ELECTRONIC SURVEILLANCE AFTER BERGER

I. THE HISTORY OF ELECTRONIC SURVEILLANCE

This history of man's attempt to communicate with his fellow man has been paralleled by another history—that of man's attempt to overhear this communication. The art of overhearing or eavesdropping has proceeded on a step-by-step basis with the science of communication. Indeed, the furtive methods of the art have rarely failed to emulate the sophisticated means of the science. From passive overhearing of face-to-face conversation to sanguinary interception of homing pigeons by domesticated hawks, the progress of interception vis-a-vis communication has been carried into the twentieth century, utilizing methods and means beyond the imagination of the interceptor or eavesdropper of yesterday. It is now possible, by the use of parabolic microphones to pick up conversations at distances of 500 to 1000 feet.[1] Hidden microphones, which receive and transmit every sound in a room, may be inserted into a telephone receiver and be operable even when the receiver is on the hook.[2] Microphones as thin as "wafers"[3] and as small as sugar cubes[4] may now be employed to listen surreptitiously to private conversations. In the area of wiretapping, it is no longer necessary to cut or tap the line directly. A commentator has recently stated that by placing, near the vicinity of a telephone, a coil of wire that receives electronic impulses from the telephonic electromagnetic field, overhearing may easily be accomplished without the necessity of cutting any of the telephone lines.[5] The potential pervasiveness of these instruments has prompted Professor Schwartz in his book entitled *The Eavesdroppers* to exclaim that:

> To be certain of defense against any eavesdropping of this kind (and incidentally, against wireless microphones as well,) one should shield his room completely with a continuous covering of aluminum foil and substitute for his window glass a special conducing glass made by several of the large glass companies . . . .[6]

[1] *See* S. DASH, R. SCHWARTZ, & R. KNOWLTON, THE EAVESDROPPERS, 350 (1959) [hereinafter cited as EAVESDROPPERS].

[2] *Id.* at 341.

[3] JUDICIARY COMMITTEE, CALIFORNIA SENATE, REPORT ON THE INTERCEPTION OF MESSAGES BY THE USE OF ELECTRONIC AND OTHER DEVICES at 8 (1957).

[4] EAVESDROPPERS at 343.

[5] Runft, *The Electronic Eavesdropping Threat to the Right of Privacy: Can the States Help?*, 3 IDAHO L. REV. 13 (1966). For other articles treating this subject, *see also:* Sullivan, *Wiretapping and Eavesdropping: A Review of the Current Law*, 18 HAST. L. REV. 59 (1966), and Comment, *Electronic Eavesdropping: A New Approach*, 52 CALIF. L. REV. 142 (1964).

[6] EAVESDROPPERS at 353-58.

This progress of communications-interception has not been without legal ramification. Recently, in the case of *Berger v. New York*,[7] the Supreme Court was confronted with a situation that exemplifies the simultaneous attempt to overhear a conversation and yet remain within the framework of existing law. To a great extent, the decision of the Supreme Court in this case rests on the constitutional history of eavesdropping in the United States. Therefore, before attempting to analyze the holding in *Berger*, it would seem appropriate to view briefly its historical underpinnings.

The development of the law in regard to eavesdropping has derived impetus from the concept that one's privacy is a protectable legal interest. In the words of Lord Nathan, it is the privilege "to shut one's door upon the world and to do or to say what one will . . . secure in the knowledge that one is alone."[8] Justice Brandeis, dissenting in *Olmstead v. United States*,[9] probably expresses the feelings of many who have considered the current impact of these two irreconcilable concepts, *i.e.*, privacy and eavesdropping.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[10]

In the United States, the history of the citizen's desire to maintain privacy, and the government's use of electronic eavesdropping and wiretapping to combat crime, has been focused against a background of constitutional interpretations beginning with the *Olmstead* case in 1928. Faced with the petitioner's contention that the admission of evidence obtained by a non-trespassory wiretap was in violation of the fourth amendment, the Supreme Court held that "search," as used in the amendment, contemplated a physical entry on the premises and that the word "seizure" referred to the taking of "material" things. Since *Olmstead*, the claim that evidence gathered by means of wiretapping or electronic eavesdropping violates constitutional rights has taken varied tacks. It is the purpose of this brief history to trace these somewhat diverse courses and determine their current status in the law.

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[7] 388 U.S. 41 (1967).
[8] Nathan, *Eavesdropping*, 225 L.T. 119, 120 (1958).
[9] 227 U.S. 438, 478 (1928) (dissenting opinion).
[10] *Id.*

A. *Wiretapping*

Seven years after the *Olmstead* case, Congress passed Section 605 of the Federal Communications Act, which essentially provides that:

> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . .[11]

Nardone v. United States[12] provided the Supreme Court with its first opportunity to construe section 605 as it applied to the admission of wiretapping evidence in a criminal prosecution. The Court, in reversing the petitioner's conviction, held that "[t]o recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the Act forbids such testimony seems to us unshaken by the government's arguments."[13] At the second trial,[14] the government introduced evidence, derived from leads which had been uncovered in the *original* wiretap, again to convict the petitioner. The Court, on *certiorari*, citing *Silverthorn Lumber Co. v. United States*,[15] held that the use of this derivative evidence was inadmissible as "fruit of the poisonous tree."[16]

In the dichotomous decisions following the second *Nardone* case, the Court has given both broad and restrictive interpretations to the scope of section 605. Leaning toward a somewhat broad interpretation, the Court held in *Weiss v. United States*[17] that wiretap evidence, whether resulting from the interception of interstate or intrastate messages, was inadmissible in the federal courts. Following *Weiss*, the Court, in a more conservative mood, observed that a defendant who was not a party to a wiretapped conversation had no standing to invoke the protection of section 605.[18] The decisions in succeeding cases have continued to follow this same oscillating course.

The 1942 decision of *Goldman v. United States*[19] limited the protection afforded under section 605, applying it only to wiretapping and not to non-telephonic electronic eavesdropping. *Goldman* also

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11 47 U.S.C. § 605 (1958).
12 302 U.S. 379 (1937).
13 *Id.* at 382.
14 Nardone v. United States, 308 U.S. 338 (1939).
15 251 U.S. 385 (1920) (evidence gained initially by constitutionally prohibited methods cannot later be the basis for additional action against a suspect).
16 Nardone v. United States, 308 U.S. at 341.
17 308 U.S. 321 (1939).
18 Goldstein v. United States, 316 U.S. 114 (1942).
19 316 U.S. 129, 133-34 (1942).

reaffirmed the *Olmstead* requisite of actual physical trespass to evince a violation of the fourth amendment. Ten years later, the Court, in *Schwartz v. Texas*,[20] considered the application of section 605 to the admissibility of wiretap evidence in state courts, and found nothing proscriptive in the federal legislation. This decision was based on the determination that Congress had not expressed an intention to preempt the area. Noteworthy was the Court's indication that section 605 might be enforced by the penal provisions of Section 501 of the Federal Communications Act,[21] which provides for a fine not to exceed $10,000 and/or imprisonment for a term not to exceed one year. However, to this date there have apparently been no prosecutions of state law-enforcement officers under this statute.

In more recent opinions,[22] the doctrine of federal preemption as to state wiretap evidence has both increased and ebbed in the Court's constitutional outlook; yet it has never been explicitly espoused. In the final analysis, the current status of the law is that a Federal Court may not enjoin the use in a criminal trial in a state court of evidence obtained by wiretapping in violation of Section 605 of the Federal Communications Act.[23] Consequently, it would seem that the only viable restraint to the introduction of state wiretap evidence is the sanction of section 501,[24] making the procurement of such evidence a federal crime. However, as already indicated, there has been no prosecution to date. This aspect of the law, then, enjoys the somewhat dubious acclaim of sanctioning a violation of federal law in the furtherance of state prosecutions. The repercussions created in this area by *Berger v. New York*,[25] will be seen subsequently.

B. *Electronic Eavesdropping*

Although *Olmstead*, as previously noted, involved a non-trespassory wiretap, it is considered the fountainhead from which flowed the basic concepts of the law in regard to electronic eavesdropping. The *Olmstead* rationale, which continues to enjoy vitality, lies in predicating a violation of the fourth amendment upon a physical trespass or intrusion into the defendant's property. In the succession of cases

20 344 U.S. 199 (1952).
21 47 U.S.C. § 501 (1959).
22 Benanti v. United States, 355 U.S. 96 (1957); Williams v. Ball, 294 F.2d 94 (2d Cir. 1961).
23 Schwartz v. Texas, 344 U.S. 199, 203 (1952). *See* Pugach v. Dollinger, 365 U.S. 458 (1961).
24 47 U.S.C. § 501 (1959).
25 388 U.S. 41 (1967).

following *Olmstead*, the Court has consistently maintained that nontrespassory eavesdropping is not per se a violation of the fourth amendment guaranty against unreasonable searches and seizures.

