to engage in its aforesaid "rehabilitation" for prospective application of the unconstitutional statute,<sup>41</sup> concluding its opinion with the "realities of life"<sup>42</sup>—*i.e.*, the rise of organized crime and criminal enterprises which demand that the individual tolerate some intrusion, "lest the only security we enjoy is that from government intrusion."<sup>43</sup> This is not a new story—the excuse has frequently been given that the recognition of the unconstitutionality of *all* wire-

<sup>35</sup> Additionally, the majority was forced to "expressly overrule," by means of a footnote (233 N.E.2d at 825, N.4), its own recent holding in *People v. Grossman*, 20 N.Y.2d 346, at 349, 283 N.Y.S.2d 12, 229 N.E.2d 589 (1967), where the same court said of the very same statute only a few short months after *Berger* had found it unconstitutional, "it is as if there had never been any valid authority for the police to act as they did."

<sup>36</sup> 233 N.E.2d at 825.

<sup>37</sup> *Id.* at 827-8.

<sup>38</sup> 344 U.S. 199 (1952).

<sup>39</sup> See Solomon, *supra* note 1, at 95, for an analysis of the interaction of this holding in *Schwartz* with the *Olmstead* rule.

<sup>40</sup> Statement of Attorney General Robert F. Kennedy to Senate Judiciary Committee, March 29, 1962; Statement of Attorney General William P. Rogers, *New York Times*, December 24, 1957, p. 10, col. 1.

<sup>41</sup> 233 N.E.2d at 828-9.

<sup>42</sup> *Id.* at 828.

<sup>43</sup> *Ibid.*, referring to the President's Commission on Law Enforcement and Administration of Justice 200-203 (1967).

tapping and electronic eavesdropping would "shackle" the police<sup>44</sup> and only help and protect the criminal element in our society,<sup>45</sup> and that the "innocent" citizen has nothing to worry about<sup>46</sup> and should have nothing to hide.<sup>47</sup> The wisdom of the late Mr. Justice Frankfurter quite ably responds to this distasteful suggestion:

It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.<sup>48</sup>

It being evident from *Kaiser* that *Berger* did not effectively kill the New York eavesdrop statute, the question then arises whether the statute, as "resuscitated" and "rehabilitated" by the New York court in *Kaiser*, can pass muster under the rationale enunciated by the Supreme Court in *Katz*.

As noted earlier, even after most intense study and examination the real meaning of *Katz* may not even be discernible at this time. This confusion results from the fact that five separate opinions spewed forth from the eight participating Justices, no more than three of the Justices concurring in any one opinion. The Ninth Circuit had held that the eavesdrop and the recording by the Government of Charley Katz's racetrack conversations did not constitute an illegal search and seizure in violation of the Fourth Amendment because "there was no physical entrance into the area occupied by appellant."<sup>49</sup>

<sup>44</sup> See, for example, Silver, *Law Enforcement and Wiretapping*, 27 Tenn. L. Rev. 352 (1960); Brown & Peer, *Wiretapping Entanglement: How to Strengthen Law Enforcement and Preserve Privacy*, 44 Corn. L.Q. 175 (1959); Rogers, *The Case for Wiretapping*, 63 Yale L.J. 792 (1954); and Comment, 6 St. Louis U.L.J. 436 (1961).

<sup>45</sup> Statement of Senator Frank E. Moss of Utah, 106 Cong. Rec. 17735 (1960); Rogers, *supra* note 44; see also note 43 *supra*.

<sup>46</sup> Silver, *The People's Case for Wiretapping*, 1 Am. Crim. L.Q. 15 (1963); Parker (Chief of Police, City of Los Angeles), *Surveillance by Wiretapping or Dictograph: Threat or Protection? A Police Chief's Opinion*, 42 Calif. L. Rev. 727 (1954); and Brown & Peer, *supra* note 44.

<sup>47</sup> Parker, *supra* note 46; and Silver, *supra* note 44. See also Aspen, *Court-Ordered Wiretapping: An Experiment in Illinois*, 15 De Paul L. Rev. 15 (1965), which presents Mayor Richard J. Daley's case, quite poorly incidentally, for court-order wiretapping. It is instructive to note that this legislative effort in Illinois did not succeed and Illinois today prohibits both police and private eavesdropping by any device and excludes all evidence procured in such a manner from criminal proceedings. Ill. Rev. Stat., ch. 38, Secs. 14-1 to 14-7 (1961).

