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Michael W. Cusick

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United States v. Yonn: Expanding the Government’s Capability to Eavesdrop

INTRODUCTION

The subtlety and accuracy of electronic surveillance devices arm government agents with effective weapons with which to confront crime.1 The potency of these devices, however, may threaten the privacy of personal conversations. Recognizing this

1. Eavesdropping is not a development of the electronic age. See 4 W. Blackstone, Commentaries 168: “Eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at court-lect. . . .”

Along with electronic developments, however, have come more sophisticated eavesdropping methods. Under present technology, devices can amplify conversations in a room by merely using the vibrations of the voices on the windowpane. Tubular and parabolic microphones can intercept conversations occurring hundreds of yards away. Not only are these devices powerful, they are increasingly subtle as well. For example, transmitters designed as olives transmit sound via their toothpick aerials. See generally Note, Eavesdropping and the Constitution, A Reappraisal of the Fourth Amendment Framework, 50 Minn. L. Rev. 378 (1965).

The potency of these devices has not been overlooked by the government. “[E]lectronic surveillances provide the Government with one of the most effective weapons in its legal armory.” Hearing of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (1974) (statement of William V. Cleveland, Ass’t Dir., Federal Bureau of Investigation, Sept. 17, 1974). See also S. Dash, R. Schwartz & R. Knowlton, The Eavesdroppers (1959), wherein the authors note that “[o]rganizations of police and district attorneys have constantly presented their case to the governor or legislature, claiming without hesitation that wiretapping has been, their most effective weapon against organized crime.” Id. at 38.

The practice of electronic eavesdropping by the government has prompted much criticism. See Spritzer, Electronic Surveillance By Leave of the Magistrate: The Case in Opposition, 118 U. Pa. L. Rev. 169 (1969). Professor Spritzer argues that all electronic surveillance should be abolished because of the danger it poses to privacy: “The time has come when, if we give reign to the advancing science of electronics, there will be no hiding down here.” Id. at 186. See also United States v. White, 401 U.S. 745, 764-65 (1971) (Douglas, J., dissenting) (“[J]ust everyone live in fear that every word he speaks may be transmitted or recorded and later reported to the entire world? I can imagine nothing that has a more chilling effect in people speaking their minds and expressing their views on important matters.”); Berger v. New York, 388 U.S. 41, 63 (1966) (“Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.”); JUDICIARY COMMITTEE, REPORT ON OMNIBUS CRIME CONTROL AND STATE STREETS ACT OF 1968, S. REP. NO. 1097, 90th Cong., 2d Sess. 92, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2112, 2154 [hereinafter cited as S. REP. No. 1097] (“As a result of electronic developments, pri-
threat, both the Supreme Court and Congress have developed guidelines controlling the use of electronic surveillance devices by government authorities.\(^2\)

The Supreme Court in *Katz v. United States*\(^3\) determined that those conversations that a person justifiably expects to remain private deserve fourth amendment protection from warrantless governmental scrutiny.\(^4\) In *Hoffa v. United States*,\(^5\) however, the Court held that a person may not justifiably expect a confidant to maintain the secrecy of what he has been told. Rather, a person’s protection lies in choosing his confidants carefully, not in the fourth amendment. Moreover, the informant may carry a transmitter or a tape recorder to obtain such evidence.\(^6\) Congress codified this holding in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 deals with federal eavesdropping. 18 U.S.C. §§ 2510-2520 (1982).

2. For a discussion of these guidelines, see infra notes 37-47 and accompanying text.


4. The fourth amendment to the Constitution provides:

   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 warrant shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.
   
   U.S. Const. amend. IV.

   It is the requirement of obtaining a warrant which protects the individual from unreasonable searches. Police must first discover facts which indicate that some act of a criminal nature has occurred in order to justify their intrusion. The police then present these facts to an independent magistrate who decides whether they suffice to justify a prudent man’s belief that a warrant should issue. The magistrate thereby makes a probable cause determination. By interposing an independent magistrate between the police and the individual, the fourth amendment protects the individual’s rights. It is presumed that a police officer “involved in the competitive enterprise of ferreting out crime” would render a distorted evaluation of the facts. A detached magistrate’s decision is more objective. Johnson v. United States, 333 U.S. 10, 14 (1948). See also Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1972) (State’s Attorney involved in investigation is not an independent magistrate.); MacDonald v. United States, 335 U.S. 451, 455 (1948) (warrantless entry to search house held unconstitutional).

   Critics have referred to the Supreme Court’s treatment of the fourth amendment as “confusing.” See Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 323, 329 (1973) (describing the Court’s fourth amendment cases as a “mess”); Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 Am. Crim. L. Rev. 603 (1982) (The author calls for a reexamination and reordering of the conceptual framework of fourth amendment jurisprudence.).


and Safe Streets Act of 1968.\(^7\)

The Court of Appeals for the Eleventh Circuit recently held in *United States v. Yonn*\(^8\) that government authorities without a warrant may place a device in a person's hotel room to monitor and record his conversations with an informant.\(^9\) In its analysis, the court first derived from *Katz* the proposition that constitutional protection attaches only to those conversations which a person justifiably expects to remain private.\(^10\) The court then relied upon *Hoffa* to reason that because the defendant confided in the informant, he could not justifiably expect that his conversations would remain private.\(^11\) Absent this justifiable expectation, the *Yonn* court held that fourth amendment protection did not attach to conversations which occurred in the hotel room. Thus, the court sanctioned the government's use as evidence the tapes derived from the warrantless electronic surveillance.

