UIC Law Review

Volume 29 | Issue 4 Article 19

Summer 1986

State v. Delaurier: Privacy Rights and Cordless Telephones - The Fourth Amendment Is Put on Hold, 19 J. Marshall L. Rev. 1087 (1986)

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*STATE V. DELAURIER**: PRIVACY RIGHTS AND CORDLESS TELEPHONES — THE FOURTH AMENDMENT IS PUT ON HOLD

In response to Supreme Court decisions[1] placing electronic eavesdropping[2] within the scope of fourth amendment protection,[3] Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[4] Title III prohibits the interception[5] and dis-

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* 488 A.2d 688 (R.I.1985).

1. *See* Katz v. United States, 389 U.S. 247 (1967) (federal agents' interception of conversation inside a phone booth without prior judicial authorization constituted an illegal search and seizure within the manner of the fourth amendment); Berger v. New York, 388 U.S. 41 (1967) (state wiretap statute which does not require a showing of probable cause held unconstitutional). In *Katz*, the Court held that the fourth amendment protects people, and not places, against unreasonable searches and seizures. *Katz*, 389 U.S. at 353. Thus, the requirement that a physical trespass into a given enclosure be made before electronic surveillance could come within fourth amendment protection, as doctrinated in Olmstead v. United States, 277 U.S. 438 (1928), was repudiated. *Katz*, 389 U.S. at 353. After the *Olmstead* decision, the permissibility of electronic eavesdropping came full circle until the *Katz* court overruled *Olmstead*'s holding that electronic surveillance without physical entry is not a search. *Compare* Nardone v. United States, 302 U.S. 379 (1937) (wiretapping is a federal crime and its gathered information is inadmissible in federal courts) *with* Schwartz v. Texas, 344 U.S. 199 (1952) (state courts are free to admit evidence obtained through wiretapping), *and TO AMEND THE WIRETAPPING LAWS, HEARINGS BEFORE SUBCOMMITTEE NO.* 1 *OF THE HOUSE COMMITTEE ON THE JUDICIARY ON H.R.* 2266 *AND H.R.* 3099, 77th Cong., 1st Sess. 18 (1941) (any person may tap telephone lines and act on the information obtained so long as he does not divulge or publish what he hears).

2. The terms electronic eavesdropping and electronic surveillance are used synonymously in this article. Both terms are used to describe what one commentator has referred to as "any means by which a third person, aided by an electronic or electrical instrument, overhears a conversation between two other persons." J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE 2, 1.01 (1977). The term wiretap, as generally understood and used in this article, refers to the "interception of wire communications, most frequently, telephone communications." *Id.* at 1, 1.01(1)(a). For a history of electronic eavesdropping and its use by government, see generally S. DASH, THE EAVESDROPPERS (1959).

3. In full, the fourth amendment 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 searches, and the persons to be seized.

U.S. CONST. amend. IV.

4. The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1982) (originally enacted as Act of June 19, 1968, Pub. L. No. 90-351, 802, 82 Stat. 212) [hereinafter referred to as Title III]. The two goals of Title III are: 1) to protect the privacy of wire and oral communications; and 2) to delineate on a uniform basis the circumstances and conditions under which the interception of such communications may be authorized. S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968

closure of wire[6] or oral[7] communications without a court order. In *State v. Delaurier*,[8] the Rhode Island Supreme Court analyzed the technology of cordless telephones[9] to decide whether Title III safeguards would protect their use. Relying primarily on a strict interpretation of the statute,[10] the court held that communications which

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U.S. CODE CONG. & AD. NEWS 2122, 2153.

5. Title III defines interception as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (1982). Any device or apparatus that can intercept wire or oral communications is covered under the statute. 18 U.S.C. § 2510(5) (1982). The only stipulated exceptions are telephone or telegraph instruments used in the ordinary course of business by a common carrier, its subscriber, or a law enforcement officer, and hearing aids which do not bring hearing to better than normal. *Id. See also* J. CARR, *supra* note 2 at 3.02(3).

6. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 defines a wire communication as

> . . . any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as common carrier in providing or operating such facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

18 U.S.C. § 2510(1)(1982).

7. An oral communication that falls within the scope of Title III is one that is "uttered by a person exhibiting an exception that such communication is not subject to interception under circumstances justifying such exception." 18 U.S.C. § 2510(2) (1982). This language reflects the holding in *Katz* that the electronic eavesdropping of the suspect in that case "violated the privacy upon which he justifiably relied." *Katz*, 389 U.S. at 353. Justice Harlan, in his concurring opinion, expanded the justifiable reliance theory with a twofold requirement: "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'." *Id.* at 361 (Harlan, J., concurring). This two-pronged test has been adopted by the Court in subsequent illegal search cases. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128 (1978). *But cf.* Falkow, *Electronic Surveillance: Protection of Privacy Expectations in Participant Monitoring Cases*, ANN. SURV. AM. L. 55, 57 (1984, vol. 1) (discussing courts which have applied the broader, exclusively objective standard of the *Katz* majority opinion and ignoring the subjective prong of the Harlan test).

8. 488 A.2d 688 (R.I. 1985).

9. A cordless telephone typically consists of a base station and a roving unit. The base station is connected to the local phone company exchange via a cable plugged into a standard telephone jack wall outlet in a manner identical to the way in which a regular telephone would be connected. The roving unit accommodates the earpiece and mouthpiece, and usually the dialing mechanism, connecting to the base station by means of a small radio transmitter in the handset. By design, its low power signal enables the cordless phone to operate only within a limited area, with an average maximum range of about 300 feet between the roving unit and base station. A cordless telephone is thus distinguished from a common landline telephone where the receiver and base are connected by wires and are together connected to the common carrier transmission lines. *See* 49 Fed. Reg. 8, 1512 (1984).

10. The Rhode Island court did, however, cite three cases as relevant case law pertaining to warrantless surveillance of radio-assisted telephone conversations: United States v. Hall, 488 F.2d 193 (9th Cir. 1973) (conversations over automobile radio-telephones constitute wire communications and therefore are within the scope

involve a cordless telephone do not fall within the scope of Title III.[11] The court was additionally burdened with having to interpret a statute that did not specifically consider the technology which was the focus of this action.[12] Consequently, police in Rhode Island may conduct surveillances of such communications without court authority or supervision.

The *Delaurier* decision has its origins in a Woonsocket, Rhode Island police station. On November 2, 1983, a local housewife called the station to report that she had overheard a conversation involving a man who was discussing the sale of drugs.[13] Her son had been playing with the dial of her AM radio and had tuned into a frequency which was carrying her neighbor Leo Delaurier's cordless telephone signals.[14] Detectives dispatched to her house reported that they heard an unanswered telephone ringing over her radio, which was still tuned to that frequency.[15] The police station captain then ordered that the station's AM radio be taken to a location near the area where the report was made and detectives were assigned to monitor the radio for illegal drug transactions.[16]

Over several weeks, the police recorded conversations involving the sale of marijuana and cocaine, gambling, and prostitution.[17] The police identified the recorded voice as Delaurier's.[18] On December 16, 1983, these recordings were submitted to a district court judge,

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of Title III regulation); Dorsey v. State, 402 So.2d 1178 (Fla. 1981) (Title III does not require a court order to intercept messages transmitted by phone to a rented "pocket-pager"); State v. Howard, 235 Kan. 236, 679 P.2d 197 (1984) (cordless phone conversations are part oral communications, with the oral communication outside the protection of Title III).

Of the three cases cited above, only *Howard* involves the same technology as that analyzed by the *Delaurier* court. The *Dorsey* court noted that it did "not reach any hypothetical questions involving more sophisticated methods of intercepting communications which in fact engender a reasonable expectation of privacy, such as landline telephone messages transmitted in part by wireless signals." *Dorsey*, 402 So.2d at 1184 n.4.

11. *Delaurier*, 488 A.2d at 695.

12. Title III is the product of combining two bills introduced in 1967: *The Federal Interception Act*, S. 675, 90th Cong. 1st Sess. (1967) and the *Electronic Surviellance Control Act of 1967*, S. 2050, 90th Cong. 1st Sess. (1967). President Johnson signed the Omnibus Crime Control and Safe Streets Act of 1968, including Title III, on June 19, 1968. The last amendment to Title III was in 1970, Act of Jan. 2, 1971, Pub. L. No. 91-64, 20, 84 Stat. 1982. The earliest versions of cordless telephones, however, did not appear on the market until 1973. Kobb, *Untangling the Cordless Phone*, PERS. COM. TECH., Apr. 1984. at 15.

