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JUDGING THE JUDGES: THREE OPINIONS

JAMES BOYD WHITE*

For some time I have been working on the problem of judicial criticism, focusing especially on the question: What is it in the work of a judge that leads us to admire a judicial opinion with the result of which we disagree, or to condemn an opinion that “comes out” the way we would do if we were charged with the responsibility of decision?¹ The response I have been making is that this kind of judicial excellence (and its opposite too) lies in the sort of social and intellectual action in which the opinion engages: in the character the court defines for itself and for its various audiences; in the relations it creates with those to whom, and those about whom, it speaks (including those who have created the texts that it takes as authoritative); and in the kind of conversational community it thus establishes, for it is in the conversation by which it works that the law has its life. The opinion enacts a way of imagining and participating in the world, and it is in this act of imagination made real that its deepest meaning lies. One way to put this point is to borrow from John Dewey’s remark that “democracy begins in conversation,” and ask how far the conversation that a particular opinion seems to initiate or invite can be said to be one in which democracy begins and has its life, and how far it makes active political and social principles of a different kind.

This, or something like it, is what I think we mean when we speak of the law not simply as a regime of rules or as a set of

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1. See J. WHITE, *THE LEGAL IMAGINATION* 623-756 (1973), which focuses on the problem of our critical language; J. WHITE, *WHEN WORDS LOSE THEIR MEANING* 231-274 (1984), which tries to work out a way of thinking about judicial opinions, using Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), as its central text; and J. WHITE, *JUSTICE ON TRANSLATION* (1990), from which this article is taken.

choices made by officials, but as a part of our culture which is to be regarded as the proper object of respect, or even veneration, as an achievement in its way as worthy of esteem as art and literature.

In this article I continue this general effort by focusing on one particular aspect of judicial work, namely the way in which the Supreme Court reads, and should read, those of its own cases that serve as precedents for its judgment in constitutional cases. For the question for the Court is normally not simply what the Constitution means as an abstract matter, as much of our talk about constitutional interpretation seems to assume, but what it should be taken to mean given its interpretive history, which has an authority of its own. In addressing this question the Court establishes a relation not only with the constitutional text but with the discourse, and with the other texts, by which it is interpreted. What kind of relation should this be?

To address this question I shall turn to *United States v. White*,² not the most famous case in the world but for our purposes of deep interest, for it provides us with three opinions that define with extraordinary clarity three distinct ways of reading relevant precedent and in so doing presents us in a fresh way with the question how prior judicial opinions should be read: how they should be interpreted as single texts, and even more importantly, how a set of opinions, decided across time, should be interpreted, with particular attention to the conflicts among them. Sometimes, as here, the question has an especially dramatic focus: When—if ever—should a case be overruled, or be regarded as having already been overruled, and upon what authority?

BACKGROUND

The question in *United States v. White* was whether a certain kind of police conduct (involving the use of an informer secretly carrying a transmitter) constituted a "search" calling for constitutional regulation under the fourth amendment.³ This question of

2. 401 U.S. 745 (1971).

3. *Id.*

course arose not in the abstract but against a background, which can be sketched in the following terms.

Olmstead v. United States,⁴ you will remember, held that non-trespassory wiretapping was not a "search" for fourth amendment purposes. This case was the subject of immediate and continuing criticism with the result that Congress quickly made wiretapping a federal crime, in a statute that was later read to require the exclusion from a criminal trial of any evidence obtained in violation of it.⁵ Outside the wiretapping field *Olmstead's* force diminished until it was finally overruled by *Katz v. United States*⁶ in 1967.

The facts of *Katz* involved not "wiretapping" but "bugging": Officers wanting to overhear a particular person's conversations attached an electronic listening device to the outside of a public telephone booth he regularly used, and did so both without a warrant and without any excuse for failing to obtain one.⁷ Formally speaking, the fourth amendment question was the same as that in *Olmstead*, namely whether this conduct was a "search."⁸ If it was, the evidence obtained by the eavesdrop had to be excluded because the warrant requirement of the fourth amendment had so obviously been violated. If not, it would mean that this kind of conduct would be entirely unregulated by the fourth amendment.

In holding for the defendant, that the intrusion was a "search," the Court said that the right question was not whether the telephone booth was a "constitutionally protected area," as the defendant's lawyer had urged.⁹ "[T]he Fourth Amendment protects people, not places," the opinion said, and went on: "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

4. 277 U.S. 438.

5. The Federal Communications Act of 1934 provided that no unauthorized person should "intercept any communication and divulge or publish the existence . . . or meaning" of such communication to any person. The case holding that this statute required exclusion was *Nardone v. United States*, 302 U.S. 379, 381 (1937).

6. 389 U.S. 347 (1967).