Thus in *Goldman v. United States*,[26] which was the first eavesdropping case to follow *Olmstead*, the Court found that there had been no violation of the fourth amendment because there had been no physical trespass. In this case, the federal officers had installed a listening device outside the office of the defendant and, through it, had gleaned the necessary information. However, prior to this external listening, the officers had entered the office of the defendant and had installed a malfunctioning listening device. The Court ruled that the initial trespass in entering the defendant's office had not tainted the evidence because it had not been obtained from the intrusion. Since the Court, rather than pursuing the generic background of the term "unreasonable," chose to define an unreasonable search and seizure as an intrusion into a constitutionally protected area, the decisions both before and after *Goldman* have been fraught with formalistic distinctions turning on whether a trespass has been committed. A striking example of this is *Hester v. United States*,[27] where a federal revenue agent, hiding 50 to 100 feet away on property belonging to the defendant's father, had seen the defendant coming out of the father's house in possession of illegal "moonshine." In response to a claimed violation of the fourth amendment, Justice Holmes stated that "the special protection accorded by the Fourth Amendment to people in their 'persons, houses, papers, and effects,' is not extended to the open fields. . . ."[28] Although, concededly, the above example does not involve electronic eavesdropping, it serves to illustrate the 1924 Court's treatment of trespass or intrusion as being synonymous with "unreasonable." Consistent with the above reasoning is the Court's decision in *Silverman v. United States*.[29] In this case, which was the first to decide directly when the fourth amendment had been violated, the District of Columbia police had pushed a "spike mike" through the party wall of the house until it penetrated 5/16 of an inch into the adjoining house of the defendant. The "spike" had come to rest on a heating duct "thus converting . . . the . . . entire heating system into a conductor of sound."[30] The

[26] 316 U.S. 129 (1942).
[27] 265 U.S. 57 (1924).
[28] *Id.* at 59.
[29] 365 U.S. 505 (1961).
[30] *Id.* at 507.

court of appeals, in affirming the defendant's conviction, deemed that a fraction of an inch did not appreciably affect the right to privacy.[31] The Supreme Court unanimously reversed, stating that the "decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area."[32]

Although the Court in *Silverman* appears to have disregarded the formal distinctions of local law in connection with the concepts of trespass, the circuit courts have apparently adhered to the requirement that the trespass must be appreciable in order to violate the fourth amendment.[33] The net effect is that the law in electronic eavesdropping—unlike the wiretapping area controlled by section 605—has much broader applicability because it is decided under the fourth amendment. Due to the Supreme Court's holding in *Mapp v. Ohio*,[34] the protection of the fourth amendment is extended to the citizens of the states through the due process clause of the fourteenth amendment. Therefore, any evidence gathered by means of electronic eavesdropping or otherwise, which is violative of the fourth amendment, is inadmissible in state courts. Since, under the *Olmstead* doctrine, *trespassory eavesdropping* has been held violative of the fourth amendment, evidence gathered by state officials in this manner would be inadmissible in state courts under the fourth and fourteenth amendments.

However, as will be discussed below, the decision in *Berger* has added new dimensions to this area so that the crucial distinction in both federal and state law should no longer be measured in inches.

C. *"Face-To-Face" Eavesdropping*

Another tack in the pertinent eavesdropping history is represented by the *On Lee*-[35] *Lopez*-[36] *Osborn*[37] trilogy. The distinguishing feature of these cases is that the eavesdropping—if it can be so termed—occurred by utilizing a hidden recording device upon the person of an agent who was engaged in face-to-face conversation with the

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31 United States v. Silverman, 275 F.2d 173 (D.C. Cir. 1960).

32 365 U.S. 505 at 512 (1961).

33 Anspach v. United States, 305 F.2d 48, 51 (10th Cir. 1962), *cert. denied*, 371 U.S. 826 (1962); Todisco v. United States, 298 F.2d 208 (9th Cir. 1961), *cert. denied*, 368 U.S. 989 (1962); United States v. Kabot, 295 F.2d 848 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962).

34 367 U.S. 643 (1961).

35 On Lee v. United States, 343 U.S. 747 (1952).

36 Lopez v. United States, 373 U.S. 427 (1963).

37 Osborn v. United States, 385 U.S. 323 (1966).

petitioner. The damaging or incriminating statements elicited from the conversation were later admitted as evidence.

In *On Lee v. United States*, an "old acquaintance" of the defendant, equipped with a transmitting device, had elicited incriminating statements regarding narcotics. The Court, in reviewing the testimony of the agent who had received the transmissions, stated that there had been no fourth amendment infringement due to the absence of a trespass. Indeed, said the Court, the "acquaintance" had "entered a place of business with the consent, if not by the implied invitation of the [defendant] . . . ."[38]

Lopez v. United States was set in much the same background as was *On Lee.* Lopez was the owner of an inn which was being investigated by the Internal Revenue Service to determine possible evasion of an excise tax on cabarets. When he discovered the purpose of an IRS visit, he invited the agent into his office to "discuss" the matter. The first meeting culminated in his giving the agent $420 and promising more if the agent would drop the case. Pursuant to an invitation to return, the agent came back to the scene, but this time with a hidden pocket wire recorder with which he recorded incriminating statements. This recording, plus the testimony of the agent, was substantially the evidence upon which Lopez was convicted in the lower court. On *certiorari* to the Supreme Court, the petitioner's theory was that in view of the agent's falsification of his mission—*i.e.*, pretending to accept a bribe while actually recording the petitioner's remarks—access to the office had been gained by misrepresentation. Therefore, all evidence obtained in the office as a consequence of the conversation with the petitioner had been illegally "seized." The Court rejected this theory by stating that the agent had not been guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe had not been real.[39] Thus, dismissing any trespass by the agent, the Court went on to characterize eavesdropping as those instances "when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear."[40] Following this line of reasoning, it was possible for the Court to conclude with faultless logic that: "Indeed this case involves no 'eavesdropping' whatever in any proper sense of that term."[41]

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38 343 U.S. at 751-52 (1952).
39 373 U.S. 427, 438 (1963).
40 *Id.*
41 *Id.* at 439. For an extremely incisive approach, contrary to that taken by the major-

The last case in the trilogy—and the Court's latest treatment of face-to-face eavesdropping—is *Osborn v. United States.* Osborn, engaged in preparing the defense of James R. Hoffa, who was awaiting trial upon a criminal charge in the federal court in Nashville, hired a man named Robert Vick to make background investigations of the prospective jurors for the Hoffa trial. Unknown to him, Vick had several times met with federal agents and had agreed to report to them any "illegal activities" he might observe. During the course of conversation between Vick and Osborn, Vick mentioned that some of the members of the panel were known to him and that one of the members was his cousin. According to Vick, Osborn then requested that Vick visit his cousin to see what arrangements could be made concerning the case. After this meeting, Vick reported to federal agents, who directed him to file a written report under oath. This sworn statement was shown to two federal district court judges who, after examining the report, authorized the agents to place a hidden recording device on the person of Vick so as to determine the veracity of the statements made in his affidavit.[42] After another meeting between Vick and Osborn, which was recorded on the hidden recorder and in which statements were again made in regard to bribing the juryman, the action leading to Osborn's conviction was initiated.

In answer to petitioner's claimed violation of fourth amendment rights with respect to the hidden recorder, the Court held that the instant case fell within the guidelines of both the majority and dissenting opinions in *Lopez.* The majority opinion in *Lopez* was easily complied with, stated the Court, because the elements of the face-to-face recorded conversations were almost identical. In conforming the

ity in this case, see the dissenting opinion of Justice Brennan. The dissent, which is joined by Justices Douglas and Goldberg, stresses that the waiver of trespass relied on by the majority is at best fictional. It points out that this form of conduct is not merely face-to-face conversation; rather the hidden microphone amounts to independent evidence of the conversation and is, therefore, as opprobrious as having a third party listen without the knowledge and consent of the speaker.

The dissent is also noteworthy for the view taken by Justice Brennan wherein he states that

> in any event, it is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" . . . could be made a precondition of lawful electronic surveillance.

Id. at 464.

[42] 385 U.S. 323, 329 n.6 (1966). District Judge Miller, who authorized the use of the recorder stated that "the tape recorder should be used under proper surveillance, supervision, to see that it was not faked in any way, and to take every precaution to determine that it was used in a fair manner, so that we could get at the bottom of it and determine what the truth was."

facts to the standards laid down by the dissenting opinion in *Lopez*, the Court emphasized the preciseness and particularity of the warrant authorizing the recording device and concluded that "[T]here could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.' "[43]

In short then, it would seem that the law as to face-to-face electronic surveillance has undergone little change since the Court's first treatment of the subject in *On Lee*. Aside from the fact that a warrant to authorize such activity has been sustained, the basic concept that this method of surveillance is not a prohibited form of eavesdropping enjoys continued vitality.

D. *The "Mere Evidence" Doctrine and the Fifth and Sixth Amendments*

In addition to the already-mentioned constitutional contentions, attacks against government electronic surveillance have been based on alleged violations of the fifth and sixth amendments, as well as on the oft-criticized "mere evidence" rule. In *Olmstead v. United States*,[44] the petitioner's claim that electronic surveillance by government officers had violated his fifth amendment rights went undecided. In fact, in most of the eavesdropping-wiretapping cases, a determination of fifth amendment rights has not been necessary. Indeed, when the question has arisen,[45] the Court has held that in light of the absence of compulsion, *i.e.*, the statements made being wholly voluntary, there has been no self-incrimination within the meaning of the fifth amendment.

