The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy

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THE INTERCEPTION OF COMMUNICATIONS WITHOUT A COURT ORDER: TITLE III, CONSENT, AND THE EXPECTATION OF PRIVACY

CLIFFORD S. FISHMAN*

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When Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968,¹ it sought to provide law enforcement with a much-needed weapon in the fight against organized crime² while protecting the privacy of oral and wire communications.³ In so doing the Legislature also attempted to satisfy the procedural

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³ S. REP., supra note 2, at 66, reprinted in U.S. CODE CONG. at 2153.
and substantive requirements discussed in *Berger v. New York*¹ and *Katz v. United States*² by delineating "on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."³ Thus, Title III describes in detail who may apply to which courts for authorization to intercept oral or wire communications,⁷ what the application and order must contain,⁴ what crimes may be investigated by means of court-authorized eavesdropping,⁹ the circumstances under which evidence obtained through eavesdropping may be utilized,¹⁰ and the manner in which tapes used to record intercepted conversations are to be sealed and preserved.¹¹

These procedural and substantive provisions, however, were made expressly inapplicable to a number of activities.¹² The most important of the exempted activities is consensual interception or eavesdropping:

It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.¹³

¹ 388 U.S. 41 (1967). The Berger Court, in the context of nonconsensual eavesdropping, delineated certain procedural and substantive safeguards which are constitutional prerequisites to the issuance of an electronic surveillance warrant: (1) There must be probable cause to believe that a particular offense has been or is being committed; (2) the conversations to be intercepted must be particularly described; (3) the eavesdrop must be for a specific and limited period of time to minimize the intrusion; (4) present probable cause must be shown for the continuance or renewal of the eavesdrop; (5) the eavesdropping must terminate once the evidence sought has been seized; (6) there must be notice unless a showing of exigency based on the existence of special facts is made; and (7) there must be a return on the warrant so that the court may supervise and restrict the use of the seized conversations. *Id.* at 54-60; see S. Rep., supra note 2, at 74, *reprinted in U.S. Code Cong.* at 2161-62.
⁵ *Id.* § 2518 (1970).
⁷ *Id.* § 2517 (1970).
⁸ *Id.* § 2518(8).
⁹ See *Id.* § 2511(2)-(3). The Congress exempted certain activities of switchboard operators and employees of communications common carriers and the Federal Communications Commission. *Id.* § 2511(2)(a)-(b). In addition, consensual interceptions by persons acting under color of law and private citizens who are not eavesdropping in furtherance of criminal or tortious conduct are also exempted. *Id.* § 2511(2)(c)-(d). Finally, the constitutional power of the President to protect the nation was not intended to be restricted by Title III. *Id.* § 2511(3); see S. Rep., supra note 2, at 94, *reprinted in U.S. Code Cong.* at 2182.
¹⁰ 18 U.S.C. § 2511(2)(c) (1970). "Intercept" is defined as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical,
This provision was intended to, and did, "largely reflect existing law."4 "Existing law," however in 1968 was, and until quite recently continued to be, in a state of flux. Despite the statutory exception for consensual interceptions, courts struggled with the more fundamental question: Does such activity fall within the search and seizure and warrant provisions of the fourth amendment?

This Article will discuss, in turn, the "existing law" which Congress sought to "reflect" in 1968, constitutional developments in that law since 1968, and several legal and practical questions that either existed prior to or have developed since the enactment of Title III concerning consensual and other interceptions of communications without a court order.5

TITLE III: EXISTING LAW AND SUBSEQUENT DEVELOPMENTS

The Supreme Court first squarely faced the question of whether the fourth amendment requires a warrant for a consensual interception in On Lee v. United States.6 There, a government informant twice wore a transmitter while discussing with the defendant a criminal conspiracy to distribute opium.7 At trial, an agent of the Nar-

or other device."Id. § 2510(4). Title III expressly permits the use of such intercepted communications in court:

Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.


14 S. REP., supra note 2, at 93-94, reprinted in U.S. CODE CONG. at 2182.


16 343 U.S. 747 (1952).

17 The conversations occurred several weeks after the defendant's arrest and while he was free on bail. 343 U.S. at 748-49. This fact did not enter in the Court's decision, which was rendered 12 years prior to Massiah v. United States, 377 U.S. 201 (1964). In Massiah, the defendant, who had been arraigned on narcotics charges and released on bail, discussed his pending case with his codefendant. Federal officials, with the codefendant's consent, monitored the conversations. The Court, not reaching the fourth amendment issue, held that the government's deliberate elicitation of postindictment statements violated the defendant's right to counsel and excluded the testimony concerning the overheard conversations. Id. at 206-07. If the facts in On Lee were before the Court today, in all likelihood the monitored conversations would be suppressed on sixth amendment grounds. See Lopez v. United States, 373 U.S. 427, 444 n.1 (1963) (Warren, C.J., concurring); Comment, Eavesdropping. Informers and the Right of Privacy: A Judicial Tightrope, 52 CORNELL L.Q. 975, 984 & n.69 (1967).

There has been considerable litigation concerning the point at which law enforcement officials must terminate consensual investigative contact with a defendant. The Supreme
otics Bureau who had monitored the conversations described the admissions the defendant had made to the informant. The Court held that eavesdropping with the consent of one of the participants is not an unreasonable search and seizure and that the agent's testimony was, therefore, properly admitted at trial.\textsuperscript{18}

In \textit{Lopez v. United States,}\textsuperscript{19} an agent of the Internal Revenue Service used a wire recorder to record a meeting at which the defendant was present. The Court dealt with this issue in a noneavesdropping context in \textit{Hoffa v. United States}, 385 U.S. 293 (1966). While on trial for violations of the Taft-Hartley Act, Hoffa and others discussed, in the presence of a government informant, their efforts to bribe members of the jury. Subsequently, Hoffa and several others were indicted for jury tampering. At the trial of these new charges the informant was permitted to testify, over objection, to the conversations he had sat in on. The Court, assuming that the jury-tampering conversations were deliberately overheard at government instigation and in the absence of counsel, held that the conversations were admissible since they did not relate to the then current trial but to the altogether different crime of jury tampering. \textit{Id.} at 308. \textit{See also Vinyard v. United States}, 335 F.2d 176 (8th Cir.), \textit{cert. denied}, 379 U.S. 930 (1964). Similarly, in \textit{United States v. Osser}, 483 F.2d 727, 733-34 (3d Cir.), \textit{cert. denied}, 414 U.S. 1028 (1973), the defendant's indictment for and arraignment on contract-rigging charges was held not to preclude use of consensual electronic surveillance to gather evidence of the defendant's subsequent attempts to suborn perjury.