13. Delaurier, 488 A.2d at 690.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Delaurier was apparently well known by several members of the Woonsocket police department. At the time of the surveillance, he was enjoying the freedom of a bail bond set in pending cases. *Id.*

who issued arrest and search warrants.[19] At a subsequent bail-revocation hearing, testimony centering largely on the surreptitous recordings[20] convinced the presiding justice to order Delaurier held without bail.[21]

The Rhode Island Supreme Court affirmed the lower court's decision, holding that Delaurier's motion to suppress the evidence obtained through the monitoring and taping of his phone conversations was correctly denied.[22] Focusing on the express provisions of Title III, the court considered whether the evidence was within the scope of the statute's exclusionary rule.[23] Because it was undisputed that the Woonsocket police did not obtain judicial authority[24] to conduct the surveillance,[25] the court turned to the definitional section of Title III[26] to support its conclusion that judicial authority is not required to monitor and record conversations involving the use of a cordless telephone.[27]

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19. *Id.*

20. At the time the recordings were made, Leo Delaurier was on bail on two pending cases involving robbery and extortion. State v. Delaurier, No. P/2 83-409 at 35, (Providence R.I. Sup. Ct. Dec. 28, 1983). Arrest and search warrants were issued on the basis of the recordings, but no other evidence was presented linking Delaurier with the illegal activities which were the subject of his intercepted phone conversations. *Id.* The recordings were enough, however, to convince the justice presiding over Delaurier's bail revocation hearing that "the conversations which were heard clearly show, at the very least, an agreement or conversations concerning agreement to do illegal things . . . So I think the State has established that Mr.Delaurier is in violation of his bail bond." *Id.* The issue of whether the recordings were legally obtained became moot upon Delaurier's subsequent release on bail notwithstanding the alleged error in his bail revocation hearing. *Id.* at 691 n.1. The Supreme Court of Rhode Island addressed the merits of Delaurier's argument, however, for three reasons: the admissibility of evidence at bail revocation hearings is likely to be a repetitious issue that evades appellate review, given Rhode Island's 90 day limit between the time of incarceration for bail violation and the trial on the charge upon which the bail was revoked; the substantial public interest in the issue presented; and to provide guidance for the lower court when facing the same issue at the trials of the several other persons arrested and charged as the result of the investigation. *Id.*

21. *Delaurier*, 488 A.2d at 691.

22. *Id.* at 695.

23. Title III's exclusionary rule states that:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515 (1982).

24. Due to the extensive invasion of privacy with communication surveillance, Congress included a number of procedural and substantive safeguards more restrictive than an ordinary search warrant. C. FISHMAN, WIRETAPPING AND EAVESDROPPING 14 (1978). The provisions for authorization and use of intercepted wire or oral communications can be found in 18 U.S.C. §§ 2516-2518 (1982).

25. *Delaurier*, 488 A.2d at 692.

26. 18. U.S.C. § 2510 (1982).

27. *Delaurier*, 488 A.2d at 692.

The court found that Delaurier's conversation was not a wire communication[28] and, therefore, not within the meaning of Title III.[29] Although the court recognized that Title III defines a wire communication as one made "in part . . . by aid of wire",[30] it concluded that applying this language in cases involving cordless telephones would produce an "absurd result"[31] not within congressional intent.[32] The court reasoned that the communication which the roving unit transmitted to the base station was a radio transmission and, therefore, was not to be given the same definitional value as the communication which the base station transmitted through the telephone lines.[33] Interference with the *radio* portion of the transmission could not be viewed as interference with a *wire communication.*

After deciding that Delaurier's conversation was not a wire communication, the court briefly addressed the issue of whether it qualified as an oral communication[34] under Title III.[35] A subjective, justifiable expectation of privacy must exist before an oral communication is included within Title III's statutory and regulatory framework.[36] The *Delaurier* court held that because the owner's manual for Delaurier's telephone warned the user that, due to its nature, privacy was not assured,[37] any expectations of privacy with the use of a cordless phone were not justifiable.[38]

In its final analysis, the court reasoned that even if Delaurier's conversation could be characterized as an oral communication, it was not "intercepted"[39] within the meaning of Title III.[40] A mechanical, electronic, or other device must be employed before an inter-

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28. For a definition of wire communication, see *supra* note 6.

29. *Delaurier*, 499 A.2d at 694.

30. 28 U.S.C. § 2510(1) (1982).

