CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Via Sapientiae: The Institutional Repository at DePaul University

DePaul University
University Libraries

DePaul Law Review

Volume 17
Issue 1 *Fall 1967*

Article 11

Constitutional Law - Limitations on Permissive Eavesdropping Statutes

William Hurst

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation

William Hurst, *Constitutional Law - Limitations on Permissive Eavesdropping Statutes*, 17 DePaul L. Rev. 219 (1967)
Available at: https://via.library.depaul.edu/law-review/vol17/iss1/11

This Case Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

recognizing the simple fact that the status of man has as much to do with the dignity he can command in his own home as his living conditions.[64]

Seymour Mansfield

[64] As Professor Thomas Emerson observes: "[P]rotection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age—industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society." As quoted in the Brief for Appellant at 20, See v. Seattle, 87 S. Ct. 1737 (1967), from Emerson. *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965).

CONSTITUTIONAL LAW—LIMITATIONS ON PERMISSIVE EAVESDROPPING STATUTES

Checking complaints that ten thousand dollar bribes were the *sine qua non* for obtaining New York State liquor licenses, New York County Rackets Bureau investigators[1] uncovered what appeared to be widespread corruption in the state Liquor Authority. Acting under New York's permissive eavesdrop statute,[2] two assistant district attorneys obtained a court order for installation of a surreptitious recording device in the private law office of a former Liquor Authority employee. Leads obtained from this eavesdrop resulted in a second application for permission to eavesdrop, this time in the business office of one Harry Steinman, a prospective liquor license applicant. The order, issued by a New York Supreme Court justice, authorized recording of "any and all conversations, communications and discussions" in Steinman's business office for a period of two months. Within two weeks, via the eavesdrop, a conspiracy was uncovered involving issuance of a liquor license for

[1] A branch of the District Attorney's Office of New York County.

[2] N.Y. CODE CRIM. PROC. § 813-a (1958). "Ex parte order for eavesdropping. An ex parte order for eavesdropping . . . may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions . . . upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department . . . 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 . . . . 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 . . . 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 . . . ."

the New York Playboy Club. Ralph Berger was convicted on two counts of conspiracy to bribe the Chairman of the New York State Liquor Authority. Tape recordings of relevant portions of the eavesdropped conversations had been received at trial, over objection. The appellate division affirmed without opinion, as did the court of appeals by a divided vote.[3] In a landmark decision,[4] the United States Supreme Court reversed the conviction and struck down New York's statute as permitting trespassory invasion of a constitutionally protected area by general warrant, contrary to the command of the fourth amendment. *Berger v. New York*, 87 S. Ct. 1873 (1967).

No less than six opinions[5] were filed by the nine Supreme Court justices. The majority proceeded solely on fourth amendment grounds rejecting or refusing to consider the following proposed alternatives: that the statute authorizes a search for "mere evidence";[6] that it invades the fifth amendment privilege against compulsory self-incrimination;[7] and that it offends under the ninth amendment.[8] This note will attempt to give a brief background of the judicial and legislative history of electronic eavesdropping, elucidate the *Berger* holding, and explore the broad implications it creates for future court and congressional action.

Electronic eavesdropping (commonly known as "bugging" and so denominated throughout the *Berger* opinions), is to be distinguished from wiretapping, which is confined to the interception of telegraphic and telephonic communications. The first wiretap case to reach the United States Supreme Court was *Olmstead v. United States*.[9] The interception therein of Olmstead's telephone line was accomplished without entry upon his premises and the Court found no violation of the fourth amendment,[10] refusing to extend its

[3] People v. Berger, 18 N.Y.2d 638, 219 N.E.2d 295 (1966), *cert. granted*, 385 U.S. 967 (1966).

[4] 35 U.S.L. WEEK 3361 (1967): "The fate of electronic eavesdropping in private homes and offices decried as an invasion of privacy so grave as to be beyond a magistrate's power to authorize and defended as a mere sophisticated, technical advance in the techniques of search and seizure—was placed in the hands of the Supreme Court last week." *Amicus curiae* briefs for affirmance were filed by Massachusetts and Oregon and by the National District Attorney's Association; for reversal, by the International Brotherhood of Teamsters, National Association of Defense Lawyers in Criminal Cases and the New York Civil Liberties Union.