Probably the Court's latest pronouncement as to the rights guaranteed under the fifth amendment occurred in the case of *Hoffa v. United States*,[46] where the defendant was convicted for attempting to bribe members of a jury. Substantial information and evidence had been obtained for the prosecution by a paid government informer, who throughout the former trial had repeatedly remained in the defendant's company. In answer to the defendant's claim that his fifth amendment rights had been violated, the Court held that since defendant's statements to the informer had been wholly voluntary,

[43] *Id.* at 330.
[44] 277 U.S. 438 (1928).
[45] *See* Todisco v. United States, 298 F.2d 208 (9th Cir. 1961), *cert. denied*, 368 U.S. 989 (1962).
[46] 385 U.S. 293 (1966).

"it [was] clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination [had been] violated in this case."[47] The Court stressed that in order to show a violation of fifth amendments rights, a defendant must show that the "incriminating statements were the product of [some] . . . sort of coercion, legal or factual."[48] Thus, unless electronically seized statements are characterized as being involuntarily elicited, or as the product of coercion, the Court will apparently not recognize this type of conduct as violative of the fifth amendment.

In the famed case of *Massiah v. United States*,[49] the Court had occasion to construe the applicability of the sixth amendment right to counsel in a situation involving surreptitious eavesdropping. After the defendant had been indicted and had retained counsel, an agent of the government engaged him in a conversation and elicited incriminating statements. The conversation was monitored by a hidden transmitter and picked up by another agent who was in a nearby car. The Court, in denying the admissibility of this testimony, held that " '[a]ny secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.' "[50]

In subsequent cases,[51] the Court has held that the right to counsel (as well as rights under the fifth amendment) arises when the suspect has been taken into custody, or his freedom of movement has been restricted by officers, and the investigation has begun to focus on the suspect in order to elicit incriminating statements. In short, it would seem that surreptitious eavesdropping would not be an abridgement of the sixth amendment, as that amendment has been currently construed, unless that activity takes place either after indictment and selection of counsel, or after the freedom of movement of the suspect is inhibited and he is subjected to in-custody interrogation.

Another argument which has occasionally been raised in opposition to electronic eavesdropping is the "mere evidence" theory, first

47 *Id.* at 304.

48 *Id.*

49 377 U.S. 201 (1964).

50 *Id.* at 205, *citing* People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 448 (1961), and Spano v. New York, 360 U.S. 315, 325-26 (1959) (Douglas, S.J., concurring).

51 Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

enunciated in *Boyd v. United States*.[52] Under this theory the government could not seize evidence unless it was the fruit or instrumentality of a crime or contraband. Evidence which did not fall into one of these categories "and [was] sought by the Government for use as evidence *merely* [could not] . . . be searched for and seized in the owner's house or office by resort to a warrant."[53] After enjoying a somewhat checkered career, in which the theory was both utilized[54] and criticized,[55] it came to its final and not undeserved resting place in *Warden v. Hayden*.[56] In treating the court of appeals' finding that the seizure and introduction of items of clothing violated the fourth amendment because they were "mere evidence," the Supreme Court rejected the distinction between "mere evidence" and properly seizable evidence (*i.e.*, instrumentalities, fruits, or contraband) "as based on premises no longer accepted as rules governing the application of the Fourth Amendment."[57]

The net effect of this decision, as it applies to eavesdropping, is that it put an end to what was once a viable argument by opponents of this means of surveillance. On the other hand, it would seem that the Court has taken a more rational approach to the problem because it views the interests protected by the fourth amendment as those of privacy, and not as one type of evidence over another.[58]

II. The Berger Decision

In *Berger v. New York*,[59] the Court was faced with a multifaceted attack on eavesdropping—both generally, as it existed under Section 813-a of New York's Code of Criminal Procedure,[60] and specifically,

[52] 116 U.S. 616 (1885). For another eavesdropping case employing this argument, see Lopez v. United States, 373 U.S. 427, 456-57 (1963).

[53] Gouled v. United States, 255 U.S. 298, 310 (1921) (emphasis added).

[54] United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); United States v. Lefkowitz, 285 U.S. 452 (1932).

[55] People v. Thayer, 63 Cal. 2d 635, 408 P.2d 108, 47 Cal. Rptr. 780, *cert. denied*, 384 U.S. 908 (1965); State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965).

[56] 387 U.S. 294 (1967). In this case the police were pursuing a man they believed had committed an armed robbery and entered the suspect's home five minutes after he allegedly entered. The suspect was found in an upstairs bedroom feigning sleep and was arrested when the officers determined that he was the only man in the building. In the meantime, other officers searched the house and found a jacket and trousers of the type the fleeing man was said to have worn. This clothing was found in the washing machine.

[57] "Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband." *Id.* at 301-02.

[58] *Id.* at 300.

[59] 388 U.S. 41 (1967).

[60] N.Y. Crim. Pro. Law § 813-a (McKinney 1958).

An ex parte order for eavesdropping . . . may be issued by any justice of the

as it applied to the petitioner. The factual underpinnings of *Berger* are substantially as follows.

Having received several complaints charging that Liquor Authority employees were extracting bribes in return for liquor licenses, the District Attorney of New York obtained an *ex parte* order[61] to place an eavesdropping device in the office of one of the suspected conspirators. Pursuant to the order, which allowed eavesdropping for 60 days if necessary, agents of the District Attorney entered the office in the early morning hours and secreted the device. Through leads supplied from this eavesdrop, a second order was issued and a similar device placed in another suspect's office. After two weeks of listening to conversations, a conspiracy was uncovered involving the issuance of liquor licenses to two New York City clubs. On the strength of this evidence, the petitioner was indicted as a "go-between" for the principal conspirators and was subsequently convicted on two counts of conspiracy to bribe the Chairman of the New York Liquor Authority. The District Attorney conceded that the information obtained by the eavesdrop was the only evidentiary basis for the prosecution, and, following petitioner's appeal, the Supreme Court granted *certiorari.*

The petitioner's objection to the statute lay in its sanction of intrusions into constitutionally protected areas, thereby allowing "general searches," and its infringement of the fifth amendment privilege against self-incrimination. Regarding his conviction, the

supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same.

61 An ex parte order is one "taken or granted at instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." Kimbrough v. Parker, 336 Ill. App. 124,——, 83 N.E.2d 42, 43 (1948).

petitioner questioned the "probable cause" upon which the warrants were based, as well as the "probative quality" of the recording introduced in evidence at the trial. In response, the State of New York asserted the constitutionality of section 813-a by assailing the claim that eavesdropping searches were "general," and hence violative of the Constitution because the warrants prescribing them were necessarily incapable of particularity. Additionally, the State maintained that there was probable cause for the issuance of the warrant and characterized eavesdropping as an "indispensable adjunct of society's obligation to discover evidence of crime."[62] Finally, the State argued that while eavesdropping was a "distasteful method for the acquisition of evidence," it was "no different in kind from a variety of conventional and long-sanctioned intrusions into peoples' private lives and affairs."[63]

The Court, speaking through Mr. Justice Clark, found that the indiscriminate use of eavesdropping evidence permitted "general searches" under the statute in violation of the fourth amendment.[64] This conclusion was compelled because the statute authorized eavesdropping "without requiring belief that any particular offense has been or is being committed [and without requiring] . . . that the 'property' sought, the conversations, be particularly described."[65] The Court further found constitutionally offensive the provision of the statute that allowed continuous eavesdropping for a two-month period. The statute, so held the Court, prescribed the equivalent of a

[62] Brief for Respondent at 69.

[63] *Id.* at 68. The long-sanctioned intrusions mentioned by the respondent include the "search by warrant, the subpoena's command [and] . . . persistent visual surveillance . . . ." *Id.* at 65. Both parties also raised claims with regard to the immunity of "mere evidence" from search and seizure. The Court however, affirmed its earlier decision in Warden v. Hayden, 387 U.S. 294 (1967), which struck down the prior immunity of "mere evidence" from search and seizure.

[64] Although the statute interposed a "neutral and detached authority between the police and the public," 388 U.S. at 54, *citing* Johnson v. United States, 333 U.S. 10, 14 (1948), it was found constitutionally offensive on the ground that it failed to provide "adequate supervision" or "protective procedures."

[65] 388 U.S. at 58-59. The purpose of the fourth amendment in this regard is to keep the government out of constitutionally protected areas until there is probable cause to believe that a specific crime will be or has been committed. Consequently, if the conversations are not sufficiently described, the officer is given a "roving commission to 'seize' any and all conversations." *Id.* at 59. The effect of the requirement of the New York statute, that, "the person or persons whose communications, conversations or discussions are to be overheard or recorded," and the purpose thereof, was in the opinion of the Court, to "no more than identify the person whose constitutionally protected area is to be invaded . . . ." *Id.* The Court further stated that " '[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " *Id.* at 58, *citing* Stanford v. Texas, 379 U.S. 476 (1965); Marron v. United States, 275 U.S. 192,196 (1927).

"series of intrusions, searches and seizures pursuant to a single showing of probable cause."[66] Additional objections to this provision of the statute stemmed from its avoiding prompt execution of the warrant, its sanctioning indiscriminate seizures of conversations of "any and all persons coming into the area covered by the [eavesdropping] device . . ."[67] and its extending the original two-month period on a "mere showing that such extension is 'in the public interest.' "[68]

The Court also found that the failure of the statute to provide a termination date for the eavesdrop resulted in the executing officer's having too much discretion in determining the length and scope of the search.[69] Presumably this objection was directed at the situation in which an eavesdrop is continued by the officer after the desired conversation is overheard, in order to gain further information.

