EAVESDROPPING, WIRETAPPING, AND THE LAW OF SEARCH AND SEIZURE - SOME IMPLICATIONS OF THE KATZ DECISION

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Criminal defendants traditionally have sought to have evidence obtained by electronic eavesdropping excluded from their trials by bringing it within the prohibitions of the fourth amendment.[1] Such attempts generally have failed because of judicial adherence to a Constitutional doctrine, bottomed on "property" concepts, that unless the electronic surveillance is accomplished by a trespass — an actual physical and unconsented-to invasion of the area occupied by the person affected — there is no fourth amendment violation.[2] Closely related to, yet conceptually distinct from this "trespass" doctrine, is the notion of "constitutionally protected area" which permeates many of the Supreme Court's decisions in the area of search and seizure.[3] Under the latter concept, in order for there to be an unreasonable search, the area invaded must be one protected by the fourth amendment — a private place in which an individual is entitled to remain free from such searches.

In *Olmstead v. United States*,[4] the first case to deal with the effect of the fourth amendment on the admissibility of evidence secured by electronic surveillance, the Court held that the tapping of telephone wires leading from the residences of the defendants did not amount to a search within the meaning of the fourth amendment. In finding that evidence thus obtained was admissible, the Court insisted that the Constitution did not forbid such activities unless there had been an actual unlawful entry; here defendant's telephone line had been tapped at a point outside his home.[5] Moreover, since the fourth amendment applied only to "material" objects, a conversation passing over a telephone wire could not be "seized," and the use of electronic devices to intercept it was not a "search" within the meaning of that amendment.[6]

The first case involving evidence obtained by "bugging" (electronic

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[1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be secured, and the persons or things to be seized. U.S. CONST. amend. IV.

[2] *See* Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942); On Lee v. United States, 365 U.S. 505 (1961).

[3] *See, e.g.*, Berger v. New York, 388 U.S. 41 (1967) [hereinafter cited as *Berger*]; Lopez v. United States, 373 U.S. 427 (1963); Silverman v. United States, 365 U.S. 505 (1961).

[4] 277 U.S. 438 (1928).

[5] *Id.* at 464-65.

[6] *Id.* at 466.

eavesdropping) devices reached the Court in 1942. In *Goldman v. United States*[7] the Court refused to either distinguish or overrule *Olmstead*, and found that the use of a detectaphone placed against the partition wall of defendant's office in order to overhear conversations did not violate the fourth amendment since there was no physical intrusion into the office.[8] And, in *On Lee v. United States*,[9] the Court once again emphasized the trend to define fourth amendment protections in terms of "property" concepts, by holding, as in *Goldman*, that a finding of no "trespass" foreclosed the question of a fourth amendment violation.

In 1961 in *Silverman v. United States*,[10] the Court for the first time specifically held that eavesdropping accomplished by an unlawful invasion of a constitutionally protected area violated the fourth amendment. There a "spike mike" was inserted several inches into a party wall until it made contact with the heating duct of defendant's house, turning the duct, in effect, into a "gigantic microphone, running through the entire house."[11] While emphasizing that "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises,"[12] the Court for the first time found that the scope of the fourth amendment reached "intangible" objects and that the interception of conversations could constitute a search and seizure. Significantly, the Court pointed out that its decision did "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."[13]

In recent years, there has been a trend to recognize an individual right to privacy going beyond traditional "property" concepts. Perhaps the earliest indication that an actual physical penetration into a "constitutionally protected area" might no longer be determinitive of constitutional protections appeared in 1963 in *Lopez v. United States*.[14] Holding that there was no fourth amendment violation where an internal revenue agent, invited into the defendant's office, recorded a bribe offer on a pocket wire recorder concealed on his person, the Court did not rely solely on the absence of a trespass as it had in *On Lee*, which involved a similar fact situation.[15] Rather, the Court found that there was

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[7] 316 U.S. 129 (1942).
[8] *Id.* at 134.
[9] 343 U.S. 747 (1952).
[10] 365 U.S. 505 (1961).
[11] *Id.* at 509.
[12] *Id.*
[13] *Id.* at 512.
[14] 373 U.S. 427 (1963).
[15] In *On Lee*, evidence was obtained by having an undercover agent whom defendant trusted engage him in an incriminating conversation which was transmitted by an electronic device hidden on the agent's person. The Court there emphasized that no trespass had been committed since the agent was invited onto the defendant's premises.

no "eavesdropping" in the proper sense of the term since the agent could have heard the conversation without the aid of a listening device,[16] and emphasized that the defendant had assumed the risk that his conversation would be reproduced in court with or without the aid of electronic devices.[17]

As recently as last term, in *Warden, Maryland Penitentiary v. Hayden*,[18] the Court indicated the trend when it stated:

> We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.[19]

Two weeks later, in *Berger v. New York*,[20] the Court struck down New

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[16] Lopez v. United States, 373 U.S. 427, 439 (1963).