<sup>48</sup> *Davis v. United States*, 328 U.S. 582, 597 (1946) (dissenting opinion).

<sup>49</sup> *Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966).

Mr. Justice Stewart, writing only for himself, Mr. Justice Fortas and Chief Justice Warren, delivered "the opinion of the Court." Quite simply, Mr. Justice Stewart confined<sup>50</sup> the issue of the unconstitutionality of eavesdropping to the framework of the Fourth Amendment;<sup>51</sup> expressly overruled both *Olmstead*<sup>52</sup> and *Goldman*<sup>53</sup> and repudiated the "trespass" doctrine which required an accompanying physical invasion into the defendant's premises;<sup>54</sup> and held that, had the Government procured the prior authorization of a magistrate, the electronic surveillance of Charley Katz,

<sup>50</sup> Mr. Justice Stewart 389 U.S. at 351, n.6) did find it necessary to cite Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890), as support for a *general* right to privacy. This 1890 article has been habitually cited by Supreme Court justices and legal commentators alike as recognition of this *general* right to privacy at the constitutional level. Even a cursory examination of that work will reveal that its authors were solely concerned with the right "to be left alone" as a *property right*. This writer, for one, desires to go on record as honestly recognizing Warren's and Brandeis' piece for what it was intended to be and, in fact, is—an essay within the bounds of *tort law*—totally unrelated to the issue of privacy *at the constitutional level*. Nowhere throughout that article is any mention even made of the United States Constitution or any of the Amendments thereto.

<sup>51</sup> So confining the constitutionality of eavesdropping to the structure of the Fourth Amendment, Mr. Justice Stewart made the following correlated conclusion:

[T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all . . . 389 U.S. at 350.

An undesirable offshoot of pinning the unconstitutionality of eavesdropping on a nebulous penumbral sphere of privacy (see note 3 *supra*) is the misplaced focus of the resultant appellate advocacy. Both Katz and the Government devoted a heavily disproportionate amount of their briefs to the characterization of the telephone booth as a "constitutionally protected area." Mr. Justice Stewart wisely rejected this formulation, noting that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area'" (389 U.S. at 350), and that "the Fourth Amendment protects people, not places" (*Id.* at 351).

<sup>52</sup> *Olmstead v. United States*, 277 U.S. 438 (1928), was effectively buried by Mr. Justice Stewart (389 U.S. at 353), when he stated that "we have since departed from the narrow view on which that decision rested." He was careful to suggest that the Court had as long ago as 1961 implied such a departure in *Silverman v. United States*, 365 U.S. 505 (1961), where a unanimous Court held the listening to incriminating conversations by the insertion of an electronic spike mike into a party wall converting the entire heating system of the apartment house into a conductor of sound to constitute an unreasonable search and seizure proscribed by the Fourth Amendment.

<sup>53</sup> In *Goldman v. United States*, 316 U.S. 129 (1942), the Court followed *Olmstead's* doctrine in sanctioning the admission of evidence obtained by the placing of a telephone against the wall of an adjoining private office. It is most unfortunate that Mr. Justice Stewart resorted to *Warden v. Hayden*, 387 U.S. 294 (1967), which discredited the concept of "property interests" as a measure of the protection against unreasonable searches and seizures, for nailing the lid on the coffin for *Goldman*.

<sup>54</sup> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device did not happen to penetrate the wall of the booth can have no constitutional significance. (389 U.S. at 353).

because it was so narrowly circumscribed,<sup>55</sup> would have complied with the applicable Fourth Amendment safeguards<sup>56</sup> and would have been constitutional.<sup>57</sup> Unfortunately, Mr. Justice Stewart left open the permissibility of "national security" eavesdrops without prior judicial authorization.<sup>58</sup>

It is this writer's opinion that the Court has made a terrible error of constitutional dimension in permitting court-order eavesdropping.<sup>59</sup> Judge Frank, as early as 1951, unequivocally recognized that eavesdrops could never constitutionally be the subject of a warrant, in the following manner:

A search warrant must describe the things to be seized and these things can be only (1) instrumentalities of the crime or (2) contraband. Speech can be neither. A listening to all talk inside a house has only one purpose—evidence-gathering. No valid warrant for such listening or for the installation of a dictaphone (*sic?*) could be issued. Such conduct is lawless, an unconstitutional violation of the owner's privacy.<sup>60</sup>

<sup>55</sup> The Government strenuously urged that the surveillance did not commence until a "strong probability" of Katz's use of the booth for his evil purpose had been established, the agents confined their eavesdrops to brief periods averaging three minutes each during which only Katz used the booth, and on the single occasion when another individual's words were intercepted the agents refrained from listening (389 U.S. at 354). Of course, we are at the mercy of the Government's credibility in ascertaining the truth of this diagram of scrupulous conduct.

