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Constitutional Criminal Procedure - Fourth Amendment - Search and Seizure - Electronic Surveillance - Pen Register

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CONSTITUTIONAL CRIMINAL PROCEDURE — FOURTH AMENDMENT — SEARCH AND SEIZURE — ELECTRONIC SURVEILLANCE — PEN REGISTER— The United States Supreme Court has held that the installation and use of a pen register device is not a fourth amendment search requiring judicial authorization.

Smith v. Maryland, 442 U.S. 735 (1979).

In March 1976, Michael Lee Smith was indicted in the Criminal Court of Baltimore for robbery.[1] Prior to trial, Smith filed a motion to suppress all evidence that the prosecution had obtained through the installation and use of a pen register device.[2] The evidence obtained from the surveillance device served as a basis for the indictment. Smith contended that the fourth amendment[3] required the police to obtain a warrant based upon a showing of probable cause prior to the installation of the pen register device.[4]

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1. Smith v. Maryland, 442 U.S. 735, 737 (1979). Patricia McDonough, the victim of the robbery, received telephone calls from the alleged robber. On one occasion, the caller requested her to step out on her front porch. As she stood on her porch she saw an automobile that she had earlier described to the authorities. The police traced the license plate numbers and learned that the car was registered in the name of Michael Lee Smith. Without obtaining a warrant, the police requested the telephone company to place a pen register device at its central offices to record the numbers dialed on Mr. Smith's telephone. The register revealed that he called the victim's number that same day. The police then used this information to secure a warrant to search Mr. Smith's home, where they found a page in his telephone book turned to the name and telephone number of the victim. *Id.* at 737.

2. *Id.* A concise description of the function of a pen register device was given by Justice Powell in his partial dissent in United States v. Giordano, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring in part and dissenting in part), as follows:

> A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations.

See generally Claerhout, *The Pen Register*, 20 DRAKE L. REV. 108 (1970).

3. The fourth amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

4. Brief for Petitioner at 4. Smith conceded that the installation and use of a pen register device was not subject to the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976).

The criminal court denied the motion to suppress, holding that despite the absence of judicial authorization, the installation and use of the pen register device did not violate the fourth amendment.[5] Smith was subsequently convicted and sentenced to six years in prison.[6] Smith appealed to the Maryland Court of Special Appeals, but prior to the decision of that court, the Maryland Court of Appeals issued a writ of certiorari to determine if the evidence obtained from the pen register was improperly admitted at trial.[7] The court affirmed Smith's conviction, reasoning that a warrant was not required for the installation of a pen register.[8] After granting certiorari[9] to resolve a possible conflict as to fourth amendment restrictions on the use of pen registers,[10] the United States Supreme Court held that because the installation and use of a pen register was not a search, no warrant was required.[11]

Speaking for the majority, Justice Blackmun cited *Katz v. United States*[12] as controlling the fourth amendment issue.[13] He established that to invoke fourth amendment protection under *Katz*, the petitioner would have to show that a justifiable expectation of privacy had been invaded by government action. This requires the individual to prove that he has a subjective expectation of privacy and that his subjective expectation is one that society regards as reasonable.

Applying the *Katz* standard to the facts of *Smith*, the Court dismissed the petitioner's contention that the state had infringed upon

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5. 442 U.S. at 737-38.

6. *Id.* at 738.

7. Smith v. State, 283 Md. 156, 389 A.2d 858 (1978).

8. *Id.* at 160, 389 A.2d at 860.

9. 439 U.S. 1001 (1978).

10. *Compare* United States v. Southwestern Bell Tel. Co., 546 F.2d 243, 245 (8th Cir. 1976), *cert. denied*, 434 U.S. 1008 (1978) (use of pen register must comply with fourth amendment) *and In re* an Order Authorizing the Use of a Pen Register or Similar Mechanical Device, 538 F.2d 956, 959-60 (2d Cir. 1976), *rev'd on other grounds sub nom.* United States v. New York Tel. Co., 434 U.S. 159 (1977) *with* Hodge v. Mountain States Tel. and Tel. Co., 555 F.2d 254, 256 (9th Cir. 1977) (use of pen register not subject to requirements of fourth amendment) *and* United States v. Clegg, 509 F.2d 605, 610 (5th Cir. 1975).

