

## WARRANTS FOR WEARING A WIRE: FOURTH AMENDMENT PRIVACY AND JUSTICE HARLAN'S DISSSENT IN *UNITED STATES V. WHITE*

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A dissent . . . is an appeal to the brooding spirit of the law, to the intelligence of a future age.<sup>1</sup>

### INTRODUCTION

Justice Harlan's dissent in *United States v. White*<sup>2</sup> appealed to a future age when all members of society will be allowed to "carry on" their "private discourse freely, openly, and spontaneously," without enduring the risk of government "eavesdroppers prying into their private affairs" by warrantless monitoring of their conversations through the use of "wired" listeners.<sup>3</sup> Justice Harlan's dissents comprised "nearly half" of the body of his judicial opinions,<sup>4</sup> but his *White* dissent was unusual for several

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<sup>1</sup> ALAN BARTH, *PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT DISSENTERS IN THE SUPREME COURT* 3 (1974) (quoting CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928)).

<sup>2</sup> 401 U.S. 745, 768 (1971) (Harlan, J., dissenting).

<sup>3</sup> *Id.* at 789-90. This Article uses the terms "bugged" or "wired" "listeners" to refer to people with electronic devices that transmit a conversation to a monitoring government agent who may also be recording the conversation.

<sup>4</sup> TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* viii (1992) (noting that during 16 years, Harlan wrote 613 opinions, "more than any other justice of his era," including 296 dissents and 149 concurrences). See also Nathan Lewin, *Justice Harlan: "The Full Measure of the Man,"* 58 A.B.A. J. 579,

reasons. It did not support the government's position,<sup>5</sup> it advocated the overruling of precedent,<sup>6</sup> and it demonstrated how Harlan could change his mind. The government's position in *White* relied heavily on a prior Harlan opinion involving electronic surveillance.<sup>7</sup> But in his *White* dissent, Harlan observed that his own earlier approach "misconceive[d] the basic issue" by focusing "on the interests of a particular individual rather than evaluating the impact of a practice on the sense of security that is the true concern of the Fourth Amendment's protection of privacy."<sup>8</sup> If Harlan's thinking had changed before the Warren Court era ended, he could have authored a majority opinion on the *White* issue, instead of dissenting for a future age.<sup>9</sup> At the time of his *White* dissent, he could not have known that it would be one of the last opinions he would write.<sup>10</sup>

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583 (June 1972) (observing that Harlan would circulate a separate opinion when he could not agree with a draft majority or dissent, because he "felt it his duty to state his own reasons for reaching his result," and that "often" the author of the draft would respond with modifications that "might" lead Harlan to withdraw his separate opinion).

<sup>5</sup> See Norman Dorsen, *John Marshall Harlan*, in IV THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1401, 1406-08 (Leon Friedman & Fred L. Israel eds., 1995) [hereinafter THE JUSTICES] (noting Harlan's dissenting opinions supporting the government's position, including *Griffin v. Illinois*, 351 U.S. 12, 29 (1956); *Douglas v. California*, 372 U.S. 353, 360 (1963); *Mapp v. Ohio*, 367 U.S. 643, 672 (1961); *Malloy v. Hogan*, 378 U.S. 1, 14 (1964); *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968); *Fay v. Noia*, 372 U.S. 391, 448 (1963); *Henry v. Mississippi*, 379 U.S. 443, 457 (1965)). See also *Miranda v. Arizona*, 384 U.S. 436, 207 (1966) (Harlan, J., dissenting); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (Harlan, J., dissenting).

<sup>6</sup> *White*, 401 U.S. at 795 (referring to *On Lee v. United States*, 343 U.S. 747 (1952), and concluding, "I would hold that *On Lee* is no longer good law").

<sup>7</sup> Brief for the United States, at 10, 13, 16, 17, 18, 19, 24, *White*, 401 U.S. 745 (No. 13), 1969 WL 120170 (relying on *Lopez v. United States*, 373 U.S. 427 (1963)).

<sup>8</sup> *White*, 401 U.S. at 788 n.24. See *infra* notes 328-30 and accompanying text.

<sup>9</sup> See *White*, 401 U.S. at 775 (recognizing that four members of the Court, not including Harlan, were ready to overrule *On Lee* when *Lopez* was decided in 1963). Cf. *id.* at 755 (Brennan, J., concurring in the result) (noting agreement with protection of privacy interest, and voting for reversal only on non-retroactivity grounds); *id.* at 756 (Douglas, J., dissenting); *id.* at 795 (Marshall, J., dissenting). But see *id.* at 745 (plurality opinion) (rejecting protection for privacy interest and also ruling against defendant on non-retroactivity grounds); *id.* at 754 (Black, J., concurring in the judgment) (supplying fifth vote for rejecting protection for privacy interest, relying on his lone dissent in *Katz v. United States*, 389 U.S. 347, 364 (1967), arguing that Fourth Amendment does not protect any conversations).

<sup>10</sup> See *id.* at 745 (plurality opinion) (decided April 5, 1971); YARBROUGH, *supra* note 4, at 335 (describing events that led to Harlan's death on December 29, 1971).

The value of Harlan's dissent grew as it receded into the past, as one of the best examples in the literary genre of judicial pedagogy in Fourth Amendment jurisprudence. Many clues in his opinion helped to explain the evolution of "privacy" precedents during the 50 years between the Court's first surreptitious surveillance case and the *White* decision.<sup>11</sup> His analysis brought to life the doctrinal dramas of the decade before *White*, when the Warren Court's precedents expanded the Fourth Amendment's boundaries while dissolving the iron grip of the Taft Court's limiting inscriptions in *Olmstead v. United States*.<sup>12</sup> Harlan authored some of those precedents,<sup>13</sup> and dissented in others.<sup>14</sup> But his *White* dissent was a testament to his support for all the Court's decisions envisioning the Fourth Amendment as a "regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure."<sup>15</sup>

Harlan's dissent embodied his attempt to prevent the Court's voice from becoming "only a voice of power, not of reason."<sup>16</sup> His opinion provided a tour de force display of the workings of a passionate intellect. More than half of its over 9,000 words were devoted to demonstrating how the 1952 precedent of

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<sup>11</sup> See *Gouled v. United States*, 255 U.S. 298 (1921); Tracey Maclin, *Hoffa v. United States: Secret Agents in Private Spaces*, in *CRIMINAL PROCEDURE STORIES 190-94* (Carol S. Steiker, ed., 2006) (identifying and analyzing *Gouled* as the first such decision).

<sup>12</sup> 277 U.S. 438 (1928).

<sup>13</sup> See Dorsen, *supra* note 5, at 1412, 1417 (noting Harlan's authorship of majority opinions ruling for defendants in Fourth Amendment cases, including, *inter alia*, *Giordenello v. United States*, 357 U.S. 480 (1958); *Jones v. United States*, 357 U.S. 493 (1958); *Simmons v. United States*, 390 U.S. 377 (1968); *Mancusi v. DeForte*, 392 U.S. 354 (1968)). See also *Spinelli v. United States*, 393 U.S. 410 (1969); *Whiteley v. Warden*, 401 U.S. 560 (1971).

<sup>14</sup> See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting); *Wong Sun v. United States*, 371 U.S. 471, 498 (1963) (Harlan, J., dissenting on probable cause issue); *Camara v. Municipal Court*, 387 U.S. 523, 546 (1967) (Clark, J., dissenting) (joined by Harlan); *Berger v. New York*, 388 U.S. 41, 89 (1967) (Harlan, J., dissenting).

<sup>15</sup> Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974). See Philip B. Heymann, in *JOHN MARSHALL HARLAN II, ASSOCIATE JUSTICE OF THE SUPREME COURT 1955-1971: REMEMBRANCES BY HIS LAW CLERKS* (Norman Dorsen & Amelia Ames Newcomb, eds., 2001), reprinted in 27 J. SUP. CT. HIST. 138, 152 (2002) [hereinafter REMEMBRANCES] (observing that Harlan "followed the practice, with rare exceptions, of treating a decision from which he had dissented as fully entitled to his personal deference, as a precedent, after six months").

<sup>16</sup> *Mapp*, 367 U.S. at 686 (Harlan, J., dissenting).

*On Lee v. United States*<sup>17</sup> was undermined by many subsequent precedents, leaving its doctrine “wholly open for reconsideration.”<sup>18</sup> The painstaking analysis of the living death of precedent was a Harlan trademark,<sup>19</sup> and his dissection of the history of *On Lee*’s fossilization symbolized his commitment to enabling Fourth Amendment doctrine to change with integrity vis-à-vis its past meanings. In this respect, Harlan’s dissent served as a sharp contrast to the *White* plurality’s analysis, which illustrated the Court’s ability to resurrect precedent through retroactive immunization of doctrine from the vicissitudes of historical change.<sup>20</sup>

In his *White* dissent, Harlan demonstrated how judges may discover and interpret the Fourth Amendment principles that “were either dimly perceived or not fully worked out” in an earlier era.<sup>21</sup> He encouraged judges to guard against the danger that either “risk analysis” or the “expectations” approach “can, ultimately, lead to the substitution of words for analysis.”<sup>22</sup> He urged judges to recognize their responsibility for the imposition of risks and expectations upon the citizenry,<sup>23</sup> and to assume that the answers to a “privacy” problem are to be found in the Fourth Amendment “tapestry,” in which the “privacy” cases are interwoven with the “strands of doctrine” in the “search” cases.<sup>24</sup> His own words illustrated his quest for a wide-ranging and nuanced analysis of precedents as the necessary antidote to reliance on catchphrases or ahistorical understandings of doctrine. For Harlan, it was the whole of Fourth Amendment jurisprudence that required translation and explication in *White*. No precedent was an island, entire of itself. Every decision was a piece of the Fourth Amendment continent that could be understood only in the light of all the decisions that had come be-

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<sup>17</sup> 343 U.S. 747 (1952).

<sup>18</sup> *United States v. White*, 401 U.S. 745, 780 (1971) (Harlan, J., dissenting). See discussion *infra* Part III.B.

<sup>19</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963) (Harlan, J., concurring) (providing the exegesis for a “respectful burial” of *Betts v. Brady*, 316 U.S. 455 (1942)).

<sup>20</sup> Cf. discussion *infra* Part III.B.1 (examining *White* plurality’s analysis of *On Lee*).

<sup>21</sup> *White*, 401 U.S. at 780.

<sup>22</sup> *Id.* at 786.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 783.

fore, and all that came after, including the concurrences and dissents that accompanied each one.<sup>25</sup>

Part I of this Article focuses on the portrayal of the *White* case in the introduction of the plurality opinion authored by Justice White, and takes a closer look at the facts of the government drug sting, the arguments of the parties, and the thicket of relevant precedents. Part II.A examines the concurrences by Justices Harlan and White in *Katz v. United States*,<sup>26</sup> the decision in which the Court formally overruled *Olmstead*, holding that conversations in a telephone booth are protected against electronic “bugging,” and that such surveillance is subject to the warrant requirement.<sup>27</sup> The ideas expressed in these concurring opinions are useful to compare because they foreshadowed the approaches used in Justice Harlan’s dissent and in Justice White’s plurality opinion in *White*. Part II.B considers the first half of Harlan’s dissent, in which he explained the historical reasons for the death of *On Lee* as controlling authority for *White*. Part II.C analyzes the second half of Harlan’s dissent, where he addressed “the desirability of saddling” the expectation and risk of wired listeners upon society. His analysis centered upon his assessment of the nature of this surveillance technique and the “likely extent of its impact” upon an individual’s sense of security.<sup>28</sup> Part III explores Harlan’s understanding of the “expectations of privacy” concept after *Katz* and before *White*, and concludes with final reflections upon the impact of the *White* decision and the legacy of Harlan’s dissent.

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<sup>25</sup> Cf. BARTH, *supra* note 1, at 14 (characterizing the Court as “a continuing body, linked to the past and to the future, in the deliberations of which predecessors are colleagues whose voices are never to be stilled,” and quoting Justice Edward White’s advocacy of “judicial continuity” in *Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting)).

<sup>26</sup> 389 U.S. 347 (1967).

<sup>27</sup> *Id.* at 353, 358-59. See Transcript of Oral Argument at 34, *Katz*, 389 U.S. 347 (No. 35) (describing *Katz*’s \$300 fine for his conviction for transmitting wagering information by telephone); *id.* at 41 (noting that *Katz* was “one of the best handicappers in the country” for basketball games).

<sup>28</sup> *White*, 401 U.S. at 786.

## I. THE GOVERNMENT'S DRUG STING AND THE THICKET OF PRECEDENTS

Two named characters appeared on the stage of the *White* plurality's opinion, but the decision provided no details to explain their actions or relationship. The defendant, James A. White, was sentenced to 25 years in prison for unspecified drug crimes. The government informer, Harvey Jackson, carried a concealed radio transmitter during his conversations with White, and these transmissions were monitored and overheard by unnamed federal agents.<sup>29</sup> On four occasions, their conversations took place in Jackson's home. As one agent watched the men from his observation post inside a kitchen closet, he saw, "through slightly open doors," the first heroin package change hands; during later episodes he saw deliveries of cash get counted.<sup>30</sup> This agent listened to the conversations "live," whereas two other agents heard them via the radio transmitter in a car across the street from Jackson's house.<sup>31</sup> The agents monitored four other conversations, including two in Jackson's car, one in a restaurant, and one in White's home. The agents testified about these conversations at White's trial, over the objection of his defense counsel. Jackson was not available to testify.<sup>32</sup> No other evidence was mentioned in the *White* plurality opinion. When White appealed his conviction, the circuit court reversed, finding the transmitted conversations were inadmissible under the Fourth Amendment.<sup>33</sup>

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<sup>29</sup> *Id.* at 746-47 (plurality opinion). See *United States v. White*, 405 F.2d 838, 840 n.2 (7th Cir. 1969) (en banc) (describing the "kel set" used by Jackson as a "small transistorized device which transmits voices or sound" to a radio transmitter receiving unit); Transcript of Oral Argument at 3, *White*, 401 U.S. 745 (No. 13) (noting that the device was "put on the chest under the clothing" of the informant, and that the device "will transmit for a mile or so").

<sup>30</sup> *White*, 405 F.2d at 840.

<sup>31</sup> See *White*, 401 U.S. at 746-47; Transcript of Oral Argument, *supra* note 29, at 5; Brief for the United States, *supra* note 7, at 3-8.

<sup>32</sup> *White*, 405 F.2d at 842; Brief for the United States, *supra* note 7, at 8 (noting that the government was unable to locate and produce Harvey Jackson as a witness, and that Jackson's wife testified that she had seen her husband the "previous evening" but "did not know where to locate" him on the day of trial).

<sup>33</sup> *White*, 405 F.2d at 848.

The *White* plurality assigned three errors to the circuit court. First, that court interpreted *Katz* as overruling *On Lee*. Second, the circuit court interpreted the Fourth Amendment as prohibiting the introduction of the agents' testimony under the circumstances of the *White* case. Thus, the circuit court "misinterpreted both the *Katz* case and the Fourth Amendment."<sup>34</sup> Third, that court granted a new trial "without advert[ing] to the fact that the transactions" in *White* "had occurred before *Katz* was decided," and thereby "erred in applying the *Katz* case to events that occurred before that decision was rendered."<sup>35</sup> This description of multiple errors cast a subtle aura of clumsiness upon the circuit court's decision, and additional references to the circuit court's mistaken "understandings" about doctrine further magnified this aura.<sup>36</sup>

The *White* plurality's dry recitation of the circuit court's errors did not disclose the reasoning for that court's interpretative choices about *Katz* and *On Lee*. Nor did the plurality explain the understandable reason for the circuit court's failure to "advert" to *Desist v. United States*,<sup>37</sup> which declared *Katz* to be non-retroactive, and which was not decided until two months after the circuit court's decision in *White*.<sup>38</sup> Immediately after deciding *Desist*, the Court granted review in *White*<sup>39</sup> because the justices were ready for another debate about an issue that had provoked disagreements in divided opinions for almost twenty years.<sup>40</sup> Ultimately, they preferred to issue an advisory opinion

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<sup>34</sup> *White*, 401 U.S. at 747.

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* at 749, 750, 754.

<sup>37</sup> 394 U.S. 244 (1969).

<sup>38</sup> *Compare id.* at 244 (decided March 24, 1969) with *White*, 405 F.2d at 838 (decided January 7, 1969) (making no reference to any government argument about non-retroactivity in anticipation of the *Desist* holding).

<sup>39</sup> *White*, 405 F.2d at 838, *cert. granted*, 394 U.S. 957 (1969). *See White*, 401 U.S. 745 (argued on November 10, 1969, and reargued on October 20, 1970, presumably because the Court was divided 4 to 4 during the 1969 Term). *Compare* Fred Graham, *Abe Fortas*, in IV THE JUSTICES, *supra* note 5, at 1451, 1462-64 with Dennis Hutchinson, *Harry A. Blackmun*, in IV THE JUSTICES, *supra* note 5, at 1607, 1608-13 (explaining how Justice Fortas resigned on May 16, 1969, and was not replaced with Justice Blackmun until June 9, 1970).

