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An Ex Parte Order May Not Serve the Function of a Search Warrant Under the Fourth Amendment To Authorize a Physical Intrusion in Connection With a "Search" for Conversations—*People v. Grossman**

There was probable cause to believe that defendant Scandifia was implicated in a larceny of jewelry by false pretenses. Pursuant to section 813-a of the New York Code of Criminal Procedure,[1] the Supreme Court in New York County issued an ex parte order authorizing the installation of an eavesdropping device in a service station owned by Scandifia. Shortly thereafter, police broke into

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* 45 Misc. 2d 557, 257 N.Y.S.2d 266 (Sup. Ct. 1965) (Sobel, J.) (hereinafter cited as principal case).

1. "An ex parte order for eavesdropping . . . may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead [*sic*] or recorded and the purpose thereof. . . . In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest." N.Y. CODE CRIM. PROC. § 813-a (Supp. 1965).

the station's private office and installed a microphone. Conversations were overheard which indicated that defendant Grossman had in his possession two pistols received from Scandifia. An affidavit setting forth these conversations supplied the sole probable cause for a warrant authorizing a search of a car owned by Grossman and seizure of the pistols. On the basis of the evidence thus obtained, the defendants were indicted for illegal possession of weapons and conspiracy. They moved to suppress the tangible product of the search—the pistols—on the ground that the probable cause for the issuance of the warrant was based on information obtained in violation of their rights under the fourth and fourteenth amendments.[2] *Held,* motion granted. Under the fourth and fourteenth amendments, no warrant may issue for a search and seizure of *mere evidence.* Electronic eavesdropping, which is inherently a quest for mere evidence, must be prohibited regardless of judicial authorization, once the protection against unreasonable searches and seizures has been brought into play by the occurrence of a trespass.[3]

In 1928 the Supreme Court of the United States held, in *Olmstead v. United States,*[4] that wiretapping is not proscribed by the fourth amendment protection against unreasonable searches and seizures. That holding was based on the fact that wiretapping lacks the essential characteristics of conventional search and seizure: physical entry and seizure of tangible property.[5] Although Congress has since outlawed all wiretapping,[6] the rationale of *Olmstead* re-

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2. The application of the fourth amendment to the states through the fourteenth amendment is well settled. See Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

3. In a comprehensive opinion, Justice Sobel discussed many constitutional problems raised by electronic eavesdropping, but chose to rely on the grounds stated in the text.

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

5. *Id.* at 464-66.

6. Wiretapping is now governed by § 605 of the Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1964), which was interpreted in Nardone v. United States, 302 U.S. 379 (1937), as prohibiting the admission of wiretap evidence in the federal courts. In the second *Nardone* case, 308 U.S. 338 (1939), the Court interpreted § 605 as requiring the federal courts to exclude all evidence *derived* from wiretapping. The second *Nardone* case also indicated that interception alone, even without divulgence, constitutes a violation of § 605. *But cf.* Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View,* 44 MINN. L. REV. 855, 858 (1960). Section 605 does not, however, protect against the admission of wiretap evidence in state courts. See Schwartz v. Texas, 344 U.S. 199 (1952). *But cf.* Pugach v. Dollinger, 277 F.2d 739, 744 (2d Cir.) (concurring opinion), *aff'd per curiam,* 365 U.S. 458 (1960). See generally DASH, KNOWLTON & SCHWARTZ, THE EAVESDROPPERS 385-406 (1959) [hereinafter cited as DASH]; Bradley & Hogan, *Wiretapping—From Nardone to Benanti and Rathbun,* 46 GEO. L.J. 418 (1958); Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 MINN. L. REV. 891 (1960); Rosenzweig, *The Law of Wiretapping,* 32 CORNELL L.Q. 514 (1947); Schwartz, *On Current Proposals To Legalize Wire Tapping,* 103 U. PA. L. REV. 157 (1954); Westin, *The Wire Tapping Problem—An Analysis and a Legislative Proposal,* 52 COLUM. L. REV. 165 (1952); Comment, *Wiretapping—The Federal Law,* 51 J. CRIM. L., C. & P.S. 441 (1960).

