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Chief Justice Warren and 1984

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Commentaries

Chief Justice Warren and *1984*

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When George Orwell published his chilling projection of the future in *1984*, Earl Warren was in the middle of his second term as Governor of California. A vigorous, hard-working political leader, Governor Warren projected an unexciting image of competence. John Gunther, in his widely-read *Inside U.S.A.*, described Warren as a man endowed with "decency, stability, sincerity, and [a] lack of genuine intellectual distinction." Gunther predicted that Warren would "never set the world on fire or even make it smoke."[1]

Despite his apparent blandness as governor, Earl Warren as Chief Justice of the United States Supreme Court left a deep impression on the law of American criminal procedure. This Commentary recounts the significant criminal procedure decisions of the Warren Court. Such a review is especially appropriate because in 1984, the year chosen by Orwell for his chilling vision of the future, Americans do not live in an Orwellian society. This Commentary concludes that Chief Justice Warren, as much as any one person could, ensured that Orwell's prediction would remain only fiction and not foreshadow modern society.

It *Was* the *Warren* Court

As a prelude, a word should be said about the extent to which Chief Justice Warren was personally responsible for what was achieved during his tenure. An era of the Supreme Court customarily is designated by the name of its Chief Justice. During Warren's tenure this designation was more than a mere formality. While headed by Warren, the Supreme Court bore the mark of its Chief Justice as unmistakably as the earlier Courts of Marshall and Taney had reflected the unique leadership of those two men.

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1. J. GUNTHER, INSIDE U.S.A. 18, 20 (1947).

Some students of the high Court dispute Warren's leadership. They claim that, although Warren was the titular head of the Court, the actual leadership was furnished by other Justices. Some assert that the proper title of the high bench while Warren sat in its center chair was the Brennan Court.[2] A biographer of Justice Black, however, has contended that it was the Alabaman who guided the judicial revolution of the Warren years.[3] Justice Black also believed that he had led the judicial revolution that rewrote so much of the corpus of our constitutional law. As Black saw it, the Court under Warren simply gave its stamp of approval to the constitutional principles that he had been advocating for so many years.[4]

Other Justices who served with Chief Justice Warren, however, recognized his leadership role. Justice Douglas, philosophically closest to Justice Black, ranked Warren with John Marshall and Charles Evan Hughes as "our three greatest Chief Justices."[5] Another member of the Warren Court told me that the Chief Justice was personally responsible for the key decisions during his tenure. The Justices who sat with him acknowledge that Chief Justice Warren was not an intellectual like Justice Frankfurter, but then, noted Justice Potter Stewart, "he never pretended to be one."[6] More important, remarked Stewart, Warren possessed "instinctive qualities of leadership."[7] When Stewart was asked whether Justice Black was the intellectual leader of the Court, he replied, "If Black was the intellectual leader, Warren was the *leader* leader."[8]

Warren brought more effective leadership to the Chief Justiceship than there had been in years. The most important work of the Supreme Court occurs behind the scenes, particularly at the conferences where the Justices discuss and vote on cases. An effective Chief Justice, exercising his prerogative to call and discuss cases before the other Justices speak, controls the conference discussion. Those who

2. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 923 (1983).

3. G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977).

4. Justice Black apparently resented the acclaim that the Chief Justice received as leader of the Warren Court. When Warren retired as Chief Justice, the Justices prepared the traditional letter of farewell. The draft letter read: "For us it is a source of pride that we have had the opportunity to be members of the Warren Court." Black changed this to "the Court over which you have presided." B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 630 (1983).

5. W.O. DOUGLAS, THE COURT YEARS 1939-1975 240 (1980).

6. B. SCHWARTZ, *supra* note 4, at 31.

7. *Id.*

8. *Id.*

served with him marveled at Chief Justice Warren's ability to lead the conference. "It is incredible," Justice Brennan once said, "how efficiently the Chief would conduct the conferences, leading the discussion of every case on the agenda, with a knowledge of each case at his fingertips."[9]

The conference notes of Justices on the Warren Court demonstrate that the Chief Justice was a remarkably effective leader of the Court. Some believe the conference notes indicate that Warren was "even more of a guiding force in the landmark opinions of his court than had been previously believed. From the moment they were first discussed, Warren helped steer cases simply by the way he framed the issues."[10] In almost all the important cases, the Chief Justice led the discussion toward the decision he favored.[11] During his tenure, the high bench was emphatically the *Warren* Court and, without arrogance, he, as well as the country, knew it. Thus, when we consider the work of the Warren Court, we are considering a constitutional corpus that was a direct product of the Chief Justice's leadership.

