Michigan Law Review

Volume 67 | Issue 3

1969

The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"

Herman Schwartz

State University of New York at Buffalo

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Criminal Procedure Commons](#), [Fourth Amendment Commons](#), [Law Enforcement and Corrections Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Herman Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455 (1969).

Available at: <https://repository.law.umich.edu/mlr/vol67/iss3/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE LEGITIMATION OF ELECTRONIC EAVESDROPPING: THE POLITICS OF "LAW AND ORDER"

Herman Schwartz*

I. INTRODUCTION

UNTIL recently, the eavesdropping impasse in Congress had continued for so long that it seemed to be a permanent fixture. For over thirty years, bills to relax the total ban on wiretapping had been unsuccessfully introduced in each session of Congress.¹ As usual, signs of change came only from the Supreme Court, which in 1967 began to inch toward approval of limited eavesdropping under strict controls.² Then, quite swiftly, a mating of longstanding Southern resentment toward the Court and the more recent popular anxiety about lawlessness spawned the Omnibus Crime Control and Safe Streets Act of 1968.³ Title I of this statute authorizes federal assistance to state efforts to improve the quality of their law enforcement, substantially as recommended by the Johnson Administration. Contrary to the Administration's wishes, however, the legislation does not stop there. Congress, led by Senators John McClellan of Arkansas and James O. Eastland of Mississippi, added the probably

* Visiting Professor of Law, University of Michigan, 1968-1969; Professor of Law, State University of New York at Buffalo. A.B. 1953, LL.B. 1956, Harvard University. —Ed.

The author wishes to thank the many colleagues and others, too numerous to list individually, who critically analyzed this manuscript.

1. The total ban on wiretapping appears in § 605 of the Communications Act, 47 U.S.C. § 605 (1958); the bills to revise § 605 introduced prior to 1959 are listed in *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 86th Cong., 1st Sess., pt. 4, at 781-1031 (1959).

2. *Katz v. United States*, 389 U.S. 347; *Berger v. New York*, 388 U.S. 41.

3. P.L. 90-351 (June 19, 1968) [hereinafter Act]. This victory was the culmination of a long campaign, which included the Valachi hearings before Senator McClellan's committee [see Bell, *The Myth of the Cosa Nostra*, 46 NEW LEADER Dec. 23, 1963, at 12, 14] and continuous pressure for legitimation after Senator Edward V. Long's Subcommittee on Administrative Practices and Procedure exposed the vast amount of illegal eavesdropping engaged in by governmental agencies. For examples of such pressure, see Graham, *Setback Is Noted in Fight on Crime*, N.Y. Times, July 18, 1965, § 1, at 1, col. 4; Landauer, *Bugging Backlash*, Wall St. J., March 6, 1967, p. 1, col. 1. The Long Subcommittee Hearings on Invasions of Privacy by Governmental Agencies were held in 1965 and 1966. A detailed and depressing account of the political and legislative history of the whole Omnibus Crime Control Act appears in Harris, *Annals of Legislation—The Turning Point*, NEW YORKER, Dec. 14, 1968, at 68-179; for title III in particular, see *id.* at 152-63. Harris sums up congressional views of the Act as follows: "[A]ll those who voted against it, many of those who voted for it, and most of those who didn't vote at all [believed] that the bill was a piece of demagoguery devised out of malevolence and enacted in hysteria." *Id.* at 68.

unconstitutional⁴ provisions of title II which seek to prevent application of *Miranda v. Arizona*⁵ and *United States v. Wade*⁶ in federal courts; a shamefully feeble gun control section—title IV—which has since been superseded;⁷ a retrogressive title V imposing a five-year ban on government employment of anyone convicted of a felony in connection with a riot or civil disorder; and of perhaps greatest ultimate impact, title III, of dubious constitutionality, which authorizes frequent and prolonged eavesdropping by federal and state investigators under “controls” which range from the ineffective to the nonexistent.⁸ Despite the questionable nature of these measures, congressional reaction to public concern about crime drove the entire bill through Congress by overwhelming margins.

Almost simultaneously with the passage of the Crime Control Act, the Advisory Committee on the Police Function of the American Bar Association's Project on Minimum Standards for Criminal Justice issued a tentative draft which also authorizes electronic eavesdropping by federal and state officials. The ABA draft, *Standards Relating to Electronic Surveillance*, and its supporting commentaries are quite similar to title III and the Senate Judiciary Committee Report that accompanied it.⁹ The similarity is hardly surprising; both bills, as well as the ABA commentaries, were prepared by Professor G. Robert Blakey of Notre Dame Law School, probably the foremost academic spokesman for the legitimization of electronic eavesdropping.¹⁰ The ABA tentative draft is thus a brief for elec-

4. See Wechsler, Letter to the N.Y. Times, June 16, 1968, § 4, at 17, col. 3.

5. 384 U.S. 436 (1966).

6. 388 U.S. 218 (1967). The Act also struck at the Court's decision in *Mallory v. United States*, 354 U.S. 449 (1957), but this attack raised no constitutional issues.

7. P.L. 90-618 (1968).

8. Even President Richard M. Nixon has criticized title III because “in some respects it failed to define clearly the acceptable limits of the practice.” CIVIL LIBERTIES, Oct. 1968, at 10, col. 2.

Title III contains not only eavesdropping authority but also a little-noted immunity provision applying to every offense for which federal officers may use electronic surveillance. This encompasses far more than was contemplated under separate immunity legislation then pending. See S. 677, 90th Cong., 1st Sess. (1967). The Act contains six other substantive “anticrime” provisions in addition to those mentioned in the text.

9. See S. REP. NO. 1097, 90th Cong., 2d Sess. (1968) [hereinafter S. REP. NO. 1097]. One of the similarities can be seen in a revealing bit of Orwellian “newspeak”: in both the Senate and ABA reports, the dichotomy constantly referred to is one allegedly between “privacy and justice,” not between “privacy and law enforcement,” as it is usually put. Compare PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 203 (1967), with, e.g., AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 13, 21 (1968) [hereinafter ABA STANDARDS].

10. Professor Blakey was described as “the principal draftsman” of title III [see

tronic eavesdropping in general and for much of title III in particular, and it is useful to examine them together.¹¹

This Article will examine some constitutional considerations raised by wiretapping and eavesdropping in light of recent Supreme Court decisions, the probable extent of such activity, the limitations imposed upon it by title III and the ABA Standards, and the arguments for the "necessity" of electronic surveillance. Finally, a few jaundiced comments will be offered about legislative and judicial lawmaking in the field of criminal justice, particularly in a time of crisis.

II. THE NONPARTICULARIZED SEARCH

A. *The Unconstitutional Indiscriminateness of the Intrusion Authorized by Title III*

The chief argument against the constitutionality of most kinds of eavesdropping¹² is that the resulting search and seizure is unavoidably too sweeping to comply with the particularity requirements of the fourth amendment. When a continuous tap is placed on a telephone, the eavesdropper almost inevitably hears all the conversations of everyone who talks on that line whether the subject calls out from the tapped number, calls in to that number, or is called by someone using that phone, and no matter how irrelevant or privileged the communication. A bug can be even more intrusive, for it can catch every intimate, irrelevant, or privileged utterance of each person in the room or area bugged.¹³ Because these devices

remarks of Congressman Anderson, 114 CONG. REC. 4633 (1968)] and was on the Senate floor during the Senate debate [114 CONG. REC. 6031 (1968)]. He also served as the reporter for the ABA Advisory Committee on the Police Function, and prepared a bill similar to title III for President Johnson's Crime Commission.

A somewhat shorter version of the eighty-six-page General Commentary to the ABA Standards, virtually identical in argument, structure, and much of the language, was prepared by Professor Blakey and appeared in a brief filed by the National District Attorneys' Association in the *Berger* case. It is reprinted in *Hearings Before Subcomm. No. 5 of the House Judiciary Comm.*, 90th Cong., 1st Sess. 1055 (1967).

11. The Standards are of more than academic and background interest. Under title III, state eavesdropping requires a specific state statute, and the Standards may well be looked to as a model, except where their requirements are less restrictive than those of title III.

12. In this discussion "eavesdropping" will refer to both wiretapping and bugging unless otherwise indicated.

13. For example, the Government has admitted that it overheard five conversations in which Muhammad Ali (Cassius Clay) participated, "at three places where electronic surveillance against others was directed." Supporting Memorandum for the United States at 1-2, *Clay v. United States*, 37 U.S.L.W. 3056 (U.S. May 6, 1968). For other examples, see *Silverman v. United States*, 365 U.S. 505 (1961) (conversations throughout the house overheard); *Irvine v. California*, 347 U.S. 128 (1954) (bedroom). See Williams, *The Wiretapping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 855, 862-68

intrude so deeply and so grossly, they discourage people from speaking freely; as Justice Brennan has warned, if these devices proliferate widely, we may find ourselves in a society where the only sure way to guard one's privacy "is to keep one's mouth shut on all occasions."¹⁴

The possibility of such indiscriminate surveillance was one of the principal reasons for which the Supreme Court struck down a New York eavesdropping statute in *Berger v. New York*.¹⁵ The statute at issue in *Berger*, section 813-a of the New York Code of Criminal Procedure, authorized eavesdropping for periods up to sixty days on the basis of a sworn statement

that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and . . . identifying the particular telephone number or telegraph line involved.¹⁶

An unlimited number of sixty-day extensions were permitted. In *Berger*, eavesdropping had been authorized under this statute for a four-month period on the offices of two suspects—one of whom was a lawyer—in a state liquor authority bribery case.

The Supreme Court, stressing that the inherently broad intrusion of electronic eavesdropping made the fourth amendment's particularity requirements "especially" important,¹⁷ set down constitutional requirements to prevent such overbroad intrusions. These requirements were drawn largely from the Court's previous discussion of the eavesdropping procedures in *Osborn v. United States*.¹⁸ As the Court emphasized, the recording device in *Osborn* was used by a party to the conversation who was engaged in the investigation of "a specific criminal offense," and the eavesdropping was restricted to the "limited purpose outlined in" an antecedent judicial order; the type of conversation was described with particularity so that

(1960). Other arguments based on the fifth amendment and the mere-evidence rule have been rejected either impliedly [*see Hoffa v. United States*, 385 U.S. 293 (1966)], or explicitly [*Berger v. New York*, 388 U.S. 41, 44 n.2 (1967)].

14. *Lopez v. United States*, 373 U.S. 427, 450 (1963). *See also* Kalven, *Privacy in the Year 2000 in Symposium, Toward the Year 2000: Work in Progress*, DAEDALUS 876, 882 (1967): "It may be a final ironic commentary on how badly things will have become by 2000 when some men will make a fortune merely by providing, on a monthly, weekly, daily, or even hourly basis, a room of one's own."

15. 388 U.S. 41 (1967). There were other reasons as well, such as a lack of requirements of notice to the victim of the eavesdropping and of a return to the judge of what was overheard. 388 U.S. at 58-60.

16. N.Y. CODE CRIM. PROC. § 813-a (1958).

17. 388 U.S. at 56. *See also* 388 U.S. at 68, 69 (Justice Stewart, concurring).

18. 385 U.S. 323 (1966).

"the officer could not search unauthorized areas"; the investigator would have to end the intrusion "once the property sought, and for which the order was issued, was found." Furthermore,

the order authorized one limited intrusion rather than a series or continuous surveillance. . . . [A] new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one. Moreover, the order was executed by the officer with dispatch, not over a prolonged and extended period. . . .¹⁹

Although *Osborn* involved the recording of a conversation by one who was participating in it, which was of course easy to describe with particularity in advance, the *Berger* Court seemed to attach no significance to this distinction. Rather, it implied that the procedures used in *Osborn* should be followed in all cases, even where none of the parties had consented to the interception.

Measured by these standards, the New York statute fell far short: to the Court, the statute authorized "general searches by electronic devices," in violation of the *Marron* rule prohibiting "the seizure of one thing under a warrant describing another."²⁰ The statute did not require the applicant to describe "the 'property' sought, the conversations," with particularity, and this gave the officer "a roving commission to 'seize' any and all conversations." Furthermore, authorization for a two-month period was impermissible:

[Such surveillance] is the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. . . . [T]he statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely to the discretion of the officer.²¹

In sum, the Court concluded that the New York statute permitted "a blanket grant of permission to eavesdrop . . . without adequate judicial supervision or protective procedures."²²

The Court's subsequent decision in *Katz v. United States* underscored this concern for particularity by approving, in dictum, an extremely narrow intrusion. In *Katz*, FBI agents had probable cause to believe that the defendant was using certain public tele-

19. 388 U.S. at 57.

20. *Marron v. United States*, 275 U.S. 192, 196 (1927), quoted in 388 U.S. at 58.

21. 388 U.S. at 58-60.

22. 388 U.S. at 60.

phones for gambling purposes about the same time almost every day. Thereafter,

[e]ach day, as petitioner approached a certain spot about a block and a half from the telephones, agents in a radio car surveilling petitioner signaled other agents near the booths, who then attached and activated the recorder and microphones [on two booths]. After petitioner departed, the device was removed. . . .²³

Six recordings were made and used. Of this procedure the Court said:

[T]his surveillance was so narrowly circumscribed that a duly authorized magistrate . . . clearly apprised of the precise intrusion . . . could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.²⁴

Purportedly in compliance with the guidelines set out in these cases, title III of the Crime Control Act authorizes electronic surveillance for thirty days, with the possibility of an unlimited number of thirty-day extensions, if a judge makes an *ex parte* determination that:

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.²⁵

The ABA Standards contain similar provisions.²⁶

Under the principles announced in *Berger*, *Katz*, and *Osborn*, both title III and the ABA Standards contain serious constitutional infirmities with respect to the duration of the eavesdropping and the required particularity of the order authorizing it.

23. Brief for Respondent at 3-4, *United States v. Katz*, 389 U.S. 347 (1967) (emphasis added).

24. 389 U.S. at 354. Because no warrant had been obtained for such surveillance, it was ruled illegal despite its compliance with particularity requirements. 389 U.S. at 358.

25. Act § 2518(3).

26. ABA STANDARDS §§ 5.1-5.11.

1. *Time*

Both title III and the Standards authorize continuous eavesdropping for potentially unlimited periods of time. Section 2518(5) of the Crime Control Act permits eavesdropping for an initial period of thirty days with an unlimited number of thirty-day extensions on renewed showings of probable cause. Allowing such lengthy surveillance, possibly for years, conflicts sharply with *Berger's* clear disapproval of the two-month authorization permitted by the New York statute.²⁷ Moreover, sections 2518 (1)(d) and 4(e) of the Act do not limit the eavesdropping to specific points in time, unlike the court orders upheld in *Katz* and the cases approvingly cited in *Berger*,²⁸ but rather allow uninterrupted eavesdropping over a "period of time." Under such a provision, officers may install a tap or a bug which will be in *continuous* operation throughout the days or months for which the interception is authorized. This would seem to pose a rather clear conflict with the Supreme Court's holding in *Berger*, which disapproved the uninterrupted interception as allowing "indiscriminate" seizure and approved the *Osborn* interception because "the order authorized one limited intrusion rather than . . . a continuous surveillance."²⁹

The legislative history and ABA commentary approve such lengthy and continuous eavesdropping for, as the Senate Reports puts it,

27. Section 5.9 of the Standards contains similar authority except that the initial period is fifteen days, though the extensions may be for thirty. The Standards add a requirement that where such extended overhearing is contemplated, there must be a showing that the suspect is engaged "over a period of time in the commission of a particular offense with two or more close associates as part of a continuing criminal activity." § 5.4(i)(A). Apart from the obvious vagueness of "close associates" and "continuing criminal activity," there seems to be no indication in *Berger* or elsewhere that suspects in a three-man conspiracy case involving several criminal acts are entitled to fewer constitutional protections than others; *Berger* itself involved a multi-person conspiracy. Indeed electronic eavesdropping is supposed to be uniquely valuable for such offenses and usually restricted to them. Were the Standards approach adopted the exception would become the rule.

Also, one might ask how much investigators will have to add to the initial showing to justify the extension. For an indication that eavesdropping for extended periods of time is not uncommon *see* text accompanying notes 30-31, 65 *infra*.

28. 388 U.S. at 63:

[T]his Court has in the past under specific conditions and circumstances, sustained the use of eavesdropping devices. See *Goldman v. United States*, 316 U.S. 129 [1942]; *On Lee v. United States*, 343 U.S. 747 [1952]; *Lopez v. United States*, *supra*; and *Osborn v. United States*, *supra*.

29. 388 U.S. at 57. For similar conclusions, *see The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 195-96 (1968). *Cf. Dash, Katz—Variations on a Theme by Berger*, 17 CATHOLIC U. L. REV. 296, 312-13 (1968). The Department of Justice takes a similarly narrow view. *See* 114 CONG. REC. 6216, Comment on Amend. No. 765 (May 23, 1968). *See also* H. Schwartz, *Electronic Eavesdropping: What the Supreme Court Did Not Do* 4 CRIM. L. BULL. 83 (1968).

