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Electronic Surveillance and the Right of Privacy

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ELECTRONIC SURVEILLANCE AND THE RIGHT OF PRIVACY

INTRODUCTION

> "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."[1]

Technological advances in wire-tapping and other forms of eavesdropping have had a significant effect upon constitutional rights. The devices available to the eavesdropper have given him an almost inconceivable ability to encroach upon the privacy of communication. Microphones too small to detect are sensitive enough to pick up every sound within a house, and tiny transmitters may be concealed in the lining of a coat, in a picture on a wall, or inside a telephone.[2] A telephone in New York may be tapped at will by using a second phone in Los Angeles to secretly actuate a small device previously installed inside the New York phone.[3] Installation of some of these devices does not require entry—a "spike mike" may be driven through a common wall.[4] Wires, when needed, may be specially painted on any surface and then concealed under a coat of ordinary paint.[5] There seemingly is no limit to what the sound engineer can construct to fit a particular situation.[6] Even more frightening is a parabolic microphone which under ideal conditions can pick up a conversation at a distance of one thousand feet, and a microwave beam now being perfected, which would be capable of penetrating any structure and returning every word spoken inside.[7] The development and perfection of such devices poses problems which must be confronted and resolved by the legislature or the courts in order to prevent further erosion of the right of privacy.

Wire-tapping is included in the broader terms of eavesdropping or electronic surveillance. Eavesdropping includes all form of surreptitious fact finding which may intrude on individual privacy.[8] This comment will analyze current restrictions on electronic surveillance under statute and case law, define the right which is to be protected, and explore new approaches to this area. Using as a foundation current and proposed legislation, a group of eavesdropping statutes for Montana will be suggested.

EXTENT AND USEFULNESS

Wire-tapping began shortly after the telegraph came into existence,

[1]Olmstead v. United States, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting).

[2]DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS 341-42 (1959). The DASH study is the most extensive in the field, and is reviewed at 44 MINN. L. REV. 813-940 (1960), in a symposium titled *The Wiretapping-Eavesdropping Problem: Reflections on the Eavesdroppers.*

[3]National Broadcasting Corporation special report, *The Big Ear,* televised October 31, 1965. Such devices are difficult to detect.

[4]This procedure was followed in Silverman v. United States, 365 U.S. 505 (1961).

[5]DASH, *op. cit. supra* note 2, at 316-17.

[6]N.B.C. special report, *supra* note 3. According to the report, eavesdropping in the Southern California area has become so widespread that some attorneys hire experts to search for "bugs" once every month.

[7]DASH, *op. cit. supra* note 2, at 346-58. However, such equipment would be bulky and very expensive.

[8]Eavesdropping is not a new problem. "Eavesdroppers, or such as listen under walls

and is now practiced throughout the United States.[9] Tapping has occurred most frequently in the city of New York where state law permits it under court order. City attorneys have testified that approximately 480 taps per year were installed in their jurisdictions for the investigation of larceny, vice, and official corruption.[10] Mr. Justice Douglas claims that there were 52,000 wire taps in New York in 1952, counting both legal and illegal installations.[11] Another authority claims that in the same year there were 13,000 to 26,000 taps.[12] The majority of wire-tap orders were obtained in vice investigations.[13] Eavesdropping other than by wire-tap is probably conducted on a much wider scale, but no statistics are available.

In contrast to the sensational activities of private investigators and police, respectable businessmen have quietly installed their own surveillance devices for purposes of internal security. Closed circuit television enables personnel to maintain a watch for possible shoplifting, and phones are tapped to detect pilfering and disloyalty. Two-way mirrors are common, as well as concealed microphones, in rooms which the public is invited to use.[14] The conversations of public officials in all sorts of government agencies, bureaus, and political subdivisions have been monitored.[15] Training centers for instructing wire-tapping are in operation under various sponsorships.[16]

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or windows, or the eaves of a house, to harken after discourse . . .'' were subject to prosecution at the common law if the offense was habitual. 4 BLACKSTONE, COMMENTARIES, ch. 13, § 5 (Lewis ed. 1900).

[9]Wire-tapping was widespread during the Civil War, and California enacted a statute prohibiting it in 1862. New York police were tapping telephones by 1895, as were unions and competing businesses. In 1929, Mayor Walker of New York City discovered that seventeen telephone lines serving city hall and his direct line to police headquarters had been tapped. An F.C.C. raiding party found wiretap equipment connected to the telephone lines of U.S. Supreme Court justices in 1935 or 1936, and during the same period the White House lines were also tapped. See DASH, *op. cit. supra* note 2, at 24-30. The most sensational wiretap scandal broke in 1955 when New York police unearthed a wire-tapping headquarters capable of intercepting conversations over one hundred thousand telephones. The New York Times, February 18, 1955; DASH, *op. cit. supra* note 2, at 84-86.

[10]DASH, *op. cit. supra* note 2, at 41.

[11]DOUGLAS, AN ALMANAC OF LIBERTY 355 (1955); DASH, *op. cit. supra* note 2, at 40.

[12]MINN. L. REV., *supra* note 2, at 819.

[13]DASH, *op. cit. supra* note 2, at 42. Police use of surveillance devices is more frequent in connection with less serious and continuing offenses such as vice. See Kent, *Wiretapping: Morality and Legality*, 2 HOUS. L. REV. 285, 288 (1965). There is some question whether gambling is a serious enough offense to justify the invasion of privacy, but police feel that gamblers are but the fringe of the hardcore underworld. See MINN. L. REV., *supra* note 2, at 843. A serious problem exists as to vice wire-tapping, in that police corruption often follows, and there have been several instances where plainclothesman were found to be ''shaking down'' the gamblers. DASH, *op. cit. supra* note 2, at 57-62; Kent, *supra* note 13, at 289-90.

[14]Car dealers in the Los Angeles area have concealed microphones in ''closing rooms'' where prospective customers are left alone to reveal how far they will go towards the purchase of a new automobile. *Id.* at 96, 212.

[15]Westin, *The Wire-tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 167 (1952). Eavesdropping is practiced by the F.B.I. in connection with loyalty probes. There have been complaints that lines at the United Nations have been under surveillance, and it is common knowledge that foreign embassy staffs have been victims of electronic surveillance.

[16]*Id.* at 168.

Law enforcement agencies hesitate to prosecute private eavesdroppers because the police themselves participate in illegal surveillance.[17] In many jurisdictions information obtained through surveillance is never introduced into court, but used only as an investigative tool. Police claim that such evidence panics lawyers and the community, resulting in efforts to restrict eavesdropping. Also, such evidence jeopardizes a trial because of the danger of technical arguments as to its source, which may also obscure the real issue.[18]

IS ELECTRONIC SURVEILLANCE NECESSARY?

