"CAN YOU HEAR ME NOW?": EXPECTATIONS OF PRIVACY, FALSE FRIENDS, AND THE PERILS OF SPEAKING UNDER THE SUPREME COURT'S FOURTH AMENDMENT JURISPRUDENCE

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INTRODUCTION

The Fourth Amendment[1] has given the Supreme Court and scholars trouble since the Court began paying serious attention to it in 1886.[2] The problems begin with its wording:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[3]

For adherents of black-letter law and bright-line tests, the Fourth Amendment presents a disconcerting challenge. After all, how much certainty and clarity can one expect from an amendment that speaks in terms of reasonableness and probability? Oddly, the Court's early approaches to the Amendment were a blend of sweeping vision and mechanical application. One would search in vain for more lofty statements about privacy interests and suspicion of government power than those in *Boyd v. United States*.[4] Justice Bradley, writing for the Court, quoted extensively from Lord Camden's famous opinion in *Entick v. Carrington*[5]

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1. U.S. CONST. amend. IV.

2. *See* Boyd v. United States, 116 U.S. 616 (1886). Only three Supreme Court cases before *Boyd* even mention the Fourth Amendment specifically; none discusses it at any length. *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.1, at 106 (4th ed. 2004) (noting that "[t]he Fourth Amendment remained largely unexplored until 1886").

3. U.S. CONST. amend. IV.

4. 116 U.S. 616 (1886).

5. (1765) 95 Eng. Rep. 807 (K.B.), *quoted in Boyd*, 116 U.S. at 627-28:

about the inviolability of individuals' houses and personal papers.

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government, and its employés 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 offense; 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 offense,—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 to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment.[6]

One should note, however, that *Boyd* and its soaring statements of "sacred right" have fallen upon hard times. For example, the Court has permitted the state to compel defendants to give voice[7] or handwriting exemplars,[8] to have their blood tested for alcohol content,[9] or to turn over private papers.[10] All of these aid in the process of securing convictions. The Court has explained, however, that the Fourth Amendment does not protect things (such as one's voice or handwriting) that are constantly exposed to the public, and the Fifth Amendment protects only against evidence that is both compelled and testimonial.

> Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

6. *Boyd*, 116 U.S. at 630.

7. *See* United States v. Dionisio, 410 U.S. 1, 13-14 (1973) (finding that a grand jury subpoena requiring voice exemplar does not violate either the Fourth or Fifth Amendment).

8. *See* United States v. Mara, 410 U.S. 19, 21-22 (1973) (finding that a grand jury subpoena requiring handwriting exemplar does not violate the Fourth or Fifth Amendment and that the government need not show reasonableness).

9. *See* Schmerber v. California, 384 U.S. 757, 765, 772 (1966) (explaining that a warrantless taking of a blood sample to determine whether defendant drove while intoxicated does not implicate the Fifth Amendment and presents no Fourth Amendment problem if there is a "clear indication" of intoxication and police officer had probable cause to detain defendant).

10. *See* Couch v. United States, 409 U.S. 322, 329 (1973) (finding that a taxpayer's papers given to an accountant were not within Fifth Amendment privilege).

Nonetheless, the Fourth Amendment continues to receive some deference from the Court, which seemed to expand the Amendment's reach in 1967 by beginning to focus on individuals' "reasonable expectation of privacy" as the touchstone for Fourth Amendment protection rather than property concepts such as trespass.[11] It turns out, though, that in many situations there is rather less to the expectation of privacy than meets the eye. The Court's pronouncements about when a subjective expectation of privacy is reasonable sometimes appear to diverge from the public's ideas. In the false-friend cases,[12] the Court has ruled that evidence revealed to the government by a confidant of the defendant is admissible precisely because there is no reasonable expectation of privacy in such situations.[13] In so ruling, the Court raises more (and more troubling) questions than it answers. First, how should the Court determine what constitutes a reasonable expectation of privacy? Second, what are the implications of the rulings in the false-friend cases that there is no reasonable expectation of privacy when voluntarily divulging information to another? Third, why does the Court espouse a concept of consent so at variance with the law's view of consent in other common contexts? This Article discusses those issues, concluding that the Court, perhaps unwittingly, has articulated a rationale that would permit the government unrestricted interception of communications without any Fourth Amendment limitations.

Part I offers a brief history of the development of Fourth Amendment jurisprudence and the Court's articulation and application of what has come to be known as the exclusionary rule, which forbids some (but not all) government use of evidence seized in violation of the Fourth Amendment. Part II focuses on the false-friend cases, elaborating the Court's reasoning and showing why, although the most famous cases involve varying kinds of activity from electronic recording to eavesdropping to simple reporting of the false friend's observation, the Court's method has united these cases under a single analytical rubric. Part III discusses the unavoidable implication of the Court's approach, and Part IV examines whether there is a principled way out of the dilemma that the Court's reasoning has created. It concludes that there is, but the solution requires recognizing two unstated assumptions that undergird the Court's jurisprudence in this area, assumptions that, when exposed to light, are highly questionable. The Court needs to reconsider how expectations of privacy really work. It has tended to view expectation of privacy as an all-or-nothing proposition, so that for Fourth Amendment purposes, lack of a reasonable expectation of privacy with respect to one person connotes that there cannot be a reasonable expectation with respect

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11. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see also infra* notes 77-91 and accompanying text.

12. With respect to the Fourth Amendment, the term first appeared in *On Lee v. United States*, 343 U.S. 747, 757 (1952): "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility."

13. *See, e.g.*, United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); *On Lee*, 343 U.S. 747; *see also infra* notes 125-79 and accompanying text.

to anyone else.[14] The Article suggests that this approach does not reflect the way that either those who wrote and ratified the Fourth Amendment or the majority of Americans today think about privacy. The Supreme Court should recognize, therefore, that when the government employs false friends to gather evidence for use in a criminal case, it does no more than to undertake a search with other eyes and ears and a seizure with other hands. It is a government intrusion all the same. Accordingly, the Fourth Amendment's warrant requirement, which demands probable cause and the acquiescence of a neutral magistrate in the proposed search, should apply in full force.[15]

I. THE DEVELOPMENT AND EARLY HISTORY OF THE EXCLUSIONARY RULE

No constitutional provision is immune from violation. With respect to the Fourth Amendment, the question for the Supreme Court became what to do after a violation had occurred. The Court's answer, now widely known, was to render inadmissible testimony based upon an unconstitutional search or seizure and to exclude any material seized as a result of the unconstitutional activity—the now familiar exclusionary rule. Although *Weeks v. United States*[16] and *Mapp v. Ohio*[17] are the cases most often associated with the Court's announcement of the rule (*Weeks* imposed the rule in the federal courts and *Mapp* extended it to the states), the Court actually first confronted the problem eighteen years before *Weeks*, in *Boyd v. United States*.[18]

The United States charged Boyd with customs violations relating to the importation of thirty-five cases of plate glass, the value of which (and therefore the duty owed) was in dispute. The government obtained a court order directing Boyd to produce the invoice from an earlier importation of twenty-nine cases of glass. Boyd produced the invoice under protest, arguing that compelled production of the evidence violated both the Fourth and Fifth Amendments.[19] The Supreme Court upheld Boyd's claim, in the process recalling matters from the colonial period that provided the impetus for adoption of the Fourth Amendment.[20] Then the Court prescribed the remedy: exclude the evidence and

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14. *See infra* text accompanying notes 103-08.

15. There is a well-recognized exception to the warrant requirement if "exigent circumstances" are present that make it impracticable to obtain a warrant. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 299 (1967) (involving a hot pursuit of an armed robber, which made warrantless search for weapons and perpetrator of house into which he fled permissible); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (finding a warrantless blood alcohol test permissible because metabolic process would otherwise have destroyed evidence of intoxication before a warrant became obtainable). Almost by definition, however, the false-friend cases involve government planning, not exigency.

16. 232 U.S. 383 (1914).

17. 367 U.S. 643 (1961).

18. 116 U.S. 616 (1886).

19. *Id.* at 617-18.

20. The *Boyd* Court noted that

remand for a new trial without the tainted evidence.[21] Although the Court did not use the word "suppression," it is clear that it meant precisely that. The *Boyd* result was unanimous. Justice Miller, joined by Chief Justice Waite, concurred. He agreed that the proceedings had violated Boyd's Fifth Amendment rights by compelling his assistance in his prosecution but disagreed on the Fourth Amendment question, refusing to view the lower court's order compelling production of the document and Boyd's subsequent compliance as a search within the meaning of the Fourth Amendment.[22] More significantly, though, Justice Miller did agree that the proper remedy was a new trial without the tainted evidence; his disagreement was limited to the constitutional designation of the taint.[23]

Boyd did not, however, settle the question of what to do about constitutional violations in the course of investigation and prosecution of crime. *Adams v. New York*[24] involved the seizure of illegal gambling slips and some personal papers[25]

> [i]n order to ascertain the nature of the proceedings intended by the [F]ourth [A]mendment to the [C]onstitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

Id. at 624-25 (footnote omitted).

21. The *Boyd* Court held that

> [w]e think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings. We are of opinion, therefore, that the judgment of the circuit court should be reversed, and the cause remanded, with directions to award a new trial; and it is so ordered.

Id. at 638.

22. *Id.* at 639-40 (Miller, J., concurring).

23. *Id.* at 639-41.

24. 192 U.S. 585 (1904).

25. The prosecution used defendant's private (but legal) papers both to establish that the office searched was the defendant's and for comparison purposes to show that the handwriting on the gambling slips was his. *See* People v. Adams, 68 N.E. 636, 637 (1903), *aff'd*, 192 U.S. 585 (1904).

of the defendant from his office when the police arrived to execute a search warrant that they claimed to have.[26] At his trial for violating New York's gambling laws, Adams argued that the seizure violated his rights under the Fourth and Fifth Amendments and under corresponding provisions of the New York Constitution. When the case reached the Supreme Court, the Justices unanimously affirmed Adams's conviction. At that level, Adams argued only with respect to the seizure of the personal papers,[27] repeating his state and federal constitutional objections. Although New York's court of last resort had brusquely disposed of the federal constitutional objections by stating that "Articles Fourth and Fifth of the amendments to the Constitution of the United States do not apply to actions in the state courts,"[28] the Supreme Court reached out to discuss the merits of Adams's arguments, assuming (while explicitly not deciding) that the federal provisions did apply.[29] Having eschewed deciding whether the Fourth and Fifth Amendments even applied to a state criminal prosecution, the Court opined that neither had been violated on the facts of the case: "An examination of this record convinces us that there has been no violation of these constitutional restrictions, either in an unreasonable search or seizure, or in compelling the plaintiff in error to testify against himself."[30]

Of far greater importance than the result in *Adams* was the Court's explanation of why it found no Fourth Amendment violation. At trial, Adams had objected to the introduction of police testimony regarding Adams's private papers. The Court took a position that, after its own decision in *Boyd*, seems surprising. Referring to Adams's argument, the Court observed:

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26. The prosecution produced no warrant at the trial, and the trial court declined to permit the defendant to introduce evidence to show that there had been no warrant. *See id.* at 640.

27. The opinion of New York's intermediate appellate court is not a beacon of clarity, but it suggests that the defendant's original objection was both to the seizure of the gambling materials and to the non-gambling material that the defendant was clearly entitled to possess. *See* People v. Adams, 83 N.Y.S. 481, 485-86 (App. Div. 1903), *aff'd*, 68 N.E. 636 (N.Y. 1903), *aff'd*, 192 U.S. 585 (1904).

28. *Adams*, 68 N.E. at 638.

29.

> We do not feel called upon to discuss the contention that the 14th Amendment has made the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the states.

Adams, 192 U.S. at 594. Justice Brandeis would probably have been appalled to see the Court declining to decide a constitutional issue that it really did have to reach in favor of deciding two constitutional issues that it might not have had to reach. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (cautioning against unnecessary decision of constitutional questions when other grounds for decision are available).

30. *Adams*, 192 U.S. at 594.

> The question was not made in the attempt to resist an unlawful seizure of the private papers of the plaintiff in error, but arose upon objection to the introduction of testimony clearly competent as tending to establish the guilt of the accused of the offense charged. In such cases the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained.[31]

That declaration, of course, required the Court to do something about *Boyd*. It distinguished *Boyd* by observing that the statute involved in that case required the defendant to participate actively in his own conviction, but that a search warrant, requiring no action on the part of the defendant, was a different creature for constitutional purposes.[32]

Perhaps because of *Adams*, the Court itself and constitutional scholars identify *Weeks v. United States*[33] rather than *Boyd* as the source of the rule that evidence seized in violation of the Fourth Amendment must be excluded from the defendant's trial.[34] Missouri police officers arrested Weeks in a public place.[35] At approximately the same time, other officers entered Weeks's home without a warrant (using a key that a neighbor pointed out) and took away some of his papers and other articles. These they delivered to the U.S. Marshal, with whom they returned later that day. The marshal searched the suspect's home (also without a warrant) and found additional papers. The government charged Weeks

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31. *Id.*

32.

> In *Boyd's Case* the law held unconstitutional, virtually compelled the defendant to furnish testimony against himself in a suit to forfeit his estate, and ran counter to both the 4th and 5th Amendments. The right to issue a search warrant to discover stolen property or the means of committing crimes is too long established to require discussion. The right of seizure of lottery tickets and gambling devices, such as policy slips, under such warrants, requires no argument to sustain it at this day. But the contention is that, if in the search for the instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration—if a search warrant is issued for stolen property, and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect.

Id. at 598.

33. 232 U.S. 383 (1914).

34. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 28 (1949) (stating that "[i]n *Weeks v. United States* . . . this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure" and that "[t]his ruling was made for the first time in 1914"); *see also* LAFAVE ET AL., *supra* note 2, § 3.1, at 106.

35. *Weeks*, 232 U.S. at 386.

with unlawful use of the mails. Weeks petitioned for the return of the seized items before trial. The trial court awarded him a truly empty victory, directing return of all items seized that were not pertinent to the charges.[36] Weeks appealed his ensuing conviction to the Supreme Court, setting the stage for the Court to recognize the principle of exclusion:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.
> . . . .
> We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.[37]

Weeks stands for the principle that a criminal defendant may demand return of personal property unconstitutionally seized before trial, thus depriving the government of its use as evidence. The Court did not say directly that evidence thus seized was inadmissible as a matter of evidence law, and *Weeks* did not involve a situation where the defendant had no right to possess the items seized, as is the case with contraband. Justice Day's opinion did, however, focus on the impropriety of the courts receiving what the Court regarded as functionally stolen property.

> The effect of the 4th Amendment is to put *the courts of the United States* . . . under limitations and restraints as to the exercise of such power . . . . The tendency of those who execute the criminal laws . . . to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution . . . .
> . . . .
> To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[38]

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36. *See id.* at 388.
37. *Id.* at 393, 398.
38. *Id.* at 391-92, 394 (emphasis added).

In *Agnello v. United States*,[39] the Court extended the *Weeks* rationale to require exclusion in the federal courts of all evidence, whether or not the defendant had a right to possess it, that the government seized from a defendant in violation of the Fourth Amendment.[40]

Silverthorne Lumber Co. v. United States[41] appeared to confirm that *Weeks* rested in part on the constitutional impropriety of the courts receiving evidence seized in violation of the Fourth Amendment, and it extended *Weeks*'s prohibition to evidence derived from materials unlawfully seized,[42] thus anticipating the fruit-of-the-poisonous tree doctrine now most commonly associated with *Wong Sun v. United States*.[43] The government indicted the corporate and individual defendants and, while the individuals were in custody, conducted an illegal search of the company office, seizing numerous books and papers. The government then photographed the illegally seized items. Upon the defendants' motion, the district court ordered return of the originals but retained the photographs. The government then secured a new indictment on the basis of the photographed documents and subpoenaed the originals from the defendants. A unanimous Court reacted indignantly,[44] refusing to permit the government to benefit in any way from unconstitutional actions, a position of purity now many times rejected by more modern Courts, which permit use of unlawfully acquired evidence for impeachment and other purposes.[45]

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39. 269 U.S. 20 (1925) (suppression of illegal drugs).

