much deprived of his liberty by a sentence to a year in jail for a minor offense as by a sentence to a year in jail for any other crime, however serious.

The issue considered here has not yet been the subject of litigation in the Georgia courts and no prediction is made as to the course they would follow in such a situation. The author has, however, formed a definite opinion that the reasoning of the Minnesota court in the case here noted is the most commendable and should be applied if the occasion arises. In a case where a misdemeanant may be subject to incarceration,[15] Georgia should provide counsel just as they long have done for those accused of a felony or capital offense.[16]

In a final analysis, it would appear that due to the inconsistent treatment in the state and lower federal courts, the Supreme Court must eventually promulgate binding precedent. If such action is forthcoming, and the author agrees with Mr. Justice Stewart that it should be,[17] it seems that the constitutional guarantee of the right to counsel must extend to all cases where a defendant is in jeopardy of loss of liberty.

JAMES V. HILBURN

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—PHYSICAL TRESPASS NO LONGER DETERMINATIVE IN ASCERTAINING THE SCOPE OF THE FOURTH AMENDMENT

In the case of *Katz v. United States*[1] the defendant was convicted of a Violation of a federal statute prohibiting interstate transmission by wire communication of bets and wagers. The circuit court affirmed the holding of the lower court, and certiorari was granted. The Supreme Court held that the government's activities in "bugging" a public telephone booth violated the privacy upon which the defendant justifiably relied and constituted a "search and seizure" within the meaning of the fourth amendment.[2] The Court stated that the fact that the device employed to record defendant's words did not penetrate the wall of the booth was without constitutional significance.[3]

This decision is noteworthy for it greatly broadens the scope of the fourth amendment beyond a strictly literal interpretation, as there was not a technical trespass in the principal case. The controlling question the court an-

15. GA. CODE ANN. §27-2502 (Supp. 1967).
16. Fair v. Balcom, 216 Ga. 721, 119 S.E.2d 691 (1961); Delk v. State, 99 Ga. 667, 26 S.E. 752 (1896).
17. Winters v. Beck, 385 U.S. 907, 908 (1966) (Stewart, J., dissenting opinion).
1. 389 U.S. 347 (1967).
2. U.S. CONST. amend IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . ."
3. 389 U.S. 347 (1967).

swered was: Did the fact that the government surveillance technique involved no physical penetration of the booth take the case out of the scope of the fourth amendment?

Boyd v. United States[4] is the landmark case defining the scope of the fourth amendment. The case was characterized by the Court's intention to stress the spirit and purpose behind the amendment, rather than to handcuff it by giving the words "search and seizure" a literal, rigid definition. The Court analyzed the problem of search and seizure historically and stressed certain fundamental principles under a free government which

> . . . apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .[5]

The conservative view would hold the words "search and seizure" to a strictly literal interpretation, but over seventy-five years ago the Court, in *Boyd,* promulgated the view of

> . . . adhering to the rule that constitutional provisions for the security of a person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.[6]

Subsequent cases, however, failed to give a liberal, interpretive view to the fourth amendment. In the first wiretap case to reach the Supreme Court, it was held that the fourth amendment was not violated because an actual trespass had not occurred.[7] The majority based its reasoning on the theory that searches and seizures could not apply so as to forbid hearing or sight. Justice Brandeis put forth a vigorous dissent, stating that the intention of the framers of the Constitution was to confer on citizens

> . . . the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the fourth amendment.[8]

The majority opinion in *Olmstead* was followed by the Court in *Goldman v. United States.*[9] In this case, a detectaphone was used to pick up

4. 116 U.S. 616 (1886).
5. *Id.* at 630. For a general discussion of modern surveillance techniques such as directional microphones of the shotgun type and parabolic mike types, which make it possible to listen from distances of several hundred feet to conversations held in rooms with open windows *see* Westin, *Science, Privacy, and Freedom,* 66 COLUM. L. REV. 1003, 1005-10 (1966).
6. *Id.* at 635.
7. Olmstead v. United States, 277 U.S. 438 (1928).
8. *Id.* at 478.
9. 316 U.S. 129 (1942).

sound waves in the suspect's office. Since the listening apparatus involved no actual trespass, this procedure was held not to be violative of the fourth amendment.