After first reviewing both judicial and statutory federal electronic surveillance law, this note will analyze the *Yonn* court's denial of the defendant's expectation of privacy, and will discuss *Yonn*’s detrimental impact upon individual liberties. This note will conclude that the Eleventh Circuit’s holding in *Yonn* that the defendant had no justifiable expectation of privacy was erroneous, and that the government therefore violated the defendant’s fourth amendment rights by eavesdropping on his conversation without a warrant.

**BACKGROUND**

*The Supreme Court Decisions: Electronic Surveillance and the Government's Use of Informants*

The Supreme Court first addressed the question of whether the fourth amendment protects individuals from electronic surveillance in *Olmstead v. United States*.\(^12\) In *Olmstead*, the Court held that although the fourth amendment shields tangible objects
such as “homes” and “papers” from unwarranted governmental intrusions, it does not protect intangibles such as conversations. Moreover, because only physical objects are protected, only a physical trespass upon those objects can constitute a search under the fourth amendment.

The two-pronged test developed by the Court in *Olmstead* survived until *Silverman v. United States*. In *Silverman*, police distributed liquor in violation of the Volstead Act. Without obtaining a search warrant, federal agents tapped the telephone lines leading out of the building in which the conspiracy was headquartered. After listening to and recording conversations for four months, officials had compiled enough evidence to convict Olmstead. The Supreme Court affirmed the court of appeals' affirmation of the trial court's denial of Olmstead's motion to suppress transcripts of the recorded conversations. This opinion is now known primarily for Justice Brandeis's eloquent dissent calling for a constitutional right to privacy. *Id.* at 471.

A penumbral right to privacy has been derived from the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965). In *Griswold*, the Supreme Court reversed the defendant's conviction for violating a Connecticut statute prohibiting the use of contraceptives, ruling that the law impermissibly violated the privacy of the bedroom. Yet, the Court has rejected the notion that the fourth amendment creates a right to privacy per se. The protection of the fourth amendment applies only to unreasonable searches and seizures. *United States v. Katz*, 389 U.S. 349, 350 (1967). See also *Warren & Brandeis, The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

13. 277 U.S. at 465. 14. *Id.* Moreover, the Court noted that Congress could protect the secrecy of telephone conversations by legislation. *Id.* Congress responded by enacting § 605 of the Communications Act, which provides that “no person not being authorized by the sender shall intercept ... or divulge ... the contents ... of such communications.” 47 U.S.C. § 605 (1976 & Supp. V). Section 605 was first addressed by the Supreme Court in *Nardone v. United States*, 302 U.S. 379 (1937), in which the Court held the statute to prohibit the introduction into federal courts of evidence obtained directly by wiretapping. The Court construed the phrase “no person” to include federal law enforcement officials, and found that “divulgence” occurs within the meaning of the statute when wiretap evidence is introduced at trial. *Id.* at 381-82. The development of more sophisticated electronic devices rendered § 605 obsolete, since officials could eavesdrop without wiretapping. Title III was designed to be more comprehensive in its coverage of surveillance techniques.

15. 365 U.S. 505 (1961). In *Silverman*, police suspected the defendant of running a gambling operation. They secured the row house adjacent to the suspected premises for use as an observation post. The police then inserted a spike attached to a microphone through the wall between the houses until it touched a heating duct which acted as a sounding board; this enabled the police to listen to conversations throughout the house. Testimony derived from the monitored conversations was sufficient to convict the gamblers. *Id.* at 506. The Supreme Court ruled that the contact between the spike and the heating duct constituted a trespass. The Court concluded that the search was unlawful and excluded the testimony derived from this search. *Id.* at 511.

The principal eavesdropping cases decided during the interim between *Olmstead* and *Silverman* found the Court adhering to the *Olmstead* rule. See *Irvine v. California*, 347 U.S. 128, 132-33 (1954) (Police entered defendant's house by means of a key procured from a locksmith, and drilled holes into the defendant's roof in order to facilitate their elec-
physically intruded upon a suspect's home without a warrant in order to effect an electronic surveillance.\textsuperscript{16} Because of the trespass, the Court excluded the evidence derived from the surveillance.\textsuperscript{17} In so doing, the Court implicitly recognized that conversations, although intangible, merit fourth amendment protection.\textsuperscript{18}