11. 442 U.S. at 745-46. Justice Blackmun delivered the opinion of the Court. Chief Justice Burger and Justices White, Rehnquist, and Stevens joined the majority opinion. Justices Stewart and Marshall filed separate dissenting opinions in which Justice Brennan joined. Justice Powell did not participate.

12. 389 U.S. 347 (1967). In *Katz*, the Federal Bureau of Investigation obtained evidence against the petitioner by placing an electronic eavesdropping device against the outside of the public telephone booth being used by the petitioner. In reversing the petitioner's conviction, the Supreme Court held that because the government's eavesdropping activities intruded upon the justifiable privacy expectations of the petitioner, its activities constituted a search requiring a warrant based upon probable cause. *Id.* at 351-53.

13. 442 U.S. at 739.

his legitimate expectation of privacy. The majority noted that a pen register, unlike the listening device employed in *Katz*, records only the numbers dialed, but not the contents of the conversation.[14] Thus, the majority viewed the petitioner's claim as being that he had retained a legitimate expectation of privacy in the numbers he had dialed on his phone. This claim was rejected because the Court believed that telephone users do not generally entertain any actual expectation of privacy in the numbers they dial.[15] The Court reasoned that all telephone subscribers knowingly convey phone numbers to the telephone company; that users are aware of the telephone company's capability to record this information; and that the company does record this information for legitimate business purposes.[16]

After finding that there was no expectation of privacy by telephone users in general, the Court addressed Smith's assertion that he had demonstrated a subjective expectation of privacy by using the phone in his house to the exclusion of others.[17] This argument was also rejected by the majority. Justice Blackmun declared that whatever relevance Smith's choice of location may have had regarding the contents of the conversation, his choice could not have been calculated to keep secret the numbers he dialed. Regardless of where the call was initiated, Smith would have had to convey the number in exactly the same manner.[18] The majority further reasoned that even if Smith did have a subjective expectation of privacy when he dialed the phone number, such an expectation is not recognized by society as reasonable. Justice Blackmun reemphasized that there is no legitimate expectation of privacy in information which a person voluntarily turns over to third parties.[19] The majority determined that once the petitioner voluntarily conveyed the number dialed to the telephone company, he assumed the risk that the company would divulge the information to the police.[20] This was true even though the call at issue was

14. *Id.* at 741.

15. *Id.* at 742.

16. *Id.* The Court reasoned that the general public was aware of the telephone company's use of pen registers in situations where no warrant was required. This awareness was said to be gleaned from the billing records of toll calls; the recording of calls subject to a special rate structure; and from announcements in phone books offering help in the event of obscene calls. *See also* Note, *The Legal Constraints upon the Use of a Pen Register as a Law Enforcement Tool*, 60 CORNELL L. REV. 1028, 1029 n.11 (1975) [hereinafter cited as *The Legal Constraints*].

17. 442 U.S. at 743.

18. *Id. See also* United States v. Clegg, 509 F.2d 605, 610 (5th Cir. 1975) (fourth amendment protects the content of the telephone conversation, but not the fact of a particular call being placed or a particular number being dialed).

19. 442 U.S. at 743-44.

20. *Id.* at 744. The Court analogized the facts in *Smith* to prior cases holding that there is no reasonable expectation of privacy in information voluntarily surrendered to

local and automated in nature, and of the sort that telephone companies do not normally record. To the majority, this was a mere fortuity which did not make Smith's expectation legitimate. All that mattered constitutionally was Smith's voluntary election to place the call into the hands of a third party with the capability of recording it.[21] Thus, the Court concluded that even if the petitioner entertained an expectation of privacy in the phone numbers he dialed, his expectation was not "legitimate." As a result, the use of the pen register was not a search and no warrant was required.