Opponents of eavesdropping believe the practice to be an unwarranted invasion of privacy. Fear of a police state, always a public concern, is also a cause of complaint. Although eavesdropping's nearest relative, search and seizure, is permitted under restraints imposed by the Constitution, electronic surveillance can not be so regulated, and is less capable of being so restricted. Surveillance does not discriminate—every one who uses a tapped line or speaks in a bugged room suffers an invasion of privacy.[19] Victims of surveillance can't object to the secret intrusions because their assailants are unseen and unknown.

Continued eavesdropping by public officers, police departments, district attorneys, and federal bureaus, has put these agencies on the defensive against an inquisitive and alarmed public. Believing surveillance to be vital to their work, law enforcers practice it, but in deference to statutory restrictions, such activities are concealed. For this reason, efforts to gather data as to the extent and usefulness of surveillance have been resisted, constituting a roadblock to constructive legislation. Use by the government of a method so generally detested may breed disrespect and distrust of the law. It is better that some offenders escape criminal penalty than that the government blacken itself in this manner.[20]

The proponents of electronic surveillance recognize the inherent dangers, but counter with two arguments: (1) the need is great, and (2) these practices are no more sordid than other aspects of criminal investigation. Many eminent authorities believe eavesdropping to be an important and necessary investigative device.[21] To fail in its function, it is argued, would bring the law into greater disrepute than to employ a

[17] MINN. L. REV., *supra* note 2, at 821-22.

[18] DASH, *op. cit. supra* note 2, at 251.

[19] At present, auditory surveillance is a greater invasion of privacy, because of the greater security from visual eavesdropping afforded by enclosed places; but in the future walls may cease to be a barrier, and it will be the visual eavesdropper who poses the greatest threat to individual privacy. See note, 52 CALIF. L. REV. 142, 147 (1964).

[20] Rosenzweig, *The Law of Wire Tapping—Part IV*, 33 CORNELL L. Q. 73, 93 (1947).

[21] Note, 2 STAN. L. REV. 744, 751-52 (1950); MINN. L. REV., *supra* note 2, at 815-16, 822-23.

method generally condemned.[22] Eavesdropping is in the interests of the nation. Its use is advocated for the detection of serious offenses such as kidnapping and murder, and crimes against national security such as sabotage and espionage. But these advocates have been unable to show that tapping and bugging reduces such serious crimes. Electronic surveillance is most helpful in detecting crimes of a continuing nature such as gambling, prostitution, narcotics, and blackmail. The crimes of murder or robbery, however, consist of a single act which is carried out, and then not discussed further.

Electronic surveillance sometimes provides the critical proof of the conspiratorial nature of a criminal act. Recordings may serve to convince the defendants that police know of their guilt, and that they would be wise to turn state's evidence.[23] Also, a recording is often the only means of proving that a bribe has been offered.

It is also argued that electronic surveillance is no more of a dirty business than search and seizure, police informers, and spies. Not all police weapons can be morally immaculate.[24] Criminals utilize science to the fullest in their schemes, and therefore law enforcers should also be permitted the use of new devices. A complete ban on tapping and bugging would allow criminals to further their schemes by telephone without fear of police interception. A man who is clearly guilty should not be allowed to escape punishment because the means used to discover his crime and apprehend him were illegal.

A value judgment must be made between these sets of opposed arguments. It is submitted that rigidly controlled surveillance should be permitted. Since police corruption is a common occurrence when surveillance is permitted in connection with vice investigation, enforcement surveillance should be confined to the more serious crimes.[25] A continuing controversy also exists as to whether evidence obtained by illegal eavesdropping should be admissible in court.[26] The trend is towards exclusion of all evidence so obtained, and the fruits of such information.

[22]Rosenzweig, *supra* note 20, at 91. J. Edgar Hoover has described wiretapping as archaic and inefficient, and a barrier to sound, ethical, and scientific investigative technique.

[23]Westin, *supra* note 15, at 195.

[24]Westin, *supra* note 15, at 187.

[25]It can be argued that invasions of privacy are more justifiable when a more serious crime is involved.

[26]The arguments can be summarized as follows—Should be admitted: (1) exclusion would violate the ancient rule that evidence is admissible regardless of the means used to obtain it; (2) such information is usually introduced in the permanent form of tape or wire recordings—evidence is therefore the most reliable and accurate obtainable, and thus of great value in determining guilt or innocence; (3) those persons who eavesdrop contrary to statute should be punished directly by penal statutes or an action for civil damages brought by the victim, not indirectly by exclusion of valuable evidence so obtained; (4) rejection of relevant, though illegally obtained evidence, will often lead to the freeing of dangerous criminals. Should be excluded: (1) to admit illegally obtained evidence ratifies the act of the offending officer—distrust of the law results from acceptance of the fruits of illegal acts; (2) the right to be protected is so valuable as to justify the occasional release of a criminal; (3) exclusion is the only practical means of enforcing eavesdropping statutes, since penal sanctions are rarely invoked. See Rosenzweig, *supra* note 20, at 90, 95; and People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

This has been found to be the only means of deterring law enforcement officers and private individuals from violating statutory restrictions.

RIGHT OF PRIVACY

Confusion exists concerning the nature of the interest protected by the right of privacy. The state of law in this area has been described as "a haystack in a hurricane."[27] Warren and Brandeis, in their famous essay, indicated that the protected interest is "the principle which protects personal writings and all other personal productions . . . against publication in any form, is in reality not the principle of private property, but that of an *inviolate personality*."[28] (Emphasis added.) Prosser suggests that privacy is a composite of the interests in reputation, emotional tranquility and tangible property.[29] Electronic surveillance is an intrusion which demeans individuality and affronts personal dignity:

> [O]ur Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and in fact, intrusion is the primary weapon of the tyrant.[30]

Unlike other torts, harm caused by intrusions on privacy is not damage which may be repaired, and the loss suffered may not be made good by an award of damages.[31]

Constitutional considerations concerning the right of privacy have revolved almost entirely around the Fourth Amendment. However, the narrow interpretation of the Fourth Amendment to date, and the continual analogy to search and seizure, renders the Fourth Amendment inadequate in this area. Other constitutional sources of protection should be cultivated.[32] The Fifth Amendment was first mentioned by Brandeis

[27]Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (2d Cir. 1956).