Nevertheless, the Court did not abandon the physical intrusion test until \textit{Katz v. United States}.\textsuperscript{19} In \textit{Katz}, the issue was whether federal agents needed a warrant to monitor private telephone calls made from a public phone booth. Instead of applying trespass law, the Court altered fourth amendment jurisprudence by holding that the amendment protects a person's justifiable expectation of privacy from unreasonable searches. Furthermore, such justifiable expectations transcend physical boundaries.\textsuperscript{20}

\begin{itemize}
\item[\textsuperscript{16}] The Court described the device and process as follows:
\begin{quote}
The instrument in question was a microphone with a spike about a foot long attached to it, together with an amplifier, a power pack, and earphones. The officers inserted the spike under the baseboard in a second floor room of the vacant house and into a crevice extending several inches into the party wall, until the spike hit something solid "that acted as a very good sounding board." The record clearly indicates that the spike made contact with a heating duct serving the house occupied by the petitioners, thus converting their entire heating system into a conductor of sound.
\end{quote}
365 U.S. at 506-07.
\item[\textsuperscript{17}] \textit{Id.} at 512.
\item[\textsuperscript{18}] Once the Court concluded that the actions constituted a trespass, it decided to exclude the evidence. It glossed over the second \textit{Olmstead} requirement that the object seized be tangible. The abandonment of the tangible object requirement was expressly recognized in \textit{Wong Sun v. United States}, 371 U.S. 471 (1963), in which the Court stated that "it follows from our holding in \textit{Silverman v. United States}, 365 U.S. 505 (1961) that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of papers and effects." \textit{Id.} at 485.
\item[\textsuperscript{19}] 389 U.S. 347, 352-53 (1967). Federal agents placed a listening device on the outside of a public phone booth from which a suspect allegedly phoned in bets to his bookie. The defendant claimed that the agents trespassed by encroaching on the phone booth. The government claimed that it could not have trespassed because the phone booth was not a private place.
\item[\textsuperscript{20}] \textit{Id.} at 350-51.
\end{itemize}
Katz has often been summarized as holding that "the Fourth Amendment protects people, not places." This aphorism does not preclude the use of property notions in fourth amendment law. It does, however, negate the proposition that trespass law controls the legitimacy of a given search. The determination of what is actually protected when one has assumed an expectation of privacy "requires reference to a place."

To determine whether a person has a justifiable expectation of privacy, the Court in Katz developed a two-pronged test. The first prong requires a defendant to display a subjective expectation of privacy. The second prong requires a judicial determination that "that expectation is one which society is prepared to recognize as reasonable." Applying this test in Katz, the Court determined that the defendant maintained a reasonable expectation of privacy. First, the defendant displayed his subjective intention to keep his conversation private by closing the doors of the phone booth. Second, the Court determined that society recognizes as reasonable a person’s expectation that even a public

21. Id. at 351. See also United States v. Yonn, 702 F.2d 1341, 1347 (11th Cir. 1983).
22. 389 U.S. at 361 (Harlan, J., concurring). See also Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) ("By focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned the use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment."). See also Note, The Reasonable Expectation of Privacy—Katz v. United States, A Postscriptum, 9 Ind. L. Rev. 468, 492 (1976) ("The property or spatial considerations upon which the Olmstead standard was based cannot be entirely disregarded under the new standard...because they influence the determination of the objective reasonableness of the expectation...").
23. 389 U.S. at 361 (Harlan, J., concurring). Justice Harlan developed the test in his concurrence. It has, however, been adopted in Smith v. Maryland, 442 U.S. 735, 740-41 (1979); United States v. Berrong, 712 F.2d 1370, 1374 (11th Cir. 1983) (warrantless search of marijuana field held constitutional); United States v. Butts, 710 F.2d 1139, 1147 (5th Cir. 1983) (placement of beeper within aircraft without a warrant held unconstitutional).
24. 389 U.S. at 361 (Harlan, J., concurring). See e.g., Rakas v. Illinois, 439 U.S. 128, 143 n. 12 (1978) (no expectation of privacy in automobile glove compartment: "[A] legitimate expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'"); United States v. Bailey, 628 F.2d 938, 943 (6th Cir. 1980) (placement of electronic tracking device in a drum of legal chemicals used to manufacture illegal substance, PCP, violated defendant’s legitimate expectation of privacy); United States v. Botero, 589 F.2d 430, 432 (9th Cir. 1979) (placement of electronic tracking device in contraband did not violate defendant’s rights because one cannot have a legitimate expectation of privacy in an illegal substance), cert. denied, 441 U.S. 944 (1979); United States v. Washington, 586 F.2d 1147 (7th Cir. 1978) (same). See also Decker & Handler, Electronic Surveillance: Standards, Restrictions and Remedies, 12 Cal. W.L. Rev. 60 (1975); Note, supra note 22.
phone booth, while momentarily occupied, should afford the occupant privacy. The defendant's actions merited fourth amendment protection by fulfilling the two-pronged requirement.