[5] Berger v. New York, 87 S. Ct. 1873 (1967). Justice Clark for the Court; Justice Douglas concurring separately; Justice Stewart concurring in the result but insisting on the constitutionality of the New York statute; Justice White dissenting; Justice Harlan dissenting; Justice Black dissenting.

[6] *Id.* at 1876.

[7] *Id.*

[8] *Id.*

[9] 277 U.S. 438 (1928).

[10] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

enumeration of "persons, houses, papers and effects" to encompass conversations. However, Congress then passed the Federal Communications Act, a section of which prohibited interception of communications by wire or radio and divulging or publishing their contents.[11] The *Nardone* cases[12] extended the exclusionary rule to wiretap evidence offered in federal prosecutions and *Benanti v. United States*[13] barred federal use of wiretap evidence even when obtained by state officers acting under authority of state law. *Schwartz v. Texas*[14] held that the federal statute does not bar wiretap evidence in state courts. Thirty-six states prohibit wiretapping but twenty-seven of these permit "authorized" interception of some type.[15]

Electronic eavesdropping, as opposed to wiretapping, is permitted both governmentally and privately in all but seven states, and in six of even these seven it is permitted on official order.[16] Dissenting in *Olmstead*,[17] Mr. Justice Brandeis foretold the future with clarity: "The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping."[18] Thirty-five years later, dissenting in *Lopez v. United States*,[19] Mr. Justice Brennan examined the fantastic scientific advances in eavesdrop technique and concluded: "Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny."[20] The *Berger* Court discusses at length the almost unbelievable capabilities of modern electronics in penetrating anywhere and everywhere and reflects the culmination of growing judicial and legislative concern with uncontrolled electronic eavesdropping.[21]

---

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[11] 47 U.S.C. § 605 (1964).

[12] 302 U.S. 379 (1937), 308 U.S. 338 (1939).

[13] 355 U.S. 96 (1957).

[14] 344 U.S. 199 (1952).

[15] *See* Berger v. New York, *supra* note 5, at 1878 n.5.

[16] The six states prohibiting surreptitious eavesdropping by mechanical or electronic device but permitting it if officially authorized are: California, CAL. PEN. CODE § 653h-j (Supp. 1966); Maryland, MD. ANN. CODE, art. 27, § 125A (1957); Massachusetts, MASS. ANN. LAWS, ch. 272, § 99 (Supp. 1964); Nevada, NEV. REV. STAT. § 200.660, 200.670 (1963); New York, N.Y. PEN. LAW § 738 (1957); Oregon, ORE. REV. STAT. § 165.540 (1)(c) (Supp. 1963). Illinois prohibits it even on official order, ILL. REV. STAT. ch. 38, §§ 14.1-.7 (1963).

[17] Olmstead v. United States, 277 U.S. 438 (1928).

[18] *Id.* at 474.

[19] 373 U.S. 427 (1963).

[20] *Id.* at 466.

[21] *E.g., Hearings on S. 234 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. *passim* (1958).

Parabolic microphones, which concentrate sound much as curved mirrors focus light, can pick up conversations three hundred feet distant and make wireless eavesdropping from building to building across a city street quite simple.[22] Microphones the size of a sugar cube are presently available at less than ten dollars each.[23] If access can be had to a subject's clothing (for example, through his dry cleaner or a public check-room) he can be made into a walking transmitter in minutes. One button of his suit-coat can conceal a subminiature transmitter, the second button a tiny microphone, and the third a battery source, with conductive wire matched to the thread as the antenna.[24] A distinguished law professor has pointed out: "Nowhere . . . is one quite safe from the eavesdropper. Not in one's home or office or automobile. Not even in one's bathroom with the shower turned on!"[25] (The frequency discrimination of new microphones can separate the audio frequencies of running water from the lower frequencies of the human voice.)

Three primary approaches have been taken to legislative control of official electronic eavesdropping: absolute prohibition, limited permission, complete permission.[26] Proponents of absolute prohibition stress the extreme threat electronic eavesdropping poses to individual liberties.[27] Mr. Justice Holmes, dissenting in *Olmstead v. United States*, denominated it "dirty business"[28] and Mr. Justice Frankfurter, dissenting in *On Lee v. United States*,[29] asserted: "Such 'dirty business' . . . makes for lazy and not alert law enforcement. It puts a premium on force and fraud, not on imagination and enterprise."[30] Proponents of limited permission, while admitting electronic eavesdropping's threat to the individual, stress the dangers of organized crime and the im-

[22] DASH, SCHWARTZ, & KNOWLTON, THE EAVESDROPPERS 350 (1959).

