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A New Constitutional Limit for Electronic Surveillance Cases

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A NEW CONSTITUTIONAL LIMIT FOR ELECTRONIC SURVEILLANCE CASES

INTRODUCTION

This note deals with the problems raised when police, by means of electronic listening devices, overhear incriminating conversations and seek to use a record of these as evidence against the participants.

In the constitutional area, these problems have been decided on the basis of whether or not there was a physical trespass.[1] The question to be examined here will be whether this test alone will give a satisfactory answer to future problems in the area and whether it is the only test justified by constitutional precedent. To do this the electronic surveillance problem must be examined from the standpoint of basic theory regarding the Fourth and Fifth Amendments of the United States Constitution. The present test of trespass stands on the basis of the relationship between these two Amendments,[2] the logic of the cases being that a compulsive process by which a man is made to testify against himself may make the manner of obtaining the evidence an illegal search and seizure.[3] This has been further expanded to admissions gained by stealth.[4] The conclusion that the only fact which need be examined is access to the listening post[5] is not the only one which can be drawn from these cases.

If persons commit illegal acts in private places, the police, even without a warrant, may still have certain means of gathering evidence of these acts beyond a mere examination of the scene after the acts have occurred. The means considered herein will be: police observation of a house, of a room or of a suspect,[6] planting an informer with recording devices on his person in the private area,[7] and planting an electronic

1. Olhmstead v. United States, 277 U.S. 438 (1927); Goldman v. United States, 316 U.S. 129 (1942); On Lee v. United States, 343 U.S. 747 (1952); Silvermnan v. United States, 365 U.S. 505 (1961).

2. On Lee v. United States, 343 U.S. 747 (1952) citing Boyd v. United States, 116 U.S. 616 (1885); Olhmstead v. United States, 277 U.S. 438 (1927) citing Boyd v. United States, *supra* and Gouled v. United States, 255 U.S. 298 (1921). Both Boyd v. United States, *supra* and Gouled v. United States, *supra*, being the leading precedents on the historic relationship of the Fourth and Fifth amendments.

3. Boyd v. United States, 116 U.S. 616 at 631-633 (1885).

4. Gouled v. United States, 255 U.S. 298 at 305 (1921).

5. On Lee v. United States, 343 U.S. at 753.

6. Hester v. United States, 265 U.S. 57 (1924) (a permissible practice); United States v. Comb, 203 F. Supp. 202 (W.D. Ark. 1962).

7. On Lee v. United States, *supra* note 2.

listening device.[8] These are all related, for all are attempts to put the police in such a situation as to be "present" in these private places. From these three methods evidence will be gathered to convict the suspect.

Police Observation

Police and law enforcement officials become aware of crime either through the reports of citizens or from their own observations. It has been decided that they may not enter homes to observe what occurs to determine if a crime has been committed, but a lesser intrusion has been sanctioned; even though there may be an actual trespass, officers may still testify as to their observations.[9] An observation by a policeman of a person's private effects may or may not be a search, depending on the status of the officer making the observation. In situations where the officer is merely at the front door of a private home in order to make inquiries, his observations, while there, have been held not to be a search.[10] In a recent case, officers who stepped just inside an apartment doorway were permitted to testify as to what they observed in the apartment. The officers were compared to the "legitimate business" callers any householder would receive during the day.[11] So it may be concluded that officers who observe that which is public or may be seen by the public are not making a search.[12]

This same comparison is also found in *On Lee v. United States*,[13] which stated, "the use of bifocals, field glasses or the telescope, to magnify the object of a witness' version is not a forbidden search

8. *Compare* Goldman v. United States, 316 U.S. 129 (1942) with Silverman v. United States, 365 U.S. 505 (1961). (It may be a permissible practice).

9. Hester v. United States, *supra* note 6. Here officers without warrant, entered defendant's land and made observations as to the events occurring outside defendant's house. *See* McDonald v. United States, 335 U.S. 451 (1948). Here officers barged into a rooming house and then observed the defendant through a door transom; held an unlawful search. *See also* United States v. Sterling, 244 F. Supp. 534 (W.D. Pa. 1965) A simple trespass without more, will not invalidate an otherwise valid search and seizure. *Compare* Brinlee v. State, 403 P.2d 253 (Okla. 1965). On similar facts to Hester v. United States, *supra* the court excluded the observations on the fact that the officers were within the curtilege of the house.

