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Minn. L. Rev. Editorial Board

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Fourth Amendment Framework

The Supreme Court's treatment of eavesdropping has been predicated upon a restrictive construction of the fourth amendment and three lines of analysis suggested in Olmstead v. United States. Since subsequent decisions have cast doubt upon the continued viability of the lines of analysis, pressure has mounted for a reconsideration of the entire constitutional framework for the treatment of eavesdropping. The author of this Note, after tracing the pattern of decisions under the Court's present rationale, discusses several proposed frameworks utilizing other provisions of the Constitution than the fourth amendment. In conclusion it is suggested that a redefinition of the fourth amendment would provide the most suitable constitutional framework for the treatment of eavesdropping.

For forty years the subject of eavesdropping has been labored by each of the three branches of the federal government, by the states, and by scholars and various interest groups. In spite of such efforts, however, problems posed by the practice of eavesdropping remain unsolved. Pressing the Supreme Court to reevaluate its position on the constitutional questions presented by eavesdropping are powerful factors: concern for the individual rights which eavesdropping is said to violate; technological advances in the field of electronics; the failure of Congress to provide a legislative solution; and, most important, the inadequacy of the Court's traditional constitutional basis for the treatment of eavesdropping.

The purpose of this Note is to undertake an analysis of the problems posed by eavesdropping and to suggest an appropriate


constitutional framework for their solution. Contrary to most discussions in this area, this Note will neither take a position on the merits—i.e., on the extent to which eavesdropping should be permitted—nor recommend that a suitable constitutional rationale be devised under provisions of the Constitution other than the fourth amendment. Those assertions upon which responsible commentators appear to agree will be accepted, and it will be suggested that eavesdropping may be most satisfactorily dealt with under the fourth amendment.

I. THE PROBLEMS POSED BY EAVESDROPPING

To facilitate meaningful analysis of a proposed constitutional rationale, it is essential that analytical difficulties attributable to the use of ambiguous terms and emotional arguments be appreciated. Modern eavesdropping techniques will require brief consideration, and areas of agreement among the divergent views on the merits of eavesdropping will be explored.

A. ANALYTICAL PROBLEMS

First, since eavesdropping obviously interferes with “privacy,” objections to the use of eavesdropping techniques have relied on “the individual’s right to privacy.” The Supreme Court, however, has never undertaken a comprehensive definition of “privacy,” nor is the term anywhere defined or even explicitly mentioned in the Constitution. Attempting a definition is beyond the scope of this Note, and because use of the term is unavoidable, especially in considering the development of the present constitutional treatment of eavesdropping under the fourth amendment, the limitations imposed by the absence of a definition must be kept in mind.

A second source of difficulty is that policy considerations have been distorted by the assumption that any constitutional solution devised by the Court must be an all or nothing proposition. Proponents of both extreme positions—those favoring an absolute prohibition of eavesdropping and those favoring its unrestricted use—point to the obvious dangers of either foster-

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ing a police state or allowing criminals to operate virtually unchecked. Obviously neither solution is necessary to avoid the dangers of the opposite solution.

Finally, eavesdropping includes three police functions which are indistinguishable in principle but which typically are neither clearly differentiated nor treated under one consistent rationale. These three functions are: eavesdropping in the traditional sense using only the physical senses of sight or hearing; electronic surveillance — eavesdropping aided by electronic devices; and wiretapping.

It has been argued that wiretapping and electronic surveillance should receive distinct treatment. Wiretapping, the argument states, is a significantly limited form of eavesdropping because it monitors only telephone conversation in which the public does not speak freely because of long experience with party lines, secretaries and operators. Thus, it does not pose as serious a threat to “privacy” as does electronic surveillance, and the considerations underlying its analysis should be different. Although such a distinction may be meaningful in devising an appropriate legislative remedy, wiretapping is but one incident of the broader category of electronic surveillance and should be treated as such under a constitutional analysis, any qualitative difference going only to the reasonableness of employing the particular method of eavesdropping in a given factual situation.

Traditional eavesdropping techniques have been treated under the warrants provision of the fourth amendment. Since few troublesome conceptual problems have arisen, it would seem that a comprehensive constitutional framework for eavesdropping should preserve a substantially similar treatment of traditional


9. Traditional techniques have, however, provoked comments laden with moral indignation:

Eavesdroppers, or such as listen under walls or windows, or the eaves of
a house, to hearken after discourse, and thereupon to frame slander-
ous and mischievous tales, are a common nuisance and presentable at
the court-leet: or are indictable at the sessions, and punishable by fine
and finding sureties for the good behavior.

4 BLACKSTONE, COMMENTARIES* 109. For a famous characterization of eaves-
techniques. Thus, the contemporary constitutional difficulties with eavesdropping essentially are raised by the technology of electronic surveillance.

B. TECHNICAL INNOVATIONS

With the development of miniaturized circuits, the methods of eavesdropping have become incredibly subtle.\textsuperscript{10} It is now possible to overhear conversation held within a closed room by using a device which makes use of the vibrations in a window pane as it responds to sounds from within. Tubular and parabolic microphones can intercept conversations held hundreds of yards away. Acoustic engineers predict that systems will soon be operable which utilize ultrasonic or electromagnetic waves to penetrate virtually any structural material and monitor conversation held within. Conversation may be monitored from within a room by such Machiavellian devices as wireless transmitters the size of sugar cubes or transmitters disguised as martini olives which transmit sounds via their toothpick aerials. Even wiretapping has developed new subtleties with the invention of devices which monitor telephone conversations by the inductive effect of electromagnetic waves emanating from the current flowing through telephone lines, thus obviating any need to connect directly into the wire. Electronic visual devices, such as miniature television cameras, have become equally sophisticated; although the problem posed by use of such devices has yet to come before the Court,\textsuperscript{11} it must be recognized that they are at least as controversial as the auditory devices giving rise to the present problems. It now appears that the only way to be safe from eavesdropping is to hold all conversations inside a tent-like enclosure, or to line the room with aluminum foil and use special glass panes in all windows.

C. THE DIVERGENT VIEWS

The use of devices for electronic surveillance has been viewed from three general positions: absolute prohibition; unrestricted

\textsuperscript{10} See generally Breton, The Privacy Invaders (1964); Dash, Schwartz & Knowlton, The Eavesdroppers (1959). The subsequent discussion is based largely upon information contained in these sources.

\textsuperscript{11} The use of visual aids has never been seriously questioned. See United States v. Lee, 274 U.S. 559 (1927) (use of a searchlight at night); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957) (use of binoculars); Comment, 52 CALIF. L. REV. 142, 147 (1964).
use; and limited, controlled use.\textsuperscript{12} Determining what aspects of eavesdropping are agreed upon by responsible advocates of all positions may furnish a substantial basis for an acceptable rationale which would commend itself to the public and to police officials as well as to the judiciary.

The most significant of these areas of agreement is that the empirical data needed for sound conclusions has not yet been compiled.\textsuperscript{13} Indeed, such data may never be presented because of the secrecy attending the use of eavesdropping techniques and the disfavor with which such techniques have invariably been viewed. It is essential to recognize, therefore, that the extreme positions which rely heavily upon conjecture are not likely to deserve consideration.

All agree that the unlimited use of eavesdropping techniques is both oppressive and generally unnecessary.\textsuperscript{14} No responsible group fully defends the propriety of using eavesdropping devices, in the discretion of police officers, to monitor all conversations in private homes. On the other hand, each position recognizes the importance to the police function of some utilization of eavesdropping techniques—traditional techniques in most cases, and contemporary techniques in the investigation of certain "vice" offenses, such as narcotics, gambling, and prostitution, where there commonly are no complaining victims or witnesses to present evidence and where elaborate secrecy precautions usually are taken to conceal such activity.\textsuperscript{15} Although there may be disagreement as to whether the disadvantages of eavesdropping outweigh its advantages even in these limited areas, each position concedes that such a balancing of interests is essential to a proper resolution of the issues.

Finally, there is agreement that regardless of the law police probably will continue to utilize eavesdropping techniques. One

\textsuperscript{12} See generally Donnelly, Comments and Caveats on the Wire Tapping Controversy, 63 YALE L.J. 799 (1954); Rogers, The Case for Wire Tapping, 63 YALE L.J. 792 (1954).