7. *Id.*

8. *Id.*

9. *Id.*

to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁰ This opinion was widely heralded as establishing the fourth amendment on a new basis, protecting “privacy” rather than “property.”¹¹

But what is this vague term “privacy” to mean? In his opinion for the Court, Justice Stewart suggested that the “privacy” of the fourth amendment extended to anything that the individual sought to preserve in secret.¹² Justice Harlan, in concurrence, said that the case should be construed to protect only those expectations of privacy that were found by the Court to be “reasonable.”¹³ This means that it is not just the individual’s purposes or impressions that count but the Court’s judgment as to whether those expectations should be protected. Justice Harlan’s language has since been taken as the central holding of *Katz*; the Court has accordingly faced in a sequence of decisions the question what is, or is not, a reasonable expectation of privacy.

One such case was *United States v. White*,¹⁴ the facts of which were these. Government agents, suspecting the defendant of various narcotics violations, investigated his activities with the aid of an undercover informant armed with a radio transmitter.¹⁵ The informant engaged White in several conversations, which were broadcast by the concealed transmitter to agents waiting elsewhere.¹⁶ On four occasions the conversations took place in the informant’s home; other conversations took place in his car, in a restaurant, and in the defendant’s home.¹⁷ The prosecution did not produce the in-

10. *Id.* at 351.

11. This notwithstanding the explicit cautionary language of the court: “[T]he Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ That amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of the person’s *general* right to privacy, his right to be let alone by other people is, like the protection of his property and of his very life, left largely to the law of the individual states.” *Id.* at 350-51 (emphasis in original).

12. *Id.* at 351.

13. *Id.* at 360.

14. 401 U.S. 745.

15. *Id.* at 747.

16. *Id.*

17. *Id.*

formant at trial and offered instead the testimony of the agents who had overheard the conversation through the radio signals.¹⁸ The Court of Appeals read *Katz* as forbidding the introduction of the agent's testimony in the circumstances of this case.¹⁹ The Supreme Court reversed on two grounds: first, that *Katz* should not apply to the events in this case because they took place before that case was decided: second, that *Katz*, properly read, would not require the exclusion of this evidence in any event.²⁰ I shall be concerned only with what the Court said about the second question.

JUSTICE WHITE

The majority opinion was written by Justice White. For him this case was governed by a series of cases, decided before *Katz*, which held that when a person confides in another he runs the risk that this person will, contrary to his expectations, offer this evidence to the government, either by prior arrangement or on his own present initiative.²¹ Thus when the government arranged with Edward Partin, an old associate of Jimmy Hoffa's, to engage in certain conversations with him and to report upon them, Partin's testimony about those conversations was admissible in Hoffa's trial. The Court said that the fourth amendment affords no protection "to a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."²² Since this is not an invasion of a fourth amendment interest—not a "search"—no warrant is required before engaging in it.²³ The Court reached a similar result in the companion case of *Lewis v. United States*,²⁴ where the government sent an undercover agent to the defendant's home to make a purchase of narcotics, and in an earlier case, *Lopez v. United States*,²⁵ where an agent carried electronic equipment that recorded the defendant's words.

18. *Id.*

19. *Id.*

20. *Id.* at 754.

21. *Id.* at 749.

22. *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

23. *Id.* at 301.

24. 385 U.S. 206 (1966).

25. 373 U.S. 427 (1963).

The intermediate appellate court in *White* conceded all of this but held that *Katz* nonetheless required a different result. The court focused on the early case of *On Lee v. United States*,²⁶ where the informer entered the defendant's premises and not only heard the conversations, as in *Hoffa* and *Lewis*, and recorded them, as in *Lopez*, but, as in the *White* case, carried a transmitter that sent the conversations out to other agents equipped with receivers. In this court's view *Katz*, which in its own context of course regarded "bugging" as a search, implicitly overruled *On Lee*.²⁷

Justice White disagreed that *Katz* should be read this way: while it is true that *On Lee* was based partly on the grounds that there was no trespass, a ground that indeed "cannot survive *Katz*," it had a "second and independent ground for its decision," namely, that the defendant had made a decision to trust the agent, and that the violation of this trust presents no fourth amendment issue, whether or not electronic transmission is involved.²⁸ Justice White sees "no indication in *Katz* that the Court meant to disturb that understanding of the fourth amendment or to disturb the result reached in the *On Lee* case."²⁹

The ultimate reason, for Justice White, is that the fourth amendment does not protect a person against misplacing his confidence in another.³⁰ It does not matter whether the other person testifies directly, writes down what he has heard and testifies from those notes, records what he hears on a tape, or broadcasts what he hears to agents waiting outside. "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 the simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the agent is talking and whose trustworthiness the defendant necessarily risks."³¹

26. 343 U.S. 747 (1952).

27. *White*, 401 U.S. at 747.

28. *Id.* at 750.

29. *Id.*

30. *Id.* at 752.