10. Ellison v. United States, 206 F.2d 476 at 478 (C.A.D.C. 1953). "If an officer sees the fruits of crime lying freely exposed on a suspect's property, he is not required to look the other way or to disregard the evidence his senses bring him." United States v. Comb, 203 F. Supp. 202 (W.D. Ark. 1962).

11. United States v. Horton, 328 F.2d 132 at 135-136 (3rd Cir. 1964).

12. United States v. Williams, 314 F.2d 795 (6th Cir. 1963).

13. 343 U.S. 747 at 754 (1952).

or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions." Still, the case, as yet uncontradicted,[14] leaves open questions, especially the question of what is open to public view.

Litigation of this point in recent California cases indicates the trend of judicial thinking in this area. While it has been held that an open window and sounds emanating through a door are available to the public and therefore to police surveillance,[15] more secretive surveillance may constitute a search. A frequent situation in which cases of police surveillance arise is the policing of public restrooms for homosexual activity. In *Bielicki v. Superior Court*,[16] police observed the defendant through a small pipe in the ceiling of a toilet stall in a public amusement park restroom. The court first characterized a search as an "exploratory investigation or an invasion and quest, a looking or seeking out." [17] With such a characterization it found that this type of surveillance did constitute a search: "from that vantage point [police] secretly observed activities of petitioners which no member of the public could have seen." [18] It is significant that this court reached this result without any consideration of the question of trespass or the question of petitioners' standing to challenge the search.[19] Emphasis in the case was on the character of the place, its usual privacy and the means by which the officers made the observation.[20] In other situations the same court has held secret spying devices to be an unconstitutional search and seizure. In *People v. Regalado*,[21] small holes drilled into hotel room doors for the purpose of spying by police were held to be

14. The authority of On Lee v. United States, *supra* note 13 has been questioned in recent years, although it is still the authority for many decisions in the area; *See* Lopez v. United States, 373 U.S. 427 at 444 (1963) Chief Justice Warren's concurring opinion.

15. People v. Jefferson, 40 Cal. Rpt. 715 (1964); People v. Aguilar, 42 Cal. Rpt. 666 (1965).

16. 21 Cal. Rpt. 552 (1962).

17. *Id.*, at 553-554.

18. *Id.*, at 555.

19. *Compare* People v. Angevine, 262 N.Y.S.2d 784 (Sup. Ct. 1965). Petitioner had no standing to challenge the evidence, where it was seized from an automobile he was driving, but was owned by another. "He did not prove his relationship nor is there any proof in the record of what his status was or what rights he had to possession." 262 N.Y.S.2d at 787.

20. *See* Britt v. Superior Court, 24 Cal. Rpt. 849 (1962); People v. Hensel, 43 Cal. Rpt. 865 (1965). Here the acts took place in the open room of the resthouse, not in the toilet stall; "although the officer was hidden, the defendant's conduct was in a place open to the view by anyone entering the room." 43 Cal. Rpt. at 867, distinguishing Bielicki and Britt.

21. 36 Cal. Rpt. 795 (1964).

an unconstitutional device for searches. It had long been a usual practice for police to use this method to spy on all hotel rooms in high-crime neighborhoods. The court in characterizing the observations as searches relied on the fact that the existence of the holes were unknown to any except the officers and, but for their use, the actions of the victims could have been observed by no one outside the room.[22] The state argued that the officers who used the devices had not drilled the holes, but that they had been there for years and so available to the public. The court rejected such a defense saying the question is not one of trespass by drilling the holes.[23]

Thus the rule as to what extent the police may physically observe the suspect's home remains unclear. A simple trespass may be allowed[24] but in other cases, the question of a trespass has not been held controlling,[25] rather the extent to which the observation intrudes into the usual privacy of the place where the defendant's admissions occur. Concepts that are used in this area may be applied to situations of electronic surveillance, for they are essentially the same "offense" against the defendant. They are methods of obtaining admissions by means of trickery, fraud or deception.