Whether a particular place is considered public or private depends on the speaker's subjective expectations and society's objective recognitions. Society will not recognize as objectively reasonable a person's subjective expectations that his conversations on a crowded street corner will necessarily remain private. A crowded street corner, after all, is a public place. But society will recognize as reasonable a person's subjective expectation that his conversation in a phone booth will remain private.25

A person taking suitable precautions may justifiably expect his conversations to remain protected from the government's "uninvited ear."26 The Supreme Court decided in Hoffa v. United States,27 however, that a speaker enjoys no such fourth amendment protection from people whom he invites to listen. A confidant may reveal the contents of a conversation to the police without violating the defendant's constitutionally protected expectation of privacy. Likewise, police may, without first procuring a warrant, plant an informant who will disclose to them his conversations. The fourth amendment "does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."28 Instead, the wrongdoer's protection lies in his careful selection of confidants.29

The application of the Katz test to the Hoffa fact situation demonstrates that the defendant in Hoffa did not have such an expectation of privacy.30 First, he did not demonstrate an expectation that the contents of his conversations would remain concealed from the informant because he himself conversed with the informant. Second, because a risk of disclosure is inherent in every conversation, the Court determined that society would not recognize as objectively reasonable the defendant's expectation that his confidant would respect the privilege of that

25. 389 U.S. at 352.
26. Id.
28. Id. at 302.
29. "Although an informer intrudes upon privacy, an individual may guard against such intrusion by choosing his confidants with care." Spritzer, supra note 1, at 174 n.24.
30. See 389 U.S. at 363 n.1 (White, J., concurring). Hoffa was decided before Katz. Justice White emphasized, however, that Katz left Hoffa undisturbed.
communication.31

The Supreme Court has extended the Hoffa rule to include informants carrying electronic transmitters and recorders. In United States v. White,32 an informant carrying a transmitter without a search warrant participated in conversations with the defendant. Although the informant in White did not testify, as did the informant in Hoffa,33 the Supreme Court determined that the distinction between the informant testifying in one case and providing evidence in another was insignificant.34 The defendant had already assumed the risk that his confidant might reveal their discussions to the police; whether the informant did so simultaneously by transmitter, or shortly thereafter by tape recording, made little difference.35

The White Court implicitly required that the informant carry the electronic equipment on his person, rather than place it

31. 385 U.S. at 303 (quoting Lopez v. United States, 373 U.S. 427, 429 (1962) (Brennan, J., dissenting)): “The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the condition of human society. It is the kind of risk we necessarily assume whenever we speak.” Lopez was convicted of attempting to bribe an IRS agent. He appealed on the basis that evidence was derived from a surreptitious recording made by the agent. The Court reasoned that because the agent was duty bound to disclose the conversation, there was no valid objection to the use of evidence which reproduced the conversation more reliably than the agent's memory. 373 U.S. at 439.

32. 401 U.S. 745 (1971). Only three justices concurred with Justice White’s plurality opinion. Justice Black, however, cast the deciding vote because of his adherence to the view that conversations are not protected by the fourth amendment. Id. at 754. Four other justices, including Justice Douglas, disagreed with the plurality opinion. Three justices filed strong dissenting opinions; their objections were based primarily upon the power of electronic surveillance. “What the ancients knew as ‘eavesdropping,’ we now call ‘electronic-surveillance,’ but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb.” Id. at 756 (Douglas, J., dissenting). The issue of electronic surveillance has provoked heated debate.

33. Id. at 749, 751.

34. Id. at 752. Justice Douglas dissented on the grounds that the distinctions between an informant not carrying electronic surveillance equipment and one carrying such equipment was significant. Justice Douglas quoted Justice Brennan’s dissent in Lopez: “Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient, and police omniscience is one of the most effective tools of tyranny.” Id. at 759-60 (Douglas, J., dissenting) (citing Lopez v. United States, 373 U.S. 427, 465 (1963)).

35. Furthermore, the Court stated that it should not be “too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable.” Id. at 753.
somewhere else. The Court's rationale was that by conversing with an informant, a suspect jeopardizes his privacy by risking that the informant, and not a third party, will reveal, record, or transmit the conversation. Because it is in the informant that the suspect confides, and because it is the informant who reveals, transmits, or records the conversation, the defendant's rights are not abridged.

Title III: Congressional Regulation of Electronic Surveillance

The Court's holdings in Silverman, Katz, Hoffa, and White defined those situations in which a warrant is necessary; the Supreme Court in Berger v. New York described the type of warrant required. This decision, in turn, spurred congressional interest in regulating federal electronic surveillance.

In Berger, the Court examined the provisions of New York's wiretapping statute delineating the prerequisites for undertaking electronic surveillance. The defendant in Berger, who was convicted with evidence obtained by electronic surveillance, argued that the statutory warrant requirements were too vague. The Supreme Court agreed with this argument and reversed the lower court's decision.

36. The informant can either "simultaneously record conversations with electronic equipment which he is carrying on his person" or by "carrying radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency." Id. at 751. See Lopez v. United States, 373 U.S. 427 (1963). The Court, in referring to a recording device carried into a room by an IRS agent, noted this distinction: "It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself." Id. at 439. See also United States v. Caceres, 440 U.S. 741 (1979) (same).