<sup>40</sup> *See, e.g.*, *On Lee v. United States*, 343 U.S. 747 (1952); *id.* at 758 (Frankfurter, J., dissenting); *id.* at 765 (Burton, J., dissenting); *id.* at 762 (Douglas, J., dissenting); Lopez

on the question concerning the viability of *On Lee*,<sup>41</sup> instead of waiting for the opportunity to review that issue in a case tried after *Katz* was decided.<sup>42</sup>

The *White* plurality's description of the government's sting operation was more succinct than those provided in the circuit court's opinion and in the briefs and arguments in the Supreme Court. There were at least six agents involved in an operation that lasted for four weeks before ending in *White*'s arrest on a street in Chicago.<sup>43</sup> *White* made three deliveries of heroin to Jackson, and always collected cash payments later, sometimes in two installments.<sup>44</sup> After making the first delivery of heroin to Jackson's home, *White* made two subsequent deliveries during arranged meetings in Jackson's car. *White* collected cash payments three times at Jackson's home, and Jackson brought other payments to *White*'s home and to the restaurant.<sup>45</sup> Jackson's wire enabled the agents to listen to numerous incriminating remarks by *White* during each delivery and collection event.<sup>46</sup> The agents tailed *White* and Jackson by car during the

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v. United States, 373 U.S. 427 (1963); *id.* at 441 (Warren, C.J., concurring in the result); *id.* at 446 (Brennan, J., dissenting).

<sup>41</sup> See Donald L. Doernberg, "Can You Hear Me Now?: Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's First Amendment Jurisprudence," 39 IND. L. REV. 253, 282 (2006) (observing that "almost the entire opinion is advisory" in *White*). Cf. Transcript of Oral Argument, *supra* note 29, at 14, 15 (urging the Court "not to decide the case on retroactivity but on the importance of the law question" because of "the importance of law enforcement of getting" that question decided, and noting that the government had twenty-two cases pending in the Court which involved the *White* issue, none of which had been tried before *Katz*).

<sup>42</sup> See *White*, 401 U.S. at 754. Cf. Transcript of Oral Argument, *supra* note 29, at 23 (arguing that *Desist* did not apply to *White* because *Desist* held that *Katz* was prospective only "as to things that *Katz* departed from in previous holdings" of the Court, and that under the law before *Katz*, the defendant would prevail on the Fourth Amendment claim "without *Katz*"); *White*, 401 U.S. at 793-95 (Harlan, J., dissenting) (endorsing the argument that *Desist* did not apply to *White*).

<sup>43</sup> *White*, 405 F.2d at 840-42.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (noting that Harvey Jackson paid \$1,360 for the first sale of "one good ounce" of heroin, \$1,250 for "two more ounces," and \$2,250 for a third "package"; he agreed to pay \$2,250 for the fourth delivery that did not occur because of *White*'s arrest). See Brief for Respondent at 3, *White*, 401 U.S. 745 (No. 13), 1969 WL 120169.

<sup>46</sup> See *White*, 405 F.2d at 840-42. Cf. Transcript of Oral Argument, *supra* note 29, at 11 (noting that Jackson called *White* once from a telephone booth to arrange a meeting and brought an agent into the booth to listen to the call).

second and third delivery events.<sup>47</sup> A similar pattern was observed each time. One agent watched as White picked up his source, then dropped off his source and picked up Jackson, and finally passed along the package from the source. During their third observed meeting, White and his source were arrested at a bus stop, just as the source handed him a briefcase containing heroin.<sup>48</sup>

These facts about the sting operation in *White* illustrated the way in which the Court could have implemented the defendant's proposed warrant requirement for the use of wired listeners like Jackson.<sup>49</sup> Counsel for the government in *White* observed, "[N]early all of these informants are themselves addicts that are used by the investigatory body to make the [drug] purchase[s]."<sup>50</sup> Assuming that government agents could obtain the assistance of an informant to gather probable cause evidence by making a drug purchase without wearing a wire, then the agents could use this evidence to obtain judicial approval for continuing the sting with a wire on the informant during future meetings with the targeted drug seller. According to the Court's discussion in *Berger v. New York*, in order to conduct a wiretap or plant "bugs," government agents would need to obtain a judicial order based on probable cause, which would establish the parameters for the "nature, scope or duration" of the electronic surveillance.<sup>51</sup> Only this type of judicial preauthorization system would satisfy the Fourth Amendment.<sup>52</sup> Defense counsel in *White* relied on *Berger* to argue that similar judicial safeguards should be required for using a transmission "bug" on a wired listener.<sup>53</sup> But *Berger* was only one decision in a thicket of relevant precedents.

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<sup>47</sup> *White*, 405 F.2d at 841-42.

<sup>48</sup> *Id.* at 842. *Cf.* Brief for the United States, *supra* note 7, at 3-8 (indicating that the source was White's co-indictee).

<sup>49</sup> Brief for Respondent, *supra* note 45, at 2; Transcript of Oral Argument, *supra* note 29, at 24-25.

<sup>50</sup> Transcript of Oral Argument, *supra* note 29, at 4.

<sup>51</sup> *Berger v. New York*, 388 U.S. 41, 54-60, 63 (1967).

<sup>52</sup> *Maclin*, *supra* note 11, at 202.

<sup>53</sup> Brief for Respondent, *supra* note 45, at 11, 12, 20.

The Court's earliest Fourth Amendment ruling against the government in an informant case came in *Gouled v. United States*, in which a false-friend informant pretended to make a social call on a defendant in his office, and in his absence, carried away an incriminating paper.<sup>54</sup> The Court treated this event as a search and seizure "by stealth" that should be equated with a search and seizure conducted by means of force or coercion.<sup>55</sup> More than thirty years later, the *On Lee* Court held that a similar pretense did not constitute an unlawful search and seizure when the false-friend informant was a wired listener whose conversation with the defendant was transmitted to a monitoring government agent with a "receiving set" that allowed him to hear it.<sup>56</sup>

The *On Lee* Court relied on *Goldman v. United States*, which held that no search or seizure occurred when unseen agents used a device to listen to magnified conversations through an office wall.<sup>57</sup> The *Goldman* ruling, in turn, extended the logic of *Olmstead*, which held that agents who listened to wiretapped conversations on home and office telephones committed no search or seizure.<sup>58</sup> The *Olmstead* Court reasoned that the text of the Fourth Amendment could not be interpreted either to treat intangible conversations as tangible "effects" or "things," or "to apply the words search and seizure as to forbid hearing or sight."<sup>59</sup> The Court observed that the tapped telephone wires were "not part of" the defendant's "house or office," and the conduct of the government agents did not fit any of the three categories of searches and seizures recognized in prior cases.<sup>60</sup> Those categories included only a seizure of the "person," a seizure of tangible material "effects," or a "physical invasion" of a person's "house or 'curtilage' for the purpose of making a

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<sup>54</sup> 255 U.S. 298 (1921).

<sup>55</sup> *Id.* at 305-06. See Maclin, *supra* note 11, at 190-92.

<sup>56</sup> *On Lee v. United States*, 343 U.S. 747, 749, 751 (1952). *But see supra* note 40 (citing *On Lee* dissents).

<sup>57</sup> *Goldman v. United States*, 316 U.S. 129, 131-32, 135 (1942). *But see id.* at 136 (Murphy, J., dissenting); *id.* at 136 (Stone, J. and Frankfurter, J., filing statements that they would have joined a Court majority to overrule *Olmstead*).

<sup>58</sup> *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928).

<sup>59</sup> *Id.* at 465.

<sup>60</sup> *Id.* at 466.

seizure.”<sup>61</sup> Subsequent precedents viewed *Olmstead* as relying on a “trespass” rationale because the Court observed that the wires were tapped “without trespass upon any property.”<sup>62</sup>

Almost twenty years after *On Lee*, the Court took up another electronic eavesdropping case in which no informant was involved. In *Silverman v. United States*,<sup>63</sup> the Court found that the interception of conversations could violate the Fourth Amendment, thus implicitly recognizing that the human ear could commit the seizure of a conversation, and that an intangible conversation could receive the constitutional protection given to tangible “effects” or “things.”<sup>64</sup> However, the Court found it unnecessary to reconsider the narrow holdings of *Olmstead* and *Goldman* because the agents in *Silverman* committed a “physical invasion” into a “constitutionally protected area” that was missing in the earlier cases.<sup>65</sup> The agents had inserted a microphone into the wall of a house and monitored the conversations of the individuals within.<sup>66</sup> Soon thereafter, in *Lopez v. United States*, the Court encountered a case in which an official-turned-undercover-agent used only a recording device when conversing with a defendant who had tried to bribe him during an earlier encounter.<sup>67</sup> Instead of treating *On Lee* as controlling precedent, the Court determined that the recording was admiss-

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<sup>61</sup> *Id.* Cf. *Amsterdam*, *supra* note 15, at 382 (noting that *Olmstead* reasoned both that “the ear cannot commit a search or a seizure” and that “the tap of the telephone wire was not an intrusion into any area protected by the Constitution in favor of the phone owner”, because the telephone wires “are not part of his house or office”). *But see id.* at 485, 487 (Butler, J., dissenting) (reasoning that “tapping the wires and listening in by the officers literally constituted a search for evidence”); *id.* at 471-85 (Brandeis, J., dissenting); *id.* at 469-71 (Holmes, J., dissenting).

<sup>62</sup> *See, e.g., Silverman v. United States*, 365 U.S. 505, 510-11 (1961) (citing *Olmstead*, 277 U.S. at 457).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 511-12. *See United States v. White*, 401 U.S. 746, 768, 775 n.9 (1971) (Harlan, J., dissenting) (noting that *Silverman*’s “unspoken premise” was articulated in *Wong Sun v. United States*, 371 U.S. 471, 485 (1963), namely “that the Fourth Amendment may protect against the overhearing of verbal statements”).

<sup>65</sup> *Silverman*, 365 U.S. at 508-10.

<sup>66</sup> *Id.* at 509, 512 (describing how the “spike mike” device made contact with the heating system of the house, which acted as a sounding board). Cf. *Clinton v. Virginia*, 377 U.S. 458 (1964) (applying *Silverman* to require exclusion of conversations monitored by use of a spike mike that was stuck in the wall with penetration comparable to thumb tack).

<sup>67</sup> *Lopez v. United States*, 373 U.S. 427, 430 (1963).

ible because no unseen government agent monitored the conversation, and because the recording was used at trial to corroborate the official's testimony as to what he had heard.<sup>68</sup>

In the Court's last informant cases before *White*, a trilogy of decisions on the same day reached the same result, finding that no search or seizure occurred. In *Lewis v. United States*, an undercover agent accepted the defendant's "invitation" to enter his home in order to conduct an illegal drug transaction, and testified later concerning their conversations.<sup>69</sup> The *Lewis* Court distinguished *Gouled* because the *Lewis* agent neither saw, nor heard, nor took anything not contemplated by the defendant as part of that transaction; the Court distinguished *Silverman* because no unseen government agents monitored the conversations.<sup>70</sup> In *Hoffa v. United States*,<sup>71</sup> the false-friend informant was not monitored, and thus the defendant's "misplaced confidence" that the informant would not be a government "plant" and would not disclose incriminating conversations to his government supervisors "was not protected by the Fourth Amendment."<sup>72</sup> In *Osborn v. United States*, the false-friend informant recorded the defendant's conversation, like the official-turned-undercover-agent in *Lopez*.<sup>73</sup> However, the *Osborn* Court did not rest its decision upon the "foundation of the Court's opinion in *Lopez*," but upon "the narrower compass" of the *Lopez* dissent and concurrence, which approved of the use of a recording device by an informant-agent when that use was authorized ahead of time by judicial order, as in *Osborn*.<sup>74</sup>

Faced with the "highly uncertain" state of the governing principles for the use of wired listeners and of electronic surveillance generally,<sup>75</sup> the government counsel in *White* said almost

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<sup>68</sup> *Lopez*, 373 U.S. at 438. Cf. Maclin, *supra* note 11, at 201-02, 203-04.

<sup>69</sup> 385 U.S. 206 (1966).

<sup>70</sup> *Id.* at 210, 212.

<sup>71</sup> *Hoffa v. United States*, 385 U.S. 293 (1966).

<sup>72</sup> *Id.* at 302. Cf. Maclin, *supra* note 11, at 206-11.

<sup>73</sup> 385 U.S. 323 (1966).

<sup>74</sup> *Id.* at 327-29.

<sup>75</sup> Kent Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 202 (1968) (explaining that "the primary conclusion to be drawn about the constitutionality of use of electronic devices by a participant, or with a participant's

nothing about *On Lee*, arguing instead that *Lopez*'s holding concerning a recording device should be expanded and applied to a transmission device.<sup>76</sup> In the government's view, the wired informant in *White* consented to the government's monitoring of his conversations with the defendant. That fact distinguished *Katz*, which did not involve an informant.<sup>77</sup> Relying on *Hoffa*, the government argued the *White* defendant must have recognized the risk that the informant Jackson could be an unwired government informant who would disclose his conversations to government agents.<sup>78</sup> Thus, the risk of disclosures by the reporting informant in *Hoffa* could be equated with the risk of transmission disclosures to unseen agents by the wired informant in *White*.<sup>79</sup>

The defense counsel's brief in *White* relied on *Gouled*, *Silverman*, *Osborn*, *Berger*, and *Katz*, and reasoned that hiding a transmission "bug" on the informant Jackson was no different from planting a "bug" in *White*'s house. This government inva-

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consent, to record or transmit the words of a non-consenting party is that the governing principles are now highly uncertain").

<sup>76</sup> See Brief for the United States, *supra* note 7, at 14-16, 18-19, 21, 24-25, 28 (referring to arguments based on *Lopez*); *id.* at 28 (citing *On Lee* as an example of a rule that "electronic surveillance without a trespass did not violate the Fourth Amendment," and circuit courts following the *On Lee* rule on the *White* issue before *Katz*); Transcript of Oral Argument, *supra* note 29, at 14 (mentioning these decisions).

<sup>77</sup> See Brief for the United States, *supra* note 7, at 10; Transcript of Oral Argument, *supra* note 29, at 11.

<sup>78</sup> Brief for the United States, *supra* note 7, at 9, 14.

<sup>79</sup> See *id.* at 20 (citing Justice White's concurrence in *Katz*). See also *infra* text accompanying note 134. At oral argument, the government counsel also emphasized that, "this is not an *On Lee* situation, where the government used an old friend after indictment of the defendant to extract an admission or confession of a past event," but a situation in which the agents were listening "to the event itself happen, to the crime being committed, in the consummation of a commercial transaction" between parties whose relationship should not be "protected in the sense of a right of expectation of privacy." Transcript of Oral Argument, *supra* note 29, at 8, 10. The government counsel may have sought to distinguish the use of the wired informant in *White* from the *On Lee* "situation" because the *On Lee* defendant was indicted, and at the time *White* was argued and decided, the Sixth Amendment right to counsel had been extended to the pre-indictment arrest phase by *Escobedo v. Illinois*, 378 U.S. 478 (1964). Therefore, the protections of *Massiah v. United States*, 377 U.S. 201 (1964), which prohibited the use of an informant or undercover government agent to deliberately elicit statements from an indicted defendant, arguably applied to an arrested defendant and possibly to others. Cf. *Greenawalt*, *supra* note 75, at 198 (observing that *Escobedo* does not reveal "how far *Massiah* will be expanded in regard to statements elicited by informers").

sion required compliance with the warrant requirement under *Berger*.<sup>80</sup> The government's reliance on *Hoffa* was deemed "misplaced" because "no electronic interception or transmission" of conversations occurred there, and because the *Hoffa* Court noted that the unwired informant was not transmitting to "sur-reptitious eavesdroppers."<sup>81</sup> The *Lopez* decision was distinguished on the basis of its facts and narrow rationales that had no application in *White*, where an unseen government agent did monitor the conversation, and the transmitting device did capture more than what the wired informant heard.<sup>82</sup> As for *On Lee*, defense counsel commented at oral argument, "I don't know if the government is urging that *On Lee* is still good law or whether they are not."<sup>83</sup> The defense counsel also argued the defendant "would prevail" even without relying on *Katz*, if the Court would "turn back the hands of time" and consider the case under the law as it "was before *Katz*."<sup>84</sup> These arguments provided the seeds of the ideas that Justice Harlan developed by in his *White* dissent.

## II. HARLAN'S DISSENT: CHALLENGING THE DEAD HAND OF THE PAST

In Harlan's "preliminary observations" about the issue in *White*, his dissent exhibited a dramatic contrast to the plurality's low-key summary of the case as an occasion for the correction of a wayward lower court.<sup>85</sup> Harlan explained that numerous electronic devices had made "technologically feasible the Orwellian Big Brother," and that "tens of thousands of times each year, throughout the country," informants and undercover officers used such devices, including wire transmitters that

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<sup>80</sup> Brief for Respondent, *supra* note 45, at 9, 11-13.

<sup>81</sup> *Id.* at 14 (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966)).

<sup>82</sup> *Id.* at 16-17.

<sup>83</sup> Transcript of Oral Argument, *supra* note 29, at 28. *Cf.* *United States v. White*, 405 F.2d 838, 847 (7th Cir. 1969) (en banc) (indicating that "[t]he government's principal reliance is placed on the decision in *On Lee*").

<sup>84</sup> Transcript of Oral Argument, *supra* note 29, at 23 (responding to questions about non-retroactivity of *Katz*).

<sup>85</sup> *White*, 401 U.S. at 769 (Harlan, J., dissenting).

broadcast conversations, free from judicial scrutiny.<sup>86</sup> Harlan saw the issue of unregulated wired listeners as one of great magnitude, because of the prevalence of this surveillance technique and because “the factors that must be reckoned with . . . are . . . subtle and complex,” doctrinally difficult to weigh “in the Fourth Amendment balance,” and the source of “sharp differences of opinion both within and without the judiciary.”<sup>87</sup>

However, Harlan had no hesitancy in expressing his conclusion that the 1952 decision in *On Lee* had been allowed to “govern official behavior . . . in spite of the subsequent erosion of its doctrinal foundations.”<sup>88</sup> In his view, *On Lee* was overdue for reassessment, and his analysis of “important constitutional developments since *On Lee*” led him to conclude “that *On Lee* can no longer be regarded as sound law.”<sup>89</sup> These developments occurred during the almost twenty year period between *On Lee* and *White*, and illustrated the Court’s altered “perception of the scope and role of the Fourth Amendment.”<sup>90</sup> In essence, subsequent precedents impeached *On Lee* before it could be overruled as a formality, and therefore the Court was required to consider the *On Lee* problem anew.<sup>91</sup>

As for *Katz*, Harlan emphasized that this decision was not a turning point in the demise of *On Lee*, and that the doctrine of *On Lee* had become “wholly open for reconsideration . . . since well before *Katz* was decided.”<sup>92</sup> Harlan defined his initial mission as the exercise of “tracing carefully the evolution of Fourth Amendment doctrine” in decisions after *On Lee*, in order to liberate the debate in *White* from the dead hand of unsound doc-

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<sup>86</sup> *Id.* at 768, 770 (quoting ALAN WESTIN, *PRIVACY AND FREEDOM* 131 (1967)). *Cf. id.* at 770 n.2 (quoting WESTIN, *supra*, at 131) (noting that electronic devices are used in investigations of crimes involving narcotics, gambling, prostitution, corruption of public officials, extortion, and conspiracy; they are also used “to unearth ‘political crimes,’” by agents who attend the public and private meetings of suspect groups).