Significantly, \textit{Hoffa, Vinyard,} and \textit{Osser} all involved crimes committed \textit{after} the original charges had been brought. In each, the contested evidence was introduced at the trial of the new, not the original, charges. Where the consensually overheard or intercepted conversations relate to already pending charges or are offered at the trial of those charges, they have been excluded. \textit{See United States v. Frank}, 520 F.2d 1287 (2d Cir. 1975), \textit{cert. denied}, 423 U.S. 1087 (1976). The \textit{Frank} court also indicated that evidence of conversations relating to both pending and new charges "might possibly [be] admitted" at a separate trial of the new charges. 520 F.2d at 1291; \textit{see United States v. Merritts}, 387 F. Supp. 807 (E.D. Ill.), \textit{rev'd in part}, 527 F.2d 713 (7th Cir. 1975).

If a defendant has not yet been formally charged with a crime, law enforcement officials may conduct consensual surveillance of his conversations even though they are on notice that he is represented by counsel, \textit{United States v. Lemonakis}, 485 F.2d 941, 954 (D.C. Cir. 1973), \textit{cert. denied}, 415 U.S. 989 (1974); \textit{United States v. DiLorenzo}, 429 F.2d 216 (2d Cir. 1970), \textit{cert. denied}, 402 U.S. 950 (1971), and may under some circumstances consensually monitor conversations to which defense counsel is a party, \textit{id.}; \textit{United States v. Gartner}, 518 F.2d 633, 637-38 (2d Cir.), \textit{cert. denied}, 423 U.S. 915 (1975); \textit{People v. Holman}, 78 Misc. 2d 613, 356 N.Y.S.2d 958 (Sup. Ct. N.Y. County 1974). Once a defendant has been formally charged, the fact that he is not maintained in custody would be irrelevant. \textit{Cf. Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized}, 56 CALIF. L. REV. 579, 613-14 (1968). In addition, it should be made clear that a significant number of questions are still present in the law. Among the unresolved problems are: (1) which principle, \textit{Massiah} or \textit{Hoffa}, applies if the "new" crime is not a different offense, but merely a continuation of the same criminal scheme, \textit{e.g.}, the continuation of a conspiracy to murder after indictment on that charge; (2) which principle is applicable when the "new" crime is merely a repetition of the old, \textit{e.g.}, the continued sale of narcotics after indictment for previous sales; (3) which principle applies when the indictment has been sealed pending further investigation; and (4) which principle applies if the information sought concerns a crime committed prior to the crime for which the defendant is under indictment. Definitive answers to these questions must await further judicial consideration.

\textsuperscript{18} 343 U.S. at 754, 757-58.
\textsuperscript{19} 373 U.S. 427 (1963).
The defendant, Lopez, offered him a bribe. The defendant argued, inter alia, that his conversations had been seized in contravention of his fourth amendment rights and thus both the agent's testimony and the recording should have been suppressed. Rejecting this contention, the Court stated that, in fact, there had been no governmental eavesdropping in the case, and held that the recording and testimony had been properly admitted at trial.\(^\text{20}\)

Both On Lee and Lopez were based, at least in part, on the then-accepted theory that fourth amendment rights were not violated unless there was a physical trespass into a "constitutionally protected area."\(^\text{21}\) This concept was laid to rest in *Katz v. United States*.\(^\text{22}\) In *Katz*, the government attached a listening and recording device to the outside of a public telephone booth. Through this device FBI agents overheard the defendant's half of his phone conversations and then testified at trial to what he had said. Neither Katz nor the person with whom he had spoken had consented to either the use of the device or the overhearing, recording, or divulging of Katz' statements. Both the defendant and the prosecution saw the issue as whether a public phone booth was a "constitutionally protected area" and whether physical penetration into such an area was necessary before the fourth amendment's search and seizure and warrant provisions would apply.\(^\text{23}\)

The Court, per Justice Stewart, "[declined] to adopt this formulation of the issues."\(^\text{24}\) Noting that "we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard, without any 'technical trespass under . . . local property law,'"\(^\text{25}\) and that "the Fourth Amendment protects people, not simply 'areas,'"\(^\text{26}\) the Court ruled that "[t]he Government's activities . . . violated the privacy upon which [the petitioner] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."\(^\text{27}\) The Court suppressed the "seized" oral statements not because use of an electronic device is inherently unconstitutional,
but rather because the failure to obtain prior judicial authorization for surveillance in the circumstances presented by *Katz* violated the requirements of the fourth amendment.  

Significantly, the applicability of a warrant requirement to the monitoring or recording of a suspect’s statements when a participant to the conversation consents to such activity was not specifically dealt with in *Katz*. True, early in his opinion, Justice Stewart wrote: “[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”  

This, by itself, would indicate that *On Lee* and *Lopez* remained good law. The very next sentence of the opinion, however, reads: “But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” Certainly a criminal conspirator “seeks to protect as private” inculpatory statements which he makes to one whom he erroneously believes to be a co-conspirator. The informant or agent carrying the concealed transmitter or recorder might consent to the use of such devices; but is his consent sufficient? Or, is the consent of the suspect himself required before his words can be “seized” without a warrant by electronic or mechanical means?  

As a result of these unanswered questions, the “existing law” governing the use of consensual surveillance remained unclear in 1968 when Congress enacted Title III and exempted interceptions with the consent of a participant from its provisions. Nonetheless,

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28 Id. at 356-57. Although the *Katz* Court stated that the fourth amendment focuses on “people—and not simply ‘areas,’” and that “the presence or absence of a physical intrusion into any given enclosure” is not the critical consideration in determining the existence of an illegal search and seizure, id. at 353, the continuing importance of an individual’s “right to be secure in [his] house” was reemphasized in Alderman v. United States, 394 U.S. 165 (1969). Reasoning that *Katz* “was [not] intended to withdraw any of the protection which the Amendment extends to the home,” id. at 180, the *Alderman* Court found that the owner of premises has standing to object to the admission of evidence obtained by the government through illegal electronic surveillance conducted on his premises regardless of whether the owner was a party to the monitored conversations. For a discussion of *Alderman*, see notes 76-83 and accompanying text infra.

29 389 U.S. at 351.

30 Id.

31 The *Katz* Court noted that “the very nature of electronic surveillance precludes its use pursuant to the suspect’s consent.” Id. at 358 (emphasis added).

32 There appears to have been little debate in Congress over the constitutionality of the exemption for consensual interception contained in 18 U.S.C. § 2551(2)(c) (1970) in light of *Katz*, although some concern was expressed over the general constitutionality of Title III in light of both *Berger* and *Katz*. See 114 Cong. Rec. 14,158-61, 14,167 (remarks of Sens. Hart and Long). For an excellent discussion of the state of the law in 1968, see Greenawalt, *The
in *United States v. White,* a case which arose prior to, but was decided after the enactment of Title III, a majority of the Court agreed with Congress' conclusion that consensual electronic eavesdropping is not an unreasonable search and seizure under the fourth amendment.