Entrance by Means of Informers

Stratagem is permissible in fighting crime.[26] But if stratagem and trickery are used to gain damaging admissions from the defendant, how far may these methods be used without violating his Fifth Amendment rights? *Gouled v. United States*,[27] held that such a technique may violate this constitutional right while *Olhmstead v. United States*[28] decided how far this logic may be carried.

Trickery may be used to execute a warrant if it appears that the suspect will resist.[29] But it was said in *Olhmstead* that a stealthy en-

22. *Id.*, at 797.

23. *Ibid.*

24. Cases cited *supra* note 9.

25. See *supra* note 16.

26. Caldwell v. United States, 205 F.2d 879 (C.A.D.C. 1953), cert. denied, 349 U.S. 930; Coplon v. United States, 191 F.2d 749 (C.A.D.C. 1951), cert. denied, 342 US.. 926; United States v. Hoffa, 349 F.2d 20 at 37 (6th Cir. 1965). "A surreptitious police effort to get evidence was proper and could not be excluded from consideration." "Appellants argue that the evidence was obtained by fraud and artifice. Even if true this would not render it inadmissible." 349 F.2d at 38. In this case government agents were "*planted*" in defendant's offices to gain evidence against him.

27. 255 U.S. 298 (1921).

28. 277 U.S. 438 (1927).

29. Leahy v. United States, 272 F.2d 487 (9th Cir. 1959); Jones v. United States, 304 F.2d 381 (C.A.D.C. 1962).

trance could become the equivalent to an entry by force.[30] Thus, in Fifth Amendment terms, an admission drawn from the defendant by trickery and fraud may be the same as one drawn from him by force. In *Gouled* the court looked to whether the defendant was made the unwilling source of information.[31] *On Lee* said the defendant is not such an unwilling source if his admissions were made to a federal informer posing as a confederate; emphasis here was put on the means of access to the listening post.[32] *Lopez v. United States*,[33] although sustaining the government against the defendant's constitutional challenge, has questioned the holding of *On Lee* and thus reduced its authority to such an extent that a mere citation of *On Lee* is not a sufficient answer to cases posed in this area.

Problems of the Fourth and Fifth Amendments often arise in federal prosecutions for income tax fraud. These cases do give a rule concerning trickery and fraud as to such rights of the defendant. In such cases the defendant usually contends that he was deceived into thinking that the revenue agents wished to examine his private records and question him merely to determine his civil liability for taxes, not as part of an investigation which aims at bringing fraud charges against him. Most of these challenges have failed on the fact question,[34] but in *United States v. Guerrina*,[35] where agents told the defendant that they were only making a "routine investigation," when in actuality they contemplated that criminal fraud charges might be brought, the court sustained the challenge to the evidence so gathered, saying, "to allow this . . . would be to encourage zealous and less scrupulous officers and agents of law enforcement agencies . . . by trick and artifice, to do what could not be done in court proceeding, *i.e.*, compel a defendant to testify against himself." [36] So if a "defendant is induced by a misunderstanding of the facts and circumstances to give testimony against himself, that testimony was given in violation of his constitutional rights." [37]

Such a defense to the evidence may be made in situations where ad-

30. 277 U.S. at 463-464.
31. 255 U.S. at 306.
32. 343 U.S. 747 (1952).
33. 373 U.S. 427 (1962).
34. United States v. Frank, 151 F. Supp. 864 (W.D. Pa. 1957); Biggs v. United States, 246 F.2d 40 (6th Cir. 1957), cert. denied, 355 U.S. 922; United States v. Manno, 118 F. Supp. 511 (N.D. Ill. 1954).
35. 112 F. Supp. 126 (E.D. Pa. 1953).
36. *Id.*, at 130.
37. *Id.*, at 131.

missions are recorded by means of an informer. But in *On Lee*,[38] the Supreme Court in such a situation allowed the evidence to be used:

> 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 interrupt conversations, at least where access to the listening post was not obtained by illegal methods.[39]

This specific reasoning has remained uncontradicted. But in *Lopez v. United States*,[40] as we have seen before, the holding in *On Lee* was almost destroyed as a controlling precedent. Chief Justice Warren's concurring opinion in *Lopez* certainly gives cause for a reassessment of the questions in this area, as do strong dissents in both *On Lee* and *Lopez*.[41] The Court has brought both this type of case and those of electronic surveillance into the same line of reasoning. The damaging statements are kept in despite the Fifth Amendment, because the statements were voluntarily made, and then the only question remaining is the manner of entrance.[42]

But these cases can be distinguished from cases of electronic surveillance itself. An informer may testify as to what was said without the aid of the recording device. The question of allowing the tape should,

38. 343 U.S. 747 (1952).

39. *Id.*, at 753.

40. 373 U.S. 427 (1962).

41. Chief Justice Warren in Lopez v. United States, *supra* note 40 at 444, states, "Thus Chin Pog armed with the transmitter, engaged On Lee in conversation for the purpose of eliciting admissions." Justice Brennen, dissenting in Lopez v. United States, *supra* at 449, states, "If a person commits his secret thoughts to paper, there is no license for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words."

42. Todisco v. United States, 298 F.2d 208 (9th Cir 1961), cert. denied, 368 U.S. 989, Here on the authority of On Lee v. United States, *supra* note 38, the use of a tape gotten by recording defendant's conversation by means of a recording device was upheld. "In the eavesdropping area constitutional problems are usually couched in terms of whether the conduct under scrutiny amounted to an unlawful search and seizure. The answer in turn, in this area, is largely dependent upon whether the entry upon the premises amounted to a trespass." 298 F.2d at 209-210. The question of the defendant's Fifth Amendment objections was quickly dealth with on a showing that the statements were voluntary, 298 F.2d at 212; *See also* Williams v. United States, 290 F.2d 451 (9th Cir. 1961); Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953; United States v. Beno, 333 F.2d 669 (2d Cir. 1964).

therefore, be made dependent on the admissibility of the informer's testimony. Such testimony would be open to attack on other grounds, in that it was obtained by an unfair appeal to kinship, friendship and camaraderie.[43] So the informer problem can be resolved on voluntariness, a consideration which is general in all cases of damaging admissions.[44] The means of gaining admissions by stealth and trickery, may then be made the same as the gaining of such admissions by force. The inquiry as to how access to the listening post was obtained should be made for the purpose of determining voluntariness and not to examine whether a trespass has occurred. The consideration of voluntariness would also have application to cases where the listening device recorded the conversation without the knowledge of any of the parties. It would seem strange that such admissions would be less open to attack than in cases of the use of informers.

Electronic Listening Devices

The Fourth Amendment protects against the "seizure" of words as well as of physical evidence.[45] In cases where the recording device was planted in a private home by a burglary or police entry, the Court has clearly held there was a violation of the Fourth Amendment. Such a situation existed in *Irwine v. California*,[46] but the action involved state officers and started in a state court, and the case was decided before *Mapp v. Ohio*,[47] therefore, the court was unable to exclude the evidence,[48] though it said that "each of these repeated entries of petitioner's home without a search warrant or other process was a trespass and probably a burglary."[49] The court further stated, "few police measures have come to our attention that have more flagrantly, deliberately and persistently violated the Fourth Amendment."[50] The question thus resolved in cases of electronic surveillance is whether there was a trespass which would bring the case within the Fourth Amendment.[51]

43. Chief Justice Warren concurring in Lopez v. United States, *supra* note 40 at 444.

44. Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

45. Wong Sun v. United States, 371 U.S. 471 (1961).

46. 347 U.S. 128 (1953).

47. 367 U.S. 643 (1961) (Previously the exclusionary rule of the United States Constitution as to evidence which was a product of an unreasonable search and seizure did not apply to the states).

48. Irwine v. California, 347 U.S. 128 at 132-137 (1953).

49. *Id.*, at 132.