mains a barrier to the control of other forms of electronic eavesdropping.[7] Thus, in *Goldman v. United States*[8] the Court extended the rationale of *Olmstead* to another type of eavesdropping and ruled that the placing of a detectaphone on the party wall of a hotel room, allowing police to overhear conversations held within the adjacent room, did not constitute a violation of the fourth amendment. In both *Goldman* and *Olmstead* it was noted that a different question would have been presented if the eavesdropping had been achieved by means of a physical trespass.[9] More recently, while preserving the basic holding of *Olmstead* and *Goldman* that the overhearing of conversations does not amount to a technical search and seizure, the Court has held that the fourth amendment does provide *some* protection against electronic eavesdropping.[10] Thus, in *Silverman v. United States*,[11] eavesdrop evidence obtained by the insertion of a spike microphone into a party wall was excluded. The Court expressly declined to reconsider *Goldman*, but rather based exclusion of the evidence solely on the finding of "an unauthorized physical penetration."[12]

Although this language would seem to admit the possibility of an *authorized* "penetration," the question has apparently never been faced by an appellate court. Section 813-a of the New York Code does not explicitly sanction judicial authorization of physical "penetrations" in connection with eavesdropping, but such authorization must have been considered implicit in the statute, since the legislature was primarily concerned with the prevention of *unauthorized* "bugging"—the practice of concealing a microphone within a room, typically the home or office of the victim.[13] Despite this legislative

7. The term "electronic eavesdropping" ordinarily includes wiretapping; in this note, however, it is used to mean all forms of electronic eavesdropping *except* wiretapping.

8. 316 U.S. 129 (1942).

9. *Id.* at 135; Olmstead v. United States, 277 U.S. 438, 466 (1928).

10. Clinton v. Virginia, 377 U.S. 158 (1964) (memorandum decision), *reversing* Clinton v. Commonwealth, 204 Va. 275, 130 S.E.2d 437 (1963); Silverman v. United States, 365 U.S. 505 (1961). See also United States v. Pardo-Bolland, 348 F.2d 316 (2d Cir.), *cert. denied*, 34 U.S. L. WEEK 3201 (U.S. Dec. 6, 1965).

11. Silverman v. United States, *supra* note 10.

12. *Id.* at 509. See Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements—A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78, 123 n.206, 123-28; *cf.* Wong Sun v. United States, 371 U.S. 471 (1963).

13. See REPORT OF THE NEW YORK JOINT LEGISLATIVE COMMITTEE ON PRIVACY OF COMMUNICATIONS AND LICENSURE OF PRIVATE INVESTIGATORS 17 (1962): "As to eavesdropping by secret microphone, on which Congress has never acted, the Supreme Court has pronounced new constitutional law. Notably, in the *Silverman* case of 1961, it reversed the conviction of a Washington gambler. District of Columbia Police had driven a spike, ingeniously equipped with a microphone, through the wall of Silverman's house, thereby overhearing conversations within. The Supreme Court noted that this was done without a warrant, and was 'accomplished by means of an unauthorized physical encroachment within a constitutionally protected area.' As to this, we observe with satisfaction that New York law [§ 813-a], enacted in 1958 on the initiative of

intent, the court in the principal case limited, on constitutional grounds,[14] the application of the statutory procedure to that eavesdropping which can be achieved without physical penetration. The first premise in the reasoning which led the court to this result was that under *Silverman* "eavesdropping, . . . accompanied by a trespass, constitutes an unreasonable search and seizure in violation of the fourth amendment."[15] In the court's view, the entry by which the "bug" was planted was a trespass.[16] Thus, the court first concluded that the activity in question was unlawful and then proceeded to inquire whether that prima facie unlawfulness was avoided by the court order.

