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MASSACHUSETTS LAW—RELAXING THE ORGANIZED CRIME REQUIREMENT FOR ELECTRONIC SURVEILLANCE: A CARTE BLANCHE FOR THE "UNINVITED EAR"? Commonwealth v. Thorpe, 1981 Mass. Adv. Sh. 1827, 424 N.E.2d 250; Commonwealth v. Jarabek, 1981 Mass. Adv. Sh. 1849, 424 N.E.2d 491

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NOTES

MASSACHUSETTS LAW—RELAXING THE ORGANIZED CRIME REQUIREMENT FOR ELECTRONIC SURVEILLANCE: A CARTE BLANCHE FOR THE "UNINVITED EAR"?—*Commonwealth v. Thorpe*, 1981 Mass. Adv. Sh. 1827, 424 N.E.2d 250; *Commonwealth v. Jarabek*, 1981 Mass. Adv. Sh. 1849, 424 N.E.2d 491.

> It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation falling upon the innocent as well as the guilty, would be both cruel and unjust: and it should seem, that search for evidence is disallowed upon the same principle.
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> Lord Camden, in *Entick v. Carrington*, 1765.[1]

I. INTRODUCTION

The controversy surrounding the legality of warrants for the search of persons or places and the seizure of property has continued from the eighteenth century until today.[2] One current focus of the controversy has shifted from the old grievances of the ransacking of persons' houses and seizure of papers by government agents[3] to the problems of electronic surveillance brought about by an advancing

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1. Entick v. Carrington, 19 How. St. Tri. 1030, 1073 (K.B. 1765) (Lord Camden delivering the opinion of the court).

2. In fact the court's language in *Entick* indicates that the problem of search and seizure was not unknown in the eighteenth century, and was controversial even then:

> These warrants are not by custom; they go no farther back than 80 years; and most amazing it is they have never before this time been opposed or controverted, considering the great men that have presided in the King's-Bench since that time. But it was reserved for the honour of this Court, which has ever been the protector of the liberty and the property of the subject, to demolish this monster of oppression, and to tear to rags this remnant of Star-chamber tyranny.

Id. at 1039.

3. *Entick* involved a general warrant issued for the seizure of all the plaintiff's personal papers and delivery of the papers with the plaintiff to the Secretary of State, Lord Halifax. The warrant was issued on information that the plaintiff was publishing a seditious newspaper called the "monitor." *Id.* at 1034.

technology. By the use of modern electronic devices placed within buildings or on persons, government officials may "search" the mind of an unsuspecting person, and "seize" his thoughts and words on a tape for use at trial.[4] The search and seizure controversy over electronic surveillance first centered on the basic legality of the practice,[5] and more recently on the delicate problem of prescribing those situations in which a warrant must precede any such surveillance.[6] Two recent decisions from the Massachusetts Supreme Judicial Court, *Commonwealth v. Thorpe*[7] and *Commonwealth v. Jarabek*,[8] illustrate the problem of prescribing situations requiring a warrant and highlight the inability of courts to adequately define the boundaries of warrant requirements. Although both decisions involved similar factual situations, and were handed down on the same day, the holdings were opposite.

II. FACTS

In *Thorpe*, the defendant, a retired policeman, offered to sell an active duty officer a copy of an upcoming promotional exam. He stated that the exam was available through an organization headed by a woman.[9] The active duty officer advised his superiors, and, with the cooperation of the State Police and the Attorney General's office, plans were made to record subsequent conversations concerning the proposed sale.[10] No attempt was made to obtain a warrant under the applicable provisions of the commonwealth's electronic

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4. Electronic surveillance was analogized to search and seizure in Berger v. New York, 388 U.S. 41, 51, 59 (1967).

5. The first judicial statement on the legality of electronic surveillance was in Olmstead v. United States, 277 U.S. 438 (1928). There, the Supreme Court upheld the testimony of a government official who secretly had overheard an incriminating conversation from a tapped telephone wire. The court ruled that "search and seizure" in connection with wiretapping was beyond the practical meaning of the fourth amendment and suggested that, if Congress wanted construction of the amendment to be so enlarged, it should pass legislation to that effect. *Id.* at 465-66. Justice Brandeis dissented, maintaining that the act of wiretapping by the government official violated both the fourth and fifth amendments. *Id.* at 479. In reviewing this controversy, a later court observed that *Olmstead* caused such widespread dissatisfaction in Congress that the legislature eventually effectively overruled it by enacting § 605 of the Federal Communications Act, of June 19, 1934 (codified at 47 U.S.C. § 605 (1976), which made wiretapping a federal crime. Lopez v. United States, 373 U.S. 427, 462 (1963) (Brennan, J., dissenting).

6. *See, e.g.*, United States v. White, 401 U.S. 745 (1971).

7. 1981 Mass. Adv. Sh. 1827, 424 N.E.2d 250.

8. 1981 Mass. Adv. Sh. 1849, 424 N.E.2d 491.

9. 1981 Mass. Adv. Sh. at 1828-29, 424 N.E.2d at 251.

10. *Id.* at 1829, 424 N.E.2d at 252.

surveillance statute.[11]

The active duty officer, using a portable radio transmitter, recorded eight subsequent telephone conversations and two face to face meetings with the defendant.[12] The superior court used the tapes as evidence to indict Thorpe. After denying the defendant's motion to suppress the tapes as evidence, the court granted an application for interlocutory appeal.[13] The appeal was based on two contentions: The state's use of warrantless recordings violated the state's surveillance statute because the requisite organized crime connection was not shown;[14] and the use of warrantless recordings violated the defendant's right to be free from unreasonable searches guaranteed by the commonwealth's Declaration of Rights.[15]

The Massachusetts Supreme Judicial Court affirmed the superior court's denial of the motion to suppress the evidence and remanded the case for further proceedings.[16] The court concluded that, with respect to the organized crime issue, the defendant's reference to "an organization headed by a woman" was sufficient to fall under the warrant exceptions of the statute since it created a reasonable suspicion that organized crime was involved.[17] As to the unreasonable search issue, the court asserted the "assumption of risk" argument, which contends that one who speaks voluntarily assumes the risk that the listener may repeat, monitor, or broadcast the conversation to others.[18] The consequence of this argument is that there

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11. *See* MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1970).

12. 1981 Mass. Adv. Sh. at 1829, 424 N.E.2d at 252.

13. *Id.* at 1828, 1831, 424 N.E.2d at 250, 253.

14. Warrantless electronic recordings are permitted in Massachusetts when conducted by law enforcement officials, in connection with a designated offense involving organized crime and when recorded either (a) by a consenting participant to the conversations or (b) by the law enforcement official who is a party to the conversation himself. MASS. GEN. LAWS ANN. ch. 272, § 99B4 (West 1970).

15. The Massachusetts Declaration of Rights provides:

> Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or function of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of the search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

MASS. CONST. art. XIV. *Compare* U.S. CONST. amend. IV, *infra* note 109.

16. 1981 Mass. Adv. Sh. at 1828, 1842, 424 N.E.2d at 250, 259.

17. *Id.* at 1835-37, 424 N.E.2d at 255-56. By state statute, an organized crime nexus is required in addition to one party consent. *See supra* note 14.

18. The "assumption of risk" doctrine in connection with surveillance by compan-

was no unreasonable search, no need for a warrant, and thus no constitutional privacy violation under the Massachusetts Declaration of Rights.[19]

Jarabek, also dealt with warrantless surveillance. A local contractor, unable to complete work for the school board, was told that his difficulties could be resolved if he made a contribution to defendant Jarabek's re-election committee.[20] The contractor, in cooperation with law enforcement authorities, recorded five subsequent face to face interviews and several telephone conversations with the defendant and with his agent. As in *Thorpe*, the recordings were made without obtaining a warrant.[21]

The failure to comply with the statutory warrant requirements led the superior court judge to suppress as evidence the tapes and the testimony incident to the conversations.[22] As in *Thorpe*, the warrantless surveillance issue reached the supreme judicial court by interlocutory appeal.[23] The supreme judicial court upheld the lower court's finding that there was no evidence of a "continuing conspiracy", and thus a scheme by two municipal officials to extort a kickback from a single contractor did not fall under the commonwealth's statutory definition of organized crime.[24]

In handing down these two simultaneous but opposite rulings, the supreme judicial court attempted to draw the line for permissible warrantless surveillance based on the notion of a continuing conspiracy: Where a continuing conspiracy can be found, warrantless surveillance will be permitted. This note will focus on two issues that have emerged as a consequence of *Thorpe* and *Jarabek*.

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ions was first articulated in Hoffa v. United States, 385 U.S. 293, 302 (1966), and later was reiterated in United States v. White, 401 U.S. 745, 753 (1971).

19. 1981 Mass. Adv. Sh. at 1839, 424 N.E.2d at 257.

20. 1981 Mass. Adv. Sh. at 1850, 424 N.E.2d at 492.

21. *Id.* at 1852, 424 N.E.2d at 492.

22. *Id.* at 1850, 424 N.E.2d at 491.

23. *Id.*

24. The Massachusetts statute requires that any warrantless surveillance must, among other things, be an "investigation of a designated offense as defined herein." MASS. GEN. LAWS ANN. ch. 272, § 99B4 (West 1970). The statute further states that "[t]he term 'designated offense' shall include the following offenses in connection with organized crime as defined in the preamble. . . ." *Id.* at § 99B7. The preamble defines organized crime in the following terms: "[o]rganized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics." *Id.* at § 99A.

The court, however, did admit into evidence live testimony, finding no constitutional bar to its admissibility. 1981 Mass. Adv. Sh. at 1854, 424 N.E.2d at 493-94.

First, the continuing conspiracy, or the "*Thorpe-Jarabek*," standard for warrantless surveillance as a judicially constructed replacement for the statutory requirement of the existence of organized crime will be examined. The second part of the note will focus upon the privacy issue raised in *Thorpe*.

III. THE THORPE-JARABEK CONTINUING CONSPIRACY STANDARD AS A LIMITATION ON SURVEILLANCE

There is a direct relationship between the *Thorpe-Jarabek* standard of organized crime and the limitations on electronic surveillance in Massachusetts. By examining *Thorpe* and *Jarabek*, and the state and federal surveillance statutes, this section will argue that the Massachusetts Supreme Judicial Court has permitted the commonwealth to exercise surveillance powers broader than those intended by the legislature.

A. *Statutory Background*

Electronic surveillance statutes exist at both the federal[25] and state levels.[26] While Congress intended its legislation to occupy the field,[27] it specifically provided an enabling provision for state legislation conceived within the federal boundary.[28] This enabling provision has been interpreted to mean that the federal statute should serve as a minimum standard and that state surveillance statutes will not be preempted if they are stricter than the federal standard.[29]

1. The Federal Statute

The nation's first federal wiretap statute was section 605 of the Communications Act of 1934,[30] enacted largely in response to con-

25. The current federal surveillance statute is the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 213-18, 222-23 (1970) (codified at 18 U.S.C. §§ 2511-2520 (1976 & Supp. V 1981)).

26. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1970).

27. United States v. Curreri, 388 F. Supp. 607, 615 (D. Md. 1974); Commonwealth v. Look, 379 Mass. 893, 907 n.9, 402 N.E.2d 470, 481 n.9, *cert. denied*, 449 U.S. 827 (1980); Commonwealth v. Vitello, 367 Mass. 224, 245, 327 N.E.2d 819, 833 (1975). Where Congress has occupied the field, state legislation is preempted. For a general discussion of the Preemption Doctrine, *see* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 267 (1978).