\textsuperscript{13} See, e.g., Hennings, The Wiretapping-Eavesdropping Problem: A Legislator's View, 44 MINN. L. REV. 813, 818 (1950); Westin, supra note 8, at 191.

\textsuperscript{14} For a full gamut of such views, see The Wiretapping-Eavesdropping Problem, 44 MINN. L. REV. 813 (1950).

reason for this is the singular public pressure upon the police to curtail those "vice" activities in the investigation of which eavesdropping techniques are most required.\textsuperscript{16} Another reason for police recalcitrance is the lack of an effective sanction for violation of eavesdropping laws.\textsuperscript{17} The exclusionary rule, barring the use as evidence of matter illegally obtained, deters only conviction-oriented police eavesdropping;\textsuperscript{18} activity intended to harass or to prevent criminal behavior remains unaffected.\textsuperscript{19} Moreover, even the protection afforded by the exclusionary rule in traditional search and seizure cases may be unavailable in eavesdropping cases; eavesdropping may take place without the defendant's knowledge, and it may result in leads rather than tangible evidence which could be suppressed at trial.

However, it is not to be inferred that police recalcitrance and the lack of definitive empirical data make the argument over the proper constitutional treatment of eavesdropping mere cavil. Public attitudes and police practices are molded by the posture of legality in which those attitudes and practices are placed.\textsuperscript{20}

\textsuperscript{16} It has been suggested that society, by defining such activity as criminal and demanding that the police check its incidence, has implicitly demanded the use of eavesdropping devices. See Allen, \textit{The Exclusionary Rule in the American Law of Search and Seizure}, in POLICE POWER AND INDIVIDUAL FREEDOM 77 (Sowle ed. 1962); Allen, \textit{Federalism and the Fourth Amendment: A Requiem for Wolf}, 1961 Sup. Ct. Rev. 1, 38.

\textsuperscript{17} Criminal violations of eavesdropping laws go unprosecuted in virtually all cases because of the necessity that the prosecutor work closely with the police and refrain from antagonizing them with such prosecutions. Tort remedies conferring a right of action upon the aggrieved individual as against either the offending police officer or the governmental unit are unsuccessful for a variety of reasons—chiefly the difficulty of determining damages and the unwillingness of jurors to award damages as against policemen or police departments in favor of plaintiffs who are likely to be viewed as criminals. See generally Barrett, \textit{Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan}, 43 Calif. L. Rev. 565 (1955); Foote, \textit{Tort Remedies for Police Violation of Individual Rights}, 39 Minn. L. Rev. 493 (1955); Paulsen, \textit{supra} note 3, at 72–74; Comment, 47 Nw. U.L. Rev. 493 (1955).


\textsuperscript{19} Paulsen, \textit{The Exclusionary Rule and Misconduct by the Police}, in POLICE POWER AND INDIVIDUAL FREEDOM 87 (Sowle ed. 1962). Indeed, it has been suggested that the exclusionary rule may force police to turn from conviction-oriented activity to less desirable "informal" methods of crime prevention. See \textit{id.} at 90; Waite, \textit{Judges and the Crime Burden}, 54 Mich. L. Rev. 193, 193–96 (1955).

\textsuperscript{20} See, \textit{e.g.}, Hall, \textit{Police and Law in a Democratic Society}, 28 Ind. L.J. 133 (1953); Kamisar, \textit{supra} note 7, at 938; Rostow, \textit{The Democratic Character of Judicial Review}, 66 Harv. L. Rev. 193 (1952).
Since a decision upon the merits of eavesdropping must be assumed to have its most significant effect in this indirect manner, any constitutional framework for decision must provide well defined and intelligible guidelines.

Furthermore, the lack of empirical data does not excuse the judiciary from determining the issues of eavesdropping confronting them. The lack of empirical data is surely one of the main reasons why Congress has been unable to deal with the problem, but the failure of a legislative solution only presses the courts more insistently for a determination of the issues. The necessity of basing decisions upon premature conclusions indicates, however, that any suitable constitutional framework should be flexible enough to accommodate future compilations of empirical data.

II. THE PRESENT TREATMENT OF EAVESDROPPING UNDER THE FOURTH AMENDMENT

The consideration of a suitable constitutional basis for the treatment of eavesdropping requires an examination of the development of its present treatment under the fourth amendment. Such an examination reveals that the Court’s difficulties with the fourth amendment stem not only from the unsuitable nature of its traditional lines of analysis, but also from its failure to reconsider, as it rejected those lines of analysis, the construction of the fourth amendment upon which they were predicated.

A. OLMSTEAD AND ITS PROGENY

The existing constitutional treatment of modern eavesdropping techniques is based upon lines of analysis suggested in Olmstead v. United States. Olmstead and others were convicted of conspiring to violate the National Prohibition Act. Evidence essential to their conviction had been obtained by wiretaps on the residence telephones of four of the conspirators and on the telephone in their main business office. Olmstead contended that the wiretap violated his rights under both the fourth and fifth amendments.

A majority of the Court, speaking through Chief Justice Taft, rejected Olmstead’s contention on three grounds. First, the fourth amendment was said to protect against seizures of tangible things only, not against the interception of conversation. This proposi-

22. 277 U.S. 438 (1928).
tion was derived from the requirement of the fourth amendment that warrants describe with particularity the objects to be seized. Second, the protection of the fourth amendment was said to extend only to those cases in which the seizure of evidence was accompanied by an actual trespass upon the property of the objecting party, not to the telephone lines which were outside Olmstead’s premises. This proposition was derived from the historical purpose of the fourth amendment to protect against invasions of the home by soldiers of the Crown under the auspices of general warrants or writs of assistance. Third, Olmstead had engaged in a voluntary conversation and had intended that his voice be projected outside the confines of his home and office; the conversation, when travelling upon the telephone lines, could not be protected under the fourth amendment. Though the basis for the third proposition is not clear, several possible sources may be suggested. Most likely, this proposition was meant to indicate that the protection of the fourth amendment was confined to narrow geographical surroundings. Another source may be found in the majority’s suggestion that the fourth amendment protects only against searches and seizures which are contrary to the will of the offended party; since Olmstead engaged in the conversation with the intention that it be projected to outsiders, the eavesdropping could not be against his will. Finally, the third proposition may have been in answer to a fifth amendment contention which the majority previously rejected; it had been argued that the introduction of evidence obtained from the wiretap was tantamount to compelling the conspirators to give evidence against themselves. By stressing the voluntariness of Olmstead’s conversation, Chief Justice Taft may have sought to dispel any troublesome notions of coerced confessions.

Mr. Justice Butler, objecting specifically to the literal interpretation espoused by the majority, would have found the wiretap to be a violation of the fourth amendment.

23. Id. at 464.
24. Id. at 463; see Fraenkel, Concerning Searches and Seizures, 34 HARV. L. REV. 361 (1921).
25. 277 U.S. at 466.
26. Id. at 443.
27. This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court,
Brandeis devoted his dissent primarily to defining the relationship between the fourth and fifth amendments and the proper relation of eavesdropping to each of them. Although he rejected the contention that eavesdropping might be struck down on the basis of the fifth amendment's prohibition against the use of coerced confessions, he would have found ample grounds to condemn it in the fourth amendment as well as in a "union" of the fourth and fifth.

Defining the scope of the fourth amendment, Brandeis stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... 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.

The role of the fifth amendment with respect to the fourth as thus defined was to protect the individual from the use in evidence against him of facts obtained by such an intrusion.

Brandeis based his concept of the "union" of the fourth and fifth amendments upon broad language in *Boyd v. United States*, referring to the views expressed by Lord Camden in *Entick v. Carrington*, the *Boyd* Court had stated:

the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words.

*Id.* at 487–88.

28. Brandeis would also have condemned the admission of the evidence because, in obtaining it through the use of the wiretap, the federal officers violated state law. *Id.* at 469–71. Justices Holmes and Stone, dissenting, agreed with this ground of the Brandeis opinion, even though the issue was not properly raised under the certiorari order. See *id.* at 479–85, 488.

29. *Id.* at 478.