Big Brother Is Watching You

What readers find most abhorrent about the future projected by Orwell is the mutation of government into the all-seeing Big Brother, against whom no rights of individual privacy exist. *1984* depicts a society in which the fourth amendment protections against unreasonable government search and seizure are inconceivable.

When Orwell described the horrors of an authoritarian society of the future, he used as his most frightening metaphor the "telescreen," a device permitting total surveillance over the individual. Like the modern television, the telescreen enabled a viewer to see and hear television transmissions. The telescreen differed, however, in one sinister respect: it enabled government security personnel to peer into a room at any time without alerting the room's occupants.[12] The placement of a telescreen in every enclosed area and on every street corner made it possible for the government to maintain complete surveillance over the individual: "You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in

9. Whitman, *For 16 Years, Warren Saw the Constitution as Protector of Rights and Equality*, N.Y. Times, July 10, 1974, at 42, col. 1.

10. Washington Post, June 15, 1983, at A16, col. 1.

11. *See, e.g.*, B. SCHWARTZ *supra* note 4, at 86, 293, 412.

12. G. ORWELL, 1984, at 3-4 (1949).

darkness, every movement scrutinized."[13] Thus, not only the expectation of privacy, but also its very existence was eliminated in Orwell's future world.

American jurisprudence most closely approached the Orwellian nightmare when it condoned intrusive, secret surveillance in *Smayda v. United States*,[14] a 1965 case challenging clandestine police surveillance of public lavatories to apprehend homosexuals. In *Smayda*, the surveillance extended to the enclosed toilet stalls. Through peepholes cut in the ceiling above each stall and disguised as air vents, the police photographed homosexual acts committed by the defendants.[15] The court of appeals held that the surveillance did not constitute an unreasonable search and that the evidence obtained was constitutionally admissible against the defendants.[16] "We are made as uncomfortable as the next man," conceded the court, "by the thought that our own legitimate activities in such a place may be spied upon by the police."[17] Nevertheless, the court concluded that under the circumstances the public interest in law enforcement overrode the individual's right to privacy.[18]

The decision in *Smayda* is troublesome. The invasion of privacy condoned by the court is similar, in kind if not degree, to the vision of the future so strikingly described by Orwell: "For a moment he was tempted to take [the letter] into one of the water closets and read it at once. But that would be shocking folly as he well knew. There was no place where you could be more certain that the telescreens were watched continuously."[19]

This troubling decision was rooted in the pre-Warren Supreme Court jurisprudence, based on the seminal case of *Olmstead v. United States*.[20] Under the *Olmstead* test, eavesdropping and surveillance did not violate the fourth amendment in the absence of physical trespass.[21] For example, in *Goldman v. United States*,[22] federal agents placed a detectaphone on a wall, enabling them to hear conversations in an adjoining office. The Court held that there was no fourth amendment

13. *Id.* This passage was quoted in United States v. On Lee, 193 F.2d 306, 317 (2d Cir. 1951), *aff'd*, 343 U.S. 747 (1952).
14. 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).
15. *Id.* at 252-53.
16. *Id.* at 253-54.
17. *Id.* at 257.
18. *Id.* at 254.
19. G. ORWELL, *supra* note 12, at 89.
20. 277 U.S. 438 (1928).
21. *Id.* at 467.
22. 316 U.S. 129 (1942).

violation because a connection to a wall not on the property of the defendant did not constitute a trespass.[23] The *Olmstead* trespass theory seemed especially applicable in *Smayda* because the police surveillance occurred in a public place. Although a man's home may be his castle, its privacy beyond invasion by either inquisitive or officious people, even the strongest proponent of privacy on the pre-Warren Court, Justice Douglas, recognized that "[a] man loses that privacy of course when he goes upon the streets or enters public places."[24]