In answering this question in the negative, the court relied on the rule enunciated in *Gouled v. United States*[17] and other cases[18] that searches for and seizures of objects of "evidentiary value only" are prohibited by the fourth amendment. Under the *Gouled* rule, searches made pursuant to a warrant,[19] as well as those incident to a lawful arrest without a warrant,[20] are limited to fruits of the crime, instrumentalities of the crime, and contraband.[21] The court in the principal case reasoned that since conversations do not fall within any of these categories but are mere evidence of guilt, and since a search for mere evidence violates the fourth amendment, a "search" for conversations is always prohibited, whether authorized or not.[22] The court was careful to limit this holding to eavesdropping achieved by physical intrusion upon a constitutionally protected area.[23] However, since all successful electronic eavesdropping, regardless of physical intrusion, involves the acquisition of mere evidence, the thrust of the court's reasoning condemns with equal force eavesdropping of the type specifically upheld in *Goldman.*

this Committee, requires the issuance of a court order (i.e., a warrant) to authorize and validate evidence obtained by secret microphone. *We hope and trust that this will be found in accord with the principles set forth in the Silverman case.*" (Emphasis added.)

14. Principal case at 574, 257 N.Y.S.2d at 283.

15. *Id.* at 562, 257 N.Y.S.2d at 271.

16. *Ibid.*

17. 255 U.S. 298, 309-11 (1921).

18. See, *e.g.*, Abel v. United States, 362 U.S. 217, 237-38 (1960); Harris v. United States, 331 U.S. 145, 155 (1947); United States v. Lefkowitz, 285 U.S. 452, 464-66 (1932); Boyd v. United States, 116 U.S. 616, 630 (1885). See generally 8 WIGMORE, EVIDENCE § 2184a, at 45-46 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]; Shellow, *The Continuing Vitality of the Gouled Rule—The Search for and Seizure of Evidence*, 48 MARQ. L. REV. 172 (1964); Comment, *Limitations on Seizure of "Evidentiary Objects"—A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319 (1953).

19. See Gouled v. United States, 255 U.S. 298, 309-11 (1921). Compare Zap v. United States, 328 U.S. 624 (1946).

20. See United States v. Lefkowitz, 285 U.S. 452, 466 (1932).

21. See Harris v. United States, 331 U.S. 145, 154 (1947).

22. Principal case at 574, 257 N.Y.S.2d at 282-83; *cf.* Schwartz, *supra* note 6, at 163; Williams, *supra* note 6, at 864-67.

23. Principal case at 578, 257 N.Y.S.2d at 286.

Indeed, it is difficult to avoid the force of Mr. Justice Douglas' argument in *Silverman* that the Court should concern itself with all the *actual*, rather than merely the physical, encroachments upon privacy.[24] Logically the evidence-only rule should apply to *all* eavesdropping if it applies to any, but such an application of the rule would be inconsistent with the views expressed in the *Olmstead* and *Goldman* cases. However, it is arguable that this inconsistency caused by the application of the *Gouled* rule in the principal case might have been avoided by use of the analysis to be suggested here.

Since it is a limitation on what may lawfully be seized, the evidence-only rule can have no application without an initial determination that there has been a *seizure* within the meaning of the fourth amendment. The instant court's interpretation of the *Silverman* case as holding that electronic eavesdropping involving physical penetration amounts to a fourth amendment search and seizure[25] is therefore of critical importance. This interpretation would seem to conflict with the literal construction given the fourth amendment by the Supreme Court in *Olmstead* and *Goldman*—that conversations, not being "persons, houses, papers [or] effects"[26] are inherently incapable of being "seized" in the constitutional sense.[27] The court in the principal case said, in effect, that *Silverman* and the later case of *Wong Sun v. United States*[28] modified *Olmstead* and *Goldman* to the extent that conversations may now be considered to have been "seized," within the meaning of the fourth amendment, when the eavesdropping is accomplished by means of a physical intrusion.[29] Such an interpretation would be permissible were it not for the express, albeit grudging, refusal by the majority of the Court in *Silverman* to reconsider the holding of *Goldman*.[30] Unless this refusal is to be regarded as mere judicial hedging, an alternative explanation of *Silverman*, one consistent with *Goldman*, is required.