30. 116 U.S. 616 (1885). *Boyd* involved a challenge to the constitutionality of a statutory provision of the federal revenue laws which provided that in forfeiture proceedings instituted for the alleged nonpayment of import duties, the court might issue a notice to defendants requiring the production of relevant books and records. Upon the failure of the defendant to comply with the notice, the allegations of the government as to the contents of the papers were taken to be confessed by the defendant. The Court struck down the statute on the ground that it violated both the fourth and fifth amendments.

31. 19 How. St. Tri. 1030, 75 Eng. Rep. 807 (1765). *Entick* involved an action in trespass against officers of the Crown who had searched plaintiff's home and seized his private papers pursuant to a general executive warrant charging him with seditious libel. The question presented was whether a warrant to search and seize a citizen's private papers could ever be lawful. Lord Camden held for the plaintiff on the ground that only the guilt of the individ-
The principles [of the fourth and fifth amendments] laid down in this opinion affect the very essence of constitutional liberty and security. They apply to all invasions on the part of the Government and its employes of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. 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 of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.32

Such a broad interpretation of the fourth and fifth amendments, however mystical the basis, was needed to define a general right of privacy and to free tests of eavesdropping from the trespass requirement because, said Brandeis, science had devised “subtler and more far-reaching means of invading privacy”33 than the methods existing at the time of the framing of the Constitution.

The Olmstead opinions, by rejecting the proffered “mystical union” between the fourth and fifth amendments and its attendant broad right of “privacy,” as well as the coerced confession argument under the fifth amendment, focused consideration solely upon the fourth amendment. But more importantly, the majority opinion implicitly determined the construction of the text of the fourth amendment which was to influence subsequent decisions. The text of the amendment is divided into two clauses, the reasonableness clause34 and the warrants clause;35 a literal reading

33. 277 U.S. at 473. He warned that, “the progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping.” Id. at 1078. (The quoted material appears only in the original report of the case.)
34. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .” U.S. Const. amend. IV.
35. “[A]nd no Warrants shall issue, but upon probable cause, supported
implies that search and seizure must be reasonable, and if conducted pursuant to a warrant, must meet certain enumerated qualifications. However, the majority in Olmstead obviated any independent significance of the reasonableness clause by reading the enumerated qualifications of the warrants clause as a *sine qua non* of reasonableness. A literal, historically-based interpretation of the warrants clause directed consideration away from a rational definition of "privacy" or a balancing of interests toward such technical factors as physical trespass.

The Court's opinion in Olmstead was greeted with little charity.\(^{36}\) The widely felt adverse reaction may have been responsible in part for the passage of the Federal Communications Act\(^ {37}\) some seven years later, although the legislative history of this Act reveals little concrete evidence of such a cause-effect relationship.\(^ {38}\) Nevertheless, the Court seized upon section 605 of the Act and interpreted it to foreclose wiretapping by federal agents on grounds which seem inconsistent with Olmstead:

> Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved Congress to adopt § 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.\(^ {39}\)

In a series of subsequent decisions construing section 605, the Court in effect "poured the Fourth Amendment into the Federal Communications Act."\(^ {40}\)

These results suggest that, although the Court was chary of broadly defining the fourth amendment to restrict eavesdropping,\(^ {41}\) it was equally reluctant to allow unrestricted eaves-
dropping outside the boundaries of fourth amendment protection. In any event, disposition of wiretapping cases under section 605 delayed further constitutional arguments about eavesdropping until Goldman v. United States.]

Petitioners in Goldman were convicted of conspiring to violate the National Bankruptcy Act through a scheme to retain a secret profit on the sale of debtors' estates. Government agents had planted a microphone in the office of petitioner Shulman designed to broadcast conversation to a recording device in an adjacent office. This device failed to work, but the agents were able to overhear Shulman's conversations with Goldman and others by the use of a detectaphone placed against the partition wall between the adjoining offices. Petitioners urged that use of evidence thus obtained violated their rights under the fourth amendment.

A majority of the Court flatly rejected the claim that the trespass tainted evidence obtained by use of the detectaphone; the trespass was wholly unconnected with its use and could not possibly be considered a sufficient ground to bar such evidence. Utilization of the detectaphone was upheld under the fourth amendment because no trespass was incident thereto. Of greater significance, however, was the majority's treatment of Olmstead; in adhering to its opinion they refused to distinguish the cases upon the ground that in Olmstead there was an intention to project the voice beyond the room, whereas in the instant case the conversations were intended to remain within. Although the ma-

privacy; the fact that search and seizure rules were invoked most often in favor of persons engaged in large scale criminal activities, often by judges unsympathetic to prohibition, could not escape the attention of other judges, such as Chief Justice Taft, who were disturbed by the growth of crime. Olmstead may well have been "the high point of Taft's crusade" for strict enforcement of prohibition. Beaney, supra note 6, at 218.

42. 316 U.S. 129 (1942).
43. As applied to Shulman's talk into the telephone receiver which was also overheard by means of the detectaphone, petitioners contended that admission of evidence thus obtained violated § 605 of the Federal Communications Act. This contention was rejected on the ground that § 605 protects only "the message itself throughout the course of transmission by the instrumentality or agency of transmission." Id. at 188.
44. The dissenters agreed that Olmstead was indistinguishable; Justices Stone and Frankfurter would have overruled it on the basis of the dissenting opinions there expressed, while Mr. Justice Murphy, in a dissent reminiscent of Brandeis' in Olmstead, advocated a broad interpretation of the fourth amendment to prohibit eavesdropping without the requirement of trespass. The latter found support for his position in the intentions of the framers:

There was no physical entry in this case. But the search of one's home or office no longer requires physical entry, for science has brought forth
jority might have said that the distinction was not of controlling significance in light of the other two bases for the *Olmstead* decision, they instead disposed entirely of the distinction:

We think, however, the distinction is too nice for practical application of the Constitutional guarantee, and no reasonable or logical distinction can be drawn between what federal agents did in the present case, and state officers did in the *Olmstead* case.\(^4\)

The proposition that the fourth amendment prohibits the seizure of tangible objects only was the next basis of the *Olmstead* decision to be undermined, first in *Irvine v. California*,\(^4\) and again in *Silverman v. United States*.\(^4\)

Suspecting Irvine of being engaged in illegal gambling activities, police employed a locksmith to make a key to the door of his house. Two days later, police entered with the key and concealed a microphone in a hall, boring a hole in the roof through which wires were strung to a neighboring garage where officers monitored Irvine’s conversations. Police entered Irvine’s house on two subsequent occasions, moving the microphone first to his bedroom and then to a closet, where it remained until the investigation ended.

The Supreme Court found that Irvine’s rights under the fourth and fourteenth amendments were violated by the “almost incredible” police measures.\(^4\) By necessary implication, therefore, the tangibility requirement was rejected, and although the plurality represented the views of only four Justices, neither Mr. Justice Clark concurring nor the four dissenting Justices mourned its passing.\(^4\)

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\(^4\) Far more effective devices for the invasion of a person’s privacy than the direct and obvious methods of oppression which were detested by our forebears and which inspired the Fourth Amendment. Surely the spirit motivating the framers of that amendment would abhor these new devices no less. Physical entry may be wholly immaterial.

316 U.S. at 139.

45. *Id.* at 135.


47. 365 U.S. 505 (1961).

48. 347 U.S. at 132. His conviction was affirmed, however, on the ground that “subsidiary procedural and evidentiary doctrines developed by the federal courts,” including the federal exclusionary rule, were not made limitations upon the states by the fourteenth amendment. *Ibid.*

49. Justice Clark reluctantly concurred in the judgment of affirmance, although he would have preferred to apply the exclusionary rule to the states through the fourteenth amendment. *Id.* at 138. Justices Frankfurter and Burton would have reversed on the ground that Irvine was deprived of due process by the police measures, without reference to the fourth amendment.
In Silverman the Court likewise implicitly rejected the tangibility limitation by deeming eavesdropping to violate the fourth amendment. The Court refused, however, to reconsider either Olmstead or Goldman and reaffirmed Olmstead's requirement of physical trespass. After Silverman, then, only this basis of the Olmstead decision retained any force, although the Court adhered to its underlying construction of the fourth amendment.