Moreover, the failure of the statute to provide for notice to the subject in the manner of conventional warrants[70] was not overcome by recognition that secrecy was necessary in eavesdropping. In so holding, the Court stated that the "inherent dangers" of eavesdropping necessitate a strict construction of the notice requirement in search warrants which is avoidable only by evincing "exigent circumstances."[71] Lastly, the Court deemed that the statute's failure to

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66 388 U.S. at 59.

67 *Id.*

68 *Id.*

69 "[T]he statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer." *Id.* at 59-60.

70 *E.g.*, "As in the making of an arrest an officer refused admittance, *after notice of his authority and purpose* by virtue of the warrant, may break into the place to be searched or any part thereof and carry out the orders in the warrant." C. FRICKE & A. ALARCON, CALIFORNIA CRIMINAL PROCEDURE 56 (7th ed. 1967) (emphasis added). *See also* CAL. PEN. CODE § 1531 (West 1956) which provides that: "[T]he officer [may enter forcibly] . . . to execute the warrant, if, *after notice of his authority and purpose*, he is refused admittance." (emphasis added). For a further example of this general concept *see* L. KOLBREK & G. PORTER, THE LAW OF ARREST, SEARCH AND SEIZURE 347 (1967) which in explaining search warrant procedure generally states:

> Within ten days of the warrant being signed, the officer named in the warrant takes the original and one copy of the warrant and affidavit to the premises to be searched, shows the original to the person in charge of the premises and gives him a copy, and conducts the search.

71 388 U.S. at 89. In his dissent, Justice Black attacks the purpose of this qualification by the Court:

> Finally, the Court makes the fantastic suggestion that the eavesdropper must give notice to the person whose conversation is to be overheard or that the eavesdropper must show "exigent circumstances" before he can perform his eavesdrop without consent. Now, if never before, the Court's purpose is clear: it is determined to ban all eavesdropping. As the Court recognizes, eavesdropping "necessarily . . . depends on secrecy." Since secrecy is an essential, indeed a definitional, element of eavesdropping, when the Court says there shall be no eavesdropping without notice, the Court means to inform the Nation there shall be no eavesdropping—period.

Id. at 86.

provide for a return on the warrant vested in the executing officer excessive discretion in the use of the seized conversations of innocent as well as guilty parties.[72] Although not articulated by the Court, it would seem that the purpose of the return on the warrant[73] is to ensure that evidence discovered beyond the scope of the warrant will not be used by the prosecuting officials. The effect of these objectionable provisions was summarized by the Court as a "blanket grant of permission to eavesdrop . . . without adequate judicial supervision or protective procedures."[74]

The Court gave considerable attention to its earlier decision in *Osborn v. United States*,[75] where an order that allowed eavesdropping was upheld as having "precise and discriminate" procedures[76] which satisfied the fourth amendment requirements in a face-to-face[77] eavesdrop.

Osborn's influence on *Berger* is clearly significant; yet the question remains as to the effect of *Berger* on the entire area of electronic surveillance. Before this effect can be accurately estimated, however, the decision's limitations should be briefly noted. The Court did not decide whether the term "reasonable ground," as found in the New

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This note interprets the holding to require only some showing of circumstances rendering the use of electronic surveillance necessary in the sense that conventional methods of search and seizure would be ineffective against the particular crime or the particular parties.

[72] 388 U.S. at 60.

[73] For a brief discussion of the mechanics of a return on a warrant *see* R. DAVIS, FEDERAL SEARCHES AND SEIZURES 86-87 (1964), and L. KOLBREK & G. PORTER, *supra* note 70, at 347. *See also* CAL. PEN. CODE § 1537 (West Supp. 1966) for an example of a statutory return provision.

[74] 388 U.S. at 60.

[75] 385 U.S. 323 (1966). For a discussion of the facts of this case *see* the text following note 41 *supra.*

[76] The Court described these procedures in the following way:

> Among other safeguards, the order described the type of conversation sought with particularity, thus indicating the specific objective of the Government in entering the constitutionally protected area and the limitations placed upon the officer executing the warrant. Under it the officer could not search unauthorized areas; likewise, once the property sought, and for which the order was issued, was found the officer could not use the order as a passkey to further search. In addition, the order authorized one limited intrusion rather than a series or a continuous surveillance. And, we note that a new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one. Moreover, the order was executed by the officer with dispatch, not over a prolonged and extended period. In this manner no greater invasion of privacy was permitted than was necessary under the circumstances. Finally the officer was required to and did make a return on the order showing how it was executed and what was seized. Through these strict precautions the danger of an unlawful search and seizure was minimized.

388 U.S. at 57.

[77] For a discussion of the concept of "face-to-face" eavesdropping *see* the text accompanying notes 35-43 *supra.*

York statute was equivalent to the "probable cause" wording of the fourth amendment. This problem was circumvented by a finding that the statute was "deficient on its face in other respects."[78] Furthermore the decision was not supported by a right to privacy arising from the penumbras of the first, fourth, fifth, and ninth amendments; rather, it was based on the fourth amendment alone and applied to the states through the due process clause of the fourteenth amendment.[79]

Although the Court was primarily concerned with the fourth amendment as it applied to the New York statute, the implications of its decision indicate ramifications beyond the sphere of the principal case. In its narrowest aspect, the decision merely invalidates a statute which would license what is otherwise a trespass into a constitutionally protected area. However, Justice Clark's treatment of the *Olmstead*[80] and *Silverman*[81] cases is indicative of an attempt to include within the purview of the fourth amendment those searches by electronic instruments which do not physically breach the close. In discussing the *Olmstead* holding, emphasis was placed more upon the object of the search (conversation) than upon the place where the search was conducted. This change in emphasis is illustrated in the following *Berger* reference to *Olmstead:*

> Statements in the opinion that a conversation passing over a telephone wire cannot be said to come within the Fourth Amendment's enumeration of "persons, houses, papers, and effects" have been negated by our subsequent cases . . . . They found "conversations" was within the Fourth Amendment's protections, and the use of electronic devices to capture it was a "search" within the meaning of the Amendment, and we so hold.[82]

Similarly, the *Berger* Court focused upon that part of the decision in *Silverman* that underscored the intrusional nature of the search, as distinguished from the penetration of the instrument effecting it.[83] This suggestion—that the Court has turned its attention more toward privacy in its generic sense than toward the narrower approach of

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78 388 U.S. at 55.

79 Mapp v. Ohio, 367 U.S. 643, 655 (1961).

80 277 U.S. 438 (1928). *See* the discussion of this case at the text following note 10 *supra.*

81 365 U.S. 505 (1961). This case is discussed in the text accompanying note 29 *supra.*

82 388 U.S. at 51.

83 "Significantly, the Court [in *Silverman*] held that its decision did 'not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area.' " 388 U.S. at 52, *citing* 365 U.S. at 512.

delimiting a constitutionally protected area—is further borne out by the Court's answer to New York's suggestion as to the necessity of electronic eavesdropping for crime prevention:

> In any event we cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. . . . [I]t is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.[84]

It must be noted that nowhere was a distinction drawn between eavesdropping accomplished by breaking the close and non-penetrating eavesdropping.

Whether the Court's broadened implications concerning the scope of the fourth amendment result in a definitive decision may depend upon the case of *Katz v. United States*,[85] to be decided this term. While investigating the defendant, federal agents placed an electronic device outside two telephone booths frequently used by him. Through the use of this equipment, information was obtained indicating the defendant's receipt and transmission of illegal wagering information. Recordings of these telephone conversations were introduced in evidence at the trial that resulted in conviction. Among the other authorities relied upon for reversal in defendant's brief, *Berger* is cited as enunciating the rule that a violation of the fourth amendment right to privacy may occur without a physical trespass.

Should the outcome of the *Katz* case be consistent with the implications in *Berger*—implications that suggest a closer look at privacy, and indicate a wilingness to disregard the older concept of trespass—then some type of warrant similar to that upheld in *Osborn* will be necessary if the privacy of the individual is to be maintained in a manner consistent with the fourth amendment.

A. *Projected Guidelines*

In addition to its effect on the right of privacy, *Berger* provided the Court with the opportunity to classify wiretapping as a form of eavesdropping, bringing it within the purview of the fourth amendment.[86]

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[84] 388 U.S. at 62, 63.

[85] 369 F.2d 130 (1966), *cert. granted*, 386 U.S. 954 (1967). *See* Postscript *infra*.

[86] "The telephone brought on a new and more modern eavesdropper known as the 'wiretapper.' " 388 U.S. at 46. The remaining portion of the majority decision is cast in terms of "eavesdropping," which would appear, by implication and the preceeding

Furthermore, by delineating that which was lacking in the New York statute, the Court, by implication, may have propounded what it considered to be prerequisites of valid legislation. Restating affirmatively what the *Berger* Court stated negatively[87] produces the following guidelines: As required by the fourth amendment, the order must follow a showing of "probable cause" for belief that a crime has been, is being, or is about to be committed. The order must state with particularity the "place to be searched" and the "thing" (conversation) to be seized. It must be promptly executed, and any extension must be based upon a new showing of probable cause. In addition to a termination date, the order must follow a showing of "special facts or circumstances" to warrant the waiving of notice to the subject and to allow secret execution of the order. And finally, it must provide for a return on the warrant by the executing officer, and must vest in the court control of the use of the "seized" conversations.[88]

The above guidelines for a valid statute are postulated in response to perhaps the most significant question raised by *Berger*: Does the decision by implication ban all electronic surveillance? The answer of the majority is inconclusive.