31. *Id.* at 751.

Think of it in terms of expectations, Justice White says: we cannot believe that a suspect "would distinguish between probable informers on the one hand and probable informers with transmitters on the other."³² If a person thinks he is talking to an undercover agent, he will not reveal damaging information in either case; if he does not, he may, and it will not matter to him, from the point of view of his privacy, whether these conversations are simply remembered or broadcast. The fact that the informer has disappeared and is unavailable at trial should not affect this result.

* * *

This is in its own terms a highly persuasive opinion, and I shall have more to say about it below. For present purposes I want only to note that a large part of its force arises from a commitment to a certain way of reading precedent that is itself not explained or defended. It works this way. Each case stands for a proposition, or a set of propositions, which are good law until the moment arrives at which they are overruled. Thus the cases can be laid out before the reader like cards on a table, in patterns of significance; the critical question is which case this one is most like. In this instance that question is first answered by pointing to *On Lee*, which on its facts is very close to this case and would presumably govern it; the next question is whether *Katz* overruled *On Lee*. This is to be determined by asking what the bases of *On Lee* are: for Justice White one of the bases is removed, the other untouched, by the rationale of *Katz*. It therefore remains good law.

This is almost a caricature of old-fashioned common-law adjudication. The cases all are authoritative, and until overruled equally so. They stand for propositions: the sole task of the court is to arrange those propositions in logical patterns of non-contradiction and to fit the present case within them. All authority is in the past, in the earlier cases. The function of the Supreme Court, including in the present opinion, is to produce a series of tags that tell you how future cases should be decided.

But this is to take an external view of a process to which Justice White and the reader are in fact internal. He speaks about the Court

32. *Id.* at 752.

that overruled *Olmstead* without any sense of why it did so, with no sense of the feelings and attitudes that underlay that movement in the law. According to what he says in this opinion the task of the Court is simply to declare results: to decide particular cases and to publish the decisions in forms that can be translated into rules. The task of the later adjudicator is simply to try to obey these rules and harmonize them when necessary to keep them in coherent order. Perhaps one should be lopped or clipped when it does not fit with the others, but that is all. It is not easy to see how the person Justice White defines himself as being in this opinion could ever overrule a precedent; yet that is part of what the Court does, and part of what it has done in the present series of cases. Virtually the only value asserted or performed here is the value of logical coherence, and with it that of legal stability.

If we ask what kind of conversation this opinion establishes, and with what relation to democracy, we see that there is reasoning here, and to that extent a sharing of power with the audience, but reasoning of a most limited kind. The sort of argument it invites from lawyers in future cases is also limited, a parsing of precedent to produce patterns of consistency, with none of the sense of uncertainty and responsibility that the work of some judges reflects. The only questions the opinion contemplates are: what the earlier cases held, upon what principles, and how those principles bear on the present case. It is true that this is an essential part of lawyering and the law—and Justice White seems to do it very well—but it is not all of it.

Suppose you asked of this opinion: What, according to it, is the purpose of the guarantee of the fourth amendment that individuals shall be free from unreasonable searches and seizures? Why do we have a Supreme Court to define and protect these rights? By what processes of reasoning is the authority of the Supreme Court defined and established? To these questions this opinion apparently gives no answer at all.

JUSTICE DOUGLAS

The dissent of Justice Douglas responds directly to what he regards as the hyperlegalistic quality of Justice White's opinion: "The

issue in this case is clouded and concealed by the very discussion of it in legalistic terms.”³³ He then proceeds to talk not like a lawyer at all but almost like a newspaper reporter, in conclusory terms about general social phenomena:

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. Electronic surveillance is the greatest leveler of human privacy ever known. How most forms of it can be held ‘reasonable’ within the meaning of the Fourth Amendment is a mystery.³⁴

This is the voice not of a lawyer, but of a citizen or as I say perhaps a journalist, and it is a central part of Douglas’ point to speak that way: his object is to resist White’s legal talk by insisting on the presence of a voice of another, more ordinary, kind.

Not that he is without “precedents” of his own. He quotes, for example, a message by Franklin Roosevelt, dated May 21, 1940, which, while authorizing wiretapping in the cases of spies and sabotage, went on to say that under ordinary circumstances “wiretapping by government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.”³⁵ And he invokes modern books on privacy, too: “Today no one perhaps notices that because only a small, obscure criminal is the victim. But every person is the victim, for the technology we exalt today is every man’s master. Any doubters should read Arthur R. Miller’s *The Assault On Privacy* (1971).”³⁶ He closes this section of his opinion by citing an article in *The Progressive* magazine, all in a kind of parody of the case-bound reasoning of Justice White.³⁷

We have here the assertion or display of a mentality that is as far from Justice White’s as could well be imagined. Justice Douglas focuses upon the social phenomena of “surveillance,” not the legal text—not the constitutional text, not the cases explicating it—and he opposes surveillance of any kind, on any grounds, without both-

33. *Id.* at 756.