31. The "absurd result" referred to by the court was taken from a characterization of a federal court's own decision which held that use of a mobile radio-telephone could be a wire communication within definition of Title III. United States v. Hall, 488 F.2d 193, 197 (9th Cir. 1973). The "in part . . . by aid of wire" language of the definition forced the court to conclude that if one party to the conversation is using a regular telephone, the entire conversation is a wire communication. *Id.* The absurdity, the court goes on to state, is that this type of communication should logically be afforded no more protection than a communication between two radio-telephones. *Id. But see infra* note 57 and accompanying text.

32. *Delaurier*, 488 A.2d at 693-94.

33. *Id.* at 693.

34. For a definition or oral communication, see *supra* note 7.

35. *Delaurier*, 488 A.2d at 694.

36. *Id. See supra* note 7.

37. Federal law requires cordless telephones to carry the warning that, among other things, "privacy of communications may not be insured when using this phone." Federal Communication Commission, 47 C.F.R. § 15.236 (1985).

38. *Delaurier*, 488 A.2d at 694. *See* State v. Howard, 235 Kan. 236, 679 P.2d 197 (1984).

39. For a definition of interception, see *supra* note 5.

40. *Delaurier*, 488 A.2d at 694.

ception violative of Title III provisions occurs.[41] The court concluded that Congress could not have intended that a standard AM radio be considered a "device" under the statute.[42] The police, therefore, did not need a court order to listen to a standard radio that received Delaurier's telephone conversations.

According to the Rhode Island Supreme Court's interpretation of Title III, police may conduct surveillances of indefinite duration without probable cause, court supervision, or the need to obtain a search warrant on the millions[43] of persons who choose to use a particular type of telephone in their homes or offices.[44] A proper interpretation of Title III would subject police monitoring of a cordless telephone communication to the same strict guidelines which control other types of telephone eavesdropping.[45] This would more accurately reflect the goals of Title III[46] as well as the intent of the fourth amendment.[47] Instead, *Delaurier* exemplifies the decisional errors that occur when a court attempts to apply law to a technology the court does not fully comprehend.

In the context of electronic surveillance and fourth amendment interpretation, a classic example of this form of judicial error is found in *Olmstead v. United States*.[48] Although by 1928 the telephone was becoming a well established necessity for home and business, the United States Supreme Court majority in *Olmstead* did

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41. 18 U.S.C. § 2510 (4-5) (1982).

42. *Delaurier*, 488 A.2d at 694-95.

43. In mid 1984, six to eight million cordless telephones were in use with another ten million predicted to be sold by year's end. Kobb, *Untangling The Cordless Phone*, PERS. COM. TECH., Apr. 1984, at 41.

44. The popularity and general acceptance of cordless telephones suggest they are more than an aberration or a novelty. In certain situations, (for example providing immediate access to a telephone for a wheelchair-bound individual) a cordless telephone may be just as important and necessary as a landline telephone.

45. *See supra* note 21. *See also ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE — STANDARDS RELATING TO ELECTRONIC SURVEILLANCE* 137-40 (Approved Draft, 1971) (a discussion of probable cause requirements for electronic surveillance warrants).

46. For a discussion of Congress' twin goals for Title III *see supra* note 4.

47. *See infra* notes 83-85 and accompanying text.

48. 277 U.S. 438 (1928). Roy Olmstead was a Seattle bootlegger who had an operation large enough to attract the attention of federal prohibition agents. W. MURPHY, WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS 16 (1965). Several months worth of evidence acquired during secret wiretap monitoring of Olmstead's home and office telephones was used to convict Olmstead in federal court of violating the Volstead Act. *Id.* In answer to the assertion that the unauthorized wiretaps constituted a fourth amendment violation, the majority opinion for the Ninth Circuit Court of Appeals reasoned that:

> [t]he purpose of the amendment is to prevent the invasion of homes and offices and the seizure of incriminating evidence found therein. Whatever may be said of tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of crime, it is not an act which comes within the letter of the prohibition of constitutional provisions.