28. 18 U.S.C. § 2516(2) (1976 & Supp. V 1981).

29. Commonwealth v. Vitello, 367 Mass. 224, 247, 327 N.E.2d 819, 833 (1975).

30. 47 U.S.C. § 605 (1976) (originally enacted as Act of June 19, 1934, ch. 652, Title VI, § 605, 48 Stat. 1103).

gressional dissatisfaction with existing case law.[31] That statute provided generally that persons transmitting or receiving wire or radio communications were not to divulge the contents to anyone other than the addressee, and that such communications were not to be intercepted or published by anyone not authorized by the sender.[32] By the 1960's, it was becoming clear that the 1934 statute was inadequate to deal with the increased threat to privacy that resulted from the use of sophisticated electronic devices.[33] Congress responded by amending section 605 with broad new provisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[34]

This statute is the currently effective federal statute governing electronic surveillance. It prohibits the unauthorized interception, use, or disclosure of wire or oral communications.[35] Authorized interceptions are permitted when used in connection with serious offenses.[36]

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31. Lopez v. United States, 373 U.S. 427, 462 (1963) (Brennan, J., dissenting). Case law at that time stemmed from the first electronic surveillance case to reach the Supreme Court, Olmstead v. United States, 277 U.S. 438 (1928). In *Olmstead*, the Court allowed evidence from a warrantless telephone tap to stand because the tapping connections were made in public places, and had resulted from no acts of trespass against plaintiff's home, person, papers or effects. *Id.* at 464-65.

32. 47 U.S.C. § 605 (1976).

33. For cases which mention or discuss this threat, see, *e.g.*, United States v. White, 401 U.S. 745, 761-65 (1971) (Douglas, J., dissenting); Berger v. New York, 388 U.S. 41, 46-49 (1967); Silverman v. United States, 365 U.S. 505, 508-09 (1961); On Lee v. United States, 343 U.S. 747, 759 (1952) (Frankfurther, J., dissenting); United States v. Carroll, 332 F. Supp. 1299, 1300 (D.D.C. 1971); United States v. Jones, 292 F. Supp. 1001, 1008-09 (D.D.C. 1968), *rev'd*, 433 F.2d 1176 (D.C. Cir.), *cert. denied*, 402 U.S. 950 (1971).

For an example of the extremes to which agents will go to obtain surveillance, see White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (police officers posing as students in classrooms).

The growing threat of increased surveillance aided by escalating technology has been much discussed by commentators. *See, e.g.*, M. BRENTON, THE PRIVACY INVADERS 151 (1964) (threat of new technology); G. MCLELLAND, ed., THE RIGHT TO PRIVACY 85-89 (1976) (spread of "wildcat surveillances," unrestricted computer surveillance, statutory loopholes); A. MILLER, THE ASSAULT ON PRIVACY 24-53 (2d ed. 1971) (rise of computers and data processing techniques in surveillance); W. PETROCELLI, LOW PROFILE 173-79 (1981) (new devices such as the "bionic briefcase," shotgun microphones, the "infinity transmitter," plus the growing threat of legal wiretapping by the telephone company); J. RAINES, ATTACK ON PRIVACY 31-33, 87 (1974) (political uses of surveillance); R. SMITH, PRIVACY 229-79 (1979) (new devices such as "laser-beam bugs," "bumper-beepers" and the use of ultra-miniaturization technology); A. WESTIN, PRIVACY AND FREEDOM 73-78 (1967) (various technological advances).

34. 18 U.S.C. §§ 2511-2520 (1976 & Supp. V 1981).

35. *Id.* at § 2511(1)(a)-(c).

36. Serious offenses include espionage, sabotage or treason, 18 U.S.C. § 2516(1)(a) (1976); illegal payments or loans to labor organizations, murder, kidnapping, robbery or extortion, *id.* at § 2516(1)(b); counterfeiting, *id.* at § 2516(1)(d); bankruptcy fraud, *id.* at

Apart from the warrant provisions, the federal statute[37] spells out two permissible circumstances for warrantless surveillance. A person acting under color of law may make a warrantless interception either when such a person is party to the communication,[38] or when one of the parties to the communication has given prior consent to such interception.[39]

Congress' intent in enacting this statute is well documented. Title III was drafted specifically to conform to the new constitutional standards established by recent Supreme Court decisions.[40] The overall and pervading purpose was to combat organized crime.[41] The statute has two additional purposes: first, to protect the privacy of wire and oral communications; and second, to make the conditions, under which interception is permitted, uniform.[42] In connection with this latter purpose, courts have found that Congress intended Title III to serve as a minimum national standard for electronic surveillance.[43] Therefore state surveillance statutes are valid only to the extent that they are stricter than the federal standard.[44]

2. Massachusetts Statute

The Massachusetts electronic surveillance statute, like its federal counterpart, contains a general prohibition against interception of communications, with limited exceptions.[45] One such exception is an interception made under authorization of a warrant.[46] Further, the statute specifies that the recording or transmitting of communica-

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§ 2516(1)(e); and offenses under the general category of "racketeering", *id.* at § 2516(1)(c).

37. 18 U.S.C. § 2511(2)(c) (1976).

38. *Id. See, e.g.*, United States v. White, 401 U.S. 745 (1971); Lopez v. United States, 373 U.S. 427 (1963). There is also a provision for such persons not acting under color of law, "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act." 18 U.S.C. § 2511(2)(d) (1976).

39. *Id. See, e.g.*, On Lee v. United States, 343 U.S. 747 (1952); Olmstead v. United States, 277 U.S. 438 (1928).

40. The cases codified by the statute were Katz v. United States, 389 U.S. 347 (1967), and Berger v. New York, 388 U.S. 41 (1967). *See* S. REP. NO. 1097, 90th Cong., 2d Sess. 66 *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2153.

41. *Id.* at 70, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2157.

42. *Id.* at 66, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2153.

43. *See, e.g.*, Commonwealth v. Look, 379 Mass. 893, 907 n.9, 402 N.E.2d 470, 481 n.9 (1980).

44. *See supra* note 29.

45. *See* MASS. GEN. LAWS ANN. ch. 272, § 99C1 (West 1970).

46. *Id.* at § 99D1d.

tions by law enforcement officials will not constitute an interception if the official either is a party to such communication, or has prior authorization to record or transmit by such a party, and, in both cases, provided that the recording or transmission is made in the course of an investigation of a designated offense.[47] Designated offenses include a specified list of crimes in connection with organized crime as defined in the statute's preamble.[48] By making such recordings or transmissions exceptions to the interception definition, the state statute permits warrantless surveillances if the recorder or transmitter either is a party to the communication itself or has permission from one of the parties.

The Massachusetts electronic surveillance statute is stricter than the federal one. The federal statute permits warrantless surveillance in situations in which one party has consented or a law enforcement officer is a party, while the state statute requires, in addition, that the investigation concern organized crime.

B. *The* Thorpe-Jarabek *Analysis*

In *Commonwealth v. Thorpe*,[49] the warrantless recordings made by the active duty officer were permissible under the federal statute because the recording officer was a party to the conversation.[50] Under Massachusetts law, the recording officer would have to have been a party to the conversation, and, in addition, the recording would have to have been made in connection with an investigation of organized crime.[51] Defendant Thorpe argued that his act of selling the exams was solitary and isolated and not indicative of organized crime activity.[52] Therefore, to hold the warrantless surveillance legal, the commonwealth had to classify Thorpe's activity as "organized crime."

In its attempt to classify Thorpe's activity, the court turned first

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47. *Id.* at § 99B4.

48. *Id.* at § 99B7. The following are "designated offenses" in connection with organized crime: arson; assault and battery with a dangerous weapon; extortion; bribery; burglary; embezzlement; forgery; gaming, intimidation of a witness or juror; kidnapping; larceny; lending violations; mayhem; murder; possession or sale of narcotics or harmful drugs; perjury; prostitution; robbery; subornation of perjury; violations of the electronic surveillance statute; and accessory to or conspiracy or attempt to commit any of the foregoing. *Id.*

49. 1981 Mass. Adv. Sh. 1827, 424 N.E.2d 250.

50. *See* 18 U.S.C. § 2511(2)(c) (1976).

51. MASS. GEN. LAWS ANN. ch. 272, § 99B4 (West 1970).

52. 1981 Mass. Adv. Sh. at 1832, 424 N.E.2d at 253.

to the full definition of organized crime found in the preamble of the surveillance statute:

> The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services, organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.[53]

The court decided that only a portion of the preamble should constitute a definition of organized crime. It agreed with the lower court that although the legislature declared that organized crime was defined in the preamble, the entire description of organized crime as written therein could not have been intended to be incorporated into the definition of designated offenses.[54] The court supported this interpretation by reasoning that "the statute would be unworkable if the Commonwealth were required to prove, in every case, that the activities [under investigation] constituted 'a grave danger to the public welfare and safety,' that 'brutal and violent tactics' were employed, and that 'legitimate business activities' were being infiltrated."[55] The court concluded that of all the language used in the preamble, it appeared that the legislature intended to define organized crime as a " 'continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services.' "[56]

In support of this statement, the court offered a footnote citation to statutes in New Hampshire, New Mexico and Tennessee that focus on the elements of discipline, organization, and the provision of illegal goods and services.[57] Beyond that, the court offered no evi-

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53. MASS. GEN. LAWS ANN. ch. 272, § 99A (West 1970).

54. 1981 Mass. Adv. Sh. at 1833, 424 N.E.2d at 254.

55. *Id.*

56. *Id.*

57. *Id.* at 1833-34 n.6, 424 N.E.2d at 254 n.6. The New Hampshire statute defines organized crime as "the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to homicide, gambling, prostitution, narcotics, marijuana or other dangerous drugs, bribery, extortion, blackmail and other unlawful activities of members of such organizations." N.H. REV. STAT. ANN. § 570-A:1XI (1974).

The New Mexico Organized Crime Act states: " 'organized crime' means the sup-

dence to support its contention that the legislature intended only part of the preamble definition to apply.

Next, the court inquired whether an organized crime connection existed prior to the Thorpe surveillance. Without such a prior connection, the surveillance would fail to meet the statutory warrantless surveillance exception and therefore would be inadmissible.[58] The only pre-surveillance evidence of organized crime presented to the court was defendant Thorpe's initial statement that the examination was available through an "organization headed by a woman."[59]

The court's inquiry additionally focused on the standard to which the decision to intercept should be held. The court rejected Thorpe's contention that a probable cause showing of the existence of organized crime was necessary; it observed that probable cause is the applicable standard when a warrant is sought and that it did not believe that the legislature intended to require as stringent a showing in situations in which warrantless surveillance is authorized.[60] The court also rejected the commonwealth's position, which had been accepted by the court below, that warrantless surveillance may be authorized on a good faith belief by officials. Instead, the court prescribed an intermediate standard of reasonable suspicion.[61] The court then proceeded to negate the effect of its rejection by stating that even if a higher standard were necessary, this higher standard would be met. The warrantless recording was permissible as evidence because Thorpe's "organization headed by a woman" statement was sufficient to indicate a reasonable suspicion of the presence of organized crime.[62]

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plying for profit of illegal goods and services, including, but not limited to, gambling, loan sharking, narcotics and other forms of vice and corruption, by members of a structured and disciplined organization." N.M. STAT. ANN. § 29-9-2-A (1978).