> It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the "fruits" of eavesdropping devices are barred under the Amendment. On the other hand this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices.[89]

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quote, to incorporate the term "wiretapping" within its aegis. Additionally, concurring and dissenting members of the Court speak in the following terms:

> I join the opinion of the Court because at long last it overrules *sub silentio Olmstead v. United States*, 277 U.S. 438, and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment.

388 U.S. at 64 (Douglas, J. concurring).

> Today's majority does not, in so many words, hold that *all wiretapping and eavesdropping* are constitutionally impermissible. But by transparent indirection it achieves practically the same result by striking down the New York statute and imposing a series of requirements for legalized electronic surveillance that will be almost impossible to satisfy.

388 U.S. at 113 (White, J. dissenting) (emphasis added). The significance of the amalgamation of eavesdropping and wiretapping is directly related to the prior divergence of the two terms under the Communications Act of 1934. *See* the section on wiretapping in the text accompanying notes 11-25 *supra.*

87 The validity of the transition from negative constitutional objections to positive constitutional guidelines hinges on the assumption that electronic surveillance is possible under the fourth amendment. This assumption is tested in the text accompanying notes 94-99 *infra.*

88 388 U.S. at 58-60.

89 *Id.* at 63.

The dissenting members of the Court however fail to share this equivocation,[90] and are for the most part convinced that the majority has by implication rendered electronic surveillance constitutionally impossible. Although the dissent's proposition that *Berger* has banned all eavesdropping, may or may not be correct, it is possible to determine the effect of this decision and its guidelines on existing state statutes purporting to authorize eavesdropping.[91]

B. *Fourth Amendment Considerations*

In addition to New York, six states having statutes specifically covering eavesdropping at the time of *Berger* were California, Nevada, Oregon, Massachusetts, Illinois, and Maryland. All save Illinois[92] allowed for eavesdropping by law enforcement officers; thus, all but Illinois should be reexamined[93] in the light of *Berger.*

In considering the application of the *Berger* guidelines to the eavesdropping statutes now in existence, some comparison must be made between the guidelines themselves and the manner in which they are to be applied. It is clear that a statute can sufficiently require probable cause for belief that a certain crime has or is about to occur. It is equally clear that provisions covering the requirements of prompt execution, termination date, special circumstance, and return on the warrant can be formulated with relative ease. This conclusion follows from the fact that in each of these instances, electronic surveillance

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90 [W]hile the Court faintly intimates to the contrary, it seems obvious to me that its holding, by creating obstacles that cannot be overcome, makes it completely impossible for the State or Federal Government ever to have a valid eavesdropping statute.

388 U.S. at 71 (Black, J. dissenting).

Despite the fact that the use of electronic eavesdropping devices as instruments of criminal law enforcement is currently being comprehensively addressed by the Congress and various other bodies in the country, the Court has chosen, quite unnecessarily, to decide this case in a manner which will seriously restrict, if not entirely thwart, such efforts, and will freeze further progress in this field, except as the Court may itself act or a Constitutional Amendment may set things right.

Id. at 89, 90 (Harlan, J. dissenting).

91 The limitation of the discussion to those statutes purporting to authorize eavesdropping, as opposed to those purporting to authorize only wiretapping, is due to the large number of statutes in the latter class. If the synonoymy of the two terms as postulated in note 86 *supra* is correct, the wiretapping statutes lend themselves to similar analysis. The wiretapping statutes now in existence in the United States, as well as recent federal regulation in the area are listed in 388 U.S. at 47, 48 nn.4 & 5.

92 ILL. ANN. STAT. ch. 38 §§ 14-1 to 14-7 (Smith-Hurd Supp. 1966).

93 If, as the dissenting opinions in *Berger* suggest, the decision completely precludes electronic surveillance, the Illinois statute, with its blanket exclusion, is the only one now satisfactory in the area. If, on the other hand, electronic surveillance under strict guidelines is both permissable and possible, Illinois has gone further than necessary under the Constitution and could, if it so chose, enact less restrictive legislation.

presents a picture no different from that found in a traditional search and seizure situation.

The requirement of particularity, however, is unique. Under the mandate of the fourth amendment, "no warrant shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing* the place to be searched, and the things to be seized . . . ."[94] In applying this standard to the search and seizure of conversations, two objections can be raised—first, particularity in the description of conversation is impossible, and second, even if it were possible, the specific warrant procedure is insufficient because it fails to describe adequately "the things to be seized." The first of these objections must be examined before the second, since if conversations are found incapable of sufficient particular description, consideration of the second objection is unnecessary.

The Court in *Berger* refers to conversations as the " 'property' sought," and requires that it be "particularly described."[95] Whether conversations can be particularly described depends to a great extent upon the interpretation of the terms "search" and "seizure," as found in the amendment and as applied to conversation. If a "search" occurs when a conversation is recorded, it necessarily encompasses the conversation's entire substantive content, rendering itself subject to the claim that, as a search, it is unconstitutionally general.[96] To allay this claim the particularity requirement of the fourth amendment must be construed so as to necessitate description only of the parties and the topic sought in their conversation, not the impossible description of the specific time in which the topic will arise in the conversation.[97]

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[94] U.S. CONST. amend. IV (emphasis added).

[95] 388 U.S. at 58, 59.

[96] The respondent in *Berger* attacked this claim in the following way:

> [I]t is argued that an eavesdropping warrant is incapable of "particularly describing the * * * things to be seized," since only the general nature of the discussions are known in advance. This claim, however, is rebutted by analogous search warrant decisions.
>
> There are inherent limits on particularity in the description of evidence not yet in hand, whether it be verbal or tangible. But this failure of precognition should no more vitiate an eavesdrop order than it destroys a search warrant. And warrants describing "intoxicating liquors" without stating the type, or "narcotic drugs" without naming the specific drug, or "gambling paraphernalia" without attaching an inventory have all been deemed sufficient [see, *Stanford* v. *Texas*, 379 U.S. 476, 486 (1965); *People* v. *Montanaro*, 34 Misc. 2d 623 (Kings Co. 1962); *Johnson* v. *United States*, 46 F.2d 7 (6th Cir. 1931); *Calo* v. *United States*, 338 F.2d 793 (1st Cir. 1923)].

Brief for Respondent at 50-51.

[97] *E.g.*, it is possible for a warrant to describe "discussions between *X* and *Y* concerning the Betmore Bookie Syndicate, occuring in *Y*'s office (within the maximum permissable time limit)" but not "discussions occuring on December 15 between *X* and *Y* in *Y*'s office concerning the Betmore Bookie Syndicate, beginning at 2:31 p.m.

A similar problem exists in applying the term "seizure" to electronic surveillance. If seizure occurs at the recording or overhearing of a conversation,[98] the entire conversation is seized. The warrant, however, is presumably directed only at one part of the conversation. Therefore, to avoid a general seizure, it is necessary either to construe the term as denoting only the subsequent use of the conversation in investigation or prosecution,[99] or to relax the particularity require-

and ending at 2:46 p.m. but not including 2:43 p.m. when they will mention their golf game." Not only is such particularity impossible, but there currently exists no device that could operate in such a selective manner.

98 "Recording an innocent conversation is no more a 'seizure' than occurs when the policeman personally overhears conversation while conducting a warranted search." 388 U.S. at 108 n.1 (White, J. dissenting). The majority, however, speaks in terms which appear to synonymize recording and "seizure":

> During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device *will be seized* indiscriminately and without regard to their connection with the crime under investigation.

Id. at 59 (emphasis added).

99 The respondent in *Berger* raised a similar interpretation of the equality of "seizure" and "use." Basically, the argument rests upon a differentiation of the functions of "search" and "seizure" in a warrant directed at intangibles.

> The distinction between search and seizure is readily apparent in the case of tangibles, and it holds by analogy in the more difficult area of intangibles as well. The search is the process of looking for the thing to be seized; the seizure is the reduction of that object to physical possession. It should therefore be clear at the outset that seizure cannot be equated with perception. Perception is the hallmark of a search, which is necessarily broader than a seizure. Were mere apprehension by the senses deemed a seizure, virtually all searches would be condemned as too general. Indiscriminate perception characterizes the search; selective acquisition distinguishes the seizure. As optic observation cannot be considered a seizure, neither can the act of listening, for "a man searches when he looks and listens" [*On Lee* v. *United States*, 193 F.2d 306, 313 (2d Cir. 1951); *Lopez* v. *United States*, 373 U.S. at 459, opin. of Justice Brennan; *District of Columbia* v. *Little*, 178 F.2d 13, 18 (D.C. Cir. 1949), *aff'd* 339 U.S. 1 (1950)].

Brief for Respondent at 53-54.