50. *Ibid.*

51. Even a warrant or a court order may not protect an eavesdropping by means of

This reasoning was followed in subsequent cases of electronic eavesdropping. In *Silverman v. United States*,[52] the use of a "spike mike" was declared to be an unconstitutional device which invaded the defendant's "constitutionally protected area." The device was stuck deep into an adjoining wall so as to take advantage of the defendant's heating pipes to hear a conversation in a private room. The basis for the decision was the extent of the invasion of the device. The Court in *Silverman*, however, would not base the intrusion of the listening device on common law concepts of trespass: "in these circumstances we need not pause to consider whether or not there was a technical trespass under local property law . . . inherent Fourth Amendment rights are not inevitably measured in terms of ancient niceties of tort or real property law." [53] Justice Douglas in his concurring opinion, states that the question should not turn upon the "nice distinctions" of the equipment used, but rather "our sole concern should be with whether the privacy of the home was invaded." [54] He points out that the invasion in *Silverman* was no greater than that in *Goldman v. United States*,[55] where the evidence gathered by a device which merely attached to a door was held admissible.

The physical limit drawn on the intrusion is further confused by the Court in a per curiam decision in *Clinton v. Virginia*,[56] based on the *Silverman* precedent. The Virginia Court in *Clinton v. Commonwealth*,[57] with full knowledge of *Silverman*, found the device covered instead by *Goldman*. The device was described thus: "Officer Beach was asked if the instrument used was a spiked device and he replied, 'Yes sir; small device.' That was the only description given of it. The uncontradicted evidence is that it was not driven into the wall, but was 'stuck in it.' " [58] This was the characterization upon which the Supreme Court of the United States thought to be covered by *Silverman* rather than *Goldman*. Then must it be concluded that the constitutional rule

a trespass. *See* People v. Grossman, 257 N.Y.S.2d 266 (Sup. Ct. Kings Co. 1965). It was held that an ex parte order permitting police to search by means of a listening device, planted in defendant's garage was unlawful as a general warrant and a search for mere evidence.

52. 365 U.S. 505 (1961).

53. *Id.*, at 511.

54. *Id.*, at 513.

55. 316 U.S. 129 (1942).

56. 377 U.S. 158 (1964).

57. 204 Va. 275, 130 S.E.2d 437 (1963).

58. 204 Va. at 281.

is to be measured in quarters of inches? The lower federal courts have interpreted the law on such a basis.[59]

The trespass test breaks down where the intrusion on the premises is made on a defendant who has little possessory interest in them. In *United States v. Stone*,[60] a recording device planted in a public phone booth was deemed to be an illegal search when it enabled police to overhear defendant's phone calls. Though the booth was a public place, the court still held there could be an intrusion into the defendant's privacy.[61] The court further stated, "electronic devices without physical presence enables an intrusion on the air, light and sound waves of a person's property as real as any physical trespass." [62] Seeing or hearing, then, of private acts may be such a real intrusion; but we know that an officer may look into a window or listen through a door, to detect crime. If those acts are not considered searches, then there must be a distinction apart from the manner of entry into the premises, for light and sound waves are just as physical as plaster into which listening devices are "stuck."

It may well be that the emphasis should be placed on the character of the place where the acts occur, its usual privacy or the character of the actual conversation. In *Lanza v. New York*,[63] the Supreme Court held that the use of an electronic listening device in the defendant's jail cell was not prohibited, as the jail was not part of the defendant's "constitutionally protected area." Such a decision seems to give the rationale in *Silverman* strong support, but there may be in *Lanza* indications of another direction. Justice Douglas in his dissent states:

> The tenor of the Court's wholly unnecessary comments is sufficiently ominous to justify the strongest emphasis that of the abbreviated Court of seven who participate in the decision, fewer than five will even intimate views that the constitutional protections against invasion of privacy do not operate for the benefit of persons—whether inmates or visitors—inside a jail or that the petitioner lacks standing to challenge secret electronic interception of his conversation because he has not

59. *Compare* United States v. Martin, 223 F. Supp. 104 (E.D. La. 1963) and Cullins v. Wainwright, 328 F.2d 481 (5th Cir. 1964). In United States v. Martin, *supra*, the court specifically rejected any test other than that of trespass.