In a dissenting opinion, Justice Stewart maintained that *Katz* recognized the vital role played by the telephone in modern society. This realization led the Court to give fourth amendment protection to telephone conversations carried on by people at their home or office.[22] In his view, it made little sense to deny the same protection to the number dialed because the digits were recorded for billing purposes by the phone company. He maintained that the situs of the phone call had constitutional significance since the captured information emanated from private conduct within a protected area, the home.[23] Justice Stewart further contended that the numbers dialed were an integral part of the telephone conversation and were therefore entitled to constitutional protection under *Katz*.[24]

In a separate dissent, Justice Marshall took issue with the majority's finding that telephone subscribers have no expectation of privacy in the numbers they dial.[25] He questioned how the majority could reasonably determine what inferences an individual drew from a long distance billing on their phone bill, or whether the general public even bothered to read cryptic references in phone books assuring help in tracing phone calls.[26] In his view, even if the general public was

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third parties. *See* United States v. Miller, 425 U.S. 435 (1976) (bank depositor has no legitimate expectation of privacy in negotiable instruments which he voluntarily surrendered to the bank); Couch v. United States, 409 U.S. 322 (1973) (accountant's disclosure of records voluntarily given to him does not violate the fourth amendment); United States v. White, 401 U.S. 745 (1971) (fourth amendment not violated when wired participant in conversation transmits it to government agents); Hoffa v. United States, 385 U.S. 293 (1966) (fourth amendment not violated where a trusted colleague turns out to be a government informant); Lopez v. United States, 373 U.S. 427 (1963) (fourth amendment not violated where a participant in conversation records it for government use).

21. 442 U.S. at 745.

22. *Id.* at 746 (Stewart, J., dissenting).

23. *Id.* at 747 (Stewart, J., dissenting).

24. *Id.* at 747-48 (Stewart, J., dissenting).

25. *Id.* at 748 (Marshall, J., dissenting).

26. *Id.* at 748-49 (Marshall, J., dissenting). Justice Marshall stated: "Lacking the Court's apparently exhaustive knowledge of this Nation's telephone books and the reading habits of telephone subscribers . . . I decline to assume general public awareness of how obscene phone calls are traced." *Id.* at 749 n.1 (Marshall, J., dissenting).

aware of the telephone companies' monitoring of phone calls for internal reasons, this did not mean that users expected the information to be made available to the government. Justice Marshall reserved his harshest criticism for the majority's finding that an expectation of privacy in the numbers dialed is unreasonable because the individual had assumed the risk of disclosure to the government. He contended that risk analysis in fourth amendment jurisprudence was limited to those situations where the defendant had some discretion in deciding who was to enjoy the confidential communication.[27] In *Smith*, no discretion existed since a phone subscriber had no realistic alternative to dialing the phone number. Moreover, Marshall stated that risk analysis allows the government to define the scope of reasonable privacy expectations. This, he contended, was improper under *Katz* since the question is not what risk an individual is presumed to accept when he conveys information to third parties, but rather what risk the individual should be forced to accept in a free society.[28] Justice Marshall maintained that if the individual's expectation of privacy in the phone number dialed was to be abrogated at all, it should be for the limited business purpose of the telephone company only and not to serve the evidentiary needs of law enforcement.[29] Because the use of pen registers had the potential for extensive intrusion into protected areas of speech, political affiliation, and journalistic effort, he concluded that the police should be required to secure a warrant for the telphone company's records.[30]

Smith v. Maryland is the Court's most recent statement on the extent of fourth amendment protection from electronic surveillance measures employed by the government. The early position of the Supreme Court, enunciated in *Olmstead v. United States*,[31] was that

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27. *Id.* at 749 (Marshall, J., dissenting).

28. *Id.* at 750 (Marshall, J., dissenting).

29. *Id.* at 749 (Marshall, J., dissenting). Justice Marshall maintained that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes." *Id.*

30. *Id.* at 751 (Marshall, J., dissenting).