<sup>87</sup> *Id.* at 770-71.

<sup>88</sup> *Id.* at 769.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 780. *Cf. id.* at 769 (observing also that “it requires no discussion of the holding in *Katz*, as distinguished from its underlying rationale as to the reach of the Fourth Amendment, to comprehend the constitutional infirmity of *On Lee*”).

trine.<sup>93</sup> He defined his second mission as the explication of the reasons why, “under our system of government, as reflected in the Constitution,” the Court should not “impose on our citizens the risks of the electronic listener or observer” without the protection of a warrant requirement.<sup>94</sup>

Harlan’s dissent candidly addressed one of the most vexing difficulties involved in interpreting the privacy precedents during the years before *White*, which derived from the Court’s tradition of silence concerning the implications of departures from the logic of *Olmstead*, *Goldman*, and *On Lee*. These cases became symbols of the Court’s efforts “to live as long as it could with decisions made in the past,”<sup>95</sup> and citations to the rationales or holdings in *Olmstead* and *On Lee* appeared in decisions that implicitly retreated from those holdings or rationales.<sup>96</sup> This custom of using *Olmstead*-observant language, while relying on *Olmstead*-evasive reasoning, made it extremely difficult to identify the cases in which the law actually changed, and this difficulty could persist for years.<sup>97</sup>

Harlan expected that a “discerning lawyer” would recognize this difficulty,<sup>98</sup> and would adapt to it by characterizing the status of any privacy issue in scrupulously nuanced terms, as when he identified “the question of whether a conversation could be the subject of a ‘seizure’ for Fourth Amendment purposes” as

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<sup>93</sup> *Id.* at 773.

<sup>94</sup> *Id.* at 786.

<sup>95</sup> BARTH, *supra* note 1, at 20 (referring to consequence of Court’s “fidelity to *stare decisis*” generally in the era before *White*).

<sup>96</sup> *See, e.g.*, *Silverman v. United States*, 365 U.S. 505, 512 (1961) (declining to re-examine *Goldman* but also declining to go beyond it “by even a fraction of an inch”).

<sup>97</sup> *See, e.g.*, Brief of Petitioner at 10, *Katz v. United States*, 389 U.S. 347 (1967) (No. 35), 1967 WL 113605 (noting how “[a]fter *Silverman*, much confusion existed as to whether this Court had abandoned the physical trespass test enunciated in *Goldman* or whether *Silverman* represented the new philosophy of the Court”); *White*, 401 U.S. at 775 n.9 (observing that *Silverman* implicitly “would seem to have eliminated any lingering uncertainty” that verbal communication was protected by the Fourth Amendment, and that this “unspoken premise of *Silverman*” was clearly articulated in *Wong Sun v. United States*, 371 U.S. 471, 485 (1963)).

<sup>98</sup> *White*, 401 U.S. at 776 (criticizing the government’s brief in *White* for citing *Lopez* as a reaffirmation of *On Lee*, because to “the discerning lawyer,” *Lopez* “could only give pause, not comfort” and could “hardly be thought to have nurtured the questionable rationale” of *On Lee*).

“yet an unanswered if not completely open question” in 1952.<sup>99</sup> Harlan refused to pretend that any precedent could be treated as a simple artifact whose meaning was synonymous with its result, and he assumed the relationship between precedents could not be ascertained merely by observing that one case cited another.<sup>100</sup> He further expected observers to recognize that the Court’s custom of citing a case “without disavowal of its holding” was entirely consistent with “the failure to reaffirm” the reasoning of that case.<sup>101</sup>

In order to speak accurately about the ambiguities of the Court’s long, slow journey away from *Olmstead*, Harlan liked to speak metaphorically about precedent, and to personify the *Olmstead* progeny in order to track the stages of their declining health. Regarding the fatal prognosis for *Olmstead* and *On Lee*, Harlan declared that no decision after 1963 gave the “breath of life to the reasoning that led to the *On Lee* and *Olmstead* results,” and so “it required little clairvoyance to predict the demise of the basic rationale of *On Lee* and *Olmstead*.”<sup>102</sup> As for the timing of *Olmstead*’s demise, Harlan declared it was given a “quiet burial” in *Berger* before *Katz* gave it “last rites.”<sup>103</sup>

Harlan treated the concurrences and dissents of his colleagues as essential sources for assessing the degree of “erosion”

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<sup>99</sup> *Id.* at 773 & n.5 (noting that the *On Lee* Court did not reach this question, the answer to which “was still unclear after *Goldman*” in 1942).

<sup>100</sup> *Id.* at 777.

<sup>101</sup> *Id.* (characterizing the significance of the citation of *On Lee* in his *Lopez* majority opinion in these terms). *Cf.* Transcript of Oral Argument, *supra* note 27, at 25 (revealing that when government counsel in *Katz* argued that “in the *Berger* case [the Court] did cite *Goldman*,” Justice Black responded, “I don’t think – they indicated [that] opinion was to be valid. Those cases were cited because they were somewhere in the realm.”).

<sup>102</sup> *White*, 401 U.S. at 777. *See also id.* at 775-76 (noting that although the *Lopez* Court “declined to follow the course” of “sounding the death knell for *Olmstead* and *On Lee*,” four members of that Court “were prepared to pronounce *On Lee* and *Olmstead* dead,” reasoning that “[t]he pyre . . . had been stoked by decisions like *Wong Sun* . . . and . . . *Silverman*”) (citations omitted).

<sup>103</sup> *Id.* at 780 (observing that even “[i]f *Berger* did not flatly sound a dirge for *Olmstead*, it articulated principles that led Mr. Justice Douglas, by way of concurrence, to comment on its quiet burial”). *See also id.* (concluding that “[a]t most [*Katz*] was a formal dispatch of *Olmstead*” and that *Katz* thereby “freed from speculation what was already evident, that *On Lee* was completely open to question”).

in the “doctrinal foundations” of *Olmstead* and *On Lee*.<sup>104</sup> He assumed that opinions for Court majorities would not attempt to reconcile their *Olmstead*-observant language with their *Olmstead*-evasive reasoning. Therefore, each Court opinion needed to be examined through the lens of the accompanying presentations of justices who had the freedom to speak with greater candor and clarity about “the undercurrents” of doctrinal evolution that drew into question “the vigor of earlier precedents.”<sup>105</sup> Harlan valued concurrences and dissents because he wrote many of his own,<sup>106</sup> and his concurrence in *Katz* foreshadowed some of the ideas he would develop in his *White* dissent. Even more dramatically, Justice White’s concurrence in *Katz* staked out the answer he planned to offer when the issue in *White* arrived at the Court. Without joining issue with each other, each justice claimed that a different tacit understanding existed on the Court concerning the proper interpretation of Justice Stewart’s ambiguous opinion for the *Katz* majority.<sup>107</sup>

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<sup>104</sup> See, e.g., *id.* at 769, 778 n.12, 780 (citing *On Lee* dissents, *Lopez* dissent, and *Berger* concurrence).

<sup>105</sup> *Id.* at 778, 784. Cf. *id.* at 769 (describing how *On Lee* “continued to govern official behavior” involving the warrantless use of wired listeners “in spite of the subsequent erosion of its doctrinal foundations”).

<sup>106</sup> Lewin, *supra* note 4, at 583 (observing that Harlan became “among the most prolific of the Court’s opinion writers” because of the number of his concurrences and dissents).

<sup>107</sup> Compare *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring) with *id.* at 362-64 (White, J., concurring). Cf. David A. Sklansky, *Katz v. United States: The Limits of Aphorism*, in *CRIMINAL PROCEDURE STORIES* 247, 248 (Carol S. Steiker, ed., 2006) (observing that “the most striking thing” about the *Katz* Court’s reasoning “was how vague and ambiguous it was,” and that the “affirmative case” for the holding “was left largely unstated”); THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 59 (2008) (noting that the *Katz* Court’s “embrace of privacy was not without reservation and [Justice] Stewart did little to explain what he meant by the term”); Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 S. CT. REV. 133, 137-38 (identifying ambiguities in *Katz* opinion, and noting that because of the Harlan concurrence, “it seems clear that the [majority] opinion is deliberately ambiguous”).

*A. Foreshadowings of the White Debate in the Katz Concurrences*1. Justice Harlan's Anchoring of *Katz* in Privacy Precedents

The implicit goal of Justice Harlan's *Katz* concurrence was to anchor the majority's holding in the precedential seabed of the Court's decisions.<sup>108</sup> But his portrayal of precedents was complicated by his penchant for elaborating upon the emerging connections between the privacy decisions. He displayed the same penchant in his *White* dissent, in which he opined that *Katz* added "no new dimension to the law."<sup>109</sup> Yet Harlan was provoked sufficiently by the *Katz* majority's opinion to offer his own explication of the result. His first step was to validate the *Katz* defendant's original and narrower argument,<sup>110</sup> stating:

I join the opinion of the Court, which I read to hold *only* (a) that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area . . . is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.<sup>111</sup>

Harlan saw no reason to cast doubt upon the continuing validity of the Court's tradition of making case-by-case additions

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<sup>108</sup> *Katz*, 389 U.S. at 360-62.

<sup>109</sup> *White*, 401 U.S. at 780 (Harlan, J., dissenting) (citations omitted).

<sup>110</sup> *Katz*, 389 U.S. at 349-50 (quoting the defendant's questions presented, namely whether a public telephone booth is a constitutionally protected area and whether a physical intrusion into such an area is necessary for a search and seizure). See Transcript of Oral Argument, *supra* note 27, at 1, 3 (explaining that when FBI agents discovered that *Katz* was making calls from a bank of three telephone booths, they put a stereophonic tape recorder on the roof of the middle booth, taped each of the microphones to the back of one of the booths, put an "out of order" sign on the third booth, and turned on the recorder whenever a radio report from the agent tailing *Katz* predicted *Katz*'s imminent arrival).

<sup>111</sup> *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring) (emphasis added) (citing *Hester v. United States*, 265 U.S. 57 (1924) (Fourth Amendment does not provide protection from visual surveillance in an "open field"); *Weeks v. United States*, 232 U.S. 383 (1914) (Fourth Amendment protects the home)).

to the category of “constitutionally protected areas.”<sup>112</sup> Moreover, his invocation of this tradition grounded the *Katz* holding in precedents that involved traditional, non-electronic types of government intrusions, and thereby linked the government’s surveillance in *Katz* to the warrant requirement.<sup>113</sup> Not until *Berger* did the Court explain how the warrant system and the probable cause requirement might be applied feasibly to wire-tapping.<sup>114</sup> Neither Harlan’s concurrence nor the *Katz* Court’s opinion revealed that the defense counsel’s original position assumed that protection of the defendant’s conversations would require an absolute Fourth Amendment prohibition on recording them.<sup>115</sup> Only in the reply brief and at oral argument did defense counsel propose that the warrant system should be imposed on the government’s bugging of the telephone booth.<sup>116</sup> Indeed, this argument was sufficiently novel that some lawyers and media commentators expressed surprise at its success in *Katz*.<sup>117</sup>

Harlan’s reliance on the “constitutionally protected area” concept implicitly rejected the defense counsel’s position at oral argument, which proposed that it was “the wrong initial in-

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<sup>112</sup> CLANCY, *supra* note 107, at 54 n.49 (quoting partial list of protected areas in *Lanza v. New York*, 370 U.S. 139, 143 (1962), including a house, a business office, a store, a hotel room, an apartment, an automobile, and a taxicab).

<sup>113</sup> See Amsterdam, *supra* note 15, at 388 (observing that the *Katz* Court “simply takes up the warrant requirement from the dwelling-entry cases and applies it routinely to the bugging of a public telephone booth”). Compare Brief for Respondent at 17-19, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113606 (arguing that even if the booth is a constitutionally protected area, it should not receive the same warrant protection as a home), with Transcript of Oral Argument, *supra* note 27, at 28 (arguing that the Fourth Amendment was designed to protect the public from trespass and that it arises from the right of the person to exclude others from an area under the person’s control, which is not a characteristic of a public telephone booth).

<sup>114</sup> Sklansky, *supra* note 107, at 234-36 (explaining the reasons for the “considerable doubt regarding the validity of surveillance warrants” before the *Silverman* era).

<sup>115</sup> See *id.* at 242-45 (analyzing the new arguments of *Katz*’s defense counsel in the reply brief and at oral argument concerning the need for a warrant).

<sup>116</sup> See Reply Brief for Petitioner at 2, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113607; Transcript of Oral Argument, *supra* note 27, at 4.

<sup>117</sup> See Sklansky, *supra* note 107, at 249-50. Cf. Samuel Dash, *Katz - Variations on a Theme by Berger*, 17 CATH. U. L. REV. 296, 303 & n.41 (1968) (describing the lack of a federal statute regulating “bugging” in the era before *Berger* and *Katz*, and the small number of state statutory provisions relating to this type of surveillance); SAMUEL DASH, RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, *THE EAVESDROPPERS* 430-37 (1959).

quiry” to ask whether any area is “constitutionally protected,”<sup>118</sup> and that the right to privacy should “follow[] the individual” so that a conversation in any setting might deserve Fourth Amendment protection.<sup>119</sup> To bolster this proposal, defense counsel emphasized that “the very first item of protection in the Fourth Amendment is ‘persons,’” which “lends credence” to the view “that privacy does follow the individual.”<sup>120</sup> The *Katz* Court echoed these sentiments in declaring that, “[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures,”<sup>121</sup> and “the Fourth Amendment protects people, not places.”<sup>122</sup> The Court even endorsed the defense counsel’s criticism of the “constitutionally protected area” doctrine, agreeing it provided no “talismanic solution to every Fourth Amendment problem.”<sup>123</sup>

Harlan must have recognized the inconsistency between the Court’s validation of these defense arguments and his own narrower interpretation of the *Katz* holding. But whatever he may have thought of the defense counsel’s broad and vaguely worded propositions, he was determined to reaffirm the precedents challenged by defense counsel, even when the *Katz* opinion remained silent about these challenges. For example, *Katz*’s defense counsel was asked at oral argument whether the Fourth Amendment should protect a conversation in a field from interception by means of a parabolic microphone one mile away.<sup>124</sup>

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<sup>118</sup> Transcript of Oral Argument, *supra* note 27, at 5; Reply Brief for Petitioner, *supra* note 116, at 4.

<sup>119</sup> Transcript of Oral Argument, *supra* note 27, at 7. Cf. Sklansky, *supra* note 107, at 237, 241 (contrasting the defense counsel’s original questions presented with counsel’s later shift away from them at oral argument).

<sup>120</sup> Transcript of Oral Argument, *supra* note 27, at 12.

<sup>121</sup> *Katz v. United States*, 389 U.S. 347, 359 (1967).

<sup>122</sup> *Id.* at 351.

<sup>123</sup> *Id.* at 351 n.9. Compare Transcript of Oral Argument, *supra* note 27, at 5, 7, with *Katz*, 389 U.S. at 350 (refusing “to adopt this formulation of the issues” using the idea of the “constitutionally protected area,” and observing that “the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase ‘constitutionally protected area’”) and *id.* at 351 (opining that the effort to decide “whether or not a given ‘area,’ viewed in the abstract, is ‘constitutionally protected’” only “deflects attention” from the problem). Cf. Amsterdam, *supra* note 15, at 357 (observing that *Katz* “rejects the concept of ‘constitutionally protected areas’ as the exclusive formula of fourth amendment coverage”).

<sup>124</sup> Transcript of Oral Argument, *supra* note 27, at 5.

The “open fields” doctrine granted no protection from visual surveillance, and Katz’s defense counsel argued that the “open fields” doctrine should be overruled so that both visual and conversational privacy could be protected.<sup>125</sup> Without mentioning this defense argument, Harlan’s concurrence referred twice to the “open fields” doctrine as established law.<sup>126</sup>

In the second step of his concurrence, Harlan acknowledged the Court’s maxim concerning the protection of “people not places,” but noted that the protection for “people” generally required a reference to a “place.”<sup>127</sup> Then he described his understanding of “the rule that ha[d] emerged from prior decisions”—a “twofold requirement” demanding “first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>128</sup> These memorable phrases soon “came to be used by the Court as the predominant measure for the scope of the Fourth Amendment’s protections” in most contexts.<sup>129</sup> But Harlan used these words as a framework for rejecting the government counsel’s argument that privacy can exist only in areas in

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<sup>125</sup> *Id.* at 5, 11 (arguing, on behalf of defendant, for overruling *Hester v. United States*, 265 U.S. 57 (1924), because it should make no difference, with regard to the right to conversational privacy, “whether you’re in an open field or in the privacy of your own home”). *But see* Transcript of Oral Argument, *supra* note 27, at 16-17 (arguing, on behalf of the government, that people in the open fields should remain unprotected equally from visual surveillance and from a parabolic microphone because they are in a “public area” and privacy is restricted to “some area in which there is a private interest”).