[23] Mosler Research Prods., Inc., Danbury, Conn., Catalogue.

[24] Westin, *Science, Privacy and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1006 (1966).

[25] Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 892 (1960).

[26] *See generally* comment, *Electronic Eavesdropping: Can It Be Authorized?*, 59 NW. U.L. REV. 632, 633-34 (1964).

[27] *See generally* Berger v. New York, *supra* note 5, concurring opinion of Justice Douglas; Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 855, 856 (1960); BARTH, THE LOYALTY OF FREE MEN 174 (1952): "A great deal could be learned about crime by putting recording devices in confessionals and in physician's consulting rooms, by compelling wives to testify against their husbands, by encouraging children to report the dangerous thoughts uttered by their parents. The trouble with these techniques, whatever their utility in safeguarding national security, is that a nation which countenances them ceases to be free."

[28] 277 U.S. 438, 470 (1928), Justice Holmes referred specifically only to wiretapping.

[29] 343 U.S. 747 (1952).

[30] *Id.* at 761.

portance of national security and would permit electronic eavesdropping only if limited to official investigations in these two areas.[31] Proponents of complete permission stress the extreme effectiveness of electronic eavesdropping and would permit its use in any area of legitimate official concern.[32]

Turning from the legislative background of the *Berger* decision to the judicial background, the case is seen to represent an extension of the core right of privacy of the fourth amendment.[33] This right was recognized in early English law and developed further in response to abuses pre-dating the American Revolution. In the famous case of *Entick v. Carrington*,[34] Lord Camden held intrusions into individual privacy subversive of all the comforts of society and that general search warrants were unlawful because uncertain. Use of the general warrant has been regarded as the single immediate cause of the American Revolution.[35] The Founders were reacting to such abuses when the fourth amendment was embodied in the Bill of Rights.

Mr. Justice Bradley, in *Boyd v. United States*,[36] commented on Lord Camden's holding in *Entick*:

> The principles laid down . . . affect the very essence of constitutional liberty and security. . . . They apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that con-

[31] *See generally* Berger v. New York, *supra* note 5, dissenting opinions of Justice White and Justice Black; THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, at 200-03 (1967); Kilzer, *A Federal Wiretap Law—Needed Weapon Against Organized Crime*, 13 DEPAUL L. REV. 98, at 101 (1963): "The most powerful and versatile single countermeasure readily available for a terminal struggle with syndicated crime is legalized wiretapping." Rogers, *The Case for Wire Tapping*, 63 YALE L.J. 792 (1954). *But see* Hennings, *The Wiretapping-Eavesdropping Problem: A Legislator's View*, 44 MINN. L. REV. 813, 833 (1960).

[32] *E.g.*, Berger v. New York, *supra* note 5, at 1891, Justice Black (dissenting): "In both perception and retention a machine is more accurate than a human listener . . . it repeats the very words uttered. . . . Transcribed eavesdropping evidence is far more likely to lead a judge or jury to reach a correct judgment or verdict—the basic and always-present objective of a trial." *But see Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., pt. 3, at 509-10 (1959) at which Samuel Dash (an author of THE EAVESDROPPERS, *supra* note 22), recounted how technicians on his staff were able to edit tapes successfully, thereby completely distorting the meaning of the statements originally recorded. He added that the editings, once transferred to new tapes, defied detection either by ear or by oscillograph.

[33] *Supra* note 10.

[34] 19 How. St. Tr. 1029 (1765).

[35] 10 ADAMS, WORKS 247 (1826).

[36] 116 U.S. 616 (1886).

stitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .[37]

Again, in *Wolf v. Colorado*[38] it was said: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[39]

There are two clauses to the fourth amendment. Mr. Justice Butler made the following analysis of them in *Go-Bart Importing Co. v. United States*.[40] The first (reasonableness clause) forbids every search that is unreasonable.[41] "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."[42] The second (warrants clause) prevents issue of warrants on loose, vague or doubtful bases of fact.[43] "[It] emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty."[44] Evidence obtained in violation of fourth amendment commands has been excluded in federal courts since 1914,[45] and since 1961, in state courts as well.[46]

Blocking the application of the fourth amendment to electronic eavesdropping evidence was the *Olmstead* case[47] which held verbal (intangible) evidence to be outside the fourth amendment and hence not subject to its warrants clause requirements nor to the federal exclusionary rules. Rather than hurdle the obstacle of *Olmstead*, the Supreme Court (until *Berger*) has chosen to side step it by developing two case-lines in both of which they limit the *Olmstead* result without overruling it.[48] These case-lines may be

[37] *Id.* at 630.