Moreover, a reading of Silverman with the recent decision of the Court in Clinton v. Virginia\(^5\) indicates that the only remaining line of analysis predicated upon the Olmstead construction of the fourth amendment has been effectively rejected. In Silverman, the Court condemned on the basis of the fourth amendment evidence obtained by inserting a spike microphone several inches into a party wall until it touched a heating duct which acted as a sounding board, enabling the police to overhear conversations throughout the petitioner's house. Mr. Justice Stewart, speaking for a majority, refused to consider pleas for both a broader construction of the fourth amendment and a reconsideration of Olmstead and Goldman; nevertheless, his opinion partially abandoned the "actual trespass" requirement of Olmstead:

\[\text{We need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law. . . . [The] decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.}^{51}\]

In Clinton, any remaining life was drained from the actual trespass requirement. Mrs. Clinton was convicted of receiving the earnings of a prostitute. Evidence introduced at trial had violation. Id. at 142. Justices Black and Douglas urged a different ground for reversal; they viewed the Government requirement of a gambling tax stamp and the required disclosure of certain information incident to obtaining the stamp as a violation of the fifth amendment protection against self-incrimination. Id. at 189. Justice Douglas also dissented separately urging application of the exclusionary rule to the states. Id. at 149.


\(^51\) 365 U.S. at 511-12. Mr. Justice Douglas concurred with the majority but would have gone much further and eliminated any reference to trespass or physical intrusion: "[O]ur sole concern should be with whether the privacy of the home was invaded." Id. at 518. Justices Clark and Whittaker wished to retain the "actual trespass" basis of Olmstead and felt "obliged" to concur only because in their view the majority had determined that the physical penetration of the microphone constituted such a trespass.
been obtained by monitoring conversations held in her apartment through the use in an adjacent apartment of an electronic eavesdropping device which fastened to the wall by making no greater penetration than a thumb tack. In a per curiam decision, the Court reversed a judgment of the Virginia Supreme Court upholding her conviction.52

The penetration made by the eavesdropping device in Clinton affords no logical ground for distinguishing the case from Goldman, where conversations were monitored by placing a detectaphone against a partition wall. Yet the Court's failure to reconsider Goldman and its citation of Silverman in the per curiam decision indicate that the penetration was of controlling significance. Such an application of the physical intrusion concept suggested in Silverman can be considered only a temporary means of avoiding a reconsideration of the lines of analysis suggested in Olmstead; the concept requires distinctions too nice for continued application. Thus the Court has condemned eavesdropping in cases where there has manifestly been no actual trespass as required by Olmstead, and where there has been only the most picayune physical intrusion. None of the three lines of analysis predicated upon the Olmstead construction of the fourth amendment retains any vitality; yet, the underlying construction remains unchanged. It seems clear that for this reason alone a reconsideration of the fourth amendment is necessary, and that its construction in Olmstead must either find new ground for support or give way to a constitutional framework more consonant with the law of eavesdropping as it has been developed by the Court.

B. On Lee and Lopez: The Bastard Offspring

An additional aspect of the current treatment of eavesdropping requires attention. In On Lee v. United States53 and Lopez v. United States54 the Court was confronted with the contention that, despite the assent of one of the parties, the fourth amendment is violated by the use of electronic eavesdropping devices to monitor and record conversation.

On Lee was a Hoboken entrepreneur who dealt in laundry and

52. Mr. Justice Clark concurred again on the basis of his belief that the majority had considered the penetration sufficient to be an "actual trespass." 377 U.S. at 158. Mr. Justice White dissented without comment. Ibid.
53. 343 U.S. 747 (1952).
narcotics. An old friend and former employee, Chin Poy, who had become an informer for the Narcotics Bureau, entered his shop and engaged On Lee in conversation. Unbeknown to On Lee, a small microphone concealed upon the person of Chin Poy broadcast their conversation outside the shop where it was monitored by a narcotics agent with a radio receiver. Conversation which took place upon the sidewalks of New York was similarly monitored and, although Chin Poy was not called as a witness, the agent was permitted to testify to the incriminating content of the conversation at the trial which resulted in On Lee's conviction. A majority of the Court refused to find a violation of the fourth amendment, relying upon two of the bases of Olmstead—there had been no physical trespass because On Lee had consented to the entry of Chin Poy, and there had been no seizure of tangible property.55

Similar issues were presented in Lopez, where an agent of the Internal Revenue Service investigating cabaret tax liability was offered a bribe by the owner of an inn. The agent feigned willingness to accept the bribe and reported the incident to his superiors. He returned with a concealed transmitter and wire recorder. The transmitter failed, but the recording of the conversation was admitted into evidence to corroborate the agent's testimony at the trial which resulted in Lopez's conviction. Lopez contended that his rights under the fourth amendment were violated both by the agent's testimony and by the introduction of the recording.

Mr. Justice Harlan, speaking for the majority, rejected this contention. He found it clear that, because the agent was present with Lopez's consent, there was no constitutional inhibition against his testimony. Once this fact was established, Harlan did not have to reconsider previous eavesdropping cases:

55. The four dissenting opinions again resurrected the arguments of the dissenters in Olmstead. Mr. Justice Black would have forbade the use of the agent's testimony on Holmes' moral grounds. 343 U.S. at 758. Mr. Justice Frankfurter expressly adhered to the dissenting views in Olmstead, reiterating the view that it should be overruled. Id. at 761. Mr. Justice Douglas argued once again for a condemnation of such eavesdropping under a broad right to privacy derived from the fourth and fifth amendments. Id. at 765. Mr. Justice Burton's opinion, in which Mr. Justice Frankfurter concurred, argued that the fourth amendment had indeed been violated: because Chin Poy had no permission from On Lee to carry the concealed transmitter, a trespass had been committed exactly as if the narcotics agent had surreptitiously entered the store; and the fourth amendment protection was not dependent upon the tangibility of the evidence seized but rather upon the manner in which it was obtained. Id. at 766–67.
[T]his case involves no "eavesdropping" whatever in any proper sense of that term. The government did not use any electronic device to listen in on conversation it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose.\textsuperscript{56}

Mr. Justice Brennan, joined in a dissent by Justices Douglas and Goldberg, advocated the overruling of \textit{Olmstead}, \textit{On Lee} and \textit{Goldman}, and a redefinition of the constitutional framework for the treatment of eavesdropping. This redefinition was to be accomplished by a recognition of a general right to privacy dictated by the "mystical union" between the fourth and fifth amendments.\textsuperscript{57} In the view of the dissenters, any use of electronic devices would be condemned by such a construction. Justification for this result was extracted from the first amendment:

If electronic surveillance by government becomes sufficiently widespread, and there is little in prospect for checking it, the hazard that as a people we may become hagridden and furtive is not fantasy.\textsuperscript{58}

\textit{On Lee} and \textit{Lopez} are thus of significance not only with respect to the historical development of present law but also with respect to possible changes in the constitutional framework for the treatment of eavesdropping. First, as Mr. Justice Harlan pointed out in \textit{Lopez}, each of these cases could have been distinguished on the ground that there was in fact no eavesdropping. But in each, fourth amendment issues would not be denied, indicating the

\textsuperscript{56} 373 U.S. at 439. Chief Justice Warren, concurring, would have drawn a distinction between \textit{Lopez} and \textit{On Lee} by permitting the use of electronic devices solely to corroborate the testimony of a witness who actually testified at the trial. The use of the device in \textit{On Lee} would be condemned because its purpose was to obviate the need to place Chin Poy upon the stand, which Warren viewed as a violation of proper criminal procedure:

[While I join the Court in permitting the use of electronic devices to corroborate an agent under the particular facts of this case, I cannot sanction by implication the use of these same devices to radically shift the pattern of presentation of evidence in the criminal trial, a shift that may be used to conceal substantial factual and legal issues concerning the rights of the accused and the administration of criminal justice.]

\textit{Id.} at 445-46.

\textsuperscript{57} The dissenters also advocated an independent recognition of the reasonableness and warrants clauses of the fourth amendment. This proposition was advanced, however, only in support of the "mystical union" argument; no independent analysis based upon the reasonableness clause of the fourth amendment was suggested. See \textit{id.} at 454-55; text accompanying notes 35 & 36 \textit{supra}.