Even before the Warren Court altered the prevailing current of jurisprudence, the Chief Justice urged overruling the *Olmstead* rule authorizing surveillance in the absence of physical trespass. At the conference on *Silverman v. United States*,[25] Warren for the first time invited his confreres to overrule *Olmstead*. Receiving the support of only three other Justices, the Chief Justice ultimately agreed to reverse on the ground that a trespass had been committed by police use of a spike microphone and to forego dissent on the *Olmstead* issue.[26]

In *Katz v. United States*,[27] a key Warren Court decision, the Chief Justice was more successful in persuading the Justices effectively to overrule the *Olmstead* rationale. Katz was convicted of interstate transmission of wagering information by telephone. FBI agents had attached an electronic listening device to the outside of a public phone booth from which he had placed his calls. Because there had been no physical trespass into the area occupied by Katz, the court of appeals, relying on *Olmstead*, rejected the contention that the eavesdropping violated the fourth amendment.[28]

Led by the Chief Justice, the Supreme Court repudiated the *Olmstead* trespass test and reversed the lower court. The Court held in *Katz* that the fourth amendment protected the privacy of a person using a phone booth.[29] The bugging of the phone booth was a search governed by the amendment, even without any "technical trespass."[30] Thus, the reach of the constitutional protection could no longer "turn upon the presence or absence of a physical intrusion."[31] Instead, the key ques-

23. *Id.* at 135.

24. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

25. 365 U.S. 505 (1961).

26. *Id.* at 509-12. *See* B. SCHWARTZ, *supra* note 4, at 386-87.

27. 389 U.S. 347 (1967).

28. Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966).

29. 389 U.S. at 353.

30. *Id.*

31. *Id.*

tion became whether the individual was entitled to a "reasonable expectation of privacy" in the factual circumstances presented.[32] An individual using a phone booth "is surely entitled to assume that his conversation is not being intercepted."[33] The booth may be open to the public, but when in use "it is a temporarily private place whose momentary occupants' expectations are recognized as reasonable."[34]

Justice Harlan in his concurring opinion noted that "today's decision must be recognized as overruling *Olmstead*."[35] In a letter to Justice Stewart, author of *Katz*, the Chief Justice wrote, "I believe that it will be a milestone decision."[36] Under *Katz*, as a more recent federal case explained, "Once it has been determined that the circumstances justify an expectation of privacy which is subjectively and objectively reasonable, the Fourth Amendment requires that the detached restraint of a neutral official be interposed between the individual and the governmental intrusion."[37]

The *Katz* decision effectively removed the jurisprudential foundation upon which the *Smayda* case rested. In *Kroehler v. Scott*,[38] although the facts were nearly identical to those in *Smayda*,[39] the court held that police reliance on *Smayda* was misplaced because the Supreme Court decision in *Katz* required a different result.[40] The Court, applying the *Katz* expectation of privacy test, was persuaded that plaintiffs harbored expectations of privacy that were subjectively and objectively reasonable, and thus were entitled to fourth amendment protections.[41] Because the police failed to secure a warrant, the court concluded that the search was unreasonable per se under *Katz*.[42]

From *Olmstead* to *Silverman* to *Katz*, there was a transformation in Supreme Court jurisprudence that was largely triggered by Chief Justice Warren. The Chief Justice had indicated his antipathy toward the *Olmstead* test in *Silverman*, and in *Katz* was ultimately able to secure its rejection by the Court. The expectation of privacy test substituted by the Warren Court for the *Olmstead* doctrine is the very

32. *Id.* at 361. (Harlan, J., concurring).
33. *Id.*
34. *Id.* at 360-61 (Harlan, J., concurring).
35. *Id.* at 362.
36. B. SCHWARTZ, *supra* note 4, at 718.
37. Kroehler v. Scott, 391 F. Supp. 1114, 1117 (E.D. Pa. 1975).
38. 391 F. Supp. 1114 (E.D. Pa. 1975).
39. *Id.* at 1115-16.
40. *Id.* at 1116-17.
41. *Id.* at 1117.
42. *Id. See also* People v. Triggs, 8 Cal. 3d. 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973); People v. Dezek, 107 Mich. App. 78, 308 N.W.2d 652 (1981).

antithesis of the governmental intrusion in *1984*. Against Big Brother, the very notion of an "expectation of privacy" would have been incomprehensible.