[w]here it is necessary to obtain coverage to [sic] only one meeting, the order should not authorize additional surveillance. . . . Where a course of conduct embracing multiple parties and extending over a period of time is involved, the order may properly authorize proportionately longer surveillance but in no event longer than 30 days, unless extensions are granted.³⁰

As authority and illustration of the "proportionately longer surveillance" for "conduct extending over a period of time," the Senate Report cites *People v. Tarantino*,³¹ a case involving fifteen months of continuous interception during which "police listened to every sound that was made in defendant's [hotel] room . . . [although they] did not consider all of the conversations they overheard relevant . . ."; the result was a set of recordings that totalled "approximately 500 hours of listening time."³² This example seems inconsistent with *Berger's* condemnation of lengthy, continuous surveillance. The Standards do additional violence to *Berger* by citing the eavesdropping in that case as an example of the kind of continuous overhearing that the ABA Advisory Committee seeks to authorize,³³ even though *Berger* itself squarely condemned that surveillance as too lengthy and indiscriminate.³⁴

A possible limitation on the length of the surveillance might result from a requirement that the interception end when a conversation of the type sought is first obtained. The Supreme Court in *Berger* criticized the New York statute for failing to prevent a police officer, in his untrammelled discretion, from continuing to listen even after he had obtained what he was looking for.³⁵ Sections 2518 (1)(d) and (4)(e) of title III take away the officer's discretion, but still permit continued listening if a judge authorizes it upon a showing of "probable cause to believe that additional communications of the same type will appear." Such a limitation is of course no limitation at all, for where there is probable cause of a continuing offense, almost inevitably there is a probable cause to believe that there will be more than one relevant conversation.

The possibility of a warrant authorizing a number of interceptions may conflict with *Berger* in yet another respect. There, the

30. S. REP. No. 1097 at 101. Cf. ABA STANDARDS 148, which uses virtually identical language.

31. 45 Cal. 2d 590, 290 P.2d 505 (1955). The evidence in *Tarantino* was excluded, however, because it was obtained without prior approval of a magistrate.

32. 45 Cal. 2d at 593, 290 P.2d at 508.

33. ABA STANDARDS § 5.9, comment.

34. 388 U.S. at 57; see text accompanying note 28.

35. 388 U.S. at 57, 59.

Court seemed to require that each order be limited to one interception; it disapproved a "series of intrusions, searches and seizures, pursuant to a single showing of probable cause."³⁶ The *Berger* Court's implied approval of *Osborn*, where the Federal Bureau of Investigation had obtained a new order for a second interception made only a day after the original interception, reinforces this reading.³⁷ Dictum in *Katz*, however, seems to approve a surveillance involving six different interceptions on several different days.³⁸ This particular point was not argued in *Katz*, and the issue of whether one order can authorize several interceptions remains in doubt. But even if *Katz* did supersede *Berger* in this respect, the "narrowly circumscribed" surveillance over a period of several days that was approved in *Katz* is a far cry from the continuous series of intrusions—possibly lasting for years—authorized by title III.³⁹

2. Particularity of the Warrant Description

Given the possibility of such long-term eavesdropping, *Berger's* requirement that the "property" sought—the conversation—be described with particularity in the warrant becomes all the more important, at least theoretically. The wider the possible temporal or spatial area of a permissible search, the more important it is that the description of what is sought be precise, for imposing such a limitation may be the only way to discourage indiscriminate searches of extensive areas. Yet the practical value of such a limitation may be rather feeble. Where eavesdropping continues for a long time, a particularized description of the conversation in the warrant is not likely to limit the intrusion very much, especially since indirect use of the evidence is hard to detect.⁴⁰ In some instances, however, the eavesdropping may not be continuous, but rather may be limited to a specific described conversation or conversations as in *Katz* and similar cases. Moreover, even if lengthy eavesdropping is statutorily permitted, the exclusion of evidence obtained directly or indirectly

36. 388 U.S. at 59.

37. This interpretation is further reinforced by the fact that the second interception was necessitated solely by the failure of the recording device to operate properly the first time, surely a reasonable justification for trying again without seeking a new order.

38. See Brief, *supra* note 23, at 3-4.

39. Section 2518(5) of title III may also offend *Berger's* condemnation of orders which are not promptly executed. Cf. *Sgro v. United States*, 287 U.S. 206 (1932). The thirty-day period apparently need not start promptly, nor within ten days as is required with a conventional warrant; rather, execution is to take place "as soon as practicable." See also ABA STANDARDS § 5.9.

40. See discussion below at text accompanying notes 152-57.

from conversations that are not specified in advance might discourage some eavesdropping; if less evidence can be used, there may be less incentive to listen. Thus, a strictly construed and enforced particularity requirement might provide some limitation, although not much optimism on this score is warranted.

Such a strict particularity requirement could exclude two types of nonspecified evidence: undescribed evidence of the crime being investigated, and evidence of other crimes.⁴¹ Title III does not seem to exclude either kind, although the text of the statute is not entirely clear. As to the nonspecified evidence of a specified crime, sections 2518(4)(c) and (e) require a description of the "type of communication sought to be intercepted." If "type of communication" is construed broadly, as the Standards at least seem to suggest,⁴² then little evidence relating to the offense in question will be excluded. Such a broad interpretation may run afoul of *Berger*, however. There Justice Clark, writing for the majority, stressed that "the need for particularity . . . is especially great in the case of eavesdropping."⁴³ His meaning may be explained by his citation of *Osborn*, *Goldman*, *Lopez*, and *On Lee* as examples of specificity, for, as his discussion in the accompanying footnote demonstrates, all four cases involved quite detailed advance knowledge and description of the anticipated contents of the conversations, of the crime and persons involved, and of the place and time of interception.⁴⁴ The facts and language in *Katz* also point toward such a meticulous construction of the particularity requirement.⁴⁵

41. See *Marron v. United States*, 275 U.S. 192, 196 (1927), for an example of the first kind, and *Seymour v. United States*, 369 F.2d 825 (10th Cir.), cert. denied, 386 U.S. 897 (1966) for an example of the second.

42. The Standards require only "a specification of the particular offense . . . under investigation," ABA STANDARDS § 5.3(iii). This is elaborated in the commentary by "that is, the type of conversation to be intercepted." *Id.* at 137. This identification is contrary to the requirements of *Berger*: specification of both the offense and the communication (388 U.S. at 58-59), the same requirements found in § 2518(4)(c) of title III.

43. 388 U.S. at 56.

44. In *Osborn*, in which James Hoffa's lawyer was convicted of attempted jury-tampering, the eavesdropping consisted of an informer's secret recording of his own planned conversation with the suspect. This was also true in *Lopez*, another case cited in *Berger*. In *On Lee v. United States*, 343 U.S. 747 (1952), an informer wore a radio transmitter to broadcast his conversations with a specific suspect. And in *Goldman v. United States*, 316 U.S. 129 (1942), also cited, the FBI's detectaphone was installed in order to overhear four conversations to which an FBI informer was a party, and which may actually have been set up by him.

At one point, *Berger* does refer to "type of conversation," 388 U.S. at 57, but this is in a discussion of the very specific and limited set of circumstances in *Osborn*.

45. *Steele v. United States*, 267 U.S. 498 (1925), cited by the ABA as authority for very broad specification (ABA STANDARDS 90 n.256), is a rather special case. A prohibition agent saw some cases stencilled "whiskey" being loaded into a building and he

Title III offers little direct guidance as to how broadly "type of communication" should be interpreted, except that apparently the description must include more than a reference to the particular offense, since this is separately required by section 2518(1)(b). Even if it is read narrowly, however, the statute would still allow the police to listen for all conversations that fit the description of the type specified in the order, under the sections discussed in the preceding paragraph, and this seems to be less than the kind of particularity that is impliedly required by *Berger* and *Katz*.

Moreover, if one may judge from the latitude allowed police officers with respect to conversations about nonspecified offenses, it is unlikely that a narrow construction of "type of communication" was intended. Section 2517(5) expressly permits retroactive judicial ratification of the seizure of evidence of other offenses if the evidence was obtained by a legal interception, which completely ignores the thrust of the Supreme Court's holding in *Marron* prohibiting "seizure of one thing under a warrant describing another."⁴⁶ Instead of the more meticulous particularity for electronic eavesdropping that is required by *Berger*, the Crime Control Act demands less particularity than is usually imposed to secure the conventional warrant.

Title III is not of course unique in ignoring *Marron*. Despite the Supreme Court's invocation of the case in *Berger* and elsewhere, the lower courts have largely disregarded it.⁴⁷ They have been reluctant to force officers to obtain a new and separate warrant in order to seize unanticipated items seen in the course of a legitimate entry and search. This is not entirely unreasonable if the initial intrusion is proper. After all, the invasion of privacy has already occurred, and legitimately, so why exclude any items seized as a result? Though this argument may sound superficially plausible, it ignores the most

obtained a warrant for "cases of whiskey." When a large seizure was made under the warrant, the Court easily found that the specificity was adequate. Given the nature of the commodity—fungible cases of whiskey—it is difficult to see how more specificity was physically possible. This is a far cry from specifying conversations which vary sharply as among different people, times, and subject matter, *inter alia*.

There is also some question whether the "especially great" particularity which is required where electronic eavesdropping is concerned (388 U.S. at 56) does not independently make *Steele* inapplicable, even if that case were generally more apposite, especially in view of the threat to free speech from electronic surveillance; cf. *Stanford v. Texas*, 379 U.S. 476 (1965) (more particularity required where first amendment implicated in seizure); *Lopez v. United States*, 373 U.S. at 469-71 (Justice Brennan dissenting). See text accompanying notes 80-81.

46. *Marron v. United States*, 275 U.S. 192, 196 (1927), is cited in *Berger*, 388 U.S. at 58.

47. See, e.g., *United States v. Eisner*, 297 F.2d 595 (6th Cir. 1962); *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961). *Contra*, *United States v. Coots*, 196 F. Supp. 775 (E.D. Tenn. 1961).

important rationale for the *Marron* rule: curtailing intrusive conduct by reducing the incentive for an extension of such conduct. Were the *Marron* limitation abolished, all searches and seizures would verge on the general, so long as the initial entry was legitimate; there would be no reason to stop the search, even after the described item was seized, since everything else that was found could be used in a subsequent prosecution.

3. *Eavesdropping on Privileged Communications*

To illustrate further the indiscriminately broad sweep of the electronic surveillance now permitted, it might be well at this point to discuss one of its more serious consequences: the interception of privileged conversations. Professor Alan Westin's conclusion that eavesdropping on lawyers is a "widespread practice"⁴⁸ is partly confirmed by the fact that many of the electronic eavesdropping cases that have been litigated involve eavesdropping on defense attorneys, and by the many reports of advertent and inadvertent intrusions on the communications of lawyers, doctors, and others.⁴⁹ Even where the police do not intend to eavesdrop on privileged conversations, it will often be impossible to monitor out such communications;⁵⁰ and it is really asking too much of human nature to expect that police officers who are trying to put a suspect behind bars will refrain from listening in on his efforts to frustrate them.⁵¹

Title III reflects virtually no awareness of this problem,⁵² but the ABA Advisory Committee professes some concern and imposes limitations. The Standards prohibit eavesdropping on

48. PRIVACY AND FREEDOM 125 (1967).

49. *United States v. Roberts*, 389 U.S. 18 (1967); *Berger v. New York*, 388 U.S. 41 (1967); *O'Brien v. United States*, 386 U.S. 345 (1967); *Osborn v. United States*, 385 U.S. 323 (1966); *Black v. United States*, 385 U.S. 26 (1966); *United States v. Goldman*, 316 U.S. 129 (1942); *People v. Morhouse*, 21 N.Y.2d 66, 286 N.Y.S.2d 657, 233 N.E.2d 705 (1967); *United States v. Coplon*, 191 F.2d 749, 757 (D.C. Cir. 1951).

The widespread use of such surveillance in abortion investigations [see, e.g., *People v. Scharfstein*, 52 Misc. 2d 976, 277 N.Y.S.2d 516 (1967); *People v. Cohen*, 248 N.Y.S.2d 339 (1964); *People v. Scardaccione*, 243 N.Y.S.2d 721 (1963)] often produces eavesdropping on physician-patient conversations.

50. *Hearings on S. Res. 190 Before Subcomm. on Administrative Practices and Procedures of Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 2, at 170-74 (1967) [hereinafter 1967 Long Committee Hearings] (testimony of Geoffrey Arn).

51. See cases cited in note 49 *supra*; *United States v. Johnson*, 333 U.S. 10, 14 (1948). But see *People v. Morhouse* (Sup. Ct. N.Y., Nov. 11, 1968), in N.Y. Times, Nov. 12, 1968, at 1, col. 2, where it was found that police refrained from listening, following remand for hearing on this point in *People v. Morhouse*, 21 N.Y.2d 66, 233 N.E.2d 705, 286 N.Y.S.2d 657 (1967).

52. The sole consideration appears in § 2517(4) which maintains the privilege of any otherwise privileged communications.

a facility or in a place primarily used by licensed physicians, licensed lawyers, or practicing clergymen or in a place used primarily for habitation by husband and wife unless an additional showing . . . is made . . . that—

(i) the overhearing or recording will be or was made in such manner so as to eliminate or minimize insofar as practicable the overhearing or recording of other communications whose overhearing or recording are not or would not be authorized and

(ii) there is or was a special need for overhearing or recording of the communications over the facilities.⁵³

This limitation, which also applies to eavesdropping on public facilities such as telephones, is a verbal placebo. The “additional showing” requirement adds little: minimizing the chances of intercepting “innocent” calls should, one would think, be required in all interceptions, as indeed it is in the Crime Control Act.⁵⁴ Furthermore, according to the only example given in the Standards,⁵⁵ the “special need” test is apparently satisfied simply by a showing that the facility in question and not another is being used for illegal purposes; again, one would expect this to be a requirement for all interceptions. We are assured that this Standard must be “scrupulously met.”⁵⁶ Does this imply that the other Standards need not be? And what is “scrupulous compliance” in contrast to less than “scrupulous” compliance?

There are alternative approaches to this problem. Could we not try to exclude entirely such privileged areas and communications from legalized eavesdropping? If these privileges are indeed crucial to the high purposes for which they were created—especially the constitutionally hallowed and ancient attorney-client relationship⁵⁷—then legislation that is as experimental as the Crime Control Act and the Standards purport to be⁵⁸ need not include them among the possible areas of interception. If we cannot prove the over-all benefit of eaves-

53. ABA STANDARDS §§ 5.11(a), 5.10, respectively (combined to incorporate a cross reference in § 5.11).

54. Act § 2518(5): “Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter”

55. ABA STANDARDS § 5.10, comment: “Second, a special need to tap the phone must be shown. For example, where a professional gambler is conducting his business not over his private phone, but over a particular public phone, there exists a special need to make interceptions over that phone.”

56. *Id.* § 5.11, comment b.

57. In addition to this obvious example, it is worth noting that priest-penitent surveillance might raise first amendment problems.

58. See ABA STANDARDS 51-52; S. REP. NO. 1097, at 107.

dropping without trying it, perhaps we should not authorize so serious and probable an invasion of privacy until at least some of the evidence is in.⁵⁹

Another possible method of reducing intrusion upon attorney-client communications is to prohibit post-indictment eavesdropping. The Standards expressly permit this kind of surveillance and title III is silent on this point, thereby not proscribing it. Yet once a man has been indicted, experience shows that there is a good chance that electronic eavesdropping on him will result in the interception of attorney-client discussions⁶⁰ or other conversations relating to his defense.⁶¹ Indeed, *Massiah v. United States*,⁶² however narrowly it is read, seems to prohibit this kind of post-indictment investigation when it relates to the particular offense under indictment. Eavesdropping on matters already under indictment, especially in cases in which information relating to the defense cannot practicably be eliminated, would seem to be as much an interference with the right to counsel as surreptitious interrogation of the defendant, and it should be subject to the same post-indictment prohibition. Such a ban might, if enforced, prevent at least some invasions of attorney-client conferences.

4. "Strategic Intelligence" and Specific Crimes

The fact that neither title III nor the Standards meet some of the fundamental restrictions imposed by *Berger* and *Katz* is not altogether surprising, for adherence to these limitations would seriously reduce the allegedly unique value of electronic surveillance: its ability to obtain "strategic intelligence" for the war against organized crime. Yet the Act's own restriction of electronic surveillance to the investigation of one of the specific offenses listed in section 2516 which "has been, is being, or is about to be committed" also severely reduces its usefulness in obtaining such "strategic intelligence." Since this restriction is clear and cannot be easily evaded by verbal manipulation, title III will turn out to be either a provision of relatively little value in the struggle against organized crime or a verbal smoke screen for continuing illegality.

According to its proponents, the special advantage of electronic surveillance is that it is a valuable tool for gathering strategic intelli-

59. For some penetrating comments on action based on ignorance see Lehman, *Crime, the Public and the Crime Commission: A Critical Review of the Challenge of Crime in a Free Society*, 66 MICH. L. REV. 1487 (1968). See also part III *infra*.

60. See cases cited in note 49 *supra*.

61. See, e.g., *Hoffa v. United States*, 402 F.2d 380 (7th Cir. 1968).

62. 377 U.S. 201 (1964); see also *Beatty v. United States*, 389 U.S. 45 (1967).

gence about organized crime and that it thus enables law enforcement officials to obtain "a look at the overall picture" for "prevention" purposes.⁶³ The techniques of fighting organized crime differ from those used in ordinary criminal investigation. The former involves accumulating a great deal of superficially irrelevant information which is then collated. Furthermore, in investigating organized crime the police do not work from a known crime to an unknown or suspected criminal, but "backwards," from a "known criminal" to a hoped-for discovery of an as-yet-unknown crime.⁶⁴ As Professor Blakey testified before the Senate Judiciary Committee:

The normal criminal situation deals with an incident, a murder, a rape, or a robbery, probably committed by one person. The criminal investigation normally moves from the known crime toward the unknown criminal. This is in sharp contrast to the type of procedures you must use in the investigation of organized crime. Here in many situations you have known criminals but unknown crimes.