\textsuperscript{58} 373 U.S. at 470.
Court's discontent with and willingness to reconsider existing law. The dissenters in Lopez recognize that not only the lines of analysis suggested by Olmstead but also its underlying construction of the fourth amendment must be reconsidered; they also suggest that an inquiry into the first amendment might prove helpful in devising a suitable framework. And finally, the issues raised in these cases suggest that any future treatment must contend with the persuasive argument that electronic devices may be used to preserve the most reliable evidence of conversations which could be divulged by a participant.69

C. Lanza v. New York: The Constitutionally Protected Area

A final aspect of the present treatment of eavesdropping under the fourth amendment was articulated in Lanza v. New York,60 where reference was made to an "area" outside of the amendment's protection. A conversation between Lanza and his brother, who was confined in a New York jail, was monitored by the use of an electronic device secreted in the jail's visiting room. During a subsequent legislative committee investigation of corruption in the parole system, Lanza was called upon to answer several questions, some of which were based upon a record of the monitored conversation which was in the committee's possession. Lanza refused to answer the questions on the ground that, since the interception of the conversation violated the fourth amendment, the fruits of that interception could not be used by the committee.

Lanza's appeal to the Supreme Court from a subsequent conviction of contempt clearly could have been disposed of without consideration of his constitutional claim; at least two of the questions he refused to answer were wholly unconnected with any matter appearing in the record of the monitored conversation.61

69. For an argument that the rule enunciated in Massiah v. United States, 377 U.S. 201 (1964), similarly results in a loss of reliable evidence by excluding official witnesses, see Enker & Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47, 82 (1964).
60. 370 U.S. 189 (1962).
61. Id. at 145. In concurring opinions, Justices Brennan and Douglas and Chief Justice Warren would have decided the case on nonconstitutional grounds and accordingly expressed displeasure with the majority's treatment of the constitutional issues. Id. at 147, 152. Mr. Justice Harlan, concurring, objected only to any suggestion in the majority opinion that the fourteenth amendment was coextensive with the fourth. Id. at 147.
However, Mr. Justice Stewart, speaking for a majority of a seven man Court, chose to address himself to the constitutional argument. He reasoned that the jail is not an area to which the protection of the fourth amendment extends, but declined to indicate how such an area is to be determined:

Without attempting either to define or to predict the ultimate scope of the Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a house, an automobile, an office, or a hotel room.\(^6^2\)

The suggestion that there are physical boundaries defining the protection of the fourth amendment, though reminiscent of the old \textit{Olmstead} analysis, is probably attributable to the Court's quest in \textit{Silverman} for "the reality of an actual intrusion into a constitutionally protected area."\(^6^3\) In either case, however, the "area" concept appears to be meaningful only if "physical intrusion" is viewed as a requisite for violation of the fourth amendment. Because it seems evident that the physical intrusion requirement cannot long be considered controlling, and because the "area" discussion in \textit{Lanza} is clearly dictum which commanded the support of but four Justices at most, it is submitted that the "area" limitation does not merit further consideration in the development of a comprehensive constitutional rationale for eavesdropping.

\section{I. A PROPOSED CONSTITUTIONAL RATIONALE}

Thus far it has been suggested that, because of the inadequacies of the existing constitutional treatment of eavesdropping and the failure of Congress or state legislatures to dispose of the problems, the Supreme Court must reconsider the constitutional issues raised by the use of eavesdropping techniques. Several requisites of a suitable constitutional framework have been proposed. First, any rule limiting eavesdropping must depend for its enforcement upon the exclusionary rule; because this remedy concededly does not satisfactorily deter the use of eavesdropping devices, the primary effect of any set of rules will be a gradual moulding of police practices and public attitudes to conform with the law. This limitation upon the effectiveness of decisions within a constitutional framework demands that the framework furnish guidelines of sufficient clarity to define a desirable moulding effect. Moreover, a suitable constitutional framework must be able to

\begin{center}
62. 370 U.S. at 143.
63. 365 U.S. at 512.
\end{center}
treat a broad range of eavesdropping problems. Finally, it should be flexible enough to accommodate any position on the merits of eavesdropping dictated by future compilations of definitive empirical data and the sentiments of the Court.

The final concern of this Note, is to propose such a framework. The method employed will be to consider possible constitutional bases and to measure the utility of each against the previously suggested criteria.

A. THE FIRST AMENDMENT

The argument that the first amendment furnishes a suitable basis for the treatment of eavesdropping rests upon two assumptions. First, it is suggested that the use of eavesdropping techniques inhibits free expression by imparting to citizens a fear that their activities will be subjected to surveillance. Furthermore, the clandestine monitoring of individual activities is said to violate a freedom to remain silent which exists concomitantly with freedom of expression.

These assertions are predicated upon the assumptions that the first amendment guarantees the right of free expression and that the psychological impact of eavesdropping techniques upon the individual is such as to inhibit free expression. The first of these assumptions appears to be arguable at best; the second can be supported only by conjecture unverified by empirical data.

On its face, the first amendment establishes a substantive limitation upon the legislative authority of Congress. It is not immediately concerned with a private right but rather with a public power— it prohibits the Government from interfering with the exercise of free choice and expression by citizens in matters of politics and religion. Even though such limitations must


66. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

extend implicitly to areas of individual expression such as education, public discussion, literature, philosophy, science, and the arts, it appears that there are many forms of communication which, because they are wholly unconnected with activities of governing or worshipping, are outside the scope of the first amendment. And it is the integrity of these forms of communication, principally concerning the individual's domestic affairs, which those who would limit eavesdropping desire most to protect. Furthermore, the recent decisions of the Court broadening the scope of the first amendment have by no means indicated that protection is extended to "free expression." On the contrary, it appears that political and religious factors underly each of these decisions.

Even if a majority of the Court were disposed to interpret the first amendment to protect "free expression," however, it would not seem to furnish a desirable constitutional framework for the treatment of eavesdropping. It may be assumed that a court which could so broadly construe the first amendment would have little difficulty recognizing the inhibiting effect of eavesdropping. But such a construction would launch the Court into wholly uncharted waters; no discernible standards exist under the first amendment for guiding either the judiciary or the police under whatever limits of eavesdropping the Court may deem appropriate. Furthermore, the bare criterion of inhibition of free expression might well lead to inquiries as anomalous as those produced by the rejected Olmstead bases. For example, would an agent of the Government who attended a meeting of an allegedly subversive organization and monitored speeches be violating a first amendment limitation on eavesdropping only if the speaker


69. See, e.g., Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) (first amendment protects right of organization to urge members to assert legal rights through recommended lawyers); Edwards v. South Carolina, 372 U.S. 229 (1963) (right of assembly of students seeking to protest racial discrimination at state capitol protected); NAACP v. Button, 371 U.S. 415, 429 (1963) (first amendment protects right of organization to provide legal counsel for its members: "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression."); Staub v. City of Baxley, 355 U.S. 313, 321 (1958) (state law inhibiting solicitation of members for any organization, union or society invalid).
knew of the agent's presence? Or would the demonstrated presence of the agent raise a presumption of inhibition of free expression sufficient to preclude the introduction of matter from the speech at any subsequent trial? In either case, it would seem quite probable that the speaker would be unaware of the presence of the agent. If, however, he knew of the agent's presence before he spoke, it is difficult to avoid the notion that he waived any constitutional objection. Of course, it could be argued that free expression is inhibited by the speaker's awareness that his conversation might be monitored and used in evidence against him, and that all persons would speak more freely if such a possibility did not exist. Experience, however, appears not to support this position, and even if the argument is assumed to have some validity, it would apply with equal force to the divulgence in court of the content of any conversation, whether by an eavesdropper or by a participant.

Such troublesome questions could be avoided either by interpreting the first amendment to bar all eavesdropping or by deciding the hypothetical case posed upon the "right to remain silent" argument. Barring all eavesdropping is generally conceded to be an unreasonable limitation upon the police function. But if the Court were to determine on the merits of eavesdropping that it should no longer be permitted, the suggested broad interpretation of the first amendment would seem to furnish an adequate ground for such a pronouncement. However, urging the "right to remain silent" adds the additional doctrinal difficulties of attempting to impress "freedom from" ideas into a concept that has always signified "freedom to do." The first amendment generally is associated with free access of ideas to the market place of public discussion; the notion that clandestine communications cannot be monitored and exposed to the public involves a curious use of this amendment. Such additional difficulties would seem to render the "right to remain silent" argument too tenuous to be useful.