Criminal Procedure

Since the time of Magna Carta, no common-law country has legitimated the power of arbitrary arrest and detention.[43] In those countries physical restraint is prima facie illegal and can be justified only when an accused prisoner awaits trial or when a duly-convicted prisoner is serving a sentence.[44] Arrest or imprisonment without such justification is normally contrary to law and will be nullified in a habeas corpus proceeding.[45]

These concepts would be utterly meaningless to the denizen of the Orwellian society, a world in which individual privacy and individual integrity had become nonexistent. "The right of the people to be secure in their persons," guaranteed by the fourth amendment, would be as inoperative as the other rights protected by the amendment. Society had completely gotten the better of individuality. Big Brother was vested with a power to arrest and punish that was not limited to specified violations of known laws. Orwell described the protagonist's keeping a diary as "not illegal (nothing was illegal, since there were no longer any laws), but if detected it was reasonably certain that it would be punished by death, or at least by twenty-five years in a forced-labor camp."[46] Like so much else that we take for granted, the principle of *nulla poena sine lege*, no punishment without law, had become inconceivable in the society of *1984*.

Advances In The Protection Of Individual Rights Under The Warren Court

The concept of criminal procedure as a safeguard of individual rights was nonexistent in the Orwellian community. "In the vast majority of cases there was no trial, no report of the arrest. People simply disappeared, always during the night. Your name was removed from the registers, every record of everything you had ever done was wiped

43. 1 H. HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 234 (5th ed. 1846).

44. A. DICEY, LAW OF THE CONSTITUTION 208 (9th ed. 1939).

45. Samuel Johnson once commented, "The *habeas corpus* is the single advantage our government has over that of other countries." BOSWELL, LIFE OF SAMUEL JOHNSON, entry for September, 1769. *See also* Harris v. Nelson, 394 U.S. 286, 290-91 (1969) (habeas corpus is the fundamental instrument safeguarding individual freedom against arbitrary and lawless action).

46. G. ORWELL, *supra* note 12, at 9.

out . . . . You were abolished, annihilated: *vaporized* was the usual word."[47] Under the Chief Justice's leadership, the Warren Court veered from the Orwellian specter in a trio of decisions protecting criminals from abuse by our system: *Gideon v. Wainwright*,[48] *Miranda v. Arizona*,[49] and *Mapp v. Ohio*.[50]

Gideon v. Wainwright, which held that an accused is entitled to independent counsel,[51] is a key decision in this respect. The Court concluded that the criminal accused's right to counsel was so fundamental as to be included in the due process guaranty. Gideon was convicted of a felony after the trial judge had denied his request for the assistance of a court-appointed lawyer. Following the Chief Justice's lead, the Supreme Court reversed the conviction. "[R]eason and reflection," declared the Court, "requires us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[52]

The *Gideon* decision gave force to the express constitutional guarantee of the right to counsel in all criminal prosecutions. But, as Anthony Lewis noted, "The constitution does not answer the critical question: When does the right to counsel begin?"[53]

The Warren Court addressed this question in *Miranda v. Arizona*.[54] Miranda had been convicted in state court of kidnapping and rape. Following his arrest, he was taken to an interrogation room and questioned without being advised that he had a right to have an attorney present. After two hours of questioning, the police secured a confession that was admitted into evidence over Miranda's objection. The state's highest court affirmed the conviction.

The Supreme Court reversed. In an opinion authored by the Chief Justice, the Court held that statements made by an individual during custodial interrogation are not admissible in court unless the police gave full effect to the defendant's rights to remain silent and to have his attorney present.[55] If he wishes to have counsel present during

47. G. ORWELL, *supra* note 12, at 20.
48. 372 U.S. 335 (1963).
49. 384 U.S. 436 (1966).
50. 367 U.S. 643 (1961).
51. 372 U.S. 335, 344-45 (1963).
52. *Id.* at 344.
53. *See* B. SCHWARTZ, *supra* note 4, at 588.
54. 384 U.S. 436, 444 (1966).
55. *Id.* at 478-79.

the questioning, interrogation must be suspended until his attorney is present.

The majority agreed with the Chief Justice that custodial interrogation exacted a heavy toll on individual liberty and traded on the weaknesses of individuals.[56] Chief Justice Warren had no doubt that the *Miranda* rights came into play when the individual was taken into custody and interrogated.[57] "I didn't know," he commented during the argument before the Court, "that we could arrest people in this country for investigation. Wouldn't you say it was accusatory when a man was locked in jail?"[58]

The *Miranda* decision drastically altered American criminal law. Under the rule of *Miranda*, the police must advise the defendant that he has a right to remain silent, that anything he says can be used against him, and that he has a right to have a lawyer present, regardless of his ability to pay for one. In effect, the Warren Court decided that an accused who requests the assistance of counsel should have it at any time after he is taken into custody.