31. 277 U.S. 438 (1928). In *Olmstead*, the first wiretapping case to reach the Supreme Court, the government obtained incriminating evidence against the accused and his codefendants by electronically tapping a telephone wire. The Supreme Court viewed intangibles, such as conversations, as being outside the scope of fourth amendment protection. In addition, because the surveillance did not involve a trespassory invasion, it was not an unreasonable search and seizure. The Court held that neither obtaining evidence by a wiretap nor using the evidence at trial violated the fourth amendment's prohibition against unreasonable searches and seizures. *See* Note, *The Reasonable Expectation of Privacy—Katz v. United States, a Postscriptum*, 9 IND. L. REV. 468, 469 (1976) [hereinafter cited as *The Reasonable Expectation of Privacy*].

unauthorized electronic surveillance violated the fourth amendment only if there was also a physical intrusion or penetration of the premises from which the communication was made. In *Silverman v. United States*,[32] the Court extended this trespass doctrine by finding that the fourth amendment was not predicated upon an actual physical entry into the premises by the police.[33] After *Silverman*, the actual physical intrusion into a "constitutionally protected area," and not the extent of an actual physical entry, was viewed as determinative by the Court.

In *Katz v. United States*,[34] the Supreme Court departed from the physical trespass or intrusion analysis. The scope of the fourth amendment was expanded to protect against any intrusion into an area in which an individual harbored a "reasonable expectation of privacy."[35] The *Katz* Court held that the electronic surveillance of an individual's conversation required judicial authorization regardless of the absence of any physical trespass, entry or intrusion.[36] Following *Katz*, a physical entry into the premises as in *Olmstead*, a physical intrusion of the premises as in *Silverman*, or the surveillance of an oral conversation without any physical intrusion of the premises were all viewed as an unconstitutional search if not effectuated pursuant to a valid search warrant. The *Katz* decision recognized the need to safeguard the privacy of the citizenry from the type of governmental invasions made possible by the advent of electronic surveillance devices. Using such devices, government can intrude into private lives in ways far beyond the imagination of both the framers of the fourth amendment and the *Olmstead* majority.[37] To prevent the erosion of fourth amendment values by technological advances, the *Katz* majority realized the necessity to protect the individual's expectation that he could engage in private conversation over the telephone.[38] In arriving at this conclusion, the *Katz* Court did not base its decision upon the form of the evidence gathered by the electronic surveillance device, but rather upon the privacy expectations of the individual and of society in general. Consistent with this view, it has been emphasized that while

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32. 365 U.S. 505 (1960). In *Silverman*, the government inserted an electronic device into a party wall so as to make contact with a heating duct going into the house. Without deciding if a technical trespass had occurred, a unanimous Court held that the act constituted an illegal search and seizure.

33. *Id.* at 511.

34. 389 U.S. 347 (1967). *See* note 12 and accompanying text *supra*.

35. 389 U.S. at 351. The *Katz* Court noted that the fourth amendment protects people, not places, and expressly repudiated the physical trespass requirements. *Id.* at 351-53.

36. *Id.* at 353.

37. *See The Reasonable Expectation of Privacy, supra* note 31, at 472.

38. 389 U.S. at 353.

the monitoring of phone numbers may not be as substantively revealing as the conversation itself, it nonetheless reveals matters that one legitimately desires to keep private.[39] The analysis of the *Smith* Court, which focuses upon the nature of the surveillance device instead of upon the purpose of the fourth amendment, is diametrically opposed to the policy reasons underlying *Katz*.

Moreover, it is questionable whether privacy expectations can be properly assessed by examining how the surveillance device works or how widespread its use has become. In *Smith*, the majority made broad statements about the general public's awareness of pen registers that hardly rise to the level of an assumption.[40] Yet upon this basis, and without any objective evidence that these assumptions are correct, the Court decided that the public retains no legitimate expectation of privacy in the phone numbers they dial.[41] Even if Smith did not, as the majority maintained, harbor a reasonable expectation of privacy due to the activities of the phone company and to so-called public awareness of the use of pen registers, it is arguable that he reasonably entertained a subjective expectation that his privacy would not be intruded upon by the police, who are instruments of the state.[42] The use of the pen register by the phone company in the normal course of its

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39. *See* 442 U.S. at 748 (Stewart, J., dissenting).