Olmstead v. United States, 19 F.2d 842, 847 (9th Cir. 1927).

not properly view this technology in light of basic constitutional principles.[49] The *Olmstead* court acknowledged that science has enabled communication to take place without a tangible, material courier or the physical presence of communicants.[50] Yet the Court could not conceptualize a fourth amendment violation that lacked either a seizure of a tangible item or a search without a physical presence.[51] It was almost forty years before the Court properly applied fourth amendment principles to telephone technology.[52]

In a manner similar to *Olmstead*, the *Delaurier* court gave insufficient consideration to fourth amendment principles which are embodied in Title III. Instead, the court applied technologically incorrect interpretations of the terms "wire communications," "oral communications," and "interception" to the technology of cordless telephones.[53] Consequently, the *Delaurier* court denies users of cordless telephones the protection logically afforded to them by the fourth amendment.

The *Delaurier* court held that Delaurier's conversation was not a wire communication because the portion of the communication that was intercepted was not carried by wires.[54] In so holding, the *Delaurier* court misunderstood both legislative intent and the function of cordless telephones. The legislative history of Title III emphasizes that the definition of wire communication[55] is intended "to include all communications carried by a common carrier, in whole or in part, through our nation's communications network."[56] A cordless

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49. The *Olmstead* court stated:

> The [Fourth] amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants . . . The languages of the amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

Olmstead, 277 U.S. at 464-65.

50. *Id.* at 465.

51. *Id.* at 466. This physical presence requirement of *Olmstead*, referred to as the Trespass Doctrine, inevitably produced incongruous decisions as electronic surveillance techniques grew more sophisticated. *Compare* Goldman v. United States, 316 U.S. 129, 135 (1942) (microphone placed against outside wall of room was allowed because it presented "no logical or reasonable distinction" from actions in *Olmstead) with* Silverman v. United States, 365 U.S. 505 (1961) (spike microphone penetrating 5/16ths of an inch into a room constituted a trespass in violation of the fourth amendment).

52. Katz v. United States, 389 U.S. 347 (1967). In overruling *Olmstead*, the *Katz* court acknowledged that illegal search and seizure can occur without a physical intrusion or confiscation of intangible items. *Id.* at 353.

53. *See supra* notes 26-40 and accompanying text.

54. *Delaurier*, 488 A.2d at 693.

55. For the Title III definition of wire communication, see *supra* note 6.

56. S. REP. No. 1097, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2178 (1968).

telephone, by definition, falls within that category.[57] Nevertheless, the *Delaurier* court ignored the express legislative intent of Title III and excluded cordless telephones from the statute's protection to avoid the possibility of "absurd results."[58]

In so doing, the court overlooked the absurdity of its rationale. A cross-country call originating from a telephone connected through a wire to a wall jack and using the nation's communications network coast to coast is afforded Title III protection against warrantless eavesdropping. That same cross-country call, according to *Delaurier*, would not be protected if the caller chose to use a cordless telephone to transmit through that same wall jack from an adjoining room. The right to be secure in one's person and house against unreasonable searches and seizures[59] should not be cast aside simply because technology untethered us from our telephones.[60] The *Delaurier* court, like the Court in *Olmstead*,[61] obscured the intent of the fourth amendment in its confusion over a technological advancement.

The *Delaurier* court, in its confusion over the technical capabil-

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57. A cordless telephone uses the same carrier facilities as any other telephone from the point of the base station located inside the caller's house to the party at the other end. *See supra* note 9.

58. *Delaurier*, 488 A.2d 693. The absurd results the court referred to is an analogy to United States v. Hall, 488 F.2d 193 (9th Cir. 1973). The *Hall* court, after admitting that the language of Title III protects mobile telephone conversations, said that this interpretation gives protection to persons using a mobile telephone to call a landline telephone, but not when he calls another mobile telephone because no wires are being used. *Id.* at 197. This is a misunderstanding of how a mobile telephone works. Signals are not sent and received from telephone to telephone, but rather are sent and received through base stations which in turn use normal carrier lines to either connect to a landline telephone or to another base station. The wires that the *Hall* court places so much emphasis on are present in either method. *Id.*

The *Hall* and *Delaurier* courts confuse the capabilities of cordless telephones and mobile telephones with pure radio-type communication systems. *Cf.* Goodall's Charter Bus Serv., Inc. v. San Diego Unified School Dist., 125 Cal. App.3d 194, 178 Cal. Rptr. 21 (1981) (interception of two-way radio system signals between school bus and dispatcher); Chandler v. State, 366 So.2d 64 (Fla. 1978) (interception of signals between two walkie-talkies), *cert. denied*, 376 So.2d 1157 (Fla. 1979), *aff'd*, 449 U.S. 560 (1981).