Berger further argued that since overhearing does not constitute a seizure, a mere recording of what is perceived could equally not constitute a seizure. The respondent also drew analogies to photographs and inventories in customary searches, and the fact that they are not regarded as seizures. Having decided what is not seizure, the respondent asked the following:

> Recognizing the distinction between search and seizure of intangibles, the question remains: when does a seizure of spoken words occur? Can a point be fixed where the seizure's essential feature of selectivity can operate? The clue to resolution is provided by cases dealing with tangible evidence which is seen, but not physically possessed [see, *Zap* v. *United States*, 328 U.S. 624, 629 (1946); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920); *McGinnis* v. *United States*, 227 F.2d 598 (1st Cir. 1955); *Williams* v. *United States*, 263 F.2d 487 (D.C. Cir. 1959)]. Those cases noted that there is no distinction between physically taking the objects and introducing testimony relating to them in court, or in using them as "leads" to other evidence. Thus, in addition to physical seizure, a constructive seizure of tangibles may occur by virtue of their use.
>
> By the same logic, reception of oral evidence—incapable of physical possession—amounts to a seizure only when use is made of conversations. And so viewed, the seizure is impermissibly general only if the use extends beyond conversations specified in the warrant.

Id. at 54-55.

ments in the seizure of conversations. In light of the additional *Berger* safeguards limiting the use of the seized conversations, namely prompt execution, termination date, special circumstances, and return on the warrant requirements, either of these interpretations may now be justified under the fourth amendment. In the *Berger* opinion, Justice Clark, commenting on the *Osborn* order, came to a similar conclusion: "[T]hrough these strict precautions the danger of an unlawful search and seizure was minimized."[100]

Some clarification of these terms is necessary before the future of electronic surveillance can be determined. If the requirements of particularity are interpreted to allow this type of surveillance, it will be necessary to examine the statutes in order to ascertain whether they possess those other safeguards which would allow the liberal construction of "particularity" under the fourth amendment.

C. *Application to State Statutes*

In examining the state statutes specifically, it should be noted that three, Nevada, Oregon, and Massachusetts, utilize the term "reasonable grounds" for belief that a crime is being, has been, or is about to be committed. The New York statute used this terminology, and while the Court declined to determine its constitutionality, finding the statute invalid on other grounds, it did indicate that "[s]uch a requirement raises a serious probable cause issue under the Fourth Amendment."[101] Insofar as the validity of the statutes is concerned, this issue need not be resolved here, since they, like the New York statute, are invalid on other grounds.

California

Shortly after the *Berger* decision was handed down, California enacted new legislation in the area of electronic surveillance. At the time of the decision, however, the then-existing law did not fare well under the application of the *Berger* guidelines. Sections 653h-j[102] of the Penal Code were rendered defective by the decision since they failed to interpose a "neutral and detached" authority between the police and the public by allowing either a supervising police officer

100 388 U.S. at 57.

101 *Id.* at 54, 55.

102 Act of May 31, 1941, ch. 525, § 1 [1941] Cal. Stats. 1833 (§ 653h, repealed 1967); Act of July 6, 1957, ch. 1879 § 1 [1957] Cal. Stats. 3285 (§ 653i, repealed 1967); Act of July 19, 1963, ch. 1886, § 1 [1963] Cal. Stats. 3871 (§ 653j, repealed 1967).

or a district attorney to authorize the placement of the devices. Additionally, these provisions failed to provide criteria as to the probable cause, particularity, prompt execution, termination date, special facts, and return requirements of *Berger*. Consequently, they were virtually without safeguard.

The new legislation, enacted two months after *Berger*, formally repealed sections 653h-j;[103] the change, however, was primarily one of form, as the wording of the erstwhile sections are incorporated in substance in California Penal Code Sections 630 to 633.[104]

The basic purpose of the new provisions is stated in section 630, where the legislature proclaims that

> [the] increasing use of [eavesdropping] . . . has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.
>
> The Legislature by this chapter intends to protect the right of privacy of the people of this state [while recognizing] . . . that law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehension of lawbreakers. Therefore, it is not the intent of the Legislature to place greater restraints on the use of listening devices and techniques by law enforcement agencies than existed prior to the effective date of this chapter.[105]

Having stated its objective, the legislature enacted sections 631 and 632, which proscribe wiretapping and eavesdropping by "any person," including those individuals who act for or on behalf of the government.[106] This reference to government officers is, however, qualified by section 633, which provides that

> [n]othing in Section 631 or 632 shall be construed as prohibiting the Attorney General, any district attorney [or their assistants or any law enforcement officer] . . . acting within the scope of his authority, from overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter.[107]

Prior to the recent legislation, California officials could lawfully eavesdrop pursuant to section 653h. This repealed statute, while im-

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103 CAL. PEN. CODE § 620 (West Supp. 1967).

104 CAL. PEN. CODE §§ 630-633 (West Supp. 1967).

105 CAL. PEN. CODE § 630 (West Supp. 1967).

106 CAL. PEN. CODE § 632(b) (West Supp. 1967). The term "person" includes "an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local . . . ."

107 CAL. PEN. CODE § 633 (West Supp. 1967).

posing criminal liability for electronic eavesdropping, carved out an exception for law enforcement officers, who could use and install recording devices when "authorized . . . by the [heads of their offices or departments] . . . or by a district attorney, when such use and installation [were] necessary in the performance of their duties in detecting crime and in the apprehension of criminals."[108]

The terminology of the new section 633 would then appear to sanction police electronic surveillance by relating back to the *repealed* statutory wording of section 653h, a confusing legislative procedure at best, even when the same grant of power can be gleaned from a reading of the new sections. Thus, it can be ascertained that the new legislation in California, by incorporating the substance of the repealed sections and by failing to heed the *Berger* guidelines, continues the unconstitutional mode of its predecessor.

Nevada

While Nevada's permissive *ex parte* court procedure for electronic search[109] interposes a neutral and detached authority between the police and the public, it fails to provide other necessary safeguards.

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[108] Act of May 31, 1941, ch. 525, § 1 [1941] Cal. Stats. 1833 (repealed 1967).

[109] NEV. REV. STAT. §§ 200.660-200.680 (1963):

§ 200.660 *Court order for interception: Contents of application; effective period; renewals.*

1. An ex parte order for the interception of wire or radio communications or private conversations may be issued by the judge of the district court or of the supreme court upon application of a district attorney or of the attorney general setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that the crime of murder, kidnapping, extortion, bribery or crime endangering the national defense or a violation of the Uniform Narcotic Drug Act has been committed or is about to be committed; and

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime or which may enable the prevention of such crime; and

(c) No other means are readily available for obtaining such evidence.

2. Where statements in the application are solely upon the information or belief of the applicant, the precise source of the information and the grounds for the belief must be given.

3. The applicant must state whether any prior application has been made to intercept private conversations or wire or radio communications on the same communication facilities or of, from or to the same person, and, if such prior application exists, the applicant shall disclose the current status thereof.

4. The application and any order issued under this section shall identify fully the particular communication facilities on which the applicant proposes to make the interception and the purpose of such interception.

5. The court may examine, upon oath or affirmation, the applicant and any witness the applicant desires to produce or the court requires to be produced.

6. Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the order may, upon application of the officer who secured the original order, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

The statute is devoid of a sufficient particularity requirement, calling only for a description of the "particular communication facilities" through which the interception is to be effected and for the "purpose" of the interception.[110] The sixty-day period allowed for execution plus the extension periods provided are clearly insufficient for the required prompt execution of the warrant as they strongly resemble the New York provisions. Furthermore, there are no "termination date" or "return on the warrant" requirements.[111] Thus, while the statute may satisfy the "special circumstances" requisite, it must still be deemed unconstitutional in omitting a provision for particularity, prompt execution, termination, and return on the warrant.

Oregon

An *ex parte* court order procedure for permissive electronic search is also prescribed in Oregon.[112] The state statute covers special

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§ 200.670 *Application for order, documents, testimony confidential; disclosure of information prohibited.*

1. During the effective period of any order issued pursuant to NRS 200.660, or any extension thereof, the application for any order under NRS 200.660 and any supporting documents, testimony or proceedings in connection therewith shall remain confidential and in the custody of the court, and such materials shall not be released nor shall any information concerning them be disclosed in any manner except upon written order of the court.

2. No person shall disclose any information obtained by reason of an order issued under NRS 200.660, except for the purpose of obtaining evidence for the solution or prevention of a crime enumerated in NRS 200.660, or for the prosecution of persons accused thereof, unless such information has become a matter of public record in a criminal action as provided in NRS 200.680.

§ 200.680 *Admissibility of information in evidence.*

. . . .

2. Any information obtained, either directly or indirectly, pursuant to an effective order issued under NRS 200.660 shall not be admissible in any action except:

(a) It shall be admissible in criminal actions involving crimes enumerated in NRS 200.660 in accordance with rules of evidence in criminal cases; and

(b) In proceedings before a grand jury involving crimes enumerated in NRS 200.660.

§ 200.690 *Penalties.*

Any person who willfully and knowingly violates NRS . . . 200.670 shall be guilty of a felony.