<sup>56</sup> *Notice*, a traditional prerequisite of conventional Fourth Amendment warrants, has apparently been dispensed with by Mr. Justice Stewart in the case of authorized eavesdrops because such an announcement would "provoke the escape of the suspect or the destruction of the critical evidence." (389 U.S. at 355, n.16). The writer finds this dispensation totally unacceptable and is of the belief that the necessity for its abandonment in the case of eavesdrops poignantly illustrates how inapplicable the warrant device is in these situations. The authority cited for this dispensation was *Ker v. California*, 374 U.S. 23 (1963), similarly resorted to for a like purpose by the New York court in *Kaiser* (233 N.E.2d at 824). The *Ker* exception, however, was specifically limited to "exigent circumstances," 374 U.S. at 37-41, and hardly supports a *blanket* elimination of the notice requirement in electronic surveillance cases.

<sup>57</sup> Mr. Justice Stewart cited *Osborn v. United States*, 385 U.S. 323 (1966), as a model for prospective permissible judicial authorization of the "carefully limited" and "particularized" use of electronic surveillance as an accommodation of the "legitimate needs of law enforcement." (389 U.S. at 355-56).

<sup>58</sup> 389 U.S. at 358, n.23.

<sup>59</sup> The specific Fourth Amendment requirement that the object of the search and seizure be "particularly described" is, of course, unattainable. Surveillance cannot be *selective* prior to the actual hearing since *anything said by any person* over a tapped phone line or in a bugged room is subjected to an invasion of his or her privacy. This blatantly shocking picture will only be further aggravated in the future when walls and other barriers to sight will no longer bar *visual* eavesdropping. Note, 52 Calif. L. Rev. 142, 147 (1964).

<sup>60</sup> *United States v. On Lee*, 193 F.2d 306, 317 (2d Cir. 1951) (dissenting opinion of Frank, J.).

Mr. Justice Douglas, whose concurring opinion was joined by Mr. Justice Brennan,<sup>61</sup> apparently was content to accept the framework of the Fourth Amendment for dealing with electronic eavesdropping,<sup>62</sup> although the genuineness of this acceptance must be seriously doubted based upon past performance,<sup>63</sup> and his brief opinion was directed only at condemning any electronic eavesdropping by the Executive Branch without a warrant in self-labeled matters of "national security."<sup>64</sup>

Mr. Justice Harlan concurred in a separate opinion<sup>65</sup> which agreed that *Goldman* and *Olmstead* must be overruled.<sup>66</sup> He expressly qualified his concurrence, however, as leaving room for future approval of eavesdrops in the absence of a warrant where demanded by the "legitimate needs of law enforcement."<sup>67</sup>

The separate concurring opinion of Mr. Justice White<sup>68</sup> went even further. He specifically salvaged for future application the types of eavesdrops previously sanctioned by the Court, even though not undertaken pursuant to a warrant, in *Hoffa*,<sup>69</sup> *Lopez*,<sup>70</sup> and *On Lee*.<sup>71</sup> In addition, he expressly stated that the Court should not

<sup>61</sup> *Katz v. United States*, 389 U.S. at 359-60 (concurring opinion of Douglas, J.).

<sup>62</sup> Mr. Justice Douglas specifically mentioned the Fourth Amendment four times and not even once referred to either a general right of privacy, any other Amendment in our Bill of Rights or his own famous "penumbra."

<sup>63</sup> See, for example, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and Douglas, *Right Of The People* 134 (1st ed. 1958).

<sup>64</sup> 389 U.S. at 359. Greenawalt, *supra* note 1, at 10, suggested the allowance of "national security" eavesdropping as a compromise because "we should expect that it will take place anyway." This suggestion has been shown to "prove too much." See Solomon, *supra* note 1, at 99.