In *Silverman v. United States*[10] the Court held that physical penetration into petitioner's premises, by use of a "spike mike" to pick up conversations, was a violation of petitioner's constitutional rights under the fourth amendment. The Court stressed the fact that there was an intrusion into a constitutionally protected area. Later cases followed this doctrine of determining if a case came within the scope of the fourth amendment, by testing to see if there had been a physical penetration into this so-called constitutionally protected area.[11]

The Court in *Berger*[12] did not overrule those cases which preceded it, but there was a subtle emphasis away from the technical trespass requirement. In *Berger* there is the suggestion that "the Court has turned its attention more toward privacy in its generic sense than toward the narrower approach of delimiting a constitutionally protected area."[13] But, it must be noted that nowhere in *Berger* "was a distinction drawn between eavesdropping accomplished by breaking the close and non-penetrating eavesdropping."[14]

In the principal case the Court held that the purpose of the fourth amendment was to protect people, not areas, against unreasonable searches and seizures.[15] Already, in *Warden v. Hayden*, the Court had held that "the premise that property interests control the right of the Government to search and seize has been discredited."[16] The Court in *Katz* applies a broad and liberal interpretation of the fourth amendment, refusing to shackle the amendment by only applying it if and when there has been a technical trespass. The trespass doctrine applied in *Olmstead* and *Goldman* is specifically overthrown.[17]

It is to be noted that the *Katz* decision is historically correct. The wheel has gone the full circle, and the Court is returning to the doctrines enunciated in *Boyd*. The protection of the individual's privacy must be a primary consideration in a free society. To hold that the fourth amendment can be invoked only where there has been a physical trespass is to defeat the spirit and purpose of the amendment, which is to protect citizens from unreasonable searches and seizures wherever and however they may occur.

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10. 365 U.S. 505 (1961); *See generally* Comment, *Constitutionally Protected Areas,* 18 MERCER L. REV. 477 (1967).
11. Wong Sun v. United States, 371 U.S. 471 (1963); Berger v. New York, 388 U.S. 41 (1967).
12. Berger v. New York, 388 U.S. 41 (1967). For a general discussion of the cases and reasoning up to Katz *see* 17 AMER. U. L. REV. 107 (1967).
13. 5 SAN DIEGO L. REV. 107, 122 (1968).
14. *Id.* at 123.
15. 389 U.S. 347 (1967). On the many ramifications of privacy, *see generally* A. WESTIN, PRIVACY AND FREEDOM (1966).
16. 387 U.S. 294, 304 (1967).
17. 389 U.S. 347 (1967).

CONTRACTS—ILLEGALITY—CONTRACTS EXECUTED ON SUNDAY

Plaintiff, a real estate contractor, brought an action for breach of contract on a listing agreement. In trial by a master it was found that the agreement was executed on a Sunday and was therefore invalid under New Hampshire law. The New Hampshire statute states, "No person shall do any work, business, or labor of his secular calling, to the disturbance of others," on Sunday, except for "works of necessity and mercy."[1] On appeal the Supreme Court of New Hampshire sustained plaintiff's exceptions in part, ruling "that where parties to an exclusive real estate listing agreement were willingly assembled on a Sunday in vendor's private home, without solicitation by realtor, for purpose of executing agreement, the activity was not to the disturbance of others and the agreement was not invalid and unenforceable."[2]

Under common law, contracts executed on Sunday were not void.[3] However, in modern times many contracts have been rendered invalid and therefore unenforceable under the Sunday observance statutes which prohibit certain acts. Although there are states which have statutes explicitly declaring Sunday contracts void,[4] most Sunday contracts are declared invalid because their execution is construed to violate a criminal statute. Any act which might be lawfully done on secular days might lawfully be done on Sunday, unless forbidden by statute.[5] These criminal statutes prohibiting certain acts on Sunday fall into three basic categories in their language, although all allow acts of necessity and charity. The three categories prohibit respectively: (1) worldly employment or business, (2) work or labor, and (3) work or business in one's secular calling on Sunday.

Under the first type of statute, prohibiting worldly employment or business, Sunday contracts have generally been held invalid.[6] However, a liberal interpretation of such a statute has allowed a contract for the sale of real estate.[7]

Under the second type of Sunday observance statute, which prohibits work or labor, a greater percentage of contracts are allowed than under either of the other two types of statutes. Under this category business agreements are generally allowed.[8]

1. N. H. REV. STAT. ANN. 578:3 (1955).
2. Brown v. Teel, 236 A.2d 699 (N.H. 1967).
3. 50 AM. JUR. SUNDAYS AND HOLIDAYS §43 (1944).
4. *E.g.*, MICH. COMP. L. ANN. §435:11 (1955).
5. Rodman v. Robinson, 134 N.C. 503, 47 S.E. 19 (1904).
6. Ryan v. Gilbert, 320 Mass. 682, 71 N.E.2d 219 (1947); Bowen v. Purcell, 100 N.J.Eq. 319, 134 A. 665 (1926).
7. Chadwick v. Stokes, 162 F.2d 132 (3d Cir. 1947).
8. Glitzke v. Ginsberg, 258 S.W. 1004 (Mo. 1924); Roberts v. Barnes, 122 Mo. 405, 30 S.W. 113 (1895).