In summary, attempting to predicate a constitutional treatment of eavesdropping upon a "free expression" guarantee of the first amendment presents a number of conceptual difficulties. Even if these were resolved, it is submitted that the lack of available standards and the inherent interpretative difficulties would

71. Ibid.
permit the first amendment to be used only if the Court were to completely eliminate the use of eavesdropping.

B. THE FOURTH, FIFTH AND SIXTH AMENDMENTS

Arguments have been made for the treatment of eavesdropping under various combinations of the fourth, fifth and sixth amendments. The present analysis will treat the three amendments together, for underlying all such arguments is the theory that the fifth amendment reflects policy considerations which, when impressed into the fourth and sixth amendments, may furnish a suitable constitutional framework for the treatment of eavesdropping.72

The basis for the “mystical union” of the fourth and fifth amendments was suggested by Mr. Justice Bradley in Boyd v. United States:

We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the “unreasonable searches and seizures” condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man “in a criminal case to be a witness against himself,” which is condemned in the Fifth Amendment throws light on the question as to what is an “unreasonable search and seizure” within the meaning of the Fourth Amendment. And we have been unable 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.73

Thus, the “mystical union” was originally based upon the idea that the fifth amendment articulates a policy requiring certain limitations upon the power of the police to elicit incriminating evidence from the accused.74 A further incident of the theory was the “lazy prosecutor” argument — if the prosecutor were allowed to resort for convictions to evidence coerced from the accused himself, the entire guilt-determining process would suffer morally.75


73. 116 U.S. 616, 633 (1885).


75. 8 WIGMORE, EVIDENCE § 2251, at 309 (3d ed. 1940); Nutting, supra note 73, at 533–34.
A similar overflow of the fifth amendment into the area of “right to counsel” traditionally associated with the sixth amendment may be observed in the recent cases of *Massiah v. United States* and *Escobedo v. Illinois*. In *Massiah* the accused was convicted of narcotics violations on the basis of incriminating statements obtained after indictment. Government agents secreted an electronic eavesdropping device in his car which enabled them to monitor a conversation between the accused and a co-defendant who had been released on bail pending the trial. The Court refused to consider a possible fourth amendment violation but reversed the conviction under a sixth amendment rationale, holding that the incriminating statements had been illegally solicited in the absence of counsel. Similarly in *Escobedo*, the Court held that:

[W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional rights to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . .

The *Massiah* and *Escobedo* cases reflect the theory that the sixth amendment functions not only to provide the accused with an attorney so that he may be informed of his legal rights, but also as a restraint upon the coercive power of the police, effective in certain cases to bar secret inquisitions. Thus viewed, the sixth amendment becomes imbued with the policies of the fifth and would operate as a limiting factor upon the use of eavesdropping techniques at the point where “general inquiry has begun to focus on a particular suspect.”

Without proceeding further into an analysis of the “mystical union” arguments, it might be suggested that the policies of the fifth amendment as impressed into the fourth and sixth would furnish a suitable basis for the treatment of eavesdropping. While it is true that certain limits upon eavesdropping have been thus defined, it cannot be contended that such limits furnish suitably

76. 377 U.S. 201 (1964).
78. Id. at 490–91.
80. 378 U.S. at 490.
defined guidelines for a delineation of the proper scope of eavesdropping. Nor do these limits seem to restrict significantly police discretion to use eavesdropping devices; only the small portion of the possible uses of eavesdropping which operate directly to produce evidence to be introduced in a trial of the observed party are condemned. In cases in which the monitored material is used for purposes other than the conviction of the observed party, these limits would have no application. Such a theory would seem to be appropriate only if the Court desired to allow the police significantly more freedom than most commentators would allow, a most unlikely position in view of the sensitivity of the present Court to the individual rights threatened by eavesdropping.

But those who argue for an eavesdropping framework built upon the "mystical union" seek a broader principle than that previously suggested. The essence of their argument is that the "mystical union" defines a general right of individual privacy. Under such a theory, the legality of eavesdropping would rest upon a determination of whether or not the sanctity of this privacy were invaded, and, it is argued, that inquiry would be freed from anomalous doctrines such as the law of trespass which bear no rational relationship to the interests at stake. This position finds support in the broad language of several opinions and in a body of search and seizure cases invoking the fifth amendment. However, the difficulties that would be encountered in supporting and applying such a framework are substantial.

82. See Barrett, Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUP. CT. REV. 46. The effectiveness of a constitutional right predicated upon the fifth amendment is limited by the judicial remedy, the exclusionary rule. See notes 17 & 19, supra, and accompanying text.
83. See, e.g., United States v. Goldfine, 174 F. Supp. 255 (D.D.C. 1959) (monitored material used to propound questions in legislative committee); People v. Lewis, 214 Cal. App. 2d 799, 29 Cal. Rptr. 825 (1963) (monitored material used as basis for search of premises.)
84. See Beaney, supra note 71, at 212; authority cited note 73, supra.
First, the basic argument that there exists a "mystical union" between the fourth and fifth amendments which defines a right to privacy is generally viewed as quite mystical in itself. Commentators who have examined the concept since its articulation by Mr. Justice Bradley have been unable to perceive the intimate relationship which he detected. But it is hardly an insight to observe that such doctrinal difficulties have proved to be of little moment to a determined Court.

A more serious difficulty is encountered in applying a constitutional framework embodying the concept of "privacy." Again, if the Court were determined to eliminate all eavesdropping, the result could be rationalized acceptably by deeming every eavesdropping technique an invasion of privacy protected by the fourth and fifth amendments. However, if the Court were to take a less extreme position and permit eavesdropping under some, but not all, circumstances, judicial inquiry and police behavior would be furnished with no discernible guidelines, and decisions would be made to turn upon a concept which the Court has steadfastly failed to clarify. Arguably the Court could not define "privacy"; because the term has been given a variety of meanings in a multitude of situations, the magnitude of the body of law which the Court would be required to reexamine to formulate a definition would make such an effort quite impractical, if not impossible. Search and seizure decisions under the fourth amendment would be of little value because they are predicated for the most part upon a construction of the fourth amendment which rejects the concept of a right to privacy. In summary, then, the "mystical union" would seem to furnish a suitable basis for the treatment of eavesdropping only if eavesdropping techniques were to be universally condemned or if the Court were to undertake a concomitant definition of "privacy," which is quite unlikely.


88. Even Mr. Justice Frankfurter has resorted to a finesse:

[T]wo protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy . . . . Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain . . . .

C. THE FIFTH AND FOURTEENTH AMENDMENTS: DUE PROCESS

The argument that eavesdropping techniques might be dealt with under the due process provisions of the Constitution was suggested by Circuit Judge Washington in his dissenting opinion in Silverman v. United States. He conceded that the use of the spike microphone was not in violation of the fourth amendment because of the lack of an "actual trespass":

But it does violate, I think, our fundamental concept of ordered liberty, as embodied in the due process clauses of the Fifth and Fourteenth Amendments. . . . Under a governmental system of constitutional or limited exercise of public power, ordered liberty requires that the police, like other public officials, take action against a citizen only pursuant to duly-conferred authority.

Judge Washington envisaged a constitutional framework for the treatment of eavesdropping in which wiretapping and traditional techniques would be left to their fate under the fourth amendment, but techniques of electronic surveillance would be prohibited by the fifth and fourteenth amendments unless the police could justify their use by statutory authority or some undefined showing of necessity.

Such an analysis is said to rest primarily upon the language of three Supreme Court decisions: Palko v. Connecticut, Rochin v. California, and Irvine v. California. However, each of these cases reflects a somewhat different inquiry into the scope of due process. In Palko it was contended that a state appeal in a criminal case deprived the accused of due process; the inquiry undertaken by the Court was whether or not explicit provisions of the fifth amendment, such as the double jeopardy provision, were incorporated into the fourteenth. The Court concluded that they were not because:

[They are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

89. 275 F.2d 173, 179 (D.C. Cir. 1960).
91. 275 F.2d at 179.
95. 302 U.S. at 325.
In *Rochin*, a narcotics conviction in which morphine capsules forcibly extracted from the stomach of the accused were used in evidence was reversed under a fourteenth amendment guarantee of rights not even suggested in the Constitution—the stomach pumping was regarded as a denial of due process because it was shocking to the conscience and abhorrent to well established principles of justice. In this sense, due process may be extended to include principles of natural law not enshrined in the Bill of Rights. Again in *Irvine*, no explicit provision of the Bill of Rights was involved; nonetheless, the Court found that due process embodied a “fundamental principle” of the fourth amendment, “the security of one’s privacy against arbitrary intrusion by the police.”