The *Hall* court correctly uses the significance of whether the signal passes through a common carrier's wires as the deciding factor in determining a wire communication. However, if this element is not present, even communications made entirely by wire do not fall under the Title III definition. *See e.g.*, United States v. Christman, 375 F. Supp. 1354, 1355 (N.D. Cal. 1974) (definition of wire communications does not encompass an in-house intercom system.).

59. U.S. CONST. amend. IV.

60. Just as the invention of the telephone freed persons from having to leave their house to communicate with someone across town, so does the cordless telephone free persons from having to remain in designated places to use the telephone. As cordless telephone technology improves, conventional wired telephones may soon be obsolete. Kobb, *Untangling the Cordless Phone*, PERS. COM. TECH., Apr. 1984, at 41.

61. Olmstead v. United States, 277 U.S. 438 (1928). For a discussion of the *Olmstead* decision, see *supra* notes 46-50 and accompanying text.

ities of a cordless telephone as compared to those of other communication devices, erred when it turned to Title III's definition of oral communication.[62] The court first correctly noted that an oral communicant must have a subjective and justifiable expectation of privacy.[63] The court then concluded that the broadcast nature of a cordless telephone belies any justifiable privacy expectations.[64] What the court did not consider was the extremely limited transmission range of cordless telephones and how that affects a user's expectation of privacy.

Under ideal conditions, the average maximum range of use for a cordless telephone is 300 feet.[65] Just as a subscriber to a party line may reasonably set his expectations of privacy within certain parameters,[66] so may a user of a cordless telephone reasonably assume his conversations will not go beyond his few close neighbors within the telephone's limited range.[67] The legislative history of Title III emphasizes that the place where the conversation occurs is an important factor in determining whether the speaker's expectation of privacy is justifiable.[68] The *Delaurier* court, however, chose not to consider the generally accepted notion that one's home is the most reasonable place to expect to carry on private conversations.[69]

Because the court could not comfortably rest its conclusion on the "expectation of privacy" reasoning,[70] the court shifted its focus

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62. For Title III's definition of oral communication, see *supra* note 7.

63. *Delaurier*, 488 A.2d at 694 (quoting 18 U.S.C. § 2510(2) (1982)).

64. *Id.* The court mostly relied on the fact that an owner's manual which comes with the telephone carries a mandatory FCC warning that eavesdropping can occur. *See supra* notes 36-37 and accompanying text.

65. Kobb, *Untangling The Cordless Phone*, PERS. COM. TECH., Apr. 1984, at 15. Unlike cellular or mobile radio telephones, the cordless telephones transmit a signal less than 500 feet. Federal Communications Commission, 47 C.F.R. § 15.2333(c) (1985).

66. Lee v. Florida, 392 U.S. 378 (1968) (police may not intercept a conversation on a party line even though the participants know other subscribers may be listening). *See also* United States v. San Martin, 469 F.2d 5 (2d Cir. 1972) (using the telephone of a party line subscriber with permission does not authorize police to intercept conversations of non-consensual subscribers), *cert. denied* 410 U.S. 934 (1973).

67. Because the practice of monitoring cordless telephone calls is illegal, a user should have a justifiable expectation that his neighbors (or the police) will not break the law within the telephone's limited range. *See* Federal Communications Commission, 47 C.F.R. 15.11 (1985).

68. S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2178.

69. For prior expectation of privacy reasoning, see Steagald v. United States, 451 U.S. 204, 211-12 (1981). *See also* United States v. Knotts, 460 U.S. 276 (1983) (greater expectation of privacy in a dwelling place than in an automobile); Silverman v. United States, 365 U.S. 505 (1961) (holding that the notion that the home is generally assumed to be private and free from unreasonable search and seizures is at the heart of the fourth amendment). *But cf.* Hester v. United States, 265 U.S. 57 (1924) (fourth amendment protection does not extend to open fields surrounding one's house).