The third category, which involves statutes prohibiting work or business in one's secular calling, has resulted in a great diversity of opinion in the cases, which, incidentally, have usually concerned real estate contracts. It was held in one jurisdiction, where this third category of statutes is effective, that a contract to buy real estate executed on Sunday was valid, as the execution of the contract was not an act done as part of the plaintiff's usual business or calling.[9] There, the emphasis was put on the nature of the act of executing a contract, an act outside plaintiff's ordinary calling. However, a study of the cases in the New Hampshire Supreme Court will show that that court has ignored the problem of whether the execution of the contract is an act within the party's secular calling. The court has concentrated its attention on the question of whether the act was to the disturbance of others. Until the principal case the New Hampshire court had given a broad definition to "disturbance," stating that any disturbance, even one willingly permitted, was prohibited by the statute.[10] By such interpretation of the statute the court had virtually ruled all Sunday contracts invalid.

The state of Georgia also follows the third category of Sunday observance statutes.[11] Under the controlling statute the Georgia courts have allowed few Sunday contracts: a marriage contract;[12] a deed given in consideration of love and affection;[13] and a note signed but not delivered on Sunday.[14] Other than these cases, there has been a consistent line of cases invalidating Sunday contracts. These have included: a real estate contract with a real estate agent;[15] an automobile rental contract;[16] a promissory note;[17] and, most recently, a home improvement contract.[18] In these cases the Georgia courts have ruled the contract invalid if its subject matter had anything to do with the ordinary calling of either party to the contract. Yet, the Georgia courts have not defined "ordinary calling." Rather, the question of whether the contract's subject matter is related to either party's "ordinary calling" has been decided upon the peculiar circumstances of each individual case. In these cases a broad construction of "ordinary calling" is evident. For example, the Georgia courts have ruled that the

9. Rodman v. Robinson, 34 N.C. 503, 47 S.E. 19 (1904).
10. Smith v. Foster, 41 N.H. 215 (1860); Varney v. French, 19 N.H. 233 (1848).
11. GA. CODE ANN. §26-6905 (1953 Rev.) provides, "Any person who shall pursue his business or the work of his ordinary calling on the Lord's day, works of necessity or charity only excepted, shall be guilty of a misdemeanor."
12. Hayden v. Mitchell, 103 Ga. 431, 30 S.E. 287 (1898).
13. Dorough v. Equitable Mortgage Co., 118 Ga. 178, 45 S.E. 22 (1903). Here the court construed the conveyance to be gift.
14. Young v. Dublin Fertilizer Works, 16 Ga. App. 651, 85 S.E. 941 (1915).
15. Browne v. Snipes, 97 Ga. App. 149, 102 S.E.2d 634 (1958); Williams v. Allison, 10 Ga. App. 840, 74 S.E. 442 (1912).
16. Jones v. Belle Isle, 13 Ga. App. 437, 79 S.E. 357 (1913).
17. Thompson v. Wilkinson, 9 Ga. App. 367, 71 S.E. 678 (1911); Smith v. Christian, 6 Ga. App. 259, 64 S.E. 1002 (1909).
18. Sewell v. Gould, 103 Ga. App. 456, 119 S.E.2d 598 (1961).

purchase of a farm by a farmer is within the ordinary business of the farmer,[19] and that a contract to sell one's own business is within the ordinary calling of the seller.[20] By a narrower construction of "ordinary calling" the Georgia courts could greatly broaden the field of valid Sunday contracts somewhat as the New Hampshire court did in the principal case by narrowing the definition of "disturbance."

It is to be noted that contracts executed on Sunday have been allowed in Georgia if there were necessity or charity involved, and sometimes if there were subsequent ratification on a secular day. Necessity is an elastic term that must be constantly broadened to apply to new conditions. The court in *Williams v. State*[21] held the purchase of gasoline to be such a necessity. Also, a note executed to secure a bond release by a lawyer was called a work of charity or necessity.[22] But, the sale of meat on Sunday was ruled unnecessary.[23] It has been said that the question of necessity is a question of fact.[24] However, the Georgia appellate courts have not generally submitted this question to the jury.