40. *Id.* at 32. This followed the lead of several lower federal courts that had suppressed illegally seized evidence on the authority of *Weeks*. *See, e.g.*, United States v. Legman, 295 F. 474 (3d Cir. 1924) (suppressing unlawfully possessed liquor); United States v. Myers, 287 F. 260 (W.D. Ky. 1923) (same); United States v. Case, 286 F. 627 (D.S.D. 1923) (holding that evidence from a search jointly conducted by state and federal law enforcement officers was inadmissible in federal court because only the state officer had a warrant); United States v. Bush, 269 F. 455 (W.D.N.Y. 1920) (suppressing stolen underwear).

41. 251 U.S. 385 (1920).

42. *Id.* at 392.

43. 371 U.S. 471 (1963).

44. *Silverthorne*, 251 U.S. at 391-92 (citations omitted):

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. . . . In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

45. The modern Court has considerably diluted *Silverthorne*'s lesson. The government may now use unconstitutionally acquired evidence in a number of ways. *See, e.g.*, United States v.

The ringing words of *Boyd*, *Weeks*, and *Silverthorne* may have implied a degree of Fourth Amendment protection that did not really exist. Soon after those cases, the Court began to discover limits on the Amendment's protection. For one thing, the Amendment did not apply to the states at all,[46] a position the Court maintained until *Wolf v. Colorado*[47] in 1949. Although *Wolf* ruled that the Fourteenth Amendment's Due Process Clause incorporated the protections of the Fourth Amendment, it refused to apply the exclusionary rule to the states.[48] That did not happen until 1961.[49] For another, the Court conceptualized the

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Leon, 468 U.S. 897 (1984) (admitting evidence seized in good faith reliance on an invalid search warrant); Nix v. Williams, 467 U.S. 431 (1984) (holding that evidence found as a result of questioning defendant in violation of his right to counsel should be admitted on a theory that the police would inevitably have discovered the evidence); United States v. Havens, 446 U.S. 620 (1980) (forbidding use of illegally obtained evidence to impeach defendant's testimony on elements of crime charged); Oregon v. Hass, 420 U.S. 714 (1975) (holding that statements taken from defendant when questioning continued, in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), after defendant requested an attorney could be used to impeach); Harris v. New York, 401 U.S. 222 (1971) (holding that statements taken from defendant in custody but not given warnings required by *Miranda* could be used to impeach); Walder v. United States, 347 U.S. 62 (1954) (allowing use of illegally obtained evidence to impeach defendant's testimony on matters going beyond elements of crime charged). *But see* James v. Illinois, 493 U.S. 307 (1990) (holding that illegally obtained evidence not admissible to impeach non-defendant witness).

46. *See* Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); United States v. Case, 286 F. 627, 628 (D.S.D. 1923) ("There is no doubt but that . . . articles 4 and 5 of the Amendments to the Constitution of the United States do not apply to actions in the state courts."). One may regard these cases merely as specific applications of the general rule that Chief Justice Marshall announced in *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), to the effect that the Bill of Rights as a whole did not apply to the states.

47. 338 U.S. 25 (1949).

48. The *Wolf* Court held "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.* at 33.

49. *See* Mapp v. Ohio, 367 U.S. 643 (1961). In the mid-1980s, the Court specifically rejected applying the exclusionary rule to the states, using instead a due-process, shock-the-conscience test from the Fourteenth Amendment first articulated in *Rochin v. California*, 342 U.S. 165 (1952). *See* Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion):

> Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the Wolf doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere

Amendment's protections strictly in terms of property concepts of trespass, a limitation that became more significant over time with the advent of widespread electronic communication and the development of methods for intercepting such communication without trespass. Finally, the Court was slow to come to the position that intangibles—specifically conversations—could be the subject of a Fourth Amendment seizure at all.

Olmstead v. United States[50] involved a prosecution for conspiracy to violate prohibition. The government obtained evidence against the defendants by wiretapping their telephones and recording the conversations. As the Court noted, the government gathered information for many months, and it revealed a sizable, ongoing conspiracy.[51] The majority recited *Boyd*, *Weeks*, and *Silverthorne*, but distinguished them on two bases. First, the Court noted that

> [t]he amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized.[52]

Second, the Court focused on trespass, finding none because there had been no entry of the defendants' space.[53] This was dispositive; the Fourth Amendment simply did not reach the government's activity.[54] Part of the defendants' argument relied on wiretapping being a misdemeanor under state law, but the majority declined to recognize that as a basis for exclusion, arguing that at common law evidence was admissible no matter how obtained and characterizing *Weeks* as an exception to the common law, applicable only when the means of procurement of the evidence violated the Fourth or Fifth Amendments.[55] Moreover, the Court pointed out that the state statute itself did not make seized evidence inadmissible.[56] These two prongs of the *Olmstead* approach—whether words could be the subject of a Fourth Amendment search or seizure and whether the government had acquired its evidence by means of spatial intrusion—remained staples of the Court's analysis for decades.

Justice Brandeis dissented in what became a classic statement of why the Constitution should hold the government to the highest standards of behavior. He excoriated the government's tactics, giving the prosecution credit only for being candid about their use and offensiveness.[57] He noted that the Court, following

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to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.

50. 277 U.S. 438 (1928).

51. *Id.* at 457.

52. *Id.* at 464.

53. *Id.* at 466.

54. *Id.* at 464-66.

55. *Id.* at 467.

56. *Id.* at 469.

57.

> The government makes no attempt to defend the methods employed by its officers.

Chief Justice John Marshall's admonition that "'[w]e must never forget . . . that it is a constitution we are expounding,'"[58] had interpreted congressional power specifically and government power generally under the Constitution with an eye toward changed conditions in the 140 years since ratification.[59] In light of that, Justice Brandeis urged that constitutional provisions guaranteeing individual rights were entitled to the same sort of interpretation because science and technology had changed the ways in which government could effect the kinds of intrusions against which the Fourth and Fifth Amendments cautioned.[60] He recalled the spirit of *Boyd*, chastising the majority Justices for having forgotten its teaching. He finished with what has become one of the most famous paragraphs in any Supreme Court opinion.

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[61]

Despite Justice Brandeis's inspiring words, his view was a dissent. Justices Holmes, Butler, and Stone also dissented, but the day went to the view that trespass was required for a Fourth Amendment violation and that words were not subject to Fourth Amendment protection.

Goldman v. United States[62] followed the rationale of *Olmstead*. *Goldman* did not involve a wiretap, but rather a speech detection device placed against a wall for the purpose of hearing conversations on the far side of the wall. The Court ruled that this could not be a Fourth Amendment violation because there was no

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> Indeed, it concedes that, if wire-tapping can be deemed a search and seizure within the Fourth Amendment, such wire-tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the amendment; and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

Id. at 471-72 (Brandeis, J., dissenting).

58. *Id.* at 472 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

59. *Id.* (citations omitted).

60. Justice Brandeis stated that "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world." *Id.*

61. *Id.* at 485.

62. 316 U.S. 129 (1942).

trespass.[63] Similarly, in one of the false-friend cases, the Justices again relied on the absence of trespass as their rationale for receiving evidence of a surreptitiously recorded conversation between the defendant and a government agent.[64]

Olmstead did not reign entirely unchallenged, however. Shortly afterward, Congress sharply limited interception and disclosure of telephone conversations.[65] The Supreme Court subsequently ruled wiretap evidence inadmissible in federal prosecutions, basing its decision on the congressional prohibition.[66] Thus, the *Olmstead* Court refused suppression although a state statute made it a misdemeanor to engage in the interception that underlay the prosecution, but when Congress adopted the same sort of approach, it made all the difference.

Olmstead officially remained the law for thirty-nine years, but its grip began to weaken in 1961. *Silverman v. United States*[67] involved the admissibility of conversations the government had overheard by means of a microphone driven into the wall of the house adjoining Silverman's until it made contact with the heating duct of his house. The duct acted as a sounding board, allowing the police to hear conversations within the defendant's house. Although the Court explicitly declined to reconsider precedent in the area,[68] it did vacate the conviction because the police had trespassed in the defendant's house when their microphone entered his wall and made contact with the heating duct.[69] Although

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63. *Id.* at 134-35.

64. *See* On Lee v. United States, 343 U.S. 747 (1952); *see also infra* notes 125-38 and accompanying text. The Court confirmed its general reliance on trespass theory in *Lopez v. United States*, 373 U.S. 427, 438-39 (1963). *See infra* notes 70-71 and accompanying text.

65. Communications Act of 1934, 47 U.S.C. § 605 (2000); *see also* Berger v. New York, 388 U.S. 41, 51 (1967).

66. *See* Nardone v. United States, 302 U.S. 379 (1937). After the retrial that the Supreme Court's decision necessitated, the case again reached the Justices, with the issue this time being whether the exclusion principle enunciated two years earlier also required exclusion of the "fruits," as set forth in *Wong Sun v. United States*, 371 U.S. 471 (1963), of the wiretaps. The Court confirmed that it did. *See Nardone*, 308 U.S. at 340.

67. 365 U.S. 505 (1961).

68. "Nor do the circumstances here make necessary a re-examination of the Court's previous decisions in the area." *Id.* at 509.

69. The Court did point out that the intrusion necessary to bring the Fourth Amendment into play was not necessarily the same as would support a property action. "[W]e 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." *Id.* at 511 (footnote omitted). *Silverman* may thus represent the Court's first tentative steps away from using property theory as a Fourth Amendment lens. It did, however, still rely quite clearly on the idea of physical intrusion.

> But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based on the reality of an actual intrusion into a constitutionally protected area. . . . We find no occasion to re-examine *Goldman* [where there was no physical intrusion] here, but we decline to go beyond it, by even a fraction

the Court's opinion dealt explicitly with whether or not there had been an intrusion, it may be more significant for its silence about whether the Fourth Amendment protects words. The Court simply assumed that Fourth Amendment analysis was appropriate, an assumption manifestly inconsistent with *Olmstead*.[70]

In *Lopez v. United States*,[71] the defendant sought to exclude from evidence a recording of a conversation he had with an undercover federal agent after inviting the undercover agent into the defendant's office. The Court ruled the evidence admissible (an unsurprising result under *Olmstead*), but it did so *after* Fourth Amendment analysis.[72] Strict application of *Olmstead* would have eschewed such analysis on the ground that conversations were not among the items to which the Fourth Amendment could apply. Although *Lopez* did not explicitly overrule the first part of *Olmstead*, it was clear that the ground under *Olmstead* had become unstable because of both *Silverman* and *Lopez*.[73]

Berger v. New York[74] apparently completed the erosion of this branch of the *Olmstead* approach. A New York statute conditionally authorized law enforcement wiretapping. The Court found the statute unconstitutional under the Fourth Amendment because it failed to require particularity consonant with the Amendment.[75] *Berger* did not explicitly overrule *Olmstead*, but Justice Douglas's concurring opinion, in a statement not challenged by the opinion for the Court, confirmed that it effectively had: "I join the opinion of the Court because at long last it overrules *sub silentio Olmstead v. United States* and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the

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of an inch.

Id. at 512 (citation omitted).

70. In *Hoffa v. United States*, 385 U.S. 293, 301 (1966) (citing *Silverman*, 365 U.S. 505), the Court credited *Silverman* with establishing that words were subject to seizure for Fourth Amendment purposes: "And the protections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements."

Justice Harlan, on the other hand, appeared to regard *Wong Sun*, 371 U.S. 471, as the source of that particular change, referring to it as having "expressly brought verbal communication within the sweep of the Fourth Amendment . . . ." United States v. White, 401 U.S. 745, 775 (1971) (Harlan, J., dissenting). That may be a bit of an overstatement. *Wong Sun* held only that statements overheard as a result of an unlawful invasion are suppressible as fruits of a Fourth Amendment violation. Although the Court's opinion did make the statement that "[i]t follows from our holding in *Silverman* . . . that the Fourth Amendment may protect against the overhearing of verbal statements . . . ," *Wong Sun*, 371 U.S. at 485, the statement was dictum and, in any case, relied expressly on *Silverman*.

71. 373 U.S. 427 (1963).

72. *Id.* at 440.

73. *See also* Osborn v. United States, 385 U.S. 323 (1966) (permitting introduction of a surreptitiously made recording, but only after finding that the procedures authorizing the recording in the case satisfied the requirements of the Fourth Amendment).

74. 388 U.S. 41 (1967).

75. *Id.* at 58-59.

Fourth Amendment."[76]

The second *Olmstead* rule—that no Fourth Amendment violation could occur without a trespass—fell later the same year. *Katz v. United States*[77] involved wiretapping the telephone in a public booth from which the government suspected Katz was placing bets in violation of federal law. The Court announced a substantial shift in the way it would analyze Fourth Amendment cases. Katz had phrased the issues presented with respect to "constitutionally protected areas," asking both whether a public telephone booth was such a place and whether physical trespass was a precondition to invoking Fourth Amendment rights,[78] but the Court "decline[d] to adopt this formulation of the issues,"[79] subsequently referring to "the misleading way the issues have been formulated."[80] It criticized Katz's reliance on the idea of constitutionally protected areas and his inferred equation of the Fourth Amendment with some sort of constitutional right to privacy.[81] In a ringing declaration destined to be just as misleading as the Court-inspired phrase "constitutionally protected areas," the Court asserted:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[82]

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76. *Id.* at 64 (Douglas, J., concurring); *see also id.* at 78-79 (Black, J., dissenting) (reiterating the *Olmstead* rationale while clearly recognizing that the Court had abandoned it).

77. 389 U.S. 347 (1967).

78. Justice Stewart's majority opinion quoted *Katz*'s formulations:

> A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.
>
> B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

Id. at 349-50 (internal quotation marks omitted).

79. *Id.* at 350.

80. *Id.* at 351. Justice Stewart was gracious enough to acknowledge that the Court might bear some of the responsibility: "It is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,' . . . ." He cited the Court's very recent opinions in *Silverman v. United States*, 365 U.S. 505 (1961); *Lopez v. United States*, 373 U.S. 427 (1963); and *Berger*, 388 U.S. 41, though he recovered later in the same sentence to attach the blame to *Katz*: "but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem." *Katz*, 389 U.S. at 351 n.9.

81. *Katz*, 389 U.S. at 350.

82. *Id.* at 351-52 (citations omitted). For a discussion of how the Court's subsequent Fourth Amendment jurisprudence may support the conclusion that the Amendment continues to protect places, not people, see Donald L. Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 267-71 (1983). Query whether Justice Stewart would have equated "exposes to the world" with "reveals to

That is all well and good, but as is so often the case, the Court was long on rhetoric but short on specifics of how the new approach would apply.[83] It clearly rejected the government's argument that because Katz made his calls from a place where he could easily be observed, he was entitled to no more privacy than he would have had outside the booth, from where he might have been overheard.

> But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. . . . One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he

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anyone." *See infra* note 121 and accompanying text.