In *White,* an informant had worn a transmitting device on eight occasions while conversing with the defendant about narcotics. At trial, the Government could not locate or produce the informant, and called as witnesses federal agents, who were allowed, over objection, to testify to the conversations they had electronically overheard. On appeal, the Court of Appeals for the Seventh Circuit, interpreting *Katz* as overruling *On Lee,* reversed the defendant's conviction and suppressed the testimony concerning the overheard conversations. Disagreeing with this conclusion, the Supreme Court ruled that the agents' testimony had been properly admitted at trial. It did so, however, with a plethora of opinions, a variety of theories, and by the narrowest of margins.

Chief Justice Burger and Justices Stewart, White, and Blackmun declared that *On Lee* and *Lopez* were both still good law. Noting the absence of a consenting party in *Katz,* Justice White, writing the plurality opinion, rejected the contention that *Katz* may have recognized a "constitutionally protected expectation that a person with whom [the defendant] is conversing will not then or later reveal the conversation to the police." Since there is no significant difference between participant revelation by subsequent reporting to the police and participant revelation by transmission or recording, the plurality concluded that the use of electronic equipment would not transform otherwise constitutional investigative techniques into an unreasonable search and seizure. As an alternative ground for reversal, Justice White adhered to an earlier decision that *Katz* would only be applied prospectively. Thus, according to

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34 405 F.2d 838 (7th Cir. 1969), rev'd, 401 U.S. 745 (1971). In *White,* the Seventh Circuit had held that *Lopez,* which dealt with a concealed tape recorder, was undisturbed by *Katz,* but that *On Lee,* which dealt with a concealed transmitter, was overruled by *Katz.* 405 F.2d at 847. See also note 45 infra.

35 See 401 U.S. at 733-54.

36 Id. at 749. As Justice White noted, the Court had previously held that the fourth amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.,* quoting *Hoffa v. United States,* 385 U.S. 293, 302 (1966).

37 401 U.S. at 751.

38 Id. at 754, citing *Desist v. United States,* 394 U.S. 244 (1969).
the plurality, the Seventh Circuit had not only interpreted *Katz* incorrectly, but had also applied it incorrectly.

Justice Black concurred in the result, based on his dissent in *Katz*, wherein he had opined that only tangible items not conversations, were protected by the fourth amendment. Justice Brennan, also concurring in the result, agreed that *Katz* should only be applied prospectively. Nevertheless, Justice Brennan went on to state that in his opinion, "the Fourth Amendment imposes the warrant requirement in both the *On Lee* and the *Lopez* situations."

Justices Douglas, Harlan, and Marshall, in separate dissents, rejected the notion that *Katz* should only provide prospective relief, and agreed that *On Lee* was no longer viable since, in their view, the fourth amendment requires prior judicial authorization for third-party monitoring of a conversation even if done with the consent of one of the participants. The dissenting Justices, however, did not agree on the continued authority of *Lopez*. Justice Douglas argued that both *On Lee* and *Lopez* had been discredited by subsequent decisions of the Court. Justice Harlan distinguished *On Lee* and *White*, describing them as "third party bugging," from *Lopez*, in which he found an absence of "third party intrusion" and thus no fourth amendment search and seizure. Justice Marshall, while agreeing that *On Lee* should be overruled, did not give any specific indication of his thinking concerning a situation involving a concealed recorder rather than a transmitter.

As a result of this six-opinion division and despite the holding of a majority of the *White* Court that consensual electronic eaves-

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39 401 U.S. at 754 (Black, J., concurring). Justice Black's dissent in *Katz* is reported in 389 U.S. at 364.

40 401 U.S. at 755 (Brennan, J., concurring).

41 Id. at 756.

42 Id. (Douglas, J., dissenting); id. at 768 (Harlan, J., dissenting); id. at 795 (Marshall, J., dissenting). In addition to disagreeing with the decision in Desist v. United States, 394 U.S. 244 (1969)—that *Katz* should only provide prospective relief—Justice Harlan stated that *White* was even more troublesome than *Desist* since general fourth amendment principles, not the *Katz* decision itself, controlled the issues presented in *White*. 401 U.S. at 794-95.

43 401 U.S. at 758-63 (Douglas, J., dissenting).

44 Id. at 776-77, 787 (Harlan, J., dissenting).

45 Id. Chief Justice Warren, concurring in *Lopez*, also distinguished between the use of transmitters, which he found to be within the fourth amendment's purview, and the use of recorders, which, in his view, is not an unreasonable search and seizure. 373 U.S. at 441-45 (Warren, C.J., concurring). Justice Harlan's rationale has been adopted in at least one state, see People v. Beavers, 393 Mich. 554, 227 N.W.2d 511, cert. denied, 423 U.S. 878 (1975), but it has also been criticized as arbitrary and illogical, see Comment, *Eavesdropping, Informers, and the Right of Privacy: A Judicial Tightrope*, 52 CORNELL L.Q. 975, 984 (1967); 17 VILL. L. REV. 350, 358-59 & nn.50 & 51 (1971).

46 401 U.S. at 798-96 (Marshall, J., dissenting).
dropping is not an unreasonable search and seizure, the validity of Lopez and On Lee continued to be challenged in the lower federal courts. Nonetheless, if the decisions of the circuit courts and the Supreme Court’s denials of certiorari from those decisions are indicative, the attack on the constitutionality of nonwarrant consensual interceptions peaked, one vote short of a majority opinion, in White. Every circuit has adopted the principles enunciated by the plurality opinion in White. Moreover, the distinction which at least some members of the Supreme Court sought to establish between the use of a concealed transmitter and a concealed tape recorder has not been employed in any federal decision rendered subsequent to White. Indeed, while White did not involve the consensual inter-


\[\text{Relatively few post-White cases involve the use of transmitters. Tape recorders are now available that are small enough to be concealed upon a person with little likelihood of discovery. Utilization of such recorders greatly enhances the probability that usable tapes will be obtained. In contrast, transmitters are frequently unreliable, particularly in urban areas containing multiple dwelling high-rise buildings. Transmitters have an additional disadvantage in that transmission signals have occasionally been picked up by nearby radios and televisions, enabling an entire neighborhood to monitor the conversation. In New York City, undercover officers are often equipped with both tape recorders and transmitters, the former in the hope of capturing the conversation on tape, the latter in the hope that other officers,}\]
ception of telephone conversations, the circuit courts have read this decision as authorizing such nonwarrant telephone interceptions, without distinction as to whether the telephone conversation is overheard or recorded by the police. 50

In addition to the constitutional arguments that have been raised, defendants have also contended that the fruits of a consensual interception should be suppressed in federal prosecutions when state prohibitions more restrictive than federal statutory and constitutional requirements have been violated. The federal courts have rejected this contention 51 in the context of state law violations by both federal and state officials, reasoning that congressional policy would be frustrated if state evidentiary rules were applicable in federal court 52 and that states can adequately enforce their laws by

monitoring the agent’s activity, will be able to come to his rescue if he encounters difficulties. Nonetheless, several federal cases have dealt with the use of transmitters. See, e.g., United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974); Ansley v. Stynchcombe, 480 F.2d 437 (5th Cir. 1973); United States v. Bishton, 463 F.2d 887 (D.C. Cir. 1972) (per curiam); United States v. Quintana, 457 F.2d 874 (10th Cir.), cert. denied, 409 U.S. 877 (1972); United States v. Holmes, 452 F.2d 249 (7th Cir. 1971), cert. denied, 407 U.S. 909 (1972); United States v. Friedland, 444 F.2d 710 (1st Cir. 1971). See also People v. Murphy, 8 Cal. 3d 349, 105 Cal. Rptr. 138, 503 P.2d 594 (1972), cert. denied, 414 U.S. 833 (1973).