60. 232 F. Supp. 396 (N.D. Texas 1964).

61. In distinguishing this case from On Lee v. United States, *supra* note 38; Goldman v. United States, *supra* note 55; and Olhmstead v. United States, *supra* note 30; the court relied on the lack of a physical invasion in those cases.

62. 232 F. Supp. at 399.

63. 370 U.S. 139 (1962).

> a sufficient possessory interest in the premises, or that the Fourth Amendment cannot be applied to protect against testimonial compulsion imposed as a result of an unconstitutional search and seizure.[64]

Thus the test of trespass into the defendant's constitutionally protected area is breaking down. The increasing tendancy of the Court to expand the areas protected makes it difficult to see how the test of a physical intrusion may be applied.[65] Secondly, there is the test as to what kind of trespass or invasion is proscribed;[66] the problem of analysis of the device itself will become more difficult as the devices themselves are improved and developed.[67]

Emphasis in the area would be better placed on testimonial compulsion, rather than the entry. The means of entry is relevant, but only as to the voluntariness of the admissions gained. It is because we should want to determine, in Fifth Amendment terms, if the statement is voluntary, that the position of the listening device is questioned.

In cases dealing with the defendant's Fifth Amendment objections to these methods, the courts quickly dispose of the question. They hold that in any case the statement was voluntarily made.[68] The only way the Fifth Amendment arises is in connection with justification for excluding evidence obtained by an illegal search and seizure:

> The defendant's statement to the officers now incriminating him, even though it does not fall within the Fifth Amendment because it does not come under the category of testimonial compulsion, a concept which has broadened as has the 'security' of the Fourth. But how did the officers find themselves in a position to see or hear the defendant? The officers in the pursuance of a general investigation entered the home under no color of right . . .[69]

64. *Id.*, at 143, Justice Douglas with whom Chief Justice Warren and Justice Brennen join.

65. *Id.*, at 143. The majority recounts the extent given to a citizen's constitutionally protected area.

66. *Cf.* text accompanying *supra* notes 56 and 57.

67. Olhmstead v. United States, 277 U.S. 438 at 474 (1927), Justice Brandeis dissenting, gives the consequences of development of new devices.

68. United States v. Williams, 314 F.2d 795 (6th Cir. 1963); In On Lee v. United States, *supra* note 38, and Goldman v. United States, *supra* note 55, this is found. More recent lower federal decisions go along with this view. *See* Todisco v. United States, 298 F.2d 208 (9th Cir. 1961), cert. denied, 368 U.S. 989; United States v. Borgese, 235 F. Supp. 286 at 291 (S.D. N.Y. 1964).

69. Nueslein v. Dist. of Columbia, 115 F.2d 690 (C.A.D.C. 1940).

Such a view of the subject has its origins in the reasoning in *Boyd v. United States.*[70] But in *Boyd*, we find not only the principle of the relationship of the Fourth to the Fifth Amendment, but also the Fifth as amplified by the Fourth:

> For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in criminal cases to be a witness against himself, which is condemned in the Fifth Amendment, throws light as to what is an unreasonable search and seizure within the meaning of the Fourth Amendment.[71]

Thus the reasoning in electronic surveillance cases uses but one-half of what is contained in *Boyd.*[72] But *Boyd* also gives us a means of determining what is testimonial compulsion from the viewpoint of certain principles of the Fourth Amendment. Thus, the manner in which the admission was gathered does throw light on its voluntariness, no matter whether it was gathered by a physical intrusion or not. The test of voluntariness, then, is whether "he is the unwilling source of the evidence";[73] a factor determining this being the extent of the intrusion.

It cannot be contended that all police actions by which the defendant is made the unwilling source of information are unlawful. In *Counselman v. Hitchcock*,[74] the general principle was laid down that "the privilege is as broad as the mischief which it (the Fifth Amendment) seeks to guard." [75] There are no compelling reasons why the privilege may not be so drawn as to cover electronic eavesdropping if constitutional reasoning may be so applied as to bring such situations within it.