83. It is perhaps a bit unfair to criticize the Court too strongly for this. The Justices are, after all, supposed to decide the case before them without gratuitously elaborating what they might do in future cases. On the other hand, in other constitutional areas the Court has articulated qualitative standards that have been considerably easier to apply to succeeding cases. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (articulating the clear-and-present-danger test). Although the Court modified the *Schenck* test some decades later, and it continues to evolve, *see* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 16.13, 16.14, 16.15, at 1080-90 (7th ed. 2004), its implementation has not compelled the Court to revisit it often. By contrast, in the thirty-eight years since the decision in *Katz*, the Court has decided more than thirty-five cases that attempt to deal with the standard that *Katz* articulated. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (thermal imaging device directed at home); Bond v. United States, 529 U.S. 334 (2000) (physical manipulation of a bus passenger's carry-on bag); Minnesota v. Carter, 525 U.S. 83 (1998) (short-time visitors in apartment for commercial purpose); Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest in apartment); Florida v. Riley, 488 U.S. 445 (1989) (helicopter overflight of curtilage); New Jersey v. T.L.O., 469 U.S. 325 (1985) (search of public school student's purse); United States v. Knotts, 460 U.S. 276 (1983) (beeper tracking device); Smith v. Maryland, 442 U.S. 735 (1979) (pen register recording telephone numbers called). As Professors LaFave, Israel, and King observed, "[T]he Court substituted for a workable tool that often proved unjust a new test that was difficult to apply." LAFAVE ET AL., *supra* note 2, § 3.2, at 128 (footnotes omitted).

The Court has had to revisit the field of personal jurisdiction far less frequently, even though the constitutional limits of personal jurisdiction are hardly beacons of clarity following the Court's groundbreaking decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (acknowledging that the *International Shoe* test rarely yields clear answers by stating that "[t]he greys are dominant and even among them the shades are innumerable"). In the sixty-one years since the Court decided *International Shoe*, it has decided only fourteen cases attempting to elaborate the meaning of "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *Kulko*, 436 U.S. 84; Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).

utters into the mouthpiece will not be broadcast to the world.[84]

Relying on *Olmstead*, the government argued that there could be no Fourth Amendment violation without physical intrusion into the telephone booth. Criticizing the "narrow view" underlying *Olmstead*, Justice Stewart's majority opinion noted that *Silverman v. United States*[85] had effectively overruled *Olmstead*'s view that intangibles could not be the subject of a Fourth Amendment seizure.[86] Linking that change with the Court's new idea that the Fourth Amendment was concerned with people rather than areas, he interred *Olmstead*'s remaining holding.[87]

Justice Harlan concurred, but he questioned the utility of the majority's people-not-places formulation.[88] In the process, he articulated a two-part standard that has come to be more important than the majority's opinion.[89]

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84. *Katz*, 389 U.S. at 352. And yet, the Court's application of the expectation-of-privacy analysis developed from Justice Harlan's concurring opinion in *Katz* compels the individual to assume the very opposite. *See infra* notes 125-221 and accompanying text.

85. 365 U.S. 505 (1961).

86. *Katz*, 389 U.S. at 353.

87.

> We conclude that the 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 Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

Id.

88. *Id.* at 361.

89. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (characterizing Katz as having "come to mean the test enunciated by Justice Harlan's separate concurrence"). Justice Scalia also criticized the test as "self-indulgent" and mocked its continued use:

> In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,'" bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is employed (as the dissent would employ it here) to determine whether a "search or seizure" within the meaning of the Constitution has *occurred* (as opposed to whether that "search or seizure" is an "unreasonable" one), it has no plausible foundation in the text of the Fourth Amendment. That provision did not guarantee some generalized "right of privacy" and leave it to this Court to determine which particular manifestations of the value of privacy "society is prepared to recognize as 'reasonable.'" Rather, it enumerated ("persons, houses, papers, and effects") the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.[90]

The Court has subsequently focused on both components of Justice Harlan's view. Not surprisingly, determining when a subjective expectation of privacy is reasonable for Fourth Amendment purposes has occasioned the most dispute.

Katz expanded the realm of Fourth Amendment protection,[91] shifting the focus of the inquiry from trespass to privacy. Over the last three decades, however, Justice Harlan's approach has been used more often to deny Fourth Amendment protection than to confirm it, despite the probable existence of a subjective expectation of privacy. For example, *Rakas v. Illinois*[92] held that a passenger in a vehicle has no reasonable expectation of privacy with respect to

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> judgment, not of this Court, but of the people through their representatives in the legislature.

Id. at 97-98 (Scalia, J., concurring) (citations omitted); *see also* Maryland v. Garrison, 480 U.S. 79, 90-91 (1987) (Blackmun, J., dissenting) ("As articulated by Justice Harlan in his *Katz* concurrence, the proper test under the Amendment is 'whether a person [has] exhibited an actual (subjective) expectation of privacy . . . that society is prepared to recognize as "reasonable."'" (alteration in original)). Justice Harlan's approach actually gained majority status only a year after Katz. Justice Harlan's opinion in *Mancusi v. DeForte*, 392 U.S. 364 (1968), noted that "*Katz* . . . also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Id.* at 392 (citation omitted).

90. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan was characteristically accurate in his assessment of the Court's people-not-places formulation. The Court has been unable to deal with the concept of privacy separate from the location involved. *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (finding use of an external heat-detecting sensor to determine whether there was an unusual heat source in the defendant's home violated the Fourth Amendment).

91. *See, e.g.*, Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 606 (1989) (seeing *Katz* as expanding the protection offered by the Amendment).

92. 439 U.S. 128 (1978).

the vehicle,[93] and *Rawlings v. Kentucky*[94] announced that one who has placed something in another's closed purse for safekeeping with the owner's consent nonetheless has no reasonable expectation of privacy.[95] Similarly, one has no reasonable expectation of privacy in an apartment, even as an invitee, unless one at least spends the night.[96] All told, the Court has used Justice Harlan's reasonable-expectation-of-privacy approach at least fifteen times to deny Fourth Amendment protection[97] and only six times to grant it.[98]

The average person might be surprised to discover the limits the Supreme Court has imposed upon expectations "that society is prepared to recognize as 'reasonable.'"[99] The Court has ruled, for example, that there is no reasonable expectation of privacy in the telephone numbers that one dials, which means that there is no Fourth Amendment impediment to the government finding out and keeping track of all of the telephone numbers that one calls.[100] The Court's rationale is that telephone subscribers have voluntarily revealed the numbers they call to the telephone company for connection and billing purposes.[101] "[I]t is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret."[102]

Justices Stewart, Marshall, and Brennan took issue with that approach. Justice Stewart's dissent noted that although most people list their home numbers

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93. *Id.* at 148-49.

94. 448 U.S. 98 (1980).

95. *Id.* at 104-05.

96. *Compare* Minnesota v. Carter, 525 U.S. 83 (1998) (holding persons in apartment for purposes of packaging cocaine for sale have no reasonable expectation of privacy), *with* Minnesota v. Olson, 495 U.S. 91 (1990) (holding that an overnight guest does have a reasonable expectation of privacy). The Court has not elaborated whether an overnight guest in the apartment for purposes of packaging cocaine for sale has such an expectation. The lesson of *Carter* and *Olson* may be that in order to secure Fourth Amendment rights when in another's house, the first thing to do is go to sleep.

97. *See Carter*, 525 U.S. 83; Florida v. Riley, 488 U.S. 445 (1989); California v. Greenwood, 486 U.S. 35 (1988); New York v. Burger, 482 U.S. 691 (1987); United States v. Dunn, 480 U.S. 294 (1987); California v. Ciraolo, 476 U.S. 207 (1986); Dow Chem. v. United States, 476 U.S. 227 (1986); United States v. Karo, 468 U.S. 705 (1984); Hudson v. Palmer, 468 U.S. 517 (1984); Oliver v. United States, 466 U.S. 170 (1984); United States v. Knotts, 460 U.S. 276 (1983); *Rawlings*, 448 U.S. 98; Smith v. Maryland, 442 U.S. 735 (1979); *Rakas*, 439 U.S. 128; United States v. White, 401 U.S. 745 (1971).

98. *See* Kyllo v. United States, 533 U.S. 27 (2001); Bond v. United States, 529 U.S. 334 (2000); *Olson*, 495 U.S. 91; Winston v. Lee, 470 U.S. 753 (1985); Arkansas v. Sanders, 442 U.S. 753 (1979), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991); United States v. Chadwick, 433 U.S. 1 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991).

99. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

100. *See Smith*, 442 U.S. 735 (using pen register to record numbers called invades no privacy interest of caller).

101. *Id.* at 743.

102. *Id.*

in telephone directories, he doubted that they would so sanguinely make public the list of people whom they call. "This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life."[103]

Justice Marshall pointed out a sharp and significant difference between his and the majority's approach to the concept of privacy under the Fourth Amendment.

> [E]ven assuming . . . that individuals "typically know" that a phone company monitors calls for internal reasons, it does not follow that they expect this information to be made available to the public in general or the government in particular. *Privacy is not a discrete commodity, possessed absolutely or not at all.* Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes.[104]

The majority had indeed taken an all-or-nothing approach to privacy, although without highlighting it. To the majority, information about the numbers that subscribers called was either secret or not.[105] Justice Blackmun acknowledged no concept of release of information to a limited audience and for a limited purpose. Justice Marshall, on the other hand, recognized a relative expectation of privacy—the idea that one may sacrifice absolute privacy without sacrificing all privacy. The dispute over the meaning of *Katz*'s expectation-of-privacy formulation is central to the Court's approach to the false-friend cases discussed below.[106] Justice Marshall also rejected the majority's assumption-of-risk analysis with respect to communications, unwilling to accept the idea that whenever one communicates with someone else he must assume that the government may get the conversation's contents.[107] He warned, in terms that seem particularly prescient today, of the price to be paid for the Court's dismissal of constitutional privacy concerns.

> The prospect of unregulated governmental monitoring will undoubtedly prove disturbing even to those with nothing illicit to hide. Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts. Permitting governmental access to

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103. *Id.* at 748 (Stewart, J., dissenting).

104. *Id.* at 749 (Marshall, J., dissenting) (emphasis added) (footnote and citation omitted).

105. *See supra* text accompanying note 102.

106. *See infra* notes 125-75 and accompanying text.

107. *Smith*, 442 U.S. at 749 (Marshall, J., dissenting). "In my view, whether privacy expectations are legitimate within the meaning of *Katz* depends not on the risks an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society." *Id.* at 750.

> telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society.[108]

In light of the recent jailing of a journalist who refused to reveal a confidential source,[109] Justice Marshall's concerns take on an eerie relevance.

It is not just the numbers one calls (which, after all, have no substantive content) that are available to the government. *United States v. Miller*[110] held there is no constitutionally protected privacy interest in bank records maintained by the bank.[111] To the extent that one uses banking services in day-to-day affairs, the government can subpoena all of the records (including canceled checks) that reveal one's financial dealings. The government need make no showing at all, much less a showing of probable cause, to demand production. Consider the amount of individual information that thus may become available to the government: the newspapers and magazines to which she subscribes, the physicians, psychiatrists, and psychologists he visits and how often he visits them, and the political parties and candidates to whom she contributes, to name only a few. Nonetheless, a seven-member majority of the Court ruled that because the records are the bank's, not the individual's, the individual is powerless to prevent access.[112] In the process, the Court explicitly rejected the idea of a relative expectation of privacy, in response to Miller's argument that his bank records contained personal information that he had revealed to the bank for a limited purpose.[113] Instead, it relied on the assumption-of-risk analysis Justice Marshall had criticized in *Smith*.[114]

The Court based its conclusion on the remark in *Katz* that "'[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment

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108. *Id.* at 751 (citations omitted).

109. *See* Adam Liptak, *A Reporter Jailed: The Overview; Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1; Editorial, *Judith Miller Goes to Jail*, N.Y. TIMES, July 7, 2005, at A22. *Time* magazine, on the other hand, decided to turn over its reporter's documents regarding confidential sources. Adam Liptak, *Time, Inc. to Yield Files on Sources, Relenting to U.S.*, N.Y. TIMES, July 1, 2005, at A1.

110. 425 U.S. 435 (1976).

111. *Id.* at 443.

112. *Id.* at 446. The Court thus relied upon property analysis, despite having ostensibly abandoned property as a Fourth Amendment analytical tool in *Katz*. *See supra* note 87 and accompanying text.

113. *Miller*, 425 U.S. at 442-43.

114. "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government." *Id.* at 443. Note that the Court performs a minor sleight-of-hand with its wording because it fails to distinguish between cases in which the third party decides to reveal the hitherto confidential information and those in which the government compels it. The majority apparently felt that it was of no constitutional moment that the information recipient's natural solicitousness for its customer's privacy was overcome by the force of arms that a subpoena represents.

protection.'"[115] One might at least question whether *Katz* meant to establish that revealing information to a single member of the public removes whatever Fourth Amendment protection the information might otherwise have enjoyed. In other words, does exposure to someone mean exposure to everyone for Fourth Amendment purposes?

Miller is not the most extreme example of the limits that the Court has imposed on the Fourth Amendment. In *United States v. Payner*,[116] a special agent of the Internal Revenue Service ("IRS") approved a covert operation to obtain bank records.[117] When an officer of an offshore bank visited Miami and left his briefcase in the apartment of his dinner companion while the two of them were at a restaurant, a private investigator acting for the IRS entered the apartment with a key its occupant had given him for the purpose of cooperating with the investigation. He removed the bank officer's briefcase and delivered it to the special agent, who had some 400 documents photocopied. While this was happening, a lookout kept watch on the diners, notifying the private investigator when they left the restaurant so that he could replace the briefcase undiscovered. Based on the photocopied documents, the government subpoenaed documents from a Florida bank, and those documents tended to prove that the defendant had filed a false income tax return. Payner moved to suppress the subpoenaed documents and succeeded—until the case reached the Supreme Court. The majority reversed and ordered reinstatement of the guilty verdict that the district court had reached before considering and granting defendant's motion to suppress.[118]

The District Court found that "'the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties . . . .'"[119] The majority held that this finding did not matter because the government's conduct did not violate any Fourth Amendment right of Payner.[120] The Court relied on *Miller* for the

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115. *Id.* at 442 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

116. 447 U.S. 727 (1980).

117. *Id.* at 729-30.

118. *Id.* at 731. Justice Powell, author of the majority opinion in *Payner*, explained the unusual sequence:

> The unusual sequence of rulings was a byproduct of the consolidated hearing conducted by the District Court. The court initially failed to enter judgment on the merits. At the close of the evidence, it simply granted respondent's motion to suppress. After the Court of Appeals for the Sixth Circuit dismissed the Government's appeal for want of jurisdiction, the District Court vacated the order granting the motion to suppress and entered a verdict of guilty. The court then reinstated its suppression order and set aside the verdict.

Id. at 729 n.2.

119. *Id.* at 730 (quoting United States v. Payner, 434 F. Supp. 113 (N.D. Ohio 1977), *aff'd*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980)).

120. In fact, Justice Powell found "that respondent lacks standing under the Fourth

proposition that Payner enjoyed no expectation of privacy in his bank's documents, even though the Government discovered them by acquiescing in clearly unconstitutional and possibly criminal activity.[121]

For good or ill, *Katz*, as Justice Harlan conceptualized it, is the governing standard. Even before *Katz*, however, the Court used something like an expectation-of-privacy approach to allow the introduction of evidence that one might have thought to be constitutionally protected.[122] Since *Katz*, the Court has often used the approach to declare the absence of a reasonable expectation of privacy in circumstances in which a majority of people probably believe that the Fourth Amendment does and should protect them from government prying. In particular, the Court has decided a series of "false friend" cases that do nothing so much as emphasize how risky it may be, in Fourth Amendment terms, to have what is ostensibly a private conversation.