<sup>126</sup> *Katz*, 389 U.S. at 360, 361 (Harlan, J., concurring) (contrasting protected telephone booth with unprotected open fields, and noting that “conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable,” without mentioning the problem of the parabolic microphone).

<sup>127</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>128</sup> *Id.* at 361. *Cf.* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 822 (2004) (observing that Harlan saw his “reasonable expectation of privacy framework” as a restatement of existing law”).

<sup>129</sup> CLANCY, *supra* note 107, at 60. For possible sources of the phrase “reasonable expectation of privacy,” see Brief for Respondent, *supra* note 113, at 15 (arguing that “[t]he rights of privacy . . . must be measured in terms of the reasonable expectations of a person”), and Transcript of Oral Argument, *supra* note 27, at 16 (revealing how Justice Fortas repeatedly used the phrase “reasonably expect” in his questioning).

which the speaker has a private interest in the premises, never in a public area.<sup>130</sup>

In Harlan's view, the government's interpretation of the concept of "constitutionally protected areas" was both narrower and more rigid than Harlan's own interpretation, and it was grounded in reasoning that ignored the precedents of *Silverman*, *Osborn*, *Berger* and others.<sup>131</sup> Those cases no longer supported the idea that "the Fourth Amendment was designed to protect the public from trespass by law enforcement officers."<sup>132</sup> Like the other justices in the *Katz* majority, Harlan wished to distinguish the protection of people from the protection of places, but for a different purpose. He wished to affirm the Court's broad concept of "constitutionally protected areas" while contradicting the government's proposition that it was only the legal right to exclude others from private premises that automatically gave rise to privacy for conversations.<sup>133</sup> As one counterexample, Harlan noted that a speaker's "statements" made in his home but exposed to the "plain view" of outsiders should not be protected, echoing the agreement of both counsel at oral argument that the Fourth Amendment would not protect a speaker who used a "loud enough voice" to be heard by someone outside his home when the windows were open.<sup>134</sup> By exhibiting "no intention" to keep his conversation to himself, this person exhibited no "actual" expectation of privacy.<sup>135</sup> Additionally, Harlan reasoned that although conversations "in the open" usually would not be protected, they should be protected in a "temporarily private place," like *Katz*'s telephone booth or a taxicab, in which momentary "freedom from intrusion" could be

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<sup>130</sup> Transcript of Oral Argument, *supra* note 27, at 16-17.

<sup>131</sup> See discussion *infra* Part II.B.2.

<sup>132</sup> Transcript of Oral Argument, *supra* note 27, at 28. See also discussion *infra* Part II.B.2 (discussing pre-*Katz* precedents).

<sup>133</sup> Transcript of Oral Argument, *supra* note 27, at 28.

<sup>134</sup> *Katz v. United States*, 389 U.S. 347, 361; Transcript of Oral Argument, *supra* note 27, at 7. *Accord id.* at 27 (agreeing, on behalf of the government, that no protection should exist "if a man stood at the window of his home and talked to somebody outside in the garden in such a loud tone that people on the sidewalk could hear it").

<sup>135</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

expected, even if a legal right to exclude did not exist.<sup>136</sup> These contrasting results could be characterized as scenarios involving different doctrinal judgments about the expectations that “society is prepared to recognize as ‘reasonable.’”<sup>137</sup>

Another foreshadowing of Harlan’s *White* dissent appeared in the end of his *Katz* concurrence, where he noted that the “overruling” of *Olmstead* had already occurred, as part of “the course of development evinced” during the previous six years in majority opinions from *Silverman* to *Berger*.<sup>138</sup> In Harlan’s view, *Olmstead*’s holding “essentially rested on the ground that conversations were not subject to the protections of the Fourth Amendment,”<sup>139</sup> and *Silverman* “established that interception of conversations reasonably intended to be private could constitute a ‘search and seizure.’”<sup>140</sup> Once *Olmstead* was impeached, only *Goldman* remained to be re-examined in *Katz*.<sup>141</sup> Harlan agreed that *Goldman* should be overruled, observing that its holding was “bad physics as well as bad law,” because “reasonable expectations of privacy may be defeated by electronic as well as physical invasion.”<sup>142</sup> In his *White* dissent, Harlan took a similar view of *On Lee* as a precedent whose time for re-examination and formal repudiation was overdue.

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<sup>136</sup> *Id.* (citing *Rios v. United States*, 364 U.S. 253 (1960), for privacy interest in taxi cab, observing that it is irrelevant that a telephone booth is “accessible to the public” when not in use); *id.* at 352 (quoting the *Katz* majority concerning the assumption of privacy exercised by a person who “shuts the door behind him, and pays the toll that permits him to place a call”).

<sup>137</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>138</sup> *Id.* at 362 n.\* (citing *Wong Sun v. United States*, 371 U.S. 471 (1963), *Berger v. New York*, 388 U.S. 41 (1967), and *Osborne v. United States*, 385 U.S. 323 (1966)). *Cf.* Transcript of Oral Argument, *supra* note 27, at 9 (revealing Justice Harlan’s questions whether *Olmstead* “already has been” overruled, “[w]ith a strong *sub silentio*” in *Berger*) (relying on Dr. George R. Conyne, legal historian at the University of Kent at Canterbury, for voice identification of Justice Harlan’s voice on October 11, 2009, using recording of oral argument in *Katz*, available at [http://www.oyez.org/cases/1960-1969/1967/1967\\_35/argument](http://www.oyez.org/cases/1960-1969/1967/1967_35/argument)).

<sup>139</sup> *Katz*, 389 U.S. at 362 n.\* (Harlan, J., concurring).

<sup>140</sup> *Id.* at 361-62.

<sup>141</sup> *Id.* at 362 (noting that the *Silverman* Court found it unnecessary to re-examine *Goldman*).

<sup>142</sup> *Id.* Justice Harlan’s concurrence ended with the point that the *Katz* majority’s opinion did not foreclose the future recognition of specific exceptions to the requirement of a warrant. *Id.*

## 2. Justice White's Proposal—What *Katz* Left Undisturbed

Justice White's concurrence in *Katz* included a footnote in which he declared that *Hoffa*, *Lopez*, *Osborn*, and *On Lee*—all of which involved undercover agents or informants—remained “undisturbed” by the *Katz* decision.<sup>143</sup> His reasoning implicitly constructed the foundation for the reasoning of his plurality opinion in *White*. Notably, Justice White's summary of the results in these precedents made no reference to the rationales used by the Court to explain the lack of Fourth Amendment protection for the conversations in each case. Instead, he characterized each of these precedents in broad terms, according to the method by which the government obtained the “evidence.” As Justice White declared:

In previous cases, which are undisturbed by today's decisions, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police [in *Hoffa* (1966)]; (2) by a recording device hidden on the person of such an informant [in *Lopez* (1963) and *Osborn* (1966)]; and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location [in *On Lee* (1952)].<sup>144</sup>

Justice White then followed this summary with three key sentences, which implicitly linked together the “risk” rationale of *Hoffa* with the recording scenarios of *Lopez* and *Osborn*, and most importantly, with the transmission scenario of *On Lee*. He reasoned as follows:

When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. . . . It is but a logical and reasonable extension of this principle that a man take the risk that his

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<sup>143</sup> *Id.* at 362 n.\*\* (White, J., concurring).

<sup>144</sup> *Id.* (citations omitted).

hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case [*Katz*] deals with an entirely different situation, for as the Court emphasizes the [defendant] “sought to exclude . . . the uninvited ear,” and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.<sup>145</sup>

Justice White’s collective invocation of *Hoffa*, *Lopez*, *Osborne*, and *On Lee* served to stack these precedents together as bricks in a small wall of doctrine, cemented together with his endorsement of the common doctrinal ground they shared in being “undisturbed” by *Katz*. Without descriptions of their accompanying rationales, the results in these decisions were portrayed implicitly as per se rules, which impression was enhanced by the enumerated, “black letter” style of Justice White’s recitation. The ahistorical character of this singular wall of precedents was obscured by the simplicity of Justice White’s promise that none of these cases needed to be reconsidered in the light of whatever meanings might be assigned to the *Katz* majority’s opinion.

Justice White’s inclusion of *On Lee* in this quartet of cases implicitly extended the decision’s legitimacy, in spite of the *On Lee* Court’s reliance on *Olmstead* and *Goldman*, now both overruled. The reference to *On Lee* also invited judges and lawyers to focus on *On Lee*’s relationship to *Katz*, rather than its relationship to all the pre-*Katz* precedents that might have “disturbed” it. Without this invitation, observers might not have noticed whether or not the *On Lee* decision was cited in Justice Stewart’s *Katz* opinion. The fact that Stewart did not cite *On Lee* might be taken to imply either that *On Lee* was irrelevant to the *Katz* issue, or that Stewart ignored *On Lee* because of its controversial status as a member of the dying *Olmstead* family of cases. Justice White’s reference to *On Lee* implied that the *Katz* Court’s silence meant that *On Lee* was alive, and had been alive all along.

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<sup>145</sup> *Id.* (citations omitted).

However, Justice White's most significant statement was his pairing of the small wall of "undisturbed" informant precedents with his recommended "logical and reasonable extension" of *Hoffa's* ascribed rationale to the scenario of the wired informant in *On Lee*. By offering up this proposal concerning the lack of need for Fourth Amendment protection against "unreliable associates" who are planted government informants, Justice White appeared to suggest that *Hoffa's* rationale could retroactively justify *On Lee's* result. His final assurance, that *Katz* involved an "entirely different situation" from the informant precedents, deflected attention away from consideration of the question whether the reasoning of *Katz* or the pre-*Katz* cases might be relevant to an endorsement of the "extension" of *Hoffa's* "risk" analysis to the scenario of the wired listener.

Justice White's closing assurance also suggested that there was no need to consider the significance of the Court's repeated distinctions between the use of unwired listeners, like those in *Hoffa* and *Lewis* who simply reported back to their government supervisors, and the use of listeners like those in *On Lee*, *Lopez*, and *Osborn*, who possessed recording or transmitting devices. Implicitly, Justice White's comments signaled to observers that the "electronic eavesdropping" precedents he left unmentioned, such as *Berger* and *Silverman*, as well as the "search" cases of the same era, were irrelevant to the assessment the need for judicial regulation of the wired listeners used in *On Lee* and *White*.

Justice White's views in his *Katz* concurrence encapsulated the core arguments that he would make in his *White* plurality opinion. The only Justice from the Warren Court who joined his opinion in *White* was Justice Stewart, the author of the *Katz* opinion.<sup>146</sup> During the years between *Katz* and *White*, Justice White's assurances about the "undisturbed" status of *On Lee* and *Lopez*, and his proposed extension of *Hoffa's* logic to justify the preservation of the *On Lee* holding, would be noticed. In the

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<sup>146</sup> *Id.* at 348. See Leon Friedman, *Byron R. White*, in IV THE JUSTICES, *supra* note 5, at 1575 (observing that Professor Philip Kurland described the 1971 term as "the year of the Stewart-White Court – because [Justices Stewart and White] voted with the majority in over ninety percent of the decisions that year").

*White* litigation, the circuit court dissenters and the government counsel relied on Justice White's *Katz* concurrence to advocate the constitutionality of the unregulated use of wired listeners.<sup>147</sup>

One key aspect of Justice White's concurrence in *Katz* later captured the attention of the circuit court judges, the government litigators in the Supreme Court, and the two justices who had not served on the *Katz* Court, Justice Blackmun and Chief Justice Burger. Justice White raised the question whether *Katz* had overruled *On Lee*, and determined that *On Lee* remained "undisturbed."<sup>148</sup> In order to escape from the various premises concealed within Justice White's frame, Justice Harlan spent more than half of his *White* dissent explaining why Justice White's question about *On Lee* was wrong, and what the right questions might be.

### *B. Reconstructing the Past: The Unrecognizable World of On Lee*

The first half of Justice Harlan's dissent focused on the goal of explaining why "*Katz* added no new dimension to the law" with regard to the viability of *On Lee*.<sup>149</sup> Harlan concluded that despite the *Katz* Court's "formal dispatch of *Olmstead*," it "was already evident that *On Lee* was completely open to question" before the Court reached its decision.<sup>150</sup> Harlan's evidence for the death of *On Lee* included the privacy precedents that revealed the slowly degrading authority of *On Lee* starting in the early 1960s, which precedents also established three "sound

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<sup>147</sup> *United States v. White*, 405 F.2d 838, 848, 850-51 (7th Cir. 1969) (en banc) (Castle, J., dissenting); Brief for the United States, *supra* note 7, at 9, 12, 14, 16, 17. See also *White*, 405 F.2d at 851, 852 (Hastings, J., dissenting) (arguing that *On Lee* must be treated as "controlling and dispositive" until "it is set aside by the Supreme Court"). *But cf. id.* at 843, 847 (majority opinion) (noting that it was unclear how *On Lee* could have been "undisturbed" by *Katz*, given that *On Lee* had relied on *Olmstead*, which was overruled by *Katz*, and given that the Supreme Court had "on other occasions completely eroded the decisional basis of *On Lee*"); *id.* at 843-44 (observing that it was not clear why "*Katz* would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging" as in *Hoffa*, and that it was difficult "to believe that such a meaningless form of consent would have rendered the defendant's overheard statements any more admissible in *Katz*").

<sup>148</sup> See Transcript of Oral Argument, *supra* note 29, at 23.

<sup>149</sup> *United States v. White*, 401 U.S. 745, 745 (1971) (Harlan, J., dissenting).

<sup>150</sup> *Id.* at 768, 780.

general principles for application of the Fourth Amendment that were either dimly perceived or not fully worked out at the time of *On Lee*.<sup>151</sup> These three general principles were: (1) “that verbal communication is protected by the Fourth Amendment;” (2) “that the reasonableness of a search does not depend on the presence or absence of a trespass;” and (3) “that the Fourth Amendment is principally concerned with protecting interests of privacy, rather than property rights.”<sup>152</sup> For Harlan, “the primacy” of a fourth general principle emerged in his examination of the search cases during the same era: that “official investigatory action that impinges on privacy must typically, in order to be constitutionally permissible, be subjected to the warrant requirement.”<sup>153</sup>

#### 1. *On Lee*’s Trespass Rationale and Its Jurisprudential Identity Before *White*

Harlan began his “exposition of the dynamics of the decline of the trespass rationale underlying *On Lee*” with a simplified version of that rationale, explaining that Justice Jackson’s opinion rejected the defendant’s contention that the “deception” of the wired informant “vitiating” the defendant’s “consent to his entry on the premises.”<sup>154</sup> Thus, “in the absence of a trespass, no constitutional violation had occurred.”<sup>155</sup> Harlan could have supplied more details about the intricacies of the trespass analysis in the *On Lee* opinion to illustrate his point that “*On Lee* rested on common-law notions and looked to a waning era of Fourth Amendment jurisprudence.”<sup>156</sup> The *On Lee* defendant made four initial arguments in an attempt to raise the question left open in *Goldman*—whether the entry into an office to install

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<sup>151</sup> *Id.* at 780-81.

<sup>152</sup> *Id.* at 781.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 773, 774 & n.6.

<sup>155</sup> *Id.* at 774.

<sup>156</sup> *Id.*

a listening device might constitute a trespass, with the operation of the device serving as a “continuing trespass.”<sup>157</sup>

The *On Lee* defendant’s first losing argument was based on the proposition that “unlawful conduct” by the wired informant, after the defendant consented to his entry into the business premises, would constitute the tort of trespass *ab initio*.<sup>158</sup> Justice Jackson reasoned that even if the agent’s conduct were assumed to be unlawful, the Court had ruled the trespass *ab initio* doctrine should not be extended beyond civil actions against the government to cases “where the right . . . to . . . use . . . evidence is involved.”<sup>159</sup> The second losing argument was that the informant tortiously entered by fraud, as Justice Harlan noted.<sup>160</sup> Here Justice Jackson acknowledged the “orthodox tort law” was unclear as to whether an entry without any affirmative misrepresentation would be a trespass.<sup>161</sup> But he concluded that any such “fine-spun” tort doctrine similarly deserved rejection as “a fiction whose origin, history, and purpose do not justify . . . [its] application,” according to the same precedent that rejected the relevance of the trespass *ab initio* doctrine.<sup>162</sup>

In his third losing argument, the *On Lee* defendant identified the government agent as a trespasser.<sup>163</sup> By sending the wired informant into the defendant’s business premises, the agent gained the same access to their conversations that physical entry by the agent would have provided. Justice Jackson rejected this analogy as “frivolous” and then summarized the three types of trespassory entry that would allow the Court to reach the question left open in *Goldman*.<sup>164</sup> These included physical entry by force, physical entry by unwilling submission to authority, and physical entry without any express or implied

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<sup>157</sup> *Goldman v. United States*, 316 U.S. 129, 134-35 (1942) (noting that this question was unnecessary to decide where agents made such an entry but the listening device did not work).

<sup>158</sup> *On Lee v. United States*, 343 U.S. 747, 751-52 (1952).