So it is necessary to subject the known criminals to surveillance, that is, to monitor their activities. It is necessary to identify their criminal and noncriminal associates; it is necessary to identify their areas of operation, both legal and illegal. Strategic intelligence attempts to paint this broad, overall picture of the criminal's activities in order that an investigator can ultimately move in with a specific criminal investigation and prosecution. . . . Perhaps the best illustration I can give you is the "airtels", . . . [which] represent the gathering of strategic intelligence against organized crime in that case against Raymond Patriarca.

Tactical intelligence, on the other hand, is illustrated by the *Osborn* case, which the Supreme Court heavily relied upon in the *Berger* opinion. You moved in there and monitored only one conversation or only one meeting. You had a limited, tactical purpose, whereas in the Patriarca situation you had a broader purpose. . . . So the distinction deals, first, with the purpose of the agency and then perhaps, second, with the extent of time the subject is under surveillance.⁶⁵

63. Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, app. C to PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT ON ORGANIZED CRIME 80, 92 (1967) [hereinafter TASK FORCE ON ORGANIZED CRIME].

64. See, e.g., *Baker v. United States*, 401 F.2d 958 (D.C. Cir. 1968) (surveillance of Fred Black, as explained by FBI agents).

65. *Hearings on Controlling Crime Through More Effective Law Enforcement Before the Subcomm. on Criminal Laws and Procedures of the Senate Judiciary Comm.*, 90th Cong., 1st Sess. 957-58 (1967) [hereinafter *1967 Senate Crime Hearings*] (testimony of Prof. G. Robert Blakey).

An example of an "intelligence investigation" appears in the testimony dealing with electronic surveillance given by Dean Elson, Special Agent in Charge of the Las Vegas Field Office of the FBI in Transcript of Testimony at 749, *United States v. Drew*, Cr. No. 1333 (D. Nev., Feb. 1968):

Strategic information does not, of course, come immediately: the *Patriarca* "airtels" cover more than three years; the *Berger* bug was in operation for four months; in one of the *Hoffa* cases, surveillance of a codefendant lasted eighteen months, including six months after indictment;⁶⁶ in the California case of *People v. Tarantino*, which was cited with apparent approval by the Senate Judiciary Committee in its report on title III, the interception continued for fifteen months; and the eavesdropping which intercepted boxing champion Muhammed Ali's conversation while he was being investigated for draft evasion also lasted some fifteen months.⁶⁷ Thus, the time limitations of *Katz* and *Berger* seem quite inconsistent with this particular use of electronic surveillance.

Moreover, a vast number of people will inevitably be overheard while the police are gathering strategic intelligence, and a substantial number of these people will be overheard often. Many of these individuals will not be involved in criminality, but since organized crime investigations usually involve the possible corruption of respected community figures, suspicion will arise and their conversations will be intercepted. As noted above, the proponents of strategic intelligence claim that it is necessary to identify "criminal and *noncriminal* associates . . . [and] their areas of operation, *both legal and illegal*."⁶⁸

Q. . . . [D]o you want to explain really what you mean by that, and [sic] intelligence type investigation?

A. We were interested in Mr. Drew from the standpoint of his activities, his associates, who he was contacting in connection with organized crime and organized criminal activity. Our primary objective in the investigation was intelligence information just as it is in an espionage investigation.

There was no—at this stage of the investigation there is no violation within the jurisdiction of the Bureau. It was purely an intelligence type of an investigation. [Emphasis added.]

Another example was given by New York District Attorney Frank S. Hogan: "We make it a habit to keep track of these [notorious gangster] characters who return [from prison] and surveillance, including wiretapping of Dio was undertaken, since he seemed to be blossoming forth as a power in a number of labor unions." *Hearings on Wiretapping Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess. 321 (1955) [hereinafter *1955 House Hearings*].

On the widespread use of general surveillance eavesdropping, see *Hearings on S. 1086 on Wiretapping and Eavesdropping Legislation Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 463 (1961) [hereinafter *1961 Senate Hearings*] (testimony of Anthony Savarese); S. DASH, R. KNOWLTON, & R. SCHWARTZ, *THE EAVESDROPPERS* 66, 163-65 (1959); cf. *Report on Certain Alleged Practices of the F.B.I.*, 10 LAW. GUILD REV. 185, 187-89 (1950).

66. *Hoffa v. United States*, 402 F.2d 380 (7th Cir. 1968).

67. Supplemental Memorandum for the United States at 1-2, *Clay v. United States*, 37 U.S.L.W. 3056 (May 6, 1968).

68. *1967 Senate Crime Hearings* 957 (emphasis added). See the testimony of Special Agent Pennypacker of the FBI in Transcript of Proceedings at 610, *United States v. Black*, Cr. Nos. 551-63, 650-63 (D.D.C., Dec. 18, 1967):

During the course of the investigation I might send a lead out to an office and make reference to the fact previously it had been determined from several sources,

Such broad-ranging surveillance is facilitated by section 2518(3)(d) of title III, which authorizes eavesdropping on facilities and places "leased to, listed in the name of, or commonly used by" the suspect, and not merely on those facilities and places that are used *primarily* by him. Thus, eavesdropping on the homes, offices, and telephone communications of the suspect's relatives, friends, business partners, and others is permitted, and *Berger's* implied disapproval of eavesdropping on people "without regard to their connection with the crime under investigation"⁶⁹ is also ignored.

The fact is that searches for strategic intelligence, without a specific crime as the objective, cannot be squared with *Berger*, *Katz*, and *Osborn*. Judging by the language used by the Court, the facts at issue in those cases, and the kinds of permissible electronic surveillance cited in the various opinions, it would seem that gathering tactical intelligence is the only kind of surveillance that is justifiable under present theories of the fourth amendment. And in this respect, both title III and the Standards are verbally consistent with the cases in limiting eavesdropping to such tactical intelligence purposes: under sections 2518(1)(b)(i) and 2518(3)(a) of the Act, the applicant for an order must provide "details as to [a] particular offense" listed in section 2516, while section 5.3(iii) of the Standards requires "a specification of the particular offense which is or was under investigation."

This is surely an odd result, for if the war against organized crime—the justification for title III—really requires strategic intelligence, how will that war be advanced by legislation which seems to permit the acquisition of only tactical intelligence? And if the Act does not grant law enforcement officers the power to obtain allegedly crucial strategic information, will we not again experience the same kind of widespread flouting of clear legal limitations that has recently come to light?⁷⁰ In sum, even the very loose title III is too restrictive to accomplish the purposes advanced by its proponents, and this raises serious questions about the reasons for their

One of the sources would be microphone surveillance, that a given named individual had been associated with Mr. Black, because this was my area of investigation, to determine who this individual was. Consequently the source of my information to determine who this individual was would be from several sources including this microphone surveillance, and it would become commingled with other information. My purpose in sending leads out in the first place would be to identify individuals which I had no identity for or I wanted to get additional background and we had a large number of people we had not identified up to that point, so it would be a situation where I would be anxious and interested.

69. *Berger v. New York*, 388 U.S. 41, 59 (1967).

70. See 1965 Long Committee Hearings 1212; text accompanying note 110 *infra*.

support of the legislation, and about how meaningful they expect its ostensible limitations to be.

B. *The Response to the Charge of Unconstitutional Generality*

The legislative history of title III does not devote much space to constitutional objections based on the theory that the statute allows excessively long and indiscriminately general searches. Rather, it simply claims compliance with *Berger* and *Katz* throughout.⁷¹ The ABA Advisory Committee adopts a similar approach in some areas, but it tries to meet the issue of indiscriminate searches more directly. The response given by the Committee seems to come down to these propositions: (1) The claim that a search by electronic eavesdropping is especially indiscriminate ignores existing practice in more conventional searches for letters and other tangibles; such searches are (or can be) just as indiscriminate, and yet they are legal. (2) Such breadth is not repugnant to the Constitution, for the search may be general so long as the seizure is specific. "All searches are general. Only seizures are definite."⁷² (3) As Justice Harlan suggests in his dissent to *Berger*, "conversations are not 'seized' either by eavesdropping alone or by their recording. . . . Just as some exercise of dominion, beyond mere perception, is necessary for the seizure of tangibles, some use of the conversations beyond the initial listening process is required for [seizure of] the spoken word."⁷³ (4) The Harlan dissent is also correct in contending that specification in the warrant of the "category" of conversation is sufficient particularity—"The materials to be seized are . . . described with sufficient particularity if the warrant readily permits their identification both by those entrusted with the warrant's execution and by the court in any judicial proceeding."⁷⁴ (5) Economic regulation cases show the acceptance of very broadly drawn warrants, as do other precedents.

Some of the problems with the fourth proposition have already been considered in the analysis of the meaning of "type of communication."⁷⁵ It is necessary to add only that identification hardly seems to be the sole purpose of the description, at least where the *property seized*, as opposed to the *premises searched*, is concerned.⁷⁶ Indeed,

71. See, e.g., S. REP. NO. 1097 at 75, 97, 101, 102, 103, 105.

72. 1967 Long Committee Hearings 434 (testimony of Prof. G. Robert Blakey).

73. ABA STANDARDS 90 (quoting from 388 U.S. at 98).

74. *Id.* at 89, 99, citing *Steele v. United States*, 267 U.S. 498, 504 (1925), discussed in note 45 *supra*.

75. See text accompanying notes 42-45 *supra*.

76. Indeed, Justice Harlan notes (388 U.S. at 99) that his authority for the criterion of sufficient particularity is derived from the discussion of the description of the *premises* in *Steele v. United States*, 267 U.S. 498, 503 (1925).

a very broad description of the property to be seized is not necessarily ambiguous; its very breadth may reduce any ambiguity by sweeping in a great deal. Rather, the particularity requirement, when tied to the predicate of probable cause, is designed to ensure that the police know what they are looking for, that they have reason to expect it to be where they are looking, and that they seek and seize nothing else.⁷⁷ Thus, the description in the *Berger* order permitting the recording of "any and all conversations, communications and discussions" taking place in a suspect's office for sixty days seems inadequately particularized, even if the warrant, which Justice Harlan approved in *Berger*, makes it plain that the police can seize only those conversations "relative to the payment of unlawful fees to obtain liquor licenses."⁷⁸ Such a statement says nothing about the conversation but only describes the offense; thus the warrant seems very much like the old English general warrant which allowed general searches for "goods imported to the Colonies in violation of the tax laws of the Crown."⁷⁹

Justice Harlan also explicitly dismisses any analogy between the kind of eavesdropping that was at issue in *Berger* and the rationale of *Stanford v. Texas*,⁸⁰ which required more scrupulous exactitude in the warrant where confiscation of books was concerned because of the first amendment implications of such a seizure. Yet, without expressly mentioning *Stanford* in this context, the majority in *Berger* did state that "the need for particularity . . . is especially great in the case of eavesdropping,"⁸¹ thus impliedly rejecting Justice Harlan's refusal to require an unusually high standard here.

Propositions two and three, which are clearly necessary to the argument, also seem untenable. The second contention, that searches may be general so long as seizures are specific, conflicts with the ABA Advisory Committee's own statement elsewhere that it was "the hated general searches"⁸² which the fourth amendment was designed to

77. See *United States v. Gable*, 276 F. Supp. 555, 559 (E.D. Pa. 1967) ("[T]he particularity requirement governs police conduct after the police have entered the individual's zone of privacy . . . [and] prevents a general exploratory search by limiting the officers' authority to search and seize.").

78. 388 U.S. at 99, 100.

79. *Id.* at 58. This type of warrant was condemned in *Berger*. See also *Alioto v. United States*, 216 F. Supp. 48, 49 (E.D. Wis. 1963) (warrant authorizing seizure of "books and records" of certain businesses which were "harbored and concealed from examination of the Internal Revenue Service . . . and which are instrumentalities of crime" held to be too general).

80. 379 U.S. 476, 485 (1965), cited in 388 U.S. at 98; see discussion in note 45 *supra*.

81. 388 U.S. at 56.

82. ABA STANDARDS § 5.6, comment c (emphasis added).

prevent; and numerous decisions, including *Berger* itself,⁸³ stress the offensiveness of the search whether or not anything at all is seized. The sole exception to this quite uniform condemnation appears in cases involving a search incident to arrest, such as *Harris v. United States*⁸⁴ and *United States v. Rabinowitz*,⁸⁵ where the permitted search for evidence of illegality was practically unlimited.⁸⁶ The anomaly of permitting such expansive powers where there is no warrant, while imposing strict limits of particularity on searches made under a warrant, has often been noted.⁸⁷ What is important here, however, is the fact that the broad scope of searches incident to arrest has not been extended to searches under a warrant, whatever the anomaly. Moreover, the Court's recent "stop and frisk" decisions, which allow a limited self-protective search by a police officer who has reason to believe that he or others are in danger during a police-citizen encounter, stressed the importance of limiting the scope of the search by the purposes for which the search was allowed.⁸⁸

The third proposition—that merely "listening and recording" is not a seizure—is inconsistent not only with the clear tenor of *Berger*, but also with the even clearer language of *Katz*. The majority in *Berger* stressed that the purpose of the fourth amendment is "to keep the state out of constitutionally protected areas";⁸⁹ moreover, its reference to "the use of seized conversations" similarly implies that conversations are seized before being used. *Katz* clinched this by flatly stating that "[t]he government's activities in electronically 'listening to and recording the petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a search and seizure within the meaning of the Fourth Amendment.'"⁹⁰

The Harlan position on this issue must of course be accepted if the specificity requirement is to be successfully evaded while retaining the ban on general searches. Justice Harlan pointed this out himself in a passage in *Berger* that shows the inherent vice of electronic eavesdropping:

83. 388 U.S. at 58.

84. 331 U.S. 145 (1947).

85. 339 U.S. 56 (1950).

86. The sole criterion laid down by these cases is "reasonableness" with little guidance on the criteria for a finding of "reasonableness." For reliance on *Harris* in a related context see ABA STANDARDS § 5.6, comment c.

87. See *Harris v. United States*, 331 U.S. 145, 197-98 (1947) (Justice Jackson, dissenting); Way, *Increasing Scope of Search Incidental to Arrest*, 1959 WASH. U. L.Q. 261; Reynard, *Freedom from Unreasonable Search and Seizure: A Second Class Constitutional Right?*, 25 IND. L.J. 259, 289-306 (1950).

88. *Terry v. Ohio*, 392 U.S. 1 (1968), citing in this connection the description of the specificity of the search in *United States v. Katz*, 389 U.S. 347, 354-56 (1967).

89. 388 U.S. at 59.

90. 389 U.S. at 353 (emphasis added).

If listening alone completes a "seizure," it would be virtually impossible for state authorities at a probable cause hearing to describe with particularity the seizures which would later be made during extended eavesdropping; correspondingly, seizures would unavoidably be made which lacked any sufficient nexus with the offenses for which the order was first issued. Cf. *Kremen v. United States*, 353 U.S. 346 (1957); *Warden v. Hayden* 387 U.S. 294.⁹¹

The *Kremen* case, where government agents seized the entire contents of a house—including toiletries, Christmas cards, violin strings, and pipe cleaners—is precisely in point for this kind of seizure; an electronic interception maintained for any length of time seizes everything that is uttered in the place that is bugged or over the telephone line that is tapped, with as little discrimination as the agents showed in *Kremen*.⁹² The Harlan-ABA approach to "seizure," apparently abandoned by Justice Harlan in *Katz* after it was flatly rejected by the majority,⁹³ is incompatible with any meaningful right of privacy. One whose intimate conversations with his wife are overheard is outraged not primarily because these conversations may be recorded or used against him in court, but simply because they are overheard.⁹⁴ Whatever its psychological sources, the desire to be free from intrusion exists regardless of how the fruits of the intrusion are later used. Conversely, the voyeuristic impulse exists for its own sake and demands immediate gratification independent of the purpose of acquiring a record to be used later.

It is true that most nontestimonial tangible evidence—narcotics, policy slips, and weapons—is seized not by mere perception but rather by being taken from the possessor's dominion. But different principles apply to testimonial communications like conversations and letters. Privacy is invaded at the point when the information in such media is obtained by one not entitled to it, and this can easily be by aural or visual perception. This much, at least, seems implied

91. 388 U.S. at 97-98.

92. Arguably, the government agents could refrain from listening to irrelevant or privileged conversations, see *People v. Morhouse*, 21 N.Y.2d 66, 233 N.E.2d 705, 286 N.Y.S.2d 657 (1967) and *United States v. Katz*, 389 U.S. at 354 n.15 (1967). But in organized crime investigations, where electronic eavesdropping is used in order to obtain an "over-all picture," it is difficult to know what is irrelevant, especially where the conversation is in a code. In any event, one must hear the entire conversation before deciding [cf. *People v. Tarantino*, 45 Cal. 2d 590, 290 P.2d 505 (1955)] and this hearing invades privacy. See text accompanying note 94 *infra*.

93. See 389 U.S. at 351-54.

94. See *McDaniel v. Atlantic Coca Cola Bottling Co.*, Ga. App. 92, 2 S.E.2d 810, 816 (1939); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958). See also cases collected in Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389-92 (1960). For a careful analysis of this issue, see Josephson, Book Review, 15 UCLA L. REV. 1586 (1968). The review also contains an illuminating exploration of many other basic issues in the privacy area.

by the quite far-reaching declaration in *Katz* that "the Fourth Amendment protects people, not places. What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."⁹⁵ Where privacy is invaded by seeing or listening, the search and seizure are identical and simultaneous, and the Court has recognized this principle ever since it abandoned the *Olmstead* theory that only tangibles are protected by the fourth amendment. When someone wrongly intrudes and perceives something that the victim does not want disseminated, privacy is invaded without more.⁹⁶

As to the fifth proposition and its reliance on the economic regulation cases, these precedents are not especially pertinent: all involve corporations or associations, and the fourth and fifth amendment rights of such entities have always been less than those of natural persons.⁹⁷ Furthermore, the economic regulation cases do not involve warrants but subpoenas, which give the party an opportunity to challenge the search before it is made. Thus, whatever limitations do exist can be effectively enforced, and there may be a trade-off between the scope of the protection and its enforceability.