<sup>65</sup> *Katz v. United States*, *supra* note 61, at 360-62 (concurring opinion of Harlan, J.).

<sup>66</sup> He concluded that the accompanying physical invasion limitation on the Fourth Amendment protection is "bad physics as well as bad law." *Id.* at 362.

<sup>67</sup> Mr. Justice Harlan specifically concluded that "conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable," *notwithstanding the absence of a warrant. Id.* at 361.

<sup>68</sup> 389 U.S. at 362-64 (concurring opinion of White, J.).

<sup>69</sup> In *Hoffa v. United States*, 385 U.S. 293 (1966), the Court sanctioned the admission of evidence obtained by an undercover agent to whom the defendant spoke without knowledge of the listener's status as a police employee.

<sup>70</sup> In *Lopez v. United States*, 373 U.S. 427 (1963), the Court found "reasonable" the recording by means of a hidden pocket wire recorder of a bribe offer to an IRS agent in the taxpayer-defendant's office, to which the agent gained access by means of a misrepresentation.

<sup>71</sup> In *On Lee v. United States*, 343 U.S. 747 (1963), the Court held admissible the monitoring at a distant location of incriminating conversations transmitted from the defendant's place of business via micro-wave emissions from a device hidden on the person of a former acquaintance who was an undercover Federal narcotics agent.

require the warrant device in matters of national security where a conclusion of "reasonableness" has been made by either the President or the Attorney General.<sup>72</sup>

Mr. Justice Marshall having "sat out" this case, the only member of the Court remaining to be heard from was Mr. Justice Black. The writer has long admired Mr. Justice Black but must frankly admit shock and displeasure at his apparent repudiation in his *Katz* dissent<sup>73</sup> of certain fundamental concepts with which he not only formerly had agreed but, in one instance, which he was instrumental in developing. He courageously, although erroneously in my opinion, registered the lone view that a *literal* interpretation of the language of the Fourth Amendment demands the retention of the *Olmstead* doctrine<sup>74</sup> to the effect that a conversation is not a *tangible* thing and, hence, "can neither be searched nor seized."<sup>75</sup> He then proceeded to reiterate his opposition to the exclusionary rule as a creature of constitutional stature, which he first enunciated in *Wolf v. Colorado*<sup>76</sup> and again set forth in both *Mapp v. Ohio*<sup>77</sup> and *Berger v. New York*.<sup>78</sup> Under his concept of the exclusionary rule as an incident of the Supreme Court's "supervisory power"<sup>79</sup> over the other federal courts, even if the other seven Justices in *Katz* were correct in finding eavesdropping proscribed by the Fourth Amendment no mandatory exclusion of the evidential fruits of such eavesdrops would be necessitated in *state* courts.<sup>80</sup>

<sup>72</sup> 389 U.S. at 364.

<sup>73</sup> *Id.* at 364-374 (dissenting opinion of Black, J.).

<sup>74</sup> Lest one be misled by the recent vintage of the cases and commentaries herein referred to, controversy over the validity of the *Olmstead* doctrine dates back to a period long before the recent liberalization in supreme judicial thinking on matters of constitutional criminal procedure. Examples of some earlier displeasure with the state of the law are Waldmar & Silver, *Ethics, Morals and Legality of Eavesdropping*, 9 Brooklyn Bar. 147 (1958); Kamisar, *The Big Ear, The Private Eye and Laymen*, 36 Wis. B. Bull. 33 (1963); and Westin, *The Wire-tapping Problem: An Analysis and a Legislative Proposal*, 52 Colum. L. Rev. 165 (1952).

<sup>75</sup> 389 U.S. at 365-6, where Mr. Justice Black somewhat naively compared the awareness of the Framers of eavesdropping "by naked ear under the eaves of houses or their windows" with the subtle modern electronic devices. See note 18 *supra* and accompanying text.

<sup>76</sup> 338 U.S. 25, 40 (1948) (concurring opinion of Black, J.).

<sup>77</sup> 367 U.S. 643, 661-66 (concurring opinion of Black, J.).

<sup>78</sup> *Berger v. New York*, 388 U.S. 41, at 76 & 87 (1967) (dissenting opinion of Black, J.).

<sup>79</sup> See *Weeks v. United States*, 232 U.S. 383 (1913).