[38] 338 U.S. 25 (1949).

[39] *Id.* at 27.

[40] 282 U.S. 344, 356-57 (1931).

[41] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

[42] Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[43] ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV.

[44] *Supra* note 42.

[45] Weeks v. United States, 232 U.S. 383 (1914).

[46] Mapp v. Ohio, 367 U.S. 643 (1961).

[47] *Supra* note 17.

[48] These cases refer to electronic eavesdropping. Such "evasive action" was not necessary to control wiretapping because of the advent of the Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1964).

summarized as the "consenting party" series and the "physical trespass" series.

In the consenting party cases, evidence secured by a mechanical or electronic eavesdropping device has been generally held admissible, regardless of other factors present, where one of the parties to the eavesdropped conversation has consented to or cooperated in its interception.[49] Illinois refused to follow the federal "any party consent" rule of admissibility and imposed an "all party consent" requirement.[50] The Illinois Supreme Court, citing Illinois' complete statutory prohibition,[51] reasoned that only an "all party" rule would accord with the clearly expressed legislative intent to eliminate surreptitious electronic eavesdropping.[52] The *Berger* case[53] does not purport to overrule the consenting party holdings[54] exempting electronic eavesdropping from fourth amendment requirements where any party has consented,[55] but its thrust, to rigidly control all such activities within fourth amendment standards, portends favorably for the Illinois position in future federal holdings.

With regard to physical trespass, the first "bugging" case to reach the Supreme Court was *Goldman v. United States*.[56] The Court held that use of a detectaphone placed against an office wall but not penetrating it in any manner, to hear private conversations in the adjoining office, did not violate the fourth amendment because there was no physical trespass in connection with the interception. Chief Justice Stone and Justices Frankfurter and Murphy registered strong dissents, all insisting that the detectaphone constituted an unreasonable search and seizure within the prohibition of the fourth amendment. In *Silverman v. United States*,[57] District of Columbia police used a "spike mike," which consisted of a microphone attached to a foot-long

[49] Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952). *Cf.* Rathbun v. United States, 355 U.S. 107 (1957), where use of an extension telephone by police to overhear a conversation with the consent of the subscriber who was also a party to the conversation was held not to be an "interception" as proscribed by § 605, Federal Communications Act, *supra* note 48.

[50] People v. Kurth, 34 Ill. 2d 387, 216 N.E.2d 154 (1966).

[51] *Supra* note 16.

[52] *Supra* note 50.

[53] *Supra* note 5.

[54] *Supra* note 49.

[55] On a strict reading of Olmstead, *supra* note 17, conversations, as intangibles, are exempt from fourth amendment requirements anyway. But the Supreme Court, perhaps mindful of the powerful Olmstead dissents, has seemed to prefer the "consenting party" rationale where available.

[56] 316 U.S. 129 (1942).

[57] 365 U.S. 505 (1961).

spike, inserted into a party wall until it made contact with a heating duct in Silverman's house turning the entire heating system into a giant sound conductor. The Court excluded the eavesdrop evidence on grounds that its procurement involved an unauthorized physical penetration into the premises.[58] "Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights."[59] A later case, *Cullins v. Wainwright*,[60] applied *Silverman* broadly in excluding evidence obtained by lowering a microphone down an air-shaft of a multiple apartment building until it was opposite a grill in petitioner's apartment.

> That portion of the shaft between the floor and ceiling . . . is wholly within the apartment and, we think, a part of it. . . . The lowering of a microphone into that portion of the ventilating shaft was an invasion of a constitutionally protected area and violated the Fourth Amendment rights of those in the apartment whose conversations were overheard by means of electronic eavesdropping.[61]

The *Berger* case,[62] while bringing eavesdrop evidence within the protection of the fourth amendment generally,[63] may not obviate the physical trespass requirement. As Justice Black (dissenting) points out:

[58] *Id.* at 513, Justice Douglas (concurring): "The concept of 'an unauthorized physical penetration into the premises' . . . is beside the point. . . . The wrong (was) done when the intimacies of the home were tapped, recorded or revealed. . . . The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury."