[28]Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, at 205 (1890). Brandeis, dissenting in *Olmstead, supra* note 1, at 478: "They [the makers of our Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

[29]According to Prosser, privacy may be violated by four distinct types of torts: (1) intrusions upon a person's seclusion or solitude, or into his private affairs; (2) public disclosure of embarassing private facts about a person; (3) publicity which places a person in a false light in the public eye; (4) appropriation, for the defendant's advantage, of the victim's name or likeness. For an intrusion to be actionable, it must be something which would be objectionable or offensive to a reasonable man. Prosser concludes that the interest protected is primarily a mental one. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392 (1960).

[30]Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 973-74 (1964).

[31]*Id.* at 1003.

[32]REVISED CODES OF MONTANA, 1947, § 64-201 "Besides the personal rights mentioned or recognized in this code, every person has, subject to the qualifications and

in his dissent in *Olmstead,* but not seriously considered because the individual was speaking voluntarily, even though unaware his statement was being overheard.[33] However, in other settings an accused is informed of his Fifth Amendment right before he is questioned. Since the Court is moving towards a requirement that the individual be advised of all his constitutional rights, it is likely that the Fifth Amendment may be employed to restrict electronic surveillance.[34]

It has been argued that privacy is part of the liberty protected against the federal government by the Due Process clause.[35] Justice Frankfurter once observed: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to free society. It is therefore implicit in 'the concept of ordered liberty' . . . ."[36] In addition, a "right of silence" may exist as one form of freedom of speech.[37] The theory has been rejected by the Court thus far, probably because of the difficulty of injecting a "freedom from" claim into a concept that has always signified "freedom to do." However, freedom of speech may be violated through the inhibitive effect of electronic surveillance.[38] The Court has recognized that indirect interference with First Amendment rights in effect violates them.[39]

Privacy is being more fully defined by recent decisions of the Supreme Court which extend far beyond electronic surveillance. Privacy may be violated by several means. On the civil side, intrusions may be

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restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations." The only case falling under this section is one of slander, but the statute could be construed so as to protect privacy. (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.)

[33]The defendant argued that the use as evidence of overheard conversations compelled the defendant to be a witness against himself in violation of the Fifth Amendment. Taft, C.J., speaking for the majority, said: "There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment." *Olmstead, supra* note 1, at 462.

[34]See, *e.g.,* Escobedo v. Illinois, 375 U.S. 902 (1964).

[35]Silverman v. United States, 275 F.2d 173, 179 (D.C. Cir. 1960) (Washington, J., dissenting).

[36]Wolf v. Colorado, 338 U.S. 25, 27 (1949). Mapp v. Ohio, 367 U.S. 643 (1961), which overruled *Wolf,* and imposed the exclusionary rule upon the states, would seem to substantiate this theory.

[37]Douglas, J., expressed this view as to those who are asked to subscribe to official oaths, and to witnesses appearing before legislative investigating committees who refuse to answer questions which touch on their beliefs or the beliefs of their friends. See DOUGLAS, RIGHT OF THE PEOPLE 134 (1958): "One great right protected by the First Amendment is the right of silence."

[38]"But freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of the home and office . . . . If electronic surveillance by the government becomes sufficiently widespread, and there is little prospect of checking it, the hazard that as a people we may become hagridden and furtive is not fantasy." Lopez v. United States, 373 U.S. 427, 470 (1963) (Brennan, J., dissenting). Further, even loss of anonymity may discourage the exercise of freedom of expression. See King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations,* 33 GEO. WASH. L. REV. 240, 267 (1964).

[39]*E.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); N.A.A.C.P. v. Alabama,

committed by the press, by landlords,[40] for commercial purposes,[41] and most recently, by a state statute which prohibited the use of contraceptives by married couples.[42] Criminal intrusions such as illegal search and seizure and eavesdropping are more serious since incriminating evidence is usually being sought. Electronic surveillance is the most serious intrusion of privacy since the victim is unaware his action are under surveillance, and eavesdropping is much more pervasive and capable of a much deeper penetration into the individual's existence.[43]

There are indications that privacy may be placed on a higher plane, and thus be accorded special protection, as has been done with freedom of speech, the right to vote, and the right of indigents to assigned counsel. Should privacy be given special protection, eavesdropping will be sharply curtailed, or perhaps prohibited altogether.

THE LAW

> Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.[44]

In order to appreciate the problems which accompany any attempt to place electronic surveillance within the Fourth Amendment or to formulate new legislation, it is necessary to analyze the law as developed by federal courts. Two main lines of authority exist in this area. Restrictions on wire-tapping have been imposed by statutory interpretation, while restrictions on eavesdropping have until very recently been of a constitutional nature.

Olmstead v. United States is the landmark case which begins the constitutional history of electronic surveillance. In a 5-4 decision, the Supreme Court held that federal agents who had tapped the defendant's telephone lines without a physical trespass had not violated the Fourth or Fifth Amendments.[45] The majority sharply limited the scope of the

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357 U.S. 449 (1958); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 316 U.S. 584 (1942), *rev'd on rehearing*, 319 U.S. 103 (1943); Grosjean v. United States, 297 U.S. 233 (1935).

[40]The leading case in this area is Welsch v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952). At first privacy was accorded legal protection only in cases of actual physical intrusion, but was later extended to include surveillance of the electronic type. See Prosser, *supra* note 29, at 389-90. Three states have applied the same principle to peering through the windows of a house. Moore v. New York Elevated R. Co., 130 N.Y. 523, 29 N.E. 997 (1892); Pritchett v. Bd. of Comm'rs of Knox County, 42 Ind. App. 3, 85 N.E. 32 (1908); Sounder v. Pendleton Detectives, 88 So.2d 716 (La. App. 1956).

[41]Including public disclosure, use of name of likeness, false light, advertising, bill collecting, pictures, and unfair competition. See Prosser, *supra* note 29.

[42]See Griswold v. Connecticut, 389 U.S. 479 (1965).

[43]Eavesdropping by means of a listening device has been held to be an actionable violation of one's right of privacy. See McDaniel v. Atlanta Coco-Cola Bottling Co., 60 Ga. 92, 2 S.E.2d 810 (1939); Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964).

[44]ARNOLD, SYMBOLS OF GOVERNMENT 160 (1935).

[45]*Supra* note 1. For an extended discussion of *Olmstead*, see Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUPREME COURT REVIEW 212, 218-28.