40. *See* notes 15-16 and accompanying text *supra*.

41. 442 U.S. at 742. To support the conclusion that the general public was aware of the use of pen registers and similar devices, the majority relied upon such things as the advertisements in the telephone book offering help in the event the customer was subjected to obscene or threatening calls.

Examination of a typical telephone book reveals no specific mention of pen registers, or even a general statement that the telephone company can detect the source of troublesome calls. To find out *how*, if at all, the telephone company would combat such calls requires the user to take the further step of calling the telephone company. A typical telephone company advertisement would advise the recipient of annoyance calls as follows:

> Malicious, threatening and abusive calls, including those in which obscene or profane language is used, are prohibited. The making of such calls over the Company's lines may constitute cause for disconnecting service and possible criminal prosecution, and civil action by the person called. The Telephone Company is concerned about obscene and harassing calls and is trying to stop them. You don't have to talk or listen to such calls—just hang up. If the calls persist, call your Service Representative at the Telephone Company Business Office. If a threat is made at any time, also call the police.

Greater Pittsburgh Telephone Directory, White Pages 25 (Dec., 1979). If the user does call the service representative, he could not be told that a pen register would be of any assistance in tracing an obscene call, since the device is incapable of recording the telephone number from which any particular incoming call originated. *See* note 2 *supra*. A pen register would be useful only where the harassed party has a fair idea of the caller's identity.

42. *See* 442 U.S. at 748-49 (Marshall, J., dissenting).

business to determine if unauthorized long distance calls are being made, or if a home phone is being used to conduct a business or to make obscene phone calls, cannot be seen as negating a reasonable expectation of privacy when the surveillance stems from a government request to investigate and to detect criminal activity unrelated to the delivery of telephone service.[43] In such a case, the installation of the pen register device is not done in the normal course of business.[44]

Another troubling aspect of the *Smith* decision is that it continues the recent erosion of traditional fourth amendment protections surrounding the home as well as conduct centered in the home.[45] In evaluating fourth amendment claims, the *Katz* Court shifted the focus of inquiry away from notions of a physical trespass to a standard that protected the reasonable expectations of privacy of the individual subject to the surveillance.[46] Although *Katz* expressly repudiated the physical trespass requirement of *Olmstead*,[47] it did not redefine what had always been a "constitutionally protected area,"[48] and thus did not withdraw any protection the fourth amendment afforded to the home. It is true that in *Katz*, the Court stated that the fourth amendment "protects people, not places."[49] However, the Court subsequently explained in *Alderman v. United States*[50] that this statement was not to be taken as withdrawing any protection from the home, nor as an indication that the *Silverman* doctrine of constitutionally protected areas was overruled.[51] What *Katz* did hold is that a nonphysical intrusion *in-*

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43. *See* Hodge v. Mountain States Tel. and Tel. Co., 555 F.2d 254, 266-67 (9th Cir. 1977) (Hufstedler, J., concurring). In Commonwealth v. Dembo, 451 Pa. 1, 301 A.2d 689 (1973), the Pennsylvania Supreme Court concluded that because postal authorities were authorized to open packages in the normal course of business to determine if the proper rate was being charged, this practice did not mean that postal authorities could open packages upon police request to find evidence of a crime.

44. *See* Comment, *Pen Register Evidence With One-Party Consent: Should It Be Admissible?*, 8 SAN DIEGO L. REV. 425, 429, 431 (1971) (a pen register is not normally installed for the purpose of detecting criminal activity) [hereinafter cited as *Pen Register Evidence*].

45. *See* Dalia v. United States, 441 U.S. 238 (1979) (separate judicial authorization not required to make covert entry into home to install wiretap).

46. 389 U.S. at 350-53.

47. *Id.* at 353.