[59] Silverman v. United States, 365 U.S. 505, 509-10. *Cf.* Wong Sun v. United States, 371 U.S. 471, 485 (1963): "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman v. United States that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of papers and effects."

[60] 328 F.2d 481 (5th Cir. 1964), *cert. denied*, 379 U.S. 845 (1964).

[61] *Id.* at 482-83. Pregnant with implications for the future, when read with *Berger*, is *United States v. Stone*, 232 F. Supp. 396, 400 (N.D. Tex. 1964), in which "bugging" of a public telephone booth was held to violate the fourth amendment: "A person using a public telephone in an enclosed booth and having placed the money in the coin box has the same right to its use as a customer in a taxi or a guest in an apartment . . . . Today electronic devices without physical presence enable an intrusion upon the air, light and sound waves of a person's property as real as any physical trespass . . . . In the light of technological improvements it is clear that an electronic device placed in a protected area by government agents without the knowledge of the defendant and transmitting a telephone conversation of defendant is as much a physical trespass and violation of the right to privacy as is the making of an unlawful physical entry, and overhearing the conversation under such circumstances is a violation of the Fourth Amendment." *Contra*, United States v. Borgese, 235 F. Supp. 286 (S.D. N.Y. 1964).

[62] *Supra* note 5.

[63] Berger v. New York, 87 S. Ct. 1873, 1886, Justice Douglas (concurring): "I join the

This case [*Berger*] deals only with a [physically] trespassory eavesdrop, an eavesdrop accomplished by placing a 'bugging' device in petitioner's office. Significantly, the court does not purport to disturb the *Olmstead—Silverman—Goldman* distinction between eavesdrops which are accompanied by a physical invasion and those that are not . . . .[64]

Contrary to Justice Black however, because *Berger* did involve physical entry, the fact that the Court went beyond and totally struck New York's permissive eavesdrop statute[65] as offensive—even though the statute also included eavesdrops involving no physical trespass[66]—indicates that the physical trespass requirement is a rapidly dying, if not dead, doctrine. Supporting this is the *Berger* Court's own characterization of the *Silverman* holding: "The [*Silverman*] 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."[67] The tenor of *Berger* is that electronic eavesdropping, no matter how accomplished, is inherently trespassory. Language like: "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices,"[68] presages a "preferred position" for the privacy of speech akin to that given freedom of speech in first amendment cases.

The New York permissive eavesdrop statute has been termed "an excellent vehicle for analysis of the possibility of placing eavesdropping within the prescriptions as well as proscriptions of the Fourth Amendment."[69] The *Berger* Court made just such an analysis and found the statute sorely lacking in almost every regard. There are two categories into which the Court's criticisms fall: defects in the particular provisions of this particular statute, and, more importantly, defects in any permissive eavesdrop statute because they are inherent in permissive eavesdropping itself. To a considerable extent, the categories overlap.

The *Berger* Court concedes that the New York statute satisfies the fourth

opinion of the Court because at long last it overrules *sub silentio* Olmstead v. United States, . . . and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment"; Berger, *id.* at 1895, Justice Black (dissenting): "In failing to make clear that the New York statute is invalid only as applied to certain kinds of eavesdropping, the Court's opinion leaves the definite impression that all eavesdropping is governed by the Fourth Amendment."

[64] *Id.* at 1895.

[65] N.Y. CODE CRIM. PROC. § 813-a (1958).

[66] N.Y. PENAL LAW § 738 (1957).

[67] *Supra* note 63, at 1880.

[68] *Supra* note 63, at 1885.

[69] *Supra* note 26, at 638.

amendment's requirement that a neutral and detached authority be interposed between police and public,[70] and assumes, without conceding, that its "reasonable ground" provision[71] is equivalent to the "probable cause" requirement of the fourth amendment. It goes on to conclude that the statute is "deficient on its face in other respects,"[72] gives "broadside authorization," and is equally as offensive as the odious "general warrant."[73]