The Tennessee statute states: "organized crime shall be defined as the unlawful activities of the members of an organized, disciplined association engaged in supplying illegal goods and services, including, but not limited to, gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations. TENN. CODE ANN. § 38-6-102 (1982 Supp.).

Compare the definition in the federal statute: " 'Organized crime' means the unlawful activities of the members of a highly organized disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations." 42 U.S.C. § 3781(b) (1976).

58. *See* MASS. GEN. LAWS ANN. ch. 272, § 99B4 (West 1970).

59. 1981 Mass. Adv. Sh. at 1835, 424 N.E.2d at 255. *See supra* note 9 and accompanying text.

60. 1981 Mass. Adv. Sh. at 1835, 424 N.E.2d at 255.

61. *Id.* at 1836-37, 424 N.E.2d at 255-56.

62. *Id.* at 1837-38, 424 N.E.2d at 256.

Thorpe has served to broaden the definition of organized crime to encompass any "continuing conspiracy," which may be satisfied by as small a showing as the statement "an organization headed by a woman." The setting of a lenient standard for the showing of the presence of organized crime means that increased levels of warrantless surveillance will now be permissible in Massachusetts.

Jarabek, rendered the same day as *Thorpe*, turned on the new judicial definition of organized crime. The court asserted that the organized crime requirement in the Massachusetts surveillance statute applied whether or not a warrant is obtained prior to the interception.[63] The court upheld the decision below because the lower court agreed with the *Thorpe* definition of organized crime.[64] Observing that the *Jarabek* facts provided no evidence of a continuing conspiracy, the court concluded that the commonwealth's statutory definition did not include a scheme to extort kickbacks from a single contractor.[65]

The combined effect of these two cases is that the judicial definition of organized crime in Massachusetts now has become a "continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services."[66] The supreme judicial court's application of its new standard so far has shown only that an organization selling exams fits the description, whereas a scheme by municipal officials to extort a kickback does not.

C. *Definitional Problems with the* Thorpe-Jarabek *Standard*

Taken together, *Thorpe* and *Jarabek* have the potential of becoming a weak, confusing and inconsistent precedent for use by future courts or law enforcement officials in two critical areas: the definition of organized crime as found within § 99 of the Massachusetts General Laws; and the definition's application to warrantless surveillance situations. The definition of organized crime is critical

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63. 1981 Mass. Adv. Sh. at 1852, 424 N.E.2d at 493. The court relied upon the Massachusetts statute which states:

> Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, or is about to be committed and that evidence of the commission of such an offense may thus be obtained, or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing or is about to commit a designated offense may thus be obtained. . . .

MASS. GEN. LAWS ANN. ch. 272, § 99E2 (West 1970).

64. 1981 Mass. Adv. Sh. at 1852, 424 N.E.2d at 493.

65. *Id.* at 1852-53, 424 N.E.2d at 493.

66. *Id.* at 1833, 1852, 424 N.E.2d at 254, 493.

to law enforcement in Massachusetts because it delineates the point where warrantless searches may begin and end. If the definition is vague or blurred, the domain of warrantless surveillances may be greatly widened, threatening the collective body of two hundred years of fourth amendment protections.[67]

The definition of organized crime which both *Thorpe* and *Jarabek* developed is a "continuing conspiracy among highly disciplined groups to engage in supplying illegal goods and services."[68] The court, in composing this definition, abridged the legislature's statutory definition by dropping three specific elements of organized crime: that it must constitute a grave danger to public safety; that it must employ brutal and violent tactics; and that it must infiltrate legitimate business activities.[69] The court reasoned that the additional elements made the definition unworkable.[70] This exercise in judicial construction served only to shift the thrust of the definition, not to clarify it.

1. Legislative Intent

The supreme judicial court premised the adoption of its abridged "workable" definition of organized crime on the idea that it reflected the intent of the legislature.[71] This view, however, was not unanimously accepted by the justices. Justice Liacos, dissenting in *Thorpe*, stated that the conclusion of the majority was without support in the record and contrary to the clear legislative history of the statute.[72]

An examination of the statute's legislative history supports the dissent's interpretation of the intent of the legislature. Until 1968, the Massachusetts surveillance statute was similar to that of New York.[73] In 1968, the Massachusetts legislature revised the surveillance statute to its present form.[74] This revision followed a United

67. *See infra* text accompanying notes 108-37.

68. *See supra* note 66.

69. MASS. GEN. LAWS ANN. ch. 272, § 99A (West 1970).

70. 1981 Mass. Adv. Sh. at 1833, 424 N.E.2d at 254. *See also supra* text accompanying note 55.

71. *See supra* note 56 and accompanying text.

72. 1981 Mass. Adv. Sh. at 1843, 424 N.E.2d at 259 (Liacos, J., dissenting).

73. REP. OF THE SPECIAL COMM'N ON ELECTRONIC EAVESDROPPING, S. DOC. NO. 1132, 165th Gen. Ct., 2d Sess. 5 (1968).

74. The original changes proposed to the general court by the Senate would have required a warrant for any interception not having the consent of all parties involved. *Id.* at 11. The House version provided for only one party consent, and contained no organized crime provision. H.R. DOC. NO. 4875, 165th Gen. Ct. 2d Sess. 3 (1968). The resulting statute was a compromise between the Senate version, Senate Bill 1218, and the

States Supreme Court decision which invalidated the New York statute and mandated that all aspects of electronic surveillance be closely supervised.[75]

Several significant points may be noted from the statute's history. First, the purpose of the state surveillance statute, as with its federal counterpart,[76] was to fight organized crime, and to supervise strictly all electronic surveillance.[77] A strict supervision of electronic surveillance is not consistent with the *Thorpe* court's broadening of the boundaries of judicially permissible surveillance by expanding the definition of organized crime.

Second, legislative history shows that the Massachusetts statute, as originally proposed by the Special Commission on Eavesdropping, was stricter than the final product in that it required two party consent as a safeguard against the abuse of electronic surveillance.[78] The proposal of the House Judiciary Committee included one party consent for law enforcement officers, but no organized crime limitation.[79] The final product was a compromise: It permitted one party

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House version, re-written as House Bill number 4875, which was passed and enacted on July 18, 1968. I JOURNAL OF THE HOUSE OF REP. 2316, 2442 (1968).

75. In Berger v. New York, 388 U.S. 41 (1967), the Supreme Court found that a state statute, § 813 of the New York Code of Criminal Procedure, exceeded fourth amendment warrant standards in the following areas: It authorized eavesdropping without requiring a probable cause showing; it gave authorization to "seize" conversations without requiring a description in the warrant of what specific conversations or discussions were being sought; it placed no termination date on the eavesdrop after the conversation sought was "seized"; and it did not provide for the return of the warrant, leaving too much discretion to law enforcement officials as to the use of the "seized" conversations of innocent as well as guilty parties. *Id.* at 59-60. *Compare infra* note 109.

76. *See supra* note 25 and accompanying text.

77. *See supra* notes 40-42 and accompanying text. The importance of permitting some surveillance for fighting organized crime is re-emphasized in the letter from Governor John Volpe to the House and Senate which accompanied House Bill 3797, and which stated: "[l]aw enforcement officials elsewhere have found this technique to be a major aid in tracking down and convicting members of the underworld." H.R. DOC. NO. 3797, 165th Gen. Ct., 2d Sess. 2 (1968).

Moreover, in its report to the Massachusetts Senate, the Special Commission on Eavesdropping stated:

> The Commission feels that eavesdropping and wiretapping by law enforcement officials should be permitted in order to effectively combat the menace of organized crime, but only if such wiretapping and eavesdropping is *limited* by the standards set forth by the United States Supreme Court. This means that law enforcement eavesdropping and wiretapping should be *strictly supervised* by the judicial branch of the government. . . .

REP. OF THE SPECIAL COMM'N ON ELECTRONIC EAVESDROPPING, S. DOC. NO. 1132, 165th Gen. Ct., 2d Sess. at 7-8 (1968) (emphasis added).

78. *Id.* at 11. (The statutory standard in Massachusetts at that time was one party consent.)

79. 1968 H.R. DOC. NO. 4875 at 3 (1968).

consent in electronic surveillance, but limited such surveillance to investigations "of offenses in connection with organized crime as defined in the preamble."[80] The organized crime provision thus served as an offset and limitation against the greater police powers permitted by the single party consent provision.[81]

The *Thorpe* majority recognized the difficulty of construing legislative intent:

> No indication exists, either in the words of the preamble or in the published legislative history of G.L. c. 272 § 99 . . . that the Legislature intended to limit the statute's application to persons with the status of full-time professional criminals—or, in the precise words of the dissent, "to those notorious and readily recognized highly 'structured criminal syndicate[s] composed of professional criminals who primarily rely on unlawful activity as a way of life,' " . . . Such a limiting definition would insulate from electronic surveillance all criminal activity, no matter how organized, disciplined, and repeated, carried on by those who maintain legitimate jobs, perhaps in the public service, while at the same time committing the designated offenses set forth in G.L. c. 272, § 99 B 7.[82]

Two points may be made in rebuttal to the majority's assertion. First, while it may be true that there are no specific words which limit the statute to "structured criminal syndicates," the description of organized crime provided in the preamble such as, for example, "brutal and violent tactics"[83] indicates that the legislature intended the statute to apply to more than a mere conspiracy. Second, although as the majority states, there are no specific words limiting the statute to "full-time professional criminals," the legislative history shows that the organized crime provisions were intended specifically to limit police surveillance powers. All through the legislative history, and in the statute itself, the words "strict judicial supervision" and "limitation" appear repeatedly.[84]

In view of this, it is difficult to see how the *Thorpe* majority

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80. MASS. GEN. LAWS ANN. ch. 272, §§ 99A, 99B7 (West 1970).

81. This point is conceded by the *Thorpe* majority. 1981 Mass. Adv. Sh. at 1836 n.7, 424 N.E.2d at 255 n.7.

82. 1981 Mass. Adv. Sh. at 1834 n.6, 424 N.E.2d at 254 n.6.

83. MASS. GEN. LAWS ANN. ch. 272, § 99A (West 1970).

84. *See supra* note 77. The preamble to the current statute echoes this theme: "[t]he use of such devices by law enforcement officials must be conducted under *strict judicial supervision* and should be *limited* to the investigation of organized crime." MASS. GEN. LAWS ANN. ch. 272, § 99A (West 1970) (emphasis added).

could be serving the intent of the legislature, as it says,[85] by using the organized crime definition to expand the impact of police electronic surveillance, rather than limit it. The legislature's intent was that the organized crime provision would be used to limit access to warrantless surveillances, not to expand it. The dissent of Justice Liacos is correct: The majority view of *Thorpe* is contrary to the clear legislative history of the statute.[86]

In addition to misreading the statute's intent, the court composed a definition of organized crime which left several terms undefined: "continuing conspiracy"; "highly disciplined"; and "illegal goods and services." A clearer understanding of these elements is needed if *Thorpe* and *Jarabek* are to be of any value for future courts.