110 NEV. REV. STAT. § 200.660(4) (1963). In the area of specific identification of the crime at which the order is directed, § 200.660(1)(a) limits application of the statute to certain crimes enumerated in note 109 *supra*, and requires the judge to be satisfied that there are reasonable grounds to believe that one of them has been or is about to be committed. While this provision may satisfy the specificity of the crime requirements in *Berger*, *see* the text accompanying note 65 *supra*, it is doubtful whether the "particular communication facility" provision of the Nevada statute adequately covers in all cases the particular description of the place of the search requirement of the fourth amendment. Note also that nowhere does the statute require the identification of the parties upon whom the eavesdrop is directed, unless it exists by implication in the special circumstances provision of § 200.660(1)(c).

111 *But see* NEV. REV. STAT. §§ 200.670(2) and 200.680(2) (1963) which have limited functions in this area, note 109 *supra*.

112 ORE. REV. STAT. § 141.720-141.740 (1963):

facts,[113] particularity and prompt execution[114] in a manner similar to that in the Nevada statute. Consequently, these provisions suffer the same fate as Nevada's, the former being satisfactory, the latter

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§ *141.720 Order for interception of telecommunications, radio communications or conversations.* (1) An ex parte order for the interception of telecommunications, radio communications or conversations, may be issued by any judge of a circuit or district court upon verified application of a district attorney setting forth fully the facts and circumstances upon which the application is based and stating that:

(a) There are reasonable grounds to believe that a crime directly and immediately affecting the safety of human life or the national security has been committed or is about to be committed.

(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime.

(c) There are no other means readily available for obtaining such information.

(2) Where statements are solely upon the information and belief of the applicant, the precise source of the information and the grounds for the belief must be given.

(3) The applicant must state whether any prior application has been made to obtain telecommunications, radio communications or conversations on the same instrument or from the person and, if such prior application exists, the applicant shall disclose the current status thereof.

(4) The application and any oder issued under this section shall identify fully the particular telephone or telegraph line, or other telecommunication or radio communication carrier or channel from which the information is to be obtained and the purpose thereof.

(5) The court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced.

(6) Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the warrant or order may, upon application of the officer who secured the original warrant by application, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days.

§ *141.730 Proceeding under expired order prohibited.* Any officer who knowingly proceeds under an order which has expired and has not been renewed as provided in ORS 141.720 is deemed to act without authority under ORS 141.720 and shall be subject to the penalties provided . . . as though he had never obtained any such order or warrant.

§ *141.740 Records confidential.* The application for any order under ORS 141.720 and any supporting documents and testimony in connection therewith shall remain confidential in the custody of the court, and these materials shall not be released or information concerning them in any manner disclosed except upon written order of the court. No person having custody of any records maintained under ORS 141.720 to 141.740 shall disclose or release any materials or information contained therein except upon written order of the court.

[113] ORE. REV. STAT. § 141.720(1)(b), (c) (1963).

[114] With regard to the particularity requirement of *Berger*, Oregon calls only for the indentification "the particular telephone or telegraph line, or other telecommunication or radio communication carrier or channel from which the information is to be obtained and the purpose thereof." ORE. REV. STAT. § 141.720(4) (1963). Prompt execution and new probable cause for extension are avoided by the statute's use of a sixty-day maximum period, § 141.720(6), thus providing for a "series" of searches on a single showing of probable cause. *See* the text accompanying note 66 *supra*. Oregon also provides for one sixty-day extension followed by renewals not exceeding thirty days each.

two unsatisfactory. The provision in Oregon's statute enunciating the termination date requirement, is as follows:

> Any officer who knowingly proceeds under an order which has expired and has not been renewed . . . is deemed to act without authority . . . and shall be subject to the penalties provided . . . as though he had never obtained any such order or warrant.[115]

This provision fails to meet the requisite termination date because the procedures upon which it relies, namely those of particularity and prompt execution, are in themselves insufficient.

As to return on the warrant, judicial control is apparently extended to the fruits of the search[116] and seizure by a provision stating that: "No person having custody of any records maintained under [the Oregon statute] . . . shall disclose or release any materials or information contained therein except upon written order of the court."[117] In review, this statute does not fulfill the *Berger* tests of particularity, prompt execution and termination date, even though it apparently suffices in the areas of special circumstances and return on the warrant requirements. Thus, if electronic surveillance is determined possible under the fourth amendment, Oregon will need additional safeguards to utilize this form of crime detection.

Massachusetts

The Massachusetts provision for electronic surveillance[118] also is wanting in adequate constitutional safeguards. The statute requires

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115 ORE. REV. STAT. § 141.730 (1963).

116 This construction of ORE. REV. STAT. § 141.740 (1963) is charitable, and thus any conclusion in favor of the provision is qualified. The critical words involved are "any records" as well as "any materials or information" and in this instance are interpreted to include the fruits of the search as well as the material involved in the application for the order. A contrary interpretation would render the provision insufficient under the *Berger* decision.

117 ORE. REV. STAT. § 141.740 (1963).

118 MASS. ANN. LAWS, ch. 272 § 99 (Supp. 1966). *Eavesdropping; use of devices; wire tapping: Court's order*

> Whoever, except in accordance with an order issued as provided herein, secretly or without the consent of either a sender or receiver, overhears, or attempts secretly, or without the consent of either a sender or receiver, to overhear, or to aid, authorize, employ, procure, or permit, or to have any other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless tap or electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both.
>
> Such order may be issued and shall be signed by any justice of the supreme judicial or superior court upon application of the attorney general or a district attorney for the district verified by his oath or affirmation that there are reason-

a statement of the purpose of the surveillance and a description of the location and identity of person or persons whose conversations are to be overheard, as well as the identity of persons authorized to overhear and intercept the communications. Additionally, in the case of telephonic interception, the statute necessitates identification of the telephone line to be tapped, if such information is known. A three-month maximum operation of the warrant is permitted, going beyond New York's invalid sixty-day period, and like New York, an extension can be granted upon a mere showing that such would be in the "public interest."[119] From the foregoing it is readily apparent that the sufficiency of the Massachusetts' legislation is highly questionable. The statute fails to require particular description of the specific crime involved, and it may be lacking in an adequate delineation of the relevant communications. Furthermore, an extension of the search is allowed beyond the limits which have already been determined impermissible. The statute has no termination date provision, no requisite showing of "special facts" to waive notice of the search, and

able grounds to believe that evidence of crime may thus be obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Said order shall describe or identify (1) the purpose thereof; (2) the location of and the person or persons who are to be so overheard or whose communications are to be so intercepted if known; (3) if telephone communications are to be so intercepted the telephone lines if known; (4) the person or persons who are authorized to so overhear or intercept, or the person or persons under whose supervision such overhearing or interception is to be conducted.

In connection with the issuance of such an order, the justice may examine on oath the applicant and any other witness he may produce, for the purpose of satisfying himself of the existence of reasonable grounds to believe that evidence of crime may be thus obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Any such order shall be effective for the time specified therein, but not for a period of more than three months, unless extended or renewed by the justice who signed and issued the original order, upon satisfying himself that such extension or renewal is in the public interest. Any such order, together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for such interception or directing such overhearing or interception of the telephone communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained personally by the judge or justice issuing the same. In case of emergency and when no such justice is available, the attorney general or the district attorney for the district may issue such order, but within seventy-two hours thereafter the said attorney general or district attorney upon oath or affirmation setting forth all the facts, shall apply to a justice of the supreme judicial or superior court for a court order to issue validating the acts of said attorney general or district attorney. If the court refuses, after hearing, to validate such prior order of the attorney general or district attorney, said prior order shall cease to be effective, and no further action thereunder may be taken.

119 This provision, standing alone, is sufficient to invalidate the Massachusetts statute under *Berger* for the reason that, like the New York statute, it provides the equivalent of a series of searches and seizures based upon a single showing of probable cause. Additionally, like New York, Oregon and Nevada, Massachusetts requires no new showing of probable cause for extensions of the original order.

therefore it would be unconstitutional under the guidelines established in *Berger*.

Maryland

Electronic search under Maryland legislation[120] comes nearest to satisfying the *Berger* test of constitutionality. The primary difference between Maryland's statute and the others previously considered is that, on its face, it does not demonstrate noncompliance with the Court's guidelines. Under this statute it must appear to a duly author-

120 MD. ANN. CODE art. 27, § 125A (Supp. 1966): *Use to overhear or record private conversation.*

(a) *Use without consent or knowledge prohibited.*—It is unlawful for any person in this State to use any electronic device or other device or equipment of any type whatsoever in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation without the knowledge or consent, expressed or implied, of that other person.

(b) *Prevention of crime or apprehension of criminal—Petition for ex parte order authorizing use.*—However, if it shall appear to a duly authorized public law enforcement officer of this State that a crime has been, or is being, or is about to be committed, and that the use of such electronic devices are required to prevent the commission of the said crime, or to apprehend the persons who shall have committed it, then the law enforcement officer or officers shall submit to the State's attorney of the county or of Baltimore City the evidence upon which the said law enforcement officer bases his contention that an ex parte order authorizing the use of the said electronic devices is necessary; and if it shall appear to the said State's attorney that there are reasonable grounds to believe that a crime has been committed or is being committed or may be committed then the said State's attorney shall apply to any of the judges of the circuit court of the county or of the Supreme Bench of Baltimore City, by means of a formal ex parte petition for the issuance of an order authorizing the use of the said electronic devices or equipment, and shall make oath or affirm in the said petition that there is probable cause to believe that a crime may be, or is being, or has been committed and shall state the facts upon which said probable cause is based, and further, that the use of the said electronic devices or equipment is necessary in order to prevent the commission of, or to secure evidence of the commission of such crime. In such case the affiant shall identify, with reasonable particularity, the device or devices to be used, the place or places where they are to be used, the person or persons whose conversation is to be intercepted, the crime or crimes which are suspected to have been, or about to be committed, and that the evidence thus obtained will be used solely in connection with an investigation or prosecution of the said crimes before any such ex parte order shall be issued. The applicant must state whether any prior application has been made in the same matter and if such prior application exists the applicant shall disclose the present status thereof.