In *United States v. White*,[76] the Court stated that the purpose of the Fifth Amendment was to prevent the use of legal process to force from

70. 116 U.S. 616 (1885).

71. *Id.*, at 633.

72. *See* Mapp v. Ohio, 367 U.S. 643 at 646 (1960); Ker v. California, 374 U.S. 23 at 30-31 (1963); In Linkletter v. Walker, 85 S.Ct. 1731 at 1747 (1965), the court stated, "The *Boyd* Court held that that Fifth Amendment's prohibition against self-incrimination gave constitutional justification to exclusion of evidence obtained by an unlawful search and seizure. The whole court treated such a search and seizure as compelling the person whose property was thus taken to give evidence against himself."

73. Gouled v. United States, 255 U.S. 298 at 306 (1921).

74. 142 U.S. 547 (1891).

75. *Id.*, at 562.

76. 322 U.S. 694 at 698 (1943).

the lips of the defendant the evidence necessary to convict him. The rule regarding the Fifth Amendment was recently spelled out in *Malloy v. Hogan*,[77] where the court extended "the right of a person to remain silent unless he chooses to speak in the *unfettered exercise of his own free will*." [78] A secretive entry just as much as a secretive eavesdropping without entry, goes to the voluntariness of the defendant's statement.

If a new rule is to be drawn in the area of electronic surveillance, it must be on the basis of the Fifth Amendment; but the full effect of the Fifth must be qualified. The use of electronic devices only goes to voluntariness, it does not proscribe voluntariness.[79] Intent to restrict one's conversation may be a factor,[80] though not a determinative one.[81] If at all, the intent of the defendant's admissions must be viewed objectively from the standpoint of the circumstances of the situation in which the admissions are made.

Conclusion

Thus the possibilities presented regarding the use of police surveillance remain unclear. The right of privacy in criminal cases is based on the concepts of the Fourth and Fifth Amendments as found in *Boyd*.[82] It is on this right that the exclusionary rule has been applied to evidence gained by electronic surveillance when there has been a physical intrusion. But this concept has been pushed so far as to be only an excuse for holding evidence to be inadmissible where it appears that the device unfairly gained evidence against the defendant.[83]

A better rationale for cases of this type would be to use *Boyd* to enable us to determine the voluntariness of the defendant's admission by weighing the factor of the police intrusion, no matter what kind or what extent. Thus the rule should not proscribe all intrusions but would weigh the intrusion of the device with the usual privacy attached to

77. 378 U.S. 1 (1964).

78. *Id.*, at 8; *See also* United States v. Guerrina, 112 F. Supp. 126 (E.D. Pa. 1953).

79. This factor has been rejected by courts because its effect would be too sweeping. United States v. Martin, 223 F. Supp. 104 (E.D. La. 1963).

80. *See* United States v. Horton, 328 F.2d 132 at 136 (3rd Cir. 1964). Here the court took into consideration the time of day which federal officers came to the defendant's doorway. At noon, the court concluded, a householder would expect, "legitimate business callers." Also Caro v. Bingler, 242 F. Supp. 418 (W.D. Pa. 1965).

81. Goldman v. United States, 316 U.S. 129 at 135 (1942), rejected intent of the defendant to restrict his conversation to those in the room, as a test.

82. 116 U.S. 616 at 633 (1885).

83. *Cf.* text accompanying notes 56 and 57 *supra*.

the place.[84] In this way a fair result may be reached which has a future as devices become more sophisticated.

Thus if police by means of a long-range mike, were able to hear statements made by persons in a private room, and from a distance record the conversation, to be used as evidence against them, this invasion could be weighed against the usual privacy of that room. The smaller the invasion and the greater the availability of what is going on in the room to the public, the more likely the admissions on Fifth Amendment grounds can be held voluntary. Indiscriminate use of these devices represents a great danger to any free society; if citizens are to be protected from such invasions by police, then it is better that the protection be based on a flexible rule of reason, rather than a standard which measures constitutional rights by quarters of inches.

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84. Cases cited *supra* notes 16 and 20.