2. Defining "Continuing Conspiracy"

Conspiracy was defined at common law as a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means.[87] Under this definition, the activities of both *Thorpe* and *Jarabek* would constitute a conspiracy.[88] Yet when the supreme judicial court set out to define "continuing conspiracy", only the *Thorpe* activities were included. While qualifying as a traditional conspiracy, the activities of *Jarabek* were not considered a "continuing conspiracy."[89]

In drawing this line, the court failed to explain why the *Thorpe* conspiracy of an organization headed by a woman might be more

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85. 1981 Mass. Adv. Sh. at 1833, 424 N.E.2d at 254.

86. *Id.* at 1842 (Liacos, J., dissenting).

87. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 121-22 (1842).

88. In *Thorpe*, the criminal or unlawful act for which the defendant was indicted was violation of MASS. GEN. LAWS ANN. ch. 268A, § 2(a)(2) (West 1970) (influencing a state employee in the commission of a fraud upon the commonwealth). Brief for the Appellee-Commonwealth at 2, Commonwealth v. Thorpe, 1981 Mass. Adv. Sh. 1827, 424 N.E.2d 250. The two or more person requirement is satisfied by defendant Thorpe's statement that the exam came from "an organization headed by a woman," 1981 Mass. Adv. Sh. at 1828.

In *Jarabek*, the criminal or unlawful act for which the defendant was indicted was violation of MASS. GEN. LAWS ANN. ch. 268A, § 2(b) (West 1970) (public employee soliciting something of value in return for performance), and § 3(b) (West 1970) (solicitation of gifts), and of conspiracy to violate both of these statutes. Brief for the Commonwealth at 1, Commonwealth v. Jarabek, 1981 Mass. Adv. Sh. 1849, 424 N.E.2d 491. The two or more person requirement is satisfied because defendant Jarabek was working through and in conjunction with an agent. 1981 Mass. Adv. Sh. at 1850-51, 424 N.E.2d at 492.

89. Specifically the court said: "it appears the legislature intended to define organized crime as 'a continuing conspiracy among highly organized and disciplined groups' . . ." 1981 Mass. Adv. Sh. at 1833, 424 N.E.2d at 492.

"continuing" than was the *Jarabek* conspiracy to extort political kickbacks. On the surface, the facts of *Thorpe* and *Jarabek* shed no light on the distinction of conspiracies which the supreme judicial court found between the two cases. The supreme judicial court needs to articulate more clearly what facts operate to give rise to a "continuing conspiracy."

3. Defining "Highly Disciplined"

A similar criticism may be addressed to the court's use of the term "highly disciplined." Two problems emerge from the court's failure to delineate adequately the meaning of "highly disciplined" within its definition of organized crime. First, there exists an internal inconsistency within *Thorpe*. While the court observed that the legislature intended to define organized crime as "highly organized and disciplined,"[90] it found from the *Thorpe* facts only that a "certain amount" of organization and discipline would be required to acquire and supply the examinations illicitly.[91] The difficulty is that the second standard is necessarily much looser and may be used to label as organized crime almost any conspiracy. As Justice Liacos points out in his dissent, one could easily infer that a "certain amount" of organization and discipline would be required to achieve the objectives of any conspiracy.[92] But, the preamble to the Massachusetts surveillance statute indicates that it was not the legislture's intent that every conspiracy be labelled "organized crime."[93]

The second difficulty with the "highly disciplined" definition is that the standard employed in *Jarabek* is not consistent with that in *Thorpe*. Using its *Thorpe* analysis, the court could have inferred that a "certain amount" of organization and discipline would be required of a public works kickback conspiracy. Yet the court chose instead to apply the stricter "highly organized and disciplined" standard[94] to exclude the *Jarabek* activities as an organized crime activity. In effect, this served to create two different standards. The

90. 1981 Mass. Adv. Sh. at 1852-53, 424 N.E.2d at 493.

91. *Id.* at 1837, 424 N.E.2d at 256.

92. *Id.* at 1845-46, 424 N.E.2d at 261.

93. This can be seen by the narrow focus of the preamble's definition: specifically, its mention of the employment of brutal and violent tactics and of the infiltration of legitimate businesses. MASS. GEN. LAWS ANN. ch. 272, § 99A (West 1970). As an example, a conspiracy by two bank employees to embezzle funds from their employer is a conspiracy under the common law definition but would not be organized crime under the statutory preamble definition because it doesn't involve brutal tactics. Under *Thorpe* however, it could become organized crime by being labeled a "continuing conspiracy."

94. 1981 Mass. Adv. Sh. at 1852, 424 N.E.2d at 493.

supreme judicial court has again failed to show what specific facts serve to constitute the standard which it wishes to prevail. Future courts have been left with no guidelines as to what facts to apply in what circumstance.

4. Defining "Illegal Goods and Circumstances"

The role that "illegal goods and services" play in the *Thorpe-Jarabek* standard is similarly unclear. The activities in both cases were considered by the commonwealth to be an "illegal good or service."[95] In the absence of specific reasoning by the court as to why the *Jarabek* activity failed to meet the definition of organized crime, a future court may speculate that it was the absence of an illegal good or service that caused the kickback scheme to fail the organized crime test. In failing to enumerate what standards were applied, or to distinguish the seeming inconsistencies within and between the two opinions, the supreme judicial court has opened the door for easy manipulation of facts and decisions by future courts. Interpretational flexibility is not a wise policy for fashioning the definition of organized crime because broad definitions may permit greater incidence of electronic surveillance.

5. Explaining the Inconsistencies

Taken together, the two cases make little sense. The underlying policies which may have caused the supreme judicial court to distinguish the two cases are not articulated. Indeed, the decisions seem highly result-oriented. It may have been that by broadening the organized crime definition beyond the statutory requirement that public safety be threatened, brutal tactics be employed, and legitimate businesses be infiltrated,[96] the court was attempting to remove organized crime identification from the narrower field traditionally thought of as the "mafia." There was some support for this idea in the commonwealth's briefs, in which it was argued rather extensively that organized crime today means more than the traditional notion of "mafia."[97]

If this was the court's aim, the policies and interests behind the decision are still not well served because the facts necessary to estab-

95. *See supra* note 88.

96. These elements were originally contained in the statute's definition of organized crime, *see supra* note 53 and accompanying text, but were dropped by the *Thorpe* court, 1981 Mass. Adv. Sh. at 1833, 424 N.E.2d at 254.

97. Brief for Appellee-Commonwealth at 4-18, Commonwealth v. Thorpe, 1981 Mass. Adv. Sh. 1827, 424 N.E.2d 250.

lish the new organized crime definition—the "continuing conspiracy"—remain unarticulated.[98]

Alternatively, the decision in *Thorpe* may have been influenced by knowledge about a woman who previously had been involved in fixing civil service exams.[99] Nothing in the facts indicates that such a connection was made; but, if it was, then the woman's on-going exam-fixing activities certainly could have served to put *Thorpe* more into the realm of a "continuing conspiracy" than a single isolated event. The *Jarabek* scheme, on the other hand, had no such implication of past repetitive abuses, and it may be that is why the court decided the *Jarabek* activities were not of a continuing nature.

A third explanation for the inconsistency of *Thorpe* and *Jarabek* may be that *Thorpe* was a result-oriented decision; and the supreme judicial court, realizing that the *Thorpe* rationale could be carried to an extreme result, offered *Jarabek* as an immediate limitation. The court showed a sensitivity to the dangers of a *Thorpe* precedent when it stated that, despite its decision, a better future course, and the most secure one constitutionally, would be for law enforcement officials to procure warrants in cases where probable cause can be shown.[100] In setting forth a broad new proposition and then failing to apply it in a similar circumstance, the supreme judicial court may have attempted to signal that *Thorpe* should be limited to its facts.

Regardless of the reasons or policies behind the supreme judicial court's actions, the results are unsettling. When guidelines and definitions are left vague, those who must make future decisions

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98. Some courts have chosen to identify organized crime by a "pattern of racketeering" analysis. *See, e.g.*, United States v. Campanale, 518 F.2d 352 (9th Cir. 1975). Under this analysis, there must be two acts of racketeering activity committed within ten years for the behavior to constitute organized crime. *Id.* at 364. "Racketeering activity" has been defined by both statute, 18 U.S.C. § 1961(1) (Supp. V 1981) (delineating specific offenses), and by courts, *see, e.g.*, United States v. Nardello, 393 U.S. 286 (1969) (racketeering activity must be an act subject to criminal sanction and any proscribed act in the pattern must violate an independent statute).

99. Briefs for both parties make references to a woman known to have been involved in past schemes to fix or alter examinations. In the Commonwealth's brief, reference was made to an opinion of one of the Assistant Attorneys General supervising the case "that the defendant was connected with Esther Bell in the thefts and dissemination of the examinations." Esther Bell had entered a plea of guilty to changing grades on a civil service promotional exam. Brief, *supra* note 97, at 22.

The defendant's brief touches on the same point, in describing the testimony of a state police lieutenant who "had been involved in previous Civil Service investigations and that a female had been indicted." Brief for Defendant-Appellant at 23, Commonwealth v. Thorpe, 1981 Mass. Adv. Sh. 1827, 424 N.E.2d 250.

100. 1981 Mass. Adv. Sh. at 1842, 424 N.E.2d at 259.

about warrants for electronic surveillance will be left free to expand police powers at their discretion. For example, in a recent Massachusetts Superior Court case, *Commonwealth v. Blood*,[101] warrantless surveillances were upheld against a burglary defendant. The court applied the *Thorpe* "continuing conspiracy" standard and found the defendant's conspiracy to constitute organized crime essentially because he and his co-conspirator were repeat offenders.[102]

By failing to define clearly the elements of its new "continuing conspiracy" definition, or to articulate what facts operate to constitute such a conspiracy, the supreme judicial court has allowed an expanding organized crime definition to serve as a vehicle by which to permit the employment of more warrantless electronic surveillances.

IV. THE PRIVACY ISSUE

The privacy issue raised in *Thorpe* centered around a claimed violation of Article 14 of the Massachusetts Declaration of Rights.[103] The privacy issue was not raised in *Jarabek*. The privacy rights emanating from both the state and federal constitutions are closely intertwined. The supreme judicial court acknowledged this constitutional interdependence in *Commonwealth v. Vitello*,[104] a case involving the validity of the state surveillance statute. The Massachusetts court stated that a detailed analysis of fourth amendment philosophy and federal surveillance cases was to be incorporated by reference into its opinion and considered an expression of the holding.[105] The *Thorpe* court re-emphasized the importance of the federal-state constitutional relationship by relying upon federal authority to respond to the defendant's claim[106] and by advancing

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101. 3 MSupp. 288 (1982).

102. Specifically, the court found evidence that " 'highly organized and disciplined' groups worked together over a period of time and engaged in burglaries that displayed a particular pattern." *Id.* at 295.

103. *See supra* note 15.

104. 367 Mass. 224, 327 N.E.2d 819 (1975).

105. *Id.* at 242, 327 N.E.2d at 831.