<sup>159</sup> *Id.* at 752 (quoting *McGuire v. United States*, 273 U.S. 95 (1927)).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §18 (1971); *McGuire*, 273 U.S. at 95).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

consent.<sup>165</sup> The entry by the wired informant matched none of these methods. The defendant's fourth losing argument relied on an analogy between the conduct of the wired informant in *On Lee* and the informant in *Gouled* who entered an office not by force but "by subterfuge or fraud."<sup>166</sup> Justice Jackson dismissed the analogy because *Olmstead* limited *Gouled*'s doctrine to a scenario where tangible property is seized by an informant.<sup>167</sup> Therefore, *Gouled* was inapposite to cases involving the use of "mechanical or electronic devices" to intercept conversations, "at least where access to the listening post was not obtained by illegal methods."<sup>168</sup>

Unexpected doctrinal drama arose in the *White* plurality opinion, thanks to the *On Lee* defendant's fifth argument—that *Olmstead* should be overruled.<sup>169</sup> After almost twenty years of judicial treatment as a "trespass" precedent, *On Lee*'s alternate identity was announced by the *White* plurality, without citation to the briefs or arguments of the parties, the arguments in the opinions below, the Court's own precedents, lower court opinions, or scholarly commentary. After acknowledging that the *On Lee* Court's trespass rationale "cannot survive *Katz*," the *White* plurality declared:

But the [*On Lee*] Court announced a second and independent ground for its decision; for it went on to say that overruling *Olmstead* and *Goldman* would be of no aid on *On Lee* since he "was talking confidentially and indiscreetly with one he trusted, and he was overheard . . . . It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the

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<sup>165</sup> *Id.* at 752-53 (citing *McDonald v. United States*, 335 U.S. 451 (1948); *Johnson v. United States*, 333 U.S. 10 (1948); *Nueslein v. District of Columbia*, 115 F.2d 690 (D.C. Cir. 1940)).

<sup>166</sup> *On Lee*, 343 U.S. at 753.

<sup>167</sup> *Id.* at 753.

<sup>168</sup> *Id.* *But cf.* Maclin, *supra* note 11, at 190-93, 199-200 (providing critique of *On Lee* Court's analysis); Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 Wash. U. L.Q. 573, 598-603 (1996) (hereinafter Maclin, *Informants*) (same).

<sup>169</sup> *On Lee*, 343 U.S. at 753.

Fourth Amendment here.” [citing *On Lee*] We see 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, nor are we now inclined to overturn this view of the Fourth Amendment.<sup>170</sup>

Justice Harlan responded to this surprising doctrinal development by acknowledging that the *On Lee* opinion did draw “some support from a brief additional assertion that ‘eavesdropping . . . with the connivance of one of the parties’ raises no Fourth Amendment problem.”<sup>171</sup> But Harlan insisted that it would be a “misreading” of *On Lee* to treat this “unelaborated assertion” as “a wholly independent ground for decision.”<sup>172</sup> Without offering further arguments, Harlan maintained that, “at the very least, this rationale needs substantial buttressing if it is to persist in our constitutional jurisprudence” after the Court’s issuance of the many decisions that collectively cast doubt upon *On Lee*’s older “understanding of the Fourth Amendment.”<sup>173</sup> If Harlan had chosen to analyze the *White* plurality’s *On Lee* excerpt in its entirety, he could have pointed out that the ambiguity of the passage, from which the plurality quoted only selectively, created some doubt about the plurality’s interpretation of its significance.<sup>174</sup>

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<sup>170</sup> United States v. White, 401 U.S. 745, 750 (1971) (plurality opinion) (quoting *On Lee*, 343 U.S. 747, 753-54 (1952)).

<sup>171</sup> *Id.* at 774 (Harlan, J., dissenting).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 774-75 (noting that the *White* plurality opinion did not rest on the discovery of *On Lee*’s independent ground for decision, and instead provided additional reasoning for its holding, thereby “tacitly” recognizing “the analytic inability of this bare hypothesis [about the independent ground] to support a rule of law so profoundly important to the proper administration of justice”). *Cf. id.* at 746-54 (plurality opinion) (revealing that the analysis of *On Lee* constituted six percent of the word count in the plurality opinion, compared to eleven percent used for borrowed ideas from Justice White’s *Katz* concurrence, and eighty-three percent for other arguments and observations).

<sup>174</sup> The relevant passage in *On Lee* consisted of a series of comments that explained why the Court rejected the *On Lee* defendant’s fifth argument that *Olmstead* should be overruled. First, the Court noted that the *Goldman* defendant had failed to persuade the Court to reconsider *Olmstead*. Second, the Court pointed out that the *On Lee* defendant’s attempt to overturn *Olmstead* “would be of no aid [to him] unless he can show that his situation should be treated as wiretapping.” Third, the Court opined that the “presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping.” Fourth, the Court explained that judgment by noting that when

Justice Harlan did not modify his thesis concerning the decline of *On Lee*'s authority when confronted with the *White* plurality's challenge to *On Lee*'s formerly exclusive association with *Olmstead*'s "trespass rationale."<sup>175</sup> Presumably he recognized that Fourth Amendment privacy cases had been litigated for years, apparently without anyone noticing *On Lee*'s "independent ground for its decision."<sup>176</sup> Harlan was prepared to attack *On Lee*'s authority on two fronts, by producing evidence of the evisceration of its trespass rationale, and by challenging its governing assumptions and result as inconsistent with the *White* plurality's "understanding of the Fourth Amendment" as revealed in subsequent precedents.<sup>177</sup>

## 2. Preservation of a Fossilized *On Lee* while Fourth Amendment Evolution Quickened

Harlan's discussion of the three newly emerging Fourth Amendment principles illustrated the ways in which the *On Lee* opinion had acquired two conspicuous flaws as it aged. First, the framework of older principles reflected in *On Lee*'s reasoning had been replaced with opposing principles, so that the *On Lee*

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the agent receiving transmitted conversations overheard the defendant, this event had the same "effect on his privacy" as if the agent "had been eavesdropping outside an open window." Fifth, the Court noted that the equivalence between plain hearing and electronic hearing was analogous to the equivalence between plain sight and the permissible use of "bifocals, field glasses or the telescope." Finally, the Court summed up its conclusion that "eavesdropping," presumably nonelectronic overhearing, should not be likened to other intrusions that constitute a search or seizure. *On Lee*, 343 U.S. at 753-54. *But see id.* at 765, 766-67 (Burton, J., dissenting) (endorsing the opposite logic from Justice Jackson, because even though agents outside the premises may use hearing aids to pick up a conversation inside the premises "more distinctly," this rule should not justify treatment of a transmitting device on wired listener as merely a hearing aid; arguing that a transmitter was equivalent to the physical presence of a listening agent hidden illegally inside the premises). *See also* Geoffrey Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUND. RES. J. 1199, 1222 (viewing Justice Jackson's rejection of the defendant's fourth argument as a response to the dissents by Justices Frankfurter and Douglas in *On Lee*).

<sup>175</sup> *White*, 401 U.S. at 773 (Harlan, J., dissenting).

<sup>176</sup> *Id.* at 750 (plurality opinion).

<sup>177</sup> *Compare White*, 401 U.S. at 750 (plurality opinion) (describing *On Lee*'s "independent ground" as "an understanding of the Fourth Amendment") *with id.* at 769 (Harlan, J., dissenting) (referring to the Court's "perception of the scope and role of the Fourth Amendment since *On Lee* was decided").

Court's holding was both outdated and inconsistent with the framework that now provided the starting point for resolving the *White* issue. Second, *On Lee* had acquired a dossier of critical commentary in Supreme Court dissents and concurrences, and Court majorities had repeatedly refused to apply its holding and rationales as written. This treatment cast upon *On Lee* the status of an unusable precedent, whose citation in subsequent cases became, in Harlan's view, an empty gesture.<sup>178</sup> As a technical matter, *On Lee*'s result remained "on the books" while the pre-*Katz* cases foreshadowed the Court's readiness to extend the implicit rejections of *On Lee*'s premises to the explicit rejection of its result.<sup>179</sup>

The earliest seeds of the three emerging Fourth Amendment principles could be found in the dissenting opinions in *On Lee*, *Goldman*, *Olmstead*, and in other early opinions.<sup>180</sup> When these principles emerged in the Court's majority opinions, they received validation together in the same cases, because each principle complemented and served to support the value of the other principles. For example, the *Silverman* Court emphasized the value of the "core" privacy right to retreat into the home, noted the absence of a technical trespass committed by the government's use of a "spike mike," and observed, "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."<sup>181</sup>

Harlan used both privacy cases and search cases to illustrate the Court's endorsements of the emerging principles, as

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<sup>178</sup> See, e.g., *White*, 401 U.S. at 777, 780 (Harlan, J., dissenting) (referring to citations to *On Lee* in *Lopez* and *Berger*).

<sup>179</sup> See *supra* notes 9 & 39 (revealing how this readiness was erased with the appointment of Justice Blackmun in 1970, who provided the fourth vote for the *White* plurality opinion and the fifth vote for the rejection of protection for the privacy interest).

<sup>180</sup> See, e.g., *Goldman v. United States*, 316 U.S. 129, 136-41 (1942) (Murphy, J., dissenting) (focusing on the value of a right to privacy, on the arbitrariness of a physical invasion requirement, and on the need to protect revelations of private thoughts expressed in conversations); *id.* at 140 n.8 (noting how *Olmstead* departed from the approach of earlier decisions that "insisted on a liberal construction of the Fourth Amendment" (citing *Gouled v. United States*, 255 U.S. 298 (1921); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Boyd v. United States*, 116 U.S. 616 (1886)).

<sup>181</sup> *Silverman v. United States*, 365 U.S. 505, 511-12 (1961).

evidenced by his reliance on cases like *Jones v. United States*<sup>182</sup> and *Warden v. Hayden*.<sup>183</sup> The *Jones* Court emphasized that the subtle historical distinctions of private property law should not be imported into the law defining Fourth Amendment rights, and recognized that overnight guests should have standing to challenge dwelling searches.<sup>184</sup> *Hayden* similarly relied on the decades of doctrinal movement away from reliance on common-law property concepts as the governing definitions for privacy interests, and overturned the longstanding prohibition on the seizure of “mere evidence” in which the government could assert no property interest.<sup>185</sup>

The *Lopez*, *Osborn*, and *Berger* decisions provided Harlan with his most direct evidence of the Court’s emerging dissatisfaction with *On Lee*’s rejection of the Fourth Amendment’s application to the government’s use of wired listeners. If the *Lopez* issue had been decided soon after *On Lee*’s ruling in 1952, that ruling should have supplied the controlling authority to uphold the use of a recording device by the government official who entered the *Lopez* defendant’s office. According to *On Lee*’s rationales, such an entry would be non-trespassory.<sup>186</sup> But Harlan’s *Lopez* opinion in 1963 did not invoke *On Lee* as the controlling authority in this way, and his *White* dissent pointed to the narrowness of his *Lopez* reasoning as an obvious sign of the Court’s retreat from both “the questionable rationale” and the result of *On Lee*.<sup>187</sup> Specifically, Harlan’s *Lopez* opinion emphasized a government official’s use of a recording device could be upheld because it was not a transmission device. The decision further

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<sup>182</sup> *Jones v. United States*, 362 U.S. 257 (1960).

<sup>183</sup> *Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>184</sup> *Jones*, 362 U.S. at 266. *But cf.* *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (preserving right of overnight guest to challenge dwelling search, but rejecting *Jones* Court’s extension of standing to “anyone legitimately on the premises where a search occurs”).

<sup>185</sup> See *Hayden*, 387 U.S. at 304-10 (noting early example of the Court’s escape from “the bounds of common law property limitations in *Silverthorne*,” which recognized the need for a suppression remedy even when “no possible common law claim existed for the return of the copies made by the Government of the papers it had seized”). See generally Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 55-61 (2005) (analyzing the abolition of the “mere evidence” rule).

<sup>186</sup> See *supra* Part III.B.1. (discussing *On Lee* rationales).

<sup>187</sup> *United States v. White*, 401 U.S. 745, 768, 776 (1971) (Harlan, J., dissenting).

distinguished *On Lee* by noting that the invisible government agents in *Lopez* had not committed “electronic eavesdropping” by listening to the defendant’s conversations.<sup>188</sup> This refusal to reaffirm the *On Lee* result was all the more remarkable because it was not a necessary consequence of the Court’s endorsements of the emerging but more abstract general Fourth Amendment principles. Thus, *Lopez* marked the first clear turning point that foreshadowed the Court’s readiness to reopen the *On Lee* decision, at the same time that four members of *Lopez* Court were ready to go further and overrule *On Lee*.<sup>189</sup>

Both *Osborn* and *Berger* spoke directly to the Court’s endorsement of the warrant system for the use of listeners with either recorders or wiretaps. In Harlan’s view, the *Osborn* Court’s approach effectively superceded the authority of *Lopez*, as the *Osborn* opinion “expressly abjured reliance on *Lopez*” and approved of the use of the recording informant based on the judicial approval of that use.<sup>190</sup> The reach of *Berger*’s reasoning went even further and “expunged any remnants of former doctrine” that were inconsistent with the Court’s declaration “that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited unsupervised ‘bugging.’”<sup>191</sup> This principle effectively buried the contradictory perspective of *Olmstead* and *On Lee*. Although *Berger*’s narrow holding addressed the elements required for valid wiretapping warrants, Harlan noted that the “emerging operative assumptions” of *Berger* rested on the commitment to judicial scrutiny of “electronic surveillance” devices generally because their current “indiscriminate use” by law enforcement posed a threat to liberty.<sup>192</sup> As Harlan’s assessments of *Lopez*, *Osborn*, and *Berger* made apparent, the question to be addressed in *White* was not whether *Katz* had “disturbed” *On Lee*, but whether *On Lee* had survived the pre-*Katz* privacy and search precedents of the 1960s.<sup>193</sup> Moreover, Harlan found further evidence

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<sup>188</sup> *Id.* at 775.

<sup>189</sup> *Id.* at 776.

<sup>190</sup> *Id.* at 777-78.

<sup>191</sup> *Id.* at 779.

<sup>192</sup> *Id.* at 780, 778 n.12.

<sup>193</sup> *Id.* at 779.

of *On Lee*'s fossilization in the Court's support for judicial scrutiny, illustrated in post-*Katz* search precedents, of government intrusions that had been left unregulated in the *On Lee* era.

### 3. The Unforeseen New Era of the Primacy of the Warrant Principle

Harlan emphasized the need to consider the primacy of a fourth "general" Fourth Amendment principle in order to appreciate the outdated character of the presumptions underlying the *On Lee* decision.<sup>194</sup> He described this principle as a requirement that, "in order to be constitutionally permissible," any "official investigatory action that impinges on privacy must typically . . . be subjected to the warrant requirement."<sup>195</sup> As evidenced by the *Katz* litigation, the idea that the warrant requirement might be applied feasibly to electronic surveillance was still being "worked out" at the time of the *Osborn* and *Berger* decisions.<sup>196</sup> At the time of the *On Lee* decision, this idea would have been a radical one for the Court to accept because of the existence of several doctrinal obstacles. These obstacles helped to explain why the reasoning of the Court's opinions in *Olmstead*, *Goldman*, and *On Lee* did not discuss the option of requiring a traditional search warrant for the electronic surveillance methods at issue. Instead, the Court appeared to assume in this era that the recognition of a claimed privacy interest would result in the prohibition of the surveillance method.<sup>197</sup>

The first obstacle was the doctrinal prohibition on using search warrants for the seizure of "mere evidence," which was established in *Gouled* and not abandoned until *Hayden*.<sup>198</sup> The seizable categories of evidence included contraband, criminal proceeds, and instrumentalities of crime. The evidence of con-

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<sup>194</sup> *Id.* at 781.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 780.

<sup>197</sup> *Cf.* Sklansky, *supra* note 107, at 234 (noting that a "passing" comment in *Silverman* regarding the possibility of a warrant was a sign of a new era); *Goldman v. United States*, 316 U.S. 129, 136, 140 n.7 (1942) (Murphy, J., dissenting) (speculating that some type of "administrative supervision" of detectaphone could be established as a substitute for traditional search warrant process).

<sup>198</sup> *Warden v. Hayden*, 387 U.S. 294, 304-10 (1967).

versations did not fit any of those categories in a literal sense.<sup>199</sup> A second obstacle was the requirement for warrants to describe, with particularity, the things to be seized. Unlike tangible objects, conversations exist in the future, and their content, timing, and parties are not possible to describe with accuracy.<sup>200</sup> In addition, an ordinary search warrant would be disclosed after execution, but disclosure of an ongoing warrant to intercept conversations would put an end to the secrecy of the surveillance.<sup>201</sup> In 1967, after the “mere evidence” rule was abolished in *Hayden*, the *Berger* decision established the template for a warrant system for wiretapping.<sup>202</sup> Shortly thereafter, *Katz* affirmed the feasibility of applying the warrant system to the use of the recording device on the telephone booth.<sup>203</sup>

Thus, one fossilized aspect of the framework for the *On Lee* decision was the “all-or-nothing” framework of options that informed its 1952 holding and rationales, which were embedded in the assumptions of the era of the “mere evidence” rule.<sup>204</sup> *On Lee* arguably could not serve as meaningful authority for the contested issue in *White* concerning the imposition of the warrant requirement on wired listeners. The *On Lee* Court rejected a privacy claim during an era when acceptance of the claim would have required the government to stop using wires, not merely to get warrants for wires. Even before *On Lee*’s trespass rationales eroded, *On Lee* could have been regarded as being inapposite from the start as useful authority for *White*.

Harlan’s concern with the “primacy” of the warrant principle was a different one, however, and his evidence for the

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<sup>199</sup> Sklansky, *supra* note 107, at 235.

<sup>200</sup> *See id.* at 236 & n.64 (describing the view that warrants for the interception of conversation would not satisfy the particularity requirement and would constitute unreasonable “general warrants”).

<sup>201</sup> *Id.* at 236.

<sup>202</sup> *Hayden*, 387 U.S. at 307.

<sup>203</sup> *Katz v. United States*, 389 U.S. 347, 354-55 (1967).