[17] *Id.* at 439. Apparently, the results in both *On Lee* and *Lopez* would remain the same under the Supreme Court's decision in *Katz v. United States*, 88 S. Ct. 507 (1967), whether or not the undercover agent acted pursuant to a valid search warrant. If the agent did have a valid search warrant, he clearly could record or transmit conversations between himself and the suspect; while *Katz* has brought nontrespassory eavesdropping within the protection of the fourth amendment, the decision has preserved this valuable tool for law enforcement where the Government complies with the procedural safeguards prescribed by that amendment. *See* text *infra* at p. 435. Moreover, in light of the "reasonable man" test set forth by *Katz*, it would seem that an undercover agent could record such conversations even without a search warrant since it could be said that the suspect assumes the risk of the agent's divulging the conversation to others. (For a contrary suggestion, see Comment, *Wire Tapping and Eavesdropping in Arizona: A Legislative and Constitutional Analysis*, *infra*, 9 ARIZ. L. REV. 452, 452 n.2.) As was pointed out in *Hoffa v. United States*, 385 U.S. 293 (1966), the suspect is not relying on the security of the area because he has invited the agent into that area; rather, he is relying on the confidence which he has placed in the person to whom he speaks. Therefore, it could hardly be said that the suspect reasonably expects to exclude the agent's ear or any electronic ear he may have on his person. Justice White, in a note to his concurring opinion in *Katz*, said that:

> When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard . . . . It is but a logical extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. 88 S.Ct. 507, at 517-18 n.**.

In a pre-*Katz* decision, the Court of Appeals for the Fifth Circuit held that evidence of conversations between defendant and a government agent obtained through the use of an electronic transmitting device strapped to the agent was admissible. Long v. United States, 387 F.2d 377 (5th Cir. 1967). In a footnote added after entry but before publication, the court pointed out that the Supreme Court's decisions in *Lopez* and *On Lee* were still viable after *Katz*. However, in a post-*Katz* decision, a divided Court of Appeals for the Seventh Circuit arrived at a contrary result. The defendant's conversations with an informer were transmitted over the air by an electronic device concealed under the informer's clothing and were overheard by federal narcotics agents. Relying on *Katz*, the court held that defendant was entitled to have the agents' testimony as to what they heard suppressed because of the absence of a proper warrant or judicial order. The court reasoned that "the well-laid plans of the government agents were obviously made because the government recognized that defendant sought to exclude the 'uninvited ear'." United States v. White, 36 U.S.L.W. 2613 (7th Cir. Mar. 18, 1968).

[18] 387 U.S. 294 (1967).

[19] *Id.* at 304.

[20] 388 U.S. 41 (1967).

York's permissive eavesdrop statute,[21] concluding that its language "is too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments."[22] The Court reasoned in part that although *Olmstead* held that wiretapping without an actual unlawful entry was not proscribed by the fourth amendment and that telephone conversations could not come within that amendment's protections, subsequent cases had "found 'conversation' was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment . . . ."[23]

This gradual erosion of long-standing "property" concepts culminated this term in the affirmative renouncing of the trespass doctrine in *Katz v. United States*.[24] Petitioner was charged and convicted in the United States District Court of transmitting wagering information interstate by telephone in violation of a federal gambling statute.[25] Recordings of petitioner's end of telephone conversations were obtained by FBI agents who, without prior authorization, had attached a listening and recording device to the top of a public telephone booth from which he had placed calls on a regular basis. This evidence was introduced at trial and was admitted over the petitioner's objection. His conviction was affirmed by the court of appeals[26] on the ground that there had been no physical intrusion into the area occupied by the petitioner. On certiorari the Supreme Court reversed, holding that the Government's activities, which had been carried on without prior judicial authorization, violated petitioner's right to be free from unreasonable searches since they invaded the privacy upon which petitioner reasonably relied in using the telephone booth.