Fourth Amendment by insisting that a trespass be committed before a violation would be found.[46] Further, the Court stated that conversation is intangible, therefore incapable of seizure.[47] Although not within the scope of certiorari, the Court also held that no exclusionary rule applied to evidence obtained in violation of the Fourth Amendment, even though wire-tapping was forbidden by the state involved.[48] Strong dissents were delivered by Justices Holmes, Brandeis, Butler and Stone. Justice Holmes protested government use of evidence obtained through a criminal act, and described wire-tapping as "dirty business."[49] Brandeis' classic and powerful dissent put wire-tapping within the confines of the Fourth and Fifth Amendments. Since the adoption of the two amendments, Brandeis said: "subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government . . . to obtain disclosure in court of what is whispered in the closet."[50] Reasoning that the two amendments were intended to forbid any unwarranted invasions of individual privacy, he concluded that the Fourth Amendment forbids interception of telephone conversations, while the Fifth forbids information so obtained from being admissible as evidence. Although severely criticized at the time, the Olmstead decision did stimulate legislation, subsequent interpretation of which strongly reflected Brandeis' influence.

Section 605

In 1934, Congress passed the Federal Communications Act. Section 605 provided in part: "[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 . . . ."[51] (Emphasis added.) A major defect of the statute is that both interception and divulgence are required before there is a violation.

Nardone v. United States was the first case in which the Supreme Court interpreted section 605. Reversing convictions on liquor violations where a substantial part of the government's proof rested on intercepted telephone conversations, the Court read section 605 to forbid tapping of telephone messages. Further, the term "person" in the statute includes federal agents, and the barring of communications to "any person" pre-

[46]By way of dicta earlier cases recognized a right of privacy protected by the Fourth Amendment when searches were not physical. See, *e.g.*, Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886). In *Olmstead* the Court questioned whether the Fifth Amendment could be violated if the Fourth were not, but dismissed the Fifth on the grounds that the monitored statements were voluntary.

[47]"'The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.'" Olmstead v. United States, 277 U.S. 438, 464 (1928).

[48]*Id.* at 466-69.

[49]*Id.* at 469-70.

[50]*Id.* at 473.

[51]48 Stat. 1103 (1934), 47 U.S.C. § 605 (1962).

cludes testimony in federal court of the evidence so obtained.[52] The defendants were reconvicted and the case was again appealed. In considering whether the lower court erred in refusing to allow the defendants to examine the government about the uses it had made of wire-tap information, the Court held that section 605 applies not only to such information, but also to evidence obtained through knowledge gained from such information.[53] During the same term the Court also held that it is impossible to separate intrastate from interstate calls as they pass over the wire, and that therefore section 605 prohibits both types of interception. Also, consent of a conversant obtained by confronting him with recordings and promises of leniency is not "authorization of the sender" under section 605.[54] In later tapping decisions, the Court found no need to resort to the Fourth Amendment, as the statutory inhibition has been interpreted to produce the same result.[55]

The analogy of the exclusion of wire-tap evidence to evidence obtained by illegal search and seizure in violation of the Fourth Amendment was extended in *Schwartz v. Texas*[56] where the Court refused to hold that wire-tap evidence obtained by state officers was barred in state courts. The case is similar to *Wolf v. Colorado*,[57] later overruled by *Mapp v. Ohio*.[58] It is submitted that if the privacy protected by section 605 is to be protected to the same extent as by the Fourth Amendment search and seizure provision, the path is clear for a ban in state courts of wire-tap evidence illegally obtained by state officers. Of course, if eavesdropping were placed within the Fourth Amendment, the *Mapp v. Ohio* exclusionary rule would likely be extended to include surveillance.

New York, by constitutional provision and statute[59] permits wiretapping if police first obtain a court order. Under this procedure, police tapped the telephone of one Benanti, and what they heard led them to believe a narcotics violation was about to take place. When arrested, Benanti had, instead, some cans of untaxed alcohol in his possession. Federal prosecution and conviction followed. The Supreme Court reversed, holding that state legislation would not be allowed to interfere with the operation of section 605, thus striking down the "silver platter" doctrine. Evidence obtained in violation of section 605, whether by state or federal agents, is inadmissible in federal courts.[60]

While *Benanti* put more "bite" in section 605, *Rathbun v. United States*[61] limited the scope of the word "interception." Summoned by a man who had received murder threats over the phone, police listened in

[52]302 U.S. 379, 383 (1937).
[53]308 U.S. 388 (1939).
[54]Weiss v. United States, 308 U.S. 321 (1939).
[55]Note, 59 NW. U.L. REV. 632, 636 (1965).
[56]344 U.S. 199 (1952).
[57]*Supra* note 36.
[58]*Supra* note 36.
[59]N.Y. CONST. art. 1, § 12 (1938); N.Y. CODE CRIM. PROC. § 813a.
[60]Benanti v. United States, 355 U.S. 96 (1957).
[61]355 U.S. 107 (1957).

on an extension when a second call with further threats was made. The Court held section 605 inapplicable because there had been no interception: "Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation."[62]

Eavesdropping by Concealed Microphone After Olmstead

Since section 605 was meant to apply only to telephone or wire surveillance, other forms of eavesdropping, until recently violated no federal law unless a trespass was committed or the Fourth Amendment otherwise violated. A 1966 ruling of the Federal Communications Commission forbids the use of radio devices for the purpose of eavesdropping. In cases after *Olmstead,* the Supreme Court employed a number of tests other than one of reasonableness. The primary test has continued to be that of "trespass." In *Goldman v. United States,* federal agents made an unauthorized entry in order to install a recorder, which failed to operate. Despite this, the agents were able to obtain the desired evidence by placing a listening device against the outer wall of defendant's room. The Supreme Court affirmed conviction, holding that the initial trespass had not tainted the subsequently acquired evidence procured without a trespass.[63] It was held in a companion case to *Goldman* that one not a party to a tapped conversation has no standing to object when evidence thus obtained is used against him.[64] In *On Lee v. United States,* a federal agent carrying a concealed transmitter entered defendant's laundry where the latter made incriminating statements concerning narcotics. The agent's testimony was admitted, and the Court affirmed, reasoning that since the agent entered with the consent, if not implied invitation of the defendant, that no trespass had been committed, and thus no violation of the Fourth Amendment.[65] In the *Irvine v. California* case, local police installed a network of microphones in the defendant's home and overheard all conversations throughout the house. Relying on the definition of interception used in *Goldman,* the Court held section 605 inapplicable: "All that was heard through the microphone was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard."[66]

A new test was announced in *Silverman v. United States*[67] where police pushed a "spike mike" through a party wall of an adjoining house until it touched the heating duct in defendant's house, thus converting the entire heating system into a conductor of sound. Defendants were

[62] *Id.* at 111.

[63] 316 U.S. 129 (1942). Section 605 of the Communications Act was held inapplicable on the theory that overhearing one end of a telephonic conversation is not an interception. The Court's opinion, however, suggested that the Fourth Amendment would be violated if the installer trespassed or the surveillance device was placed within the premises.

