Supplementary Material

Chapter 9: Liberalism Divided—Criminal Justice

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

In 1976, Michael Lee Smith robbed Patricia McDonough. Soon thereafter, Smith began to make obscene phone calls to McDonagh in which he identified himself as the man who had robbed her. McDonough was able to give a description of Smith and his car to police. Without first obtaining a warrant, the police used that information to install a pen register at the local telephone company. A pen register is a mechanical device that records only the phone numbers dialed from a specified phone, in this case Smith's home phone. When the register recorded that Smith dialed McDonough's number again, the police were able to obtain a search warrant for his home, which led to his arrest and subsequent indictment for robbery. Smith moved that installation of the pen register be declared illegal and that the evidence from all subsequent searches be excluded from trial. The searches were declared valid, and Smith was convicted. The state courts upheld that initial ruling. Smith appealed to the Supreme Court of the United States.

The U.S. Supreme Court affirmed the Maryland courts in a 6–2 decision. Justice Blackmun's majority opinion determined that Smith had no reasonable expectation of privacy for data regarding his phone calls. The Court had previously held that a warrant was constitutional required before police could use a wiretap to listen to phone conversations. Smith *was different, the justices in the majority maintained, because people routine reveal the numbers they dial to other parties (the phone company). Is there a reasonable expectation of privacy for information about who a person calls as well as for the content of the calls themselves? Is the fact that private companies have access to data sufficient to allow the government to have access that data? If Google and advertisers know your search history, do you have a reasonable expectation of privacy that the government will not also have access to that search history? Does caller ID reduce the reasonable expectation of privacy in phone numbers? Given the holding in this case, does the government need a warrant to learn the recipients (but not the contents) of your email and text messages?*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether the installation and use of a pen register constitutes a "search" within the meaning of the Fourth Amendment, made applicable to the States through the Fourteenth Amendment. . . .

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. . . . In determining whether a particular form of government-initiated electronic surveillance is a "search" within the meaning of the Fourth Amendment, our lodestar is *Katz v. United States* (1967). In *Katz*, Government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a "search" can occur only when there has been a "physical intrusion" into a "constitutionally protected area," noting that the Fourth Amendment "protects people, not places." . . .

Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. . . . This inquiry . . . normally embraces two discrete questions. The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy." . . . The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" . . .

In applying the *Katz* analysis to this case, it is important to begin by specifying precisely the nature of the state activity that is challenged. The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his "property" was invaded or that police intruded into a "constitutionally protected area." . . .

Given a pen register's limited capabilities, therefore, petitioner's argument that its installation and use constituted a "search" necessarily rests upon a claim that he had a "legitimate expectation of privacy" regarding the numbers he dialed on his phone.

This claim must be rejected. First, we doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies "for the purposes of checking billing operations, detecting fraud, and preventing violations of law." . . . Although most people may be oblivious to a pen register's esoteric functions, they presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls. . . . Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

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[E]ven if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not "one that society is prepared to recognize as 'reasonable.'" This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. . . . [F]or example, the Court [has] held that a bank depositor has no "legitimate 'expectation of privacy'" in financial information "voluntarily conveyed to . . . banks and exposed to their employees in the ordinary course of business." . . .

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. . . . The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not, in our view, make any constitutional difference. Regardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record. In these circumstances, petitioner assumed the risk that the information would be divulged to police. . . .

We therefore conclude that petitioner in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not "legitimate." The installation and use of a pen register, consequently, was not a "search," and no warrant was required. . . .

Affirmed.

JUSTICE POWELL took no part in the consideration or decision of this case.

JUSTICE STEWART, with whom JUSTICE BRENNAN joins, dissenting.

I am not persuaded that the numbers dialed from a private telephone fall outside the constitutional protection of the Fourth and Fourteenth Amendments.

. . . . [S]ince *Katz* it has been abundantly clear that telephone conversations carried on by people in their homes or offices are fully protected. . . .

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The central question in this case is whether a person who makes telephone calls from his home is entitled to make a similar assumption about the numbers he dials. What the telephone company does or might do with those numbers is no more relevant to this inquiry than it would be in a case involving the conversation itself. It is simply not enough to say, after *Katz*, that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will disclose them to the police.

I think that the numbers dialed from a private telephone—like the conversations that occur during a call—are within the constitutional protection recognized in *Katz*. It seems clear to me that information obtained by pen register surveillance of a private telephone is information in which the telephone subscriber has a legitimate expectation of privacy. The information captured by such surveillance emanates from private conduct within a person's home or office. . . . Further, that information is an integral part of the telephonic communication that under *Katz* is entitled to constitutional protection, whether or not it is captured by a trespass into such an area.

The numbers dialed from a private telephone—although certainly more prosaic than the conversation itself—are not without "content." Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.

I respectfully dissent.