II. THE FALSE FRIEND CASES

The false-friend cases always involve consensual activity. The government does not itself perform a search over the protest of the suspect. Instead, the suspect reveals information to someone he trusts to keep a confidence, not knowing that the individual has already begun actively cooperating with the police in their investigation.[123] The government connection frustrates the suspect's subjective expectation of privacy. The remaining question, in *Katz* terms, is whether his expectation is "one that society is prepared to recognize as 'reasonable.'"[124]

On Lee v. United States[125] was the first in the series. The government had arrested On Lee and charged him with dealing in narcotics. While On Lee was

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Amendment to suppress the documents illegally seized . . . ." *Id.* at 731-32. This is a bit of an odd statement for Justice Powell to have made, given that, as he pointed out, the preceding Term had seen the Court's decision in *Rakas v. Illinois*, 439 U.S. 128 (1978), in which a majority that included Justice Powell had ostensibly discarded the vocabulary of standing and stated that the preferable course was to focus on the merits. *See infra* note 203.

121. The Court also declined to order suppression in the exercise of the courts' supervisory power. *Payner*, 447 U.S. at 733-37. Justice Brennan, joined by Justices Marshall and Blackmun, vigorously dissented. Justice Brennan seemed to think the Government's activity was clearly criminal when he discussed the agent's action: "Casper entered the apartment and *stole* Wolstencroft's briefcase." *Id.* at 740 (Brennan, J., dissenting).

122. *See* On Lee v. United States, 343 U.S. 747 (1952); *see also infra* notes 125-29 and accompanying text.

123. Distinguish this situation from one in which an individual acting privately subsequently decides to share with the government what he has learned. In the text situation, the individual acts as a government agent, and his acts are attributable to the government and subject to constitutional standards. If he acts privately, the Constitution imposes no constraint. *See infra* notes 247-60 and accompanying text.

124. Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring) (citations omitted).

125. 343 U.S. 747 (1952).

free on bail, Chin Poy (a former employee of On Lee turned government informer) engaged him in conversation, and On Lee made incriminating statements. Chin Poy was wearing a microphone, which transmitted the conversation to a Narcotics Bureau agent stationed outside On Lee's laundry, where the conversation took place. The agent subsequently testified at On Lee's trial.[126] On Lee objected to the testimony on Fourth Amendment grounds, but the district court allowed the evidence. The jury convicted On Lee of selling a pound of opium and of conspiring to sell opium. The issue of whether Chin Poy's conduct violated the Fourth Amendment came to the Supreme Court, where a five-to-four majority held that there was no Fourth Amendment violation.[127]

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126. The Court originally expressed mystification about why Chin Poy himself did not testify. "For reasons left to our imagination, Chin Poy was not called to testify about petitioner's incriminating admissions." *Id.* at 749. Justice Jackson's imagination seemed equal to the task later in the opinion:

> The normal manner of proof would be to call Chin Poy and have him relate the conversation. We can only speculate on the reasons why Chin Poy was not called. It seems a not unlikely assumption that the very defects of character and blemishes of record which made On Lee trust him with confidences would make a jury distrust his testimony. Chin Poy was close enough to the underworld to serve as bait, near enough the criminal design so that petitioner would embrace him as a confidante, but too close to it for the Government to vouch for him as a witness. Instead, the Government called agent Lee. We should think a jury probably would find the testimony of agent Lee to have more probative value than the word of Chin Poy.

Id. at 756.

Perhaps I give Justice Jackson undeserved credit for imagination. A decade later, Chief Justice Warren pointed out other advantages to the government in not calling Chin Poy to testify:

> However, there were further advantages in not using Chin Poy. Had Chin Poy been available for cross-examination, counsel for On Lee could have explored the nature of Chin Poy's friendship with On Lee, the possibility of other unmonitored conversations and appeals to friendship, the possibility of entrapments, police pressure brought to bear to persuade Chin Poy to turn informer, and Chin Poy's own recollection of the contents of the conversation. His testimony might not only have seriously discredited the prosecution, but might also have raised questions of constitutional proportions. This Court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a suspect, but suffice it to say here, the issue is substantial. . . . Yet the fact remains that without the testimony of Chin Poy, counsel for On Lee could not develop a record sufficient to raise and present the issue for decision, and the courts could not evaluate the full impact of such practices upon the rights of an accused or upon the administration of criminal justice.

Lopez v. United States, 373 U.S. 427, 444-45 (1963) (Warren, C.J., concurring in the result) (citations omitted) (footnote omitted).

127. In *Massiah v. United States*, 377 U.S. 201 (1964), the Court would later hold that such government conduct violated the defendant's Sixth Amendment right to counsel. Its facts are virtually identical to *On Lee*'s facts. Massiah faced a federal narcotics indictment. A friend

The majority rejected On Lee's argument that Chin Poy, because he entered the laundry under false pretenses, was a trespasser, making the government's overhearing of the conversation no better than if an officer had secreted himself in a closet to eavesdrop. Justice Jackson held that Chin Poy's entry was consensual, and the fact that On Lee might not have consented had he known Chin Poy's true purpose did not transmute an otherwise lawful entry into an unlawful search for Fourth Amendment purposes.[128] The Court also refused to analogize transmission of conversations to seizure of tangible property, though it never explained why the analogy failed:

> Petitioner relies on cases relating to the more common and clearly distinguishable problems raised where tangible property is unlawfully seized. Such unlawful seizure may violate the Fourth Amendment, even though the entry itself was by subterfuge or fraud rather than force. But such decisions are inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversation, at least where access to the listening post was not obtained by illegal methods.[129]

Had Chin Poy seized tangible evidence (a sample of the opium, perhaps) at an opportune moment when On Lee had turned his back rather than electronically transmitting On Lee's conversation, it is clear that the Court would have suppressed the evidence. That was the situation the Court had faced decades earlier in *Gouled v. United States*.[130]

In order to get evidence against Gouled, military investigators used a supposed friend and business acquaintance of Gouled to retrieve evidence during a visit to Gouled's office. While Gouled was out of the room, the informant seized some papers, which he delivered to his superiors. The Court left no doubt about its disapproval. It pointedly refused to distinguish between seizure resulting from forcible invasion and seizure by stealth.[131]

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures[,] and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and

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allowed the government to install a transmitter in his car and then engaged Massiah, released on bail, in an incriminating conversation. The majority refused to approve what it characterized as the government's surreptitious interrogation in the absence of Massiah's counsel. *See id.* at 206; *see also* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE § 16.02, at 410 (4th ed. 2000).

128. *On Lee*, 343 U.S. at 751-52.

129. *Id.* at 753 (citations omitted).

130. 255 U.S. 298 (1921), *overruled in part*, Warden v. Hayden, 387 U.S. 294 (1967) (rejecting *Gouled*'s holding that "mere evidence," i.e. evidence other than fruits or instrumentalities of crime or contraband, was not subject to seizure by search warrant).

131. *Id.* at 305-06.

> seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.[132]

The unanimous Court therefore held that the seizure violated the Fourth Amendment. The Court has never overruled this part of *Gouled*. *On Lee* was identical to *Gouled* except that the government seized words rather than papers through the false friend. It is possible, therefore, that *On Lee* does little more than reflect the Court's then-continuing reluctance to recognize that the Fourth Amendment protects words as well as tangible objects.[133]

Justice Frankfurter dissented. His first sentence savaged the Court's reasoning as adopting an ends-justify-the-means approach.[134] He attacked *Olmstead* as fundamentally unsound, echoing Justice Brandeis's admonition that ended his dissent in that case[135] and responding to the majority's game metaphor.

> Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which "the dirty business" of criminals is outwitted by "the dirty business" of law officers. The

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132. *Id.*

133. The Court also declined On Lee's request that it rule the evidence inadmissible in the exercise of its supervisory power, and it was in that context that the false-friend discussion occurred. It relied in part on Justice Stone's statement from a quarter century before: "'A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule.'" *On Lee*, 343 U.S. at 755 (quoting McGuire v. United States, 273 U.S. 95, 99 (1927)). The Court was unable to find a justification for excluding the evidence on supervisory grounds. "No good reason of public policy occurs to us why the Government should be deprived of the benefit of On Lee's admissions because he made them to a confidante of shady character." *Id.* at 756. At the same time, Justice Jackson did recognize that "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility[,]" *id.* at 757, but he emphasized that it was only a question of credibility, not one of constitutional law.

134.

> The law of this Court ought not to be open to the just charge of having been dictated by "odious doctrine," as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally, on the ground of practical convenience, is to yield to a short-sighted view of practicality. It derives from a preoccupation with what is episodic and a disregard of long-run consequences. The method by which the state chiefly exerts an influence upon the conduct of its citizens, it was wisely said by Archbishop William Temple, is "the moral qualities which it exhibits in its own conduct."

Id. at 758 (Frankfurter, J., dissenting).

135. *See supra* note 61 and accompanying text.

> contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet.[136]

Justices Douglas and Burton also dissented, the latter noting that had a federal officer secreted himself in On Lee's closet, evidence she secured from that vantage point would have been inadmissible. Justice Burton also disagreed with the majority's consent theory, arguing that On Lee had not consented to Chin Poy's broadcasting their conversation and that the presence of the transmitter effectively brought the federal agent's ear into On Lee's house without consent.[137]

With the decision in *On Lee*, the Court permitted the government to do indirectly through a false friend what it could not have done directly. Had the federal official been in the closet, as Justice Burton pointed out, his testimony would have been inadmissible. Similarly, had the agent entered On Lee's house surreptitiously to place a microphone on the premises, the Court would likely not have permitted him to testify as to overheard conversations, the microphone being the functional equivalent of his physical presence and having been placed by means of a trespass.[138] Instead, the government sent the microphone in with Chin Poy, an agent.

The Court announced its next two opinions dealing with false friends on the same day in 1966. In *Lewis v. United States*,[139] the defendant invited an undercover federal narcotics agent who posed as a buyer to his home for the

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136. *On Lee*, 343 U.S. at 758-59 (Frankfurter, J., dissenting).

137. *See id.* at 766 (Burton, J., dissenting). Justice Burton was dealing with a concept that *Katz* would later discuss under the rubric of "reasonable expectation of privacy," though he did not phrase it that way. *See supra* note 90 and accompanying text.

138. In *Goldman v. United States*, 316 U.S. 129 (1942), the Court hinted obliquely that it would have viewed such a situation with constitutional skepticism. Federal officers had unlawfully entered one of the petitioners' offices to install a listening device. When it did not work, the officers listened to conversations instead by placing a device ("detectaphone") against the wall of an adjacent room to which they had lawful access. The Court declined to suppress because it found that the trespass itself did not result in the officers' acquiring evidence.

> The petitioners contend that the trespass committed in Shulman's office when the listening apparatus was there installed, and what was learned as the result of that trespass, was of some assistance on the following day in locating the receiver of the detectaphone in the adjoining office, and this connection between the trespass and the listening resulted in a violation of the Fourth Amendment. Whatever trespass was committed was connected with the installation of the listening apparatus. As respects it, the trespass might be said to be continuing and, if the apparatus had been used, it might, with reason, be claimed that the continuing trespass was the concomitant of its use.

Id. at 134-35. Meanwhile, the *Goldman* Court's five-to-three decision strongly reaffirmed *Olmstead*. Chief Justice Stone and Justice Frankfurter joined in dissent to call for overruling *Olmstead*. Justice Murphy also dissented.

139. 385 U.S. 206 (1966).

purpose of engaging in a drug transaction with the defendant.[140] Lewis argued that, there being no warrant, the agent's entry into Lewis's home using fraud and deception violated the Fourth Amendment. The Court was unimpressed. Chief Justice Warren distinguished *Gouled* (but implicitly approved it)[141] because the government agent there had affirmatively misrepresented his purpose, stating he intended only to pay a social call on Gouled.[142] In *Lewis*, by contrast, the defendant had invited the undercover officer to his house for the specific purpose of conducting a drug transaction, and the officer did not see, hear, or seize anything Lewis did not intend.[143]

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140. *Id.* at 207-08.

141. "This Court had no difficulty concluding that the Fourth Amendment had been violated by the secret and general ransacking, notwithstanding that the initial intrusion was occasioned by a fraudulently obtained invitation rather than by force or stealth." *Id.* at 210. The Court explicitly reaffirmed *Gouled* in a case decided the same day as *Lewis*. *See* Hoffa v. United States, 385 U.S. 293, 301 (1966) ("The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area." (citing Gouled v. United States, 255 U.S. 298 (1921))).

142. *Lewis*, 385 U.S. at 209.

143. One might rationalize the result in *On Lee* on exactly the same basis, though the *Lewis* Court did not cite *On Lee*. Some circuit court cases have invalidated consensual searches when the government has made an affirmative misrepresentation of the purpose of the search. In *Graves v. Beto*, 424 F.2d 524 (5th Cir. 1970), a police officer told a suspect in a rape case that he wanted to have the suspect's blood tested for alcohol to see if there was enough to hold him on a drunkenness charge. In fact, the purpose of the test was to see whether the suspect's blood type matched blood found at the scene of a rape. The court granted habeas corpus relief. *Id.* at 526; *accord* United States v. Tweel, 550 F.2d 297 (5th Cir. 1977) (holding that IRS agent's misrepresentation of investigation as civil rather than criminal vitiated defendant's consent to turn over papers). *United States v. Andrews*, 746 F.2d 247 (5th Cir. 1984), questioned whether *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), undermined *Graves*, but it seems clear that it did not. The *Schneckloth* Court ruled that the test for consent was voluntariness and that the police need not advise the person from whom they seek consent of his right to refuse. *Schneckloth*, however, involved no misrepresentation by the police. *See also* United States v. Maldonado Garcia, 655 F. Supp. 1363, 1367 (D.P.R. 1987) (entrance gained by falsely stating that postal inspectors wanted to serve summons):

> It is true that consent is not necessarily vitiated by deception and subterfuge on the part of the police. But officers cannot use a ruse to gain access unless they have more than mere conjecture that criminal activity is underway. To hold otherwise would be to give police a blanket license to enter homes randomly in the hope of uncovering incriminating evidence and information. That this last was the intention of the police in this case is evident from the testimony of Postal Inspector Pacheco[,] who admitted that he did not know if there was any evidence in the apartment, that he was acting solely on an anonymous tip, that he did not have probable cause and that his motivation was to fish for incriminating evidence.

Id. (citations omitted). Moreover, a search by consent may not exceed the limits imposed by the consenting party. *See, e.g.*, United States v. Turner, 169 F.3d 84 (1st Cir. 1999) (finding that

The other case was *Hoffa v. United States*.[144] James Hoffa was the president of the Teamsters Union. In 1962, he was a defendant in a federal criminal case. During the trial, he made statements in his hotel room to a co-defendant about tampering with the jury. Partin, a paid informer[145] (who was in the room because he was a Teamsters Union official), overheard the conversations and reported them to the government, which subsequently prosecuted and convicted Hoffa and the other defendants in the original case for attempting to influence jurors. Hoffa objected to the introduction of Partin's evidence as a Fourth Amendment violation, but the trial court overruled the objection, and the Supreme Court affirmed the resulting conviction.[146]

Hoffa argued that Partin's role as a government informer rendered Hoffa's consent for Partin to be in the hotel room ineffective,[147] thus making Partin's conduct a Fourth Amendment violation. The Court refused to go down that path. Justice Stewart's majority opinion made clear that the problem, if any, was not the government agent's invasion of the hotel room, either surreptitiously or by force; it was Hoffa's misplaced reliance on Partin's trustworthiness.[148] The Court also declined to find either a Fifth or Sixth Amendment violation on the facts.[149]

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consent to search house for intruder did not authorize search of computer files or tapes); United States v. Acosta, 110 F. Supp. 2d 918 (E.D. Wis. 2000) (finding that consent to search stated to be for persons does not authorize opening of containers too small to hold a person).