[64] Goldstein v. United States, 316 U.S. 114 (1942).

[65] 343 U.S. 747, 751-2 (1952).

[66] 347 U.S. 128, 131 (1953).

[67] 365 U.S. 505, 512 (1961).

convicted, and the court of appeals affirmed, based on testimony that the microphone did not penetrate more than five-sixteenths of an inch.[68] In an unanimous decision, the Supreme Court reversed, refusing to base their reasoning on the technicality of trespass, but upon the reality of an actual intrusion into a "constitutionally protected area" under the Fourth Amendment.[69] The new test was further defined in 1962, when it was argued that the monitoring of a jail cell conversation was a violation under the test. Although the Court rejected the petition, it broadened by way of dicta the area to be protected to include an apartment and hotel room, and in some cases, a store or business office.[70]

The chief problem in the application of the "area" test is that of defining the area, and at what times the test is applicable. Obviously there can be no eavesdropping when a confidential relationship is involved, such as attorney and client. Freedom of the individual may be restricted because of the uncertainty as to when the line is crossed from one area to another.[71] In adding the "area" test to the older "trespass' test the Court did not explain whether the two were exclusive, or whether there must be a violation of both before privacy is infringed. However, the *Lanza* case did make it clear that electronic surveillance could constitute an unreasonable search and seizure, hence could violate constitutional rights, thus going beyond the superficial rationale of trespass to recognize individual privacy.[72]

Lopez v. United States was based on facts similar to *On Lee:* A government agent carrying a concealed transmitter entering defendant's premises.[73] The Court affirmed conviction, relying heavily on the presence of the agent who heard the incriminating evidence, to which he could testify. However, three dissenters argued that defendant's rights had been violated, but even more important, the dissenters dēmonstrated an increased awareness of the problems presented by electronic surveillance, which permits "a degree of invasion of privacy that can only be described as frightening."[74] Further, the considerations underlying the Fourth Amendment have been too often ignored. *Lopez* indicates that deeper analysis and fresh approaches may be found soon.

Olmstead may no longer be valid law. In a recent search and seizure case, the Court held that incriminating statements could be illegally "seized."[75] Since the *Olmstead* rationale was that eavesdropping was not within the Fourth Amendment because conversation was intangible and therefore incapable of seizure, the way now seems clear for overruling *Olmstead* and its successor cases,[76] and utilizing the Fourth Amendment

[68]166 F. Supp. 838 (D. D.C. 1958).
[69]365 U.S. 505, 512 (1961).
[70]Lanza v. New York, 370 U.S. 139 (1962).
[71]See King, *supra* note 38, at 255.
[72]*Id.* at 257.
[73]*Supra* note 38.
[74]*Id.* at 468.
[75]Wong Sun v. United States, 371 U.S. 471 (1963).
[76]*Goldman, supra* note 63; *On Lee, supra* note 65.

to restrict electronic surveillance. The downfall of *Olmstead* was foreshadowed by *Silverman,* which added the "area" test.[77]

Use of Radio Banned

Most eavesdropping occurs in one of three situations, depending on the location of the parties and the equipment used: (1) where two or more persons at different locations are conversing by telephone or other means of wire communication, and the wire is tapped—section 605 prohibits interception and divulgence of this type of communication; (2) where two or more persons are conversing in the same room, and their words are picked up by concealed microphone and relayed by *radio transmitter* to a monitor and recorder; (3) where persons are together and their conversation is picked up by microphone and carried by *wire* to the recorder or monitor.

A very recent ruling by the F. C. C. prohibits the use of any radio device in connection with eavesdropping.[78] Therefore, surveillance in the second situation is now forbidden.[79] However, there is no federal law which prohibits eavesdropping in the third situation, where the overheard words are relayed by wire to listener or recorder The new ruling, which became effective April 8, 1966, reveals an increased awareness of the problems posed by modern eavesdropping. Contrary to previously developed case law, there is no exception where one party consents. The Commission felt that the ordinary risk of being overheard is converted into an entirely different risk when the electronic device is the instrument used by the intruder. Although the distinction is valid, its application may unreasonably restrict common business practices.[80]

Also, the new ruling does not apply to law enforcement officers acting under lawful authority.[81] Although section 605 contained no such exception, one was developed of necessity through case law and state statute, notably that of New York. However, the new rule allows police to eavesdrop in connection with any crime, unless a restriction is imposed by local law. Experience has shown that unrestricted police surveillance is undesirable—a better approach would restrict such activity to serious crimes. Only private conversations are protected under the new ruling. If a conversation is conducted within earshot of other persons, or in a public place, the monitoring of the conversation is not unlawful.[82]

[77]For an excellent analysis of the ramifications of the *Wong Sun* case, see Broeder, *Wong Sun v. United States: A Study in Faith and Hope,* 42 NEB. L. REV. 483 (1963).

[78]31 Fed. Reg. 3397 (1966).

[79]The prohibition applies also to indirect use of radio devices, *i.e.,* even where a conversation is picked up initially by a non-radio device. "Thus, irrespective of the combination of devices employed by the eavesdropper to accomplish his objective, the proposed rules will apply if any one of the combination is a radio device." 31 Fed. Reg. 3397, 3399 (1966).

[80]It has become a common practice for a business associate to listen in on a conversation or for a secretary to take shorthand notes of a conversation.

[81]The burden of establishing that radio eavesdropping activities are being conducted under lawful authority rests with the law enforcement agency.

[82]The Commission notes that where protective or beneficial monitoring is desired, the public could be given notice that the area is under surveillance. Thus, persons con-

Enforcement of the rule will be troublesome. It is difficult to apprehend the eavesdropper while he is actually monitoring a conversation. Usually, eavesdropping statutes are enforced when such information is introduced into court or brought before the judiciary. However, at this stage, there is no way of determining whether the overheard words were transmitted from the microphone to the recorder by wire or by means of radio device. The eavesdropper will, of course, assert vigorously that wire was used. In the face of such a problem, the courts will be forced to fall back on Constitutional considerations and the yet undeveloped right of privacy. This would seem to be the only serious defect of the new ruling. Unfortunately, the F. C. C. lacks the authority to extend the prohibition to the third situation—eavesdropping, with wire transmission. The new rule, like section 605, will be very difficult to enforce against the states.