For ratification on a secular day to render an invalid Sunday contract valid it appears that there must be a new consideration.[25] Continued use of property bought on Sunday furnished such consideration in *Smith Motor Car Co. v. Goddard.*[26] Also, subsequent payment and acceptance of installments and delivery of possession on secular days were held to be such ratification of a Sunday contract to sell a newspaper business as to render the contract valid.[27] But, where only the vendee ratified a sale made on Sunday, the sale was not validated.[28] The validation of Sunday contracts by ratification actually amounts to the formation, either expressly or impliedly, of a contract on a secular day, employing the terms included in the invalid Sunday contract. It should be noted that validation by ratification is not a form of novation, which requires a previous valid obligation.[29]

As a general rule there has been no trend in the jurisdictions toward a relaxation of the rule against Sunday contracts. But, the principal case shows an exception to this generalization. This case specifically overruled two earlier decisions in that state, greatly expanding the field of valid Sunday contracts.[30] At this time there is no evidence from the cases that such a reversal or even liberalization will occur in Georgia. It is the opinion

19. Morgan v. Bailey, 59 Ga. 684 (1877).
20. Cook v. Blain, 44 Ga. App. 691, 162 S.E. 658 (1932).
21. 167 Ga. 160, 144 S.E. 745 (1928).
22. Few v. Gunter, 10 Ga. App. 100, 72 S.E. 720 (1911).
23. Arnheiter v. State. 115 Ga. 572, 41 S.E. 989 (1902).
24. Postal Telegraph-Cable Co. v. Kaler, 65 Ga. App. 641, 16 S.E.2d 77 (1941).
25. Jones v. Belle Isle, 13 Ga. App. 437, 79 S.E. 357 (1913).
26. 42 Ga. App. 560, 156 S.E. 724 (1931).
27. McAuliffe v. Vaughan, 135 Ga. 852, 70 S.E. 322 (1911).
28. Calhoun v. Phillips, 87 Ga. 482, 13 S.E. 593 (1891).
29. Miller-Terrell, Inc. v. Strother, 85 Ga. App. 763, 70 S.E.2d 160 (1952).
30. Brown v. Teel, 236 A.2d 699 (N.H. 1967).

of this writer that Georgia should refuse to employ the method of judicial legislation seen in the principal case, leaving such policy decisions with regard to Sunday contracts to the legislature.

JEFFREY B. TALLEY

EVIDENCE—BASTARDS—RACIAL DIFFERENCE EXCEPTION DISALLOWED

In this case[1] the California Court of Appeal for the Second District ruled that no racial difference exception is contained in the statute providing that issue born while a wife is cohabiting with her husband is presumed legitimate.[2]

The court found as fact that the child's mother and her husband were Caucasian, that the defendant was a Negro, and that the child was of mixed blood "evidencing both Negro and Caucasian characteristics, and bearing a close physical resemblance to the defendant."[3] Testimony was to the effect that the child's mother had engaged in sexual intercourse with the Negro defendant repeatedly from July, 1960, through late August or early September of that year. The child was born on May 25, 1961.[4]

Citing the statute,[5] the court held that the only exception allowed to rebut the presumption of legitimacy was impotency of the husband.

The court reasoned that as the California legislature had refused to adopt that portion of the Uniform Act on Blood Test[6] which would allow blood testing to determine paternity, and therefore the legislative intent was clear to the effect that the presumption of legitimacy was conclusive except in cases of impotency of the husband.

The holding in this case seems to be contrary to the rule in Georgia. Justice Lumpkin in an 1852 Georgia case[7] held that the common law presumption of legitimacy was rebuttable. In a well-documented opinion he traced the development of the presumption through the common law and expressed his opinion as follows:

> It is hard to believe, at the middle of the nineteenth century, that there ever existed, in any enlightened country, a law so diametrically opposed to every principle of reason and common sense, as, that the children of a married woman should in all cases, be

1. Hess v. Whitsitt, 257 Cal. App.2d 618, 65 Cal. Rptr. 45 (1967).
2. CAL. CODE OF CIVIL PROCED. §1962 (West 1955) provides the following: "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate."
5. CAL. CODE OF CIVIL PROCED. §1962 (West 1955).
4. *Id.* at ___, 65 Cal. Rptr. at 46.
5. CAL. CODE OF CIVIL PROCED. §1962 (West 1955).
6. For a discussion of the Uniform Act on Blood Test see Comment, *Blood Will Tell!*, 1 MERCER L. REV. 266 (1950).
7. Wright v. Hicks, 12 Ga. 155 (1852).