The *Miranda* decision exemplified Warren's concern for the protection of the rights of criminal defendants. Every so often in criminal cases, when counsel defending convictions would cite legal precedents, Warren would bend over the bench and ask, "Yes, yes—but were you fair?"[59] The fairness that concerned the Chief Justice was no jurisprudential abstraction. It related to methods of arrest, questioning of suspects, and police conduct, matters Chief Justice Warren understood intimately through his experience as a district attorney. The *Miranda* decision embodied the Warren fairness approach.

The Warren Court's concern for protecting the defendant's rights and for curbing illegal or oppressive police conduct was also manifest in *Mapp v. Ohio*,[60] in which the Court adopted the rule barring the admission of illegally seized evidence in state criminal cases. Prior to *Mapp*, the Supreme Court had not interpreted the United States Constitution to require application of the exclusionary rule in state criminal cases. The Warren Court held in *Mapp* that the exclusionary rule was a part of the fourth and fourteenth amendments, and binding on the states.[61] Mapp's state court conviction was reversed because illegally

56. *Id.* at 455.
57. *Id.* at 444.
58. 34 U.S.L.W. 3298-99 (1966).
59. *See* B. SCHWARTZ, *supra* note 4, at 628.
60. 367 U.S. 643, 655 (1961).
61. *Id.* at 657.

seized evidence had been admitted at the trial.[62] This holding, the Court remarked, closed "the only courtroom door remaining open to evidence secured by official lawlessness"[63] in violation of the constitutional guaranty against unreasonable searches and seizures. In effect, the Court held that even the rights of a criminal defendant could prevail against the interests of the police in apprehending criminals. Such a balancing of rights could not exist in the Orwellian world in which the power of the state was preeminent and the right of the individual nonexistent.

In its criminal law decisions, the Warren Court greatly extended the reach of the Bill of Rights, making virtually all of its guarantees binding upon the states as well as the federal government. This result was obtained without formally abandoning the selective incorporation approach previously endorsed by the Supreme Court.[64] In a famous pre-Warren dissent from that view, Justice Black had argued that the fourteenth amendment incorporated the entire Bill of Rights in its due process clause.[65] Although Justice Black lost the total incorporation battle, during Warren's tenure he nearly won the war. Led by the Chief Justice, the Warren Court held nearly all of the Bill of Rights guarantees to be fundamental and hence absorbed by due process.

In this regard, *Mapp v. Ohio* and *Gideon v. Wainwright* were key decisions. In those cases the Court characterized as fundamental, and therefore within the due process clause, the right against the use of illegally secured evidence and the right to counsel.[66] Speaking broadly of the need to protect individual rights, these cases signaled a trend to require that the states honor more of the Bill of Rights guarantees of individual rights. In the decade that followed, the Warren Court also held to be fundamental and hence binding upon the states all but two[67] guarantees of individual rights contained in the Bill of Rights. While such rights prevail, the forbidding society foreseen by Orwell will remain fictional.

62. *See id.* at 643-60.

63. *Id.* at 654-55.

64. *See* B. SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK § 7.2 (2d ed. 1979).

65. Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

66. *See supra* notes 51-52, 60-63 & accompanying text.

67. Cases holding a right fundamental and binding on the states include Benton v. Maryland, 395 U.S. 784 (1969) (right against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to a jury trial in criminal cases); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront one's accusers); and Malloy v. Hogan, 378 U.S. 1 (1964) (right not to incriminate oneself). The right to indictment by a grand jury and the right to an attorney in civil cases are not binding on the states.

Caveat: Technological Development and Social Change

As the prior portions of this Commentary have shown, Chief Justice Warren was primarily responsible for a jurisprudence that would not countenance the kind of society envisaged in *1984*. Indeed, in purely legal terms, the Warren Court made it difficult for a society even remotely like that described by Orwell to become a reality. A discussion of *1984* in legal terms alone, however, does not fully address the potential for government encroachment into everyday life manifest in Orwell's projection of the future.