106. 1981 Mass. Adv. Sh. at 1838, 424 N.E.2d at 256-57. In response to defendant's claim of violation of the state constitution's privacy guarantees, the *Thorpe* court cited United States v. Caceres, 440 U.S. 741 (1979), United States v. White, 401 U.S. 745 (1971), and Lopez v. United States, 373 U.S. 427 (1963). The three Massachusetts decisions cited by *Thorpe* all resort to federal authority for the search and seizure and privacy issues. *See* Commonwealth v. Hall, 366 Mass. 790, 794-95, 323 N.E.2d 319, 322 (1975); Commonwealth v. Dinnall, 366 Mass. 165, 166-67, 314 N.E.2d 903, 904 (1974); and Commonwealth v. Douglas, 354 Mass. 212, 221-22, 236 N.E.2d 865, 871-72 (1968), *cert. denied*, 394 U.S. 960 (1969).

the "assumption of risk" argument which had evolved in the United States Supreme Court.[107] An understanding of the development of the privacy doctrine in federal courts will provide an insight into the doctrine as incorporated within Massachusetts law.

A. *Development of the Privacy Doctrine*

The idea of freedom from unreasonable searches and seizures is so deep-rooted in the Anglo-American legal tradition that jurists on both sides of the Atlantic were describing the right as "fundamental" over two hundred years ago.[108]

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107. 1981 Mass. Adv. Sh. at 1839, 424 N.E.2d at 257. The "assumption of risk" argument, which states that one contemplating illegal activity must assume the risk that his companions may be reporting to the police, was first articulated in Hoffa v. United States, 385 U.S. 293, 302 (1966) and was later reiterated in United States v. White, 401 U.S. at 752 (1971).

108. The right to privacy has existed in Anglo-American law for at least two hundred years. James Otis argued against general writs in the Petition of Lechmere, in what is now the Old State House in Boston, and declared in February 1761 that general writs "violated the fundamental principle that a man should be secure in his own house." 2 L. WROTH & H. ZOBEL, THE LEGAL PAPERS OF JOHN ADAMS 114-15 (1965). The court, however, saw it differently and after a second hearing in November 1761 decided unanimously in favor of the writ. *Id.* at 115. The unpopularity of this decision with the colonists may be attested to by the observation of eyewitness John Adams who, looking back some fifty years later remembered: "then and there the child Independance [sic] was born." *Id.* at 107.

The right to privacy has been officially protected by the tort invasion of privacy since its general acceptance by most American jurisdictions during the 1930s. Recognition of this right came largely as a result of publicity generated from the 1890 Warren and Brandeis article "The Right to Privacy." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 802-04 (4th ed. 1971). *See infra* note 115.

Although not a legally recognized right in earlier times, the idea of a right of privacy was often mentioned in dicta and statements of judicial philosophy. Judge Thomas Cooley planted the seed for the legal profession's modern interest by noting in 1888 that people had a "right to be let alone." T. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888). Judge Story wrote in 1841 that the violation of correspondence "strikes at the root of all that free and mutual interchange of advice, opinions, and sentiments . . . [that] is so essential to the well-being of society." A. WESTIN, *supra* note 33, at 336.

Many have traced the right to privacy back through various amendments of the Bill of Rights, inferring it from the first amendment's prohibition of scrutiny of political expression, the third amendment's prohibition of the practice of quartering troops, the fourth amendment's prohibition against general searches, and the fifth amendment's prohibition against the compelling of self-incrimination. *See* J. RAINES, *supra* note 33, at 115. In one of the broadest examples of judicial activism, Justice Douglas found the right of privacy in the penumbras of the first, third, fourth, fifth and ninth amendments, while two of his colleagues located it more simply in the due process clause of the fourteenth amendment. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). Justice Douglas was joined in this by Justices Harlan, *id.* at 500-02, and White, *id.* at 502-07. For a general background survey on the right to privacy, see A. BRECKENRIDGE, THE RIGHT TO PRIVACY (3d ed. 1971). For an excellent background on the basis for the fourth amendment right to privacy, see D. O'BRIEN, PRIVACY, LAW, AND PUBLIC POLICY 38-78

After independence was achieved, the founders of the new nation attempted to eliminate forever the perceived abuses of the common practice which authorized searches of individual's homes pursuant to general warrants.[109] The drafters of the constitution wrote their prohibition expressly into the constitution by way of the fourth amendment.[110]

The privacy violations resulting from general warrants were equally as offensive and traditionally disliked in England. In *Entick v. Carrington*,[111] a general warrant permitted a house search of a man suspected of printing seditious newspapers.[112] The court said of such illegal searches that they were "monstrous indeed! and if . . . lawful, no man could endure to live in this country."[113] Lord Camden, who delivered the opinion in *Entick*, was sensitive not only to the property trespass involved, but also to the privacy invasion which such searches worked: "For ransacking a man's secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts."[114]

The idea that privacy and property were intertwined was an idea which gathered growing favor in America and reached its ulti-

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(1979). For an examination of the role of privacy in judicial philosophy, *see generally* Miller, *Privacy in the Modern Corporate State: A Speculative Essay*, 25 AD. L. REV. 231 (1973); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROBS. 281 (1966).

109. General warrants or general writs as they were sometimes called originated in England from the practice by which justices issued search warrants for the seizure of stolen property. The use of search warrants expanded slowly and imperceptibly to permit searches among the papers of political suspects. When the specificity requirements of search warrants became burdensome, the practice evolved to one of issuing the general warrant, which authorized the King's agents to arrest anyone and search any house to apprehend unnamed authors and seize private papers. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362-63 (1921). In the American colonies, the practice was employed by issuing similarly broad writs of assistance to revenue officers to search suspected places for smuggled goods. Boyd v. United States, 116 U.S. 616, 625 (1886).

110. The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons and things to be seized.

U.S. CONST. amend. IV. That these provisions were written in response to perceived abuses of general warrants has long been recognized by American courts. *See, e.g.*, Boyd v. United States, 116 U.S. at 626-27.

111. 19 How. St. Tr. 1029 (1765).

112. *Id.* at 1038.

113. *Id.*

114. *Id.*

mate expression in the well-known Brandeis and Warren privacy article of 1890.[115] Contemporaneously, the United States Supreme Court broadened considerably the concept of privacy by finding that both the fourth and fifth amendments interacted to create a comprehensive right of privacy in a search and seizure case.[116] In *Boyd v. United States*,[117] the Court echoed words of an earlier era, noting that it was not the breaking of a person's doors or the rummaging of his drawers that constituted the essence of the offense, but rather the invasion of his indefinable right of personal security, personal liberty, and private property.[118] Subsequent courts have frequently noted the soundness of the *Boyd* principle that the fourth and fifth amendments interact to create a right of privacy.[119]

Despite the fact that principles of property and privacy were connected at an early stage, the first electronic surveillance cases did not employ this interrelation analysis. In *Olmstead v. United States*,[120] a divided Court[121] applied the traditional property approach to a wiretap situation, and held that, in the absence of trespass, there could be no fourth amendment search and seizure violation associated with the wiretap.[122]

The *Olmstead* property perspective of fourth amendment rights was controlling law for over twenty-five years.[123] Nevertheless, a

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115. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The authors explored this intricate interrelationship by observing that the law had grown in response to the nation's expanding emotional, intellectual and technological life, so that the concept of property had broadened to encompass every form of possession, intangible as well as tangible. *Id.* at 194-95. Intangible property included a right to privacy, or a right to be "let alone", *id.* at 195, such that, even if a person had chosen to give his thoughts expression, he generally retained the powers to fix the limits of the publicity which shall be given them. *Id.* at 198.

116. Boyd v. United States, 116 U.S. 616 (1886). The plaintiff protested that a court order to produce the invoices for disputed goods was a violation of his fifth amendment rights. The court agreed, finding not only a violation of the fifth amendment privilege against self-incrimination, but also a violation of the fourth amendment protection against unreasonable search and seizure. *Id.* at 630.

117. 116 U.S. 616 (1886).

118. *Id.* at 630. *Compare supra* text accompanying note 114 (Lord Camden's statement in 1765).

119. Lopez v. United States, 373 U.S. 427, 456 (1963) (Brennan, J., dissenting).

120. 277 U.S. 438 (1928).

121. The Court was split 5-4, with dissents written by Justices Holmes, Brandeis, Butler, and Stone. *Id.* at 469-88.

122. The case concerned government officials who made tapping connections to telephone lines in public locations. In the absence of acts of trespass against the plaintiff's house, person, papers or effects, the *Olmstead* Court refused to find a search or seizure. *Id.* at 464-65.

123. *See, e.g.*, Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942).

philosophical split, beginning with the dissent of Justice Brandeis in *Olmstead*,[124] divided the Court for that entire period of time. Narrow majorities continued to uphold the *Olmstead* property analysis of search and seizure,[125] while dissenting minorities argued from *Entick*, *Boyd*, and the Brandeis and Warren article that warrantless surveillance should be prohibited as a violation of the privacy right guaranteed under the fourth amendment.[126] The persuasive force of

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124. *See infra* note 126.

125. In Goldman v. United States, 316 U.S. 129 (1942), the Court upheld evidence from a detectaphone placed outside a hotel room wall without a warrant. As in *Olmstead*, the absence of a trespass precluded the Court from finding a fourth amendment violation. *Id.* at 134-35. The Court delivered the decision with a 5-3 split; dissents were written by Justices Stone, Frankfurter, and Murphy, with Chief Justice Stone and Justice Frankfurter indicating an express desire to have *Olmstead* overruled. *Id.* at 136 (dissenting opinion).

In On Lee v. United States, 343 U.S. 747 (1952), a friend of the plaintiff entered the plaintiff's laundry acting as an undercover agent and wearing a concealed transmitter which relayed incriminating statements to an outside receiver. The evidence was upheld because the agent's presence in the laundry was consensual and not a trespass. *Id.* at 751-52. Here the Court was split 5-4, with dissents written by Justices Frankfurter, Douglas, Burton, and Black. Justice Black stated that he believed the district court should have rejected the evidence challenged. *Id.* at 758 (dissenting opinion).

Lopez v. United States, 373 U.S. 427 (1963), involved tapes of conversations made by an I.R.S. agent who had been offered a bribe. *Id.* at 430. Again, the majority of a split Court rejected the plaintiff's privacy argument and upheld the property principles of *Olmstead* and *Goldman*. *Id.* at 438, 441.

126. In his memorable dissent in *Olmstead*, Justice Brandeis argued from *Boyd* that protection against invasion of the "sanctities of a man's home and the privacies of life" was provided in the fourth and fifth amendments by specific language. And, taking note of the growing means of government espionage heralded by the advent of wire tapping even then (1928), he warned:

> 'That places the liberty of every man in the hands of every petty officer' was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed 'subversive of all the comforts of society'. Can it be that the Constitution affords no protection against such invasions of individual security?

277 U.S. at 473-74 (Brandeis, J., dissenting).

Dissenting in *Goldman*, Justice Murphy relied on the Brandeis and Warren privacy article, as well as *Entick, Boyd*, and the Brandeis dissent in *Olmstead* to assert: "On the value of the right of privacy, as dear as any to free men, . . . [s]uffice it to say that the spiritual freedom of the individual depends in no small measure upon the preservation of that right." Goldman v. United States, 316 U.S. 129, 137 (1942) (Murphy, J., dissenting).

Dissenting in *Lopez*, Justice Brennan similarly alluded to *Entick*, *Boyd*, and the Brandeis dissent in *Olmstead*, to criticize:

> *Olmstead*'s illiberal interpretation of the Fourth Amendment as limited to the tangible fruits of actual trespasses was a departure from the Court's previous decisions, notably *Boyd*, and a misreading of the history of the purpose of the Amendment. Such a limitation cannot be squared with a meaningful right to inviolate personal liberty. It cannot even be justified as a 'literal' reading of the Fourth Amendment.