<sup>204</sup> *Compare* *United States v. Johnson*, 333 U.S. 10, 13-14 (1948) (providing Justice Jackson’s famous description of the warrant requirement as an essential protection for “a society which chooses to dwell in reasonable security and freedom from surveillance” (quoted in *United States v. White*, 401 U.S. 745, 768, 781 n.17 (1971) (Harlan, J., dissenting)) *with* *On Lee v. United States*, 343 U.S. 747, 758 (1952) (revealing no comment by Justice Jackson concerning the feasibility of imposing the warrant system on the use of wired listeners).

emerging primacy of that principle did not stop with *Silverman*, *Osborn*, *Berger*, and *Katz*.<sup>205</sup> He also relied on the search cases of *Camara v. Municipal Court*,<sup>206</sup> *Chimel v. California*,<sup>207</sup> and *Terry v. Ohio*,<sup>208</sup> to show how the justifications for warrants for wired listeners in *White* were supported by the expansion of Fourth Amendment protection in each of these precedents. In *Camara* and *Chimel*, government searches that were previously unregulated by the warrant requirement were brought under its mandate, and for similar reasons. The *Camara* Court required warrants for housing inspections, but demonstrated flexibility by approving a warrant based on area-wide need for inspections, rather than evidence of need for inspecting particular houses.<sup>209</sup> The *Chimel* Court's ruling effectively required search warrants for houses that previously could be searched from top to bottom when an arrest occurred inside.<sup>210</sup> Both precedents recognized that judicial pre-authorization provided desirable protection against arbitrary police intrusions and "hunting expedition[s]" for evidence.<sup>211</sup> These precedents supplied evidence of the Court's support for case-by-case scrutiny of government justifications for privacy intrusions, and *Terry*'s stop-and-frisk rules demonstrated a commitment to that principle, even in the absence of a warrant requirement.<sup>212</sup> As Harlan's analysis intimated, from the perspective of the *On Lee* Court, each of these three decisions would have been inconceivable applications of the warrant principle in 1952, highlighting a further dimension of *On Lee*'s fossilization and providing a further reason to abandon its holding.

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<sup>205</sup> *White*, 401 U.S. at 781 (Harlan, J., dissenting).

<sup>206</sup> 387 U.S. 523 (1967).

<sup>207</sup> 395 U.S. 752 (1969).

<sup>208</sup> 392 U.S. 1 (1968). *Cf. White*, 401 U.S. at 784 (Harlan, J., dissenting) (citing *Davis v. Mississippi*, 394 U.S. 721 (1969)).

<sup>209</sup> *White*, 401 U.S. at 778, 781-82 (Harlan, J., dissenting).

<sup>210</sup> *See Chimel*, 395 U.S. at 768-69 (overruling *United States v. Rabinowitz*, 339 U.S. 56 (1950)).

<sup>211</sup> *White*, 401 U.S. at 783.

<sup>212</sup> *See Catherine Hancock, State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1094 (1982) (describing *Terry*'s imitation of the warrant system's protections, in the form of a scope limitation principle that imposed the burden on the government to justify each step in the escalation of an initial intrusion on a case-by-case basis).

*C. Harlan's Formulations of the "Should" Question About Risks and Expectations*

1. The Task of the Law: To Form and Project the Future, to Mirror and Reflect the Past

The decision to impose the warrant system for the use of wired listeners would have been consistent with virtually every result and rationale of all the precedents that Harlan so painstakingly marshaled, examined, explained, and interpreted in the light of their subsequent treatment in later precedent. But Harlan preferred to speak as though in a dialogue with the *White* plurality, and to begin by offering this sentiment as their own: "That the foundations of *On Lee* have been destroyed does not, of course, mean that its result can no longer stand."<sup>213</sup> Then he responded by offering his reasons that the *On Lee* result "should not stand," because of the lack of "substantial buttressing" needed for it "to persist in our constitutional jurisprudence."<sup>214</sup>

Harlan continued the dialogue by noting the narrowness of the precedents of *Hoffa*, *Lewis*, and *Lopez*, which the plurality had "fasten[ed] upon" to "resist the undercurrents of the more recent cases" that imposed the warrant requirement on forms of electronic surveillance as well as other intrusions.<sup>215</sup> None of the plurality's three precedents involved the "surreptitious third ear" of the government agent who receives a transmission from the wired listener.<sup>216</sup> For that reason, Harlan concluded that the plurality's effort to "buttress" *On Lee* could be reduced to a single argument based on two assumptions. Implicitly, the *White* plurality first assumed that "the distinction between third-party monitoring and *other* undercover techniques" is "one of form and not substance."<sup>217</sup> Accordingly, the plurality then assumed that

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<sup>213</sup> *White*, 401 U.S. at 784.

<sup>214</sup> *Id.* at 775.

<sup>215</sup> *Id.* at 784.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 785.

the electronic monitoring in *White* involved the same invasion of privacy as other uses of unwired listeners.<sup>218</sup>

Harlan recognized that the plurality opinion used the *Katz* vocabulary of “expectations” interchangeably with the vocabulary of “risks,” plugging these words into similar comments about the risks undertaken by “wrongdoers” and about their “expectations.”<sup>219</sup> For example, the *White* plurality declared that since a wrongdoer “necessarily risks” the “trustworthiness” of any confidante who may be an informant, it may be concluded that neither a wired nor unwired informant will invade the wrongdoer’s “justifiable expectations of privacy.”<sup>220</sup> Justice White passed quickly over the question whether “defendants” have actual (subjective) expectations of privacy, because that was not the Court’s “problem.”<sup>221</sup> Instead, as he explained, “Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally ‘justifiable.’”<sup>222</sup> Asked another way, “[W]hat expectations [will] the Fourth Amendment . . . protect in the absence of a warrant?”<sup>223</sup> For Justice White, the answer was provided by logic: “[T]he law permits the frustration of actual expectations” by the use of non-electronic reporting informants in *Hoffa* and *Lewis*, and so the same “frustration of expectations” must be justifiable under the law for those monitored by wired informants.<sup>224</sup>

Rather than criticize Justice White directly for resting the plurality’s decision on these assumptions, Harlan observed neutrally that “the ‘so-called risk analysis’ approach of *Lewis*” and *Hoffa*, and the “expectations approach” of *Katz*, “have their limitations and can ultimately lead to the substitution of words for analysis.”<sup>225</sup> Harlan then seized the gift that the plurality’s reasoning provided for him—the opportunity to call attention to the

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 789.

<sup>220</sup> *Id.* at 751-52 (plurality opinion).

<sup>221</sup> *Id.* at 751.

<sup>222</sup> *Id.* at 752.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 786 (Harlan, J., dissenting) (noting that the “risk” and “expectations” approaches are formulations that “represent an advance over the unsophisticated trespass analysis of the common law”).

responsibility of judges for articulating and explaining the potential meanings of “expectations” and “risks.” Harlan explained that the analysis of “expectations” or “risks” always raised a “should” question, concerning “the desirability” of recognizing particular expectations, or conversely, of “saddling” particular risks “upon society.”<sup>226</sup> Harlan did not want judges to “merely recite the expectations and risks” that only reflect the “laws that translate” customs and values into rules.<sup>227</sup> He declared that “the task of the law” is to “form and project” the customs and values of the future, as well as to “mirror and reflect” the “customs and values of the past and present.”<sup>228</sup>

In speaking of the recitation of risks, Harlan might have been referring to the unhelpful legacies of *Olmstead*, *Goldman*, and *On Lee*, whose rationales directed judges to the past, rather than enabling them to build Fourth Amendment foundations for the future of the electronic age. Harlan’s talk of the competing tasks of the law, to be focused on the future as well as on the past, reflected his understanding of the historically contested character of the judicial portrayal of the customs and values at stake in electronic surveillance controversies. For judges who asked the “should” question, Harlan’s analysis of the privacy precedents revealed that the Court’s holdings had not remained static, and implied the they would change in the future.<sup>229</sup> The *White* plurality’s attempt to resurrect *On Lee* symbolized a philosophy that was the opposite of Harlan’s perspective. He wanted judges to avoid the recitation of past conclusions con-

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* Cf. Dolores A. Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 BUFF. L. REV. 333, 363 & n.145 (1984) (recognizing that Harlan’s approach to determining expectations of privacy is “prospective in nature,” asking whether, “under our system of [representative democracy],” it will be “desirable to live in a society in which the expectations of privacy in question are not protected . . . against unreviewable governmental action”) (referring to *White*, 401 U.S. at 786 (Harlan, J., dissenting)).

<sup>228</sup> *White*, 401 U.S. at 786 (opining that Fourth Amendment analysis must “transcend the search for subjective expectations or legal attribution of assumptions of risk”). See Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935, 959 (2008) (recognizing Harlan’s concern with the jurisprudence of “the social” in his search for “transcendence” analysis).

<sup>229</sup> See *supra* text accompanying notes 40, 180 (noting dissents in *Olmstead*, *Goldman*, *On Lee*, and *Lopez*).

cerning expectations and risks by remembering the need to open the intellectual doors to re-examining those conclusions. In Harlan's hands, the implementation of the "task of the law" called for the independent scrutiny of each new privacy problem, not for reliance on analogies to outdated privacy doctrines.

## 2. Harlan's Standard: Assessing the Impact of Surveillance on the Ordinary Citizen

In addressing the "should" question about the risks and expectations involved in *White*, Harlan explained that "[t]his question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security," since that sense "is the paramount concern of Fourth Amendment liberties."<sup>230</sup> Here the "individual" represented everyone, including the "public generally," and more particularly, the "ordinary citizen" who "has never engaged in illegal conduct in his life."<sup>231</sup> Harlan assumed that government officials possess neither the foresight nor the good fortune to commence investigations only against individuals who may be convicted of crimes, or "wrongdoers" who may be "contemplating illegal activities."<sup>232</sup> Therefore, the agents who manage informants and equip them with wires cannot be expected to avoid the monitoring of "ordinary citizens."

Harlan could not imagine why courts should assume that the presence of wired informants and agents in our midst would have no impact on our lives. He saw that impact as the Fourth Amendment's concern, because it impairs "that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society."<sup>233</sup> Given the function of the warrant system as the constitutional method of providing judicial protection to that sense of security, Harlan articulated the "should" question in *White* as follows: "[W]hether, under our system of government, as reflect-

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<sup>230</sup> *White*, 401 U.S. at 786 (Harlan, J., dissenting).

<sup>231</sup> *Id.* at 789-90.

<sup>232</sup> *Id.* at 749-53 (plurality opinion) (repeating references to "wrongdoers" or "defendants").

<sup>233</sup> *Id.* at 787 (Harlan, J., dissenting).

ed in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.<sup>234</sup>

Although Justice White did not formulate a “should” question in the plurality opinion, a suitable question to fit that opinion could have been phrased as follows: Whether we should impose on “wrongdoer[s]” or on those “contemplating illegal activities” the risk of the electronic listener, on the grounds that this risk is similar to that already imposed by the Court’s precedents on such persons, namely the risk that the listener will report back to government officials without the aid of electronic surveillance.<sup>235</sup> A further refinement of that question could be accomplished by adding this question: Whether we should deem these two risks to be similar in the absence of “persuasive evidence” produced by the defendant that the utterances of “wrongdoers” would be “substantially different” or their sense of security any less if they thought it possible that the listener might be wired with an electronic surveillance device.<sup>236</sup>

A comparison of Harlan’s question with these questions illustrates how the scope of the plurality’s inquiries differed in several ways. First, the plurality justices saw no reason to conduct an “impact analysis” concerning the potential effects of surveillance by wired agents and informants on ordinary citizens. Second, they viewed the government’s power to use surveillance tools, without judicial scrutiny, as a need that should be accommodated when the “risks” to “wrongdoers” could be viewed as sufficiently similar.<sup>237</sup> Third, they placed the burden of disproving the similarity of these risks on the defendant in

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<sup>234</sup> *Id.* at 786.

<sup>235</sup> *Id.* at 751-52 (plurality opinion) (repeating analogies between disclosures by trusted accomplices under all surveillance circumstances).

<sup>236</sup> *Id.* at 752-53 (declaring that “there is no persuasive evidence” that this difference “is substantial enough to require discrete constitutional recognition”). *But cf.* Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 159 (2002) (noting that the *White* plurality equated first treated “a willingness to trust people” as “an invitation to deception” by disclosing informants, and second, treated “the further sharing of the [electronic] fruits of that pretense” with government agents as “no more intrusive than the initial deception”).

<sup>237</sup> *Id.* at 752-53 (plurality opinion). *Cf.* Brief for the United States, *supra* note 7, at 33 (describing the government’s “right” to use a listening device on an informant).

*White*. Finally, they defined the burden implicitly to require the production of empirical evidence that would be difficult, if not impossible, to produce.<sup>238</sup>

These questions of the *White* plurality justices produced a simple inquiry because so many other questions were avoided. The questions were designed to be answered, “No.” In the absence of the aforementioned evidence, the risks of disclosure from reporting and from electronic surveillance were deemed to be similar for wrongdoers. A third and final question of the plurality could be phrased as follows: Whether any evidentiary barrier should be erected to the admission of transmitted conversations obtained by wired listeners, given the “accurate,” “reliable,” “relevant,” and “probative” nature of such evidence.<sup>239</sup> Again, the answer would be, “No.” The plurality described the defendant’s claim for recognition of a privacy interest as a demand for “a Fourth Amendment privilege” against the admission in evidence of “a more accurate version” of a conversation than could be obtained from an unwired informant.<sup>240</sup>

Justice Harlan’s dissent posed questions that held no interest for the plurality. First, in undertaking an inquiry into the “impact of the practice of third-party bugging,” Harlan observed that the impact of wired agents and informants constituted an “extensive” type of intrusion that would “significantly jeopardize” the sense of security of citizens in a free society.<sup>241</sup> Second, Harlan made it clear that his inquiry required the exercise of

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<sup>238</sup> *White*, 401 U.S. at 752 (plurality opinion) (observing that “it is only speculation to assert that the defendant’s utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound”).

<sup>239</sup> *Id.* at 753. Cf. Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 575-77 (2007) (arguing in favor of *White* rule and similar rules). *But cf.* Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 137 (2002) (observing that the *White* plurality’s consideration of the state’s need for the evidence supplied by wired listeners would have been more appropriately addressed “under the [Fourth] Amendment’s [reasonableness analysis] balancing rubric,” rather than being used to determine whether to recognize the privacy interest).

<sup>240</sup> *White*, 401 U.S. at 753. *See infra* text accompanying note 283.

<sup>241</sup> *Id.* at 786-87 (Harlan, J., dissenting). Cf. Stone, *supra* note 174, at 1219 (describing the importance of assessing the impact of a surveillance practice “on the lives of individuals and on the nature of society”).

imagination as to the possible impact arising from unregulated “bugging.” He was concerned about the future possible impact that might be imagined if the uses of such surveillance were to become a “prevalent practice.”<sup>242</sup> Third, he did not demand empirical proof of present impact, although he might have regarded such evidence as helpful. Instead, he was prepared to take judicial notice of the potential impact of wired listeners and observers, in formulating a basis for discerning cultural intuitions about the nature of that impact.<sup>243</sup> In Harlan’s view, “[a]uthority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed.”<sup>244</sup> Harlan went on to describe how the impact of wired listeners would be both personal and political, with the potential to inhibit “much vital social exchange,”<sup>245</sup> and to “smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.”<sup>246</sup>

Harlan was attuned to the potential consequences of the government’s gathering of “speech” evidence, and to the impossibility of separating the sense of security about freedom of speech as a daily and lived expectation, from the sense of security about the surreptitious discussion of criminal activities. He was the Court’s architect of the doctrines that led to enduring restrictions of the government’s power to prosecute the advocacy

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<sup>242</sup> *Id.* at 787 (Harlan, J., dissenting).

<sup>243</sup> When Harlan called for “assessing the nature of a particular practice and the likely extent of its impact on the individual’s sense of security,” he ended this statement with “balanced against the utility of the conduct as a technique of law enforcement.” *Id.* at 786. However, he did not engage in such “balancing” in *White* or even identify specific aspects of the “utility” of the conduct. Given the difficulty of comparing incommensurable values such as impact and utility, scholars have criticized the latter element without mentioning that Harlan never described or applied it in his *White* dissent. See, e.g., William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 44 n.161 (2001/2002).

<sup>244</sup> *White*, 401 U.S. at 787 (Harlan, J., dissenting).

<sup>245</sup> *Id.* at 788 n.23.

<sup>246</sup> *Id.* at 787. See also Doernberg, *supra* note 41, at 284-85 (criticizing the *White* plurality’s demand for empirical proof of inhibiting effect of wired listeners, and observing that evidence rules provide for privileges based on the presumption that requiring disclosures would have inhibiting effects on a variety of behaviors).

of illegal action.<sup>247</sup> Moreover, only two months after the *White* decision, Harlan authored the Court's opinion in *Cohen v. California*,<sup>248</sup> and his advocacy of Fourth Amendment protection in *White* for "frivolous, impetuous, sacrilegious and defiant discourse" echoed his reasoning in support of First Amendment protection for the vulgar, the profane, and the immoral speech that cannot be punished without the danger of thought control.<sup>249</sup>

In his impact analysis, Harlan treated the government's practice of "third party bugging" as tantamount to a form of overbroad speech regulation. Members of society would have reason to fear potential future intrusions and exposures, and would remain vulnerable to exposure of past intrusions. Such records might appear at any time and embarrass, stigmatize, or damage a person, with or without provoking potential criminal prosecution.<sup>250</sup> Each type of fear could produce a chilling effect on speech.

The first sense of fear invoked by Harlan was that which comes from the envisioned "instantaneous intrusion" of the invisible third ear, the government agent who receives the trans-

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<sup>247</sup> See *Yates v. United States*, 354 U.S. 298 (1957); *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 203 (1961). Cf. YARBROUGH, *supra* note 4, at 190-197 (reviewing these Harlan opinions for the Court, which led the government to abandon Smith Act prosecutions).