For these and other reasons, the following example given by the ABA Advisory Committee to support the proposition that electronic surveillance is not an indiscriminate search hardly seems persuasive:

Suppose, for example, a search warrant were issued for all copies of a certain multi-copy letter or document thought to be located in a specified building. To find all copies of the letter or document, the officer executing the search warrant would have to examine every piece of paper on the premises which might reasonably be the specified letter or document. No piece of paper on the premises that might reasonably be the specified letter or document could go unexamined or unread, no matter who wrote it or however innocent, privileged or intimate its contents. Depending on the scope of the files, this might entail going over correspondence covering several years in time. Only after all are initially "searched" would it be possible to make the ultimately discriminate "seizures" which were constitutionally authorized by warrant.⁹⁸

For one thing, this hardly seems like a typical case: police do not usually go hunting for all copies of one letter. Moreover, it is dif-

95. 389 U.S. at 351-52.

96. *Cf. Irvine v. California*, 347 U.S. 128 (1954), in which use of electronically intercepted conversations in court was not prohibited but the interception itself was found to be a violation of the fourth and fourteenth amendments. In *Katz*, the Court referred to "listening and recording" (389 U.S. at 353) (emphasis added), but it is hard to believe that the recording was essential to the seizure.

97. See Reynard, *supra* note 87, at 286-89.

98. ABA STANDARDS 89.

difficult to believe that such wholesale rummaging would be upheld. As noted, the Court's recent decision in *Terry* reflected much concern over the permissible limits of a search, and in light of this concern, it is difficult to believe that the Court would permit the wholesale intrusion that the example entails. *Kremen*, discussed above, also implies such a prohibition. Furthermore, why does the example assume that it is necessary to read *all the way through every piece of paper* to find the specified document? Once the relevant document is identified, it should be easy for the officer to avoid reading even a part of the other papers.⁹⁹ Finally, it is questionable whether even under *Warden v. Hayden* the police can read all of such documents, for in some cases the paper may be "testimonial" and possibly protected.¹⁰⁰

Here, too, the *Harris* case may cut the other way, since it allowed a substantial amount of rummaging in a search incident to an arrest—not unlike the kind of search described in the ABA illustration. But for the reasons discussed earlier, *Harris*, which allowed a general search for unspecified evidence, seems a dubious precedent for a search warrant situation in which the importance of an especially high standard of particularity has just been asserted.¹⁰¹

III. THE ANTICIPATED EXTENT OF LEGALIZED EAVESDROPPING

A. *The Extent of Eavesdropping Prior to Title III*

The eavesdropping authorized by title III will be not only indiscriminate in character but also frequent in incidence. Its much-proclaimed almost magical potency¹⁰² alone would lead one to expect that the police will want to use it regularly. Nevertheless, we are assured that despite its great value, eavesdropping has been and will be rarely used,¹⁰³ and that strict judicial supervision will ensure such restraint. Unfortunately, neither past experience nor future probabilities justify much hope here, whether the restraint is enforced internally or externally.

That electronic eavesdropping has been widespread—even when

99. This could apply to listening as well as reading, except that the combination of a lack of limiting specification in the authorization (*see* part II.A. *supra*) and the desire to learn everything about the suspect, both peculiarly relevant to electronic eavesdropping, will deter such self-discipline. *See* note 92 *supra*.

100. *See* *Warden v. Hayden*, 387 U.S. 294 (1967) (Chief Justice Warren and Justice Fortas concurring).

101. *See* text accompanying notes 83-88.

102. Frank S. Hogan frequently refers to electronic surveillance as "the single most valuable weapon in fighting organized crime." *See, e.g., Hearings on S. 2813 and S. 1495 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 172 (1962).

103. ABA STANDARDS 45-47.

unmistakably illegal—has often been verified; the hearings of Senator Edward V. Long's Senate Subcommittee on Administrative Practice and Procedure and Professor Alan Westin's study¹⁰⁴ are only the most recent examples. Instances of abuse in the practice of electronic surveillance have included eavesdropping directed against those suspected of minor offenses,¹⁰⁵ civil rights activists,¹⁰⁶ and suspected subversives.¹⁰⁷ The use of either phony or patently inadequate affidavits has also been common.¹⁰⁸ Recently, Internal Revenue Service Commissioner Sheldon Cohen admitted that IRS agents had knowingly violated the law in organized crime investigations,¹⁰⁹ and that the IRS had actually run a school for eavesdropping.¹¹⁰ Such illegalities, as well as others committed by the FBI, have jeopardized numerous convictions.¹¹¹ Many of these cases involved eavesdropping on attorney-client conferences and other defense-related activities, notably in conference rooms provided by the IRS;¹¹² bugs have also been placed in the offices of lawyers whose only suspected offense was that their clients were under investigation.¹¹³ In one extreme

104. PRIVACY AND FREEDOM (1967). For an earlier extensive report see S. DASH, R. KNOWLTON, & R. SCHWARTZ, *THE EAVESDROPPERS* (1959).

105. See remarks of Justice Hofstadter, *In re* Interception of Telephone Communications, 207 Misc. 69, 136 N.Y.S.2d 612, 613 (Sup. Ct. 1955). One survey found that 30% of the police departments polled used eavesdropping "whenever possible"; in all 80% made some use of it. This was true for communities of all types and sizes. The New York City police use it primarily for small-time gambling and prostitution. A. WESTIN, *PRIVACY AND FREEDOM* [hereinafter *PRIVACY AND FREEDOM*] 127-28. See also 1967 Long Committee Hearings 261 (testimony of Vincent Piersante).

106. Baton-Rouge State Times, Oct. 23, 1961, at 1, col. 3.

107. These have included eavesdropping on the W.E.B. DuBois Clubs and others; see Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L. REV. 749, 760-62, especially 762 n.66, and 763 n.100 (1968).

108. See *In re* Interception of Telephone Communications, 207 Misc. 69, 136 N.Y.S.2d 612, 613 (Sup. Ct. 1955); S. DASH, R. KNOWLTON & R. SCHWARTZ, *THE EAVESDROPPERS* 56 (1959); note 142 *infra*.

109. Kenworthy, *Tax Chief Admits 8-year Bugging*, N.Y. Times, July 13, 1967, at 26, col. 1; *Officials Concede U.S. Revenue Men Used Wiretapping*, N.Y. Times, July 14, 1965, at 1, col. 3. Yet in 1964, the Internal Revenue Service flatly denied that it did any wiretapping and issued directives against it. PRIVACY AND FREEDOM 122-23; 1965 Long Committee Hearings 1198-99. The FBI was also caught lying about the number and types of eavesdropping it engaged in, particularly in its oft-repeated claim that FBI wiretapping was limited to national security cases. Compare PRIVACY AND FREEDOM 119-21 with Hearings Pursuant to S. Res. 62 on Wiretapping, Eavesdropping, and the Bill of Rights Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., pt. 5, at 1481-82 (1959) (letters of former Attorney General William P. Rogers), 1961 Senate Hearings, 87th Cong., 1st Sess. 363 (1961) (testimony of former Assistant Attorney General Herbert Miller).

110. 1965 Long Committee Hearings 1212.

111. The figure has been estimated to be as high as sixty. Theoharis & Meyer, *supra* note 107, at 766 n.90.

112. 1967 Long Committee Hearings 122.

113. *Lawyer's Office Bugged by FBI*, N.Y. Times, Dec. 11, 1966, § 1, at 148, col. 3.

example that occurred a few years ago, Detroit police allegedly wire-tapped every public telephone in police headquarters¹¹⁴—almost certainly an intrusion upon lawyer-client conversations.

New York County District Attorney Frank Hogan has indeed testified that he seeks very few orders and that there are no abuses in New York County.¹¹⁵ But even the sympathetic ABA Advisory Committee could not quite swallow the latter claim, for a report issued in the late 1950's by a New York state legislative committee which strongly favored wiretapping conceded that there had been serious abuses.¹¹⁶ Mr. Hogan's contention that he has sought very few orders and that the other prosecutors in New York City have shown similar self-restraint is both unproved and unprovable. Mr. Hogan claims to have averaged about seventy-five wiretap orders per year since June of 1958 and about nineteen bugging orders annually.¹¹⁷ This may be a lot or a little—it depends on how many telephones, places, and people were involved. But this is only one small part of the picture. There are many other police and prosecutorial agencies in New York City and State who can eavesdrop. As to these, the Standards say only: "What has been true of the Office of the District Attorney of New York has also been largely true of the other agencies serving the cities"¹¹⁸—but no figures are presented.

Unfortunately—at least for the residents of New York City—the ABA's implication of limited eavesdropping is simply not true. From 1952 to 1954, for example, the New York City police alone tapped some 2,625 telephones,¹¹⁹ many of which were public facilities.¹²⁰ This was at a time when they were averaging about 300 court orders for wiretapping per year.¹²¹ They were up to 451 court orders in 1963 and 671 in 1964,¹²² and though the figures for the number of telephones tapped in these years are not given, it cannot be small.

114. Hofmann, *Police Said To Tap Police in Detroit*, N.Y. Times, Feb. 6, 1967, at 18, col. 1.

115. *1967 Senate Crime Hearings* 1097.

116. ABA STANDARDS 84; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202 (1967).

117. ABA STANDARDS 47, quoting PRESIDENT'S COMMISSION, *supra* note 116, at 95.

118. *Id.*

119. Note, *Wiretapping—Analysis of the Law and Practice Under New York Constitutional and Statutory Provisions*, 31 N.Y.U. L. REV. 197, 210 (1956).

120. *Id.* at 210 n.96.

121. See *Hearings on the Current Wiretapping Dilemma in New York State Created by Federal Court Decisions Before the N.Y. Commn. of Investigation* 129 (290 average from 1952-59); *1955 House Hearings* (338 in 1952) (testimony of Edward Silver).

122. See Statement of John F. Shanley, Supervising Assistant Chief Inspector, N.Y. Police Department, before Illinois Crime Comm., Feb. 5, 1965, at 2 (mimeo).

Finally, a state legislative committee recently reported that it knew of some 22,000 wiretaps in New York State over a period of twelve years.¹²³ Since so many of these taps were made on public telephones,¹²⁴ the privacy of thousands of innocent people was invaded daily. This hardly seems like sparing use for "only . . . important" investigations.¹²⁵

Reliable information on these surreptitious activities is not readily available. New York Judge Nathan Sobel has gone so far as to say: "No one, not the county prosecutor, nor the police, can furnish *valid* statistics as to the number of court orders issued. None are kept in the records of the court, prosecutor's office, or by the police."¹²⁶ However, the recent and earlier revelations, which inevitably understate the picture, show indisputably that even without the legitimation provided by title III, law enforcement officials were eavesdropping intensively while flatly denying it in public.¹²⁷ Is it likely that making these practices respectable will *reduce* the amount of eavesdropping? Is it not far more probable that if the legislation imposes any restraints, they will be as much ignored as the limitations imposed by prior law? Such lawlessness is indeed inevitable since, as noted above, title III purports to legitimate only "tactical" eavesdropping undertaken for the purpose of obtaining evidence of a particular crime, not the kind of "strategic" surveillance that is allegedly needed for investigating organized crime. The only effect of title III may well be that from now on many who rarely or never eavesdropped will be able to possess the equipment openly and have it temptingly available for frequent use.

B. *The Impact of Title III on the Amount of Eavesdropping*

The openhandedness of title III is such that eavesdropping without its blessings will rarely be necessary. The combination of a shopping list of eavesdroppable offenses, a less-than-airtight court order system, generous "emergency" powers, broad "national security" provisions, and a somewhat ambiguous provision permitting electronic surveillance for offenses "about to be" committed ensures that an alert investigator will always be able to tune in legally, at least for a limited period of time.

123. REPORT OF LEGISLATIVE RECOMMENDATIONS BY N.Y. STATE JOINT LEGISLATIVE COMMITTEE ON CRIME, ITS CAUSES, CONTROL AND EFFECT ON SOCIETY 15 (1967).

124. See PRIVACY AND FREEDOM 130 (public phones "a common target"); Note, *supra* note 119, at 210 n.96.

125. ABA STANDARDS 46.

126. Letter to Senator Edward V. Long, April 19, 1967, reprinted in 1967 Long Committee Hearings 642.

127. See note 109 *supra*.

1. *The Offenses for Which Eavesdropping Is Specifically Permitted*

As noted above, the current attempt to justify eavesdropping is based almost exclusively on its indispensability as a tool for fighting organized crime. The legislation, however, is not so restricted. When an attempt was made in Congress to impose such a limit, Senators McClellan and Tydings, floor managers for the Crime Control Act, protested on the ground that they could not say what organized crime was.¹²⁸ Senator McClellan also stressed that he wanted to allow eavesdropping on black militants like Rap Brown and Stokely Carmichael,¹²⁹ and the statute therefore allows eavesdropping on those suspected of being involved in civil disorders.¹³⁰

Perhaps because organized crime can engage in a wide variety of activities, title III allows eavesdropping for a vast number of offenses, many of which will not be associated with organized crime in most actual instances. For example, section 2516 allows federal officials to tap and bug not only for such common activities of organized crime as extortion, corruption, interstate gambling, loan sharking, labor racketeering, and the like, but also for any offense involving marijuana, riots, obstruction of a criminal investigation, counterfeiting, and theft from interstate shipments.¹³¹

State officers are treated even more generously, despite the fact that the states have a far smaller role than the federal government in fighting organized crime. Indeed, one of the greatest problems in fighting organized crime is that, for reasons to be explored more fully below, few state or local law enforcement agencies show any

128. E.g., Tydings: "I suspect it is very difficult to say what organized crime is," 114 CONG. REC. S6198 (daily ed. May 23, 1968); McClellan, *id.* at S6197-98.

129. *Id.* at S6197, S6199.

130. Act, § 2516(1)(a).

131. There is one rather curious omission. Despite the importance of monopoly and other restraints of trade in the activities of organized crime [*see* Schelling, *Economic Analysis and Organized Crime*, in TASK FORCE REPORT ON ORGANIZED CRIME 114 (1967)], the antitrust laws are not included in the federal list. Is that because the sponsors of the legislation are really not that concerned about such "respectable" crimes, despite the enormously greater cost to the community from such activities as price-fixing and boycotts? It should be noted that, as the author concluded from two years on the staff of the Senate Antitrust and Monopoly Subcommittee, the enthusiasm of Senators McClellan, Eastland, Dirksen, and Ervin for vigorous law enforcement has not usually extended to the antitrust laws.

On the other hand, inclusion in this list of 18 U.S.C. § 1952 (1964), which prohibits any travel in or use of interstate commerce to further activities related to gambling, narcotics, prostitution, extortion, bribery, or arson, in violation of any federal or state law, permits electronic eavesdropping by federal officers for a wide variety of often minor state offenses which happen to involve activities which cross a state line. I am indebted to Michael Tigar for bringing this to my attention.

interest in the enterprise.¹³² Yet, states are given authority to use electronic surveillance for offenses that are even further beyond the normal reaches of organized crime than those enumerated above. In fact, the list of offenses for which state eavesdropping is permitted is practically unlimited: "murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year . . . or any conspiracy to commit any of the foregoing offenses."¹³³ Since the legislative history indicates that a crime "dangerous to . . . property" can include attempts to evade the payment of taxes,¹³⁴ it is clear that any kind of pecuniary harm is covered by the statute, and that state officials can eavesdrop when investigating such offenses as state income tax evasion, prize fighting in Connecticut, the theft of a horse or a chicken in other states,¹³⁵ or smoking marijuana. Yet even with respect to certain serious offenses, the case for eavesdropping authority is feeble, for the technique is of little use in solving murder cases and of almost no use in investigating robbery, rape, or any other crimes of violence that usually involved sudden, nonrepetitive encounters.¹³⁶ Thus, far from limiting electronic eavesdropping to the "important investigation" or "a limited class of designated violations,"¹³⁷ title III grants authority to use eavesdropping almost as freely as any other standard investigative tool. In this respect, it is not very different from the New York statute which allows eavesdropping for any crime,¹³⁸ and under which some eighty per cent of police wiretapping was for the investigation of minor gambling and vice offenses.¹³⁹

132. See text accompanying notes 271-74.

133. Act § 2516(2) (emphasis added).

134. S. REP. NO. 1097 at 99.

135. S. REP. NO. 1097 at 99. See CONN. GEN. STAT. REV. § 53-200 (1958), as amended (Supp., 1965); 11 DEL. CODE ANN. § 332 (1953); KY. REV. STAT. § 433.250 (1962); R.I. GEN. LAWS ANN. § 11-8-6 (1956).

136. See Letter, *supra* note 126, in 1967 Long Committee Hearings 643.

137. ABA STANDARDS 46, § 5.6 (comment a).

138. [1968] Sess. Laws of N.Y. ch. 546, § 816, which replaced a similar earlier act, [1958] Sess. Laws of N.Y. ch. 676, § 813-a.

139. For a discussion of New York police wiretapping, see PRIVACY AND FREEDOM 128.

A survey of the cases in the New York law reports prepared for the author by Gerald Kahn, Michigan Law School '69, confirms that eavesdropping is used widely for minor offenses and that organized-crime investigations account for a very small part indeed. Although hardly a scientific sample, the results of the survey are consistent with the findings of others.