144. 385 U.S. 293 (1966).

145. The government disputed the defendants' assertion that it had placed the informer in the room for the purpose of gathering evidence. The Court declined to reach that factual issue.

> But whether or not the Government 'placed' Partin with Hoffa in Nashville during the Test Fleet trial, we proceed upon the premise that Partin was a government informer from the time he first arrived in Nashville on October 22, and that the Government compensated him for his services as such.

Id. at 299.

146. *Id.* at 312.

147. *United States v. Jeffers*, 342 U.S. 48 (1951), had established that hotel rooms are constitutionally protected areas for Fourth Amendment purposes.

148.

> It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. . . .
>
> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

Hoffa, 385 U.S. at 302 (footnote omitted).

149. *See id.* at 303-12. The Court also decided a third case stemming from the *Hoffa* trial. In

On Lee, *Lewis*, and *Hoffa* all antedated *Katz* with its discussion (primarily in Justice Harlan's concurrence) of reasonable expectation of privacy. *United States v. White*[150] offered the Court its first opportunity to evaluate a false-friend case in *Katz*'s light. *White*'s fact pattern is familiar. White had several conversations with a government informant who carried a radio transmitter that broadcasted these conversations to nearby police receivers.[151] The government did not produce the informant at White's trial, and the trial court overruled defense objections to testimony of the government agents who conducted the electronic surveillance.[152]

The case produced no majority opinion. Justice White wrote for the plurality,[153] disapproving the Seventh Circuit's reliance on *Katz* as a basis for excluding the agents' testimony. Remarkably, almost the entire opinion is advisory, but that is the interesting part. The Court had previously held that the "decision in *Katz v. United States* applied only to those electronic surveillances that occurred subsequent to the date of that decision."[154] Since the surveillance in *White* antedated *Katz*, the Court held that the Seventh Circuit had erred in analyzing the case under *Katz*: "The court should have judged this case by the pre-*Katz* law[,] and under that law, as *On Lee* clearly holds, the electronic surveillance here involved did not violate White's rights to be free from unreasonable searches and seizures."[155]

Having castigated the Seventh Circuit for even doing a *Katz* analysis, Justice White performed one of his own, arriving at the opposite conclusion.[156] First, he distinguished *Katz* on the ground that the wiretapping involved was not with the

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Osborn v. United States, 385 U.S. 327 (1966), the Court approved the admissibility of a tape recording of a conversation between one of the defense lawyers and a Nashville police officer whom the lawyer had hired to do background checks on prospective jurors. Osborn knew his employee was a police officer; he did not know that the officer, before undertaking the employment, had agreed to report to federal authorities any "'illegal activities' he might observe." *Id.* at 325. However, the recorded conversation followed another conversation that the officer had reported to the federal agents, who then used the officer's affidavit about the contents of the first conversation as the basis for securing a judicial order permitting the recording. That judicial supervision distinguishes *Osborn* from the other false-friend cases.

150. 401 U.S. 745 (1971).

151. Some of the conversations took place in the informant's house. As to those, a police officer hidden in a kitchen closet with the informant's consent also overheard the conversations without the aid of electronic transmission or amplification. *Id.* at 747.

152. *See* United States v. White, 405 F.2d 838, 842 (7th Cir. 1969), *rev'd*, 401 U.S. 745 (1971).

153. One wonders whether Chief Justice Burger's assignment of the plurality opinion in *White* to Justice White was some version of a Freudian slip or reflects instead the Chief Justice's well known elfin sense of humor.

154. United States v. White, 401 U.S. 745, 754 (1971) (citing Desist v. United States, 394 U.S. 244 (1969)).

155. *Id.*

156. This is a fine judicial example of adding insult to injury.

consent of either party to the conversation.[157] Second, he reaffirmed the Court's preceding false-friend cases: *On Lee*, *Lewis*, *Hoffa*, and *Lopez*.[158] Justice White observed that the parties seemed to agree that an undercover agent speaking with a suspect could make notes of the conversation and testify about it without any Fourth Amendment violation.

> For constitutional purposes, no different result is required if the agent[,] instead of immediately reporting and transcribing his conversations with [the] defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.[159]

There is a bit of sleight of hand going on Justice White's last sentence. He takes the elided cases, *Lopez* and *On Lee*, to stand for the proposition that the government's activities in those cases invaded no "constitutionally justifiable expectation of privacy," but the Court did not begin to analyze Fourth Amendment cases under the privacy rubric until *Katz*, which postdated both *Lopez* and *On Lee*. Given that Justice White's opinion represents only a plurality, it seems improper for him to ascribe new meaning to those cases.

In any event, Justice White cautioned about an over-expansive reading of the expectation of privacy, almost disposing its subjective component in favor of emphasizing its objective focus.

> Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. . . . Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant.[160]

He went on to illustrate, one assumes unwittingly, a real problem with his reading of *Katz*'s test. "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . [I]f he has no doubts,

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157. *White*, 401 U.S. at 749.

158. *Id.* at 749-50.

159. *Id.* at 751 (citations omitted).

160. *Id.* at 751-52.

or allays them, or risks what doubt he has, the risk is his."[161] The underlying, unstated assumption of that sentiment is that those who wrote and ratified the Fourth Amendment did not intend it to protect or help conceal unlawful activities. Although that assumption is probably true, it misses the point. The Fourth Amendment exists to protect people's privacy against unwarranted government intrusion, and it was at that evil that the former colonists aimed.[162] The protection is not absolute, but it is circumscribed by the Fourth Amendment's inclusion of the reasonableness and probable cause requirements. The harm that the Amendment protects against is the loss of the sense of security that inevitably accompanies the idea that no matter where one is, and no matter what one does, the government may be listening or watching.

It is a bit too facile to think only the wrongdoer fears that the government will take notice. A person taking a shower may have nothing criminal to conceal, but it seems unlikely that such a person would be sanguine about having uninvited, surreptitious observers, whether governmental or not.[163] The difference is one of degree, not kind. Several states have reflected exactly this concern by prohibiting surveillance of changing rooms in retail stores,[164] and all states make criminal the sort of activities associated with Peeping Toms.[165]

The law recognizes that concern about disclosure of conversations causes people to restrict their communication artificially (although the *White* plurality denied such a connection).[166] The well known testimonial privileges—doctor-patient,[167] husband-wife,[168] clergy-penitent[169] and lawyer-client[170]—do not exist

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161. *Id.* at 752.

162. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767 (1966). Query whether Justice Brennan used the word "unwarranted" in its literal sense, to mean without a warrant. "[T]he Fourth Amendment is intended to protect personal privacy rather than to prevent the conviction of criminals." LAFAVE ET AL., *supra* note 2, § 3.9(b), at 231.

163. I am indebted to Justice Stevens for this observation. "A bathtub is a less private area when the plumber is present even if his back is turned." Karo v. United States, 468 U.S. 705, 735 (1984) (Stevens, J., concurring and dissenting).

164. *See, e.g.*, CAL. PENAL CODE § 653n (West 1999); FLA. STAT. ANN. § 877.26 (West 2005); MD. CODE ANN., §§ 3-901 to 3-903 (Michie 2002 & West 2004); N.Y. GEN. BUS. LAW § 395-b (McKinney Supp. 2005).

165. *See, e.g.*, FLA. STAT. § 810.145 (West 2005); N.C. GEN. STAT. § 14-202 (West 2004); OKLA. STAT. tit. 21, § 1171 (2002); VA. CODE. ANN. § 18.2-130 (West 2004).

166.

> Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound.

White, 401 U.S. at 752. There is no indication of whether Justice White was able to suppress a giggle when he wrote this.

167. *See generally* ROGER C. PARK ET AL., EVIDENCE LAW § 8.13, at 441-44 (2d ed. 2004); Martha M. Kendrick et al., *The Physician-Patient, Psychotherapist-Patient, and Related Privileges*,

to protect wrongdoers; the privileges exist in recognition that people will be inhibited if they know that their communications to others may go not merely to the intended recipient, but to the world.[171]

Justice Harlan's dissent focused in part on exactly that problem. To him, it was obvious:

> Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.[172]

Justice White's plurality took the view that the difference between a conversational partner deciding to tell the government about a conversation and recording or transmitting the conversation itself was a matter of form, not substance. Justice Harlan disputed that assertion.

> The force of the contention depends on the evaluation of two separable but intertwined assumptions: first, that there is no greater invasion of privacy in the third-party situation, and, second, that uncontrolled consensual surveillance in an electronic age is a tolerable technique of

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in 1 TESTIMONIAL PRIVILEGES §§ 7:01-7:34, at 7-3 to -56 (David M. Greenwald et al. eds., 3d ed. 2005).

168. *See generally* PARK ET AL., *supra* note 167, §§ 8.15-8.17, at 446-52; Edward F. Malone & Claudia Gallo, *Spousal Privileges*, *in* 1 TESTIMONIAL PRIVILEGES, *supra* note 167, §§ 5:01-5:14, at 5-2 to -43.

169. *See generally* PARK ET AL., *supra* note 167, § 8.20, at 458; David W. Austin & Donald S. Boyce, Jr., *The Clergy Communications Privilege*, *in* 1 TESTIMONIAL PRIVILEGES, *supra* note 167, §§ 6:1-6:14, at 6-1 to -54.

170. *See generally* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting that the privilege's "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice"); David M. Greenwald et al., *The Attorney-Client Privilege*, *in* 1 TESTIMONIAL PRIVILEGES, *supra* note 167, §§ 1:01-1:98, at 1-5 to -404.

171. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 51 (1980) ("[T]he physician must know all that patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment."); *id.* (noting that the spousal privilege protects confidential communications and fosters marital harmony); *id.* ("The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."); *id.* ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.").

172. United States v. White, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting) (footnote omitted).

law enforcement, given the values and goals of our political system."[173]

He focused on the value that he saw reflected in the Fourth Amendment: "the individual's sense of security."[174] Justice Harlan made it clear that he meant every individual in the society, not simply those (upon whom the plurality focused) engaged in wrongdoing.

> Finally, it is too easy to forget—and, hence, too often forgotten—that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally. By casting its "risk analysis" solely in terms of the expectations and risks that "wrongdoers" or "one contemplating illegal activities" ought to bear, the plurality opinion, I think, misses the mark entirely. *On Lee* does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk. The very purpose of interposing the Fourth Amendment warrant requirement is to redistribute the privacy risks throughout society in a way that produces the results the plurality opinion ascribes to the *On Lee* rule. Abolition of *On Lee* would not end electronic eavesdropping. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer. The interest *On Lee* fails to protect is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation. Interposition of a warrant requirement is designed not to shield "wrongdoers," but to secure a measure of privacy and a sense of personal security throughout our society.[175]

In effect, Justice Harlan suggested that the plurality overlooked that the Fourth Amendment has a heavy component of collective, not merely individual, protection.

The Fourth Amendment exists in large part in reaction to the general searches and writs of assistance that had plagued the colonists in the period leading up to the revolution.[176] The untrammeled use of British power to search for crime

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173. *Id.* at 785.

174. *Id.* at 786.

175. *Id.* at 789-90.

176. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (noting "the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the

without focused and factually supported suspicion motivated the new nation to recognize the society-damaging effects of executive power not subject to neutral—judicial—control. The major cost of government behavior such as that in *White* is borne not primarily by the individual upon whom the government focuses; it is borne by the rest of society, which must worry that government overreaching, which the Framers certainly regarded as endemic to the institution of government,[177] may bring us within its ambit. As Professor Amsterdam pointed out:

> The evil [addressed by the Framers] was general: it was the creation of an administration of public justice that authorized and supported indiscriminate searching and seizing. It was against such a regime of public justice that the fourth amendment was set. I do not think that the phraseology of the amendment, akin to that of the first and second amendments and the ninth, is accidental. It speaks of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The vice of a system of criminal justice that relies upon a professional police and admits evidence they obtain by unreasonable searches and seizures is precisely that we are all thereby made less secure in our persons, houses, papers and effects against unreasonable searches and seizures.[178]

The Court has recognized the Fourth Amendment's collective aspect. In a series of cases refusing to apply the exclusionary rule in response to clearly unconstitutional conduct, the Court explained that the rule exists to protect the collective interest against government overreaching. Therefore, it argued, if applying the rule would have limited deterrent effect, the courts should not

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Revolution"); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMPLE L. REV. 221, 254 (1989):

> The fourth amendment was designed to prevent the arbitrary and indiscriminate searches permitted by general warrants and writs of assistance. General warrants and writs of assistance were harmful because they delegated to the officer the power to decide whom to search and for what to search. They granted the power to search without a showing of individualized suspicion that evidence of criminal activity would be found in a particular place.

See also Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501, 506-15 (2004).

177. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1998). It is that recognition that inspired Lord Acton's famous comment: "Power tends to corrupt and absolute power corrupts absolutely." Letter from John E.E. Dalberg-Acton (Lord Acton) to Bishop Mendell Creighton (Apr. 5, 1887), *reprinted in* JOHN EMERICH EDWARD DALBERG-ACTON, ESSAYS ON FREEDOM AND POWER 364 (G. Himmelfarb ed., The Free Press 1972).

178. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 432-33 (1974).

suppress the evidence.[179]

These concerns have never been more appropriate than today. Congress passed the USA Patriot Act[180] in haste in 2001 as a response to the terrorist attacks of September 11. Both houses have now voted to renew it with no major modifications.[181] Criticisms of the Patriot Act have focused on its insulation of executive practice from meaningful judicial review and the threats to individual privacy that inhere in the government's vastly expanded surveillance powers.[182] On July 21, 2005, the New York City Police Department began randomly searching bags and parcels carried by anyone using public transportation, promising to deny access to anyone who refused.[183] New York's Metropolitan

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179. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347-48 (1974) (citation omitted):

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
> "The ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.
>
> . . . .
>
> In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

See generally Doernberg, *supra* note 82, at 282-97.

180. Uniting and Strengthening America to Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

181. *See* Eric Lichtblau, *Senate Makes Permanent Nearly All Provisions of Patriot Act, with a Few Restrictions*, N.Y. TIMES, July 30, 2005, at A11; Eric Lichtblau, *House Votes for a Permanent Patriot Act*, N.Y. TIMES, July 22, 2005, at A11.

182. *See, e.g.*, Patricia Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA Patriot Act*, 80 DENV. U.L. REV. 375 (2002); Jeremy C. Smith, *The USA Patriot Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 N.C. L. REV. 412 (2003); John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002). James Madison also warned of the dangers the Patriot Act poses, though he could not have appreciated it at the time: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." Letter from James Madison to Thomas Jefferson (May 13, 1798), *reprinted in* PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR, at xi (2003). At the time, Madison was speaking of the Alien and Sedition Acts of 1798, but his words apply equally well to the legislation of two centuries later.