A more plausible alternative would be to read *Silverman* as excluding the eavesdrop evidence not because it was illegally "seized," but because its acquisition was "tainted" by a prior illegality—the "unauthorized physical penetration."[31] This interpretation is rein-

24. See Silverman v. United States, 365 U.S. 505, 512 (1961) (concurring opinion).

25. Principal case at 562, 257 N.Y.S.2d at 271.

26. U.S. CONST. amend. IV.

27. Olmstead v. United States, 277 U.S. 438, 464 (1928).

28. 371 U.S. 471 (1963).

29. Professor Broeder is of the opinion that *Silverman* and *Wong Sun* foreshadow the ultimate demise of *Olmstead* and *Goldman*. See Broeder, *Wong Sun v. United States—A Study in Faith and Hope*, 42 NEB. L. REV. 483, 614 (1963): "[T]he main premise of Olmstead is not trespass, but that conversation is not an 'effect.' Silverman and Wong Sun destroyed that premise and Olmstead along with it." *But see* note 31 *infra* and accompanying text.

30. Silverman v. United States, 365 U.S. 505, 512 (1961).

31. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). For an exposition of the distinction between the exclusion of intangible evidence, such as

forced by the Supreme Court's express reliance upon *Silverman*, in the non-eavesdropping context of the *Wong Sun* case,[32] to exclude incriminating statements obtained as the result of an illegal entry and arrest. The two cases present parallel applications of the same principle; both decisions exclude intangible evidence as the "fruit of the poisonous tree," *not* as illegally seized. In *Wong Sun* the "poisonous tree" was the illegal entry and arrest; in *Silverman*, it was the unauthorized penetration.[33]

If this line of reasoning is valid, eavesdropping accompanied by a validly *authorized* penetration would seem to stand on exactly the same constitutional footing as that found permissible in *Goldman*, since no prior illegality is present to taint it. The proper inquiry in the principal case would then concern the legality of the physical intrusion. Under New York law, a forcible, surreptitious entry, such as in the principal case, would seem to be lawful when validly authorized.[34] The intrusion here, however, was not confined to the entry of the officer who planted the "bug," but extended to the continued presence, for almost five months, of the microphone in defendant's office. It would therefore appear that periodically

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incriminating evidence, as illegally "seized," and exclusion as "the fruit of the poisonous tree," see Kamisar, *supra* note 12, at 123-28. As Professor Kamisar points out, there has been considerable confusion on this point. *Id.* at 125. For an illustration of the confusion, *compare* McDonald v. United States, 335 U.S. 451, 458-59 (1948) (Jackson, J., concurring), *with* Williams v. United States, 263 F.2d 487 (D.C. Cir. 1959).

32. Wong Sun v. United States, 371 U.S. 471, 485 (1963).

33. The author of the opinion in the principal case takes a different view of *Silverman* and *Wong Sun*. See SOBEL, CURRENT PROBLEMS IN THE LAW OF SEARCH AND SEIZURE 105 (1964):

> "*Silverman* is thus the first recent (see also Wong Sun v. United States, 371 U.S. 471 (1963)) practical recognition of the dual nature of the Fourth Amendment—that the first or privacy clause forbids the search for evidence (with or without a warrant) by *trespass* into the privacy of home, office, etc.—while the second or search warrant clause permits search for tangibles to which the People or Government have the primary right but only with a search warrant."

It is difficult to understand the basis for these conclusions. Neither *Silverman* nor *Wong Sun* discusses the evidence-only rule. Moreover, there is nothing to indicate that exclusion was based on anything other than the initial illegality—the penetration in *Silverman* and the entry and arrest in *Wong Sun*. In fact there were positive indications that had valid warrants been obtained the evidence would have been admissible. See Wong v. United States, 371 U.S. 471, 484 (1963); Silverman v. United States, 365 U.S. 505, 509 (1961).

34. See N.Y. CODE CRIM. PROC. § 799 (Supp. 1965), which allows forcible entries to preserve evidence. Section 801 permits nighttime searches when specially authorized. Section 813-a must be read as implicitly authorizing such tactics in view of the peculiar requirements of "bug" planting. See note 13 *supra*. See also People v. Johnson, 231 N.Y.S.2d 689 (Ct. Gen. Sess. 1962) (search of unoccupied premises held constitutional).