52 The principle that state law does not govern the rules of evidence in federal courts is not of recent origin, as is illustrated by Chief Justice Roger Taney’s remarks interpreting the Judiciary Act of 1789:

[It could not be supposed, without very plain words to show it, that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offences against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another.

United States v. Reid, 53 U.S. (12 How.) 361, 363 (1851). Accordingly, the federal courts have
means of civil suits against those who violate their statutes. For
example, United States v. Neville involved a prosecution, based
almost entirely on an investigation conducted by Illinois law en-
forcement officials, for the transportation of stolen vehicles in inter-
state commerce. With the consent of the defendant's co-conspirator,
police officers, in apparent violation of state law, overheard and
transcribed a telephone conversation between the co-conspirator
and the defendant. At trial, the officer who monitored the phone call
was permitted to testify to the conversation he overheard, and the
Assistant United States Attorney utilized the transcripts of the
overheard conversation to cross-examine the defendant. The Court
of Appeals for the Eighth Circuit affirmed, stating that "wiretap or
other evidence obtained without violating the Constitution or fed-
eral law is admissible in a federal criminal trial even though ob-
tained in violation of state law."

refused to apply state evidentiary standards to the admissibility of evidence obtained by
electronic surveillance. See, e.g., United States v. Shaffer, 520 F.2d 1369, 1371-72 (3d Cir.
1975) (per curiam), cert. denied, 423 U.S. 1051 (1976); United States v. Armocida, 515 F.2d
49, 51-52 (3d Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Keen, 508 F.2d 986,
989 (9th Cir. 1974), cert. denied, 421 U.S. 929 (1975); United States v. Infelice, 506 F.2d 1358,
1365 (7th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); United States v. Castillo, 449 F.2d
1300, 1301 n.2 (5th Cir. 1971); United States v. Teller, 412 F.2d 374, 377 (7th Cir. 1969), cert.

See United States v. Shaffer, 520 F.2d 1369, 1372 (3d Cir. 1975) (per curiam) (dictum),

516 F.2d 1302 (8th Cir. 1975), cert. denied, 423 U.S. 925 (1976).

Neville decision, one party's consent was sufficient to justify eavesdropping in Illinois. Id. In
1976 the statute was amended to require the consent of all parties unless a warrant is
obtained. Id. § 14-2 (Supp. 1976).

516 F.2d at 1309. The Third Circuit reached a similar result in United States v.
Shaffer, 520 F.2d 1369 (1975) (per curiam), cert. denied, 423 U.S. 1051 (1976), wherein it
enumerated certain policy considerations for deciding evidentiary questions solely on federal,
rather than state law: First, "[i]f the states could require federal courts to exclude evidence
in federal criminal cases, some convictions would undoubtedly be lost, and the enforcement
of congressional policy would be weakened," 530 F.2d at 1372; second, state law enforcement
officials could simply request federal agents "to do the tapping in similar cases in the future,
which would be clearly permissible . . . and would be indistinguishable from the point of view
of the person whose call was intercepted," id.; and third, states prohibiting such activity can
enforce their policies "through the use of civil suits against persons" violating the state law.
Id. See also United States v. Beni, 397 F. Supp. 1086, 1088 (E.D. Wis. 1975) and cases cited
therein. In United States v. Keen, 508 F.2d 986 (9th Cir. 1974), cert. denied, 421 U.S. 929
(1975), the court stated that absent a violation of the Federal Constitution, common law
principles, which permit the introduction of evidence irrespective of "its illegal origins," and
not state rules, would apply. 508 F.2d at 989. See also United States v. Hall, 536 F.2d 313,
327 (10th Cir. 1976). State courts, however, do apply more restrictive state laws to the
activities of both state and federal officials. See People v. Jones, 30 Cal. App. 3d 852, 106
Cal. Rptr. 749 (Ct. App.), appeal dismissed on other grounds, 414 U.S. 804 (1973) (evidence
obtained by eavesdropping proscribed by state law inadmissible in state court regardless of
federal involvement).
The logic of this approach is compelling from the perspective of the federal court system. Nonetheless, it appears to establish a new "silver platter doctrine." State officials can knowingly violate their state's laws, so long as the evidence developed during the investigation makes out a federal as well as a state crime and a United States Attorney agrees to accept the case.

TITLE III AND THE EXPECTATION OF PRIVACY

One of the goals Congress sought to accomplish in enacting Title III was "to protect effectively the privacy of wire and oral communications." With minor exceptions, law enforcement officials may not intercept either oral communications or wire communications without a court order unless they have obtained the consent of a participant to the conversation. Similarly, Congress forbade all interceptions of oral or wire communications by private citizens unless the interception is accomplished by "a party to the communication or . . . one of the parties has given prior consent to such interception" and the interception was not conducted "for the purpose of committing any criminal . . . tortious . . . or . . . other

57 The "silver platter doctrine" was based on Weeks v. United States, 232 U.S. 383 (1914). There, the Supreme Court affirmed the admission of illegal evidence procured by local police officers because the "limitations [of the fourth amendment] reach the Federal Government and its agencies." Id. at 398 (citations omitted). Consequently, the federal courts, in determining the admissibility of evidence seized in violation of the Constitution and federal law, based their decisions upon the state or federal character of the seizing entity. See, e.g., Feldman v. United States, 322 U.S. 487, 492 (1944); Byars v. United States, 273 U.S. 28, 32 (1927); Marron v. United States, 273 U.S. 28, 32 (9th Cir. 1926), aff'd on other grounds, 275 U.S. 192 (1927); United States v. Brown, 8 F.2d 630, 631 (D. Ore. 1925), aff'd, 12 F.2d 926 (9th Cir. 1926). The theoretical foundation of this doctrine, however, was undermined by Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), wherein the Court held that the fourth amendment prohibition of unreasonable searches and seizures applies to state officers through the fourteenth amendment. Subsequently, in Elkins v. United States, 364 U.S. 206, 213-16 (1960), the Court abrogated the silver platter doctrine, holding that evidence obtained by a state officer's illegal search and seizure is inadmissible in evidence in a federal trial.