34. *Id.*

35. *Id.* at 756-57.

36. *Id.* at 757.

37. *Id.* at 758.

ering to discriminate between one kind and the other. In particular he fails even to allude to the distinction that for Justice White is crucial, between the case in which the government intrudes upon a conversation which both parties wish private and the case in which one of the parties is himself an agent or wishes to disclose what is said to the government. This, added to his use of mock precedents, can be read as a kind of serious teasing of Justice White, the solemn and rigid lawyer who is bound by his sense of logic and nothing else.

In the second half of his opinion Justice Douglas does turn to the law, but in a very different way indeed from Justice White. For Douglas the precedents represent not static and equal authorities, like cards on a table, but a progressive movement in time, from less enlightened to more enlightened positions. He focuses especially on *Berger v. New York*,³⁸ which invalidated a comprehensive New York wiretapping statute on fourth amendment grounds, and *Katz*, which held that nonconsensual bugging was a "search" subject to fourth amendment regulation, and regards them as holding simply that all forms of electronic surveillance "are now covered by the Fourth Amendment."³⁹ But once more he fails to make the fundamental distinction that is essential to the majority opinion in *White*, between surveillance that is consented to by one of the parties and surveillance that is not. It would flunk a law school exam.

Surely Justice Douglas, one of the smartest people ever to sit on the Supreme Court, knew this. Why then does he insist on talking this way? Simply to frustrate the lawyer-judge for whom such distinctions are the stuff of life? To express disdain for all reasoning of that kind in favor of the plain assertions of plain rights? Here Douglas is in fact working rather like the authoritarian Taft in *Olmstead*, for like him he seeks to shortcut the processes of legal thought by the use of common-sense language and ordinary talk.⁴⁰ There is much to be said for the use of the vernacular in law, but to speak

38. 388 U.S. 41 (1967).

39. *White*, 401 U.S. at 758.

40. For further discussion of Taft's opinion, see J. WHITE, *JUSTICE AS TRANSLATION*, ch. 6 (1990).

only in such terms, at least in such a conclusory way as Douglas and Taft do, is to eliminate the processes of law altogether.

When he turns to prior law, Douglas divides the cases into two classes, those that come after *Berger* and those that precede it.⁴¹ He discounts all the decisions decided before *Berger* as representing an "opposed view."⁴² Thus for him *On Lee* is really based upon "[t]he idea, discredited by *Katz*, that there was no violation of the Fourth Amendment because there was no trespass."⁴³ *Lopez*, where the government agent carried a pocket wire recorder, "was also pre-*Berger* and pre-*Katz*."⁴⁴ He says: "We have moved far away from the rationale of *On Lee* and *Lopez* and only a retrogressive step of large dimensions would bring us back to it."⁴⁵ He lives in a world of moral progress, in which the old is outmoded because it is unenlightened. Unlike Justice White, for whom all precedent is of equal authority, Justice Douglas creates a scale of authority, crediting one group of cases, discrediting others, according to the era they represent.

* * *

It would be easy to mock this opinion, but it is important to see that Douglas in fact focuses on a real element that White leaves out, namely, the way in which the law changes and the reasons for which it does so. Justice Douglas' statement of those reasons is crude—"for" or "against" electronic surveillance and wiretapping—and his attributions of motives to the Court is equally simplistic, for in his view the Justices seem to be either high-minded protectors of civil rights or craven apologists for a tyrannical government. But he does see something that Justice White misses, and something central to the law. It is thus fair to say that each of these opinions has real merits as well as real defects: neither is adequate but they expose each other's deficiencies rather well.

41. *Id.* at 759.

42. *Id.* at 758.

43. *Id.* at 759.

44. *Id.*

45. *Id.* at 761.

JUSTICE HARLAN

Justice Harlan, normally a "conservative" who resisted the transformation of the law of criminal procedure worked by the Warren Court, here writes in dissent. Usually he and Douglas were deep antagonists; here in one sense—their "results"—they are on the same side, but in another—their sense of the law and the Court—they remain divided.

Justice Harlan begins by defining the question, much as Justice White did, in terms of the binding force of precedent: "The uncontested facts of this case squarely challenge the continuing viability of *On Lee v. United States*."⁴⁶ But for Justice Harlan this is not merely a technical question about the holding of a prior case, as it is for Justice White, but an important social and political question; the prior case is accordingly to be read not as simply a declaration of a rule but as an attempt to find a meaningful resolution of an issue difficult on the merits, a matter that has "provoked sharp differences of opinion both within and without the judiciary."⁴⁷ "[T]he factors that must be reckoned with in reaching constitutional conclusions . . . are exceedingly subtle and complex."⁴⁸ This is all a way of saying that this is a large and serious question, not to be reduced to a merely technical or easy one.