In rejecting the Government's contention that its agents' activities should not be tested by fourth amendment standards because its use of electronic surveillance involved no physical penetration of the area occupied by petitioner, Justice Stewart, delivering the Court's opinion, concluded that:

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[21] N.Y. CODE CRIM. PROC. § 813-a (1958). It should be noted that a bill was recently passed by the Arizona Legislature and signed into law which, *inter alia*, makes wilful wiretapping or electronic eavesdropping a felony if carried on without the consent of a party to the conversation, except where such wiretapping or electronic eavesdropping is done by a police officer pursuant to an ex parte order issued by a judge upon oath or affirmation that there is probable cause and describing with particularity the person or persons whose communications or conversations are to be intercepted. For a detailed discussion of the provisions of the Act and some of the constitutional problems presented by its passage, see Comment, *Wire Tapping and Eavesdropping in Arizona: A Legislative and Constitutional Analysis, infra*, 9 ARIZ. L. REV. 452.

[22] *Berger*, 388 U.S. at 44.

[23] *Id.* at 51.

[24] 88 S.Ct. 507 (1967) [hereinafter cited as *Katz*].

[25] 18 U.S.C. § 1084 (1964).

[26] Katz v. United States, 369 F.2d 130 (9th Cir. 1966).

> [T]he underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling . . . . *The fact that the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance.* (emphasis added).[27]

This result should not have surprised those students of constitutional law who have followed the Court's decisions in the area of search and seizure. It represents another step in a trend toward abolishing "property" concepts in the area of fourth amendment freedoms.[28] There are, however, other aspects of the decision which, either because of their impact on prior law or because of their legal ramifications in the context of existing law, are very significant and require close examination.

CONSTITUTIONALLY PROTECTED AREAS

Prior to the *Katz* decision, there was a great deal of litigation as to which areas are protected by the fourth amendment against unreasonable searches. The Supreme Court had extended this protection to such areas as a business office,[29] a hotel room,[30] a friend's apartment,[31] a locked store attached to a house,[32] an automobile,[33] and a taxicab.[34] However, none of these decisions set forth any real guidelines for the lower courts to follow in determining whether a given area is constitutionally protected and, as a result, there was a great deal of confusion among the federal courts as to how far the fourth amendment protections should be extended.

The concept of one's private dwelling house as a constitutionally protected area was enlarged by the courts to include a home temporarily

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[27] *Katz*, 88 S.Ct. at 512.

[28] The Court had abolished certain distinctions founded on property concepts in two earlier cases. Prior to *Jones v. United States*, 362 U.S. 257 (1960), in order to have standing to move to suppress evidence obtained by an unlawful search, one had to admit possession — often the sole element of criminal guilt. In *Jones*, the Court held that a defendant in a prosecution which turns on illicit possession may challenge the legality of evidence sought to be admitted without proving ownership thereof or a substantial possessory interest in the premises searched, since to require this would be to force the defendant to incriminate himself in order to challenge the search. Subsequently, in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967), the Court repudiated the technical "mere evidence" rule by finding that the language of the fourth amendment did not support the distinction between mere evidence and instrumentalities, fruits of a crime, or contraband.

[29] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[30] United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949).

[31] Jones v. United States, 362 U.S. 257 (1960).

[32] Amos v. United States, 255 U.S. 313 (1921).

[33] Gambino v. United States, 275 U.S. 310 (1927).

[34] Rios v. United States, 364 U.S. 253 (1960).

unoccupied,[35] the underside of a private dwelling,[36] and buildings which are located within the "curtilage."[37] The decisions have not been at all clear, however, as to what should be included within the term "curtilage." The Court of Appeals for the Tenth Circuit suggested a test in *Care v. United States*:[38]

> Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.[39]

Through application of this test, fourth amendment protections were extended to such buildings as a barn,[40] a garage,[41], a smokehouse,[42] a shed,[43] and a chicken house.[44] Yet, at least one court has restricted the concept of "curtilage" to the dwelling house itself,[45] while another has limited its scope to buildings physically attached to the residential structure.[46] The federal courts seem to agree, however, that open fields are not within the curtilage and therefore are not protected.[47]

In addition to questions concerning the scope of the curtilage, the courts have been faced with problems concerning the application of the fourth amendment to searches conducted in such areas as public restrooms and telephone booths. In *Smayda v. United States*,[48] the Ninth Circuit Court of Appeals, in a split decision, held that the fourth amendment rights of the occupants of a public toilet stall were not violated by federal officers who spied on them from a hole in the roof in an effort to catch homosexuals. In refusing to make fourth amendment restrictions applicable to such a semi-public area, the court subordinated the individual occupant's right to privacy to the public interest in law enforcement. This decision raised some serious questions as to whether the mere fact that a place may be used for criminal activities

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[35] Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952); Roberson v. United States, 165 F.2d 752 (6th Cir. 1948); United States v. Thomas, 216 F. Supp. 942 (N.D. Cal. 1963).