Observing that, "By its very nature eavesdropping involves an intrusion on privacy that is broad in scope," the *Berger* Court finds an especially great need for "particularity and evidence of reliability in the showing required when judicial authorization . . . is sought."[74] New York's statute is scored for authorizing eavesdropping without requiring belief that any particular offense has been or is being committed, nor that the conversations sought be particularly described. "[F]ailure to describe with particularity the conversations sought gives the officer a roving commission to seize any and all conversations."[75] The statute's requirement that the persons whose communications are to be eavesdropped be named[76] is dismissed as doing no more than identifying the person whose constitutionally protected area is to be invaded, rather than "particularly describing" the communications, conversations, or discussions to be seized. As with general warrants, this broad discretion is too dangerous in the hands of the officer executing the order.[77]

The Court found the statute's two-month eavesdropping authorization to be "the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause." It avoids prompt execution and "[d]uring such a long and continuous period [24 hours a day] 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 to the crime

[70] *Supra* note 63, at 1881.

[71] *Supra* note 65.

[72] *Supra* note 63, at 1882.

[73] *Supra* note 63, at 1883.

[74] *Supra* note 63, at 1882.

[75] *Supra* note 63, at 1883; *but see* Justice Harlan's dissent at 1903-04, where he states that mere listening is not a seizure—"some use of the conversation beyond the initial listening process is required for the seizure of the spoken word," and that "materials to be seized are described with sufficient particularity if the warrant readily permits their identification . . . . The affidavits make plain that, among the intercepted conversations, the police were authorized to seize only those 'relative to the payment of unlawful fees to obtain liquor licenses. . . .' There could be no difficulty, either in the course of the search or in any subsequent judicial proceeding, in determining whether specific conversations were among those authorized for seizure . . . ."

[76] N.Y. CODE CRIM. PROC. § 813-a (1958).

[77] *Supra* note 63, at 1883.

under investigation." The statute places no termination date on the eavesdrop once the conversation sought is seized. Also repugnant to the fourth amendment, the Court held, is the statute's provision for extensions of the initial two-month period (presumedly for two months each) on a mere showing that such extension is "in the public interest."[78] The statute has no requirement for notice ("necessarily because its success depends on secrecy") as do conventional warrants. The statute does not overcome this defect by requiring some showing of special facts. "On the contrary, it permits unconsented entry without any showing of exigent circumstances." The statute provides for no return on the warrant, thus leaving the officer full discretion as to use of seized conversations of innocent as well as guilty parties. "In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures."[79]

Mr. Justice Clark, for the *Berger* majority, denies the impossibility of drawing a warrant or a statute authorizing eavesdropping and yet meeting fourth amendment requirements and cites *Osborn v. United States*.[80] The eavesdrop order in *Osborn*, which was upheld, is distinguished by Justice Clark because the authorization was "under the most precise and discriminate circumstances . . . which fully met the requirement of particularity of the Fourth Amendment."[81] The *Osborn* order, Justice Clark finds, was based upon a detailed factual affidavit alleging commission of a specific criminal offense directly and immediately affecting the administration of justice; it described the types of conversation sought with particularity; it provided that the officer could not search unauthorized areas; once the property sought was found, the officer could not use the order as a passkey to further search; the order authorized one limited intrusion rather than a series or a continuous surveillance; the order was executed with dispatch; the officer was required to make a return on the order; generally, no greater invasion of privacy was permitted than was necessary under the circumstances.[82] New York's statute on the contrary, Justice Clark held, "lays down no such 'precise and discriminate' requirements. Indeed, it authorizes the 'indiscriminate use' of electronic devices as specifically condemned in Osborn."[83]

[78] *Supra* note 63, at 1883-84. *Cf.* Sgro v. United States, 287 U.S. 206 (1932), in which a National Prohibition statutory search warrant was good for ten days and the court held that new probable cause must be shown, after expiration of the first warrant, before a new warrant could issue.

[79] *Supra* note 63, at 1884.

[80] 385 U.S. 323 (1966). Two federal judges jointly authorized "bugging" the person of a prospective witness (with his knowledge and cooperation) to record conversations with a defendant's attorney concerning bribing of jurors. (It seems *Osborn* could be sustained on pure consenting party grounds, *supra* note 49.)

[81] *Supra* note 63, at 1882.

[82] *Supra* note 63, at 1882-83.

[83] *Supra* note 63, at 1883.