In recent years, several states have interpreted their own laws and constitutions more restrictively than federal courts have in applying the analogous federal law. This has been particularly true in such areas as electronic surveillance, search and seizure, and the use of confessions obtained in violation of a defendant's fifth amendment rights. Such evidence, excluded from state trials, may nonetheless be admitted in federal trials. See 18 CRIM. L. REP. (BNA) 2507 (1976). As a result, a new "silver platter" concept may be developing, although based on a different legal theory than the pre-Elkins doctrine. See United States v. Ramsey, 367 F. Supp. 1307 (W.D. Mo. 1973). See generally Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting).


59 See note 12 supra.

injurious act." Communications intercepted in violation of these or other provisions of Title III may not be admitted into evidence.

In most instances, then, it is a relatively easy task to determine under Title III whether an oral or a wire communication may be lawfully intercepted without a court order, and whether the contents of the communication may be disclosed: absent a court order, if no participant to the communication consents to its interception, the privacy of the communication is protected from interception or disclosure. Determining where the "privacy of communications" ends and the right to intercept and disclose begins, however, is not always so simple. Is invocation of the statutory protection dependent upon the participants having an expectation of privacy when they communicate, and if so, by what standards is that expectation to be measured? Is the consent of a nonparticipant to the communication sufficient to defeat that expectation, and if so, under what circumstances? Is it proper to frustrate one conversant’s expectations of privacy by misleading him as to the identity of the other conversant? If a private citizen intercepts a communication under circumstances requiring suppression if conducted by law enforcement officials, may law enforcement officials nonetheless use or disclose the fruits of the interception?

Title III, state statutes modeled in whole or in part upon Title III, and the courts of several jurisdictions have dealt with these issues, occasionally in contradictory fashion. This section will discuss the expectation of privacy as it affects the interception of oral

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1 Id. § 2511(2)(d).
2 Id. § 2515 provides:
Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. See also id. § 2511(1), which makes the willful interception of a communication or the disclosure or use of an intercepted communication in violation of that subsection punishable by imprisonment for up to five years and/or a fine of up to $10,000.

3 The "contents" of a communication are defined as including "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." Id. § 2510(8).

4 For a description of the exceptions to the general protection provided by Title III, see note 12 supra.

5 The constitutional underpinnings of the exclusionary rule do not mandate exclusion of evidence obtained illegally by a private citizen and surrendered to governmental authorities since the fourth amendment's protection against unreasonable searches and seizures only restricts governmental action. See Hoffa v. United States, 385 U.S. 293 (1966); Burdeau v. McDowell, 256 U.S. 465 (1921); note 113 infra.
and wire communications, interceptions by impersonation, and use by law enforcement officials of interceptions by private citizens.

Oral Communications and the Expectation of Privacy

Title III defines "oral communication" as "any . . . communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." Discussing this definition, the Senate Judiciary Committee commented:

The person's subjective intent or the place where the communication is uttered is not necessarily the controlling factor. Nevertheless, such an expectation would clearly be unjustified in certain areas; for example, a jail cell or an open field. . . . The person's expectation that his communication is or is not subject to "interception," . . . is thus to be gathered and evaluated from and in terms of all the facts and circumstances. If "all the facts and circumstances" render the conversants' expectations of privacy unjustified, the communication is not an oral communication within the definition, and the interception, use, and disclosure of that communication does not violate the statute.

The Court of Appeals for the Second Circuit applied the definition of oral communication in affirming a conviction for possession of heroin in United States v. Pui Kan Lam. There, the wife of the superintendent of an apartment building informed the authorities that four oriental males had attempted to gain admission to an apartment previously occupied by other orientals who had been arrested on heroin importation charges. Federal agents investigated the complaint and received permission from the current tenants to search the apartment and to "'do anything they want[ed] to.'" After discovering several pounds of heroin hidden behind a baseboard, the agents concealed a microphone under a mattress in the room where the heroin was secreted. They did not obtain a warrant authorizing the use of electronic eavesdropping. An hour and a half later, as was expected, three of the four defendants returned to the


S. Rep., supra note 2, at 90, reprinted in U.S. Code Cong. at 2178 (citations omitted).


483 F.2d at 1203.
apartment, claiming they had come to retrieve immigration papers that had been left there. A federal agent, posing as the superintendent's helper, admitted them and then left them in the apartment, where their activities were monitored and their conversations, in Chinese, recorded by the use of the concealed microphone. The defendants were arrested as they left the apartment with a shopping bag containing the heroin.70

At trial, the Government introduced, as rebuttal evidence, the tape and a translated transcript of the recorded conversation. The defendants were convicted and, on appeal, they argued that the interception was unlawful under Title III and the fourth amendment. Acknowledging the lack of a warrant or participant consent, the Second Circuit nonetheless found that the defendants did not have a justifiable expectation of privacy.71 As a result, the fourth amendment was inapplicable and there had been no oral communication as defined in Title III. The court reasoned:

As we have been advised, "the Fourth Amendment protects people, not places," . . . and the statutory definition of an "oral communication" tracks this constitutional concept. The question we have before us is whether the subjective expectation of privacy violated by the allegedly illegal intrusion is one society is prepared to recognize as "justifiable. . . ." Measured by this objective standard appellants' expectations must fail. The interception here did not occur in a public phone booth, . . . a suspect's home, . . . or office, . . . or the home of a friend into which appellants had been invited. . . . Rather it occurred in the house of complete strangers to which appellants had made several suspicious visits and into which they tried to gain entry by false representations, which alone would seem sufficient to deny them any expectation of privacy. Further, appellants were granted entry into the house by a "superintendent's helper" who then departed and left them alone. Under the circumstances appellants may be held to have assumed that their activities might be monitored.72

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70 Id. at 1204.
71 As to two defendants who had not been present in the apartment when the conversations were monitored, the court held that they did not have standing to challenge the legality of the interception on either constitutional or Title III grounds, since these defendants had not established "that their personal rights were violated by the allegedly illegal interception." Id. at 1205.
72 Id. at 1206 (emphasis added) (citations omitted) (footnote omitted). The last two sentences of the quoted passage seem inherently contradictory. When the defendants were left alone, their subjective expectations of privacy presumably were enhanced rather than diminished.
In effect, the Second Circuit has held that under these somewhat unusual facts, the protection of society from the distribution of heroin is more important than protection of these defendants' subjective expectations of privacy.73