His next move is to reexamine the sequence of cases. This section of the opinion is a lesson in the reading of precedent, directed both to Justice White and to Justice Douglas, as well as to those who might be persuaded by them. First, as to *On Lee* itself, upon which the majority relies so strongly: This was a five-four judgment, Harlan reminds us, based solidly on the trespass rationale that *Katz* was later to overrule and which in fact three members of the Court disapproved of at the time.⁴⁹ It is true "that the opinion in *On Lee* drew some support from a brief additional assertion that 'eavesdropping on a conversation, with the connivance of one of the parties' raises no Fourth Amendment problem. But surely it is a

46. *Id.* at 768.

47. *Id.* at 771.

48. *Id.*

49. *Id.* at 774.

misreading of that opinion to view this unelaborated assertion as a wholly independent ground for decision.”⁵⁰ This “misreading” is of course essential to Justice White’s opinion; Justice Harlan’s remark thus challenges the central link in Justice White’s chain of authority and challenges as well his methodological commitments to a reading of prior cases as propounding with equal weight a series of equally valid propositions.

Eleven years later the Court decided *Lopez v. United States*,⁵¹ the tape recording case. *Lopez* is cited by White as reaffirming *On Lee*, but Harlan, who was in fact the author of the majority opinion there, says it can hardly be thought to have done so.⁵² While the Court did not then take the step of overruling *Olmstead*, he says, it was careful to base its judgment on two premises: the fact that the tape recordings were used only to corroborate the evidence of the government informer and the fact that there was no risk here not fairly assumed by the defendant. “To the discerning lawyer” unlike Justice White, Harlan is necessarily implying “*Lopez* could give only pause, not comfort.”⁵³

Harlan next turns to *Osborn v. United States*,⁵⁴ a companion to the *Hoffa* and *Lewis* cases, but to which White made no reference at all.⁵⁵ In *Osborn* agents investigating the attempted subornation of a juror were equipped with tape recording devices, the contents of which were sought to be used in evidence against the defendants.⁵⁶ In this it was like *Lopez* and similar to *On Lee* and *White*. But there was a dramatic difference as well, for here the police sought and obtained judicial authorization for what they did.⁵⁷ They had, that is, a form of the judicial “warrant” normally required by the

50. *Id.*

51. 373 U.S. 447.

52. *White*, 401 U.S. at 777.

53. *Id.* at 776.

54. 385 U.S. 323 (1966).

55. Why did Justice Douglas make no reference to this case, except in a footnote? I think the reason is that he had dissented in *Osborn*, believing that even under those circumstances the evidence should be excluded, and did not want to refer to the case approvingly.

56. *Osborn*, 385 U.S. 323.

57. *Id.* at 328.

fourth amendment for any intrusion that amounts to a "search."⁵⁸ The Supreme Court opinion upholding the police conduct in *Osborn* praised the government in the warmest terms and approved most strongly of what it had done.⁵⁹ While this did not entail an explicit holding that there was a "search"—for the government had done what was required of them if there were—some sense that the fourth amendment spoke to this situation was certainly implicit in the Court's pleased approval.⁶⁰

Justice Harlan thus challenges Justice White in two related ways. First, he rejects the implicit theory that cases are to be read simply as rules to be followed until overruled. Rather they are complex struggles to come to terms with real difficulty, to be read in light of the Court's perception of that difficulty and to be given weight reflecting both the Court's confidence in its judgment at the time and our own present sense of its wisdom. Second, he insists that one take all the judicial evidence into account, which Justice White cannot do, for his reading cannot explain the enthusiasm with which the Court approved of the result in *Osborn*. It can of course explain the narrow holding, for his theory would also have led to affirmance. But to reduce a case to its result in that way is to destroy its character as a communicative act, as an expression of mind to mind.

Justice Harlan, then, sees the law as developing, as Justice White did not, but developing in a complex and reasoned way, not in the simple fashion that Justice Douglas describes. For him, indeed, the ultimate overruling of *Olmstead* by *Katz* was deeply foreshadowed by other developments:

Viewed in perspective, then, *Katz* added no new dimension to the law. At most it was a formal dispatch of *Olmstead* and the notion that such problems may usefully be resolved in the light of the trespass doctrine, and, of course, it freed for speculation what was already evident, that *On Lee* was completely open to question.⁶¹

58. *Id.*

59. *Id.*

60. *White*, 401 U.S. at 777.

61. *Id.* at 780. For an elaboration of the view that *Katz* added "no new dimension to the law," and should therefore be retroactive in its application, see Justice Harlan's opinion in *Desist v. United States*, 394 U.S. 244, 256 (1969).