Under this analysis it would seem arguable that the legality of the trespass depends on its purpose and therefore that a trespass to secure mere evidence may not be authorized. Under the fourth amendment as construed in *Olmstead* and *Goldman*, however, the securing of this type of evidence, *i.e.*, conversations, does not require authorization. Thus the *purpose* is constitutionally permissible and cannot be used to invalidate the physical intrusion.

renewed, validly issued judicial authorization would be required both by the fourth amendment and by section 813-a for the duration of the intrusion.[35] Although the court found that there was sufficient probable cause to support the initial issuance of the eavesdrop order, no *new* probable cause was supplied to support the two extensions of the order.[36] Thus, when the incriminating conversations were finally overheard some four months after the initial issuance of the order, there was no effective probable cause to justify the continued intrusion, and the authorizing order would have been invalid for that reason alone.[37] Moreover, the fact that the "bug" was in operation for so long a time, regardless of probable cause, would seem to render the search exploratory, placing it within the proscription of the fourth amendment.[38]

Thus, had the court confined its inquiry to the legality of the intrusion, it would have reached the same result that it eventually reached through its application of the evidence-only rule. In placing full reliance on that rule, however, the court necessarily outlawed *all* eavesdropping accompanied by an intrusion. A narrower inquiry, based solely on the legality of the intrusion, would have allowed eavesdropping when reasonable—when there is effective probable cause to support the court order, and the length of operation does not render the search exploratory.[39]

The unavoidable result of the decision in the principal case appears to be that a New York policeman who has probable cause and obtains a court order may eavesdrop only if the circumstances enable him to do so without a physical intrusion. Freedom from official eavesdropping is thus made to depend on the sophistication of police equipment or the thickness of a wall.[40] Moreover, if the rationale of the principal case were applied in a jurisdiction which provides no statutory safeguards against eavesdropping,[41] as it must

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35. New York provides for renewal or extension when the judge who originally issued the eavesdrop order satisfies himself that it is in the public interest. N.Y. CODE CRIM. PROC. § 813-a (Supp. 1965). *Cf.* Westin, *supra* note 6, at 203-04.

36. Principal case at 568, 257 N.Y.S.2d at 277.

37. See People v. Chippewa Circuit Judge, 226 Mich. 326, 197 N.W. 539 (1924).

38. See, *e.g.*, Marron v. United States, 275 U.S. 192 (1927).

39. The requirement that the warrant particularly describe the things to be seized, discussed in the principal case at 567-68, 257 N.Y.S.2d at 276-77, does not arise under the suggested interpretation of *Silverman* (see text accompanying note 27 *supra*) since nothing is *seized*. The same is true of the problem of "unrelated" seizures, discussed in the principal case at 568-69, 257 N.Y.S.2d at 276-77. However, the problem of new probable cause to support the extensions of the order is common to both approaches, regardless of whether there is a seizure. The court apparently concluded that lack of new probable cause vitiated the order, but declined to rest its decision on this conclusion. See principal case at 568, 257 N.Y.S.2d at 277.

40. See Silverman v. United States, 365 U.S. 505, 513 (1961) (concurring opinion of Douglas, J.).

41. New York was the first state to provide for court-ordered eavesdropping; three other states have subsequently enacted similar statutes. See MASS. GEN. LAWS ch. 272,

be if it is required by the fourth amendment, the result would be even more anomalous. For example, a policeman could not employ a "spike mike" even if he had probable cause and had obtained a warrant. However, a policeman with a parabolic microphone[42] could eavesdrop without any restriction whatever.