<sup>80</sup> Note, *Electronic Surveillance and the Right of Privacy*, 27 Mont. L. Rev. 173, 186 (1966), ably illustrates the anomaly of admitting illegally obtained wiretap evidence in a state court and excluding the same evidence in a federal court while excluding "tangible" evidence illegally seized in *all* courts.

Strangely enough, it is this same Mr. Justice Black who has continuously advocated the liberal alliance between the Fourth and Fifth Amendments, first enunciated by Mr. Justice Bradley in *Boyd v. United States*<sup>81</sup> eighty-three years ago, and which this writer has demonstrated demands that all eavesdrops be considered *unreasonable* since "they are unavoidably an expedition for self-incriminating evidence in the form of *admissions* by the person whose private words are being monitored."<sup>82</sup> The Court in *Boyd*, of course, did not snatch the concept of a Fourth and Fifth alliance out of thin air. Rather, this union of the two protections was based upon the views of Lord Camden set forth in *Entick v. Carrington*,<sup>83</sup> way back in 1765, where the seizure of an individual's private papers was condemned.<sup>84</sup>

The issue of the proper framework within which the examination of the constitutionality of eavesdropping should proceed is not without controversy.<sup>85</sup> It has been suggested by one writer that since the Supreme Court is creating a requirement that the individual be advised of all his constitutional rights, and because the individual being subjected to an eavesdrop is speaking voluntarily, *although unaware that his words are being overheard*, it is "likely that the Fifth Amendment may be employed to restrict electronic surveillance."<sup>86</sup> The student commentator seems to imply that the thought of a coalition of the Fourth and Fifth Amendments is a new one. This implication may be bottomed on Chief Justice Taft's rejection of such a contention<sup>87</sup> in *Olmstead*.<sup>88</sup> In reality, the Court

<sup>81</sup> 116 U.S. 616, 627-8, 633 (1885).

<sup>82</sup> Solomon, *supra* note 1, at 98. Examine *United States v. Rabinowitz*, 339 U.S. 56 (1948).

<sup>83</sup> 19 How. St. Tri. 1030, 75 Eng. Rep. 807 (1765).

<sup>84</sup> *Id.* at 1073, where Lord Camden held ". . . [O]ur law has provided no paper-search in these cases to help forward the conviction."

<sup>85</sup> See generally regarding the Fourth and Fifth Amendment alliance and the *Boyd* doctrine, Note, 66 Colum. L. Rev. 355, at 356-370 (1966).

<sup>86</sup> Note, *Electronic Surveillance and the Right of Privacy*, 27 Mont. L. Rev. 173 (1966).

<sup>87</sup> The contention was made by the defendants in *Olmstead* that the use of overheard admissions as evidence effectively compelled them to be witnesses against themselves in contravention of the Fifth Amendment.

<sup>88</sup> Chief Justice Taft responded as follows: "There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment." 277 U.S. at 462,

in *Boyd* clearly established such a union of the two Amendments in its inability to “perceive that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.”<sup>89</sup> The alliance of the two Amendments has been similarly suggested in that: the right not to be forced to testify against oneself or confess under coercion and the right to be secure from illegal searches and seizures are “cut from the same mold:”<sup>90</sup> to listen *in and of itself* is not to violate the protection against unreasonable searches and seizures—but only in the same sense that to look or to smell is not to do so;<sup>91</sup> and when an individual has incriminated himself without being aware that he is being subjected to electronic surveillance the “evidence, in a sense, has been extorted from him.”<sup>92</sup>

Although not elaborated upon in any great detail, the suggestion has been made that the formulation of the right of privacy as a barrier to the use of electronic surveillance devices might well be established by the Supreme Court’s following the lead of the *Lopez* dissent<sup>93</sup> and utilizing the interaction of the Fourth, Fifth and Sixth Amendments.<sup>94</sup>

One student commentator<sup>95</sup> has run the “union” of the Fourth and Fifth Amendments, as based upon *Boyd*,<sup>96</sup> through the wringer, along with both a proposed First Amendment structure,<sup>97</sup> and a Fourth Amendment framework as complemented by Fifth and

<sup>89</sup> *Boyd v. United States*, *supra* note 81, at 633.

<sup>90</sup> Long, *supra* note 18, at 5.

<sup>91</sup> Kamisar, *Illegal Search or Seizure and Contemporaneous Incriminating Statements: A Dialogue On a Neglected Area of Criminal Procedure*, 1961 U. Ill. L.F. 78, at 128, where it is further noted that “the use of the senses *in and of itself* does not constitute a violation.”