The Inadequacy of Current Restrictions on Eavesdropping

The approach of the judiciary to electronic surveillance has been criticized as rigid and over-reliant on precedent.[83] Purely tangible considerations have been emphasized, which ignore the underlying spirit and basis of constitutional protections. Instead of setting up boundaries around such concepts by determining invasions on actual physical penetration, the courts should have been considering the basic liberty involved. The fallacy of the frequently drawn analogy to search and seizure is that electronic eavesdropping is much more pervasive than any physical search, and capable of much deeper penetration into the individual's existence. Further, eavesdropping will pick up incriminating statements made by a person not aware he is under surveillance, while the same statements would never be uttered during the course of a physical search.[84] Also, what is "seized" by surveillance is words and ideas, the freedom of thought and expression. These intangibles have long been recognized by the courts as more important than tangible items.

Further, reliance on precedent is not realistic in light of modern developments. Testimony of eavesdroppers was allowed as evidence at common law, but reliance on the common law is inadequate in a dynamic area such as electronic surveillance. Previously one could guard against the risk of being overheard, which is no longer true. Now only a specially constructed room can guarantee protection.[85]

Constitutional control of eavesdropping, through the Fourth Amendmend, is also unsatisfactory. Questions which would have to be answered include a determination of what eavesdropping is reasonable, and on what conditions authorized surveillance should be permitted, if at all. The Fourth Amendment requires that the things seized be described with

versing in the area would have consented by implication. Failure to give adequate notice would result in an actionable invasion of privacy.

[83]King, *supra* note 38, at 262.

[84]*Id.* at 264.

[85]DASH, *op. cit. supra* note 2, at 358.

particularity which is very difficult with such far-reaching devices as are now in use. Also, the amendment requires that items of evidentiary value only be seized. Although this has been construed to include many other things, it is difficult to see how the scope of eavesdropping could be limited so as to satisfy the wording of the amendment.[86]

The exclusion anomaly aggravates the problem: illegally obtained wire-tap evidence is admitted in state court and excluded in federal court no matter who obtains it—yet tangible evidence illegally seized is excluded in all courts. Eavesdropping by concealed microphone with wire transmission to the recorder remains uncontrolled, except in the few cases where the victim can prove a trespass was committed. In an attempt to correct the problem, numerous congressional investigations have been conducted, and eavesdropping bills introduced, none of which has passed.

State Law

State law has also failed to keep pace with scientific advances. The majority of states have enacted statutes to control wire-tapping, but unfortunately many of these only forbid injury to telephone wire or interference with telephone service. A few attempts to bring wire-tapping under these statutes failed because there was no damage to wires or interference with service. It is unlikely that these statutes will ever be effective since tapping by induction requires no touching of the wires and is virtually undetectable.[87] On the whole, state legislation can not cope with the methods now in use. Few states have attempted to control eavesdropping other than wire-tapping. Authorized tapping is allowed in twenty eight states, some of which detail the authority required, while others leave the job to the courts.[88] Aside from the legality of tapping, the question of admissibility has received less attention. Four state supreme courts hold such evidence admissible, while one state excludes it. Of the seven state statutes dealing with admissibility, four prohibit, and three admit wire-tap information as evidence.[89]

The Revised Codes of Montana contain four statutes pertinent to the subject.[90] Three of the statutes deal only with telegraphic communica-

[86]"A listening to all talk inside a house has only one purpose—evidence gathering. No valid warrant for such listening or for the installation of a dictaphone could be issued. Such conduct is lawless, an unconstitutional violation of the owner's privacy." United States v. On Lee, 193 F.2d 306, 317 (2nd Cir. 1951) (Frank, J., dissenting).

[87]For a discussion of state law, see Westin, *supra* note 15, at 181-86.

[88]For a list of the states, see Kent, *supra* note 13, at 308 n. 106. Seven states have adopted statutes which prohibit electronic eavesdropping. See CAL. PENAL CODE § 653(j); ILL. ANN. STAT. ch. 38, § 14-1 (Smith-Hurd 1941); MD. ANN. CODE art. 27 and 125 (a) (1957); MASS. ANN. LAWS ch. 272, § 99 (1956); NEV. REV. STAT. § 200.650 (1957); N.Y. PEN. LAW § 738; and ORE. REV. STAT. § 165-540(1)(c) (1965).

[89]States holding such evidence inadmissible: ILL. REV. STAT. ch. 38, § 206.3 (1964); PA. STAT. ANN. tit. 15, § 2443 (1958); R.I. GEN. LAWS ANN. § 11-35-13 (1956); TEX. PEN. CODE art. 727a (1948). Admitting such information as evidence: MD. ANN. CODE art. 35, § 97 (1957); NEV. REV. STAT. § 200-680 (1959); ORE. REV. STAT. § 41.910 (1959).

[90]R.C.M. 1947, §§ 94-3321 and 94-3322 prohibit the disclosure or alternation of the

tions. The fourth, section 94-3203 provides a penalty for tapping or making any connection with a telephone or telegraph line by any means. The violation must be wilfull and malicious, and applies to every person, thereby apparently not excluding law enforcement officers. There is no Montana statute dealing with other forms of eavesdropping. Nor are there decisions dealing with other forms of eavesdropping. In a recent Oklahoma case the court interpreted a statute nearly identical to that of Montana's so as to forbid wire-tapping, and even more importantly, focused consideration on the protection of privacy.[91] The Montana statute could be interpreted in like manner.

PROPOSED STATUTES

Section 1. Eavesdropping.

(a) Except as provided in this section, a person:

(1) not present during a private conversation, who by means of instrument, surreptitiously overhears, amplifies, or records such conversation, or attempts to do so, or aids, authorizes, employs, procures, or permits another to do so, or

(2) not a sender or receiver of a telephone, telegraph, or other wire communication, who by means of instrument, overhears, amplifies, or records such communication, or attempts to do so, or aids, authorizes, employs, procures or permits another to do so,

is guilty of eavesdropping. Unlawful eavesdropping shall be a misdemeanor punishable by imprisonment not exceeding one year, or by fine not exceeding one thousand dollars, or both such fine and imprisonment.

(b) Exceptions: Eavesdropping as defined in section (a) will not be unlawful if:

(1) the consent of one party to the conversation is obtained, or

(2) conducted in a place of business, or on business premises, with the consent of the business owner, or other person having lawful or primary right to possession,

and if the eavesdropping conducted under either of these subsections is not an unreasonable infringement of individual privacy.

(3) the person eavesdropping is a law enforcement officer acting under authority of a court order described in section two of this chapter.

(c) The term "person" includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof.

(d) "Instrument" means any device designated or used for acoustical detection, including but not limited to wire-tapping equipment, microphones, detectaphones, 'spike mikes,' distaphones, radio transmitters and recorders.

(e) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

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contents of a telegraphic message without the consent of the addressee or court order. R.C.M. 1947, § 94-35-220 prohibits the learning of the contents of a telegraphic message by machine, instrument, contrivance, or in any other manner. The first two sections were apparently intended to apply to agents and employees of the telegraph company. The third could be interpreted so as to prevent not only wire-tapping by connection, but also by induction. All three sections, however, apply only to telegraphic communications.