70. *See Delaurier*, 488 A.2d at 694 n.4. The court admits that a person on the

to the "interception" element of Title III. A proper interpretation of Title III's definition of interception includes, with few exceptions, any electronic device capable of accepting wire or oral communications.[71] A radio is an electronic device capable of accepting a wire or oral communication.[72] Furthermore, a radio does not qualify for any of the exemptions expressed in Title III.[73] The court, however, refused to apply the clear language of Title III, reasoning that Congress could not have meant for an ordinary radio to fall within this inclusive definition.[74] A better understanding of the technology involved would necessitate the inquiry of when a radio ceases to be a radio and becomes an eavesdropping device. More importantly, it is the purpose for which something is used, not what it is, that should control when Title III violations are encountered.[75]

The court also erred when it described Delaurier's conversation as an AM broadcast accessible to anyone possessing an AM radio.[76] The bandwidths which cordless telephones operate within are well beyond the designated radio broadcast frequencies that many radios are capable of receiving.[77] Delaurier's broadcast actually was on a

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other end of Delaurier's telephone conversations may have been unaware of his use of a cordless telephone and may be justified in expecting privacy. The logical extension of this notion, then, is that interception of Delaurier's calls was illegal because someone's reasonable and justifiable expectation of privacy was violated.

If the *Delaurier* court chose to address this issue at length, the notion of implied consent could have entered into the proceedings. A court order is not required to intercept communications when one of the parties to the conversation has given prior consent to the interception. 18 U.S.C. 2511(2)(c) (1982). Delaurier, by engaging in a conversation that he knew was not private, could be said to have implied consent to its interception. *See* Commonwealth v. Gullett, 459 P. 431, 436, 329 A.2d 513, 519 (1974), *But cf.* Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (9th Cir. 1983) (consent under Title III is not to be cavalierly implied).

71. For Title III's definition of interception, see *supra* note 5.

72. 18 U.S.C. § 2510(5) (1982).

73. 18 U.S.C. § 2510(5) (a-b) (1982).

74. *Delaurier*, 488 A.2d at 694-95.

75. Even an ordinary extension telephone, which *is* specifically excluded as a device under 18 U.S.C. 2510(5), can become an eavesdropping device when it is not used as intended. If the speaker element in the handset is removed (a simple, nonpermanent procedure that takes only a few seconds), the telephone becomes an eavesdropping device by definition. People v. Gervasi, 89 Ill.2d 522, 434 N.E.2d 1112 (1982).

76. *Delaurier*, 488 A.2d at 694.

77. Radio frequencies which may be used for commercial broadcasts are assigned by federal law. AM radio broadcasts on the bandwidths between 535 kHz and 1605kHz on the frequency spectrum and FM radio broadcasts between 88 MHz and 108 MHz. 47 C.F.R. § 2.106 (1985). Cordless telephones operate at both 49 MHz (below the FM broadcast band) and from 1625 kHz to 1800 kHz (above the AM broadcast band). 49 Fed. Reg. 8, 1512 (1984). The October 1, 1985 revised FCC guidelines have eliminated the AM broadcast band from permissible operating frequencies for the current models of cordless telephones. Federal Communications Commission, 47 C.F.R. § 15.232 (1985). The new telephones will operate in the 49 MHz band and the recently released 46 MHz band. *Id.* This change is primarily the result of International Telecommunication Union decisions which call for expansion of AM broadcasting into the 1700 kHz band within a few years. Kobb, *Untangling the Cordless*

spectrum located between the AM broadcast band and the 160-meter amateur radio band.[78] Title III certainly was not intended to prevent anyone from listening to an AM broadcast.[79] Yet, when a radio is intentionally tuned beyond any usable AM broadcast frequency for the purpose of monitoring private telephone conversations, it falls squarely within Title III's control.[80] An electronic device should not escape Title III scrutiny simply because it can also be used in a different, but law-abiding, manner.

The final reason the *Delaurier* court erred in holding that the interception of Delaurier's telephone conversation did not violate Title III is more philosophical than technical. The fourth amendment was drafted in an effort to prevent government misconduct.[81] It was an articulation of the resentment the framers of the Constitution had toward the writs of assistance and general warrants officers of the crown used in their indiscriminate searches.[82] Congress, when enacting Title III, kept in mind this lack of particularity that the framers abhorred.[83] The *Delaurier* court, by interpreting the language of Title III to exclude cordless telephones, ignored these principles underlying the fourth amendment. According to *Delaurier*, police can intercept calls made on cordless telephones and are under no restraint or guidelines as to basic fourth amendment standards such as probable cause, minimization, and duration.[84] As cordless telephones become more common, the possibilities of constitutional

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Phone, PERS. COM. TECH., Apr. 1984, at 15. The government thus continues to allocate frequency spectrums for private communications separate and distinct from those designated for commercial broadcast use.