It is arguable that, on the basis of past Supreme Court decisions, primarily *Olmstead* and *Goldman*, the question of the applicability of the evidence-only rule should never have been reached in the principal case.[43] However, there is a distinct possibility that these cases will ultimately be overruled and eavesdropping brought within the terms of the fourth amendment.[44] Should this occur, the rationale of the principal case in applying the evidence-only rule would assume great significance. The application of the *Gouled* rule would result in the complete prohibition of eavesdropping,[45] eliminating any possibility of a judicially controlled process. There are cogent arguments against the application of the *Gouled* rule to electronic eavesdropping,[46] and there is no compel-

§ 99 (Supp. 1964); NEV. REV. STAT. §§ 200.660, 200.670 (1959); ORE. REV. STAT. § 171.720 (1959). See also DASH 430-37.

42. For a description of devices that require no physical penetration, see DASH 346-58.

43. See text accompanying notes 30-31 *supra*.

44. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965); Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212; *Symposium on The Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965). *Griswold* is significant both for its expansive approach to the Bill of Rights and for its discussion of a right of privacy. See also Lopez v. United States, 373 U.S. 427, 457-63 (1962), where Justices Brennan, Douglas, and Goldberg indicated their disagreement with *Olmstead*, and the separate opinion of the Chief Justice, 373 U.S. at 441, suggesting that he might join in overruling at least *Goldman*.

45. It has been assumed throughout this note that conversations are inherently mere evidence. In certain instances, however, the courts have broadened the meaning of "instrumentalities" to avoid the effect of the *Gouled* rule. For example, in a conspiracy case conversations might be considered the instrumentalities of the crime. *Cf.* Kamisar, *supra* note 6, at 914-18.

46. The *Gouled* rule is probably a historical anomaly. See 8 WIGMORE § 2264 n.4; Kamisar, *supra* note 6, at 914 n.129; Comment, *supra* note 18. It has been said the rule cannot be justified on policy grounds. See Inbau, *Public Safety v. Individual Civil Liberties—The Prosecutor's Stand*, 53 J. CRIM. L., C. & P.S. 85, 87 (1962); Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and Some "Theories,"* 53 J. CRIM. L., C. & P.S. 171, 177 (1962). Applications of the evidence-only rule have led to striking inconsistencies. *Compare* Gouled v. United States, 255 U.S. 298 (1921), *with* Zap v. United States, 328 U.S. 624 (1946). One court concluded that the issue as to what are instrumentalities as opposed to mere evidence "turns more on the good faith of the search than the actual distinction between the matters turned up." Matthews v. Correa, 135 F.2d 534, 537 (2d Cir. 1943). This has led to the suggestion that the rule would not stand in the way of a comprehensive statutory scheme for the regulation of wiretapping. See Kamisar, *supra* note 6, at 916-18. The same considerations would seem applicable to eavesdropping. *But see* Williams, *supra* note 6, at 870-71, where it is suggested that the *Gouled* rule is inapplicable to wiretapping only insofar as the telephone itself, as opposed to the conversations, is considered an "instrumentality."

The Supreme Court has applied the rule only in cases involving the seizure of private papers. See Shellow, *supra* note 18, at 179. Moreover, Mr. Justice Jackson once

ling case *for* its application, because the rule does not attack the most objectionable aspect of eavesdropping. The most obnoxious feature of electronic eavesdropping is not that it permits the acquisition of mere evidence, but that it invades privacy to an extent heretofore unknown, and in such a way that the individual has little or no opportunity to know of the invasion.[47] It would seem that the rejection of the evidence-only rule would be far more likely if there were a sound basis for allowing *limited* eavesdropping under safeguards which rendered it no more objectionable than conventional investigatory practice. Although a detailed examination of the regulatory problem is beyond the scope of the present discussion, two observations are appropriate. It is well accepted that the requirement of probable cause is the heart of the fourth amendment protection against unreasonable searches and seizures.[48] The probable-cause requirement does not protect privacy in general. The fourth amendment permits invasions of privacy, provided there is sufficient probability that the offended individuals are guilty of a crime. It is submitted that electronic eavesdropping is as capable of fulfilling this probable-cause requirement as any conventional method of search.[49] With regard to eavesdropping, however, the requirement of probable cause establishing that the thing to be seized will be found in the place to be searched is especially pertinent. For example, in the principal case the investigating officer should have been required to show not only that the defendant was probably implicated in the crime, but also that there was reason to believe he would be discussing the crime in his office during the period of the proposed eavesdropping.[50] If this requirement were strictly observed, the possibility of overhearing irrelevant conversations would seem to be diminished. Furthermore, the time span covered by the eavesdropping is crucial. It would seem that the statutory period of two months in New York is too long,[51] and that a reasonable period should be measured in hours or days, not months. A longer period suggests a "fishing expedition" and would render the search exploratory.