<sup>248</sup> 403 U.S. 15 (1971) (enlarging First Amendment protection for offensive speech by reversing a disorderly conduct conviction for wearing a jacket displaying expletive in message). Cf. *Street v. New York*, 394 U.S. 576 (1969); Thomas B. Stoel, Jr., in REMEMBRANCES, *supra* note 15, at 165 (noting that Harlan's original majority draft in *Street* concluded that the First Amendment protected flag burning, but when the majority "melted away, and it looked as though the Court would hold that flag burning wasn't constitutionally protected," Harlan revised his opinion to reverse the conviction on narrower grounds and held on to the majority).

<sup>249</sup> Cf. Dorsen, *supra* note 5, at 1419-20 (quoting *Cohen*'s principles and noting their importance for First Amendment doctrine); Taslitz, *supra* note 239, at 136-37 (noting that the *White* plurality ignored "[t]he broader impact of its rule on political dissenters, . . . unpopular minority groups, and the wider citizenry"); Karen A. Springer, *In God We Trust; All Others Who Enter This Store Are Subject to Surveillance*, 48 FED. COMM. L.J. 187, 203 (1995) (observing that Harlan's *White* dissent sought to protect the discourse of "informal conversation between intimates" which contains "agreeable falsehoods, exaggerations, obscurities, and even antisocial views that the speaker does not expect to be taken seriously").

<sup>250</sup> Springer, *supra* note 249, at 203 (recognizing that disclosure of conversations may "lead to adverse consequences such as the loss of respect, or a job, or friends").

mitted conversations from the wired listener and who thereby becomes empowered to engage in “prying” into the speaker’s “private affairs.”<sup>251</sup> The second sense of fear was that which comes from the agent’s power to preserve those conversations with a recording that “insures full and accurate disclosure of all that is said, free of the possibility of error and oversight.”<sup>252</sup> This fear may be heightened by the realization that it is easy for the recording agents or anyone else who becomes privy to the recording to interpret speech in damaging ways. Disclosures could lead to the loss of relationships, of jobs, and of reputation, even when no criminal activity might be disclosed. That second sense of fear, as Harlan portrayed it, would be fueled by the realization that a person’s recorded speech may carry erroneous connotations “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.”<sup>253</sup>

Harlan objected to the implicit “should” questions posed by the *White* plurality justices, because they failed to consider the impact of wired listeners on ordinary citizens. He also objected to their failure to recognize that the consequence of Fourth Amendment protection from wired listeners would be the interposition of the warrant system upon government officials seeking to use wires, not the prohibition of this surveillance technique.<sup>254</sup> Together, these two failures prevented the plurality from recognizing that the warrant requirement was all about “risks” because, in Harlan’s view, its “very purpose” was to “redistribute the privacy risks throughout society in a way that produce[d] the results the plurality opinion ascribe[d] to the *On Lee* rule.”<sup>255</sup> That is, assuming that the plurality’s goal was to impose the risk of transmission by informants upon “wrongdoers,” the warrant requirement would achieve this result by approving of the use of wired listeners upon this class of non-

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<sup>251</sup> *White*, 401 U.S. at 789 (Harlan, J., dissenting).

<sup>252</sup> *Id.* at 787.

<sup>253</sup> *Id.* at 790. *Cf.* Taslitz, *supra* note 239, at 138 (observing that “the gravest danger is that of having one’s character misjudged by being taken out of context”).

<sup>254</sup> *White*, 401 U.S. at 789-90 (Harlan, J., dissenting).

<sup>255</sup> *Id.* at 789.

ordinary citizens, who could be identified by probable cause evidence of their criminal activities.

Harlan's focus on the warrant requirement provided a reminder that the *White* plurality's analysis of the benefits of wired listeners never explained how the scope of such benefits would be weakened by the probable cause and warrant requirements. The plurality also failed to explain its deference to the government need for the benefits of unregulated wired listeners. This need was presumed to be so strong that it could not be satisfied with the benefits from warrant-authorized wired listeners. That presumption effectively trumped the primacy of the Fourth Amendment warrant principle. The *White* plurality did not address the possibility that government agents would fail to exercise what Harlan called "self-restraint," by engaging in the use of wired listeners in cases in which no suspicion of criminal conduct existed to justify the investigation of their targets.<sup>256</sup>

For Harlan, the plurality's unstated presumption struck at the core of the Fourth Amendment's protection for "the openness which is at the core of our traditions," provided by placing limitations "on the means and circumstances by which the Government may collect information about its citizens by intruding into their personal lives."<sup>257</sup> Harlan saw that the *White* plurality's holding, writ large, was based on the assumption that "uncontrolled" electronic surveillance "is a tolerable technique of law enforcement, given the values and goals of our political system."<sup>258</sup> For Harlan, this assumption begged the question: Who should bear "the burden of guarding privacy in a free society"—the Government or its citizens? Ultimately, he saw the Fourth Amendment as standing for the proposition that "the Government . . . must justify its need to electronically eavesdrop."<sup>259</sup>

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<sup>256</sup> *Id.* Cf. Maclin, *Informants*, *supra* note 168, at 625 (noting that the *White* plurality "never addressed the reality that secret police informants would target, just as wire-tapping had targeted, the privacy and security of all citizens, the guilty and innocent alike").

<sup>257</sup> *White*, 401 U.S. at 792 (Harlan, J., dissenting).

<sup>258</sup> *Id.* at 785.

<sup>259</sup> *Id.* at 793.

### III. REFLECTIONS ON HARLAN'S UNDERSTANDINGS OF FOURTH AMENDMENT PRIVACY AS FREEDOM

#### *A. Harlan's Views After Katz and Before White About Expectations of Privacy*

It is ironic that a justice like Harlan, with his commitment to careful articulation of the reasoning for his decisions through the synthesis of nuanced interpretations of vast quantities of judicial prose, would receive not only Fourth Amendment fame but also intense scrutiny and criticism of his ideas, based on the twenty-seven words in his *Katz* concurrence about “expectations of privacy.”<sup>260</sup> Harlan’s dissent in *White*, with its cautionary observation that “the expectations approach” can “lead to the substitution of words for analysis,”<sup>261</sup> has been interpreted as an expression of his “second thoughts” about his quotable and iconic formula in *Katz*.<sup>262</sup> The truth appears to be more complicated, and it is useful to consider how Harlan interpreted the expectations concept in his opinions appearing after *Katz* and before *White*.

In his opinion in *Alderman v. United States*,<sup>263</sup> Justice Harlan interpreted the *Katz* rationale as providing Fourth Amendment “right to conversational privacy”<sup>264</sup> for “every person who participates in a conversation he legitimately expects will remain private,”<sup>265</sup> and for every person who “is not actually speaking” but “is listening to the confidences of others.”<sup>266</sup> To

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<sup>260</sup> See, e.g., *Simon*, *supra* note 228, at 947-49, 952-54; CLANCY, *supra* note 107, at 68 & n.139 (citing examples of criticism of the Court’s use of the “expectations” formula). Cf. Doernberg, *supra* note 41, at 268 n.83 (citing thirty-five cases during the thirty-eight years since the *Katz* decision in which the Court has attempted “to deal with” the expectations standard).

<sup>261</sup> *White*, 401 U.S. at 786 (Harlan, J., dissenting).

<sup>262</sup> See, e.g., Heffernan, *supra* note 243, at 44 n.161 (observing that Harlan’s *White* dissent shows that he came to have doubts about the expectations test); Stone, *supra* note 174, at 1213 n.70 (describing Harlan as having “second thoughts” in *White* about the expectations test); Amsterdam, *supra* note 15, 384 & n.345 (same).

<sup>263</sup> *Alderman v. United States*, 394 U.S. 165, 187 (1969) (Harlan, J., concurring in part and dissenting in part).

<sup>264</sup> *Id.* at 194.

<sup>265</sup> *Id.* at 191.

<sup>266</sup> *Id.* at 191 n.4.

these individuals, Harlan would have granted standing to object to the admissibility of electronically-seized conversations. He was willing also to consider an extension of standing “to protect a person’s interest in his family’s privacy . . . whenever a family member’s reasonable expectation of privacy has been infringed,” and “regardless of the place where his privacy was invaded.”<sup>267</sup> In “the field of conversational privacy,” these conclusions illustrated the meaning of the *Katz* adage that “the Fourth Amendment protects persons not places.”<sup>268</sup> But Harlan was unwilling to preserve the pre-*Katz* rule that granted standing to a property owner to object to the admissibility of all conversations occurring on the owner’s premises, irrespective of whether the owner participated in the conversations or was present at the time they were intercepted.<sup>269</sup> Harlan argued that this pre-*Katz* rule mistakenly treated “the right to conversational privacy”<sup>270</sup> as a property right, and thereby gave *Olmstead* “new life in the law of standing.”<sup>271</sup>

Thus, Harlan used the expectations concept in *Alderman* to explain why the personal and direct experience of the disturbance of conversational privacy should define the scope of the right to such privacy. He refused to equate the relationship between a property owner and a dwelling with the protected relationship between a speaker or listener and the speaker’s intangible conversation. Harlan acknowledged the longstanding right of an absent property owner to challenge an illegal dwelling entry, and to object to the admission of the tangible effects seized as fruits from that dwelling.<sup>272</sup> But he rejected the right of a property owner to object to an illegal dwelling entry that produced only the “fruits” of intercepted, intangible conversations of people to whom the property owner had no family-based rela-

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<sup>267</sup> *Id.* at 194 (noting that this question need not be reached on the facts of *Alderman*).

<sup>268</sup> *Id.* at 193.

<sup>269</sup> *Id.* at 190-93. *Cf. id.* at 176 (majority opinion) (noting that the government conceded the continuing validity of the rule after *Katz*).

<sup>270</sup> *Id.* at 194 (Harlan, J., concurring in part and dissenting in part).

<sup>271</sup> *Id.* at 191. *Cf. id.* at 178 (majority opinion).

<sup>272</sup> *Id.* at 189-91 (Harlan, J., concurring in part and dissenting in part).

tionship.<sup>273</sup> Justice White's opinion for the *Alderman* Court concluded that nothing in *Katz* "was intended to withdraw any of the protection . . . extend[ed] to the home" in prior precedents.<sup>274</sup> Therefore, the standing right of the property owner must be maintained based on *Silverman's* holding, which "vindicated . . . the right to be secure in one's own home" at a time when "no right of conversational privacy had been recognized as such."<sup>275</sup> But for Justice Harlan, expectations of privacy in the conversations of others could not be justified by reference to space alone.

The privacy problem in *Mancusi v. DeForte*<sup>276</sup> presented Justice Harlan, speaking for the Court, with the opportunity to consider the role of the expectations concept in a context that did not involve the right of conversational privacy. After state officials entered a union office and seized the union's papers from the custody and over the protest of DeForte, a union official, the union did not protest the seizure. Instead, it was DeForte who was prosecuted and sought to obtain standing to object to the admission of the papers at his trial.<sup>277</sup> As Harlan explained, DeForte had "little expectation of absolute privacy" in the papers,<sup>278</sup> which were taken from him in a large room that he shared with several other union officials, and in which he spent "a considerable amount of time."<sup>279</sup> The record did not reveal the precise location of the papers in the room at the time of seizure, and Harlan noted that if DeForte "had occupied a 'private' office," the Court's precedents would have established his standing to object to the seizure of papers from his desk or filing cabinet in that office.<sup>280</sup> The reasonable expectations of an employee in a private office setting provided Harlan with the start-

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<sup>273</sup> *Id.* at 189-94.

<sup>274</sup> *Id.* at 180 (majority opinion).

<sup>275</sup> *Id.* at 178.

<sup>276</sup> 392 U.S. 364 (1968). *Cf.* *Simmons v. United States*, 390 U.S. 377 (1968) (holding in another Harlan opinion, not involving discussion of expectations of privacy, that defendant's testimony offered to prove standing to seek suppression of evidence should be inadmissible in order to avoid deterring individuals from asserting Fourth Amendment rights).

<sup>277</sup> *Mancusi*, 392 U.S. at 365.

<sup>278</sup> *Id.* at 370.

<sup>279</sup> *Id.* at 368-69 (citation omitted).

<sup>280</sup> *Id.* at 369 (citations omitted).

ing point for determining the analogous expectations of an employee like DeForte in a shared office space.

Drawing implicitly upon the social norms of courtesy and business practice, Harlan determined that workers in a private office or a shared office would be similarly situated in terms of expectations. They would not be “disturbed” by anyone other than co-workers or their “personal or business guests,” and no papers in the offices would be touched “except with their permission or that of union higher-ups.”<sup>281</sup> Both of these expectations would be “defeated” by the warrantless entry of the state officials into DeForte’s work space and their seizure of the papers, and therefore DeForte should have standing to challenge this violation of his Fourth Amendment right.<sup>282</sup> Harlan saw no need to inquire into the question whether DeForte possessed a legal right to exclude members of the public from the shared office. In this way, the *Mancusi* decision resembled *Katz*, where the Court ignored the government’s argument that *Katz* could have no privacy interest in a telephone booth without a legal right to stop anyone from entering it.<sup>283</sup> Nor did the *Mancusi* Court pause to consider whether the risk of the seizure of the papers by the state officials might have been assumed by DeForte, given the potential exposure of the union’s papers to other co-workers or non-invitees.<sup>284</sup> Instead, Justice Harlan’s opinion treated an employee’s lack of “absolute privacy” as irrelevant, reflecting the assumption that Justice Marshall would later articulate, that “[p]rivacy is not a discrete commodity, possessed absolutely or not at all.”<sup>285</sup>

Justice Harlan’s *Mancusi* opinion reflected the merger of the “constitutionally protected area” concept with the “expectations of privacy” idea to raise the question whether the shared

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> See *supra* note 136 and accompanying text.

<sup>284</sup> Cf. *California v. Greenwood*, 486 U.S. 35, 40 (1988) (rejecting privacy interest in garbage bag left for pickup outside dwelling because of possibility of access of public, including snoops and scavengers, and because of “conveyance” to third-party garbage collector).

<sup>285</sup> *Smith v. Maryland*, 442 U.S. 735, 748, 749 (1979) (Marshall, J., dissenting). See Doernberg, *supra* note 41, at 299 (noting that Harlan’s *Mancusi* opinion recognized “relative privacy” in the shared workplace).

office was an area “in which there was a reasonable expectation of freedom from governmental intrusion.”<sup>286</sup> Harlan also merged this concept and this idea in his *Katz* concurrence, which included the reference to temporarily private places in which people may have momentary “expectations of freedom from intrusion.”<sup>287</sup> He used an analogy in *Mancusi* between workers with private offices and those with shared workspaces, like his analogy between the taxi cab and the telephone booth in *Katz*, in order to anchor the newly recognized privacy interest to the seabed of precedent. However, Harlan’s analysis of the nature of the office “area” in *Mancusi* was more complex than the comments in his *Katz* opinion about the fleeting experience of making a call from a telephone booth.<sup>288</sup> For example, his validation of equal expectations of privacy for workers who must share a single room, as well as the furniture and equipment inside it, ran counter to the typical “distributive tilt” of workplace privacy, expressed in the dichotomy between the warrant system protection for “private offices” and the power of police officers to search other types of offices with the consent of an employer.<sup>289</sup>

Moreover, Harlan’s assessment of workplace expectations included subtle references to the emotional character of the privacy protection that a warrant would afford the workers in shared offices whose standing received recognition in *Mancusi*. The invisible recording surveillance in *Katz* went unnoticed by the defendant, and his protected expectation concerned his freedom from later discovery of the hidden intrusion and its consequences. But as Harlan noted, the intrusion in *Mancusi* coincided with the immediate workplace experience of being “dis-

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<sup>286</sup> *Mancusi*, 392 U.S. at 368.

<sup>287</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>288</sup> *Id.* (quoting from the *Katz* majority opinion concerning the behavior and assumptions of a person using a telephone booth).

<sup>289</sup> William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270-71 (1999) (explaining the “distributive tilt” and noting that when people share their workspaces, police may look in spaces to which the public has access, and may look in other non-public spaces only with the consent of the employer). *Cf.* CLANCY, *supra* note 107, at 86-87 (describing Harlan’s *Mancusi* opinion as “one of the most expansive readings of the scope of a person’s right to privacy” and explaining how later cases reflect a more limited view of workplace privacy, such as *O’Connor v. Ortega*, 480 U.S. 709 (1987)).

turbed” in an enclave where only co-workers abided, by the entry of unauthorized persons demanding possession of documents whose relinquishment could cause negative consequences for the workers.<sup>290</sup> By contrast, Justice Black’s dissent in *Mancusi* argued that such experiences could create “no personal injury” or “invasion of the ‘personal privacy’ or security” of workers, whose status as mere “agents” of the entity gave them no cognizable Fourth Amendment expectations of any kind.<sup>291</sup> Justice White’s dissent observed that even if the Fourth Amendment “perhaps” might protect an individual’s private desk in an office space shared with others, the Court should not extend the protected area “to the office door.”<sup>292</sup>

For similar reasons, Justice Harlan disagreed with the *Mancusi* dissents, the *Alderman* Court, and the *White* plurality. These opinions reflected the view that the *Katz* expectations concept was a vessel that could be filled with arguments that defined privacy based on artificial criteria resembling the legal fictions of the *Olmstead* regime. Harlan favored the development of the expectations concept through use of analogies to prior opinions that attempted to construct more meaningful criteria for the evaluation and recognition of privacy interests. In the years following the *White* decision, Harlan’s voice was replaced with those of other justices. As the privacy debates continued, Court majorities often reached decisions that rejected privacy claims and ignored the path of analysis that Harlan proposed in *White*.

### B. *The Free Society and the Return of Olmstead*

When Harlan declared in his *White* dissent that the task of the law is to “form and project” the values and customs of the future,<sup>293</sup> his words sounded the theme of the Brandeis dissent in *Olmstead*, that “[i]n the application of a Constitution, our contemplation cannot be only of what has been, but of what may

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<sup>290</sup> *Mancusi*, 392 U.S. at 369.