The first of these inquiries, suggested by *Palko*, is unsatisfactory for a treatment of eavesdropping because it would look to provisions of the fourth amendment, which conceded have not been construed to forbid the use of electronic eavesdropping devices. The last, suggested by *Irvine*, suffers from the same limitations as the proposed “mystical union” basis—it is keyed to a definition of privacy which has not yet been supplied; thus it would seem to be practical only if the Court would seek total elimination of eavesdropping. The second inquiry, articulated in *Rochin*, would leave the status of eavesdropping under the Constitution even more uncertain; not even the meandering “privacy” discussions of the Court would be available for guidance by analogy.

A further difficulty in Judge Washington’s analysis lies in its failure to treat the range of eavesdropping techniques within a consistent framework; analysis of traditional eavesdropping and wiretapping would remain under the fourth amendment but electronic devices would be separately condemned. Anomalous results might be obtained where, for example, the same telephone conversation is monitored by a wiretap and by a transmitter or recorder secreted upon the telephone. Similarly, it is difficult to rationalize a distinction between an informer’s testimony as to conversations in which he was a participant and the same testimony revealed by a recorder which had been concealed upon his

96. 342 U.S. at 172.
This distinction becomes even more troublesome when it is realized that the accused is at least as likely as the Government to suffer from the inaccuracies of the informer's memory. Finally, it is not at all evident that the use of electronic eavesdropping techniques violates the fundamentals of "ordered liberty." The effects of eavesdropping have not been established conclusively, and "ordered liberty" is without a clear definition; hence, it might well be argued that any such judgment could reflect only the subjective reactions of nine Justices. However, certain objective criteria are visible in due process adjudication; in determining whether a certain concept is a fundamental of ordered liberty, the Court has examined previous moral judgments—found in the opinions of the framers of the Constitution, state legislative decisions, opinions of American courts, and laws of foreign countries—moral propositions of unquestioned acceptance as fundamentals of ordered liberty from which it can logically be deduced that the concept in question is also fundamental, and procedures of tyrannical governments which are unquestionably the antithesis of ordered liberty.

If any conclusion is indicated by previous moral judgments, it is that ordered liberty does not demand a closer limitation upon the use of eavesdropping techniques than that which is presently derived from the fourth amendment. Opinions of the framers are, of course, nonexistent. However, only six states prohibit the use of electronic eavesdropping techniques, whereas 99. See On Lee v. United States, 343 U.S. 747 (1952); cf. Lopez v. United States, 373 U.S. 427 (1963).

100. The analysis pursued here was suggested in Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319 (1957).


105. See Snyder v. Massachusetts, 291 U.S. 97 (1934) (right to be present at jury view deduced from right to be present throughout trial); Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel deduced from right to hearing).


107. [Statutory references]
thirty-six restrict wiretapping\textsuperscript{108} — which the due process framework proposed by Judge Washington would not encompass. Statutory limits upon police practices by foreign jurisdictions generally allow at least as much freedom in the use of eavesdropping techniques as the fourth amendment; moreover, these jurisdictions, virtually without exception, reject the exclusionary rule and permit the introduction of evidence into a trial without regard for the manner in which it was obtained.\textsuperscript{109}

It appears that there exist moral principles deemed fundamentals of ordered liberty from which may be deduced the proposition that ordered liberty also demands the prohibition of electronic surveillance. "Privacy,"\textsuperscript{110} "free speech,"\textsuperscript{111} and the freedom from self-incrimination\textsuperscript{112} are but three of these principles. However, as has been stated, predicated a constitutional framework for the treatment of eavesdropping upon these principles, without a clear elucidation of their boundaries, would leave the treatment of eavesdropping without suitable guidelines — unless, of course, the utilization of eavesdropping techniques were universally prohibited.

\textsuperscript{111} See \textit{supra} note 70 at 246–50.


\textbf{112. See Malloy v. Hogan, 378 U.S. 1 (1964).}
It is obvious that constant surveillance by all available eavesdropping techniques is an incident of totalitarianism. However, this is at best a weak basis for concluding that prohibition of electronic surveillance is demanded by ordered liberty — at least in the absence of a clearly defined cause-effect relationship between the abhorrent aspects of totalitarianism and its use of surveillance. It might be argued with equal plausibility that ordered liberty demands the dissolution of police organizations and militia groups.

In summary, although a due process framework would preserve flexibility in treating the problems of eavesdropping, avoid the analysis of electronic eavesdropping techniques in the anomalous framework of the Olmstead rationale, and preserve the fourth amendment treatment of traditional eavesdropping techniques, its failure to provide suitably defined guidelines to furnish a comprehensive framework for the treatment of the entire range of eavesdropping techniques considerably restricts its utility.

D. THE FOURTH AMENDMENT

The constitutional framework suggested is predicated upon a construction of the fourth amendment giving recognition to the independent significance of the reasonableness and warrants clauses. Such a construction is not novel; it was propounded by the Court in United States v. Rabinowitz, 113 to validate a warrantless search incident to arrest. 114

Under this construction, eavesdropping techniques would be judged by both clauses; the warrant framework of traditional

114. A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a sine qua non the reasonableness of a search. . . . The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. Id. at 65–66. There is little historical gloss upon the fourth amendment. See ANNUALS OF CONGRESS 783, 808–09 (1789); LASSENO, HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 102 n.36 (1937). Early commentators, however, read the warrants clause as a sine qua non of reasonableness, and, in addition, as a requirement that warrant ed searches be conducted reasonably. See, e.g., COOLEY, CONSTITUTIONAL LIMITATIONS 299–308 (1889); Black, CONSTITUTIONAL LAW 435–42 (1895). See generally LASSENO, op. cit. supra, at 18–105; Reynard, Freedom From Unreasonable Search and Seizure—A Second Class Constitutional Right?, 25 IND. L.J. 259 (1950); Comment, 28 U. CHI. L. REV. 664, 678–80 (1961).
eavesdropping would be preserved, and the constitutionality of modern eavesdropping techniques would be tested by the reasonableness of their utilization in a given situation. Such a framework would rid fourth amendment interpretation of the anomalous survival of the Olmstead construction, would permit decisions which comport with the rejection of the lines of analysis suggested by that construction, and would be far more consonant with recent decisions espousing a broader interpretation of the fourth amendment in related areas of search and seizure. Furthermore, it would permit the Court to make a determination upon the merits as eavesdropping practices come before it, while preserving the flexibility necessary to adjust its determinations of reasonableness as future compilations of empirical data dictate different conclusions.

The arguments against this redefinition of the fourth amendment are corollaries of a main objection that it likewise places eavesdropping in a limbo of unfettered judicial discretion. It is submitted, however, that adequate guidelines for both judicial and police treatment of eavesdropping techniques are provided through a fairly well defined "calculus of reasonableness" suggested by the Court in Frank v. Maryland and by analogy to the requisites of the warrants clause.

Mr. Justice Frankfurter, speaking for the Court in Frank, suggested three determinants of the reasonableness of searches and seizures under the fourth amendment: the seriousness of the invasion of individual "liberty" or "privacy," the probability that the search would reveal the matter sought, and the importance of the public need by which the invasion was sought to be justified. With slight modification, these factors may be used to determine the reasonableness of the utilization of a given eavesdropping technique.

The first of the determinants leads immediately into the quagmire of "privacy." Definitional difficulties with the use of this term could be minimized, however, by predicking the inquiry into reasonableness upon the assumption that the primary purpose in limiting the use of eavesdropping is expressed in the proposition that "the fundamental requirement of a free society is that the official use of force must be subject to other checks than the discretion of law enforcement officials themselves."
Under this assumption, the basic inquiry is not whether the use of eavesdropping techniques infringes upon the individual's "privacy." Rather, the inquiry is whether the boundaries of permissible eavesdropping constitute a reasonable limitation upon the discretionary use of police power. Such an inquiry is admittedly but the obverse of that based upon "individual privacy"; however, by working from an assumption that the police function must be subject to certain limitations, substantially the same interests are examined without facing either the difficulty of determining what are the boundaries of "privacy" or the apparent futility of asking the Court to furnish a definition of "privacy."