suggested that the rule of the *Gouled* case was "inapposite in the field of mechanical or electronic devices designed to overhear or intercept conversations." On Lee v. United States, 343 U.S. 747, 753 (1952). See also Goldman v. United States, 316 U.S. 129, 140 n.7 (1942) (Murphy, J., dissenting). *But see* Lopez v. United States, 373 U.S. 427, 463-65 (1963) (Brennan, J., dissenting); United States v. On Lee, 193 F.2d 306, 311 n.17 (2d Cir. 1951) (Frank, J., dissenting).

47. See Schwartz, *supra* note 6; Williams, *supra* note 6, at 862-68. See also Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. U.L. Rev. 65, 72 (1957).

48. See Lopez v. United States, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting).

49. See *ibid.*

50. It seems likely that once there is probable cause to believe that the suspect is implicated in the crime, satisfaction of this additional requirement will tend to be assumed. *Cf.* Westin, *supra* note 6, at 203.

51. *But see id.* at 203-04.

It is possible that these and other appropriate restrictions, vigorously observed,[52] would render the practice of electronic eavesdropping virtually useless to law-enforcement officers.[53] On the other hand, it has been persuasively argued that no amount of safeguards can be sufficient to bring the practice within the realm of what *ought* to be permissible.[54] As was emphasized by Justice Sobel in the principal case,[55] the secrecy surrounding the issuance of eavesdropping orders, and the fact that the courts encounter only that eavesdropping which successfully obtains evidence of guilt, probably preclude a valid judgment as to either the indispensability of eavesdropping to law enforcement or the actual danger of eavesdropping to privacy. Although Justice Sobel is to be commended for his scholarly explanation and application of constitutional principles, his reliance on the evidence-only rule in the principal case seems unfortunate, since he passed up an opportunity for experimentation in judicial control. A holding that the practice under consideration was unconstitutional in this particular case because it was unreasonable, not because the evidence-only rule renders it unconstitutional in every case, might have been a better first step toward a "solution where the rights of individual liberty and the needs of law enforcement are fairly accommodated."[56] Assuming that such a solution is possible, it can be devised only by experimenting with meaningful standards of control.

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52. In his discussion of a possible federal law authorizing wiretapping, Edward Bennett Williams has suggested that one judge in each district be appointed by the Chief Justice to handle wiretap applications, in order to ensure conscientious judicial supervision and prevent "judge-shopping." See Williams, *supra* note 6, at 869.

53. *Cf. id.* at 869. Law enforcement officials are reluctant to submit wiretapping and eavesdropping to traditional controls. See, *e.g.*, Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835 (1960). One reason for this reluctance may be that wiretapping and eavesdropping are not used in traditional ways. That is, they are used for surveillance and crime prevention rather than crime detection. See Parker, *Surveillance by Wiretap or Dictagraph: Threat or Protection? A Police Chief's Opinion*, 42 CALIF. L. REV. 727 (1954). See also DASH 129, 221-22, 251. Section 813-a authorizes the issuance of orders for eavesdropping when there is probable cause to believe that "evidence of crime," *i.e.*, crime in general, will thereby be obtained. As is pointed out in the principal case at 568-69, 257 N.Y.S.2d at 277, the fourth amendment would seem to require probable cause as to evidence of a specific, named crime.

54. See, *e.g.*, Williams, *supra* note 6, at 855.

55. Principal case at 579-80, 257 N.Y.S.2d at 287.

56. Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting). See Westin, *Wiretapping—The Quiet Revolution*, 29 COMMENTARY 333, 340 (1960).