183. Sewell Chan & Kareem Fahim, *New York Starts to Inspect Bags on the Subways*, N.Y.

Transportation Authority, which runs commuter trains to and from the city, announced that it would begin doing the same thing.[184] Some have asserted that the practice violated the Constitution.[185] Boston officials welcomed the 2004 Democratic National Convention by announcing that they would conduct random searches of passengers using that city's transit system, which provoked a court challenge.[186]

It turns out that those relatively limited government operations are but the tip of the iceberg. On December 15, 2005, the New York Times published an article about a presidential initiative that had apparently been going on for three years and may be far broader and more chilling in its application and effects.

> Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency [hereinafter "NSA"] to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.
>
> Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The

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TIMES, July 22, 2005, at A1. It is not clear how the City will make such searches constitutional in light of *Delaware v. Prouse*, 440 U.S. 648 (1979), in which the Court declared a random stop of a vehicle, with neither probable cause nor reasonable suspicion to believe that any violation had occurred, violated the Fourth Amendment. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) (authorizing limited stops of individuals on the street and pat-downs of their outer clothing if the police have reasonable suspicion, based on "specific and articulable facts" that crime is afoot). Justice White noted, however, that it was the randomness of the stop that offended the Constitution.

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type [sic] stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

Prouse, 440 U.S. at 663 (footnote omitted). The Court did not attempt to explain how, if it is unconstitutional to stop a single vehicle without probable cause or reasonable suspicion, it might nonetheless be constitutional to stop every vehicle without probable cause or reasonable suspicion. On the other hand, the Court has held that a Border Patrol agent's simple act of feeling the outside of a bus passenger's soft-sided luggage to attempt to discern whether the passenger was carrying contraband violated the Fourth Amendment. Bond v. United States, 529 U.S. 334 (2000). This may pose a problem for the New York plan.

184. Chan & Fahim, *supra* note 183.

185. *See* Robert F. Worth, *Privacy Rights Are at Issue in New Policy on Security*, N.Y. TIMES, July 22, 2005, at B5.

186. *Id.*

> agency, they said, still seeks warrants to monitor entirely domestic communications.[187]

That report set off a cascade of follow-up reports as public officials and private individuals reacted to the news.[188] "A federal judge . . . resigned from the court that oversees government surveillance in intelligence cases in protest of President Bush's secret authorization of a domestic spying program. . . ."[189] The Justice Department announced that it would investigate not the legality of the program, but rather whether those who revealed the program's existence to the New York Times committed criminal acts in doing so.[190] The Washington Post raised the possibility that NSA was conducting domestic surveillance even before President Bush purported to authorize it.[191] The Foreign Intelligence Surveillance Court asked for an explanation of the program and the authority for it out of concern that its own proceedings might have been tainted by unknowing receipt of evidence traceable back to NSA spying.[192] The chairman of the Senate Judiciary Committee decided to hold hearings to consider whether the President acted illegally.[193] For its part, the executive branch refused requests from the Senate

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187. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 15, 2005, at A1. The revelation of the spying program was not the only unusual thing about the article. The reporters also revealed that the *Times* had withheld publication for a year under pressure from the White House and ultimately omitted some of the story because of administration-expressed security concerns. *See id.*

188. *See, e.g.*, Peter Baker & Charles Babington, *Bush Addresses Uproar over Spying*, WASH. POST, Dec. 20, 2005, at A1; Dan Eggen & Charles Lane, *On Hill, Anger and Calls for Hearings Greet News of Stateside Surveillance*, WASH. POST, Dec. 17, 2005, at A1; Barton Gellman & Dafna Linzer, *Pushing the Limits of Wartime Powers*, WASH. POST, Dec. 18, 2005, at A1.

189. Carol D. Leonnig & Dafna Linzer, *Spy Court Judge Quits in Protest*, WASH. POST, Dec. 21, 2005, at A1.

190. Echoes of the Pentagon Papers case from the Viet Nam War era are unmistakable. See *New York Times Co. v. United States*, 403 U.S. 713 (1971), which "confirmed the weight of First Amendment principles and the importance of airing information potentially critical of the government, despite drastic security, military, and diplomatic repercussions." Elana J. Zeide, *In Bed with the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309, 1329 (2005).

191. *See* Dafna Linzer, *Secret Surveillance May Have Occurred Before Authorization*, WASH. POST, Jan. 4, 2006, at A3.

192. *See* Carol D. Leonnig, *Surveillance Court Is Seeking Answers*, WASH. POST, Jan. 5, 2006, at A2.

193. *See* Douglas Jehl, *Specter Vows a Close Look at Spy Program*, N.Y. TIMES, Jan. 16, 2006, at A11.

Whether the President acted legally or not is for now a matter of public debate. *See, e.g.*, Noah Feldman, *Deliberation Nation*, N.Y. TIMES, Feb. 5, 2006, § 6, at 17. In 1972, the Supreme Court held in *United States v. United States District Court*, 407 U.S. 297 (1972), a unanimous Court (Justice Rehnquist not participating) held that electronic surveillance in domestic security matters was constitutional only if conducted pursuant to the Fourth Amendment's warrant

Committee for Justice Department opinion documents,[194] and there the matter rests at this writing. Justice Harlan's concerns and Professor Amsterdam's warning about uncontrolled government spying making every member of society less secure seem to be mere speculation no longer.

Whether one is addressing random stops of transit passengers, police practices of recruiting and using false friends to accomplish what the police presumably cannot do for themselves, or the President's NSA spying program, the underlying question is what kind of society the Constitution contemplates. Recent police practices in New York and Boston seem to envision a society in which the contents of one's parcels are not private whenever one is in a public place. The false-friend cases apparently countenance a society in which one speaks to another person only if one is willing to accept the risks that the

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procedure. *Id.* at 321. The Court expressly did not consider the extent of presidential surveillance power with respect to "the activities of foreign powers, within or without this country." *Id.* at 308, 321-22. In 1978, Congress passed the Foreign Surveillance Intelligence Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801-1811 (2000)) [hereinafter "FSIA"]. That statute addresses part of the question that the Court reserved by requiring warrants for electronic surveillance of anyone in the United States. *See* 50 U.S.C. § 1802 (2000). To the extent that NSA has without warrants been intercepting communications involving at least one person within the United States, it appears that such activity violates FSIA, which was foresighted enough to provide that electronic surveillance except as authorized by statute is a prohibited activity. *See* 50 U.S.C. § 1809 (2000).

The Government's response has been to argue that both Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), enacted in the immediate aftermath of the September 11 terrorist attack on the United States, and the Constitution's designation of the President as commander-in-chief of the military allow the President to take any actions he deems necessary to protect the nation from terrorism.

> [T]he administration argues that another law, the Sept. 18, 2001, Authorization for Use of Military Force, superseded FISA: by giving the president the power to make war against Al Qaeda and its supporters, the argument goes, the law implicitly authorized the customary activities of war, including a wide variety of intelligence gathering. When challenged on this point, the administration's next line of defense is the Constitution: the president's responsibility as commander in chief and his executive power over foreign affairs are said to entail the authority to listen to conversations across borders that are relevant to national security.

Feldman, *supra*, at 17. There are some difficulties with the administration's arguments. First, the administration implicitly argues that the restrictions of FSIA are unconstitutional as a matter of separation of powers. Second, as the Supreme Court has repeatedly admonished, repeals by implication (in this case of portions of FSIA by the 2001 Authorization) are disfavored. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 99 (1980); Schlesinger v. Councilman, 420 U.S. 738, 752 (1975). Resolution of this debate is beyond the scope of this Article. The important thing, for present purposes, is the Government's assertion of a constitutional entitlement to conduct surveillance of persons within the United States without constraint from the Fourth Amendment.

194. *See* Eric Lichtblau, *Panel Rebuffed on Documents on U.S. Spying*, N.Y. TIMES, Feb. 2, 2006, at A1.

individual may already be acting as a government agent and informer and that the government may be listening in on the conversation. The Court's position is that everyone is charged with the knowledge that when they speak, they may be speaking to the government. The President's position appears to be that his Article II powers as commander-in-chief, combined with Congress's authorization of military force following the September 11 attacks, allow him to ignore other parts of the Constitution. The world has witnessed such societies in the recent past, but they have not been located on the North American continent[195] or purportedly functioning under the U.S. Constitution. There is, however, an even larger problem, which flows from the confluence of the Court's assumption-of-risk approach and its expectation-of-privacy analysis as the Court has interpreted it since *Katz*. Part III addresses the logical *dénouement* of that meeting.

III. TAKING THE COURT'S FOURTH AMENDMENT CASES SERIOUSLY: THE IRON LAW OF (UN?)INTENDED CONSEQUENCES

The Court has made clear that the Fourth Amendment protects only reasonable expectations of privacy. If there is no reasonable expectation of privacy, there is no Fourth Amendment protection. Cases like *Smith v. Maryland*[196] and *United States v. Miller*[197] make that clear. The Court has taken the same approach in the false-friend cases.[198] It is important to focus on exactly what makes the reasonable expectation of privacy disappear: it is not the fact that one's listener is cooperating with the government; it is the risk that he may be. The risk, of course, is always present. If it is the risk that causes the reasonable expectation of privacy to evaporate, however, then there can be no expectation of privacy whenever one is talking to another person, whether or not that person is in fact acting as an informer. What is to stop the police from eavesdropping on

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195. *See, e.g.*, Joachim J. Savelsberg, *Contradictions, Law, and State Socialism*, 25 LAW & SOC. INQUIRY 1021, 1030 (2000):

> [A]n extensive informant system aided the policing of Soviet society. In extreme periods such as the late 1920s, 10% of the population was recruited as full-time informers, and 30-60% of the population was forced to cooperate in undercover work of the security police. An additional percentage was coopted [sic] into the militia's undercover operations.

See also W.W. Rostow, THE DYNAMICS OF SOVIET SOCIETY 200 (1967) (emphasis added):

> The power of the police has . . . been directly felt by various ethnic and other groups considered, at one time or another, politically unreliable. More generally, the "secret sections" set up within offices, factories, military units, and other organizations, and the forced recruiting of *vast numbers of citizens as informers*, bring home the existence of the secret police to the people at large, even when the average unskilled factory or farm worker may live out his life without becoming personally involved.

196. 442 U.S. 735 (1979); *see supra* notes 100-08 and accompanying text.

197. 425 U.S. 435 (1976); *see supra* notes 110-15 and accompanying text.

198. *See supra* notes 125-74 and accompanying text.

any conversation, circumventing the protection that the Fourth Amendment would otherwise offer, by arguing that there was no reasonable expectation of privacy because the listener *might have been* wired or otherwise cooperating with the police?

It is tempting to respond that the risk the speaker assumed was that his *listener* would turn out to be a false friend, not that the police might unilaterally have decided to use technology to listen in on the conversation. That response, however, requires recognition of a relative expectation of privacy,[199] something the Court has resolutely refused to do. Privacy and the reasonable expectation of privacy are all-or-nothing matters; one either has them or not. That was the thrust of Justice Marshall's dissent in *Smith*.[200] The fact remains, however, that it was a dissent. Both in *Smith* and *United States v. Miller*[201] the Court took the position that once the individual delivers information to someone else, whether in digital or paper form, she loses any expectation of privacy that she might theretofore have enjoyed.[202] The false-friend cases demonstrate that this is true of oral communications as well. Moreover, *Miller* is particularly important because it makes clear that the loss of privacy is unrelated to the information recipient's voluntary transmission of the information to third parties. In *Miller*, the government had subpoenaed the defendant's bank records; the bank had not sought out the government or otherwise volunteered to cooperate with it.[203] The Court elided the distinction between willing and unwilling revelation:

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199. *See supra* text accompanying notes 103-09.

200. *See supra* text accompanying note 104.

201. 425 U.S. 435 (1976).

202. *See supra* notes 110-15 and accompanying text.

203. *Miller*, 425 U.S. at 436. *Miller* argued, inter alia, that the subpoenas were defective in form. The Court rejected his position, finding "that there was no intrusion into any area in which respondent had a protected Fourth Amendment interest . . . ." *Id.* at 440. In effect, the Court was holding that Miller had no standing to object, since the records did not belong to him (even though they reflected his financial dealings). Two years later, however, the Court urged abandoning the vocabulary of standing in Fourth Amendment cases in favor of the direct substantive inquiry:

> [T]he question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim. We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement discussed in *Jones* and reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of "standing," will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.

Rakas v. Illinois, 439 U.S. 128, 138-39 (1978) (footnote omitted). One might regard *Miller* as a forerunner of *Rakas*'s approach.

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.[204]

It is noteworthy that *White*, *Hoffa*, and *Lopez*, which the Court cited, all involved circumstances in which the listener was not compelled by process to reveal the information. Be that as it may, *Miller* and the precedents that underlie it make clear that under the Court's Fourth Amendment analysis, one divulges information to almost anyone at his own risk, and the risk is not simply that the recipient of the information will decide (or has previously decided) to share the information with the government, but rather that the government will seize the information. Whether the seizure is by subpoena or uninvited eavesdropping is, given *Miller*'s rationale, of no constitutional importance.

The upshot is that the government may eavesdrop on or intercept any conversation that takes place outside of an area that the government has no right to enter.[205] The government need have neither probable cause nor reasonable suspicion to do so, because, according to the Court, there are no Fourth Amendment interests involved. For that matter, there may be no constitutional impediment to the government intercepting conversations that take place within what the Court still calls a "constitutionally protected area"[206]—the home—despite *Katz*'s admonition that the term focuses on the wrong issues,[207] as long as the government does not depend upon an illegal entry to do so. After all, if revealing information to another person causes the reasonable expectation of privacy to disappear, what difference does it make whether the government overhears a conversation taking place in a restaurant or the defendant's home?[208]

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204. *Miller*, 425 U.S. at 443 (citation omitted) (citing United States v. White, 401 U.S. 745, 751-52 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427 (1963)).

205. Presumably, the government could not enter a private home or office for the purpose of placing a transmitter on the premises, because such an intrusion would itself be a Fourth Amendment violation, and conversations intercepted as a result of it would be suppressible fruits. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

206. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34 (2001) (citing Silverman v. United States, 365 U.S. 505 (1961)); United States v. Knotts, 460 U.S. 276, 286 (1983).

207. *See supra* text accompanying notes 77-82.

208. At this point, of course, the ghost of the Court's cases dealing with physical trespass smiles grotesquely in the background. Suppose, however, that no trespass occurs. As *Kyllo* demonstrates, technology now makes it possible to detect from outside a home things that occur within the home. With respect to conversations, it may be entirely possible to detect the contents of a conversation inside a house by electronic capture of sound vibrations, just as in *Kyllo*, where the police equipment detected an unusual heat source within the building. *Kyllo*, 533 U.S. at 29-30.

IV. THE COURT'S MUDDLED VIEW OF PRIVACY AS AN ALL-OR-NOTHING CONCEPT

The progression from what the Court has always found constitutionally improper to what it now recognizes as permissible under the Fourth Amendment is not nearly as clear-cut as the Court would like everyone to believe. From *Boyd v. United States*[209] forward, the Court has disapproved collection of evidence facilitated by trespass. In addition, even where there was no trespass because the person who seized the evidence had been invited into the private area, the Court refused to admit physical evidence taken surreptitiously.[210] In *Olmstead*, while ruling evidence obtained by wiretapping admissible, the Court relied on two grounds: one, that spoken words were not within the class of things that the Fourth Amendment protects; and the other, that there had been no trespass committed in order to acquire the information.[211] *Olmstead* implied that if a government agent enters the defendant's home or office undetected and without permission and hides in order to hear the defendant's conversations, the Court would suppress the agent's testimony. Justice Burton's dissent in *On Lee v. United States*[212] confirmed this view, as did the Court's decision in *Silverman v. United States*,[213] when the Justices condemned physical intrusion, no matter how minimal.[214]

Moreover, the Court has ruled "that obtaining by sense-enhancing technology

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Wiretapping, of course, has never required physical entry, as *Olmstead* recognized. Olmstead v. United States, 277 U.S. 438, 457 (1928), *overruled in part by* Katz v. United States, 389 U.S. 347 (1957) *and* Berger v. New York, 388 U.S. 41 (1957).