[91]Two Oklahoma statutes, OKLA. STAT. ANN. tit. 21, §§ 1757, 1782, which are very similar to R.C.M. 1947, § 94-3203, have been interpreted to prohibit wire-tapping

> (f) This section does not apply to employees or agents of a public utility engaged in the business of providing communication services and facilities when acting within the scope of their employment and by order of their superiors for the purpose of construction, maintenance or operation.

The section is similar to the Keating Bill[92] and parts of the *California Penal Code*.[93] The primary defect in section 605 is eliminated. Interception or its attempt is alone sufficient to violate the law. There is no requirement of publication, use, or divulgence. The section restricts both wire-tapping and other forms of eavesdropping. Section 605 and most existing statutes only restrict wire-tapping. It is absolutely essential that surveillance by concealed microphone be controlled, as it poses the greatest threat to privacy. Wire-tapping is ostensibly controlled by section 605.

Only conversations intended to be private are given protection. Obviously when a discussion is conducted in a public place under circumstances which reasonably indicate that the participants do not desire it to be confined, privacy cannot be expected. Nor does the protection extend to a situation where an individual is known by the parties to be overhearing or recording their conversation. The eavesdropping must be surreptitious, unknown to both parties, and without the consent of either.

By use of the word "instrument", the section defines eavesdropping so that information obtainable by use of norman human senses is excluded. Only surveillance which enables the eavesdropper to monitor sounds beyond the range of the human ear is restricted. It is felt that persons conducting a conversation can easily take reasonable precautions to prevent overhearing by non-electronic means.[94]

The first two exceptions, with consent or on business premises, are subject to a requirement of reasonableness. Examples of otherwise lawful eavesdropping which might be held unreasonable, and thus prohibited, are: (1) surveillance devices placed in a public bathroom in a business establishment; (2) installation of surveillance equipment in the bedroom of a house, even though one party's consent has been secured; (3) the over-hearing of certain highly personal or confidential matters such as those of a marital or financial nature, even though the monitored conversation is conducted on business premises, or elsewhere with the consent

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by "connection" or "physical interruption" without the consent of both parties to the conversation and the telephone company. See Cameron v. State, 365 P.2d 576 (Okla. 1961). According to that court, the purpose of the statutes is protection of privacy, although wire-tapping was held not to constitute a seizure within the Oklahoma constitutional provision identical to the Fourth Amendment. Where no illegal interception occurs, one party's consent, either express or implied, would render lawful the overhearing or recording of the conversation. Further, evidence obtained by illegal interception is inadmissible in court, but would be admitted if authorized by court order, or obtained by a law enforcement officer in the discharge of his duties.

[92]S. 1221, 87th Cong., 1st Sess. (1961). A thorough analysis of the bill may be found in Kent, *supra* note 13, at 320 *et. seq.*

[93]CAL. PEN. CODE § 653(j).

[94]King, *Electronic Surveillance and Constitutional Rights*, 33 GEO. WASH. L. REV. 240, 263-64 (1964).

of a participant. The police exception, subsection three, is also subject to a standard of reasonableness. Law enforcement eavesdropping requires a court order, and the judiciary, in considering applications to eavesdrop, would prevent any unreasonable invasions of privacy, taking into consideration the crime involved.

The statute provides for legalized surveillance if the consent of one party to the conversation is obtained. A citizen's privacy is not unduly jeopardized if those persons to whom he voluntarily speaks are permitted to monitor or record his conversations, subject to the reasonableness criterion.[95] The majority of courts and legislators feel that the right of privacy does not extend to a situation where a participant has consented to have the discussion monitored.[96] Except in the case of a privileged communication, standard rules of evidence support this position. Evidence law allows a participant to testify, and in some instances, compels such testimony.[97] Outside of court, a party to a discussion may normally repeat it to anyone without fear of legal liability. A person is bound at his peril to evaluate the reliability of those whom he engages in conversation.

The private investigator may still function under the statute, by operating within the first two exceptions. The potential for legitimate business use of eavesdropping is very great, and there are numerous instances where needed information can lawfully be obtained as a party to the conversation, or with the consent of a party.[98]

Section 2. Court Order Authorizing Eavesdropping.

> A Montana court of record may issue an order authorizing eavesdropping by law enforcement officers upon a showing that:
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> (1) there are reasonable grounds to believe that a crime directly or immediately affecting the safety of human life has been committed or is about to be committed; and
>
> (2) 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
>
> (3) there are no other means readily available for obtaining such information.
>
> The application for such order shall be made upon oath or affirmation, setting forth fully the facts and circumstances upon which such application is based. Where statements are solely upon the information and belief of the affiant, the precise source of such information and the grounds for such belief must be given. The affiant must state whether any prior applications have been made to eavesdrop

[95]Telephone companies, in compliance with an order of the F.C.C., require that a beep signal be used when telephone conversations are recorded, but this provision is largely ignored. Consent of a subscriber who is not a party to the conversation is not sufficient to legalize eavesdropping on the subscriber's phone. Only a participant to the conversation can give the necessary consent.

[96]DASH, *op. cit. supra* note 2, 423-24.

[97]See generally, MCCORMICK, EVIDENCE 502 *et. seq.* (1954).

[98]The proposed statute is contrary to section 605. Law enforcement officers are not permitted to tap under court interpretation of section 605, although both California and New York so provide by statute. The result is that evidence obtained in such a manner would be inadmissible in federal court. The exclusionary rule has not thus far been applied to state courts. This may soon occur by way of a court holding putting eavesdropping within the Fourth Amendment. Then *Mapp v. Ohio* would be extended.

from the same person, and, if such prior applications exist, the affiant shall disclose the current status thereof. The application and any order issued under this section shall identify the telephone or telegraph line, or other communications carrier from which information is to be obtained, the persons whose conversation is to be subjected to eavesdropping, and the purpose thereof. The court shall examine upon oath and affirmation the applicant and any witnesses he shall produce or the court may require.

Orders issued under this section shall not be effective for a period longer than sixty days, after which the court may, in its discretion, renew such order.

Upon the completion of eavesdropping authorized by section 1(b)(3) and this section, any tape or wire recordings or other evidence of a permanent nature will be promptly returned to the court which issued the order, with an affidavit showing where such recordings were obtained, and that the recordings have not been altered in any way.