Title III is likely to encourage the extension of eavesdropping to states which have not used this technique before and have no real organized-crime problem. Police spokesmen from Pennsylvania, Florida, and Connecticut have made it clear that they would seek such authority from their states once federal enabling legislation is en-

2. Judicial Supervision

The task of protecting privacy against whatever eavesdropping remains illegal rests primarily with the judiciary. Unfortunately, the experience with the few court order systems in effect prior to the enactment of the Crime Control Act has been "very bad"¹⁴⁰ according to Samuel Dash, who has made perhaps the most thorough study of this aspect of the problem; neither title III nor the ABA Standards will do much to improve things. In the past, supporting affidavits have often been skimpy¹⁴¹ and even false.¹⁴² Although the Standards claim that these problems have been solved by cases like *Mapp v. Ohio*¹⁴³ and *People v. McCall*,¹⁴⁴ some of the inadequate affidavits are post-*Mapp* and it is still too early to determine what effect *McCall* will have.¹⁴⁵

Moreover, even with more restrictive judicial supervision, some judges are not too demanding. For example, Congressman Emanuel Celler reported that he knew of one judge who used to sign hundreds of orders "without putting in any name and the [police] sergeant filled the names in. He could go down to the clerk and get any authorization he wanted."¹⁴⁶ Some judges have publicly stated that they never refuse certain kinds of warrants.¹⁴⁷ It is therefore hardly

acted. Given today's climate and the respectability granted the practice by federal authorization, such legislation is likely to be passed, and perhaps not inappropriately. These are states which may well have some organized crime, although their inability to cope adequately with it until now is not really attributable to the lack of wiretapping authority. See text accompanying notes 263-74 *infra*. But we may also see enactment of such a statute in a state like Iowa. In 1962, an Iowa district attorney testified that despite the absence of any organized crime problem in his state, wiretapping "would be a valuable tool in Iowa to help us in solving the crimes that we have." *Hearings on S. 2813 and S. 1495 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 264 (1962).

140. 1961 Senate Hearings 104-05 (testimony of Samuel Dash).

141. *In re* Interception of Telephone Communication, 207 Misc. 69, 136 N.Y.S.2d 612, 613 (Sup. Ct. 1955).

142. Report of the King's County Grand Jury summarized in Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 195-96 (1952); see also 1955 House Hearings 217-18 (testimony of William Keating). The lengthy affidavit reprinted in ABA STANDARDS 191-94 as a "representative" affidavit seems anything but that, to judge from the affidavits in such cases as *Berger*, *Katz*, and others; see, e.g., *People v. Gold*, 46 Misc. 2d 860, 259 N.Y.S.2d 867 (1965); *People v. Rogers*, 46 Misc. 2d 860, 261 N.Y.S.2d 152 (1965).

143. 367 U.S. 643 (1961).

144. 17 N.Y.2d 152, 216 N.E.2d 570, 269 N.Y.S.2d 396 (1966).

145. *McCall* held that eavesdropping orders were subject to a full hearing on legality, similar to other search warrants.

146. *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 407 (1967).

147. *New York Hearings*, *supra* note 121, at 159 (testimony of former N.Y. S. Ct. Justice Ferdinand Pecora). The author heard one New York judge declare in an unguarded moment at a small but public bar association meeting in 1964 that, "I sign every wiretap order that's put in front of me."

surprising that few prosecutors have complained about the difficulty in obtaining orders.¹⁴⁸ Despite the obvious dangers that officials will go "judge-shopping," neither title III nor the Standards attempt to incorporate any of the safeguards against such a practice that have been proposed elsewhere;¹⁴⁹ both provisions allow application to any judge of competent jurisdiction.¹⁵⁰

The normal dangers of any *ex parte* application are somewhat reduced by an after-the-fact hearing if anything is seized or attempted to be used. For this procedure to be an effective safeguard, obviously there must be notice of the seizure; generally this is automatically provided with the conventional search, but not with a surreptitious eavesdrop. Of course, there must also be a right and an opportunity to object. As to notice, title III offers relatively little. Sections 2518(8) and (9) provide that notice must be given only to the persons named in the application; it requires an affirmative exercise of discretion by the judge to give notice to others, and this in a setting where, by hypothesis, those others are not present to argue their case for notice. Thus, even parties to an intercepted conversation depend upon the discretion of the court if they are not named in the application, and on only partially informed discretion at that. Additionally, on an *ex parte* application, giving notice may be postponed, apparently indefinitely.¹⁵¹ If the content of that interception, or evidence derived from it, is offered in evidence, all parties to the proceeding must be given notice, but only an "aggrieved person"—defined as "a party to the intercepted communication . . . or party against whom the interception was directed"—

148. "It is practically unheard of for a judge to fail to grant a wiretap order for the district attorney." S. DASH, R. KNOWLTON, & R. SCHWARTZ, *THE EAVESDROPPERS* 45 (1959). See also *Hearings on H.R. 408 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 83d Cong., 1st Sess., ser. 7, at 37 (1953) (testimony of former U.S. Attorney General, now Secretary of State William P. Rogers: "I don't recall any difficulty in getting permission of the court . . . it's pretty easy."); N. SOBEL, *CURRENT PROBLEMS IN THE LAW OF SEARCH AND SEIZURE* 111 (1964).

Lest such successes be considered a thing of the past, see Neyer, Book Review, 15 *CIVIL LIBERTIES IN NEW YORK* 8 (1967), indicating that when challenged, New York City Police Department and Brooklyn and Westchester D.A.'s representatives were unable to present a single instance in which they had been turned down.

149. New York State Constitutional Convention, Text, Abstract and Highlights of Proposed Constitution of the State of New York, art. I, § 4 (1967). (When submitted to the electorate, the proposed constitution was defeated by a margin of nearly 3 to 1—Schanberg, *Rockefeller Will Try To Salvage Sections of Beaten Proposal*, N.Y. Times, Nov. 8, 1967, at 1, col. 8). See also Assn., of the Bar of the City of New York Committees on Federal Legislation and Civil Rights of the Association of the Bar of the City of New York, *Proposed Legislation on Eavesdropping After Berger v. New York and Katz v. United States*, 7 N.Y.C.B.A. COMM. RPTS. BULL. 2, at 1 (1968). For proof of the practice, see Letter, *supra* note 126, in 1967 Long Committee Hearings 643.

150. Act § 2518(1); ABA STANDARDS § 5.1.

151. Act § 2518(8)(d).

may object.¹⁵² The Act and Standards thus seem to incorporate the existing restrictions on standing¹⁵³ which are currently being reconsidered by the Supreme Court.¹⁵⁴ Under these limitations, strongly supported by the ABA,¹⁵⁵ nonparties to an illegally intercepted conversation will rarely be able to object, no matter how much they are affected by the interception. Therefore, in the not uncommon situation where the interception is used to persuade the party overheard to inform on a third person, the third party would not be entitled to challenge.¹⁵⁶ This inhibition on third-party challenges is particularly troublesome in the eavesdropping area, since the use of seized communications is often quite indirect.¹⁵⁷

Moreover, title III makes no attempt to ensure disclosure of the existence of eavesdropping. Forcing such disclosure can be extremely difficult, as the recent Long Committee hearings have made clear. Some added protection might result from requiring the prosecutor, on demand, to make a full investigation of all officers who have worked on a case, and on that basis to state, under oath, whether eavesdropping has been used at any time. Otherwise, the defense may find it impossible to meet the *Nardone*¹⁵⁸ burden of introducing some evidence of eavesdropping in order to put the matter in issue. Even this device is likely to be relatively feeble, for, in the last analysis, "barring accidental discovery, all disclosure of such surveillance

152. Act §§ 2518(10), 2510(11); S. REP. NO. 1097, at 91, 106.

153. For the existing law, see *Berger*; *Jones v. United States*, 362 U.S. 257 (1960); *Goldstein v. United States*, 316 U.S. 114 (1942). The standing requirement has been abolished in California. *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955).

154. *Kolod v. United States*, 371 F.2d 983, cert. denied, 390 U.S. 136, petition for rehearing granted and order denying petition for writ of certiorari set aside, 392 U.S. 919 (1968). The Solicitor General opposes liberalization of the standing requirements on the ground that this would entitle every criminal defendant to "examine the records of every conversation ever overheard by the government, on the theory that the overhearing of any conversation might have produced investigative leads which eventually led to evidence that was used against him." Brief for the United States at 24. This burden can apparently be met sometimes. See *United States v. Zirpolo*, 288 F. Supp. 993 (D.N.J. 1968).

155. The Standards justify the current standing rule with the comment that it "provides a convenient . . . line between 'enough' and 'too much' deterrence." ABA STANDARDS 117. Can there be "too much" deterrence of illegal conduct? If the community may prosecute such illegality in the name of deterrence, a remedy provided by title III but usually futile, why may not the injured party more effectively seek to deter it by preventing his prosecution? Or is the demand for "law and order" inapplicable to the forces of "justice"?

156. See, e.g., *Goldstein v. United States*, 316 U.S. 114 (1942).

157. Eavesdropping evidence is actually used primarily for leads and intelligence, and is introduced in court rather infrequently because of the difficulties in transcription; see 1955 House Hearings 331 (testimony of Frank Hogan). There is, of course, a great danger that what will be introduced will often be the eavesdroppers' recreated version of what was overheard. This seems to have happened in the *Berger* case itself. Grutzner, *Berger Attacks Recorded Talks*, N.Y. Times, Oct. 28, 1964, at 46, col. 1.

158. *Nardone v. United States*, 308 U.S. 338 (1939).

ultimately depends upon the good faith of those who have the power and mechanical ability to utilize this technique."¹⁵⁹ As we now know, skillful prosecutors have been able to avoid disclosing the existence of wiretapping, and even to avoid learning about it themselves. And even where the defendant can overcome these obstacles and make an attack, the recent dilution of the standards for probable cause in *Peters v. New York*¹⁶⁰ means that there is little chance of a successful challenge unless the lower courts agree that more stringent standards are necessary in eavesdropping cases—a probably futile hope.

Finally, the requirement set forth in section 2518(1)(c), that reasons must be given as to why measures other than eavesdropping are not used, is likely to be of little or no significance if any relationship to organized crime is alleged; and this seems to be the only requirement specially imposed for wiretapping and bugging.

In sum, title III's court order provision offers relatively little protection on its face, and merely adopts the conventional court order system with all its shortcomings. For this reason, it may seem that at least some of the foregoing criticisms apply not so much to title III in particular but rather to judicial supervision in any context. To some degree this is true, for there is much discontent with judicial supervision of invasions of privacy.¹⁶¹ Given such weaknesses in the over-all system, however, it becomes all the more important to introduce as many meaningful safeguards as possible, and, if none of these is really effective, to ask whether eavesdropping authority should be given at all.

C. Emergency Authority

Even the feeble safeguards of title III seem to be too severe for its authors and the ABA Advisory Committee, for under both the Act and the Standards, police can either forestall judicial supervision until something good turns up or avoid it entirely. One of the means of avoidance is provided by the "emergency" provision

159. *United States v. Zirpolo*, 288 F. Supp. 993 (D.N.J. 1968). For a discussion of how prosecutors have been able to avoid disclosure of electronic eavesdropping by simple denial that their evidence was derived through such techniques, see Note, *Exclusion of Evidence Obtained by Wire Tapping: An Illusory Safeguard*, 61 YALE L.J. 1221 (1952). Such tactics are no longer quite so effective since the Supreme Court has decided that decisions on exclusion may not be made solely on the basis of the prosecutor's representation. *Kolod v. United States*, 390 U.S. 136 (1968).

160. 389 U.S. 950 (1968). But see *Spinelli v. United States*, 4 CR. L. REP. 3083 (Jan. 27, 1969).

161. See Report on Criminal Courts Committee, Bronx County Bar Association, reported in N.Y. Times, March 10, 1965, at 51 (warrants frequently granted on false affidavits); H. Schwartz, *Stop and Frisk*, 58 J. CRIM. L.C. & P.S. 433, 450-51 (1967).

of the Act, section 2518(7), which allows police to eavesdrop for up to forty-eight hours without prior judicial approval if "an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime," and if there are grounds upon which an order could be based. It is obviously possible to use a plea of emergency as justification for some fishing on the basis of hunches;¹⁶² this has often occurred in the past,¹⁶³ and the police apparently want to continue doing so regularly. If nothing turns up, nothing is lost, for who will ever find out? If something does turn up within forty-eight hours, the police can then apply to a judge for retroactive ratification. And, as the Supreme Court has recognized, at such a point the pressure on the judge to ratify a successful investigation in order to permit use of relevant evidence is very strong indeed,¹⁶⁴ especially if the particular magistrate, like so many judges, is not altogether happy with the exclusionary rule when it prohibits the use of important evidence. Experience also indicates that an officer seeking to validate his original intrusion will rarely hesitate to embroider the past a bit in order to make it easier for the judge to find the probable cause *ab initio*.¹⁶⁵

Both the wisdom and the constitutionality of this emergency power are dubious.¹⁶⁶ No criteria for determining what will be considered an "emergency" are indicated in the statute.¹⁶⁷ Indeed, only one example is given in the legislative history: a meeting of suspected criminals is arranged and then held almost immediately thereafter, leaving no time for the police to obtain an order.¹⁶⁸

What justification is there for *always* allowing such a lengthy postponement¹⁶⁹ of resort to a magistrate in such a situation? Surely

162. J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 216 (1966): *PRIVACY AND FREEDOM* 128.

163. In one case, police bugged a series of conversations for a week, picking up apparently quite intimate conversations, and then dropped the matter when they found nothing criminal. *PRIVACY AND FREEDOM* 124-25.

164. *Cf. Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("the far less reliable procedure of an after-the-event justification for the . . . search, [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment").

165. J. SKOLNICK, *supra* note 162, at 144; L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, *DETECTION OF CRIME* 128 (1967).

166. Significantly, this was the provision which came closest to defeat, prevailing in the Senate by only a seven-vote margin: 44-37. 114 CONG. REC. S6193 (daily ed. May 23, 1968).

167. *Cf. Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) ("hot pursuit" exception).

168. S. REP. NO. 1097, at 104; ABA STANDARDS 13.

169. It may be more than forty-eight hours: the officers need apply to a magistrate "within 48 hours after the interception has occurred, or begins to occur," with no provision for "whichever is earlier," as appears in the very next sentence. Act § 2518(7). Where the interception, that is, the "aural acquisition of . . . any wire or oral com-

sometime during the forty-eight hours the eavesdropping officers can—and probably must—notify someone at their headquarters of their activities and the reason for the eavesdrop, and certainly *that* person could arrange for the application. In another context we are told by District Attorney Hogan and the ABA Advisory Committee that it requires four to six men to set up an interception, and much time and effort.¹⁷⁰ If so, at least one of this large group should be able to arrange for someone to get to a magistrate in less than forty-eight hours, especially since few meetings are likely to last for two full days without interruption. Nor does it normally take forty-eight hours to find a judge. Even Senator Tydings claimed that it takes only “twelve to fourteen hours sometimes,”¹⁷¹ and, in large cities where most organized crime conspiracies are encountered, one can usually find a magistrate quite quickly.¹⁷² With the possible exception of time periods beginning on Friday nights, it will almost never require two days to find a sitting—much less a sleeping—magistrate.

It is also hard to believe that emergencies of the kind described are so frequent and important that, despite the obvious potential for abuse, a special broad exemption must be created for them. Judge and former district attorney Edward S. Silver has commented on this point: “The need for an order doesn’t suddenly pop up. A situation develops over a long period of time, at least a considerable number of days. Thus the law-enforcing agent has plenty of time to get the order if he has the legal grounds upon which to get it.”¹⁷³

The constitutional authority for such emergency powers is as dubious as the wisdom of granting them. In *Katz*, the Court expressly rejected the Government’s request for a similar exemption from observance of the warrant requirement, saying that “the use of electronic surveillance without prior authorization [could not] be justified on the ground of ‘hot pursuit.’”¹⁷⁴ The Court then cited *Warden v. Hayden*¹⁷⁵ with the comment that “[a]lthough ‘the Fourth Amendment does not require police to delay . . . if to do so would gravely

munication,” takes several hours or days, the 48 hours may run from its termination. Act § 2510(4).

170. 1961 *Hearings* 1094; ABA STANDARDS 45.

171. 114 CONG. REC. S6192 (daily ed. May 23, 1968).

172. Even so experienced an eavesdropper as former Brooklyn District Attorney Edward S. Silver conceded this point at one time. 1955 *House Hearings* 98 (“He can get an order pretty quickly if he has the grounds to get it.”).

173. *Id.*

174. 389 U.S. at 357-58.

175. 389 U.S. 294 (1967).

endanger their lives or the lives of others,' *Warden v. Hayden* . . . there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency."¹⁷⁶ The obvious implication from *Katz*, and of course from *Warden* itself, is that the only emergency justifying a dispensation from antecedent judicial approval is one posing a danger to life—not merely a loss of evidence.