37. 388 U.S. 41 (1967). In Berger, an attorney interested in illicitly obtaining a liquor license approached state officials. Pursuant to the state wiretapping statute, the officials procured a warrant to install a recording device in the attorney's office. The defendant attorney objected to the admission of tape recordings of his office conversations because the warrant authorizing the eavesdrop was too vague. The Supreme Court agreed with the attorney, and overturned the New York Court of Appeals' determination that the statute was constitutional. Id. at 55-60.


39. Generally, the Court emphasized that the state statute merely says that a warrant may issue on reasonable grounds to believe that evidence of a crime may be obtained by eavesdropping. 388 U.S. at 54. This requirement was held too broad. For a definitive review of the status of fourth amendment law at the time of the Berger decision, see LeFave, Search and Seizure, "The Course of True Law . . . Has Not . . . Run Smooth," 1966 U. ILL. L.F. 255. For a sprightly analysis of one state's statute, see Michael, Electronic Surveillance in Illinois, 1 LOY. U. CHI. L.J. 33 (1970).
The Court found three principal deficiencies in the state statute, all of which Congress responded to when it enacted Title III. First, because the statute did not require officials to set forth particular facts supporting probable cause, Congress required the petitioning officer to provide a description of the location and nature of the place in which the communications would be surveilled. Title III also specifies that the petitioning officer particularly describe the type of communication sought.

The second Berger criticism addressed the warrant’s sixty day validity. The Court reasoned that such a lengthy period did not sufficiently specify the period during which police had probable cause to believe that a crime was being committed. Congress remedied this problem by reducing the period to thirty days, and by adding an automatic termination provision. Government officials must now terminate electronic surveillance upon the accomplishment of the investigation’s objective if this occurs before the thirty day period has lapsed.

Third, Title III requires authorities to notify suspects that they have been electronically surveilled. Although the Court in Berger

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40. See S. REP. NO. 1097, supra note 1, at 2113. “This proposed legislation Title III conforms to the constitutional standards set out in Berger v. New York . . .” Id. Although never expressly decided by the Supreme Court, Title III’s constitutionality seems well established. See United States v. Cox, 449 F.2d 679 (10th Cir. 1971) (upholding Title III as being in accordance with Berger), cert. denied, 406 U.S. 934 (1972).


42. Id. § 2518(1)b(iii). The text of the statute reads in pertinent part as follows:

Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction . . . Each application shall include the following information

(b) a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communication sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.

Id.

43. 388 U.S. at 59.

44. 18 U.S.C. § 2518(5)(1982). Furthermore, this section provides that “[e]very order and extension thereof shall contain a provision that the authorization to intercept shall be . . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . .” Id. The purpose of this provision is to reduce to a minimum the interception of conversations which are irrelevant to
realized that any warning prior to surveillance would alert the suspects and thereby thwart the purpose of the operation, it nevertheless required some sort of notice. Congress responded with an after the fact notice provision. Authorities must inform subjects of surveillances regarding which conversations have been monitored and recorded. Authorities obtaining a warrant in conformity with the above requirements may constitutionally eavesdrop.

47. 18 U.S.C. § 2515 provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or, other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be violation of this chapter.

Id. This rule is to be interpreted along the lines of the judicially created exclusionary rule. See generally Scott v. United States, 436 U.S. 128, 139 (1978) (discussing Title III's legislative history).


In Weeks v. United States, 232 U.S. 383 (1913), the Court held that intangible evidence secured by an unreasonable search and seizure in violation of the fourth amendment is inadmissible in federal court. Silverman v. United States, 365 U.S. 505 (1961), extended that rule to also exclude intangible evidence, such as conversations. Mapp v. Ohio, 367 U.S. 643 (1961), applied the exclusionary rule to the states.

The judiciary created the exclusionary rule to promote judicial integrity and to deter unlawful police conduct. Judicial integrity is theoretically promoted by the judiciary’s refraining from the use of evidence obtained in violation of the constitution. See Bernardi, The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment?, 30 DE PAUL L. REV. 51, 56 (1981). See also Olmstead v. United States, 272 U.S. 438, 469-70 (1928) (Holmes, J., dissenting) (“[A]part from the Constitution, the Government ought not to use evidence obtained and only obtainable by a criminal act [wiretapping] . . . .”).


Attempts have been made to measure empirically whether the deterrent purpose of the rule has any claim to validity. See Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 KY. L.J. 681 (1974) (concluding that the data supported the deterrence theory); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 655 (1970) (concluding that the data neither supports nor detracts from the deterrence theory); Spiotto, Search and Seiz-
United States v. Yonn

The Majority Opinion

In United States v. Yonn, the Court of Appeals for the Eleventh Circuit addressed the issue of whether the fourth amendment protects an individual when authorities acting without a warrant place an electronic surveillance device in a suspect's hotel room to monitor and record his conversations with an informant. In Yonn, the defendant offered to pay a government informant named Dozier to fly a planeload of marijuana from Columbia to Florida. The Drug Enforcement Administration ("DEA") provided Dozier with a portable tape recorder to record some of his conversations with the defendant, Yonn. Yonn later asked Dozier to rent a motel room for him where they could discuss plans for Dozier's flight. Dozier complied with Yonn's
request, and informed the DEA of the planned meeting.ут Without obtaining a warrant, DEA agents placed a transmitter in Yonn’s hotel room and set up their monitoring and recording devices in another room. The DEA allegedly recorded conversations only when Dozier was in Yonn’s motel room. Nonetheless, the agents recorded enough incriminating conversation to convict Yonn of conspiracy to import marijuana and intent to distribute it.