(c) *Same—Issuance of order; duration; disposition.*—The judge of the circuit court of the county or of the Supreme Bench of Baltimore City shall satisfy himself that the facts stated in the petition indicate that there is probable cause for the issuance of the said order. Such ex parte order shall be effective for the time specified in the order, but for not more than thirty days unless extended or renewed by the judge, upon proper petition meeting the same requirements as the original petition. Any ex parte order so issued shall be retained by the applicant as authority for the use of the electronic device or equipment therein set out and the interception of the conversation sought to be intercepted. A true copy of such order, together with any exhibits submitted with the petition shall be sealed and filed with the clerk of the court in which the order is issued, at the time of its issuance, provided, however, that such order shall be available to persons in interest after arrest, upon order of the court.

ized law enforcement officer that a crime "has been, or is being, or is about to be committed," and that the use of electronic devices is required either to prevent the commission of the crime or to apprehend those who have committed it. The law enforcement officer must then convince the state's attorney of these facts, whereupon the attorney applies to the court for an *ex parte* eavesdropping warrant. In turn, the Court must be satisfied that "probable cause" existed to believe the particular crimes have been, are being, or are about to be committed.

Clearly, Maryland has avoided the quandary as to the relationship between the terms "reasonable ground" and "probable cause" by expressly using the latter. Moreover, it satisfies the *Berger* requisite of showing particular facts so as to permit the waiving of notice to the person upon whom the search is focused.[121] By limiting the maximum duration of the surveillance to thirty days, the Maryland statute may provide for prompt execution. However, an unequivocal statement of validity cannot be offered, since the Court in *Berger* merely indicated that a period of sixty days is too long, not that a thirty-day period is an acceptable limit.[122] The statute is also unique since it is the only one that directs an extension of the original order to be based upon a "proper petition meeting the same requirements as the original petition."[123]

The next question is central to the relationship between electronic surveillance and the requirements of the fourth amendment: does the Maryland statute describe with sufficient particularity the place to be searched and the thing to be seized? It is necessary in the application for such an order to identify,

> with reasonable particularity, the device or devices to be used, the place or places where they are to be used, the person or persons whose conversation is to be intercepted, the crime or crimes which are suspected to have been, or about to be committed, and [to cer-

121 "[T]he State's attorney shall . . . affirm in the said petition that . . . *use of the said electronic devices or equipment is necessary* in order to prevent the commission of, or to secure evidence of the commission of such crime . . . ." MD. ANN. CODE art. 27, § 125A(b) (Supp. 1966) (emphasis added). The same section also provides that, "it shall appear to a duly authorized public law enforcement officer of this State that . . . the use of such electronic devices are required to prevent the commission of the said crime, or to apprehend the persons who shall have committed it . . . ."

122 It is submitted, however, that since length was the motivating factor in the objection, Maryland will fare better in this regard than did New York. *See* 388 U.S. at 59.

123 MD. ANN. CODE art. 27, § 125A(c) (Supp. 1966).

> tify] that the evidence thus obtained will be used solely in connection with an investigation or prosecution of the said crimes before any such ex parte order shall be issued.[124]

Whether the Maryland statute provides sufficient particularity in the warrant, and whether such particularity is possible in *any* statute, could best be ascertained by further inquiry into what is capable of identification and description that is not identified and described by the Maryland statute. The statute requires description of the device, the place in which it is used, the person or persons at which such use is directed, and the crime or crimes which it seeks to uncover. It is offered that these requirements render as complete a picture as is possible with regard to a future conversation in which there is probable cause to believe that evidence of a crime will arise, and therefore would provide the necessary particularity in a constitutional interpretation allowing electronic surveillance.

What then is the fate of the Maryland statute with respect to the remaining *Berger* requirements of termination date and return on the warrant? Since the terms are not specifically mentioned in the statute, it is necessary to determine whether they exist functionally or by implication. The function of both the termination date and return of the warrant requirements is to limit the discretion of the officer executing the warrant.[125] The former limits his discretion in the scope of the search and seizure, the latter limits his use of the product. Maryland's statute satisfies both of these goals by restricting the admission of evidence gained pursuant to the warrant to that relevant to the specified crime.[126] The phrase "pursuant to the warrant," as used in this interpretation, implies satisfaction of the other safeguards of the statute and assumes their constitutional sufficiency as demonstrated above. The officer's discretion in the scope of the search and seizure could take two forms in an electronic surveillance —he could, because of a desire to hear more incriminating statements, continue to eavesdrop after hearing the relevant conversation, or he could continue in the hope of hearing incrimination of a different type. Both are inherently restricted by the thirty-day maximum time

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124 MD. ANN. CODE art. 27, § 125A(b) (Supp. 1966).

125 For a general reference to the mechanics of return on the warrant, *see* material cited in note 73 *supra.*

126 MD. ANN. CODE art. 27, § 125A(b) (Supp. 1966). "[T]he evidence thus obtained will be used solely in connection with an investigation or prosecution of the said crimes . . . ."

limit on the surveillance, and the latter is further limited by the admission of evidence relevant only to the crime specifically mentioned in the warrant. It is therefore submitted that of all the statutes considered, Maryland alone approximates the requirements of the *Berger* decision. This is not to say, however, that a more satisfactory statute cannot be drafted to meet the additional safeguards of *Berger*, particularly in the areas of termination date and return on the warrant provisions, found only by implication in the Maryland statute.

III. CONCLUSION

The history of the law of eavesdropping has been traced to its latest development in *Berger v. New York*. An attempt has been made to establish the effect of the decision on electronic surveillance. The central question presented by the decision is concerned with the possibility that the Court may, by implication, have established safeguards for electronic surveillance that are impossible to meet. This impossibility specifically concerns the fourth amendment requirement that the object of a search be particularly described, a feat uniquely difficult with conversations that are to occur sometime in the future. If the terms "search" and "seizure" are construed in a manner consistent with the selective use of parts of a conversation, and the rights of the accused are additionally protected by (1) procedures requiring showing of *probable cause* for belief that a *particular crime* has been or will be committed; (2) a showing of *special circumstances* necessitating the use of electronic devices; (3) *prompt execution;* (4) a demonstration of *new probable cause for extensions* of the order; and (5) a return on the order *provision limiting the use* of any conversations, a valid electronic surveillance statute could conceivably exist. Proceeding on the assumption that such surveillance is possible under the fourth amendment, the statutes of six states were examined to see whether they otherwise met the requirements of *Berger*. Only one, that of Maryland, appears to meet the test, and then by implication in the areas of the termination date and return on the warrant. The remaining question, of course, concerns the validity of the assumption that electronic surveillance *is* possible and therefore consistent with the requirements of the fourth amendment. It is postulated that the offered interpretation of the terms "search" and "seizure," taken in conjunction with the other safeguards promulgated in *Berger*, render this consistency possible. Its probability, however, rests with the Court.

POSTSCRIPT

Shortly after the completion of this note, the Supreme Court handed down its decision in *Katz v. United States*.[127] The majority opinion, written by Mr. Justice Stewart, presents succinct constitutional interpretations that have been foreshadowed by previous decisions.

In overturning the conviction of the petitioner, the Court reasoned that the protection of the fourth amendment extends to people rather than places, and refused to speak in terms of "constitutionally protected" areas. Consequently, the trespass doctrine enunciated in the *Olmstead* and *Goldman* opinions—that lack of physical penetration foreclosed fourth amendment considerations—was deemed not controlling in the present analysis of constitutional protection afforded the defendant. Rather, that which an individual desires to preserve as private was held to be significant. Thus, although the defendant in *Katz* could not reasonably expect his presence in a public telephone booth to be exempt from public view, he could expect that his conversation remain inaccessible to others.[128]

The most important aspect of *Katz* was the Court's determination that, even though the specific search and seizure before it was violative of the fourth amendment, electronic surveillance can be constitutionally conducted. Noting that the procedure in the instant case failed to impose a neutral and detached authority between the police and public, *i.e.*, the search was conducted without a judicial order, the Court stated:

> [I]t is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly appraised of the precise intrusion it would entail, *could constitutionally have authorized* [*the search and seizure*] *with appropriate safeguards* . . . .[129]

The *Katz* decision, consistent with the *Osborn-Berger* rationale, enunciates the constitutional propriety of electronic surveillance when conducted according to the *Berger* guidelines. This being so, critical evaluation of those existing statutes that purport to authorize such surveillance is rendered all the more pertinent.

JAMES W. STREET & MICHAEL T. THORSNES

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[127] 36 U.S.L.W. 4080 (U.S. Dec. 18, 1967). For a brief discussion of the *Katz* facts *see* text accompanying note 85 *supra*.

[128] *Id.* at 4081.

[129] *Id.* at 4082.