<sup>92</sup> King, *supra* note 3, at 265.

<sup>93</sup> *Lopez v. United States*, 373 U.S. 427, 441 (1963) (dissenting opinion of Warren, C. J.).

<sup>94</sup> See Sullivan, *Wiretapping and Eavesdropping: A Review of the Current Law*, 18 Hastings L. J. 59 (1966).

<sup>95</sup> Note, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework*, 50 Minn. L. Rev. 378 (1965).

<sup>96</sup> The commentator, *supra* note 95, recognizes that Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 699-701 (1951), has found this intimate interrelationship between the Fourth and Fifth Amendments difficult to accept. See also Comment, 28 U. Chi. L. Rev. 664, 695 (1961).

<sup>97</sup> The student commentator, *supra* note 95, sets forth two bases for a First Amendment prohibition of eavesdropping—first, on the theory that the cloud of unknown surveillance inhibits free expression; and alternatively, as a violation of the individual’s freedom to remain silent. See King, *Wiretapping and Electronic Surveillance*, 66 Dick. L. Rev. 17 (1961), at 25-30 (restriction on freedom of expression) and at 29 (interference with right of silence).



Sixth Amendment limitations<sup>98</sup> on police conduct once the investigation has focused upon the particular subject.<sup>99</sup> The First Amendment framework was rejected by the writer because of the lack of available standards within the context of that Amendment for dealing with eavesdropping and the concomitant inherent interpretative difficulties.<sup>100</sup> The union of the Fourth and Fifth Amendments based upon *Boyd* was rejected<sup>101</sup> as the appropriate constitutional structure in favor of the Fourth Amendment as complemented by the recent limitations upon police investigative techniques promulgated by the Court pursuant to the Fifth and Sixth Amendments<sup>102</sup> because such an alliance would entail broad overtones of *privacy* which "without a clear elucidation" of the boundaries would "leave the treatment of eavesdropping without suitable guidelines."<sup>103</sup> It must be noted, however, that the author of that comment expressly granted that a *universal* prohibition of the utilization of eavesdropping techniques would not be subject to these defects and could purify the use of the Fourth and Fifth "union" as a proper framework.<sup>104</sup> His own difficulties with measuring "reasonableness" under the Fourth Amendment may well reflect that the use of the Fourth

<sup>98</sup> See Sullivan, *supra* note 94.

<sup>99</sup> This triumverate of Amendments envisions the application of the limiting investigative principles enunciated by the Supreme Court in *Massiah v. United States*, 377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964); and *Miranda v. Arizona*, 384 U.S. 436 (1965). Apparently, once the investigation has focused on a particular suspect any subsequent eavesdropping activities by the police would be precluded as "unreasonable" searches and seizures. See Solomon, *supra* note 1, at 100-101, where it was demonstrated that borrowing the *Massiah* rationale to regulate law enforcement eavesdrops would not afford the individual the complete safety demanded by the Constitution, while illustrating by means of four hypotheticals that the union of the Fourth and Fifth for the purpose of having the latter measure "reasonableness" of eavesdrops circumscribed by the former would *not* result in barring the admissibility into evidence of every admission by a defendant.

<sup>100</sup> 50 Minn. L. Rev. at 399-400. Recent expansions of the rights of association and expression pursuant to the First Amendment perhaps justify this criticism. See *NAACP v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); and *United Mine Workers of America v. Illinois St. Bar Ass'n*, 389 U.S. 217 (1967). It is interesting to note that the opinion of the Court in the last of the three cases, which concluded, at 222, that the First Amendment would be "a hollow promise if it left government free to destroy or erode its guarantee by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such," was authorized by *Mr. Justice Black*. Compare the liberality of this First Amendment interpretation with the needless restrictiveness of his *Katz* dissent as disclosed in notes 74 and 75, *supra*, and 117, *infra*, along with accompanying textual matter.

<sup>101</sup> 50 Minn. L. Rev. at 407-408.

<sup>102</sup> *Id.* at 408-414.

<sup>103</sup> *Id.* at 407-408.