209. 116 U.S. 616 (1886), *overruled in part by* Fisher v. United States, 425 U.S. 391 (1976); *see supra* notes 4-10, 19-23 and accompanying text.

210. *See* Gouled v. United States, 255 U.S. 298 (1921), *overruled in part by* Maryland Penitentiary v. Hayden, 387 U.S. 294 (1957); *see supra* notes 130-33 and accompanying text.

211. *Olmstead*, 277 U.S. at 464, 466.

212. 343 U.S. 747, 765-66 (1952) (Burton, J., dissenting) (emphasis added):

> It seems clear that if federal officers without warrant or permission enter a house, under conditions amounting to unreasonable search, and there conceal themselves, the conversations they thereby overhear are inadmissible in a federal criminal action. It is argued that, in the instant case, there was no illegal entry because petitioner consented to Chin Poy's presence. This overlooks the fact that Chin Poy, without warrant and without petitioner's consent, took with him the concealed radio transmitter to which agent Lee's receiving set was tuned. For these purposes, *that amounted to Chin Poy surreptitiously bringing [federal agent] Lee with him*.

See supra notes 112-24 and accompanying text.

213. 365 U.S. 505 (1961); *see supra* notes 67-70 and accompanying text.

214. Recall that in *Goldman v. United States*, 316 U.S. 129 (1942), the Court had approved use of a speech detection device placed *against* a wall but not penetrating it. *See supra* note 62 and accompanying text. The *Silverman* Court noted, "We find no reason to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch." *Silverman*, 365 U.S. at 512.

any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search . . . where . . . the technology in question is not in general public use."[215] The question, of course, is what constitutes general public use. Binoculars clearly do;[216] infrared heat sensors do not.[217] The Court has held that both some aerial photography[218] and electronic tracking devices[219] are sufficiently common that their use does not constitute a Fourth Amendment search. On the other hand, a tracking device that permits police to determine exactly where a particular object is inside a private house does constitute a search,[220] and Justice O'Connor's concurrence in one of the aerial surveillance cases suggested that some aerial observations might be sufficiently intrusive to be a Fourth Amendment search.[221] One of the difficulties that the Court's approach invites is that as technology becomes more and more sophisticated, it also tends to become more and more common. The Court's general-public-use standard may have the effect of constricting Fourth Amendment protection of privacy over time, as the public adopts technologies once restricted to the laboratory or the military (e.g. aerial photography).

Consider now some variations on the themes that the Court has confronted. In *On Lee*, suppose that Chin Poy, the informer, had stealthily admitted a government agent to the house and directed him to a nearby closet when On Lee's back was turned. It seems beyond question that the Court would suppress the agent's testimony as to conversations he overheard. And yet, in the same way that the Court tells us that one assumes the risk in speaking with someone that he may tell the government (or be wired for sound at the time of the conversation), does one not risk, when admitting someone to the home, that the guest will subsequently open the door for others to enter without the host's permission? Under the Court's Fourth Amendment jurisprudence, it is no answer to say that the house guest lacks the authority to admit uninvited people to the home. In the false-friend cases, the defendants certainly had not authorized their confidantes to record or transmit conversations, but the Court brushed aside the idea of

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215. Kyllo v. United States, 533 U.S. 27, 34 (2001) (citation omitted).

216. *See, e.g.*, United States v. Grimes, 426 F.2d 706 (5th Cir. 1970); Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968).

217. *Kyllo*, 533 U.S. at 34.

218. *See* Dow Chem. Co. v. United States, 476 U.S. 227 (1986).

219. *See* United States v. Knotts, 460 U.S. 276 (1983).

220. *See* United States v. Karo, 468 U.S. 705, 716 (1984):

> We cannot accept the Government's contention that it should be completely free from the constraints of the Fourth Amendment to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual's home at a particular time. Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.

221. *See* Florida v. Riley, 488 U.S. 445, 455 (1989) (O'Connor, J., concurring).

limited consent by using its assumption-of-risk approach. If one risks repetition or simultaneous transmission to the government of conversations that one supposes to be confidential, then surely one must also risk other types of confidante infidelity, including admitting government agents into areas otherwise private and in which the homeowner would not have welcomed them. Certainly there is a difference between bringing in a hidden transmitter and admitting a government agent; the question is whether the difference rises to a constitutional level for Fourth Amendment purposes and, if so, exactly why.

In *United States v. Matlock*,[222] the Court held that a person with common authority over private premises can admit the police and consent to a search, but clearly the informants in *On Lee*, *Hoffa*, and *White* were not in that category. The question is whether someone without common authority can similarly sanction a government intrusion, and the answer turns out to be yes and no. "Generally, a guest cannot give consent to a search of the premises that will be effective against his host."[223] In *Illinois v. Rodriguez*,[224] police gained entry to the defendant's apartment with the help of a person who had formerly shared the apartment and had retained a key to it. The Court upheld the state court's finding that the prosecution had failed to carry its burden of showing joint access or control so as to bring the case within the *Matlock* rule.[225] Nonetheless, the Court also held that the reasonable belief that there was authority, given the facts available to the police at the time, made the ensuing search reasonable for Fourth Amendment purposes.[226] That finding came with a significant limitation, however:

> [W]hat we hold today does not suggest that law enforcement officers may always accept a person's invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief'" that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists.[227]

It seems clear, therefore, that for a casual visitor in a private place to admit the police would make evidence the police acquire during their presence

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222. 415 U.S. 164 (1974).

223. LAFAVE AL., *supra* note 2, § 3.10, at 259.

224. 497 U.S. 177 (1990).

225. *Id.* at 181-82 (finding "the Appellate Court's determination of no common authority over the apartment . . . obviously correct").

226. *Id.* at 186.

227. *Id.* at 188-89 (citation omitted) (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

inadmissible; the police would have no reason to think that such a person was authorized to give the consent necessary in the absence of a warrant or probable cause coupled with exigent circumstances rendering a warrant unnecessary.[228] A fortiori, for a casual visitor who is already a police informer (like Chin Poy in *On Lee*) to take advantage of his presence to admit officers without the host's knowledge or permission would similarly violate the Fourth Amendment. When an agent of the government effectively takes in not the officer herself, but rather only the officer's electronic ear, the government accomplishes precisely the same thing in terms of intercepting conversations as if the officer were in the closet or had trespassed for purposes of planting a listening device. To be sure, it is different simply to bring in a transmitter, but is it *constitutionally* different?

One can distinguish the two cases only by relying on theories of property and trespass that the Court has long since discarded for Fourth Amendment analysis.[229] If the Court really believes, as it continues to say, that the Fourth Amendment protects privacy, not property per se, then the cases are constitutionally indistinguishable, because the privacy of the individual with respect to his conversations is no more violated by the surreptitiously-admitted policeman in the closet than by the policeman's ear in the informer's pocket. Seizure of the conversation is the same in both instances, as is the defendant's decision to reveal the confidence to the informer and the risk the Court says he assumed in doing so.

All of this flows from the Court's all-or-nothing approach to expectations of privacy. Yet the Court's view blinks reality and ignores some of the Court's own precedents (and, one suspects, the Justices' own expectations)[230] that do recognize relative expectations of privacy. For example, in *Florida v. Jimeno*,[231] the Court noted that the expressed object of a search controls the inferred scope of consent if the defendant expresses no particular limitations on the search. In that case, the defendant consented to a search of his car for narcotics, and the Court held that this inferentially included opening a paper bag found on the floor of the car.[232] At the same time, the Court cited with approval a Florida case that held that consent to search a car's trunk did not reasonably include consent to break open locked containers found therein.[233] Similarly, permission for an undercover agent to enter the home is not consent to a search of the home,[234] and a call from a home for emergency help does not authorize a second entry for purposes of conducting

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228. There is a practical problem, however, of the extent to which the police must question someone who offers them access about his entitlement to do so.

229. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); Katz v. United States, 389 U.S. 347 (1967).

230. *See infra* note 233 and accompanying text.

231. 500 U.S. 248 (1991).

232. *Id.* at 251-52.

233. *Id.* (citing State v. Wells, 539 So. 2d 464 (Fla. 1989), *aff'd*, 495 U.S. 1 (1990)).

234. *See* Gouled v. United States, 255 U.S. 298 (1921), *overruled in part by* Maryland Penitentiary v. Hayden, 387 U.S. 294 (1957).

a general search.[235] As a general rule, "[t]he scope of a consent search can be limited by the consentor [sic] to specific areas or types of items."[236]

Beyond even that, the Court has explicitly recognized a relative expectation of privacy in the Fourth Amendment context. In *Mancusi v. DeForte*,[237] police acting on a subpoena duces tecum (but not a warrant) invaded a union office used by DeForte and several other union officials and seized some union records from DeForte's possession. The Court held that DeForte had standing to object on Fourth Amendment grounds.

> [I]t seems clear that if DeForte had occupied a "private" office in the union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing. In such a "private" office, DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that *records would not be taken except with his permission or that of his union superiors*. It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. DeForte still could reasonably have expected that only those persons and their personal or business agents would enter the office, and that records would not be touched *except with their permission or that of union higher-ups*.[238]

Here is an acknowledgment by the Court that one may have a reasonable expectation of privacy with respect to some persons and not others. DeForte clearly had no reasonable expectation of privacy with respect to his union superiors (and perhaps not even with respect to his colleagues who shared the office), but the majority had no trouble concluding that he nonetheless had such an expectation with respect to the government. The Court has reaffirmed this idea, even in the context of a government employee:

> Given the societal expectations of privacy in one's place of work expressed in both *Oliver* and *Mancusi*, we reject the contention made by the Solicitor General and petitioners that public employees can never have a reasonable expectation of privacy in their place of work. Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate

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235. *See* Thompson v. Louisiana, 469 U.S. 17 (1984).

236. WHITEBREAD & SLOBOGIN, *supra* note 127, § 12.05, at 290.

237. 392 U.S. 364 (1968).

238. *Id.* at 369 (emphasis added) (citations omitted).

> regulation. Indeed, in *Mancusi* itself, the Court suggested that the union employee did not have a reasonable expectation of privacy against his union supervisors.[239]

Thus, *Mancusi*'s recognition of a relative expectation of privacy appears to be more than a sport.

There are two other and more significant problems with the Court's position. An unspoken assumption underlies the false-friend cases. The Court implicitly states that an expectation of privacy is unreasonable for Fourth Amendment purposes if there is a risk of that expectation being frustrated. That is, *expectation* of privacy is not enough; there must be a *guarantee* of privacy. A moment's reflection will demonstrate why this assumption must remain unspoken for the Court's approach to retain even superficial validity. When a client speaks to her attorney, there is an expectation that the conversation will remain confidential. Indeed, the standards of professional conduct to which the attorney is subject demand confidentiality.[240] Nonetheless, there is a risk that the attorney will betray the client and turn incriminating information over to the police. If the attorney does so (at least without a prior agreement with the police), the client will be unable to suppress the evidence because the attorney acted as a private agent to whose conduct the Fourth Amendment does not apply.[241] When one spouse speaks to the other, there is an expectation of privacy as to the contents of the conversation, one that the law recognizes in the spousal privilege. Nonetheless, there is a risk that the hearing spouse will elect to relay the information to the government. Does that mean that the expectation of privacy that attended the conversation was unreasonable?

Certainly the Court itself does not operate that way. All of the Justices hire law clerks. They certainly expect their clerks jealously to guard the confidentiality of chambers.[242] There is always a risk, however, that a clerk will decide to reveal information about cases under consideration or other matters that transpire in chambers. For that matter, if a Justice had a stash of cocaine in a file drawer, a clerk might decide to reveal its existence, even if that risk is a remote one. Under the Court's rationale, the Justices' expectations of privacy with respect to their clerks are not reasonable, because in the Court's calculus, risk of perfidy equals unreasonableness. Why that should be is a mystery.

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239. O'Connor v. Ortega, 480 U.S. 709, 717 (1987).

240. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983). The standards do not, however, cause the exclusion of improperly revealed material. "Even though the breach of those ethical confidentiality obligations might lead to professional discipline or loss of professional license, the professional codes do not provide a legal basis for the exclusion of evidence." PARK ET AL., *supra* note 167, § 8.02, at 418.

241. The client may, of course, have a civil action against the attorney, but she may have to pursue it from prison.

242. *See, e.g.*, David Lane, Bush v. Gore, *Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL ETHICS 863, 864 (2005) (noting that clerks must sign a confidentiality agreement when beginning Supreme Court employment).

Beneath the reasoning in the false-friend cases lies another assumption. The idea that a government intrusion carried out by deception is reasonable because of the suspect's consent is dependent upon the background premise that the Fourth Amendment protects only against searches known to be such by the suspect. That is, the false-friend cases seem to say that as long as the suspect does not know that a search is going on, there is no government intrusion and hence no Fourth Amendment problem. That assumes that the Fourth Amendment offers no protection against a search of which the suspect is unaware, but clearly that is not true. If it were, the government could conduct all the covert searches it wished, without concern about Fourth Amendment problems. *United States v. Payner*,[243] although refusing to suppress the seized evidence on standing grounds, nonetheless recognized that surreptitious, warrantless entry violates the Fourth Amendment. That holding demonstrates that the Amendment's focus is on the *fact* of government intrusion, not the *perception* of intrusion.

The false-friend cases rest on the idea that as long as the "consenting" suspect does not perceive a government intrusion, everything is all right. That reduces the idea of consent to a mockery and suggests that consent obtained by fraud is effective. As Professors Whitebread and Slobogin put it, "despite the Court's characterization of undercover encounters as consensual, these cases have nothing to do with consent as that concept is normally understood, since the nature of what is being agreed to is never made clear to the 'consentor [sic].'"[244] In other contexts, consent obtained by fraud or misrepresentation is ineffective.[245] This should not be surprising; otherwise giving consent unwittingly becomes the equivalent of issuing a blank check.

The Court should change its approach so that it more clearly reflects the values that underlie the Fourth Amendment. First, it should recognize relative expectations of privacy in this area as it has in others.[246] There is a critical difference between a person who decides after a conversation occurs to reveal its contents to the police and one who, cooperating with the police, engages the defendant in the conversation in the first place. In the first case, the individual is not acting as an agent of the police; in the second he is. If the false friend is acting as an agent of the police (and perhaps is wired to boot), there is official activity. The Fourth Amendment exists to guard individual privacy against official activity.

The Court recognized this distinction decades ago, when the exclusionary rule applied to the federal government because of *Weeks* but did not yet apply to

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243. 447 U.S. 727 (1980); *see supra* notes 116-21 and accompanying text.

244. WHITEBREAD & SLOBOGIN, *supra* note 127, § 12.01, at 276.

245. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 892B(2) (1979):

> If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.

246. *See supra* notes 235-39 and accompanying text.

the states. In *Byars v. United States*,[247] the defendant challenged the admissibility of evidence discovered when a federal agent participated in a search conducted by state police under a state-issued warrant that the Supreme Court declared could not constitutionally authorize a federal search.[248] The government also argued that since the state officers had found some of the evidence and turned it over to the federal officer, that evidence was not tainted. However, a unanimous Court refused to permit the government to evade the constitutional principle.