48. The Court in *Katz* stated that "the Fourth Amendment protects people—and not simply 'areas' " *Id.*

49. *Id.* at 351.

50. 394 U.S. 165 (1969).

51. *Id.* at 180. In the recent case of Rakas v. Illinois, 439 U.S. 128 (1978), Justice Rehnquist, writing for the majority, opined that a person subjected to a search and seizure must show a "legitimate expectation of privacy in the invaded place" in order to claim the protection of the fourth amendment. *Id.* at 143. He stressed that "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not

to a place that is private can also constitute a violation of the fourth amendment.[52] A principled application of this standard to the home, an admittedly private place, would dictate that acts short of physical intrusion may also be prohibited by the fourth amendment. The *Katz* Court's statement that the fourth amendment protects people as opposed to places[53] necessarily requires reference to a place in order to determine if the people gathered there have any justifiable privacy expectation.[54] Thus, the rule has been stated that because the home is largely a private place, it is of no constitutional significance that a governmental intrusion is accomplished without resort to a physical penetration of the premises.[55]

Because of these principles, it was necessary for the Court to determine if Smith's presence in his home entitled him to a reasonable expectation of privacy in the phone numbers he dialed. In finding his location to be immaterial, the Court relied upon *United States v. Miller*[56] and other decisions holding that an individual who voluntarily

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altogether abandoned the use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment." *Id.* at 144 n.12. *See also The Reasonable Expectation of Privacy, supra* note 31, at 479.

52. 389 U.S. at 351-53. *See also* Berger v. New York, 388 U.S. 41 (1967), the frequently cited companion case to *Katz*, in which the Court maintained that "[t]he purpose of the probable-cause requirements of the Fourth Amendment, [is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed." *Id.* at 59.

53. 389 U.S. at 351.

54. *Id.* at 361 (Harlan, J., concurring).

55. *Id.* at 353.

56. 425 U.S. 435 (1976). The *Miller* Court held that:

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443 (citation omitted).

In response to *Miller*, Congress passed the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978). In Title XI of that statute, the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (Supp. II 1978), Congress limited procedures whereby federal authorities could obtain a customer's bank records, *id.* § 3402, as well as granted to the customer the opportunity to challenge the legitimacy of any seizure, *id.* § 3410. The purpose of Title XI is to protect the customers of financial institutions from unwarranted intrusions into their private records while at the same time permitting legitimate law enforcement activity. Title XI seeks to strike a balance between the customer's right to privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations.

Some state courts have circumvented *Miller* by finding that a depositor retains a legitimate expectation of privacy in banking records as a matter of state constitutional law. *See, e.g.*, Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979); Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166, (1974).

conveys information to third parties assumes the risk that the information will be turned over to the authorities.[57] In the majority's opinion, Smith's conduct could not have been calculated to preserve the privacy of the numbers he dialed, since the numbers would be conveyed in exactly the same manner regardless of his location.[58] This analysis is flawed in several respects. First, if this reasoning is accepted, there is no basis to protect the ensuing conversation, since it also passes through telephone company equipment in order to be processed to the receiver of the dialogue.[59] This is equally true whether the call initiates in the home as in *Smith*, or in a public phone booth as in *Katz*. Just as the individual cannot find a secure method to dial the numbers, there is no secure line for the conversation once the number is dialed. Secondly, there can be no true assumption of the risk if there are no alternatives to assuming the risk.[60] There is no alternative to using a telephone if one is to take part in the social, economic, and political life of the country. Neither the petitioner nor anyone else can be said to "voluntarily" use the telephone without ignoring the vital role of the telephone in modern society. This was clearly recognized in *Katz*.[61]

Furthermore, even if one does voluntarily surrender the numbers he dials to the telephone company, it does not follow that all expectations of privacy in the information become illegitimate. Even before *Katz*, fourth amendment protection extended to situations which were not absolutely private.[62] *Katz* did not overrule this principle, nor did it postulate a rule of absolute secrecy before one could claim a reasonable expectation of privacy. As such it can hardly be said that the telephone user is subject to unrestrained police scrutiny merely because he has surrendered a portion of his privacy for a limited purpose to those with whom he is doing business.[63] It is not unreasonable

57. 442 U.S. at 743-44.