<sup>104</sup> *Id.* at 408-414.

and Fifth "union" to *universally* ban all forms of eavesdropping is the only road left open by the Constitution itself. In other words, *every* eavesdrop is an *unreasonable* search and seizure since the privilege against self-incrimination is infringed by the official Government use of extorted incriminating statements from the defendant's own lips.<sup>105</sup>

Mr. Justice Black in *Mapp v. Ohio* relied upon this alliance as the only justification for the exclusionary rule as a *constitutional* standard<sup>106</sup> and commented on the logic of *Boyd* as follows:

In the final analysis, it seems to me that the Boyd doctrine, *though perhaps not required by the express language of the Constitution strictly construed*, is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights . . . . (Emphasis added).<sup>107</sup>

Is not the tone of Mr. Justice Black's concurrence in *Mapp*, as highlighted by the italicized language above, strikingly at variance with the restrictiveness of his *Katz* dissent?

Mr. Justice Black had next proceeded in *Mapp* to demonstrate how *Rochin v. California*,<sup>108</sup> (where the majority reversed a narcotics conviction on a Due Process "shocks the conscience" theory since capsules had been recovered by pumping the defendant's stomach<sup>109</sup>), was "an almost perfect example" of the interrelationship between the Fourth and Fifth Amendments.<sup>110</sup> He said of his own concurrence in *Rochin*: "I concurred . . . on the ground that that provision (the Fifth's protection against self-incrimination) barred the introduction of this 'capsule' evidence just as much as it would have forbidden the use of words Rochin might have been coerced to speak."<sup>111</sup>

<sup>105</sup> See notes 90, 91 and 92, and the accompanying text.

<sup>106</sup> *Mapp v. Ohio*, 367 U.S. 643, at 662 (1961), where Mr. Justice Black concluded: "[W]hen the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."

<sup>107</sup> *Id.* at 622.

<sup>108</sup> 342 U.S. 165 (1951).

<sup>109</sup> *Cf. Schmerber v. California*, 384 U.S. 757 (1966).

<sup>110</sup> *Mapp v. Ohio*, *supra* note 106, at 663.

<sup>111</sup> *Ibid.*

Mr. Justice Black then proceeded to set forth his understanding that the Court in *Mapp* was relying on the "precise, intelligible and more predictable constitutional doctrine enunciated in the Boyd case,"<sup>112</sup> further commenting that he fully agreed with "Mr. Justice Bradley's opinion (in *Boyd*) that the two Amendments upon which the Boyd doctrine rests are of vital importance in our constitutional scheme of liberty and that both are *entitled to a liberal rather than a niggardly interpretation*," (Emphasis added).<sup>113</sup> This Mr. Justice Black is conspicuously inconsistent with the man who dissented in *Katz*, refusing to give that same liberal construction to the Fourth Amendment, forgetting all about the very union of the Fourth and Fifth as a measuring stick for "unreasonableness" which he alone fashioned for the modern Court, and mysteriously stating that a conversation "is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized"<sup>114</sup> and that "(s)ince I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me."<sup>115</sup>

Apparently, we are left unhappily to conclude only that Mr. Justice Black's view of the Fourth Amendment as well as his instrumental position in support of that Amendment's alliance with the privilege against self-incrimination embodied in the Fifth Amendment have undergone a radical transformation, signs of which appeared in *Berger*<sup>116</sup> and were conclusively established in this observer's mind by his *Katz* dissent.<sup>117</sup>

Of course, we are still left with the problem of resolving the constitutional status of the governing law of New York as rehabilitated by *Kaiser* subsequent to *Katz*. The writer agrees with Mr. Justice Black that the result of *Katz* is to remove the "doubts about state power in this field" and "abate to a large extent the confusion

<sup>112</sup> *Id.* at 666.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Katz v. United States*, 389 U.S. 347, 365 (1967).

<sup>115</sup> *Id.* at 373.

<sup>116</sup> *Berger v. New York*, 388 U.S. 41, 76 (1967).