On the other hand, *Carroll v. United States*¹⁷⁷ and *Schmerber v. California*¹⁷⁸ do support some relaxation of the warrant requirements for a wider range of emergencies, for in both cases a warrant was dispensed with in connection with a search for nonlethal evidence and in neither was there any danger to life. Although for some reason the Government did not invoke these cases for this point in *Katz*,¹⁷⁹ the Senate Committee Report and Standards rely heavily on them, with the Report completely ignoring *Katz*; in addition, the Standards cite present New York law as a precedent.¹⁸⁰

Although the *Carroll* and *Schmerber* cases do offer some support for emergency powers, they are readily distinguishable on several significant grounds. In the first place, in neither case was there really any time at all, much less forty-eight hours, in which to obtain a magistrate's approval. In *Carroll*, it was possible that only a matter of minutes would elapse between the moment when the officers spotted Carroll's car and the time when he might have eluded them permanently. Similarly, the police in *Schmerber* probably had at best only a few hours in which to obtain a valid blood sample before the alcohol content of the suspect's bloodstream diminished, and, since Schmerber was arrested in the very early hours of the morning, this could well have happened before a magistrate became available.¹⁸¹ Second, *Carroll* involved a situation in which contraband might have been permanently lost if it was not seized immediately, and the state's independent interest in preventing continued circulation of such contraband was at stake—usually a more significant interest than the mere collection of evidence. *Schmerber*,

176. 389 U.S. at 358 n.21.

177. 267 U.S. 132 (1925).

178. 384 U.S. 757 (1966).

179. See Brief for Respondent United States, in *Katz v. United States*, 389 U.S. 347 (1967). *Carroll* was cited for a related point on constitutionally protected areas. *Id.* at 17, 18.

180. S. REP. NO. 1097, at 104; ABA STANDARDS 134, citing former N.Y. Code Crim. Proc. § 813(b).

181. 384 U.S. at 758 n.2. See also 384 U.S. at 770-71: "[W]here time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant."

while involving mere evidence and not contraband, dealt with a situation where the most significant kind of evidence—and perhaps the only kind—would be irretrievably lost during the time it took to secure the approval of a magistrate.

Finally, the reliance on New York precedent by the ABA commentary is also somewhat dubious: although prior New York law did contain an emergency provision, the New York legislation enacted *after* the *Katz* decision omitted such a section.¹⁸²

D. National Security

The second specific means by which law enforcement officials can avoid direct judicial supervision is by invoking title III's "national security" exemption. Relaxation of the limits on electronic eavesdropping on these grounds has long bedevilled civil libertarians. They have claimed, with some justification, that such an exception really has little value, that the power has been abused,¹⁸³ and that the constitutional arguments apply here in the same way that they do in other eavesdropping situations. Nevertheless, there has never been much hope that such practices could be stopped, since they are performed in secret and rarely come to light thereafter. Few political figures are willing to speak out against such an exemption, partly because there is an inevitable and apparently unshakable feeling that where "national security" is concerned, the practice must be of some value.¹⁸⁴ The world of intelligence and counterintelligence is regarded as "dirty business" anyway, and electronic eavesdropping seems an inevitable part of this way of life whether or not its value can be proved.

For practical purposes, the controversy over the national security exemption has centered on whether this type of eavesdropping should be subjected to judicial control. The Supreme Court has not yet had to meet this issue,¹⁸⁵ although a facet of the problem is cur-

182. Compare [1968] N.Y. Sess. Laws ch. 546 with former N.Y. CODE CRIM. PROC. § 813-b; State of New York Temporary Commn. on Revision of the Penal Law and Criminal Code, Proposed Crim. Proc. L. § 370.20 (1967). Recent New Jersey legislation, patterned after title III, requires at least verbal judicial approval. 4 CR. L. REP. 2346 (Jan. 14, 1969).

183. For a listing of some of the abuses which includes the destruction of tapes by the FBI and the bugging of John L. Lewis, Mrs. Eleanor Roosevelt, and various government officials, see, e.g., Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L. REV. 749, 760-62 (1968).

184. This may be at least part of the reason for former Attorney General Ramsey Clark's support for electronic surveillance in national security cases, despite his skepticism as to its value generally. For criticism of this alleged inconsistency, see Ruth, *Why Organized Crime Thrives*, 374 ANNALS 113, 116 n.4 (1967).

185. See *Katz v. United States*, 389 U.S. 347, 358 n.23 (Justice Stewart for the majority), 363-64 (Justice White, concurring), 359-60 (Justice Douglas, concurring).

rently before the Court,¹⁸⁶ and until the passage of the Crime Control Act it seemed as if the general eavesdropping impasse would leave this question unresolved also.¹⁸⁷ Section 2511(3) of the Act now legitimates the President's power to order eavesdropping for purposes of intelligence and counterintelligence against foreign powers without antecedent judicial approval. The provision, however, goes beyond this customary formulation of the national security exemption: it extends the exception to "any other clear and present danger to the structure and existence of the government," language so broad that it might be construed to embrace even a movement to alter the electoral college, or more pertinently, any black militant or radical group such as the Black Panther Party, the Students for a Democratic Society (SDS), the "Yippies," or any other "subversive" organization even though it has no credible links to a foreign power. It has recently been revealed that President Franklin D. Roosevelt, who first authorized such eavesdropping, intended the power to be exercised very sparingly and only on aliens,¹⁸⁸ but the power was expanded during both World War II and the early days of the Cold War.¹⁸⁹ There is no reason to think that the amount of electronic surveillance for this purpose has since diminished in any respect.¹⁹⁰ The Crime Control Act thus merely continues this tendency to sweep dissent and difference under the heading of "national security."

When objections to the broad sweep of the national security exemption were raised in Congress, Senator McClellan declared that the provision would not give the President any more powers than those he already has under the Constitution.¹⁹¹ This is not altogether clear, however. When the national security section is read in light of its legislative history, it expresses a clear intent to allow eavesdropping on such activities without *any* judicial supervision, a great and almost unique departure from normal fourth amendment requirements. The Senate Committee Report stresses that even where such intrusions eventually come before a judge because an attempt

186. *Ivanov v. United States*, 384 F.2d 554 (1967), *cert. granted*, 392 U.S. 923 (1968). The primary issue in the case relates to the degree to which eavesdropping logs and notes must be disclosed to the defense for purposes of determining taint, where the existence of such eavesdropping comes to light. The Government is seeking to restrict this to what a judge, after an *in camera* examination, deems relevant; *cf.* 18 U.S.C. § 3500 (Jencks statute related to impeachment).

187. Some observers believed that this issue was the primary cause of the impasse.

188. Theoharis & Meyer, *supra* note 183, at 768 n.100.

189. *Id.* at 760-61.

190. Indeed, Professor Westin has concluded that there is now probably more eavesdropping than ever before. *PRIVACY AND FREEDOM* 119.

191. 114 CONG. REC. S6245 (daily ed. May 23, 1968).

is made to use the fruits in evidence—and this will be a relatively rare occurrence¹⁹²—admissibility will turn on reasonableness only, with the possibility of prior judicial authorization but one factor to be considered in the determination. The Senate Report states: "No preference should be given to either alternative [that is, whether a warrant was or was not obtained], since this would tend to limit the very power that this provision recognizes is not to be deemed disturbed."¹⁹³

The constitutionality of this latter construction is dubious. So far, no general exception to the warrant requirement has been recognized for national security cases,¹⁹⁴ let alone an exception for so vague and overbroad a class of activities as those which might pose a "danger to the structure . . . of the government." Recently, in *United States v. Robel*,¹⁹⁵ the Court stressed that the talismanic phrase "national defense" cannot be used to override those rights and values which the national defense is supposed to safeguard. In earlier congressional discussion, the Justice Department sought to avoid judicial supervision, allegedly because of fear of information leaks and prejudicial delay.¹⁹⁶ Leaks and delay were said to be unlikely, however, by Judge Edward Silver,¹⁹⁷ who criticized such an exception to antecedent judicial supervision despite his general desire to have eavesdropping authority. Even if the case for such an exception were stronger than it is, there is really no reason why these powers could not be scrutinized by an appropriate committee of Congress. The ABA Standards refer to the desirability of such supervision, but they omit any detailed analysis.¹⁹⁸

Because antecedent approval and virtually all *post hoc* supervision are abrogated for this potentially vast range of activity, it is doubtful that the "probable cause" requirements can effectively limit

192. In *Ivanov*, the Solicitor General declared "[T]he government has not claimed that evidence obtained by electronic eavesdropping in the course of a national security investigation is admissible in a criminal trial." Brief for the United States at 8-9.

193. S. REP. NO. 1097, at 94.

194. See *Katz v. United States*, 389 U.S. 347, 358 n.23. In *Ivanov*, the Solicitor General has asserted that "[i]t is at least arguable that, within this narrow area, the Executive has independent constitutional authority . . . [because] the 'President * * * possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.'" (Brief for the United States at 6), citing *C. & S. Airlines, Inc. v. Waterman Corp.*, 333 U.S. 103, 109 (1948), which refused to review "Presidential discretion as to political matters" (333 U.S. at 114) involving grant of an international route to one airline.

195. 389 U.S. 258, 263-64 (1967).

196. *Hearings on S. 2813 and S. 1495 Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 16-17 (1962) (testimony of Robert Kennedy).

197. See, e.g., 1955 *House Hearings* 98.

198. ABA STANDARDS § 3.1-2, comment a; cf. *PRIVACY AND FREEDOM* 391.

eavesdropping that is allegedly related to the protection of national security. There is no way to compel disclosure of the existence of such eavesdropping in the first place, so that compliance with whatever "reasonableness" requirements are imposed can be verified.¹⁹⁹ In the very few instances where such a disclosure does occur, the Senate Report declares that the statute requires only an "ad hoc" determination of reasonableness, "taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself."²⁰⁰ *Carroll v. United States*, which the Senate Report cites in support of this proposition, did insist on probable cause;²⁰¹ but where national security is balanced against the intrusion, the standards almost certainly will be relaxed, as they have been elsewhere.²⁰² The ABA Standards increase this possibility by invoking the much-criticized and heretofore unique "border search" as a precedent.²⁰³

The national security provision is therefore likely to exempt such eavesdropping from present constitutional limitations almost completely. This seems to be the only fourth amendment area where an outright exemption is made because of the type of offense under investigation—except for the border search²⁰⁴—and it is yet another instance in which Congress has required *fewer* protections limiting eavesdropping, not *more* as *Berger* directed. Further, the breadth of the exemption will permit much intrusion on private speech and association, thereby raising serious first amendment issues.²⁰⁵ Since this power probably will be used almost exclusively for intelligence and rarely for evidentiary purposes, challenge and control of even the mildest variety will be virtually impossible.²⁰⁶

199. Former Attorney General Ramsey Clark voluntarily disclosed the existence of electronic eavesdropping in such cases as *Ivanov*, *Clay*, and many others, but these are cases in litigation, and the demands of fairness mandate such disclosure. Moreover, even in such instances, experience in *Coplon* and other cases indicates that disclosure will rarely be made voluntarily. See *Report on Certain Alleged Practices of the F.B.I.*, 10 LAW. GUILD REV. 185 (1950), for examples of very wide-ranging eavesdropping in national security cases which would ordinarily not be disclosed.

200. S. REP. NO. 1097, at 94.

201. 267 U.S. 132, 155-56 (1925).

202. Cf. *Barenblatt v. United States*, 360 U.S. 109 (1959), for a discussion of balancing where national security is concerned.

203. ABA STANDARDS § 3.2, comment b. For the criticism, see Note, *Search and Seizure at the Border—The Border Search*, 21 RUTGERS L. REV. 513 (1967); Comment, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276 (1966); Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1967). The Standards omit any reference to this criticism.

204. Cf. *Abel v. United States*, 362 U.S. 217 (1960), in which the FBI had to resort to an Immigration Naturalization Service arrest because it lacked probable cause.

205. This of course distinguishes it from the usual border search which raises no such issues.

206. In this connection, the Standards almost indignantly reject any attempt to

E. *Some Problems of Scope*

Title III and the Standards at least purport to subject emergency eavesdropping to ostensibly significant controls, and to place national security eavesdropping under some restrictions. With respect to two kinds of eavesdropping, however, the legislation and the ABA proposal do not even attempt to impose limits: those interceptions that take place with the consent of one of the parties and those which occur by means of an extension telephone. Some brief comments are in order for each of these problems.

1. *Extension Telephones*

Under the definition of "device" given in section 2510(5), an extension telephone is excluded from the Act's prohibitions. There is no authority for such an exception, nor is any explanation given for it in the legislative history of title III. The only possible support for this exclusion is *Rathbun v. United States*,²⁰⁷ but that case turned on a statutory definition of "intercept,"²⁰⁸ and, more fundamentally, it involved consent by one of the parties to the conversation.

deny the government the right to use such evidence in court on the ground that this would produce secret eavesdropping and a Kafkaesque world. ABA STANDARDS 122-24. But this comment almost seems tongue in cheek, for it is clear that the power to keep the eavesdropping secret still remains with the government, and the Standards make no effort to change this. Moreover, denial of admissibility in an attempt (probably futile) to discourage excessive eavesdropping by making it less profitable does not imply non-disclosure—a defendant could still be allowed to find out whether any of the fruits of eavesdropping were used as leads, even if not as evidence. Joseph K's problem was not that his accusers couldn't use any of their evidence against him but that he couldn't find out what the charges and evidence were.

An additional opportunity for extensive wiretapping appears in the probable cause section: an order can be issued to obtain facts concerning a crime "about to be committed." § 2518(1)(b), (3). No Supreme Court case has approved or even dealt with such an anticipatory search. *Berger* is cited by the Senate Committee Report, but *Berger*, citing the classic statements in *Brinegar v. United States*, 338 U.S. 160 (1949) and *Carroll*, refers solely to searches for crimes which have been or are being committed. 388 U.S. at 55, 56, 58. The only Supreme Court reference to such a concept appears in Justice Douglas' dissent in *Terry v. Ohio*, where he describes the occasions for a search. 392 U.S. 1, 35 (1968).

A search for evidence of a crime "about to be committed" throws the possibility of surveillance even farther back in time than the present broad scope of such inchoate crimes as attempt, conspiracy, and solicitation allow. It is too early to tell whether this is wise, but it is certainly both novel and troublesome. The Justice Department disapproved this provision on the ground that it was vague and likely to be abused. 114 CONG. REC. S6108-11 (daily ed. May 22, 1968). Its vagueness was demonstrated during the Senate debate. When Senators Tydings and McClellan were challenged to cite cases of a crime "about to be committed" which did not really amount to a crime already or then being committed, they were unable to do so. 114 CONG. REC. S6110 (daily ed. May 22, 1968). Senator McClellan fell back on *Katz*, where the police had evidence that the defendant was engaged in illegal activity before they installed the tap; Senator Tydings provided a case which involved an existing as well as a future violation.

207. 355 U.S. 107 (1957).

208. See *United States v. Jones* 292 F. Supp. 1001 (D.D.C. 1968).

There are many situations in which undesirable eavesdropping may be accomplished by using an extension telephone. Indeed, the exemption is broader than the traditional home telephone that comes to mind when we think of an extension. It includes all equipment "furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business."²⁰⁹ This definition can encompass a switchboard in a huge corporation, law firm, or hotel to which police gain access with or without the permission of the subscriber.²¹⁰ Surely invasions of privacy of this magnitude are too serious to be excluded from control. Perhaps the law should not try to regulate eavesdropping by one family member upon another over an extension telephone, but the present exemption in this area is far too broad to accomplish such a limited objective.

2. Consent

Title III and the Standards also grant a blanket exclusion from control for eavesdropping that is undertaken with the consent of one party to the communication. This exception was easy to support with decisions like *On Lee v. United States*²¹¹ and *Lopez v. United States*²¹²—at least until *Osborn*²¹³ and *Katz* were decided. The Court originally granted certiorari in *Osborn* in order to consider the continuing vitality of *Lopez*;²¹⁴ it chose, however, to affirm the conviction not on the basis of *Lopez* and its consent theory, but rather on the ground of antecedent judicial approval. The Court's choice of this ground for decision, plus the aforementioned approving references to that rationale in *Berger* and *Katz*, may indicate that Justice Brennan's dissent in *Lopez*,²¹⁵ in which he concluded that surrepti-

209. Act § 2510(5)(a)(i).

210. The Long Committee Hearings brought out the existence of equipment known as "service-observing equipment," leased by telephone companies to approximately 4,000 firms and individuals. With it, a president of a company can listen in on *all* the phone conversations taking place and can, of course, permit others to do so as well. 1967 Long Committee Hearings 395. Professor Westin has also pointed out the great cooperation between hotel managers and the police. PRIVACY AND FREEDOM 120-21.

211. 343 U.S. 747 (1952).

212. 373 U.S. 427 (1963). In *On Lee*, a government informer was outfitted with a radio transmitter, and sent into the suspect's laundry; their conversation was overheard and testified to by government agents. In *Lopez*, a government revenue agent, whom the suspect tried to bribe, recorded his conversation with the suspect on a miniature recorder, the tapes from which were introduced as evidence to corroborate the agent's testimony.

213. *Osborn v. United States*, 385 U.S. 326 (1966).

214. 385 U.S. at 324-25.

215. 373 U.S. at 446.

tious recording of a conversation by one of the parties thereto was an unconstitutional invasion of privacy, will soon be accepted by a majority of the Court. In addition, Justice Stewart's comment that "what [a person] . . . seeks to preserve as private . . . may be constitutionally protected"²¹⁶ has led at least a few courts to conclude that *On Lee* and its progeny are now dead.²¹⁷ Indeed, the Solicitor General recently informed the Court, during oral argument of the *Ivanov* case, that in his judgment governmental eavesdropping on a conversation between two people may violate the fourth amendment as interpreted in *Katz* even if one party consented to an interception.²¹⁸

The consent problem is too difficult to explore in detail here;²¹⁹ but surely one cannot easily dismiss the threats to privacy posed by consensual eavesdropping of the kind approved in *On Lee*. Indeed, Professor Westin has concluded that this is perhaps the most widespread form of electronic surveillance being used today and that it should not be left unregulated.²²⁰ Under title III and the decisions in *On Lee* and *Hoffa v. United States*,²²¹ however, there are virtually no judicial controls on the use of electronic aids in schemes utilizing informers to deceive suspects into making self-incriminatory statements; the only hope seems to be that the *Osborn* procedure may eventually become mandatory.²²²

216. 389 U.S. at 351-52.