The Court of Appeals for the Eleventh Circuit affirmed the trial court’s denial of Yonn’s motion to suppress the tape of his conversations with the informant. The Eleventh Circuit reached this conclusion by utilizing a two-step analysis. It first applied Katz, determining that Yonn had no expectation of privacy in his hotel room. Second, the court cited Hoffa as the basis for its conclusion that Yonn had maintained no justifiable expectation of privacy in his discussions with Dozier.

The Eleventh Circuit interpreted the Katz aphorism, “the Fourth Amendment protects people, not places,” to mean that no area physically demarcated can be constitutionally protected because of those boundaries. Therefore, the court concluded, the location of the conversations was irrelevant to the question of whether the conversations were protected. Instead, the court decided that the determinative factor was Yonn’s own expectation of privacy.

The Eleventh Circuit further relied upon the Hoffa decision to determine that Yonn had lost his expectation of privacy when he

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52. Id. at 1346.
53. Id. at 1347. The decision does not reveal why the DEA failed to secure a warrant.
54. Id.
55. Id. at 1344. Yonn violated 21 U.S.C. §§ 841, 846, 952, 963 (1982). In Title III, Congress specifically enumerated several crimes for which electronic surveillance could be authorized, including crimes “dealing in narcotic drugs, marijuana or other dangerous drugs.” 18 U.S.C. § 2516(2) (1982). See also S. Rep. No. 1097, supra note 1, at 2157 (“The major purpose of Title III is to combat organized crime.”).
56. 702 F.2d at 1347 (quoting Katz v. United States, 389 U.S. 347, 353 (1967)).
57. “The location of the conversations that were intercepted is not determinative; the proper inquiry is whether the government’s activity in electronically listening to and recording the conversations violated privacy upon which the [defendant] justifiably relied.” Id. at 1347 (quoting United States v. Shields, 675 F.2d 1152, 1158 (11th Cir. 1982)). The Yonn court relied upon United States v. Shields. Shields, however, involved an informant who carried the recording device on his person, as in United States v. White, 401 U.S. 745 (1971). The informant in Yonn, however, did not carry the device. See supra notes 32-36 and accompanying text for a discussion of White.
confided in Dozier. When Yonn confided in Dozier, he relinquished his expectation of privacy, leaving their conversation unprotected. Because the DEA may monitor and record unprotected conversations without obtaining a warrant, the tapes were admissible.

To support its analysis, the Eleventh Circuit noted that Dozier had consented to the recording of the conversation in the hotel room. The court reasoned that consent by one of the parties to the conversation’s interception waived constitutional protection for that conversation.

The Dissent

The dissent disagreed with the majority’s interpretation of Katz, observing that “Yonn [had] maintained an expectation of privacy, not that his conversations with Dozier would remain confidential, but that his hotel room would remain unbugged.” Thus, in the dissent’s view, the location of the conversations was relevant to the determination of whether they were constitutionally protected. The dissent agreed with the majority’s premise that Dozier could have disclosed the contents of the conversations to the government. Dozier, however, did not disclose the conversation. Instead, the government obtained the evidence by planting electronic devices in Yonn’s room without a warrant. This was the fourth amendment violation.

The dissent further argued that Dozier’s consent to the recordings did not determine the legality of the eavesdropping as the majority had maintained. Although Dozier rented the room, he rented it in Yonn’s name; Dozier therefore exercised no control over the room. Dozier had no authority to consent to the placing of the device in Yonn’s room. His consent could not waive Yonn’s rights.

58. 702 F.2d at 1347.
59. Id.
60. Id. Consent may serve to waive constitutional rights. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). See also Stoner v. California, 376 U.S. 483, 489 (1964) (search of defendant’s hotel room held unconstitutional where consent was given by hotel clerk rather than defendant).
61. 702 F.2d at 1350. (Hatchett, J., dissenting).
62. Furthermore, the dissent emphasized that Dozier could have worn a body microphone, as had the informant in White. “Although the practicalities are the same, the legal principles are different.” Id.
63. See Stoner v. California, 376 U.S. 483 (1964) (hotel clerk does not have the author-
To support its argument, the dissent relied upon United States v. Padilla, a case factually similar to Yonn. As in Yonn, the informant in Padilla neither testified nor carried an electronic device. Like Yonn, authorities placed the electronic device in the suspect’s room without a warrant. The Court of Appeals for the First Circuit, however, suppressed the tapes.