<sup>117</sup> *Katz v. United States*, *supra* note 114, at 364-74. See notes 72, 73, 75, 81, 82, 108, 114, and 115, and accompanying text.

and near paralyzing effect of the *Berger* holding,"<sup>118</sup> but severe exception must be taken to his view of these consequences as "good efforts."<sup>119</sup> Conceivably, one so inclined, as the New York court so obviously is, can neatly amalgamate *Kaiser* and *Katz*, with a resultant resuscitation of that State's eavesdrop statute only a short while ago thought to be constitutionally dead and buried. This will prove to be only the first unfortunate and sorrowful consequence of the Court's failure in *Katz* to take advantage of the opportunity for giving teeth to a constitutional ban against all eavesdrops. In my view, we have witnessed the construction of an undesirable "half-way house," albeit properly within the context of the Fourth Amendment by three members of the Court, joined by two members of the Court who would have been much happier with the espousal of a general right of privacy as a barrier to all eavesdrops<sup>120</sup> and two other brethren still clinging to the old while giving the misleading impression of adopting the new,<sup>121</sup> all compounded by the curious literalness of Mr. Justice Black in defending a very restrictive view of individual liberties<sup>122</sup> and apparently forsaking his own step-child<sup>123</sup>—the union of the Fourth and Fifth Amendments pursuant to the learning of *Boyd*.<sup>124</sup> Quite plainly, the future will demonstrate how dangerous *Katz* really is in *subjecting* individuals to, and *not* protecting them from, law enforcement intru-

<sup>118</sup> 389 U.S. at 364.

<sup>119</sup> *Ibid.*

<sup>120</sup> Justices Douglas and Brennan might likewise be favorably disposed to an across-the-board blanket proscription of eavesdropping and may have regarded Justice Stewart's opinion as a stepping stone to the achievement of that end in the future. See notes 3, 62, and 63, and accompanying text.

<sup>121</sup> Justices Harlan and White presented opinions far more harsh than libertarian as to individual freedom from police eavesdrops, especially with the inexcusable specific retention by White of *Hoffa*, *Lopez* and *On Lee*. Harlan apparently views the *place* or *area* where the conversation occurs as the point for critical demarcation, keyed to the speaker's reasonable expectation of privacy. See notes 65 through 72 and accompanying text.

<sup>122</sup> Examine notes 74 and 75 and accompanying text.

<sup>123</sup> See notes 72, 73, 81, 82, 107, 113 through 117, and accompanying text for the full story of Black's apparent curious abandonment of this doctrine which he was so instrumental in resurrecting for the modern Court.

<sup>124</sup> The logic of *Boyd*, *supra* note 81, compels no conclusion other than that any eavesdrop is unavoidably a search for admissions from the defendant's *own lips* and that prior "magistrate's purification" through the warrant mechanism is nonsensical since an eavesdrop cannot possibly select which words are to be heard and which are not to be heard *until after the police have done the hearing*. Carefully re-examine notes 82 and 89 and the accompanying text; see also Note, 66 Colum. L. Rev. 355, at 356-370 (1966).

sions without invasions.<sup>125</sup> Let us hope that *Katz's* "life" will be no longer than that which the fates meted out to *Berger!*

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<sup>125</sup> The test vehicle may well turn out to be Title III of the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, Publ. Law 90-351, 82 Stat. 197 (1968), which gives across-the-board court-order wire tap and eavesdrop authorization to all local and state law enforcement officials for a thirty day period, renewable for an unlimited number of thirty day extensions. See §§ 2516 *et seq.* Needless to say, this statute, which this writer has labelled "the little Hitler package," should be held unconstitutional, but in the proper manner. Soloman, *Privacy and the Threat of Eavesdropping*, Speech delivered to student body, St. University of N.Y., at Buffalo, School of Law, Oct. 17, 1968.

Also, on Jan. 14, 1969, the new United States Attorney General, John Mitchell, stated that, although he was unfamiliar with anti-wiretap orders issued by his predecessor, Ramsey Clark, he planned to reexamine the question of eavesdropping by federal law enforcement officials and was inclined to believe that more effective use of wiretap and other eavesdropping could and should be employed. *Chicago Sun-Times*, Jan. 15, 1969.

On Jan. 7, 1969, the United States Court of Appeals for the Seventh Circuit overturned the conviction, twenty five year sentence and thirty five thousand dollar fine of James A. White, allegedly one of Chicago's leading narcotics peddlers. The sole ground for reversal was the government's eavesdrop by means of a tiny radio transmitter, concealed on an informer, which resulted in a major chunk of the evidence against White. *Chicago Sun-Times*, Jan. 8, 1969, p. 2, col. 1. Compare notes 69, 70 and 71 and accompanying text, and note 121, *supra*. The *Sun-Times* also pointed out that, due to the government's use of an identical device, the conviction and twenty two year dope peddling sentence of the "notorious" Danny Escobedo is also in jeopardy.