So far all of Justice Harlan's reading of precedent has merely established this last point, that *On Lee* is open to question.⁶² How is the matter of its continued force to be decided? This is a version of the central question that faces every judge examining any case that bears upon the one before her: Is this a case to which she should submit her own judgment, or is it properly to be regarded as no longer having effect? How is this decision to be made: by the strength of one's own agreement or disagreement with the case? Or by something external to the self, in the law, and if so, what?

Justice Harlan makes no claim that he is entitled to oppose his will or preference to that of a prior court. But as a reader of the legal context in which he acts, as an interpreter of the cases which define it, he attempts to find an authority outside the self—though in part established by his skill and understanding—upon which to rest. He reads the decisions of the Court since *On Lee* and finds in them “sound general principles for the application of the Fourth Amendment” of a kind that were either “dimly perceived or not fully worked out” at the time of *On Lee* itself, and which, therefore, have a higher standing than the holding of that case.⁶³ These principles, Harlan says, include the following: “[T]hat verbal communications are protected by the Fourth Amendment, that the reasonableness of a search does not depend on the presence or absence of a trespass, and that the Fourth Amendment is principally concerned with protecting interests of privacy, rather than property rights.”⁶⁴

How do these principles bear upon the *Lewis* and *Hoffa* cases? Do they suggest, for example, that a warrant should be required whenever anyone acts as an undercover agent? Justice Harlan says no, asserting as a crucial difference that “[i]n each of these cases the risk the general populace faced was different from that surfaced by the instant case. No surreptitious third ear was present, and in each opinion that fact was carefully noted.”⁶⁵ It will not do, as

62. *White*, 401 U.S. at 780.

63. *Id.* at 780-81.

64. *Id.* at 781.

65. *Id.* at 784.

Justice White will have it, simply to assert that there is "no difference" between a case in which an individual talks to a government informer and the case in which that conversation is recorded or transmitted.⁶⁶ While the "risk analysis" approach represents "an advance over the unsophisticated trespass analysis of the common law," it too has its "limitations and can, ultimately, lead to the substitution of words for analysis."⁶⁷ In particular, Harlan says, we must "transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and the present."⁶⁸

The real question, then, is whether the risk that is imposed on the public by the use of such bugging devices is a proper one under the fourth amendment. This question should be answered, he says, "by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."⁶⁹

The issue for Justice Harlan, then, is not what risks wrongdoers must have to contemplate, but what risks every person in the country must have to contemplate.⁷⁰ If the use of electronic surveillance of this kind is not regulated by the fourth amendment, it means that the police may do it to any person at any time, without any controls whatsoever.

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.⁷¹

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.⁷²

66. *Id.* at 750.

67. *Id.* at 786.

68. *Id.*

69. *Id.*

70. *Id.* at 787.

71. *Id.* at 790.

72. *Id.*

At the end, then, Harlan must choose, and choose upon the basis of his own construction of the fourth amendment, of the values it protects, and of the social effects of the practice of consensual bug-ging. But this act of choice is not the raw exercise of power, or the imposition of his values on the law, or the simple assertion of a "cost-benefit" method of reasoning, for it takes place in the context created by the rest of his opinion, in which he defines himself as faithful to the law, as a responsible and intelligent reader of the cases that give it meaning—far better than the literalist White or the simplistic Douglas—and as one whose values, and hence whose choice, are inspired in large measure by the law to which he is paying such careful attention. When he makes his choice it is to fill a gap left by the law, a gap that requires a choice; and he grounds his choice in an educative process—in which his reader may share — by which it is not he alone, as an atomized bearer of tastes and preferences, who acts, but he as one who is formed by the very tradition to which he contributes in this opinion. When this case is read in the context of his work as a whole—in which he repeatedly argues for judicial restraint, on the grounds that the residual power of the Court should be reserved for great matters on which the tradition is inconclusive—we can see it as the fulfillment of an implied promise, that when such a case arose he would act, and here he did.

* * *

When we put these opinions together with those in *Olmstead*, certain parallels emerge. Justice White's opinion, like Taft's, purports to locate all authority in texts external to itself, in the authoritative declarations of others. For Taft this declaration was the language of the fourth amendment, to him "plain" beyond question; for White, the external declaration consists of the series of cases construing that amendment. His texts are more complex than Taft's, and harder to read—they require an understanding of the reasons why the cases were decided as they were and the construction of the distinctions that organize them—but for White as for Taft there is nothing in principle problematic about the process of reading them, at least for the legally trained mind. (But this is an important qualification: the authority he rests upon is not just the text plus "com-

mon sense," as with Taft: it is the text plus a certain form of disciplined reading.)