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account. But the rule is otherwise when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure. To hold the contrary would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official action. The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.[249]

The same principled reasoning applies when the source of the evidence is a false friend acting in cooperation with the government. If a private individual acting on his own account elects to turn evidence over to the government for use against a defendant, there is no Fourth Amendment violation, even if the individual obtained the evidence as the result of an unreasonable search.[250] This is not the case if the individual is already acting as a government agent.[251]

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247. 273 U.S. 28 (1927).

248. *Id.* at 29.

249. *Id.* at 33-34.

250. Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); Burdeau v. McDowell, 256 U.S. 465, 475 (1921). *See generally* WHITEBREAD & SLOBOGIN, *supra* note 127, § 4.02, at 105.

251. The year before the Court decided *Mapp v. Ohio*, 367 U.S. 643 (1961), a narrow majority of the Justices went even further, holding that evidence obtained by an unreasonable search and seizure is inadmissible in federal proceedings even if the state officers were acting entirely on their own. Elkins v. United States, 364 U.S. 206 (1960). The Court thus laid to rest what had come to be called the silver platter doctrine, concluding that "this doctrine can no longer be accepted." *Id.* at 208. As Justice Stewart pointed out, the doctrine actually originated in *Weeks*, which held that admission, against *Weeks*, of evidence that state officers had seized unlawfully (but without federal participation or connivance) was not constitutional error. *Id.* at 211. *Byars* had confirmed this view while holding that if a federal officer participated in the search "under color of his federal office" the resulting evidence was inadmissible. *Byars*, 273 U.S. at 33; *see also* Gambino v. United States, 275 U.S. 310 (1927) (finding when state officers conducted a search only to gather evidence of a federal crime, the search was on behalf of the United States, producing only inadmissible evidence).

In *United States v. White*,[252] the plurality suggested that it was of no moment whether the private individual was already a police agent at the time she acquired the evidence from the defendant or decided afterward to become one.[253] Yet, surely that cannot be. Status matters very much in the law of search and seizure. If a private citizen acting entirely on his own conducts an unreasonable search and turns the product over to the police, the evidence is admissible even though the police could not have conducted the search themselves. If the citizen subsequently becomes a police officer, that does not retroactively make the search unconstitutional. By the same token, if a police officer conducts a search that violates the Fourth Amendment, the evidence she seizes does not become admissible because the officer happens to retire the following day. Furthermore, if the distinction were unimportant, one would not expect to see the circuit courts wrestling with the question of when a non-officer is acting as an agent of the government; yet they do.[254]

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252. 401 U.S. 745 (1971).

253. *Id.* at 752 (emphasis added) ("If the law gives no protection to the wrongdoer whose trusted accomplice *is or becomes a police agent*, neither should it protect him when that same agent has recorded or transmitted the conversations which [sic] are later offered in evidence to prove the State's case.").

254. The circuit courts have struggled trying to determine when a private citizen is a government agent for Fourth Amendment purposes. They appear to consider two criteria: (1) whether the government knew of and acquiesced in the private search; and (2) whether the citizen acted to assist law enforcement or acted for his own purposes. *See, e.g.*, United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003); United States v. Souza, 223 F.3d 1197, 1201 (10th Cir. 2000). Whether an agency relationship exists depends on the degree of government participation in the citizen's activities. *See* United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003). Mere passive acceptance by the government is not enough. *Ellyson*, 326 F.3d at 546. Several circuits have also ruled that the citizen's sole objective must be to assist law enforcement. *See* United States v. Smith, 383 F.3d 700, 705 (8th Cir. 2004); *Ellyson*, 326 F.3d at 528; United States v. Shahid, 117 F.3d 322, 326 (7th Cir. 1997).

> A private citizen might decide to aid in the control and prevention of criminal activity out of his or her own moral conviction, concern for his or her employer's public image or profitability, or even the desire to incarcerate criminals, but even if such private purpose should happen to coincide with the purposes of the government, "this happy coincidence does not make a private actor an arm of the government."

Shahid, 117 F.3d at 326 (quoting United States v. Koenig, 856 F.2d 843, 850-51 (7th Cir. 1988)). It is not obvious why the motive of the individual should be relevant; certainly under the law of agency it is not. The question is *whether* the individual acts for the principal, not *why* she does. *See* RESTATEMENT (SECOND) OF AGENCY § 277 & cmt. d (1957) (holding principal liable for agent's misrepresentation within scope of duty even if agent misrepresents from motive other than serving principal); *id.* § 262 cmt. a, illus. 1, 2 (1957) (holding principal liable for agent's misrepresentations within scope of duty even if agent acts "entirely for his own purposes" unless person to whom the representation is made has notice). In any event, a false friend who seizes tangible or intangible evidence for the government after the government has sent him (and perhaps wired him) is acting on the government's behalf. That he may derive personal satisfaction, an increased sense of

Massiah v. United States[255] offers an analogous example of the importance of the listener's status. It, too, is a false-friend case, though it deals with the Sixth Amendment rather than the Fourth.[256] After the district court granted Massiah release on bail in a federal narcotics case, his co-defendant permitted the government to install a listening device in the co-defendant's car. He then engaged Massiah in conversation about the case. Agent Murphy testified at Massiah's trial as to the contents of the automobile conversation. The Court found that the government's conduct had violated Massiah's Sixth Amendment right to the effective assistance of counsel.[257] Justice Stewart's opinion quoted Judge Hays's opinion from the Second Circuit:[258] "In this case, Massiah was more seriously imposed upon [than the defendant in a police-station-interrogation case] because he did not even know that he was under interrogation by a government agent."[259] Had the co-defendant not been cooperating with the government when Massiah made the incriminating statements, and had he subsequently decided to turn the statements over to the government, it would have dictated a different outcome because there would have been no governmental action.[260] The Court reversed the conviction and remanded the case

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security, or some other personal benefit from doing so is beside the point. After all, most agents act for their principals for reasons other than unadulterated altruism; they do so because they expect to reap some benefit (often salary or professional fees) as a result.

255. 377 U.S. 201 (1964).

256. Massiah also argued that there was a Fourth Amendment violation in the government's use of the listening device. In light of its holding on the Sixth Amendment argument, the Court declined to reach that issue. *Id.* at 204.

257. *Id.* at 206.

258. United States v. Massiah, 307 F.2d 62 (2d Cir. 1962), *rev'd*, 377 U.S. 201 (1964). There were multiple charges against Massiah, one for conspiracy to import drugs and several for related substantive offenses. The Circuit panel split. Chief Judge Lumbard and Judge Waterman ruled that the government's behavior did not violate Massiah's rights; Judge Hays dissented on that point. Judges Hays and Waterman ruled that the trial court's charge to the jury on the conspiracy count was improper. As a result, the court affirmed Massiah's conviction on the substantive counts of the indictment but reversed on the conspiracy count.

259. *Massiah*, 377 U.S. at 206 (quoting *Massiah*, 307 F.2d at 72-73 (Hays, J., concurring in part and dissenting in part)).

260. *See id.* at 207 ("All that we hold is that the defendant's . . . incriminating statements, *obtained by federal agents* under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at trial." (emphasis added)). Justice White's dissent emphasized the difference.

> Had there been no prior arrangements between Colson [the co-defendant] and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating to Massiah's statements would be readily admissible at the trial, as would a recording which [sic] he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But if, as occurred here, Colson had been cooperating with the police prior to his meeting with Massiah, both his evidence

for a new trial without the tainted evidence.[261]

As *Massiah* makes clear, status is everything. There was no claim in *Massiah* that the defendant's revelations were anything but consensual. The co-defendant did not trick Massiah into saying anything he did not intend to say. The government simply sent the co-defendant to engage Massiah in conversation about the case. It is superficially tempting to distinguish *Massiah* from the false-friend cases because the Court ruled under the Sixth Amendment, not the Fourth. That, however, overlooks the critical aspect common to both situations. In both situations, the government intruded on a privacy status that the Constitution recognizes. In both situations, the defendants willingly (albeit unknowingly) reveal evidence the government seeks. The privacy status between defendant and attorney stems from the Sixth Amendment's guarantee of the assistance of counsel. The privacy status of the defendant with respect to his home, office, or activities conducted out of public view comes from the Fourth Amendment.

Notably missing from the majority opinion in *Massiah* is any mention of Massiah's revelations being consensual. It made no difference at all. Justice White's dissent did focus on the voluntariness of Massiah's statements,[262] which did nothing so much as emphasize the majority's view that voluntariness was irrelevant and that the important fact was government intrusion. The question remains why the Court, in the Fourth Amendment area, chooses to focus on voluntariness rather than the fact that a government-sponsored intrusion occurs. Perhaps there is an unspoken hierarchy of amendments in the Court's calculus, with the Sixth Amendment right to counsel being more important than the Fourth Amendment's right to privacy. If so, the Court has never indicated such, nor is there any principled basis that it could articulate for making importance distinctions among provisions of the Constitution.

The critical thing to recognize is that when the government uses an individual to acquire evidence from a suspect, and the evidence is not in public view, a governmental intrusion—a search—occurs.[263] However, where the government uses a private actor to gather evidence that the government could not obtain on its own, it seeks to evade the Fourth Amendment's requirements. The Supreme Court should recognize such activity for what it is and, rather than permitting or even tacitly encouraging it, take steps to bring such conduct within Fourth Amendment scrutiny.

That is not to say that the government can no longer use undercover agents or rely on informers or false friends; it certainly can. Use of such individuals may

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> and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same—defection of a confederate in crime.

Id. at 211 (White, J., dissenting).

261. *Id.* at 207 (majority opinion).

262. *See id.* at 211 (White, J., dissenting).

263. If the evidence is in plain view, of course, the government need not resort to a private individual; it can make its observations directly. *See generally* LAFAVE ET AL., *supra* note 2, § 3.2(b), at 130-33.

represent good police work. The point is, however, that it *is* police work. The activities that such persons conduct are searches and are, therefore, subject to Fourth Amendment analysis and protections. The police search conducted through a wired false-friend is no less a search than if the police planted the listening device themselves. If the police wish to plant a listening device in a suspect's home or office, that activity will be subject to Fourth Amendment standards, which is to say that it would require a warrant supported by probable cause. When the police instead send a recording device into the home or office on the person of the false friend, the fact that the false friend transports the device for the police should make no constitutional difference.

CONCLUSION

The Court's false-friend jurisprudence connotes a society in which one always speaks at his own peril, for according to the Court, no expectation of privacy is reasonable if there is a chance that it will be frustrated. Revealing something in conversation risks that the listener is not simply the person whom the speaker believes he is addressing, but also the government. It is not just the wrongdoer who need be concerned. As Justice Harlan pointed out, the perception that conversation may not be truly private will have a general deterrent effect.[264] Political discussion may become more restrained, and people may hesitate openly to discuss controversial social issues. The time in which we live only accentuates that possibility. As a part of its response to terrorism, the federal government has vigorously asserted the entitlement to arrest and confine incommunicado, indefinitely, and without judicial process of any sort anyone whom it designates an "enemy combatant," whether citizen or alien. It finally took the Supreme Court to tell the government that it could not dispense with all legal process and imprison someone merely on the executive branch's say-so.[265] It is not much of a stretch to imagine that in such a climate, people might be extraordinarily cautious discussing the Middle East if they thought the government were listening.

Speaking also becomes riskier for the innocent person suspected of a crime. Comments taken out of context (or, for that matter, in context) may help the government build a circumstantial case. For example, the innocent suspect may reveal to someone that he was in the vicinity of the crime scene or that he harbors a grudge against the victim of a crime. Opportunity and motive being relevant to proof of guilt, the suspect may thus help unwittingly to incriminate himself, though he has done nothing wrong.

Justice Harlan's dissent in *United States v. White*[266] warned against unsupervised use of government power to spy on the people. He urged that

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264. *See supra* text accompanying note 175.

265. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

266. 401 U.S. 745, 768-95 (1971) (Harlan, J., dissenting); *see supra* text accompanying note 175.

electronic and false-friend surveillance as seen in the cases from *On Lee* to *White* be permitted only under the warrant requirements of the Fourth Amendment, so that government intrusion is possible only if a magistrate agrees with the government that there is probable cause.[267] Respect for the principles that underlie the Fourth Amendment and the rebellion that produced it, demands no less.

Daniel Webster warned of the sort of danger posed by unaccountable executive power.

> Good intentions will always be pleaded for every assumption of power, but they cannot justify it, even if we were sure they existed. . . . [T]he Constitution was made to guard the people against the dangers of good intentions, real or pretended. There are men, in all ages, who mean to govern well; but they mean to govern. They promise to be good masters; but they mean to be masters.[268]

The government always argues its good intentions for spying on the people, whether it is to apprehend criminals, as Justice White argued in *White*, or to prevent terrorism. One need not question the government's good intentions to appreciate that much of the Bill of Rights exists precisely to guard against well-intentioned zeal, more than outright knavery. That is why Justice Douglas warned that:

> We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and "bugging" run rampant, *without effective judicial or legislative control.*
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> . . . .
>
> [T]he privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of a man's life at will.[269]

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267. *See id.* at 786-87.

268. Daniel Webster, United States Senator, Address at a Reception at New York, March 15, 1837, *in* 2 THE PAPERS OF DANIEL WEBSTER: SPEECHES AND FORMAL WRITINGS 132 (Charles M. Wiltse, ed. 1988).

269. Osborn v. United States, 385 U.S. 323, 341, 343 (1966) (Douglas, J., dissenting) (emphasis added). As Justice Douglas said on another occasion, "[T]he Constitution was designed to keep government off the backs of the people." WILLIAM O. DOUGLAS, POINTS OF REBELLION 6 (1969); *see also* Laurence Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 162 (1984) (footnote omitted):

> [The Court invites] "the tyranny of small decisions," a lovely phrase coined some time ago by the economist Alfred Kahn. He used the phrase to describe the fallacies of those economists and managers who tend to look down at their feet to figure out how far

The Supreme Court's false-friend jurisprudence has written a prescription for exactly the types of harm that Justice Douglas foresaw. By declaring that one has no reasonable expectation of privacy when speaking with another, the Court removes conversation from the protections of the Fourth Amendment, leaving government power unchecked. The Amendment becomes an empty, and mocking, promise. The Court has thus abdicated the judicial function in an area so sensitive that it lay at the heart of the revolution.

The nation ratified the Fourth Amendment (and the First and Fifth as well) to protect against excessive governmental intrusion. The effect of the disappearance of the reasonable expectation of privacy is that Fourth Amendment limits—and, indeed, the Fourth Amendment itself as a practical matter—cease to exist with respect to communications. What the Court has accomplished (without, of course, saying so) is a return to *Olmstead*'s idea that words are not within the Fourth Amendment's protection.[270] In other words, it has used *Katz*'s rationale de facto to overrule one of the central holdings of *Katz*. Under the Court's assumption-of-risk and reasonable-expectation-of-privacy approach, one's legally protected expectation of privacy vanishes whenever one communicates with another person, because one never knows when the government may be listening. The Court's logic requires every person to *assume* that the government is listening, without having a warrant, without probable cause, and without reasonable suspicion. The President's NSA spying program confirms the soundness of that assumption. George Orwell would be proud.[271] Those who proposed, wrote and ratified the Fourth Amendment, however, might be a bit concerned. Perhaps we should be as well.

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they've gone and where they're heading. It's not a very illuminating view. They may think they've taken but a short step from where they were just a moment ago; it's no surprise that, by the time they realize it; they've departed a remarkable distance from their first premises.

270. *See supra* notes 51-64 and accompanying text.

271. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).