Taking sharp issue with Justice Clark's portrayal of what permissible permissive eavesdropping must encompass, the *Berger* dissenters found the majority's standards deliberately designed to make permissive eavesdropping impossible. Mr. Justice White, dissenting, charged: "The Court appears intent upon creating out of whole cloth new constitutionally mandated procedures carefully tailored to make eavesdrop warrants unobtainable."[84] Justice Black, likewise dissenting in *Berger*, was more specific: "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."[85]

The key question is where does *Berger* really leave the future of permissive eavesdrop legislation? One commentator, before *Berger*, analyzed New York's statute and predicted it would need only two modifications to be found constitutional: limit its eavesdrop authorization to business premises and require notice of the interception within six months to all parties involved.[86] As has been seen, the *Berger* Court held New York's statute to need many more modifications than two. Judge Sobel, in *People v. Grossman*,[87] stated that electronic eavesdropping is necessarily indiscriminate because, technologically, no electronic device has been discovered which shuts itself off to all social discourse and turns itself on when the conversation turns to criminal ends; in consequence of which, advance specificity of description of the verbal statements to be seized is impossible and any eavesdrop order is therefore unconstitutional. Judge Sobel was not upheld in this contention but his concern is clearly echoed in *Berger*.

Certainly, the future of permissive eavesdropping will involve staggering conflicts between dual opposing pressures: (1) increased clamor for official eavesdropping authorization as organized crime proliferates and threats to national security intensify in this nuclear age; (2) increased demand for total prohibition or tight control of both official and private eavesdropping[88] as the fantastic scientific advances predicted by Mr. Justice Brandeis in 1928 pose the ultimate threat to individual rights.[89]

The gist of *Berger v. New York* seems to be to bring all officially obtained

[84] *Supra* note 63, at 1911.

[85] *Supra* note 63, at 1897.

[86] *Supra* note 26, at 640.

[87] 45 Misc. 2d 557, 257 N.Y.S.2d 266 (1966), *reversed*, 27 App. Div. 2d 572, 276 N.Y.S.2d 168 (1966).

[88] Another fruitful source for future constitutional controversy will be the growing sophistication of *visual* electronic surveillance by such means as miniaturized closed-circuit television cameras or high-powered telescopes coupled to video-recorders.

[89] Olmstead v. United States, 277 U.S. 438, 474 (1928), Justice Brandeis (dissenting): "Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to

electronic eavesdrop evidence within the purview of the fourth amendment, physical trespass or no, so that it must satisfy rigidly applied fourth amendment standards as to its origin or be excluded at both federal and state trials. Further, permissive eavesdrop legislation seems now to face virtual "presumptive invalidity" so that the burden is upon the legislature, propounding it to embody full fourth amendment safeguards, Justice Black's *Berger* dissent notwithstanding: "From the deficiencies the Court finds in the New York statute, it seems that the Court would be compelled to strike down a state statute which merely tracked verbatim the language of the Fourth Amendment itself."[90]

William Hurst

expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions."

[90] *Supra* note 63, at 1897. *But cf.* Ker v. California, 374 U.S. 23, 34 (1963), Justice Clark: "The states are not . . . precluded from developing workable rules governing arrests, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

TORTS—DEFAMATION AND THE PRIVILEGED SPEECH HIERARCHY—HOW LOW CAN YOU GO

The president of Queens College, acting under the authorization and approval of the chairman of the New York City Board of Higher Education, issued a public statement in answer to charges of anti-Catholic discrimination in the promotional policies of the College. The statement was intended and understood to refer to the plaintiffs, two associate professors at Queens College. In a libel action brought by these professors alleging that they were defamed by the statement, the New York Court of Appeals affirmed the appellate division of the supreme court and held that the public expression of the position of the Board was an appropriate exercise of discretion and was absolutely privileged. Consequently, any teachers allegedly defamed by the public statement were not entitled to recover. *Lombardo v. Stoke*, 18 N.Y.2d 394, 222 N.E.2d 721 (1966).

The significance of the decision lies in the extension of the doctrine of absolute privilege to defame to members of a public school board. Although a number of courts have granted such an official a qualified privilege,[1] never, in the absence of a statute, has a court given a school board member absolute

[1] Branaman v. Hinkle, 137 Ind. 496, 37 N.E. 546 (1894); Ebaught v. Miller, 127 Kan. 464, 274 P. 251 (1929); Tanner v. Stevenson, 138 Ky. 578, 128 S.W. 878 (1910); Hett v. Ploetz, 20 Wis. 2d 55, 121 N.W.2d 270 (1963).