217. Compare *White v. United States*, 4 Cr. L. REP. 2317 (7th Cir. Jan. 9, 1969); *Doty v. United States*, 3 Cr. L. REP. 2220 (10th Cir. June 4, 1968); and *United States v. Jones*, 292 F. Supp. 1001 (D.D.C. 1968); with *United States v. Kaufer*, 4 Cr. L. REP. 2333 (2d Cir. Jan. 14, 1969), *Dancy v. United States*, 390 F.2d 370 (5th Cir. 1968) and *Handsford v. United States*, 390 F.2d 373 (5th Cir. 1967) (*On Lee* still good law). The issue has been ably presented to the Court in a petition for certiorari filed in *Douglas v. Massachusetts*, petition for certiorari filed, 3 Cr. L. REP. 2186 (June 5, 1968).

218. Oral Argument by Solicitor General Griswold in *Ivanov v. United States*, No. 11 (U.S. 1968), at 27:

Q. Mr. Solicitor General, assume that A invites B and C to a meeting at his house and A consents, asks the Government or consents to the taping of that conversation by the Government. Now, the Government position is that B and C—has there been any violation of the Fourth Amendment?

A. Mr. Justice, I think there may be under the *Katz* case.

Q. Even though A has consented?

A. Even though A has consented, just as though the telephone company consented in the *Katz* case, I don't think that would have made any difference.

219. See Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping; Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968).

220. PRIVACY AND FREEDOM 131 ("used tens of thousands of times each year"), 390 ("Allowing eavesdropping with the consent of one party would destroy the statutory plan of limiting the offenses for which eavesdropping by device can be used and insisting on a court order process.").

221. 385 U.S. 293 (1966).

222. If it does not, we shall continue to be exposed to the kind of totally uncontrolled intrusion which Professor Leslie Fiedler and his family endured at the

F. Other Sanctions: The Reporting System and Private Actions

Title III contains one provision which might induce some restraint with regard to the number of eavesdropping orders issued. Section 2519 requires that state and federal judges must send full reports of all orders applied for and issued to the Administrator of the United States Courts. In addition, the principal prosecuting officers of each state and the federal government must report to the Administrator all arrests, trials, and convictions resulting from such orders. The Administrator must then transmit a summary of this information to Congress in April of each year. If the figures are made public—and the statute is silent on that point—widespread court-ordered eavesdropping might produce an adverse public reaction. This in turn could induce some reduction in the number of orders granted. Of course, the importance of this provision depends on the existence and amount of publicity given to the report.

The Act also contains a provision permitting the victims of eavesdropping performed in violation of the statute to recover civil damages of 100 dollars per day or 1,000 dollars, whichever is higher, in addition to punitive damages, a reasonable attorney's fee, and court costs.²²³ This provision could also have the beneficial result of reducing illegal eavesdropping when such illicit surveillance does in fact come to light. Damage actions against illegal police activity in other contexts have not been overly effective in reducing police misconduct; however, some of the people whose conversations are

hands of the Buffalo, New York, police. Fiedler, an outspoken proponent of marijuana legalization and an equally outspoken critic of the Buffalo Narcotics Squad, was arrested in 1967 for maintaining premises where marijuana was located. The prosecution's case is based entirely on evidence obtained by sending a sixteen-year-old girl, a school friend of the Fiedler's fifteen-year-old daughter, into Fiedler's home some eighteen to twenty-seven times over a nine-week period. On each entry the girl, who was in a psychiatric hospital immediately before she was engaged by the police to spy on the Fiedlers, carried a radio transmitter which broadcast conversations in the home to police listening outside. There were times that the girl would insist on coming in with gifts even when Mrs. Fiedler told her not to visit that day. There is no evidence in the record that the police had probable cause to believe that Fiedler or anyone else in the house was involved in lawbreaking when they first sent the girl in. At the hearing the girl admitted lying under oath to Fiedler's counsel about whether she had planted any drugs in the Fiedler home. Record of Hearing To Suppress Evidence at 67, *People v. Kurt Fiedler*, 4 Cr. L. REP. 2187 (App. Div. N.Y. Nov. 31, 1968).

The case against Leslie Fiedler has not yet been tried. In a companion case involving Fiedler's son, an appeal from a lower court's denial of a motion to suppress the evidence obtained by the girl was rejected by a 3-2 vote although on grounds other than those cited by the trial court. The latter relied on Justice White's reaffirmation of *On Lee* in his concurrence in *Katz v. United States*, 389 U.S. at 362, 363 n.*, but the Appellate Division majority ruled instead that the search warrant which produced the evidence had not been based on eavesdropping evidence. *People v. Kurt Fiedler*, 4 Cr. L. REP. 2187 (App. Div. N.Y. Nov. 31, 1968).

²²³ Act § 2520.

illegally overheard may be in a better financial position to bring suit effectively than the class of people who are normally victims of the more traditional modes of police misconduct.

IV. THE NEED FOR ELECTRONIC SURVEILLANCE

Title III's grant of the power to issue these latter-day general warrants is rationalized by the claim that without electronic surveillance the fight against organized crime would collapse,²²⁴ and that with this failure the foundations of the Republic would totter.²²⁵ But the public seems to want many of the illicit services provided by organized crime, and is still rather apathetic about combatting it²²⁶ despite steady torrents of propaganda during the last ten years. The community is, however, seriously agitated about street crime and riots. Thus, these concerns were frequently invoked during the floor debate on title III,²²⁷ even though electronic surveillance has nothing to do with alleviating either problem. But by the manipulation of such irrelevancies is major legislation enacted.²²⁸

One cannot confidently make the unqualified assertion that electronic eavesdropping is not a useful device. Its very "dirtiness"—its secret intrusion into what people try to keep confidential—seems to ensure that it would be of some value to law enforcement agencies, just as the threat and application of coercion probably produce a significant number of confessions. But the issue in both cases is the indispensability of the technique to the solution of major crimes, and with both electronic eavesdropping and confessions, the myth of necessity may far surpass the reality.²²⁹ Most of the ABA Com-

224. S. REP. NO. 1097, at 74; ABA STANDARDS 70-78.

225. ABA STANDARDS 26-43; especially 40-43; S. REP. NO. 1097, at 70-74.

226. Gardiner, *Public Attitude Toward Gambling and Corruption*, 374 ANNALS 123 (1967); Ruth, *Why Organized Crime Thrives*, *id.* at 113, 120-22 (1967).

227. *See, e.g.*, 114 CONG. REC. S6207 (Senator McClellan on the dangers of the situation in Washington at night), S6197 (and on the need to eavesdrop on black militants) (daily ed. May 23, 1968).

228. In the House, proponents of the Crime Control Act overcame what was expected to be stiff opposition, primarily by invoking the assassination of Senator Robert F. Kennedy [*see, e.g.*, 114 CONG. REC. H4587 (daily ed. June 6, 1968) (remarks of Melvin Laird); *id.* at H4595-96 (June 6, 1968) (remarks of Roman C. Pucinski)] even though Kennedy was on record as opposing both title II and title III. For his views on title II, *see* 114 CONG. REC. S6019 (daily ed. May 21, 1968) (paired for amendment striking title II); on title III, *see id.* at S6210 (May 23, 1968) (Senator Byrd stating that Senator Kennedy was absent, but if present would vote for striking all of title III).

229. With respect to confessions, *see* S. REP. NO. 1097, at 151 (minority report) and numerous studies including Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt To Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967); Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). For a critical analysis of equally fervent claims

mittee's general commentary is devoted to this question, and since this commentary is the most thorough version of arguments that have been presented elsewhere,²³⁰ it will be the focus of attention here.

A. The ABA Case for "Need"

After setting forth some twenty pages on the evils of organized crime, the Advisory Committee concedes that statistics are "wanting" to prove the need for electronic surveillance as a technique in attacking this problem. The Committee then asserts that "[d]ecision here . . . must rest on the sort of 'pragmatic evidence' that is not 'wanting.'" ²³¹ Then follow a summary statement of the information obtained from a bug that was apparently in continuous operation for over three years²³² and a description of the *Berger* investigation, in which bugging of course played a large part. Recognizing that at most these two cases prove utility and not indispensability, the Committee then discusses the shortcomings of what has heretofore been one of the principal methods of investigating organized crime, the use of informers. According to the Committee, informants can provide only fragmentary data and are often unreliable and afraid of reprisals; moreover, grants of immunity from prosecution may result merely in defiance or perjury. For reasons that are not made clear, the Committee asserts that such informants can do nothing to prevent crime but rather are useful only to solve crimes that have already been committed.²³³

Supposedly because of these difficulties, according to the ABA, no law enforcement office other than that of New York County District Attorney Frank Hogan has been very successful in fighting organized crime. Since former Attorney General Ramsey Clark has

of necessity with respect to investigative arrests, attacks on *Mapp v. Ohio*, and on *Mallory v. United States*, see Kamisar, *On the Tactics of Police—Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 446-71 (1964).

230. See, e.g., S. REP. NO. 1097 passim; Brief for National District Attorneys' Association, in *Berger v. New York*, 388 U.S. 41 (1967), reprinted in *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 1055-142 (1967).

231. ABA STANDARDS 54. The approach is reminiscent of Professor Fred E. Inbau's claim when attacking the *McNabb-Mallory* rule: "I cannot answer the . . . point with any statistics of my own . . . but some simple logic is available to support the proposition that the *McNabb-Mallory* rule does, and is bound to have, a crippling effect upon law enforcement . . ." *More About Public Safety v. Individual Liberties*, 53 J. CRIM. L.C.&P.S. 329, 331 (1962). Professor Kamisar's article, *supra* note 229, shows how unreliable "simple logic" can be, as do many of the studies of the impact of *Miranda v. Arizona*; see, e.g., sources cited in note 229 *supra*.

232. ABA STANDARDS 54.

233. But cf. *Osborn v. United States*, 385 U.S. 323 (1966).

frequently denied the indispensability of electronic eavesdropping,²³⁴ the Advisory Committee takes special pains to show that the Justice Department's effort has "not been a success. The alternative to surveillance has, in short, been tried and found wanting."²³⁵ This general conclusion is buttressed by conclusions from the English Privy Councillors' Report in 1957,²³⁶ the National Crime Commission Report,²³⁷ and other studies.

B. *Analysis of the Case for Need*

The section dealing with the indispensability of electronic surveillance is by far the weakest part of the ABA tentative draft. We are not given the balanced analysis one might have expected from such a blue ribbon group as the ABA Advisory Committee, particularly in view of the quality of other ABA reports in the criminal justice area; rather, we are presented with a one-sided brief, full of half-truths and bootstrapping. For example, the commentary relies heavily on "the two most comprehensive studies undertaken of electronic surveillance: the report of the English Privy Councillors in 1957 and the recent report of the President's [Crime] Commission"²³⁸ The first work is cited and quoted frequently in the draft and elsewhere,²³⁹ yet nowhere is it even mentioned that of the three Privy Councillors who compiled the Report, one dissented and called for restrictions so severe that "interception would practically cease to be used" for detection of crime.²⁴⁰ Citations to the Crime Commission Report involve a substantial element of bootstrapping, for the ABA Advisory Committee Reporter was the chief consultant on electronic surveillance for the Crime Commission. Thus, the Advisory Committee quotes a statement that "electronic surveillance techniques were termed 'the tools' " in fighting

234. See, e.g., 1967 Long Subcommittee Hearings 48.

235. ABA STANDARDS 77.

236. REPORT OF THE COMMITTEE TO INQUIRE INTO THE INTERCEPTION OF COMMUNICATIONS, Cmnd. No. 283 (1957).

237. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

238. ABA STANDARDS 78.

239. See, e.g., *Berger* Brief, *supra* note 230, at 40, 43, 44, 45, 46, 47.

240. REPORT, *supra* note 236, at 38, ¶ 170 (dissent of P.C. Gordon Walker). Incidentally, the results of the majority Privy Councillors' approach, and perhaps a forecast of what may befall us, were reported recently under the headline: "Britons live among army of snoopers." The article stated that a recent report by a Committee for the Public Protection of Privacy found that "Scotland Yard has 25 lines which can be used for intercepting phone calls within a radius of 100 miles. The general post office [which operates the phone system] has 40 wiretap officers on full-time duty, and another 30 snoopers attached by other agencies Britain's intelligence . . . operate 400-plus wiretaps throughout the country." The Detroit News, Sept. 18, 1968, at 1-F, col. 1.

organized crime,²⁴¹ but it fails to reveal that the statement was made by the ABA Reporter himself in a research paper prepared for the Crime Commission's Task Force on Organized Crime.²⁴²

The analysis of relative success in combatting organized crime of those jurisdictions with and without eavesdropping authority is especially one-sided. New York is said to be the only jurisdiction which has been successful in fighting organized crime, allegedly because of its use of electronic eavesdropping.²⁴³ At most, this would prove only that New York has used this weapon effectively and not that the state could not have done the job equally well without it. It is obviously impossible to know whether New York could continue its success in this area without electronic eavesdropping for it has never had to try—its organized crime investigations have been built around such techniques for almost thirty-five years.

Second, has New York really been so successful? Some of organized crime's most powerful years in New York were during the 1940's²⁴⁴ when the New York police tapped without any inhibitions, and New York is still the center of organized crime.²⁴⁵ Since this objection has been made frequently, the ABA Committee and the Crime Commission both respond with the comment that Mr. Hogan's office has lacked resources and manpower to do more.²⁴⁶ Yet, the New York County District Attorney's Office is one of the largest and best equipped in the nation, with over a hundred lawyers, ten special investigators, approximately six accountants, and seventy-five elite police officers permanently assigned to it.²⁴⁷ In addition, it is backed by a 28,000-man police force which has laboratories and other modern facilities; the New York State Intelligence and Information Service with its electronic computers; and the cooperation, when necessary,

241. ABA STANDARDS 75-76.

242. TASK FORCE REPORT ON ORGANIZED CRIME 95. The technique is reminiscent of that used by former Narcotics Commissioner Harry Anslinger to build up the marijuana phobia. See Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588, 598-601 (1968).

243. ABA STANDARDS 75, citing *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, *supra* note 237, at 201.

244. The famous conversation between Frank Costello and Judge Thomas Aurelio, ABA STANDARDS 41, occurred in the 1940's. *THE KEFAUVER REPORT ON ORGANIZED CRIME* 102-05 (Didier ed. 1951). On organized crime in the 1940's see generally *id.*

245. Eighty percent of all Cosa Nostra members are said to live in the New Jersey-New York area or in Chicago. *Hearings Before the House Subcomm. on Government Operations on the Federal Effort Against Organized Crime*, 90th Cong., 1st Sess., at 48 (1967) (testimony of Fred M. Vinson, Jr.).

246. ABA STANDARDS 76, citing *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, *supra* note 237, at 202, as authority.

247. Mayer, *Hogan's Office Is a Kind of Ministry of Justice*, N.Y. Times, July 23, 1967, § 6 (Magazine) at 7, col. 1.

of the district attorneys of the four other counties that comprise New York City, to say nothing of the potential assistance of police and prosecutors outside of the city. How large a law enforcement establishment must a free society support in order to deal with this problem if one of the largest and best prosecutorial offices in the nation cannot do an adequate job even with electronic eavesdropping powers?

Moreover, even the evidence cited by the ABA undermines the claim that New York is the only jurisdiction in the country that has achieved success in this area. Both the ABA commentary and the Crime Commission Report praise Chicago, which operates under one of the stiffest anti-eavesdropping laws in the nation, as having one of the best programs aimed at organized crime.²⁴⁸ The Los Angeles police department, which has been forced to operate without electronic eavesdropping authority in recent years, was also rated highly.²⁴⁹ Both departments have of course asked for eavesdropping authority²⁵⁰—although leading law enforcement authorities in both states have denied its indispensability—but such requests are hardly surprising given today's atmosphere.

Indeed, the Crime Commission Report, carefully analyzed, does not say that *only* New York has had success but rather that only New York has had “*continuous success*.”²⁵¹ It is unlikely that the uniqueness of this continuity resulted primarily from the use of electronic eavesdropping. Rather, a good part of the answer is that other cities have had a rapid turnover of district attorneys, many of whom have had a distinct lack of interest in fighting organized crime.²⁵² In New York, on the other hand, Frank Hogan and his predecessor, Thomas Dewey, have been in office for almost thirty-four years, and both have continuously given top priority to fighting organized crime. Indeed, as Samuel Dash and his colleagues discovered, and as Professor Westin has recently confirmed,²⁵³ many other cities have actually used wiretapping for crime detection, albeit illegally, and yet they did not achieve the “continuous success” that New York has supposedly enjoyed.

248. ABA STANDARDS 25, citing TASK FORCE REPORT ON ORGANIZED CRIME at 12-14 nn.110, 111, 114.

249. TASK FORCE REPORT 12-14.

250. 1967 Long Committee Hearings 567-72 (testimony of Orlando Wilson); TASK FORCE REPORT 13-14 n.114 (Chicago); *id.* at 12 n.110 (Los Angeles).