Lopez v. United States, 373 U.S. 427, 454-55, 459 (1963) (Brennan, J., dissenting).

the privacy argument was recognized by Justice Douglas when he observed that the issue was "constantly stirred by those dissents."[127]

A shift in the philosophical balance of fourth amendment doctrine finally occurred in 1967 in two Supreme Court decisions: *Berger v. New York*[128] and *Katz v. United States*.[129] *Berger* identified electronic surveillance as a search and seizure within the meaning of the fourth amendment, thereby requiring that warrants for such surveillances meet the warrant standards for other fourth amendment searches.[130] *Katz* occasioned the final demise of the *Olmstead* property analysis for fourth amendment surveillances. In *Katz*, the Court stated that "the Fourth Amendment protects people, not places."[131] This statement sent out a new signal that privacy, not trespass, was the appropriate inquiry for fourth amendment surveillance problems.[132]

The constitutional boundaries for electronic surveillance were further defined in 1971 when the Supreme Court decided *United States v. White*.[133] There, the Court upheld warrantless evidence obtained in a consensual recording, based on an "assumption of risk" doctrine.[134] Although the *White* Court stated that the warrantless surveillance involved did not violate the fourth amendment, it

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127. On Lee v. United States, 343 U.S. 747, 762 (1952) (Douglas, J., dissenting).

128. 388 U.S. 41 (1967).

129. 389 U.S. 347 (1967).

130. 388 U.S. at 63-64. In *Berger*, the issue revolved around a court order for the bugging of an office. In prior cases of warrantless surveillance, the Court had avoided invoking a fourth amendment analysis by finding no physical trespass. Here, however, there was a warrant, and the Court's scrutiny focused on the warrant and the statute under which it was issued, and on the fourth amendment standards for such. In this way, the Court's reasoning was led to apply fourth amendment guarantees to the area of electronic surveillance. *Id.* at 59-60.

131. 389 U.S. at 350-51.

132. In *Katz*, law enforcement agents attached an electronic listening and recording device to the outside of a public telephone booth. Justice Stewart, writing for the court, ushered in a new era for the protection of privacy when he stated:

> We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

389 U.S. at 353.

133. 401 U.S. 745 (1971).

134. *Id.* at 749. *See also supra* note 107.

pointed out that its decision was based on pre-*Katz* law.[135] Once again the Supreme Court was divided on the issue of electronic surveillance, with dissents written by Justices Douglas, Harlan, and Marshall.[136]

As it presently stands, the law on electronic surveillance is a clouded mixture of *Katz* and *White*.[137] The force of *Katz's* inclusion of electronic surveillance under the umbrella of the fourth amendment has been somewhat diluted by *White* which has excluded warrantless recordings from fourth amendment protection where one party to the recording has consented.[138] The impact of *White* however has also been diluted; its reliance on pre-*Katz* law, and the persuasive force of its dissenting opinions have left it vulnerable to criticism from diverse sources.[139]

B. *The Privacy Issue Raised by* Thorpe

The defendant in *Thorpe* asserted that his privacy rights, as guaranteed by both the state and federal constitutions, had been violated.[140] On appeal to the supreme judicial court, defendant abandoned his federal constitutional challenge and advanced his privacy violation claim based solely on the state constitution.[141] Nonetheless, the response of the supreme judicial court embodied a discussion of federal constitutional authority[142] and relied on the federally created doctrine of "assumption of risk,"[143] as advanced in *United*

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135. The warrantless surveillances occurred in 1965 and 1966; *Katz* was decided in 1967. Since *Katz* was not retroactive, the Court ruled that its decision should be based on the pre-*Katz* law of electronic surveillance, as exemplified in *On Lee*. *Id.* at 754.

136. *Id.* at 756-96 (dissenting opinions).

137. *See, e.g.*, United States v. Caceres, 440 U.S. 741 (1979). For varying interpretations of the manner in which *Katz* and *White* have been interpreted, see *infra* notes 164-68 and accompanying text.

138. 401 U.S. at 749.

139. *See infra* notes 157-59, 164-68 and accompanying text.

140. Specifically, defendant asserted a violation of his privacy right as guaranteed under the fourth amendment of the United States Constitution, and Article 14 of the Massachusetts Declaration of Rights. 1981 Mass. Adv. Sh. at 1831, 424 N.E.2d at 253.

141. *Id.*

142. The cases relied upon by the Supreme Judicial Court were either federal cases, or state cases citing federal authority. *See supra* note 106.

Nowhere in its opinion does the *Thorpe* court state the relationship between the state constitutional privacy provision in article 14 and the federal provision in the fourth amendment. Instead, the court concludes, after discussing the line of federal authority on privacy: "In the case at bar we find no violation of the State Constitution. . . . This is not the type of warrantless surveillance condemned by the courts and commentators discussed above. . . ." 1981 Mass. Adv. Sh. at 1841, 424 N.E.2d at 258.

143. *See supra* note 107.

States v. White.[144]

This section will argue that the *Thorpe* court's reliance on *White's* "assumption of risk" doctrine is insecure because of the logical inconsistencies of the doctrine itself, and because of the recognized weakness of *White* as precedent.

1. Criticism of The "Assumption of Risk" Doctrine

The "assumption of risk" doctrine has been criticized by both judges and commentators for drawing a faulty analogy between the ordinary eavesdropper and one who is electronically bugged. Dissenting in *United States v. Lopez*,[145] Justice Brennan observed a qualitative difference between electronic and conventional eavesdropping.[146] Whereas conventional eavesdroppers may be shut out of a conversation by the lowering of voices or the withdrawal of the speaker to a more private place, the electronic eavesdropper may not be so easily excluded. Justice Brennan concluded that the only way to guard against such a risk "is to keep one's mouth shut on all occasions."[147]

Similarly, Justice Douglas, dissenting in *United States v. White*,[148] called electronic surveillance the "greatest leveler of human privacy ever known."[149] He further said that to equate eavesdropping and electronic surveillance is like treating "man's first gunpowder on the same level of the nuclear bomb."[150] He further observed that the Constitution and the Bill of Rights were not to be read as covering only the technology known in the eighteenth century.[151]

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144. *See supra* note 134.

145. 373 U.S. 427, 446-71 (1963) (Brennan, J., dissenting).

146. *Id.* at 465-66.

147. *Id.* at 450. Both the federal and state statutes provide that conversations may be monitored with the consent of one of the parties. *See supra* notes 37-39 and accompanying text. Justice Brennan criticized this statutory distinction which would permit surveillances where at least one party to the conversation consents, but which would preclude surveillances where neither party has consented to being monitored by a third party. Justice Brennan argued that the distinction thus made is entirely fictitious because the ensuing privacy violation to a speaker is equal regardless of whether the other party to the conversation has consented to electronic monitoring. 373 U.S. at 452. The sensible solution for Brennan is not consensual one-party surveillance, but rather no warrantless surveillance at all; in a later case, he stated that he would have required a warrant for the surveillances conducted in *On Lee, Lopez* and *White*. United States v. White, 401 U.S. at 755-56 (Brennan, J., concurring in result).

148. 401 U.S. 745, 756-68 (Douglas, J., dissenting).

149. *Id.* at 756.

150. *Id.*

151. *Id.*

Commentators also have found fault with the "assumption of risk" doctrine. One commentator has questioned why, even if it is "reasonable" to require individuals to assume the risk that those in whom they confide are secret agents, it is also reasonable to require the same individuals to assume the risk that the "agents" are electronically recording or transmitting their conversations.[152] The problem foreseen is that, in a society where people are increasingly apprehensive of being monitored and recorded, free expression will be inhibited.[153]

The underlying premise of the "assumption of risk" doctrine, that electronic surveillance is no more harmful than ordinary eavesdropping, has been derided by another commentator as "wildly beside the point."[154] Justifying official electronic surveillance by saying the speaker assumes the risk is like justifying an official break-in to a car by saying that the owner assumed the risk it would be burglarized when he parked it.[155]

2. Criticism of *White* as Precedent

Several state courts have shown a trend towards expanding state guarantees of privacy, thereby diminishing the impact of *White*. The Alaska Supreme Court, in a 4-1 decision,[156] took note of the Brennan dissent in *Lopez* and the split decision in *White* and ruled that warrantless recording by a police informant was inadmissible as a violation of a person's reasonable expectations that the conversation will not be secretly recorded.[157] In so doing, the Alaska court construed its state constitutional privacy provision[158] as a general prohibition on the warrantless monitoring of conversations.[159]

The Supreme Court of Florida has also ruled against warrant-

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152. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, A.B. FOUND. RESEARCH J. 1193, 1253-54 (1976). Stone carries this inquiry to the threshold by questioning the "reasonableness" of the first assumption that individuals must assume the risk that persons in whom they confide are secret agents. *Id.*

153. *Id.* at 1254.

154. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 406-07 (1974).

155. *Id.*

156. State v. Glass, 583 P.2d 872 (Alaska 1978).

157. *Id.* at 876-77, 879-80.

158. *Id.* at 879-82. The full privacy provision from the Alaska constitution reads: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." ALASKA CONST. art. I, § 22.

159. State v. Glass, 583 P.2d 872, 881 (Alaska 1978).

less electronic surveillance, even where one party has consented.[160] There, the state constitution's search and seizure provision was expanded to cover "unreasonable interception of private communications,"[161] and the addition of these words was deemed sufficient to override the *White* court's decision that consenting parties to a conversation may escape the warrant requirement.[162]

The constitutions of both Alaska and Florida have provisions beyond the search and seizure guarantees of the federal Constitution. Nonetheless the courts in both states felt compelled to distinguish *White* before proceeding to their conclusion.[163]

A situation more closely analogous to Massachusetts is found in Michigan. There, as in Massachusetts, privacy rights are derived directly from a search and seizure statute which is modeled after the fourth amendment.[164] In a 1975 case,[165] a defendant argued from *Katz* before the Michigan Supreme Court that an expanded right of privacy included freedom from warrantless surveillance, even in the situation where one party consented.[166] The state argued that *White* was controlling.

The Michigan court noted *White* was a plurality opinion, and stated it was most persuaded by the dissent of Justice Harlan which rejected the "assumption of risk" argument.[167] Relying on *Katz* and the Harlan dissent in *White*, the Michigan Supreme Court ruled that third-party monitored conversations, whether transmitted by a party or consenting person, would require a warrant. The court also noted

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160. Tollett v. State, 272 So. 2d 490, 494 (Fla. 1973).

161. FLA. CONST. art. I, § 12. The Florida search and seizure provision, which is identical with the fourth amendment, was revised in 1968 by the addition of protections against "unreasonable interception of private communications by any means" and the further requirement that "the communications to be intercepted, and the nature of evidence to be obtained" be included in the warrant. *Id.*

162. Tollett v. State, 272 So. 2d 490, 493 (Fla. 1973).

163. *Id.* at 492-93; State v. Glass, 583 P.2d 872, 876 (Alaska 1978).

164. The Michigan search and seizure provision states:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

MICH. CONST. art. 1, § 11. *Compare* Massachusetts search and seizure provisions, *supra* note 15, *and* those of the fourth amendment, *supra* note 109.

165. People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975).

166. *Id.* at 562, 227 N.W.2d at 513.