Justice Douglas finds his authority not in the specific language of the Constitution—one remembers his famous opinion in *Griswold v. Connecticut*,⁷³ outlawing state-imposed contraceptive bans upon married couples, in which he spoke of the "penumbras" of the various amendments—nor in the specific holdings of prior cases, but in the providential history of which he is an observer and in which he is an actor. Once we thought this, but we were wrong: gradually we have come to see the truth. This movement is its own authority, at least as it is reported by a mind correctly attuned to it. To compare for a moment legal with biblical interpretation, one is reminded of those Protestants—among whom Douglas was in fact raised—who focused like all Protestants upon the sacred text rather than the tradition, but who read the text with an eye not to its letter but to its spirit.⁷⁴ This is a kind of reading that is easy to mock—one thinks of the famous pages in Hooker and Swift where this is done—but for us perhaps too easy. There is much to the view that what is required to read a text is not mere "reason," as if that could be segmented off from the rest of experience and the self, but attunement, or right orientation; the effort to make oneself its ideal reader.

Harlan sees authority not simply in the cases, certainly not in the spirit of change, but in the tradition out of which he speaks; this tradition must be read, and we are responsible for the way we choose to read it, and hence to construct it. The right way of reading is not legalistic, as White's is, but as a "discerning lawyer," that is, with a kind of thoughtfulness and attention that go beyond the local holdings to what Harlan calls the "principles" that the cases can be seen gradually to create. Authority thus lies in a kind of respectful interaction between mind and material, past and present, in which each has its proper contribution to make: not simply in the tradition, then, but in the tradition as it is reconstituted in the

73. 381 U.S. 479 (1965).

74. For a discussion of "Protestant" and "Catholic" hermeneutics see S. LEVINSON, *CONSTITUTIONAL FAITH*, (1988).

present text. The central excellence of the judicial mind lies in the art of composition by which this is achieved.

With his reader Justice Harlan establishes a double relation: in one sense he educates us—he trains us in the art of “discerning,” of seeing through the holdings to the deeper patterns—but at the same time he holds up his own efforts of that kind to our own scrutiny and criticism, thus establishing a kind of fundamental equality with us too. In this sense the conversation he establishes, despite its traditional cast, is deeply democratic.

The past is there and he treats it seriously, as Douglas does not; but he knows, as White in this opinion seems not to have known, that it is impossible simply to set over the meaning of this past, without gain or loss or modification, into a series of declaratory propositions. Like Brandeis in *Olmstead*, he sees that the past must be translated and that this necessarily involves making it mean something new, something it does not already mean. The present mind creates out of the materials of the past the meanings upon which its own authority rests; but in doing so it always acts under an obligation of fidelity to what is external to the present self, the present moment.

* * *

In all of this there are many paradoxes and ironies. It is, for example, Brandeis’s famous opinion in *Olmstead*, in many ways so admirable, that provides the ground used in *Katz* to overrule that case; but the opinion in *Katz* has some of the conclusory and authoritarian characteristics of Taft’s opinion, in many ways so objectionable. And the fourth amendment is here converted from a text regulating “search and seizure” into a “right of privacy against the government,” leaving us with the kind of question the due process clause itself presents, how such vague language is to be given meaning, but without the history that might help us do this. Does *Katz* mean that judges will have to become simply authoritative sensibilities? Or can the processes of legal thought still find a way to work?

White provides three responses to this question, of which the first, that of Justice White, can perhaps be explained by this history.

He insists upon reading the prior constitutional cases as a set of authoritative holdings, in a rigid adherence to a very old-fashioned model of a common-law thought. This method can easily be criticized, as I have done, but in fairness one should also say that this choice may be self-consciously motivated by Justice White's sense of the current state of constitutional law, and in particular the law of the fourth amendment, namely, that we are in danger of losing all sense of obligation to the past. After all, *White* was decided at the end of the Warren Court era, when, in a burst of judicial energy, case after case had been overruled; the style of White's opinion here can be thus taken as an argument by performance that the Court should look at prior cases as constraining it far more than it had come to do. This caricatured form of thought, that is, can itself be read as a kind of corrective argument about the way we ought to think.

Much can also be said in defense of Douglas's opinion, which at once mocks White's and introduces important ways of thinking which that opinion excludes. The deep question Douglas brings to the surface is the proper role of *stare decisis*, the doctrine that gives opinions their authority. White pretends to see no problem of this sort, and seems simply to regard all opinions as of equal weight. But to do this he must treat the opinions in a rather reduced way, as each promulgating a rule or a set of rules resting on wholly restatable reasons rather than seeing them as parts of a process in self-education and self-constitution. Equally important, his method has no place for the kind of change this sort of law requires, namely, by overruling.