A troublesome aspect of *1984* was its implication that Big Brother is a stage in the evolving role of government. Belief in the inevitability of this result may be reinforced by the high profile that government exhibits in modern society. When the Federal Constitution and the Bill of Rights were written, however, government left the individual largely unrestrained, arbitrating between individuals only at extreme limits of conduct. Yet in the century and a half that followed, government's role gradually shifted to promotion of the community welfare, even at the cost of individual property rights. By the time Earl Warren became Chief Justice, the welfare state had become an established fact.

As technology advances, the problem shifts from the exertion of governmental authority over property rights to the potential for governmental intrusion on individual privacy rights. In the words of Justice Douglas, "[t]he central problem of the age is the scientific revolution and all the wonders and the damage it brings."[68] The machine, which Orwell once called "the genie that man has thoughtlessly let out of its bottle and cannot put back again,"[69] has allowed new concentrations of power, particularly in government, which utterly dwarf the individual and threaten individuality as never before. "Where in this tightly knit regime," asked Justice Douglas, "is man to find liberty?"[70] Perhaps Chief Justice Warren and the members of his Court were only being Canute-like in interposing the Bill of Rights in the face of the ever-increasing governmental ability to violate individual rights that characterizes our time.

On the vital subject of privacy and its place in the society of the future, Justice Douglas remarked, "We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where

68. THE GREAT RIGHTS 148 (A. Cahn ed. 1963).

69. 4 THE COLLECTED ESSAYS JOURNALISM AND LETTERS OF GEORGE ORWELL 75 (1968).

70. THE GREAT RIGHTS, *supra* note 68, at 148.

there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions."[71]

Justice Brandeis, one of the fathers of the legal right of privacy, observed a similar development in his noted dissent in *Olmstead v. United States*.[72] When the fourth amendment was written, declared Brandeis, force and violence were the essential means by which privacy could be invaded. It was against such relatively simple evils that the constitutional guaranty was directed. With time, Brandeis noted, subtler and more far-reaching means of invading privacy have become available to the government. "Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."[73]

The development of modern methods of electronic eavesdropping gives credence to Brandeis' observations. In 1928, when *Olmstead* was decided, the method used to intercept telephone conversations was relatively crude. The wiretapper had to splice a wire from earphones into the telephone circuit or insert magneto wires into the telephone box, then wait for calls to be made, and furiously scribble notes while the parties talked.[74] Today, the wiretapper has far more sophisticated methods of making direct wire connections[75] and is even capable of intercepting phone conversations without physical connections to the telephone or its line and wires.[76] Once intercepted, the conversations may be amplified and recorded by voice-activated recording devices that permit the equipment to be left unattended.[77] In addition, numbers called from the tapped phone may be recorded.

But it is in the area of non-wiretap electronic eavesdropping that the greatest scientific advances have occurred. The impact of these advances has been summarized by Justice Brennan:

> Electronic eavesdropping by means of concealed microphones and recording devices of various kinds has become as large a problem as wiretapping, and is pervasively employed by private detectives, police, labor spies, employers and others for a variety of purposes; some downright disreputable . . . . These devices go far beyond simple

71. Osborn v. United States, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting).

72. 277 U.S. 438 (1928).

73. *Id.* at 473.

74. *See* West, *The Wire-tapping Problem*, 42 COLUM. L. REV. 165, 197 (1952).

75. *See* S. DASH, R. SCHWARTZ, & R. KNOWLTON, THE EAVESDROPPERS 312-18 (1959) [hereinafter cited as S. DASH].

76. *See* Ognibene, *Guarding Against High-Tech Espionage*, N.Y. Times, July 15, 1983, at A23, col. 3.

77. S. DASH, *supra* note 75, at 323-24.

> 'bugging,' and permit a degree of invasion of privacy that can only be described as frightening.[78]

The potential for invasion is greatly expanded by recent developments in electronic surveillance[79] such as parabolic microphones, which can pick up conversations at considerable distances;[80] ultra-miniature wireless microphones no larger than a pencil eraser; recorders so small they can be built into cigarette lighters;[81] and microwave-beam devices with a range of 1,000 feet or more, which can penetrate walls and other obstacles.[82]

In his *Olmstead* dissent, Justice Brandeis, with "unerring moral insight,"[83] foresaw the technological revolution that so transformed the field of communications and magnified the potential for electronic eavesdropping:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.[84]

The technological changes wrought by scientific progress have outstripped the law and legal commentary. The Warren Court's protective jurisprudence may become completely outmoded by the seven-league strides being made in long-distance eavesdropping techniques.