The Padilla court reasoned that according to Katz the defendant maintained a reasonable expectation of privacy in his hotel room. Thus, no electronic device could be planted without a warrant. If, however, the informant had testified, transmitted, or recorded the conversations himself, as did the informants in Hoffa and White, the evidence would have been lawfully obtained. Since the DEA, and not the informant, planted the transmitter and recorded the conversation, the Padilla court reasoned that neither the Hoffa nor the White rationale was applicable. The conversations, therefore, deserved constitutional protection.

ANALYSIS

The Defendant’s Reasonable Expectation of Privacy

The Eleventh Circuit reached its conclusion that Yonn’s conversation with Dozier was not protected by applying the hold-

64. 520 F.2d 526 (1st Cir. 1975). The Eleventh Circuit relied upon Padilla just one year before it decided Yonn. In United States v. Shields, 675 F.2d 1152 (11th Cir. 1982), the Eleventh Circuit distinguished Padilla because in Shields the informant carried the electronic device, while in Padilla, the device was placed in the hotel room by independent agents. Thus Padilla and Yonn are both distinguishable from Shields. Yet the Eleventh Circuit cited Shields as support for its Yonn decision.

65. 520 F.2d at 528.

66. Id. at 527. “The government would have us overlook the fact that a microphone was installed in the hotel room without prior authority and consider the case as if the agent carried the recording device on him, thus bringing it within the authority of United States v. White, 401 U.S. 745 (1971).” Id.

67. See supra notes 27-36 and accompanying text.
ings of Katz and Hoffa. It first applied Katz to determine that Yonn had no reasonable expectation of privacy in his hotel room.\textsuperscript{68} The court interpreted Katz as rendering irrelevant the place of the conversation to the question of its constitutional protection. The court reasoned that the determinative factor is the defendant’s subjective expectation of privacy.

The Yonn court then applied the Hoffa rationale to determine that the defendant did not demonstrate an expectation of privacy.\textsuperscript{69} The Supreme Court in Hoffa found that constitutional protection does not attach “to a wrongdoer’s misplaced belief that a person to whom [he] voluntarily confides his wrongdoing will not reveal it.”\textsuperscript{70} The Yonn court reasoned from this decision that “the fourth amendment did not protect Yonn from the risk that Dozier might not maintain his confidence.”\textsuperscript{71} According to the Eleventh Circuit, Yonn’s assumption of risk indicated that he did not maintain a subjective expectation of privacy.

The court’s analysis overlooks the fact that Dozier did not reveal the contents of the conversation. Dozier never testified, as did the agent in Hoffa, nor did he carry the recorder or transmitter on his person, as did the informant in White. Rather, the transmitter was placed in the room by the DEA independent of Dozier, and the tapes were made by the DEA. Dozier’s absence or presence did not affect the location of the transmitter. It remained in the room whether or not Dozier was present.

The Hoffa and White decisions require the defendant to assume only the risk that his confidant will testify about, transmit, or record conversations.\textsuperscript{72} He need not assume the risk that someone else will reveal the communication, nor that someone else will surreptitiously plant an electronic device to transmit or record them. Neither the Hoffa nor the White decisions justifiably serve as the basis for the Yonn decision. By misapplying these cases the Eleventh Circuit incorrectly determined that Yonn did not maintain a subjective expectation of privacy.

The Yonn court should have employed the two-pronged test developed in Katz. In Katz, the location protected was a phone booth. Likewise, “a man’s home is, for most purposes, a place

\textsuperscript{68} See supra notes 55-57 and accompanying text.
\textsuperscript{69} See supra notes 58-59 and accompanying text.
\textsuperscript{70} 385 U.S. at 302.
\textsuperscript{71} 702 F.2d at 1347.
\textsuperscript{72} See supra notes 31-37 and accompanying text.
where he expects privacy...." Instead, the Eleventh Circuit completely disregarded the location of Yonn's conversations.

The issue overlooked by the Yonn court was whether Yonn maintained a reasonable expectation that his hotel room would remain private, not from informants, but from secret electronic devices. If Yonn did expect the room to remain private, and society is willing to recognize that expectation as being reasonable, then Yonn did have a justifiable expectation of privacy and his conversations within that room deserved constitutional protection.

The application of the Katz test to the Yonn fact situation demonstrates that Yonn did have a justifiable expectation of privacy in his hotel room. First, Yonn demonstrated that he intended to keep his conversations with Dozier private by not conversing with him in public. Rather than speaking with Dozier in the hotel hallways or lobby, Yonn spoke in his own room. It can be reasonably inferred from this course of conduct that Yonn thought he could be afforded privacy in his hotel room.

Second, society must be willing to recognize that Yonn's expectation that his hotel room would remain private is objectively reasonable. The Supreme Court has recognized that a hotel room deserves virtually the same constitutional protection as a home, because a hotel room is no less than a temporary home. A person's privacy in his own home is respected because an individual must have a final retreat from governmental intrusions. Because Yonn satisfied both prongs of the Katz test, his expectation of privacy in his hotel room was reasonable. The Constitution protects a reasonable expectation of privacy from unwarranted governmental intrusions.