[36] California v. Hurst, 325 F.2d 891 (9th Cir. 1963).

[37] *See* cases cited notes 38 to 47 *infra*.

[38] 231 F.2d 22 (10th Cir. 1956).

[39] *Id.* at 25.

[40] Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); Walker v. United States, 225 F.2d 447 (5th Cir. 1955).

[41] Taylor v. United States, 286 U.S. 1 (1931).

[42] United States v. Mullin, 329 F.2d 295 (4th Cir. 1964); Roberson v. United States, 165 F.2d 752 (6th Cir. 1948).

[43] United States v. Carter, 118 F. Supp. 559 (W.D. Pa. 1954).

[44] Walker v. United States, 125 F.2d 395 (5th Cir. 1942).

[45] United States v. Hayden, 140 F. Supp. 429 (D. Md. 1956).

[46] Carney v. United States, 163 F.2d 784 (9th Cir. 1947).

[47] Hester v. United States, 265 U.S. 57 (1924); United States v. Romano, 330 F.2d 566 (2d Cir. 1964); United States v. Sorce, 325 F.2d 84 (7th Cir. 1963); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957); Janney v. United States, 206 F.2d 601 (4th Cir. 1953).

[48] 352 F.2d 251 (9th Cir. 1965).

justifies giving the police an unrestricted right to search that area. The federal courts were clearly split on whether or not a public telephone booth is a constitutionally protected area — federal courts in the Fifth[49] and District of Columbia[50] Circuits found that it was, whereas a Second Circuit district court held that it was not.[51]

The Court's decision in *Katz* substantially alters the concept of constitutionally protected areas. The Government contended that the public telephone booth from which petitioner made his calls was not a constitutionally protected area and therefore that the evidence obtained was not inadmissible under fourth amendment standards. The Court rejected this argument as diverting attention from the real problem presented.

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. (citations omitted).[52]

The Government also stressed the fact that, since the booth was made partly of glass, the petitioner was visible after he had entered it. The Court answered by pointing out that:

> [W]hat he sought to exclude when he entered the booth was not the intruding eye — it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen.[53]

While it admitted that it had "occasionally described its conclusions in terms of 'constitutionally protected areas'," the Court pointed out that it never suggested that the concept could "serve as a talismanic solution to every Fourth Amendment problem."[54]

The Court in *Katz* appears to be cautioning against the use of the concept of "constitutionally protected area" in the abstract. The inquiries now would seem to be: For what purpose is the area being used? Is the individual reasonable in relying on the fact that his activities will remain private? Thus, a person using a glass-enclosed telephone booth to disrobe would not be accorded the same constitutional protections as when he enters the booth to place a private telephone call.

The *Katz* decision, applying the "reasonable man" test to determine the extent of fourth amendment protections, should end much of the

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[49] United States v. Stone, 232 F. Supp. 396 (N.D. Tex. 1964).
[50] United States v. Madison, 32 U.S.L.W. 2243 (D.C. Ct. Gen. Sess. Dec. 18, 1963).
[51] United States v. Borgese, 235 F. Supp. 286 (S.D.N.Y. 1964).
[52] *Katz*, 88 S.Ct. at 511.
[53] *Id.*
[54] *Id.* at 511, n.9.

confusion which has permeated federal decisions. Under *Katz*, even activities carried on in an open field might be the subject of fourth amendment protections if the parties reasonably rely on the fact that such activities will remain private. In all probability, the *Smayda* result would not be the same today, for a convincing argument can be made that, in accordance with ordinary human understanding, even a semi-public toilet stall offers a certain degree of privacy upon which a reasonable person can rely while using it. In fact, the Maryland Court of Appeals recently held that the protections of the fourth amendment do extend to a public toilet stall.[55] Moreover, the common law concept of "curtilage" would appear to have no relevance to the fourth amendment protection against unreasonable searches; in a post-*Katz* decision, the Ninth Circuit so held.[56] Citing *Katz* the court said:

> [I]t seems to us a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public.[57]

Search Warrants — A Boon to Law Enforcement

Although the *Katz* decision limits law enforcement activities by recognizing rights of privacy outside traditional trespass concepts where an individual reasonably relies on the fact that his conversations are to remain confidential, it appears ultimately to aid law enforcement by making it clear that the Government's agents could have obtained a search warrant to eavesdrop on petitioner's telephone conversations.

> Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly appraised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.[58]

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[55] Brown v. State, 2 Crim. L. Rep. 2359 (Feb. 14, 1968).
[56] Wattenburg v. United States, 388 F.2d 853 (1968).
[57] *Id.* at 857.
[58] *Katz*, 88 S.Ct. at 513. The Government, in defending the actions of its agents, contended that:

> They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself. 88 S.Ct. at 512-13.

The Court reasoned that it had recently sustained such an authorization in *Osborn v. United States*,[59] holding that "under the most precise and discriminate circumstances" which fully meet the fourth amendment's requirements of particularity, federal agents may be judicially authorized to utilize an electronic eavesdropping device "for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense."[60] The Court in *Katz* then went on to state:

> Here, too, a single judicial order could have accommodated "the legitimate needs of law enforcement" by authorizing the carefully limited use of electronic surveillance.[61]

The search warrant aspect of the *Katz* decision raises additional questions, such as its impact on the "mere evidence" rule and on section 605 of the Federal Communications Act of 1934.[62]

THE "MERE EVIDENCE" RULE

In 1921 in *Gouled v. United States*,[63] the Court held that material of purely evidentiary value could not validly be seized under the fourth amendment, even if a search warrant had been issued. This rule limits the type of evidence which can be seized, under a warrant or otherwise, to either instrumentalities, fruits of a crime, or contraband.[64] Although the Court expressly repudiated the rule last term in *Warden, Maryland Penitentiary v. Hayden*,[65] it continues to have vitality. Rule 41(b) of the Federal Rules of Criminal Procedure, which has not been amended since *Hayden*, limits the type of evidence which lawfully may be searched for and seized with a warrant to property which does not belong to the possessor (stolen or embezzled), or the right to possession of which he has forfeited by using or planning to use it as the means of committing a criminal offense. Also, most state jurisdictions,[66] including Arizona,[67] have rules resembling the "mere evidence" rule. The

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[59] 385 U.S. 323 (1966).
[60] *Id.* at 329-30.
[61] *Katz*, 88 S.Ct. at 513-14.
[62] 47 U.S.C. § 605 (1964).
[63] 255 U.S. 298 (1921).
[64] This rule has been severely criticized. *See, e.g.*, People v. Thayer, 63 Cal. 2d 635, 408 P.2d 108 (1965), *cert. denied*, 384 U.S. 908 (1966). *See also* Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 474, 478 (1960).
[65] 387 U.S. 294 (1967).
[66] According to a recent survey, some 27 states have followed the *"Gouled"* rule. *See* Note, *Evidentiary Searches: The Rule and the Reason*, 54 GEO. L.J. 593, 616-21 (1966).
[67] ARIZ. REV. STAT. ANN. § 13-1442 (1956). A bill has recently been introduced before the Arizona Legislature to amend this statute. *See* H.B. 90, 28th Leg., 2d Sess. (1968). The proposed legislation permits issuance of a warrant "when the property *or thing to be seized* . . . tends to show that a *felony has been committed*, or . . . that a particular person *has committed a felony*." (emphasis added). This

essential provisions of the Arizona rule were discussed in a recent court of appeals decision.[68]

> A.R.S. § 13-1442 sets forth the grounds for the issuance of a search warrant, and in each of its four subdivisions reference is made to "property," which by its character is personal property as distinguished from real property, and is either stolen, embezzled, used to commit a felony, or in possession of a person who intends to use it as a means to commit a public offense, or is in other ways contraband.[69]

Thus, while eavesdropping may be permitted under *Katz* where there has been sufficient compliance with the procedural safeguards of the fourth amendment, the evidence thereby obtained may be held inadmissible on "mere evidence" grounds except, in rare instances, where the utterance of the words seized is the act which constitutes the crime, such as treason, seditious utterances, and conspiracy.[70] Therefore, in order to take full advantage of the *Katz* decision and to permit the full use of wiretapping and electronic eavesdropping as effective tools of law enforcement, states such as Arizona should revise legislation which limits the type of evidence which may be seized.