This section is modelled upon the current New York statute,[99] a bill developed by a Senate committee which conducted an investigation of wire-tapping,[100] and recommendations of a grand jury.[101] Assuming that the need for law enforcement surveillance can be shown, it is appropriate to consider schemes of regulation and the type of crimes in which eavesdropping will be permitted. Because surveillance necessarily involves a serious invasion of privacy, the practice should be confined to major offenses, or cases involving the safety of human life. With such a broad definition, the judiciary will be able to determine which cases should properly fall therein. A sense of proportion demands that the areas in which eavesdropping is permitted be limited, and human life is a reasonable dividing line. The criterion suggested is not as restrictive as might appear, since in many types of crimes, such as grand larceny, blackmail, or espionage, police could eavesdrop under either of the other two exceptions, that is, with the consent of a party, or on business premises. The use of eavesdropping in vice cases is unwarranted for two reasons: (1) there is no real need because these crimes depend on public patronage, and therefore a large number of people have knowledge of the offense[102]—evidence is thus more easily obtainable from other sources; (2) the opportunity for blackmail, bribery, extortion, and other forms of corruption is often too great for police to resist.

Judicial supervision is more effective than administrative supervision. Because in most cases an order would have to be obtained without delay, administration by the attorney general is obviously impractical, considering the size of Montana. Also, the close relation of both the attorney general and the county attorneys to enforcement agencies might not insure impartial scrutiny of applications, which commends the court system. In Montana, where there are fewer judges, there will be less opportunity for "judge shopping" and a resulting loosening of stand-

[99]N.Y. CODE CRIM. PROC. § 813(a).

[100]S. 4154, 81st Cong., 2nd Sess. (1950).

[101]Kings County Grand Jury. For text, see N.Y. Times, December 28, 1950, p. 19, col 1. See also Westin, *supra* note 15, at 203 *et. seq.*

[102]"I think it would be safe to say that the dogs in the street know—at least in the city of New York—who the bookmakers are." Keating, testifying before House Judiciary Committee in 1955, reported in MINN. L. REV., *supra* note 2, at 823.

ards. By requiring a complete statement, and allowing the issuing court discretion, more than a ministerial function is involved. The judiciary will be enabled to prevent any unjustifiable invasions of privacy through the exercise of firm supervisory control.

The order is effective for only sixty days. Any officer seeking renewal would be required to follow the same procedure used to obtain the initial order. Any officer who knowingly proceeded under an order which had expired and had not been renewed would be subject to the same penalties as if the order had never been obtained.[103]

The procedure for obtaining a court order is detailed, and among other things, requires "reasonable grounds to believe that evidence will be obtained," that the person whose conversation is to be monitored be fully identified, and that all pertinent facts be stated. These requirements have three virtues: (1) there is less opportunity for police abuse of the system; (2) maximum protection is given to privacy; and (3) the requirements of the Fourth Amendment are satisfied to the fullest extent possible.

Science has made possible the editing of tape recordings so that words may be added, deleted, or altered, making possible a complete transformation in what was actually said. This may be done without detection.[104] In view of this, a reasonable safeguard would require immediate return to the issuing judge of all tapes, along with an affidavit that no alterations had been made. A heavy penalty should be imposed for any violation of this provision.

Section 3. Evidence Obtained in Violation of This Chapter.

> **Except as proof in a prosecution for violation of this chapter, no evidence obtained in violation of this chapter shall be admissible in any judicial, administrative, legislative or other proceeding.**

The section is modelled on a California statute.[105] Criminal sanctions alone are inadequate to prevent illegal eavesdropping. If information illegally obtained is excluded as evidence, most of the incentive is removed. If further restriction is desired, courts may exclude also the fruits of illegally obtained information. In addition to the penal and exclusionary sanctions, the eavesdropper should be liable in tort for damages caused by the invasion of the victim's privacy. Minimum damages should be presumed in such an action. More could be recovered upon proof. Injunctions are ineffective against surveillance, since in most cases the victim is not aware of the eavesdropping. By the time it is discovered, and an injunction obtained, the damage is already done.

[103]New York provides that officers may eavesdrop without an order when it is imperative to commence surveillance immediately, and then apply for an order within twenty four hours. This procedure seems unnecessary since the time required to determine where the surveillance is to be conducted and then installation of the equipment should allow ample opportunity in which to obtain an order. Also, a problem arises when police tap, and the subsequent application for an order is denied.

[104]DASH, *op. cit. supra* note 2, at 367-71.

[105]CAL. PEN. CODE § 653 (j).

It would be desirable to require telephone companies and the courts issuing surveillance orders to compile statistics. Any data which would indicate the extent of electronic surveillance would be helpful in determining what further controls are needed.

Section 4. Eavesdropping Prohibited—When.

> Eavesdropping shall be prohibited by law enforcement officers or other public agents on a person in custody or on the premises of the public agent when the conversation is with his attorney, religious adviser, or licensed physician.

This section is similar to that of California.[106] Notwithstanding the exceptions permitted by section one, no surveillance will be permitted of "privileged" conversations, without the consent of all parties.

Section 5. Possession of Eavesdropping Equipment.

> A person who has in his possession any eavesdropping instrument or equipment under circumstances evincing an intent to use or employ or allow the same to be used or employed for unlawful purposes under this chapter, or knowing the same to be so used, shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

This provision is similar to New York's penal law and is necessary because of the extreme difficulty of apprehending the eavesdropper in the act of conducting illegal surveillance.[107] Possession alone is not an offense. Circumstances must indicate an intent by the possessor to use such equipment for unlawful surveillance.

CONCLUSION

A society which values the individual's right of privacy will not tolerate unrestricted surveillance. Eavesdropping is an affront to personal dignity and inhibits individual action and expression. Because electronic surveillance is pervasive and indiscriminate, the unsuspecting victim is particularly vulnerable. Controls must be imposed which will keep pace with the rapid development of sophisticated electronic devices. Experience has demonstrated the difficulty of obtaining adequate legislation at the federal level. Nor is a satisfactory remedy found in the Constitution, for eavesdropping does not fall comfortably within the proscriptions of the Fourth and Fifth Amendments. The individual states are in a much better position to control surveillance. But even when such controls are adopted at the state level, there is a remaining problem of enforcement. The needs of law enforcers and businessmen can be met if legitimate surveillance based on a standard of reasonableness is permitted. The exclusionary rule and firm judicial supervision will curb abuses. Heavy penalties for wrongful eavesdropping, or for possession of surveillance equipment with an intent to eavesdrop, will prevent blackmail and other criminal activities. Adoption of the statutory controls suggested, and their enforcement by an informed judiciary will adequately preserve the privacy of individual communication.

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[106] *Id.*

[107] N.Y. CODE CRIM. PROC. § 552(a).