Notably, the tenants of the apartment had given the federal agents permission to "do anything they want[ed] to."74 This implied consent by the tenants to the use of the bug was one of the facts considered by the Second Circuit in evaluating the reasonableness of the defendants' expectations.75 Four years prior to Pui Kan Lam, the Supreme Court, in a footnote in Alderman v. United States,76 indicated that consent by the owner of the premises might have great significance at least when the owner was a criminal associate of the third-party conversants. The issues in Alderman included whether a defendant had standing to suppress conversations in which he did not participate, but which were intercepted on his premises.77 While discussing this question, the Court noted:

73 Interestingly, after finding that the defendants had no justifiable expectation of privacy under the circumstances and thus the conversation was not protected, the court stated: Additionally, in delineating the scope of the statutory and constitutional protections, the value of the law enforcement activity, as well as the officers' reasons for not obtaining a warrant, should also be considered. The value of the interception here is obvious, since it enabled relevant evidence against appellants to be gathered that could be obtained by no other means. The reason for not securing a warrant was simply, and justifiably, the pressure of time. Id. at 1206-07 (citations omitted). This discussion of the "value of the law enforcement activity" at least suggests that under different circumstances the court might impose limits on nonwarrant eavesdropping even in the absence of an expectation of privacy. Cf. White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (en banc) (undercover police surveillance of university classroom prima facie violation of State and Federal Constitutions); text accompanying note 258 infra.

74 See 18 U.S.C. § 2511(2)(c) (1970); cf. S. REP., supra note 2, at 94, reprinted in U.S. CODE CONG. at 2182 (defining party as the actual participant). On the other hand, even if the agents had bugged the apartment without the tenants' permission, the defendants would have lacked standing to assert a violation of the tenants' right to enjoy the premises free from unreasonable search and seizure.

75 A five-Justice majority held that such a defendant would have standing even though his "conversational privacy" would not have been violated. Noting that the fourth amendment secures the individual's right to enjoy his premises free from unreasonable searches and seizures and that unlawfully overheard conversations, like physical evidence seized during an illegal search, are "fruits of an illegal entry," id. at 177-78, the Court stated:

The rights of the owner of the premises are as clearly invaded when the police enter and install a listening device in his house as they are when the entry is made to undertake a warrantless search for tangible property; and the prosecution as surely employs the fruits of an illegal search of the home when it offers overheard third-party conversations as it does when it introduces tangible evidence belonging not to the homeowner, but to others.
Those who converse and are overheard when the owner is not present . . . have a valid objection unless the owner of the premises has consented to the surveillance. . . . The Fourth Amendment protects reasonable expectations of privacy and does not protect persons engaged in crime from the risk that those with whom they associate or converse will cooperate with the government.\textsuperscript{76}

Taken at face value, this language suggests that law enforcement officials, having obtained the cooperation of a member of a criminal organization, can lawfully bug their informer’s premises and intercept the conversations of his criminal associates regardless of the informer’s presence and without either a court order or the consent of a participant to the conversations.\textsuperscript{77}

Thus, the \textit{Alderman} footnote indicates that a person’s expectations of privacy are not justified when he is on a criminal associate’s premises if that criminal associate has consented to the eavesdropping, and \textit{Pui Kan Lam} holds such expectations unjustified when the conversants are intruding on another’s premises under false pretenses and with criminal design.\textsuperscript{80} In each instance, the authorities

\textsuperscript{76} 394 U.S. at 179 n.11 (emphasis added) (citations omitted), \textit{citing} Hoffa v. United States, 385 U.S. 293, 303 (1966). For a discussion of Hoffa, see note 17 supra.

\textsuperscript{77} If a criminal cannot have a reasonable expectation that his associates will not cooperate with the police, conversations conducted on premises belonging to a criminal associate will not be “oral communications” at all if the owner consents to surveillance. Consequently, the evidence of these conversations will not be subject to the exclusionary rule of Title III. As to the effect of the owner’s consent when the conversants are not criminal associates, see note 83 infra.


Interesting questions of law are likely to arise when the overheard conversations were conducted via citizen band radios in those states which protect communications without.
would appear to have, if not probable cause, at least a reasonable suspicion that unlawful activity was afoot. Would the denial of such expectations extend to other situations and other types of premises? Consent by the owner to the interception of conversations on his premises should not be sufficient to overcome the conversants' expectations of privacy if the conversation is privileged.\(^1\) Nor should such consent authorize indiscriminate interceptions of conversations in quasi-public, commercial, industrial, or governmental premises,\(^2\) since allowing eavesdropping on such a widespread scale would have a disastrously chilling effect on the exercise of first amendment freedoms.\(^3\) Moreover, the incorporation of such a broad exception into the federal definition of oral communication would seriously jeopardize the privacy of conversation and consequently thwart one of the express purposes underlying the enactment of Title III. The question remains, however, exactly where the line separating justified from unjustified expectations of privacy is to be drawn.\(^4\) The Court of Appeals for the First Circuit encountered this

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\(^2\) The use of surveillance in public or quasi-public places is deemed impliedly consented to, if the surveillance is used for security reasons. See S. Rep., supra note 2, at 94, reprinted in U.S. Code Cong. at 2182.

\(^3\) The footnote in Alderman apparently limits the ability of an owner to authorize interceptions on his premises to situations where the parties to the intercepted conversation are criminal associates of the owner. An absent owner could not authorize law enforcement officials to monitor conversations of persons lawfully on his premises who were not engaged in criminal activity, any more than an owner could himself conduct such nonconsensual surveillance. In such a situation, the rationale of the Alderman footnote would not apply, the "value of the law enforcement activity," see note 73 supra, would be nil, and the conversants' expectations of privacy would be justified, see Katz v. United States, 389 U.S. 347 (1968). Violation of those expectations would subject the owner and the law enforcement officials to criminal prosecution, see 18 U.S.C. § 2511(1) (1970), and to civil liability, see 18 U.S.C. § 2520 (1970).

\(^4\) This question has often arisen in situations involving interception of the conversation of an individual in custody. Whether a particular jurisdiction allows its officials to monitor prisoners' conversations would appear to depend in part upon how that jurisdiction defines those "oral communications" that are protected from nonwarrant, nonconsensual interception. Jurisdictions which protect only conversations conducted in circumstances justifying an expectation of privacy are more likely to permit interception of prisoners' conversations. See, e.g., S. Rep., supra note 2, at 90, reprinted in U.S. Code Cong. at 2178. Those states which protect all oral communications probably do not permit such interceptions. See note 80 supra. Telephone conversations between prisoners and people outside the facility are likely to be immune from interception and disclosure since definitions of "wire communications" do not utilize the expectation of privacy concept. See notes 92-102 and accompanying text infra;
issue in *United States v. Padilla*, and reached a conclusion which appears to conflict with the Supreme Court's suggestions in *Alderman* and perhaps the Second Circuit's holding in *Pui Kan Lam*.