Section 605 of the Federal Communications Act

Section 605 provides in pertinent part that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications."[71] This section has been con-

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would, in effect, abolish the "mere evidence" rule in Arizona only to the extent that the material sought to be seized is evidence of the commission of a felony. Such a limited revision of the present rule would prevent Arizona law enforcement agencies from taking full advantage of the Court's decision in *Katz*.

[68] State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965).

[69] *Id.* at 11, 406 P.2d at 213.

[70] In such cases, the words themselves could be considered "instrumentalities" of the crime and therefore seizable under the "mere evidence" rule.

[71] 47 U.S.C. § 605 (1964). "Interception," an essential element of section 605, has been defined as a seizure of a communication after it has left the sender and before it has arrived at the destined place. Goldman v. United States, 316 U.S. 129, 134 (1942). In *Rathbun v. United States*, 355 U.S. 107 (1958), the Supreme Court held that there had been no "interception" within the meaning of section 605 where evidence was obtained by police officers who, at the invitation of a party receiving a telephone call, listened to the conversation on a telephone extension in another room. The Court reasoned that:

> [E]ach party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. *Id.* at 111.

Does *Katz* require a search warrant where a conversation between a suspect and a police officer or informer is overheard by means of an extension telephone with the consent of the officer or informer? In light of the Court's statement in *Rathbun*, it would seem that a party to a telephone conversation could not justifiably rely on the fact that no one is listening on an extension phone. Two post-*Katz* decisions support this conclusion. In *Clark v. State*, 237 A.2d 768, 773 (1968), the Maryland Court of Special Appeals held:

> [T]he admissibility in evidence of the contents of a communication over-

strued to render evidence obtained by the tapping of telephone conversations inadmissible in federal courts,[72] even where such evidence is obtained by state officers without participation by federal authorities.[73]

It is interesting to note that although the language of section 605 can readily be construed to outlaw wiretapping, this was apparently not the intent of Congress when it enacted the Communications Act of 1934.[74] Rather, it appears that the federal wiretap statute was born in the Supreme Court in *Nardone v. United States*,[75] where the Court found condemnation of wiretapping to be the "plain mandate of the statute."[76] Yet, because of thirty years of legislative aquiescence in the *Nardone* decision, it has become academic to discuss the precarious foundation of section 605 as an anti-wiretap measure. Nonetheless, it is helpful to keep this background in mind when considering the application of section 605 to new problems.[77]

Since wiretapping is "nothing more than eavesdropping by telephone,"[78] the *Katz* decision presumably also applies to wiretapping. If so, absent a statute to the contrary, wiretapping could be permitted under *Katz* upon compliance with fourth amendment standards. However, section 605 has been construed to outlaw wiretapping with or without a warrant; unless it is revised to take advantage of *Katz*, federal

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heard on a regularly used telephone extension is not controlled by the provisions of the Maryland Wire Tapping Act, since the Legislature never intended that the use of such an extension telephone would be considered as a means for "intercepting" a telephonic communication.

And, in *Dryden v. United States*, 2 CRIM. L. REP. 2028 (April 10, 1968), the Court of Appeals for the Fifth Circuit found that a tape recording of a conversation, taken over an extension phone in an informer's residence, was not prohibited by *Katz*.

[72] Nardone v. United States, 308 U.S. 338 (1939). This does not mean that federal agents no longer employ the wiretap technique. On the contrary, the policy of the Justice Department has been to engage in such activities whenever necessary because of the seriousness of the case or the threat to national security. This has been justified on the ground that section 605 outlaws wiretapping only when it is followed by divulgence, that is, only when a government agent attempts to introduce information obtained thereby into evidence. However, beneficial use of intercepted information may be attacked as "fruit of the poisonous tree." *See* Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 197-99 (1954); Younger, *Wiretapping, Electronic Eavesdropping, and the Police: A Note on the Present State of the Law*, 42 N.Y.U.L. REV. 83, 84 (1967). *See also* Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 855, 860 (1960).

[73] Benanti v. United States, 355 U.S. 96 (1957).

[74] *See* Bradley & Hogan, *Wiretapping: from Nardone to Benanti and Rathbun*, 46 GEO. L.J. 418, 422 (1958). There the authors point out that:

> [N]othing in the legislative history of the Federal Communications Act so much as hints that section 605 was directed at wiretapping. On the contrary, it is clear that the Federal Communications Act was chiefly designed to transfer jurisdiction over wire and radio communications to the newly-created Federal Communications Commission. The language of section 605 is almost identical in wording to the provisions of the old Radio Act of 1927, which was in effect when *Olmstead* was decided.