58. *See* text accompanying notes 17 & 18 *supra*.

59. 442 U.S. at 746 (Stewart, J., dissenting).

60. *Id.* at 750 (Marshall, J., dissenting). *See* W. PROSSER, THE LAW OF TORTS § 68 (4th ed. 1971).

61. The *Katz* Court acknowledged that even *public* telephones played a vital role in *private communication*. 389 U.S. at 352. *Smith* breeds a curious dichotomy into the law of electronic surveillance, since the user of a public phone booth is deemed to have selected the site for privacy reasons, yet the user of a private phone is said to be incapable of dialing the number in privacy. 442 U.S. at 743.

62. *See* Stoner v. California, 376 U.S. 483 (1964) (because maids, janitors and repairmen may enter hotel rooms to perform their duties does not mean the room is not protected by the fourth amendment against an invasion by the police); Chapman v. United States, 365 U.S. 610 (1961) (because a landlord may enter his tenants' dwelling does not mean that the police may do so with the permission of the landlord).

63. *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.7 (1978).

to expect that the number conveyed to the telephone company will be used solely to process the call.

Assuming that risk analysis is the proper method to adjudicate certain fourth amendment claims, it is somewhat incongruous to treat the telephone company as an ordinary third party,[64] and not as a government sanctioned monopoly. Although the Court assumed state action to be present in *Smith*,[65] it failed to recognize that the state, through licensing power, will always dictate to whom a telephone user must initially convey the signal.[66] The individual has no choice between competing alternatives unless the alternatives are viewed as using or not using the phone at all. By granting a telephone company a virtual if not absolute monopoly in an essential area of communication,[67] the state can, consistent with the *Smith* Court's analysis, effectively force the telephone user to accept the risk of disclosure. While *Katz* recognized that foregoing the use of the telephone is not a realistic alternative in modern society, *Smith* gives the individual no other choice but to assume the risk of unrestrained government monitoring.

The *Smith* Court's approval of the installation of pen registers without judicial authorization does little to prevent the unrestrained[68]

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64. *See* 442 U.S. at 749-50 (Marshall, J., dissenting).

65. *Id.* at 739 n.4.

66. For example, the Pennsylvania Public Utility Code, 66 PA. CONS. STAT. ANN. § 1103(a) (Purdons Supp. 1979) provides that: "[a] certificate of public convenience shall be granted by order of the [State public utility] commission, *only* if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public." (emphasis added).

In Parker v. Brown, 317 U.S. 341 (1942), the Supreme Court recognized that certain state action was immune from the anti-monopoly proscriptions of the Sherman Act, 15 U.S.C. §§ 1-7 (1976). In Mobilphone of Northeastern Pa. v. Commonwealth Tel. Co., 571 F.2d 141 (3d Cir. 1978), the Court of Appeals for the Third Circuit applied the *Parker* exemption to the state's control over the radio-telephone paging market. In *Mobilphone*, the state controlled entry into the market by using the certificate of public convenience. This was said to be evidence of such complete and active control, as required by *Parker*, so as to give rise to the state action exemption from the Sherman Act. Just as the presence of state licensing is seen as sufficient to give rise to an antitrust exemption, so also should state action with respect to the licensing of a monopolistic public utility be seen as effectively dictating to the telephone subscriber acceptance of the risk of disclosure of the numbers he dials on his telephone.

67. The telephone company's unique status as a monopoly led the Sixth Circuit, in Michigan Bell Tel. Co. v. United States, 565 F.2d 385, 389 (6th Cir. 1977), to affirm an order requiring the telephone company to install equipment and perform certain operations to aid the Federal Bureau of Investigation in tracing telephone calls.