In *Padilla*, government undercover agents, negotiating a purchase of narcotics from the defendant, agreed to meet with him in a hotel in Puerto Rico. The government rented a room for Padilla and a room for its agents. Both rooms were rented under the name of one of the agents. A hidden microphone was installed in defendant's hotel room and used to monitor and record Padilla's conversations with the undercover agents.

The First Circuit, in upholding the suppression of these tapes, reasoned:

The government would have us overlook the fact that a microphone was installed in the hotel room without prior authority and consider the case as if the agent carried a recording device on him, thus bringing it within the authority of *United States v. White* . . . . It assures us that only conversations between the agent and defendant were recorded.

. . . .

The government's position would turn on its head the carefully tailored exception to the *Katz* protection afforded one's expectation of privacy . . . . Electronic devices could be installed for lengthy periods of time without antecedent authority, so long as only a suspect's conversations with police agents were offered in evidence and the enforcement officials alleged that nothing else was recorded. Under this approach a room or an entire hotel—could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur.

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California law provides that when a person is in custody his circumstances are such that he should "reasonably expect that [his] communication[s] may be overheard or recorded," Cal. Penal Code § 632(c) (West 1970), and evidence of these conversations is regularly admitted at trial. See, e.g., United States v. Hearst, 412 F. Supp. 888 (N.D. Cal. 1976); People v. Newton, 42 Cal. App. 3d 292, 116 Cal. Rptr. 690 (Ct. App. 1974), cert. denied, 420 U.S. 937 (1975); People v. Todd, 26 Cal. App. 3d 15, 102 Cal. Rptr. 539 (Ct. App. 1972). However, interception of communications between a prisoner and his attorney, clergyman, or physician is generally prohibited. See Cal. Penal Code § 636 (West 1970). See also North v. Superior Court, 8 Cal. 3d 301, 102 P.2d 1305, 104 Cal. Rptr. 833 (1972) (en banc), discussed in Comment, 76 W. Va. L. Rev. 228 (1974), wherein the court held that tapes made of a conversation between a prisoner and his spouse should not have been admitted into evidence since the couple had been lulled into believing that their conversation was confidential, and they had, therefore, a reasonable expectation of privacy.

520 F.2d 526 (1st Cir.), cert. denied, 415 U.S. 984 (1975).

520 F.2d at 527-28 (citations omitted).
Furthermore, the Padilla court read White as limited to its facts, stating that although a person's expectation of privacy can lawfully be "frustrated" when a defendant mistakenly confides in one who is a government agent, the "built-in limitation . . . is that no more can be recorded than is given to one who is, mistakenly or not, trusted. When one's confidante leaves his premises, he is left with an expectation of privacy in his surroundings which is not only actual but justifiable . . . ."87

It is difficult to discern the precise rationale upon which the court based its suppression ruling. If "only conversations between the agent and the defendant were recorded,"88 the decision was apparently premised upon what the court saw as a violation of the defendant's proprietary, rather than conversational, privacy. But the decision does not make clear whether the court concluded that the hotel room was a constitutionally protected area within which the defendant had a justifiable expectation of privacy such that the installation of the bug, although not the manner in which it was used, constituted a violation of that privacy.

As a result of the court's incomplete discussion of its holding, the intended effect of the decision is difficult to discern. A general prohibition on the bugging of premises without a court order would present a conflict with Pui Kan Lam as well as with the dicta of the Supreme Court in Alderman. On the other hand, if Padilla is read as suppressing the recordings because the room, though technically not the defendant's premises, was in fact his residence and therefore constitutionally protected from government intrusions without either a court order or his consent, the First Circuit's holding may be harmonized with the other precedents in this area.

In Commonwealth v. Donnelly,89 for example, an informant told government officials that the defendant had offered to sell him stolen United States bonds. The informant then met the defendant in the informant's hotel room, which the government had rented and bugged with the informant's consent, and discussed the sale of the bonds. The next day, the defendant returned, sold some of the bonds, and was arrested. On appeal from the defendant's convic-

87 Id. at 527. The court apparently concluded that the hotel room was "his (Padilla's) premises" even though it had been rented by and in the name of government agents who had consented to the placement and use of monitoring equipment therein. Moreover, the court found the defendant's expectations of privacy therein justified even though he intended to use the room to commit a crime.

88 Id. at 527.

tion, the Superior Court of Pennsylvania held that the installation of the eavesdropping device in the informant's room did not violate either Title III or the fourth amendment since the informant had consented to the recording. Unlike *Padilla*, the defendant in *Donnelly* was not residing in the room, and therefore did not have a justifiable expectation of privacy with regard to the hotel room.

Despite the possibility of reconciliation between *Padilla* and other decisions dealing with justifiable expectations of privacy, the parameters of this concept with regard to the interception of oral communications are still quite vague. Whether *Padilla* conflicts with *Pui Kan Lam*; whether the inferences which may be drawn from the *Alderman* footnote become law; whether, in sum, justifiable expectations are to be found in many or only a few circumstances where criminal activity is afoot—all are issues at the most rudimentary stage of development.

**Wire Communications**

The Title III definition of "wire communication" differs significantly from the definition of "oral communication." A wire communication is

any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

A telephone call or telegram is a wire communication within this definition and is thus protected by Title III regardless of whether the

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80 233 Pa. Super. at 413, 336 A.2d at 639.
81 Cf. Ladner v. State, 276 So. 2d 686 (Miss. 1973), wherein an undercover agent reserved a hotel room at the request of defendant for the purpose of making a drug sale. A hole was cut in the curtains in the room so that police officers might observe the transaction. Id. at 687. Although the room was not bugged as in *Donnelly* and *Padilla*, the undercover agent wore a transmitter which enabled officers behind the curtains to hear the conversation. The defendant came to the hotel room, the sale was made, and the officers entered the room and arrested the defendant. Id. The Supreme Court of Mississippi rejected defendant's claim that the testimony of the eavesdropping officers was illegally obtained and thus inadmissable. This claim was based on defendant's contention that because she had asked the agent to reserve the room, it was "her room" and thus the entry of the officers without a warrant was illegal. Id. Noting that one involved in illegal activities must assume the risk that an associate may report to the police, the court declared that "it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound." Id. at 688.
participants actually have any justifiable expectations of privacy.\textsuperscript{93} Were it otherwise, all conversations conducted on partyline telephones might be vulnerable to warrantless wiretapping.