[75] 302 U.S. 379 (1937).

[76] *Id.* at 383.

[77] *See* Bradley & Hogan, *supra* note 74, at 422-23.

[78] *See* Justice Black's dissent in *Katz*, 88 S.Ct. at 518, 519.

jurisdictions are faced with an anomalous situation — eavesdropping evidence is conditionally admissible, while wiretapping evidence is unconditionally banned. Of course, if section 605 were repealed, wiretapping would be controlled solely by the *Katz* decision. However, it is not likely that the federal government will attempt to bring wiretapping within the application of *Katz;* rather, the federal administration's policy appears to be leaning in the oposite direction, as evidenced by President Johnson's Special Message to Congress on February 7, 1968,[79] in which he urged enactment of the Right of Privacy Act originally recommended in his 1967 State of the Union Address.[80] The bill, which is now pending in the Judiciary Committees of both the House and the Senate,[81] prohibits wire interception and eavesdropping wherever it occurs, except when the national security is at stake.[82]

State courts will not be faced with the same dilemma, because the Supreme Court has held that evidence obtained by wiretapping can be admitted in state courts, despite the possible violation of federal law.[83] Although section 605 applies to intrastate as well as interstate communications,[84] state legislation is not pre-empted thereby. In fact, as was pointed out in the Court's opinion in *Berger,* "[s]ome 36 states prohibit wiretapping," but 27 of these states "permit 'authorized' interception of some type."[85]

Conclusion

The result in *Katz* could have been foreseen as the climax of the recent trend to abolish the traditional notion that a physical intrusion

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[79] 114 Cong. Rec. H874, S1020 (daily ed. Feb. 7, 1968).

[80] 113 Cong. Rec. H27 (daily ed. Jan. 10, 1967).

[81] *See* S. 928, 90th Cong., 1st Sess. (1967); H.R. 7760, 90th Cong., 1st Sess. (1967). It should be noted that the Senate recently passed the "Safe Streets and Crime Control Act of 1968." S. 917, 90th Cong., 2d Sess. (1968). Title III of the Act prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization by a court order obtained after a showing of probable cause. Exceptions to this prohibition are provided to enable the President to obtain information to protect the national security, to permit the Federal Communications Commission to discharge its monitoring responsibilities, and to allow employees of communication common carriers to engage in activities necessary to the rendition of service or protection of the carrier's property rights.

[82] Justice Stewart declined to consider the question of whether a search warrant would satisfy the fourth amendment in a situation involving the national security. However, two of the Justices discussed the question in their concurring opinions. Justice White insisted that "there are circumstances in which it is reasonable to search without a warrant" and that the warrant procedure should not be required "if the President . . . or the Attorney General has considered the requirements of national security and authorized electronic surveillance as reasonable." *Katz,* 88 S.Ct. at 518. Feeling compelled to reply, Justice Douglas found Justice White's view to be "a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters." *Id.* at 516.

[83] Schwartz v. Texas, 344 U.S. 199 (1952).

[84] Weiss v. United States, 308 U.S. 321, 327 (1939).

[85] *Berger,* 388 U.S. at 48.

into a constitutionally protected area is necessary to constitute a fourth amendment violation. *Katz* defines the scope of constitutional protections against eavesdropping in terms of an individual's right to privacy, as measured by the reasonableness of his reliance on the fact that his conversation will remain confidential. The rationale adopted by the Court is sound, for regardless of the means employed to obtain evidence, the evil against which the individual should be protected is the invasion of his privacy, and with the sophisticated nature of modern electronic devices,[86] his right to privacy will be in extreme danger if law enforcement agencies are not reasonably restricted in the employment of such devices.

Significant from the standpoint of law enforcement are the questions which inevitably arise concerning the availability of search warrants, the limitations of the "mere evidence" rule and the application of the federal wiretap statute. Hopefully, in attempting to solve these and other related problems, state legislatures will strive to follow the lead of the Supreme Court by taking the utmost advantage of its decision in *Katz*.

[86] For an interesting discussion of recent scientific advances in the "art" of eavesdropping, see S. DASH, R. SCHWARTZ & R. KNOWLTON, THE EAVESDROPPERS 341-52 (1959).