167. *Id.* at 565, 227 N.W.2d at 515.

that none of the cases relied upon in *White* involved third-party monitoring.[168]

At least one state has required the suppression of warrantless tape recordings based on a privacy interpretation of the fourth amendment itself. In Montana, where the state's constitutional privacy provision is similar to that of Alaska,[169] the state supreme court relied heavily on the rationale of *Katz* to disallow one party consensual recordings.[170] The Montana court also noted that because *White* was a plurality decision and had been decided on pre-*Katz* law, its precedent was not binding.[171]

These decisions show that state courts have found ways to circumvent *White*. Courts have chosen to disregard *White*, and rely instead on *Katz*, to ascribe to *White* only limited force because of its split opinion, or to rely instead on the *White* dissents. Courts have rejected *White* because it was decided on pre-*Katz* law or because it had not relied on third-party monitoring cases. A state supreme court has at its discretion the implements to provide for broader privacy guarantees in keeping with the spirit of *Entick*, *Boyd*, and an expanding privacy doctrine. The erosion of *White* in the courts of other states has shown that, should the Massachusetts Supreme Judicial Court choose to expand the right to privacy from electronic surveillance for its citizenry, it need not be constrained in its efforts by *White*.

3. The Need for Stronger Privacy Guarantees

In recent years, legal scholars, social scientists and others concerned with privacy have concluded that its basic feature is the ability of an individual to control the flow of information about himself.[172] Genuine concern has been expressed that the rising use of police informers[173] and sprawling technology[174] pose a threat not

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168. *Id.*

169. The Montana right to privacy provision states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10.

170. State v. Brackman, 178 Mont. 105, 108, 117, 582 P.2d 1216, 1217, 1222 (1978).

171. *Id.* at 108, 582 P.2d at 1217.

172. *See, e.g.*, A. MILLER, *supra* note 33, at 25; A. WESTIN, *supra* note 33, at 7; Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1189-90 (1965); Shils, *supra* note 108, at 281-82; Stone, *supra* note 152, at 1207.

173. One court has estimated that secret informers are used "tens of thousands of times" annually in the United States. *See* Holmes v. Burr, 486 F.2d 55, 65 (9th Cir.) (Hufstedler, J., dissenting), *cert. denied*, 414 U.S. 1116 (1973). A commentator has described the growth of secret informers as a "sprawling mass-producing, self-perpetuating system of spies and informers." Amsterdam, *supra* note 154, at 401.

174. *See supra* note 34.

only to the value of open expression necessary in a free society,[175] but also to the ordinariness and simplicity of life.[176] Because the Supreme Court has held, with only one exception over the last fifty years,[177] that the fourth amendment imposes no meaningful restraints on the use of spies and informers, it has been criticized for failure to exercise foresight in this problem.[178]

The development of modern government bureaucracy and its growing role in our lives have added a further dimension to the privacy problem. The government's acquisition of information in connection with its licensing, taxing, and administrative duties[179] has led some to conclude that, because our lives are more inextricably tied to government today than in 1791, the fourth amendment's protection of privacy should properly be viewed as extending to the preservation of the individual's interest in keeping information away from the "prying hands, eyes, and ears of the government."[180] Ways in which this may be achieved are discussed in the following section.

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175. Frank, honest, and spontaneous private discussion as well as open discourse has been recognized by courts as essential to our free society. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 314 (1972).

176. The fear of being spied upon may not only inhibit free public and private expression, but may bring about changes in personal behavior. For example, one commentator has suggested that if an official entered his home, he might discover an unmade bed, unwashed dishes, piles of clothing scattered about, etc., which would cause the resident to feel exposed and embarrassed. Such an experience might cause the individual so exposed to change small personal habits to avoid such future embarrassment. The commentator goes on to suggest that when discussing the grander aspects of liberty, we should not lose sight of the other unnoticed day-to-day liberties we cherish as well. Stone, *supra* note 152, at 1207.

177. *See* Gouled v. United States, 255 U.S. 298 (1921).

178. Professor Stone for example has criticized: "These decisions . . . are too often conclusory in nature, poorly analyzed, and reflect a tendency to reach a given result without normal concern over doctrine or the law's long term impact." Stone, *supra* note 152, at 1229.

179. For example, government agencies collect and maintain information in connection with the tax system, the welfare system, the social security system, for the licensing of automobile drivers, the operation of businesses, and professional practices. *Id.* at 1239.

180. *Id.* at 1209. Attempts to compare today's society and government to that of 1791 for the purpose of discovering what the framers of the fourth amendment would enact today are of course entirely speculative. Professor Stone, observing the history of early English cases like *Entick*, and Supreme Court decisions like *Boyd*, stated that "it seems reasonable to conclude that, in prohibiting the unrestrained rummagings of governmental officials, the framers sought not only to protect property rights but also to preserve the ability of individuals to determine for themselves when, how, and to what extent information about them is revealed to others." *Id.* at 1208.

V. TOWARDS A CONCRETE SURVEILLANCE STANDARD

The development of electronic surveillance doctrine has paralleled the doctrine of search and seizure.[181] The analogy has advanced in recent years as the analysis of electronic surveillance has shifted from a trespass to a privacy perspective.[182] The analogy with search and seizure has become imbalanced, however, because advancing technology has afforded a greater potential for privacy abuse of electronic surveillance than that associated with warrantless searches.[183] The question remains unanswered whether such potential for abuse would have been tolerated by the framers of the fourth amendment. Observers have noted that the intent of the framers was reasonably clear: Like *Entick*, the fourth amendment was written to stem the abuses of the eighteenth century practice of issuing general warrants.[184] In the eighteenth century, general warrants, not warrantless searches, were the more greatly feared source of privacy violation.[185]

Had warrantless searches been abused in the eighteenth century to the same extent as were general warrants, it is reasonable to expect that there would have been a public outcry similar to that which issued against the use of general warrants.[186] Similarly, had the potential for abuse of warrantless searches been perceived by the framers to the same extent as was the potential for the abuse of general

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181. *See supra* text accompanying notes 120-32.

182. *See supra* text accompanying notes 136-37.

183. *See supra* note 33 and accompanying text.

184. Amsterdam, *supra* note 154, at 410. For example, one commentator has argued that the framers of the fourth amendment were concerned above all with the preservation of the individual's right to personal privacy and freedom from unwarranted government surveillance. Stone, *supra* note 152, at 1271.

Another commentator has suggested that the real issue with general writs was that they served to immunize the scope of executive seizure from judicial control. Amsterdam, *supra* note 154, at 412.

185. Not much is known about the extent of warrantless searches in the eighteenth century aside from the fact that the common law recognized a warrantless search incident to arrest. It is not certain whether this exception extended the privilege of warrantless search beyond the body. Amsterdam, *supra* note 154, at 412. The real fear of eighteenth century citizens seems to have been not a warrantless search of the person, but rather the ransacking of houses and the taking of private papers and possessions. It was against abuses such as that that both Lord Camden and James Otis argued, and about which the framers of the fourth amendment were concerned. *Id.* at 410, 412. The issuance of general writs was seen as such an abuse because the general writ did not describe the items subject to seizure, nor require their inventory or return, thereby lending itself to the overreaching effect of search on suspicion alone. *Id.* at 412. It was this fear of the overreaching effects of warrants, not the fear of warrantless searches, to which the framers of the fourth amendment responded. *Id.* at 410.

186. *See supra* note 185.

warrants, it is reasonable to expect that restrictions on the employment of warrantless searches would have been written into the fourth amendment beside the restrictions on searches under warrant.[187] It makes no sense that the framers of the fourth amendment would have gone to express lengths to safeguard against the potential privacy abuse of the search warrant, only to permit the employment of warrantless searches to exact the same abuse by evading the fourth amendment guarantee.[188]

When the court in *Commonwealth v. Thorpe* permitted the warrantless electronic surveillance to stand as evidence, it demonstrated an example of the futility of addressing a twentieth century problem with an eighteenth century standard. The growing potential for privacy abuse has been well documented and discussed.[189] This potential encompasses the same elements which caused apprehension to the framers of the fourth amendment: a violation of the individual's right to privacy from government surveillance[190] and the exercise of executive seizures absent judicial supervision.[191] Yet, by statutory construction, the *Thorpe* court removed the surveillance from fourth amendment protections by exempting it from the warrant

187. This is a reasonable assumption in light of the fact that the framers of the fourth amendment were not concerned at the time about warrantless searches, but rather about overreaching warrants. Amsterdam, *supra* note 154, at 410.

188. The fourth amendment guarantees that the people will be free from unreasonable searches and seizures and that warrants will be issued only upon showing of probable cause, supported by oath or affirmation, with specific description of the place to be searched and the persons or things to be seized. *See supra* note 110. The purpose of the search warrant is to assure that the decision whether there is probable cause to search or seize be made by a neutral and detached magistrate, rather than the officer engaged in the investigation. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Melendez v. Shultz, 356 F. Supp. 1205 (D. Mass. 1973). The guarantee that a neutral and detached magistrate will make the probable cause determination is evaded where a court permits the search or seizure to stand without a warrant. *See* Commonwealth v. Thorpe, 1981 Mass. Adv. Sh. 1827, 424 N.E.2d 250 (probable cause determination made by local police officials conducting the investigation).

The important issue presented by *Thorpe* is not only the presence or absence of probable cause for the seizure, but also who is to make the determination.

189. *See supra* note 33 and accompanying text.

190. At least one commentator has argued that privacy and freedom from government surveillance was the primary concern of the framers. *See* Stone, *supra* note 152, at 1271. For authorities describing the growing threat of government surveillance by electronic means, see *supra* note 33.

191. One commentator has suggested that the real issue with general writs was that they immunized the scope of executive seizures from judicial control. It was for this reason that warrants were required by the fourth amendment to be sworn by oath or affirmation, with a particularity of description of persons, places and things to be searched. Amsterdam, *supra* note 154, at 412. Where there is no warrant, as in *Thorpe*, the potential exists for evading this constitutional control.

requirement.[192]

While such construction has been permitted by *United States v. White*,[193] the doctrine should not go unquestioned. The Supreme Court has stated that police must, whenever possible, obtain advance judicial approval of searches and seizures through the warrant procedure.[194] The continued existence of the "assumption of risk" doctrine serves to undermine that mandate. Warrantless electronic surveillance poses the same threat to freedom and privacy today that general warrants did two hundred years ago.[195] Both forms of search and seizure deserve equal treatment under the constitution.

One possible solution would be to examine the policies behind permitting warrantless searches, and then permit warrantless electronic surveillances only where such policies are similarly served.

The following exceptions to the warrant requirement have been recognized: hot pursuit;[196] stop and frisk;[197] search incident to arrest;[198] and various forms of consensual and administrative

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192. 1981 Mass. Adv. Sh. at 1837-38, 424 N.E.2d at 256.

193. In *White*, the Supreme Court upheld warrantless evidence contained in a consensual recording, stating that it did not violate the fourth amendment. 401 U.S. at 754.

194. United States v. United States Dist. Court, 407 U.S. 297, 318 (1972); Chimel v. California, 395 U.S. 752, 762 (1969); Terry v. Ohio, 392 U.S. 1, 20 (1968).

195. Justice Brandeis thought general warrants were "but puny instruments of tyranny and oppression compared with wire-tapping." Olmstead v. United States, 277 U.S. at 476 (Brandeis J., dissenting).