78. This is what one commentator describes as "radio outer limits." Kobb, *Untangling The Cordless Phone*, PERS. COM. TECH., Apr. 1984, at 15.

79. *Delaurier*, 488 A.2d at 694.

80. Title III's exclusionary rule is not limited to evidence which is intentionally intercepted. 18 U.S.C. § 2510 (1982). Criminal sanctions, however, apply only to intentional activities. 18 U.S.C. § 2511(1)(a)-(d) (1982). The court should not find sanctions against eavesdropping absurd because the law is clear on this matter. *Delaurier*, 488 A.2d at 694. *See* Federal Communications Commission, 47 C.F.R. § 15.11 (1985) (prohibition against eavesdropping). *Compare* State *ex rel.* Flournoy v. Wren, 108 Ariz. 356, 360-61, 498 P.2d 444, 448 (1972) (conversation inadvertently overheard by motel switchboard operator found not to violate Title III) *with* State v. Dwyer, 120 Ariz. 291, 294, 585 P.2d 900, 903 (1978) (telephone operator listening for fifteen minutes was not an inadvertent interception and violates Title III).

81. *See, e.g.*, Nix v. Williams, 467 U.S. 431 (1984) (the core rationale for the exclusionary rule is to deter police from violations of constitutional protections not withstanding the cost of letting obviously guilty persons go unpunished).

82. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 30 (1966).

83. SEN. REP. NO. 1097, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2161-2162.

84. For a general discussion of fourth amendment standards relating to electronic surveillance, see Cranwell, *Judicial Fine-tuning of Electronic Surveillance*, 6 SETON HALL L. REV. 225 (1975). *See also* Katz v. United States, 389 U.S. 347, 356 (1967) (limitations regarding electronic surveillance, such as maximum duration of time allowed for surveillance and court guidelines as to when surveillance should be allowed).

violations increase. With *Delaurier* as precedent, random monitoring of telephone conversations may become a routine law enforcement activity for the police unit on patrol. The *Delaurier* holding, in effect, limits the right to be free from warrantless searches by electronic eavesdropping to only those willing to sacrifice technological advances in communications.

The fact that the Woonsocket police sat outside of Delaurier's house and amassed one hundred hours of eavesdropping[85] over several weeks without need of a court order suggests a gap in either the law or the court's reasoning. In response to what may be a gap in the law, a bill has recently been introduced in Congress[86] which in part would change Title III's definition of wire communication to more precisely include communication devices such as cordless telephones.[87] The gaps in judicial reasoning, however, will have a profound impact on the growing number of persons who will be without legal redress for violations of their constitutional rights because they choose to take advantage of certain technological advances offered in a modern society.

The *Delaurier* court attempted to legitimatize the Woonsocket police department's actions with a strained interpretation of Title III. The words of Title III, however, frame underlying fourth amendment principles that allow the intent of the statute to be clear even as technology changes the circumstances. It took the Supreme Court almost forty years to acknowledge that fourth amendment protection should not be denied to telephone users simply because technology changed the way people communicate.[88] Now that technology has changed the type of telephones people use, the courts should be flexible enough to interpret the law to accommodate those technological advances. A better understanding of the technology in question, by both court and counsel, will help avoid the factually erroneous analysis which in this case precluded constitutional pro-

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85. *Freedom But No Privacy On Cordless Phone*, PRIVACY J., Jan. 1984, at 10.

86. H.R. 3378, 99th Cong., 1st Sess. (1985).

87. Under the proposed bill, the term "wire communication" would be amended to "electronic communication . . . [which] means any transmission of signs, signals, writings, images, sounds, data, or intelligence of any nature in whole or in part by a wire, radio, electromagnetic, or photoelectric system . . . " H.R. 3378, 99th Cong., 1st Sess. at 101(a)(1)(1985). *But see, Testimony on H.R. 3378 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice* 99th Cong. 2nd Sess. 5-6 (Mar. 5, 1986)(statement of James Knapp, Deputy Assistant Attorney General Criminal Division, U.S. Dept. of Justice) (recommendation that radio transmission portion of cordless telephones not be subject to Title III unless signals are encrypted).

88. Katz v. United States, 389 U.S. 347 (1967). *See also* Olmstead v. United States, 277 U.S. 438 (1928) and *infra* notes 46-50 and accompanying text.

tection for a user of technologically advanced communication system.

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