68. Under *Smith*, the police may without any cause whatsoever and for whatever purpose they choose, uncover private relationships. If the police desired to obtain a pattern of contacts and associations of a group of individuals there would be nothing to stop them from placing pen registers on the lines of individuals who have received calls from a phone already subject to pen register surveillance. This is true even though the number dialed from the monitored phone may have been dialed mistakenly.

and indiscriminate[69] use of the device by law enforcement authorities. The unsupervised use of pen registers could result in a "chilling effect" on freedom of association.[70] Throughout history the first and fourth amendments have been inseparably tied[71] and just as the widespread use of a wiretap device can affect an individual's right to free speech, the widespread use of the pen register device can affect an individual's right to free association.[72] It is all too easy to dismiss the pen register as a harmless device simply because it does not intercept the contents of the conversation.[73]

The Court's unwillingness to subject governmental use of pen registers to the requirements of the warrant clause must be analyzed in terms of the conflicting interests of the parties before the Court. In *Smith*, the interests to be balanced are the desire to eliminate inva-

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69. Allowing the interception of all numbers dialed resembles the "general warrant" feared by the framers of the fourth amendment. That is why the amendment calls for a particular description of the items subject to the search and seizure. *See* Berger v. New York, 388 U.S. 41, 58 (1967); Stanford v. Texas, 379 U.S. 476, 480-81 (1965). Accordingly, if the telephone number subject to interception begins with 642, it would be unnecessary to record a number beginning with 562, yet the pen register records even those numbers. *See Pen Register Evidence, supra* note 44, at 432. Even if the caller has no reasonable expectation of privacy, surely the unwilling recipient of a call has a reasonable expectation that his number is not being documented by the telephone company or the authorities, especially when he does not answer his phone, yet again the pen register records those numbers.

70. In United States v. White, 401 U.S. 745 (1971), Justice Douglas found first amendment issues inseparable from fourth amendment issues and argued that prior judicial authorization should be obtained before any electronic surveillance occurs. He maintained that "[m]onitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance." *Id.* at 762 (Douglas, J., dissenting). As Professor Amsterdam argues, "[t]he insidious, far-reaching and indiscriminate nature of electronic surveillance—and, most important, its capacity to choke off free human discourse that is the hallmark of an open society—makes it almost, although not quite, as destructive of liberty, as 'the kicked-in door.' " Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974).

71. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting).

72. *See Pen Register Evidence, supra* note 44, at 433. One commentator suggests that if pen register data were fed into a central computer on a widespread basis, patterns of acquaintances and dealings among a substantial group of people would be available to the government. A. MILLER, THE ASSAULT ON PRIVACY 43 (1971).

73. A pen register may be subject to abuse because it may be easily converted into a wiretap by attaching headphones or a tape recorder to appropriate terminals on the pen register unit. Newer models of pen registers have automatic voice activated switches which can automatically turn a tape on and off as the telephone is used. *See Circumventing Title III: The Use of Pen Register Surveillance in Law Enforcement*, 1977 DUKE L.J. 751, 759.

sions of privacy of innocent citizens against the desire of law enforcement authorities to employ techniques like the pen register to detect and combat increasingly sophisticated lawbreakers.[74] In *Katz*, the Court balanced these two interests by subjecting the electronic surveillance at issue there to the requirement of the warrant clause.[75] The underlying goal in *Katz* was to maximize individual freedom while at the same time permitting the authorities to use an effective law enforcement tool.[76] The majority in *Smith*, however, did not strive to balance the individual's right to privacy and the needs of law enforcement. By treating the needs of law enforcement as paramount, the Court has sanctioned the prospect of abusive and overzealous activity by government agents.[77]

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74. *See id.* at 751.

75. *See The Reasonable Expectation of Privacy, supra* note 31, at 484.

76. *Id.*

77. In Berger v. New York, 388 U.S. 41 (1967), as in *Katz*, the Court recognized the threat electronic surveillance posed to an individual's privacy and maintained that:

> [W]e cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. . . . While '[t]he requirements of the Fourth Amendment are not inflexible . . . to the legitimate needs of law enforcement,' it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment . . . . Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.

Id. at 62-63 (citation omitted).