Our reading of Douglas's opinion thus suggests the general question: What kind of respect should be paid to the opinions of the past and why? One might think, for example, that the only text that matters is the Constitution (or, in a statutory case, the statute). Whatever other judges have said is only their opinion, to be given no more weight than their reasons seem to us to warrant. On this view all real authority would reside in the primary text; the opinion of the court would be entitled to no more consideration than an academic or even journalistic commentary. (This is roughly the way in which civil-law systems treat statutory adjudication.) This is a

difficult position for our Supreme Court in practice to accept, for it would change our whole sense of what the Court does. Our Justices do not feel that they are just commentators but that they are acting as lawmakers; they no doubt want their own opinions to receive the kind of attention that law commands, and we do too. For that to happen they must accord other opinions equal respect, or their own claims to authority will be undermined.

But the question can be put more generally, whether the Court should seek to have its decisions regarded as law in the first place. What would be lost if they were not? How are judicial decisions different, for example, from the opinions of commentators? The difference lies not in the intelligence or virtue of judges as people but in the process and discipline by which they act. Their decisions are not abstract but contextualized in the demands of a particular case; they are not volunteered, but required of them, for they do not choose what comes before them; and they are informed by argument both ways, both oral and written, and by argument that is itself informed and constrained by what has preceded it. The array of decisions a court makes over time in this way constitutes an enormous reservoir of intellectual and practical experience upon which future lawyers and judges may draw. In this sense the heart of the law is that it is a mode of communal self-education and self-constitution. This process can work as it does only if the cases we read are entitled to attention of a very high degree of intensity. This is indeed a function of their authority as law.

There are those who would argue with this view, wishing to reduce law to mere policy and to act as though our freedom to choose at any point were wholly unconstrained except by the nature of our material and social resources. But it is the nature of the law to constitute a set of constraints; its art lies in living with and within them.

All this is not to say that all cases should be given equal weight. This is the point that Douglas sees and that White's opinion slides over. How are we to decide which cases are no longer "good law"? How are we to talk about the process by which we do so? But Douglas is less helpful than he might be, speaking as he does in terms of self-evident moral progress. Here Harlan's achievement is

remarkable, for in his opinion he re-creates the past in such a way as to pay it the respect it is due, and this in two seemingly conflicting ways: he respects both the particular conclusions the cases have reached and the process of transformation by which certain of these cases lose their authority as law. For in his view the proper overruling of a case is not a simple act of will or judgment, a decision to overturn, but a gradual process by which the understandings that underlie the case are eroded or modified, over time, and by others as well as oneself. The law is a community in the process of its own transformation, and for him the transformation is entitled to the same kind of weight that the particular decisions have. The transformation that counts as authority is not to be found in one's preferences but in the world. It is not the judge's will that decides but his sense of the meaning of the authoritative past. And what changes can include his own mind: Justice Harlan here reaches a judgment that would require a different result in *Lopez*, the opinion of which he was the author.

Each of these styles of thought constitutes a different relation not only with the cases of the past, but with the present reader and with those who will think about these matters in the future as well. Justice White's opinion exposes itself to factual and logical refutation, and to that extent creates with its reader the relation that exists between reasoning beings, and this is to perform an essential but limited egalitarianism; limited because the intellectual processes are limited, and because they assume the kind of knowledge that belongs only to a learned profession. Douglas's opinion is egalitarian in a different sense: it speaks to and for the nonlawyer in the world and asserts her capacity to understand the essence of what is at stake in constitutional law. But to that audience Douglas preaches rather than reasons—it is hard to see in what terms the opinion can imagine its own refutation—and this is to establish an inherently authoritarian relation with the present and future reader. Harlan, by contrast to both, expresses a complex process of reasoning, each stage of which exposes itself to potential refutation even as it seeks to amend it. And the power of reasoning is not mere logic: it is an attempt to think about the critical social issue in the terms established by our common past. If this were held out as a model of conversation in the law, one could imagine turning to that life with

a kind of eagerness, with a sense of pleasure and a hope of meaning, that either of the other two opinions would blunt. It is true that Harlan's discourse is one that requires training of the mind and sensibility, and is in this sense not egalitarian. But its ultimate position is plainly enough stated for the average reader to follow; and in the rest of it he offers an education in the art of mind he is exercising, which is close to the center of what in a world like ours we can mean by democracy.

* * *

Much as I admire the spirit in which Harlan does all this, I should say that on the merits I myself am unconvinced that the line he draws between the agent without a transmitter and the agent with a transmitter is the important one. There is much to be said for Justice White's view that not a great deal hangs on this. I agree with much of Justice Harlan's sense of the meaning of the past but think that it is the use of the informer himself (at least in any case in which the initial contact is not criminal) that should count as a search requiring judicial approval.⁷⁵ In this sense my view on the "merits" is closest to that of Douglas, whose opinion is in my view much less admirable than Harlan's. I say all this not because my views on these matters have special importance, but to suggest by this example one way in which one's estimate of the quality of an opinion can differ from one's imagined vote.

75. For fuller explication of this position see White, "The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock," 1974 SUP. CT. REV. 165, 227-231.