> To be secure against police officers' breaking and entering to search for physical objects is worth very little if there is no security against the officers' using secret recording devices to purloin words spoken in confidence within the four walls of home or office . . . . If electronic surveillance by government becomes sufficiently widespread, and there is little in prospect for checking it, the hazard that as a people we may become hagridden and furtive is not fantasy.[85]

One may question how much of the concept of privacy itself will remain if, through the advances in applied science,[86] the area of privacy remaining physically immune from official scrutiny were to all but disappear.

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78. Lopez v. United States, 373 U.S. 427, 467-68 (1963) (Brennan, J., dissenting).

79. Lipset, *The Wiretapping-Eavesdropping Problem: A Private Investigator's View*, 44 MINN. L. REV. 873, 888 (1960).

80. *Lopez*, 373 U.S. 427, 468 n.16 (1963) (Brennan, J., dissenting).

81. Lipset, *supra* note 79, at 888.

82. *Lopez*, 373 U.S. 427, 468 n.16 (1963) (Brennan, J., dissenting).

83. *See* On Lee v. United States, 343 U.S. 747, 759 (1952) (Frankfurter, J., dissenting).

84. *Olmstead*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

85. *Lopez*, 373 U.S. 427, 469-70 (1963) (Brennan, J., dissenting).

86. *See* United States v. On Lee, 193 F.2d 306, 317 (2d Cir. 1951) (Frank, J., dissenting).

If society moves toward the Orwellian State, the decisions of the Supreme Court alone will not be enough to stop the trend. On the subject of privacy, for example, technological developments may bypass the restrictions laid down by the Warren Court. Justice Douglas warned:

> The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears . . . . If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the Constitution envisages it will have vanished.[87]

Will the decisions of any Court, even the Warren Court, be enough to preserve the individual from such a society? Certainly, it is true, as an English writer recently noted, that "[i]n America, the Supreme Court is supreme. In no other democratic country do nine judges, none of them elected, tell the president and the legislature what each may or may not do."[88] Even so, we should not overmagnify the judicial role in maintaining the system under which we live. As Chief Justice John Marshall stated, "The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will."[89] Responsibility for the kind of society in which we live rests ultimately not with the judges, but with the people.

Courts must not be the only instruments of government that we rely upon to preserve our rights against intrusions by the state. If they are, they will be largely inadequate for the purpose. Civil liberties can at best draw only limited strength from judicial guarantees. The Supreme Court alone cannot be expected to protect us from our own excesses. It is no idle speculation to inquire as to which comes first, judicial enforcement of constitutional rights or a free and tolerant society. Must we, as Justice Jackson inquired, first maintain a system of free government to assure a free and independent judiciary, or can we rely upon an aggressive, activist judiciary to guarantee free govern-

87. Osborn v. United States, 385 U.S. 323, 353-54 (1967).

88. THE ECONOMIST, July 2, 1983, at 16.

89. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 389 (1821).

ment?[90] Americans not infrequently forget the answer to this question. Without a doubt, the Court is of basic importance, particularly in molding public opinion to accept fully the implications of the rule of law. The law enunciated by it may have a definite educative as well as a normative effect. But it is the attitude of the society and of its organized political forces, rather than of its purely legal machinery alone, that is the controlling force in the character of free institutions.

Not long before his death, Chief Justice Warren commented on the results of a poll indicating public reaction to the Bill of Rights 180 years after its adoption. A majority of those polled favored restricting first amendment rights as well as other constitutional rights. Warren termed the poll results "disturbing," for they showed how large a segment of the population "believed that the provisions of the Bill of Rights were outdated, and not essential to our way of life."[91] In the perspective of this Commentary, the poll may reveal at least as much about the future society as does the jurisprudence of the Warren Court.

It was with profound insight that one of the greatest of modern jurists, Judge Learned Hand, declared,

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[92]

90. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 81 (1955).

91. E. WARREN, A REPUBLIC, IF YOU CAN KEEP IT 110-11 (1972).

92. C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 251 (1954).