196. No warrant is required when police are in immediate pursuit of a suspect if they have personal knowledge or reliable information about his whereabouts. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967) (evidence admissible when police entered and searched a house without warrant to which an armed robber was reported by a witness to have fled).

197. Without probable cause to make an arrest, a police officer may stop a suspicious person, question him and, for his own protection if he reasonably believes him to be armed, pat his outer clothing for a weapon. 1 WHARTON'S CRIMINAL PROCEDURE § 179, at 360-62 (C. Torcia 13th ed. 1972). *See, e.g.*, Michigan v. De Fillippo, 443 U.S. 31 (1979) (police officer's search valid when a suspect after being stopped, refused to identify himself); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (evidence admissible when officer noticed revolver under jacket as suspect fled car); Adams v. Williams, 407 U.S. 143 (1972) (evidence admissible when police officer searched suspect in response to tip from known informer); Terry v. Ohio, 392 U.S. 1 (1968) (evidence admissible when detective patted down two men seen patrolling in front of store and conferring periodically). *But see* United States *ex rel.* Richardson v. Rundle, 325 F. Supp. 1262, (E.D. Pa. 1971), *rev'd on other grounds*, 461 F.2d 860 (3d Cir. 1972), *cert. denied*, 410 U.S. 911 (1973) (defendant was not suspected of any definite crime and police officer had no reason to believe suspect to be armed and dangerous).

198. After defendant's arrest, a warrantless search may be conducted as incident to the arrest. If the arrest is lawful, the incidental search will also be lawful. 1 WHARTON'S CRIMINAL PROCEDURE § 180, *supra* note 197, § 180, at 363-73. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291 (1973) (when suspected strangler voluntarily came to a police station for questioning, evidence of blood and fingernail samples taken without warrant was

searches.[199] With the exception of consensual and administrative searches, the policy underlying these exceptions is what is usually called either exigent circumstances[200] or necessitous haste.[201] This policy permits a search and seizure without a warrant where speed is essential or delay would endanger the lives of the authorities or other innocent persons.[202]

Exigent circumstances do not usually exist in the context of electronic surveillance where time is normally not so critical as to preclude the obtaining of a warrant.[203] The only consistent exception to

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admissible due to the evanescent nature of the evidence); Chimel v. California, 395 U.S. 752 (1969) (arresting officers may search arrestee's person to discover and remove weapons or prevent concealment or destruction of evidence).

199. These include: consent to search by the accused, 1 WHARTON'S CRIMINAL PROCEDURE, *supra* note 197, § 181, at 373; consent to search by third person, *id.*, § 182, at 390; border searches, *id.*, § 184, at 399; and administrative inspections, *id.*, § 185, at 403.

200. *See* Terry v. Ohio, 392 U.S. 1, 20 (1968) (dictum).

201. Amsterdam, *supra* note 154, at 412.

202. Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

203. A sampling of electronic surveillance cases over the past ten years shows little evidence of the presence of exigent circumstances. The general sense is that such surveillance is normally employed to detect general conspiratorial planning over a period of time, premised on the general notion of a threat, rather than to combat the threat of immediate acts of violence for which time is of the essence. *See, e.g.*, Sinclair v. Kleindienst, 645 F.2d 1080 (D.C. Cir. 1981) (surveillance of Black Panther Party between January and June 1969 premised on general grounds of violent goals of organization and its contacts with foreign radicals); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) (surveillance by Justice Department of Jewish Defense League from October 1970 to June 1971 premised on general ground that the organization's anti-Soviet activities were detrimental to the nation's foreign relations).

Some cases show a long lapse of time between the initial suspicion and the final surveillance sufficient to afford an opportunity to obtain a warrant. *See, e.g.*, Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979) (FBI learned of anti-war conspiracy in June 1970, and conducted a wiretap of the conspirators between November 1970 and January 1971).

Many surveillance cases involve investigations of illegal possession or sale of drugs or contraband based on tips or reasonable suspicion in situations where there is sufficient time to obtain a warrant. *See, e.g.*, Miroyan v. United States, 439 U.S. 1338 (1978) (Drug Enforcement Administration agents obtained warrant to install monitor on drug smuggling aircraft); United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977) (warrant obtained to monitor suspected illegal gambling activities); United States v. De La Fuente, 548 F.2d 528 (5th Cir. 1977) (warrant obtained in pursuit of investigation of drug dealing).

It is also common for the policing organization to cooperate or participate in the monitored activity, such as by investigating a monitored conversation, or conducting or arranging a sale of contraband. In situations such as this, where the policing organization controls the timing, it would be difficult to argue that exigent circumstances exist. *See, e.g.*, Holmes v. Burr, 486 F.2d 55 (9th Cir. 1973) (monitored conversation of liquor store operator arranged and investigated through cooperation with state liquor department which was conducting the investigation); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) (heroin sale negotiated with agents of the Bureau of Narcotics and Dangerous Drugs); United States v. Stephenson, 490 F. Supp. 619 (E.D. Mich. 1979) (Drug

this is where such surveillance may be authorized for purposes of national security.[204]

The use of warrantless surveillance cannot be justified as furthering the aims of federal and state surveillance statutes. Statutes at both federal and state levels tolerate electronic surveillance only for the purpose of fighting organized crime.[205] The existence of exigent circumstances in such a setting is unlikely because the surveillance contemplated for such an aim is directed at the organizational aspects of organized crime, such as planning and secret meetings.[206]

As further illustration that warrantless surveillance is not essential for fighting organized crime, the legislative history behind Title III shows that the federal warrantless surveillance exceptions in section 2511(2)(c)[207] were intended largely to codify established case law as it then existed,[208] not specifically to fight organized crime as was the rest of the statute. The continuing tolerance of warrantless surveillance in the federal statute was an unrelated afterthought; warrantless surveillance was not then, nor is it now, a component logically or intrinsically necessary for the accomplishment of the statute's expressed purpose. For this reason, it would in no way interfere with the purpose of the federal or state surveillance statutes if the Massachusetts Supreme Judicial Court were to rule, as did the Michigan Supreme Court, that the growing scope of surveillance

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Enforcement Administration agents, working with a drug manufacturer, placed monitor in chemical cans being delivered for a suspiciously large order).

The other area where electronic surveillance is often employed is the area of domestic disputes. Here again, the circumstances seldom indicate the presence of an exigent situation. *See, e.g.*, Kratz v. Kratz, 477 F. Supp. 463 (E.D. Pa. 1979) (phone tapped for six month period by spouse suspicious of an extra-marital affair).

Exigent circumstances are, however, occasionally found in connection with electronic surveillance. *See, e.g.*, United States v. Moskow, 588 F.2d 882 (3d Cir. 1978) (when government agent was solicited to set fire to building, the circumstances were considered to constitute an emergency due to the known record of the suspect).

204. National security surveillances are not subject to the warrant requirements contained in 18 U.S.C. § 2518. Jabara v. Kelley, 476 F. Supp. 561, 575 (E.D. Mich. 1979).

205. *See supra* notes 41 & 77 and accompanying text.

206. The Senate report for Title III stated: "Organized criminals must hold meetings to lay plans. Where the geographical areas over which they operate is large, they must use telephones. Wiretapping and electronic surveillance techniques can intercept these wire and oral communications." S. REP. NO. 1097, 90th Cong., 2d Sess. 73-74, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2161. *See also* letter from Governor Volpe to the Massachusetts House and Senate, *supra* note 77.

207. *See supra* note 37.

208. S. REP. NO. 1097, 90th Cong., 2d Sess. 93-94, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2182.

technology[209] has made electronic surveillance outside the protections of the fourth amendment no longer acceptable. Such a ruling would have several beneficial effects. It would eliminate the potential for abuse which permits after the fact acceptance of warrantless surveillances through *Thorpe*-like definition-stretching.[210] It would eliminate the anomaly that the area of greatest potential abuse—warrantless surveillance—is also the area of least control or protection.[211] It would serve the specifically articulated intent of the Massachusetts General Court by affording stricter supervision of electronic surveillance by the judiciary.[212] It would accomplish this without detracting from the true intent of the statute which is to enhance the state's ability to fight organized crime.[213]

VI. CONCLUSION

The effect of the Massachusetts Supreme Judicial Court's rulings in *Thorpe* and *Jarabek* is to alter the statutory definition of organized crime to the judicially created concept of a "continuing conspiracy." By broadening the definition, the court has facilitated the encompassing of a greater range of activities. The court's action will permit a greater incidence of electronic surveillance in Massachusetts for two reasons. First, because the state statute exempts electronic surveillance from the warrant requirement if the surveillance concerns investigations of organized crime, a broader definition of organized crime will permit a broader incidence of electronic surveillance. Second, because the *Thorpe-Jarabek* "continuing con-

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209. *See supra* note 33.

210. By broadening the definition of organized crime, increased levels of warrantless surveillance will now be permissible because almost any conspiracy may be fitted into the new definition. *See supra* note 92 and accompanying text.

211. The standard for warrantless surveillance in Massachusetts is now "reasonable suspicion." Commonwealth v. Thorpe, 1981 Mass. Adv. Sh. at 1837, 424 N.E.2d at 256. The standard for surveillance requiring warrants, probable cause, is a stricter standard. *Id.* at 1835, 424 N.E.2d at 255.

212. *See supra* notes 77 & 84 and accompanying text.

213. The problem with the definition of organized crime would still remain. The problem would still exist if warrantless surveillance were eliminated because connection to a designated offense would still be a requirement at a probable cause hearing to obtain a warrant. MASS. GEN. LAWS ANN. ch. 272, § 99E2 (West 1970). Such a system still would be preferable to the present one because decisions made by the state's courts are more likely to develop a uniform set of standards than are spontaneous decisions made in police stations. Such a system would also be more in keeping with the legislative mandate that electronic surveillance be strictly supervised by the judiciary. Finally, such a system is more in keeping with the constitutional guarantee of freedom from unreasonable searches and seizures because it would require the approval of a detached and neutral magistrate.

spiracy" standard is imprecise as to what facts need to be shown, future courts will have to interpret on a case by case basis. A court desirous of upholding surveillance evidence is given broad leeway to apply the definition loosely. At the very least, such broad grants of discretion can lead to inconsistent results.

In *Thorpe*, the court justified the warrantless surveillance by incorporating the "assumption of risk" doctrine from *United States v. White*. The high courts of several other states have either distinguished or disregarded *White* for the purpose of placing greater limitations on electronic surveillance and advancing the privacy rights of their citizens. The same could have been done by the Supreme Judicial Court of Massachusetts.

The United States Supreme Court should re-consider *White* and the "assumption of risk" doctrine. *White*'s status as precedent has been oft-criticized by commentators and judges. Modern electronic surveillance is at least as great a threat to privacy as are searches and seizures. Both forms of privacy invasion should receive equivalent supervision under the fourth amendment. Yet warrantless electronic surveillances in consensual situations continue to be a major loophole at both the state and federal level. One solution might be for courts to apply an exigent circumstance limitation on warrantless electronic surveillance as is done with warrantless searches.

Legislatures at both the state and federal level have stated their intention to curtail and strictly control electronic surveillance. Spiraling technology has enabled those who would spy to do so with greater sophistication and ease, in contravention of that clear intent. The courts and legislatures should begin now to readdress a problem which has grown beyond the contemplation of earlier lawmakers.

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