Thus, it was through a misinterpretation of Katz and a misapplication of Hoffa that the Eleventh Circuit determined that Yonn did not maintain an expectation of privacy. A proper interpretation of Katz demonstrates that Yonn did maintain a reasonable expectation that his hotel room would remain private and that his conversations would be constitutionally protected. When the DEA placed the device in Yonn's room, it violated his

fourth amendment rights. This violation should have compelled the court to suppress the tapes.

*The Informant's "Consent"

As a corollary, the Eleventh Circuit elevated Dozier's consent to the tape recordings to the status of a de facto waiver of Yonn's fourth amendment rights. In order to have consented to the recordings, Dozier first had to consent to the DEA's placement of the monitoring device in Yonn's room. The right to privacy in the hotel room, however, belonged to Yonn, since it was his room. It was a right which only Yonn could waive. There is no evidence that Yonn granted Dozier authority over the room by giving him the key or other means of control. Furthermore, considering the nature of Yonn's alleged activities, it is doubtful that he would have waived this protection. Dozier's consent was therefore invalid and the ensuing eavesdropping unconstitutional.

The dissent in *Yonn* suggested alternative electronic surveillance techniques which the DEA could have lawfully utilized pursuant to the Supreme Court's decision in *White*, which held that an informant could transmit or record conversations in which he participates. Indeed, the DEA conducted part of its investigation by concealing an electronic device on the informant's person, just as authorities had done in *White*.

Aside from the *White* technique, the DEA could have instructed the informant to carry an electronic device into the hotel room, plant it, converse with the suspect, and then remove the device upon leaving. The adoption of this method would protect the informant from discovery if physically searched by a wary suspect. This method is consistent with the *White* rationale. Because the suspect has chosen to speak with the informant, the suspect has relinquished his expectation of privacy in him. By relinquishing his privacy expectation the suspect has assumed the risk that the informant might transmit or record their conversations. Because the informant brings the device in and out of the room when he enters and leaves, however, no one else may use the device to intercept the suspect's conversations. Thus, the suspect is only exposed to that risk which he has assumed.

76. See supra note 36 and accompanying text.
According to *Katz*, the suspect's expectation of privacy in his room is objectively reasonable. This expectation is frustrated only when the device remains in place, thereby violating the suspect's fourth amendment rights.

**IMPACT**

The rule to be distilled from *Yonn* is that authorities may plant electronic surveillance devices in hotel rooms without warrants, and introduce into evidence resulting tapes of conversations in which an informant participates. The consequences of this rule include the possibility that electronic devices may be installed for lengthy periods of time without warrants, so long as the conversations introduced into evidence involved informants. This situation is contrary to the intentions manifested by the Supreme Court in *Berger v. New York*. There, the Court indicated that specific warrant requirements limiting the use of electronic eavesdropping devices would be necessary to prevent fourth amendment violations. Congress responded to the Court's decision in *Berger* by enacting Title III. The provisions of this act further delineate the requirements called for in *Berger*, thereby providing safeguards for fourth amendment rights.

The spirit of the *Yonn* decision violates the intent of Title III in several respects. Because "[b]y its very nature eavesdropping involves an intrusion on privacy that is broad in scope,"77 Congress requires authorities to procure a warrant based upon particularities.78 The method of electronic surveillance sanctioned by the *Yonn* court allows for general rather than particular use of electronic devices, contrary to congressional intent.

Furthermore, limitations imposed by Congress on the use of electronic surveillance devices may be breached when government authorities forego independent judicial supervision. Officials could extend surveillances and fail to notify subjects that they had been electronically surveilled.79 Without this notice, subjects would not know whether their conversations had been monitored and possibly stored in official files, despite clear congressional intent that this information be disclosed.

78. See supra notes 41-42 and accompanying text.
79. See supra notes 43-44 and accompanying text. Furthermore, the First Circuit in *United States v. Padilla*, 520 F.2d 526 (1st Cir. 1975), warned:

    Electronic devices could be installed for lengthy periods of time without antecedent
Such scenarios clearly conflict with both Congress's and the Supreme Court's goal of curtailing the abuse of electronic surveillance. By allowing government agents to use an informant to legitimize their planting of an unauthorized device in a hotel room, the *Yonn* court has opened the door to more extensive and less discriminate use of these powerful devices.

**CONCLUSION**

Both Congress and the Supreme Court have expressed concern that the indiscriminate use of electronic surveillance may violate citizens' rights. Accordingly, both bodies have demonstrated their intent to limit the use of these devices. The Court of Appeals for the Eleventh Circuit has nonetheless significantly expanded the opportunities for their lawful, and imprudent, use. The *Yonn* court's decision to allow the placement of a device without a warrant erodes fourth amendment protection.

MICHAEL W. CUSICK

authority, so long as only a suspect's conversations with police agents were offered in evidence and the enforcement officials alleged that nothing else was recorded. Under this approach a room—or an entire hotel—could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur.

*Id.* at 528.