A determination of the reasonableness of a utilization of eavesdropping techniques would, then, balance four factors: the nature and range of individual conduct that the techniques would permit the police to observe; the likelihood that the permitted observation of individual conduct would reveal the information sought; the likelihood that observation of a narrower range of conduct would have produced similar information; and the importance of the public need by which the observation was sought to be justified.

By the use of these determinants, the Court could provide a rational framework for whatever position on the merits of eavesdropping it might choose to take. The universal unconstitutionality of eavesdropping could be reached by simply deeming the observation too onerous to be justified by any public need. Intermediate positions would be judged by the interplay of these determinants. For example, any sort of electronic eavesdropping device installed in a home or apartment would allow the police discretion to observe the broadest possible range of individual conduct. The use of such a device could be validated only by a showing of the most essential public need and an overwhelming probability that the information sought could not be obtained by observing a narrower range of conduct than the individual in his home. It seems inconceivable that such a situation would exist, because if enough were known of the individual's behavior to show the probability of obtaining evidence in this manner, then evidence sufficient to convict him should be easily obtainable in other ways. In a less extreme case, suppose a policeman staked out near the home of suspected gamblers peers through the transom when he hears the sound of adding machines, known to him to be used in the tabulation of policy cards. He observes the gamblers surrounded by such cards, and testifies accordingly at a
subsequent trial.110 Next, suppose the police, suspecting the same men of gambling, conceal a television camera near their house. The camera similarly scans the room through the transom and records the tabulation of policy cards upon video tape, which is introduced in evidence at a subsequent trial. In assessing the reasonableness of each of these techniques of eavesdropping, it is clear that the public need by which the eavesdropping may be justified is the same. The range of conduct which the police may observe is, however, much broader in the case of the camera than in the case of the policeman; the policeman may stand upon a chair at the transom only for a short time without arousing the suspicion of those inside, whereas the secreted camera may observe their conduct without their knowledge for days. Furthermore, the probability that the policeman will observe the policy operation without viewing much unrelated conduct is great because of the immediate circumstances. The camera, however, cannot turn itself on only when the sound of adding machines emanates from the room; thus, the possibility of police observation of much unrelated conduct is very much greater than in the case of the policeman. Moreover, there is little likelihood that the policeman could have observed the illegal operation by a technique of eavesdropping which would have scanned a narrower range of conduct. Thus, the eavesdropping of the policeman would be considerably more reasonable than the eavesdropping of the camera. If the policeman had carried the camera, however, each method would be equally reasonable; there would then be no rational ground for excluding the video tape merely because it revealed evidence which was obtained by the use of an electronic eavesdropping device rather than through the human senses alone.

The guidance furnished by the determinants suggested above is augmented by analogy to the requisites specified in the warrants clause. Upon the assumption that the procedures enumerated in the warrants clause are reasonable, the use of an eavesdropping technique accompanied by procedures which impose similar limitations upon the police function should be equally reasonable.120 Moreover, the basic warrant requirements are familiar to the judiciary and to the police, whose actions must be guided by the constitutional framework adopted.

119. For a similar fact situation, see McDonald v. United States, 335 U.S. 451 (1948).

120. See generally Comment, 28 U. Chi. L. Rev. 664, 686–92 (1961), where this analysis is used to examine the equivalence of protection in a search with a warrant and a search incident to arrest.
Most notable of the warrants clause requisites is probable cause, which is designed to guarantee the likelihood that observation will produce the matter sought. Since this requirement is also one of the suggested determinants of reasonableness, there should be no difficulty in assimilating the standards of probable cause derived from existing search and seizure precedent. However, the use of some eavesdropping techniques portends a much broader exercise of police discretion than traditional search and seizure; therefore, it would seem that the existing standards of probable cause should function as a minimum standard for valid employment of these techniques.

A second requisite of the warrants clause is particularity of description. This limitation is intended to prevent general fishing expeditions where entry is gained ostensibly to obtain one item and the search becomes a general one for evidence of any offense.\(^1\) The use of modern eavesdropping techniques obviously infringes upon this limitation because they are necessarily indiscriminate in the conduct which they observe. Thus, it would seem that the requirement of particularity, if strictly enforced as a criterion of reasonableness, would sharply limit if not forbid the utilization of electronic surveillance devices. Even strict observance may not, however, prevent their employment in certain locations. To cite one example, where a telephone is tapped in an office which the police strongly suspect is being used as the headquarters of a gambling operation, the chances of monitoring matter unrelated to the purpose justifying the wiretap is at a minimum. Moreover, police can usually obtain additional warrants to seize objects which they observe while present to seize a particular unrelated item.\(^2\) It might thus be argued that observing the particularity limitation inhibits exercise of police discretion only to the extent of requiring a second trip to the magistrate. However, since the magistrate must then judge the good faith and reasonableness of the successive searches and seizures in the light of the original limited purpose, it would seem that an initial judgment of the reasonableness of a utilization of eavesdropping techniques would provide similar restraints upon the police function.

The final requisite of the warrants clause is prior approval by a magistrate. There should be little difficulty in devising suitable

provisions for submission of plans to eavesdrop to a magistrate.\textsuperscript{123} It may, in fact, be desirable to deem such prior approval a \textit{sine qua non} of reasonableness in the case of electronic eavesdropping techniques. This requirement, coupled with a stricter demonstration of probable cause and a location suitably limited by the particularity requirement, would seem to furnish procedures which would place limitations upon the police function with respect to the range of eavesdropping techniques equally as reasonable and well defined as those now provided in the case of traditional eavesdropping techniques by the requisites of the warrants clause.

\section*{IV. CONCLUSION}

In concluding that the fourth amendment furnishes an adequate constitutional basis for the treatment of eavesdropping, other constitutional amendments were severally analyzed and compared. However, certain additional incidents of the suggested rationale appear from an interplay of the fourth amendment with those other provisions.

First, it appears that the reasonableness analysis is bounded by the \textit{Massiah-Escobedo} right to counsel rationale. Thus, at the point where "general inquiry . . . has begun to focus on a particular suspect,"\textsuperscript{124} the fifth and sixth amendment limitation upon police conduct dictates an absolute prohibition of the use of eavesdropping devices,\textsuperscript{125} thereby rendering a reasonableness analysis immaterial. Second, the suggested construction of the fourth amendment and the guidelines it entails would automatically be included in the due process clause of the fourteenth amendment and thus extended to the states.\textsuperscript{126} Finally, it would seem that a theory of waiver of protection by consent, a general limitation upon the individual's protection under the Bill of Rights, would also limit the application of the suggested analysis. For example, such a theory would be useful in disposing of the \textit{On Lee-Lopez} problem where one party to a conversation has consented to its monitoring by an electronic device. But because

\begin{itemize}
  \item \textsuperscript{123} See Lopez v. United States, 373 U.S. 427, 464–65 (1963) (Brennan, J., dissenting); Goldman v. United States, 316 U.S. 129, 140 n.6 (1942) (Murphy, J., dissenting).
  \item \textsuperscript{124} Escobedo v. Illinois, 378 U.S. 478, 490 (1964).
  \item \textsuperscript{125} Compare People v. Jones, 47 Cal. Rptr. 40 (Dist. Ct. App. 1965), with People v. Flores, 46 Cal. Rptr. 412 (Dist. Ct. App. 1965).
  \item \textsuperscript{126} See, \textit{e.g.}, Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).
\end{itemize}
the suggested fourth amendment analysis is predicated upon a limitation of the police function rather than an invasion of individual rights, it might be suggested that consent by the individual should be immaterial.\textsuperscript{127} To avoid any such difficulty, the use of the informer could itself be viewed as the utilization of an eavesdropping technique and its reasonableness in the circumstances determined by the suggested analysis without regard for any additional monitoring of the conversation by concealed electronic devices. Regardless of the Court's disposition of such eavesdropping issues, however, it seems that the fourth amendment provides the most suitable framework for analysis.