251. TASK FORCE REPORT 201 (emphasis added).

252. See Ruth, *supra* note 226, and TASK FORCE REPORT ON ORGANIZED CRIME 13.

253. See generally S. DASH, R. KNOWLTON & R. SCHWARTZ, THE EAVESDROPPERS.

Perhaps the weakest link in the ABA Committee's whole argument is the denigration of the federal effort. The Advisory Committee summarizes its dissatisfaction by complaining that the Department of Justice, with all its investigative resources—save eavesdropping since 1967—has been able to convict only 102 out of 5,000 Cosa Nostra members. Informants are ineffective, tax cases are becoming too difficult to make, immunity statutes are inadequate. In short, without electronic surveillance little can be accomplished, and former Attorney General Ramsey Clark, who ordered an end to federal eavesdropping in June 1967,²⁵⁴ was apparently too uninformed or too indifferent about fighting organized crime.

The facts, however, simply do not support this argument. In the first place, one obviously cannot blame any pre-1967 ineffectiveness on the lack of eavesdropping authority (or on Ramsey Clark for that matter), for federal authorities eavesdropped extensively until then, as has been mentioned. Moreover, the situation today does not support the charge of inevitable inadequacy. Apart from the fact that the file cards of the Justice Department's Criminal Division list only some two thousand Cosa Nostra members,²⁵⁵ a Justice Department report in September 1968, the first since the Department began to implement Clark's "strike force" approach, shows quite a significant increase in such prosecutions and convictions.²⁵⁶ The 1968 annual report of the FBI claims equal success, including, just in this one year, an impressive number of convictions of persons who seem to be quite important in organized crime;²⁵⁷ since these

254. PRIVACY AND FREEDOM 126-30.

255. *Hearings*, *supra* note 245, at 24.

256. Press Release, Department of Justice, Sept. 4, 1968: "Of 210 known or suspected members of La Cosa Nostra indicted or convicted during the past 13 years, 48 were indicted or convicted during fiscal 1968." Congressional budget-cutting has recently been said to threaten this effort; see *Fight on Organized Crime Gains, but Tight Budget Hurts*, Ann Arbor News, Nov. 17, 1968, at 1, col. 4.

257. FBI ANNUAL REPORT, FISCAL YEAR 1968 3-4 (1968):

For the FBI [the 1968 fiscal year] was a year of striking accomplishment against the bulwark of the hoodlum criminal conspiracy—La Cosa Nostra. Clearly evidencing ever deeper penetration into the organized crime network in the past few years, FBI probes netted the convictions of 281 hoodlum, gambling and vice figures for violations within the Bureau's jurisdiction—a dramatic increase over the previous record total of 197 convicted during the preceding fiscal year. Although there is some skepticism about FBI figures in some quarters (See Kohlmeier, *Hoover Loses Immunity to Criticism Despite "Law-and-Order" Mood*, Wall St. J., Oct. 10, 1968, at 1, col. 6 at 14, col. 1.), the Standards of course show little of this skepticism.

The Bureau has even been able to move against Stefano Magaddino (see Spieler, *Magaddino: Mobster or a Loving Father?*, Rochester Democrat & Chronicle, Nov. 30, 1968, at 1A, col. 4), whom Professor Blakey recently singled out as someone whom the federal government was not able to indict because of its lack of eavesdropping powers. 1967 Long Committee Hearings 962.

reports there have been additional successes.²⁵⁸ Indeed, this federal effort has been so successful that President Nixon's "main congressional advisers on crime," the House Republican Task Force on Crime, overcame its customary hostility to Ramsey Clark and recommended not only that his coordinated strike forces be "expanded," but that electronic surveillance "should be utilized on an extremely selective and carefully controlled basis," with bugging used especially rarely.²⁵⁹

The ABA Committee makes dire predictions that even the "unsuccessful" federal performance will get worse, for many federal prosecutions are in tax cases, and these are getting harder to make as criminals increase the amount of earnings they report.²⁶⁰ Here, too, the facts seem otherwise: an IRS spokesman told Congress in 1967 that tax convictions were increasing,²⁶¹ and the increase in arrests and convictions recently reported bear him out.²⁶²

Perhaps the federal effort is not yet a "success." It may never be—"success" is an ambiguous term. After all, how many more convictions of the high-level officials of organized crime could one ever obtain, even with every investigative resource possible, given the inevitable problems of detection and proof in such cases? But if the comparison is made with prior years or other jurisdictions, it is hard to call the federal drive against organized crime—which started in 1959, moved into high gear only when Robert F. Kennedy became Attorney General, and is just beginning to pay off—not a "success."

The arguments against the indispensability of eavesdropping authority are reinforced by the fact that many career law enforcement officers apparently do not consider this power essential. These include former Attorney General Stanley Mosk of California²⁶³ (now a justice of that state's supreme court), former Cook County, Illinois, State's Attorney Dan Ward,²⁶⁴ former Detroit Police Com-

258. E.g., Fox, *U.S. Anticrime Force in Brooklyn Strikes Again*, N.Y. Times, Dec. 20, 1968, at 31, col. 3.

259. Graham, *Nixon Is Given Plan To Combat Crime*, N.Y. Times, Dec. 18, 1968, p. 1, col. 8. The intensity and success of the federal effort is also considered one of the main reasons why American criminals are moving into English gambling. Wall St. J., Nov. 8, 1968, at 1, col. 1.

Attorney General John Mitchell has not, however, indicated any great reluctance to use the powers given him by title III. See Graham, *Mitchell To Use Wiretap Powers in Fight on Crime*, N.Y. Times, Jan. 15, 1969, at 1, col. 4.

260. ABA STANDARDS 77.

261. *Hearings*, *supra* note 245, at 108 (testimony of William Kolar).

262. See text accompanying notes 256-58 *supra*.

263. 1961 Senate Hearings 545.

264. *Id.* at 400.

missioner Ray Girardin,²⁶⁵ Senator Thomas Eagleton of Missouri,²⁶⁶ former Attorney General Thomas McBride of Pennsylvania,²⁶⁷ former Philadelphia District Attorney Samuel Dash, and many others. Judge Isadore Dollinger, former Bronx District Attorney, recently commented that even with respect to investigations of gambling—the “lifblood” of organized crime and the area where most eavesdropping takes place—wiretapping is not of much use.²⁶⁸ One federal prosecutor told a *Wall Street Journal* reporter: “All this bugging flap and most of the time we got nothing.”²⁶⁹ Indeed, even J. Edgar Hoover once called electronic eavesdropping “a handicap to the development of sound investigational technique,”²⁷⁰ although today this “handicap” has apparently been overcome, at least in Mr. Hoover’s eyes.

Even if electronic eavesdropping were as vital to the fight against organized crime as its most ardent proponents claim, its legitimation by the Crime Control Act would still not be “successful” in removing organized crime as a force in American life. At most, as is evident from the experience in New York, a few more criminals may be convicted in other cities and places. But even this result is unlikely, for, as most specialists on organized crime will readily agree, there are other basic and perhaps insuperable problems: public apathy; police corruption,²⁷¹ perhaps fostered by poor police salaries and training; light sentences in gambling cases; a lack of coordinated intelligence and other cooperation between enforcement agencies;²⁷²

265. See letter of March 3, 1967, to the author, quoted in 1967 *Long Committee Hearings* 405.

266. 1961 *Senate Hearings* 554-55.

267. *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., pt. 1, 25 (1958).

268. Zion, *Dollinger Is Favored in Bronx, But Calandra Stays Optimistic*, N.Y. Times, Nov. 2, 1967, at 36, col. 2, 3.

269. Landauer, *Agents' Eavesdropping Hurts U.S. Campaign Against Racketeering*, Wall St. J., March 6, 1967, p. 1, col. 1, p. 11, col. 2. In *Olmstead* itself [*Olmstead v. United States*, 277 U.S. 438 (1927)], the now disavowed grandfather of all the wiretapping and bugging cases, the jury foreman stated that “the telephone conversations virtually were disregarded.” Quoted in W. MURPHY, *WIRETAPPING ON TRIAL: A CASE STUDY IN THE JUDICIAL PROCESS* 45 (1965).

270. Quoted in Note, *Wiretapping and Law Enforcement*, 31 HARV. L. REV. 863, 870 n.53 (1940).

271. See Council of Judges of the National Council on Crime and Delinquency, *Search Warrants and Organized Crime: A Policy Statement*, (32 pages of unnumbered text) (1966): “[T]he most obvious expense of organized crime is the purchase of protection and . . . the primary agency to be corrupted by such purchase is the local police.” See also Smith, *The Mob: You Can't Expect Police on the Take To Take Orders*, LIFE MAGAZINE, Dec. 6, 1968, at 40.

272. See 1961 REPORT OF THE NEW YORK STATE INVESTIGATING COMMISSION ON SYNDICATED GAMBLING 100-10; Gardner, *supra* note 226; Kamisar, Comment, ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES MONOGRAPH No. 1, 37 (1967); Ruth, *supra* note

and a fear of implicating highly placed political or business figures and other community leaders who often work with and protect major organized-crime leaders. The Crime Commission's Task Force on Organized Crime found that very few police departments and prosecutors' offices even had special units in this area.²⁷³ Thus, few prosecutors are really interested in attacking organized crime for such investigations may touch very powerful officials on whom an elected prosecutor must depend and with whom he must work.²⁷⁴ Surely the dangerous and quite uncontrolled eavesdropping power of title III should not be entrusted to men who are likely to use it not for the allegedly limited and grave purpose for which it was created, but rather, for more trivial matters. In making this grant of sweeping power, are we not authorizing use of a very dangerous drug to treat the common cold? Indeed, this loose legislation, with its extensive list of offenses that can be investigated by eavesdropping even though they have no substantial or even ostensible connection with organized crime, actually encourages such indiscriminate use.

What then can be done to combat organized crime? Even if eavesdropping is merely useful and not indispensable to this effort, should we not at least grant the authority to employ electronic surveillance to those who will actually use it against this troublesome force in our community? How many weapons can we take away from our law enforcement officers and still leave them with effective tools? Perhaps the only real answer here, as in so many of society's other crime problems, is that effective law enforcement is really not the first line of defense against crime or even a very significant aspect of crime control. In a free society, forcible repression rarely brings about a lasting solution to a social problem, though it may be otherwise in a totalitarian state. Other solutions must be sought which strike at the social and economic structure out of which

226. Problems of cooperation often exist within the federal establishment, although the Justice Department's strike force technique has apparently been quite successful. See notes 257-58 *supra*; Calame & Steiger, *State, Federal Officials Team Up To Intensify Drive Against Crime*, Wall St. J. May 15, 1968, at 1, col. 6; Kohlmeier, *supra* note 257 ("The FBI has refused to assign its agents to strike forces. And in the Justice Department there are strong feelings that Mr. Hoover's independence is rendering the effort far less effective than it could be.").

273. TASK FORCE REPORT ON ORGANIZED CRIME 12.

274. See, e.g., the problems for the Hudson County prosecutor which arose when a Congressman with ties to the local county leader was charged with being involved with organized crime. Sullivan, *Hudson Prosecutor Investigating Charges Against Gallagher*, N.Y. Times, Aug. 14, 1968, at 41, col. 3; Smith, *supra* note 271.

specific types of crime arise. Thomas Schelling has observed, in a Crime Commission research paper which that body seems to have ignored, that criminals who provide illegal services depend upon an absence of legitimate competition.²⁷⁵ Effective prohibition and law enforcement against potential legitimate or illegitimate competitors reinforce the criminal's illicit monopoly and keep the monopoly returns high. When he loses the monopoly, he quits. Organized crime abandoned the liquor industry after Prohibition was repealed because it was "rather swamped . . . with competition,"²⁷⁶ not because of the extensive law enforcement effort. Therefore, one solution may be selective "decriminalization" in areas such as gambling, a proposal which was concurred in recently by an IRS spokesman.²⁷⁷ As Professor Norval Morris has said with respect to gambling: "It seems to me late in the day for us to be further delaying removal of the major financing of organized crime in this country. . . . There is no evidence whatsoever that gambling legislation reduces the incidence of gambling and virtually nobody believes that it does Have we got to continue this charade?"²⁷⁸ The practicality of this approach can be seen in Nevada, for example, where the entry of Howard Hughes and other legitimate operators into the gambling business seems to be driving the criminal element out.²⁷⁹ Loan sharking, another principal source of revenue for organized crime might be reduced if we directly confronted the problem of providing legitimate sources of capital for hard-pressed debtors, although this may be quite difficult where very poor risks are involved. Similarly, the ABA Advisory Committee deplors the drug addict's misery and the terrible cost that his crime inflicts upon society. Yet, paradoxically but inevitably, stringent enforcement of the narcotics laws worsens the addict's life and increases his criminal activity by driving the supply of drugs down and the price up. In all the service areas where organized crime thrives, decriminalization or legitimate

275. Schelling, *Economic Analysis and Organized Crime*, TASK FORCE REPORT app. D 114, 116-17.

276. *Id.* at 124.

277. *Hearings*, *supra* note 245, at 70 (testimony of William Kolar). *See also* Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967).

278. Morris, *Politics and Pragmatism in Crime Control*, FED. PROBATION, June 1968, 9, 14.

279. Lehman, *Crime, The Public, and the Crime Commission: A Critical Review of the Challenge of Crime in a Free Society*, 66 MICH. L. REV. 1487, 1536-37 (1968). Professor Lehman also points to the exodus of the criminal element from bars which cater to homosexuals as reduced police harassment of such places encourages legitimate businesses to enter. *Id.* at 1536.

competition might well do far more good²⁸⁰ than giving prosecutors dangerous weapons to fight a war that very few want to enter and none can win.

An approach which tries to substitute decriminalization for repression requires rationality and patience. Moreover, the law enforcement job that inevitably remains calls for substantial training and other expenditures and a willingness to cooperate by jealously independent entities like the FBI, the Treasury Department, and local governmental agencies.²⁸¹ In contrast, electronic eavesdropping seems "so easy"; as Ramsey Clark has noted: "[I]t doesn't cost anything in the sense that it would cost something to increase police salaries It's something that can be done with the words of the law" ²⁸²

V. CONCLUSION

One of the vices of a one-sided presentation of important issues is that responsive criticism inevitably appears equally one-sided. Thus, a few caveats are in order when considering the ABA Standards and title III.

The foregoing discussion is not meant to argue that electronic eavesdropping is of little or no use in fighting organized crime. As the ABA Committee correctly says, it is probably true that no convincing demonstration can be made either way. The purpose here has been to show only that there is a very strong doubt about the need for eavesdropping, that the argument in support of eavesdropping authority is quite vulnerable to critical analysis. On the other hand, the evidence clearly indicates that the electronic surveillance permitted by title III and the Standards will result in an inherently intensive, widespread, and unavoidable encroachment on some of our most necessary rights. As proponents of this new authority admit—indeed, proclaim—eavesdropping's great value is to provide strategic intelligence; but searching for such intelligence cannot be reconciled either with the fourth amendment (and perhaps the first as well) or with title III's ostensible limitation to specific crimes. The burden on those who would justify eavesdropping's far-reaching

280. Morris, *supra* note 278, at 14. See generally H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1967).

281. See note 272 *supra*.

282. Clark, Transcript of *Speaking Freely*, WNBC Television, May 12, 1968, at 29-30.

intrusion upon individual liberty is very great. On the record presented by the ABA Committee, this burden has simply not been met.

Title III is an invitation to widespread eavesdropping and the ABA Tentative Draft is little better. This should not have been unexpected this year, or perhaps any year. Indeed, in one sense, these times are not so unique. We have always had crime scares of one kind or another—either domestic crime or international espionage or internal subversion—and our legislatures have always been especially susceptible to this kind of pressure. It is for this reason that the call for legislative solutions to crime problems²⁸³ usually ensures an antilibertarian result. It is difficult to find very much recent criminal legislation which is not repressive and law-enforcement-oriented, except perhaps for the Federal Bail Reform Act of 1966.²⁸⁴ Almost no legislation, state or federal, has restricted police officers. As our domestic cauldron continues to seethe, as young people, angry, frustrated, and disenchanted, account for an increasing share of our population and inevitably raise crime rates, as riots and disorders continue in part because men like Senators McClellan, Eastland, Dirksen, and others block social reform—as all these forces persist, legislative action is likely to become more and more reactionary and repressive. This Article was written in the midst of the 1968 election campaign, when the primary concern of much of the electorate seemed to focus on the slogan “law and order”; how the new Administration reacts may well determine how much domestic tranquility we will have.

Our best hope for maintaining and furthering individual liberty lies with the courts, and particularly with the Supreme Court, since it has at least some insulation from popular hysteria, and a special concern for liberty. It cannot do everything of course, as the Chief Justice somewhat poignantly acknowledged recently,²⁸⁵ especially in a time of crisis. Indeed, lately the Court has seemed to draw back from a strong libertarian position.²⁸⁶ The defeat of President Johnson's nomination of Abe Fortas to be Chief Justice—motivated as it was primarily by resentment toward the Court for its attempts at

283. See, e.g., Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

284. 18 U.S.C. § 3146-52 (Supp. III, 1967), 80 Stat. 21.

285. *Terry v. Ohio*, 389 U.S. 1, 13-14 (1967).

286. See *United States v. O'Brien*, 391 U.S. 367 (1968); *Walker v. Birmingham*, 388 U.S. 307 (1967); *Adderley v. Florida*, 385 U.S. 39 (1966); Steel, *Nine Men in Black Who Think White*, N.Y. Times, Oct. 13, 1967, § 6 (Magazine), at 56, col. 1.

enhancing individual liberty—may make the Justices even more gun-shy. But if we must rely on legislative solutions to these problems, we are indeed in a bad way; the Omnibus Crime Control and Safe Streets Act of 1968 may well be symptomatic of what we can expect.