<sup>291</sup> *Id.* at 373-74 (Black, J., dissenting).

<sup>292</sup> *Id.* at 377 (White, J., dissenting).

<sup>293</sup> *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

be.”<sup>294</sup> Harlan described *Berger* as “following a path opened by Mr. Justice Brandeis’s dissent in *Olmstead*,” which was “smoothed” in the pre-*Katz* cases,<sup>295</sup> and led to the Court’s conclusion that modern electronic devices must be regulated because they “are capable of eavesdropping on anyone in most any given situation.”<sup>296</sup> In Harlan’s view, *Berger* brought to life the legacy of Brandeis’s arguments, in leaving “no doubt that, as a general principle, electronic eavesdropping was an invasion of privacy and that the Fourth Amendment prohibited unsupervised ‘bugging.’”<sup>297</sup> Harlan also quoted from *Boyd v. United States*,<sup>298</sup> first, concerning the need to prevent unconstitutional practices from obtaining “their first footing . . . by silent approaches and slight deviations from legal modes of procedure,”<sup>299</sup> and later, concerning the need to protect “liberty and security” from “all invasions . . . of the sanctity of . . . home and the privacies of life.”<sup>300</sup>

Harlan’s *White* dissent supplied the foundation that was missing from *Katz*. Four years earlier, “Stewart’s opinion for the Court in *Katz* was . . . notable for what it did not say,” for relying neither “on *Boyd* [n]or on Brandeis’[s] dissent in *Olmstead*,” and for offering “no broad philosophical basis for its decision.”<sup>301</sup> Perhaps these gaps in *Katz* explain why Justice Harlan’s twenty-seven words from *Katz* “endured,”<sup>302</sup> and why his *White* dissent continues to attract the endorsement of state court judges through incorporation into state constitutional doctrine.<sup>303</sup> Harlan’s dissent expressed concern for the protection of

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<sup>294</sup> *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (internal quotations omitted).

<sup>295</sup> *White*, 401 U.S. at 779.

<sup>296</sup> *Berger v. New York*, 388 U.S. 41, 47 (1967); see *White*, 401 U.S. at 779 (Harlan, J., dissenting).

<sup>297</sup> *White*, 401 U.S. at 779.

<sup>298</sup> 116 U.S. 616 (1886).

<sup>299</sup> *White*, 401 U.S. at 789 (quoting *Boyd*, 116 U.S. at 635).

<sup>300</sup> *Id.* at 793 (quoting *Boyd*, 116 U.S. at 630).

<sup>301</sup> CLANCY, *supra* note 107, at 58.

<sup>302</sup> *Id.* at 60.

<sup>303</sup> See, e.g., *State v. Goetz*, 191 P.3d 489 (Mont. 2008); *State v. Mullens*, 650 S.E.2d 169 (W. Va. 2007); *State v. Geraw*, 795 A.2d 1219 (Vt. 2002); *Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1995); *Commonwealth v. Blood*, 507 N.E.2d 1029 (Mass. 1987); Melanie L. Black Dubis, *The Consensual Electronic Surveillance Experiment: State Courts*

the “sense of security . . . that is characteristic of individual relationships between citizens in a free society.”<sup>304</sup> This concern inspires the views of scholars who advocate that unregulated surveillance should not diminish the amount of privacy and freedom “to a compass inconsistent with the aims of a free and open society.”<sup>305</sup> Justice Harlan’s foresight concerning the dangers of unregulated government surveillance was invoked in discussions of the secret presidential order of 2002 to authorize “domestic spying” on citizens.<sup>306</sup> Yet Harlan’s dissent did not sway the Supreme Court majority that later endorsed the *White* plurality’s position,<sup>307</sup> and the *White* decision had profound effects on the Court’s privacy analysis during subsequent decades, wrapped in the rhetoric of Harlan’s twenty-seven words about “reasonable” expectations.

Based on Justice White’s premise in *White* that *Katz* left *On Lee* undisturbed, the *White* decision might be viewed as carving out a niche for informant cases, so that the rationales of *Hoffa*, *On Lee*, and *White* would continue to remain undisturbed by whatever *Katz* might mean.<sup>308</sup> But this interpretation would not take account of how *Katz*’s right of conversational privacy was disturbed by *White*. Although the *Katz* Court protected a person’s conversations from warrantless surveillance by devices attached to objects like telephone booths, the *White* plurality did not protect conversations from such surveillance by devices attached to people. Implicitly, the *White* plurality charged everyone “with the knowledge that when they speak, they may be speaking to the government.”<sup>309</sup> As one scholar reasoned, given

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*React to United States v. White*, 47 VAND. L. REV. 857 (1994); Carol M. Bast, *What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837 (1998).

<sup>304</sup> *White*, 401 U.S. at 787.

<sup>305</sup> Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 594 (1989) (quoting WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, §3.2, at 99 (1985), for approval of privacy values expressed in Amsterdam, *supra* note 15, at 403).

<sup>306</sup> See Doernberg, *supra* note 41, at 290.

<sup>307</sup> See Maclin, *supra* note 11, at 215 n.127 (citing *United States v. Caceres*, 440 U.S. 741, 744 & n.2 (1979)).

<sup>308</sup> *Id.* at 215 (noting that the *White* decision demonstrated the “reasoning of *Katz* would have no impact on the law governing the use of informers and secret agents”).

<sup>309</sup> Doernberg, *supra* note 41, at 292.

that “one never knows when the government may be listening,” then the right of conversational “privacy vanishes whenever one communicates with another person.”<sup>310</sup> No wonder, then, that *White* has been described as “inconsistent” with *Katz*.<sup>311</sup>

The possibility that *White*'s impact might be confined to informant cases was undermined by the fact that Justice White used the “expectations of privacy” rhetoric as the frame around the “risk” analysis borrowed from *Hoffa* as a core rationale in *White*.<sup>312</sup> In later cases, the Court developed the idea that a person's expectations should encompass the assumption of a risk of police surveillance, by drawing upon the *Katz* Court's observation concerning the lack of Fourth Amendment protection for “[w]hat a person knowingly exposes to the public, even in his own home or office.”<sup>313</sup> Justice Harlan's *Katz* concurrence implied that only obvious examples of demonstrated indifference to privacy concerns would fail to satisfy the requirement of “subjective” manifestation of a privacy interest, such as the case of the loud talker inside a house who can be heard through an open window by people outside.<sup>314</sup> But the Court did not limit the concept of knowing exposure to match Harlan's category,<sup>315</sup> and instead blended the ideas of knowing exposure and assumption of risk into the analysis of reasonable expectations of privacy.

Another legacy of *White*'s approach to privacy analysis was inspired by Justice White's use of “inexorable logic” reasoning

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<sup>310</sup> *Id.* at 308. *Cf. id.* (arguing that the Court “used *Katz*'s rationale *de facto* to overrule one of the central holdings of *Katz*”).

<sup>311</sup> Colb, *supra* note 236, at 141. See Peter P. Swire, *Katz is Dead, Long Live Katz*, 102 MICH. L. REV. 904, 910-11 (2004) (noting the Stored Communications Act of 1986 allows the government to obtain warrantless access to the content of stored telephone calls, so that as larger percentage of calls are stored, the protection for these calls provided by *Katz* and *Berger* will disappear).

<sup>312</sup> See *United States v. White*, 401 U.S. 745, 751-52 (1971). *Cf. Maclin, Informants*, *supra* note 168, at 621 (describing use of expectations analysis as “meaningless” in the *White* plurality opinion).

<sup>313</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967) (citing *United States v. Lee*, 274 U.S. 559, 563 (1927) (holding the use of a search light at sea was not a “search”); *Lewis v. United States*, 385 U.S. 206, 210 (1967)).

<sup>314</sup> See *supra* note 134 and accompanying text.

<sup>315</sup> See Serr, *supra* note 305, at 624 (arguing that Stewart's reference to “knowing exposure” in *Katz* was an illustration of Harlan's lack-of-subjective-expectation category, and was not intended to be “the *sine qua non* of fourth amendment protection”).

based on *Hoffa*. This reasoning implies that debates about new privacy claims can be resolved through reliance on logical extensions of privacy or no-privacy holdings, taken in isolation from the context of other privacy and search precedents. The “inexorable logic” reasoning contributed to the Court’s post-*Katz* tradition of evaluating new claims primarily by making analogies to past privacy claims, many of which have been rejected since *Katz*.<sup>316</sup>

The Court’s post-*White* privacy precedents illustrate how Harlan’s “should” question about expectations and risks has been reformulated as an inquiry concerning logical inferences about the “knowing exposure” of a privacy interest. That is, if it appears that an individual knowingly exposed something, such as a garbage bag on a curb or heat emanating from a house, to a hypothetical observant member of the public, then the Court may choose to infer that privacy claimant knowingly exposed the garbage or the heat to police detection, and conclude that an expectation of privacy from such detection would be unreasonable.<sup>317</sup> After *Katz*, the isolation of the privacy precedents meant that the Court did not have to reconcile their rationales with the reasoning in the search precedents reflecting the expansion of the territory of the warrant requirement. Justice Harlan viewed these precedents as relevant sources to support the recognition of the privacy interest in *White*.<sup>318</sup>

Given the fact that *Katz* overruled *Olmstead*, it might seem astonishing to claim that the *White* decision accomplished “a return to *Olmstead*’s idea that words are not within the Fourth

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<sup>316</sup> See CLANCY, *supra* note 107, at 62-64 (enumerating rejected claims). Cf. *California v. Ciraolo*, 476 U.S. 207, 214-15 (1986) (relying on *Knotts v. United States*, 460 U.S. 276 (1983) and reasoning that unregulated helicopter surveillance of people in their back yards is justifiable as a logical extension of unregulated automobile surveillance of people traveling on streets and highways); Catherine Hancock, *Justice Powell’s Garden: The Ciraolo Dissent and Fourth Amendment Protection for Curtilage Home Privacy*, 44 SAN DIEGO L. REV. 551, 562 (2007) (contrasting the “precedential power of analogy-making” by the *Ciraolo* majority with the different approach of the *Ciraolo* dissent).

<sup>317</sup> Compare *California v. Greenwood*, 486 U.S. 35, 40 (1988) with *Kyllo v. United States*, 533 U.S. 27, 42-44 (2001) (Stevens, J., dissenting).

<sup>318</sup> Cf. Hancock, *supra* note 316, at 560-61 (explaining how Justice Powell’s dissent in *Ciraolo* relied on search precedents as well as privacy precedents as sources for determining expectations of “freedom from surveillance”).

Amendment's protection."<sup>319</sup> However, even without expressing that sentiment directly, the *White* plurality did condition the exercise of the right to conversational privacy on the government's lack of interest in using a wired informant to listen to conversations. One thread of *Olmstead's* reasoning received no attention in the *White* opinions, perhaps because the express reasoning of *Katz* repudiated it. The *Olmstead* opinion reasoned that anyone "who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside." This argument could be translated into the proposition that every telephone user must assume the risk that a wiretapping agent is listening.<sup>320</sup> Similarly, the *Goldman* opinion reasoned that *Olmstead* should control the Court's decision, without actually saying that the *Goldman* defendants should have assumed that the office walls around them "had ears."<sup>321</sup> The *White* plurality opinion did not actually say the *White* defendant or anyone else should assume that the next person to whom they speak is a wired listener, whose power depends on the discretion of the government. But the *White* decision made that fact true.

#### CODA

Thirty years after Justice Harlan's retirement, each of his former law clerks contributed a brief "remembrance" to memorialize the anniversary of that event, and their recollections illustrate four hallmarks of Harlan's work in his *White* dissent. First, he "demanded, and strove for, clarity in his judgments,"<sup>322</sup> and "he wanted the arguments that formed his opinions to be

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<sup>319</sup> Doernberg, *supra* note 41, at 308.

<sup>320</sup> *Olmstead v. United States*, 277 U.S. 438, 466 (1928). *But see Katz v. United States*, 389 U.S. 347, 352 (1967) (reasoning that the *Katz* defendant was "surely entitled to assume that the words he utters into the mouth piece will not be broadcast to the world").

<sup>321</sup> For an example of a society where the walls "had ears," see generally *DAS LEBEN DER ANDEREN* [THE LIVES OF OTHERS] (Arte 2006).

<sup>322</sup> Charles Fried, in *REMEMBRANCES*, *supra* note 15, at 152. See also Norbert A. Schlei, in *REMEMBRANCES*, *supra* note 15, at 146 (noting that when Harlan received a draft opinion from a clerk, he copied out every word in longhand, "in order to force himself to think through every word, every sentence, to make sure it said what it should say and nothing else").

transparent, never hiding a premise or sliding over a fallacy or ignoring an ellipsis to reach a result.<sup>323</sup> He regarded “[a] rhetorical glide over a gap or fault in reasoning, an imperious *ipse dixit*” not only as “professional lapses” but as conduct that showed a “profound lack of courtesy towards those who must study, follow, and live with the consequences of what the Court decreed.”<sup>324</sup> Second, regarding both his opinion writing and his treatment of others, one clerk recalled that “never did he ever say a harsh personal word about one of his colleagues, or indeed about anyone else.”<sup>325</sup> Another clerk noted that Harlan “exemplified civility and tolerance” and that the “[a]cerbic personal references to other Justices, now featured in some opinions, would have distressed him.”<sup>326</sup> Harlan’s criticism of the *White* plurality opinion, for example, featured mild expressions such as the observation that one of the plurality’s arguments “misses the mark entirely.”<sup>327</sup>

Harlan’s *White* dissent also displayed his willingness and ability to change his mind. One clerk reported that “[h]e was always open to argument,”<sup>328</sup> while another remembered “watching him change his mind two or three times as he weighed the merits and decided how to vote” in some cases.<sup>329</sup> In his *Lopez* opinion, Harlan concluded his analysis with the observation that the defendant’s argument “amounts to saying that he has a constitutional right . . . to challenge [an] agent’s credibility without being beset by corroborating evidence.”<sup>330</sup> Harlan ex-

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<sup>323</sup> Heymann, *supra* note 15, at 152.

<sup>324</sup> Fried, *supra* note 322, at 152.

<sup>325</sup> Matthew Nimetz, in REMEMBRANCES, *supra* note 15, at 162; Kent Greenawalt, in REMEMBRANCES, *supra* note 15, at 158 (recalling that “[d]espite legal disagreements that nearly always left him in the minority, he expressed good feelings about the other Justices, declining, as many people would, to personalize disputes of substance or to attribute unwise judgment to stupidity or bad faith”).

<sup>326</sup> Charles Lister, in REMEMBRANCES, *supra* note 15, at 162.

<sup>327</sup> *United States v. White*, 401 U.S. 745, 789 (1971) (Harlan, J., dissenting).

<sup>328</sup> See, e.g., Lister, *supra* note 326, at 162.

<sup>329</sup> Stoel, *supra* note 248, at 165. See Leonard M. Lieman, in REMEMBRANCES, *supra* note 15, at 146 (remembering Harlan as “independent and open-minded”).

<sup>330</sup> *Lopez v. United States*, 373 U.S. 427, 439 (1963). Cf. Brief for the United States, *supra* note 7, at 18 (describing the “only interests of which [the defendant] was deprived by the transmitting device” as being “those which directly violate the integrity of the criminal process”).

plained in his *White* dissent, “I am now persuaded that such an approach misconceives the basic issue . . . .”<sup>331</sup> In his dissent in *On Lee*, Justice Douglas described his realization that he voted the wrong way in *Goldman*.<sup>332</sup> Justice Harlan’s *White* dissent echoed the themes in Douglas’s own *White* dissent, along with the themes of the *Lopez* dissenters.<sup>333</sup>

Finally, Harlan’s “love for the law and the Court” was vividly recalled by his clerks.<sup>334</sup> During his final term, his clerks devoted sixty hours a week to the chore of reading to Harlan because he was nearly blind.<sup>335</sup> He wrote the *White* dissent during the last four months of that term, when he suffered from severe lower back pains, diagnosed the following autumn as the symptoms of cancer.<sup>336</sup> Yet Harlan continued to “give his all” to the Court.<sup>337</sup> In *White*, he gave his all to the Fourth Amendment.

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<sup>331</sup> *White*, 401 U.S. at 788 n.24 (Harlan, J., dissenting). *Cf. id.* (noting that “the continuing vitality of *Lopez* is not drawn directly into question” in *White*, and not joining other *White* opinions which advocated overruling of *Lopez*).

<sup>332</sup> *On Lee v. United States*, 343 U.S. 747, 762 (1952) (Douglas, J., dissenting) (observing, “I now more fully appreciate the vice of the practices spawned by *Olmstead* and *Goldman*. Reflection upon them has brought new insight to me. I know feel that I was wrong in the *Goldman* case.”).

<sup>333</sup> Compare *White*, 401 U.S. 756-57, 759-60 (Douglas, J., dissenting), with *id.* at 789-90, 787-88, 778 & n.12 (Harlan, J., dissenting).

<sup>334</sup> Nimetz, *supra* note 325, at 161; *cf.* E. Barrett Prettyman, Jr., in REMEMBRANCES, *supra* note 15, at 145 (reporting that Harlan “loved discussions about every aspect of the law”); Fried, *supra* note 322, at 151 (noting that Harlan’s “love for the Court and for the rule of law was legendary”).

<sup>335</sup> YARBROUGH, *supra* note 4, at 325.

<sup>336</sup> See YARBROUGH, *supra* note 4, at 330-335 (describing how, after months of medical tests, Harlan retired after receiving the diagnosis of spinal cancer in late September, and died on December 29, 1971).

<sup>337</sup> Schlei, *supra* note 322, at 146 (“The Justices he respected most were not necessarily those who agreed with him most often but those who felt as he did about the importance of the work of the Court and gave their all to it.”).