A case illustrating this possibility, \textit{Lee v. Florida},\textsuperscript{94} reached the Supreme Court in 1968. There, state police, using special equipment, hooked into the defendant’s partyline telephone and recorded incriminating conversations, which were played at trial. Basing its decision upon the prohibition against interception and divulgence of telephone conversations contained in section 605 of the Communications Act of 1934,\textsuperscript{95} rather than upon the underlying fourth and fourteenth amendment issues,\textsuperscript{96} the Court rejected the Government’s argument that there had been no interception since a partyline user “should realize that [he] . . . might be overheard,”\textsuperscript{97} and reversed the conviction.\textsuperscript{98} Although the Court observed that this was not a case “where the police merely picked up the receiver on an ordinary party line,” it nonetheless implied that it would have suppressed the tapes even were it such a case on the grounds that “[t]here is nothing in the language or history of § 605 to indicate that Congress meant to afford any less protection to those who, by virtue of geography or financial hardship, must use party-line telephones.”\textsuperscript{99} Had the events in \textit{Lee} occurred after the enactment of

\textsuperscript{94} 392 U.S. 378 (1968).
\textsuperscript{95} Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103 (1934) (current version at 47 U.S.C. § 605 (1970)). The \textit{Lee} decision was rendered shortly before Congress enacted Title III.
\textsuperscript{96} See 392 U. S. at 379 n.2.
\textsuperscript{97} Id. at 380-81.
\textsuperscript{98} Section 605, dealing only with wire communications, banned all interceptions of these communications and any divulgence of information gained through an interception. Thus, the threshold definitional question involved the term “interception.” In Rathbun v. United States, 355 U.S. 107 (1957), the Supreme Court held that interception does not include listening to a telephone conversation on an extension phone with the consent of one of the parties to the conversation, since “there has been no violation of any privacy of which the parties may complain.” \textit{Id.} at 111. This apparent incorporation of a justifiable expectation of privacy test into the definition of interception was restricted in \textit{Lee} to those situations in which a conversant consents to the surveillance. The Court’s treatment of wire communication under § 605 was apparently perpetuated by Congress in Title III. Unlike an oral communication, a Title III wire communication is not defined with reference to justifiable expectations. Rather, a wire communication interception requires participant consent to justify a nonwarranted interception, just as under § 605 before 1968, consent was necessary to justify any interception of a wire communication. With enactment of Title III, § 605 was amended to allow interceptions that comply with Title III requirements. The present version of § 605 is aimed at regulating the conduct of the employees of communications common carriers and not the conduct of the public. S. \textit{Rept.}, supra note 2, at 107-08, \textit{reprinted in U.S. Code Cong. at 2197}.
\textsuperscript{99} 392 U.S. at 381 n.5.
Title III, the defendant's conversation would have been a wire communication, shielded by Title III from the nonwarrant and non-consensual surveillance conducted in *Lee*.\(^{100}\)

The absence of an expectation of privacy condition in the definition of wire communication makes it clear that whatever significance might be attached to the consent of the owner of the premises on which oral communications are intercepted,\(^{101}\) the owner's consent to the interception of conversations on his telephone is irrelevant to the existence of a wire communication if he is not a party to the call.\(^{102}\) Justifiable privacy expectations must, nonetheless, be considered in the wire communication area when a nonwarrant interception is consented to by a participant but is objected to as violative of another person's fourth amendment rights. Such a case is presented when police officers, executing a search warrant for gambling records and paraphernalia, attach a recording device to telephones on the premises and answer and record incoming calls by impersonating the intended recipient.\(^{103}\) In this situation, the


\(^{101}\) See text accompanying notes 75-79 *supra*.

\(^{102}\) It should be noted, however, that under Title III an interception does not occur unless a device is used, 18 U.S.C. § 2510(4) (1970), and the definition of device excludes a telephone used in the regular course of the subscriber's business. *Id.* § 2510(5). Thus, an owner's consent to use of an extension telephone may have significance with respect to the occurrence of an interception of a wire communication. See note 124 and accompanying text *infra*. It should not, however, have any effect on the initial determination that a wire communication has occurred. Cf. *United States v. San Martin*, 469 F.2d 5 (2d Cir. 1972), cert. denied, 410 U.S. 934 (1973). In *San Martin*, a suspect arrested for narcotics importation agreed to let federal agents tap the telephone in his hotel room. A second suspect, Gonzalez, entered the room, used the phone, and had a conversation with the defendant, San Martin. After the phone call, Gonzalez was arrested, "and, *without being told by anyone about the bug, agreed to cooperate.*" 469 F.2d at 6 (emphasis in original). As a result of Gonzalez' cooperation, San Martin was arrested later that day for possession of heroin and was subsequently convicted. On appeal, the Second Circuit expressed strong misgivings about the lawfulness of the tap, but affirmed the conviction. The court stressed that "[*t]he contents of the conversation were not incriminating or offered in evidence," that "Gonzalez' cooperation was not effected by the use of the tap," and that therefore "the Government had an independent source, Gonzalez himself," which led to "evidence of [defendant's] involvement . . . Thus, even if there were a poisoned tree (the wiretap) . . . [the Government] had an alternate healthy tree from which to eat." *Id.* at 8. Had the tap in *San Martin* contributed in any material way to the defendant's arrest or conviction, it is clear that reversal would have been mandated. This result would be necessary because "[*t]he exclusionary prohibition extends as well to the indirect as the direct products of such invasions" and "protects against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'" *Wong Sun v. United States*, 371 U.S. 471, 484, 485 (1963) (citation omitted). *See also United States v. Cole*, 463 F.2d 163 (2d Cir.), cert. denied, 409 U.S. 942 (1972).

\(^{103}\) Congress clearly intended that the consent of the impersonator would be sufficient to qualify the interception for exemption under the consensual provisions of Title III. The
officers may be regarded as parties to the conversations, whose consent would normally overcome constitutional and federal statutory objections\(^{104}\) to the use of the evidence.\(^{105}\) This technique, however, differs significantly from the consensual interception involved in *White*. There, the defendant lacked a justifiable expectation of privacy because he was conversing with a known associate and assumed the risk that his associate might be cooperating with the police. In impersonation interceptions, the privacy expectations held by both the caller and the intended recipient of the call are frustrated.

In *Flaherty v. Arkansas*,\(^{106}\) a case involving interceptions by impersonation, Justice Douglas, joined by Justices Brennan and Marshall, dissented from the denial of certiorari to the Supreme Court of Arkansas and asserted that:

\[\text{Senate Report described the party capable of giving consent as "the person actually participating in the communication." S. Rsp., supra note 2, at 94, reprinted in U.S. Code Cong. at 2182, citing United States v. Pasha, 332 F.2d 193 (7th Cir.), cert. denied, 379 U.S. 839 (1964). *Pasha* involved the introduction at trial of recorded phone calls to the defendants' gambling business. The calls had been answered by a government agent who gave the name of one of the defendants upon being asked his identity. The court rejected the defendants' contention that use of the evidence produced by the impersonation violated their fourth and fifth amendment rights. In so holding, the court cited *Olmstead v. United States*, 277 U.S. 438 (1928), which "held that telephone conversations intercepted by police officers were not protected by the fourth and fifth amendments." 332 F.2d at 197. *Accord*, State v. Carbone, 38 N.J. 19, 183 A.2d 1 (1962). As to the defendants' claims that the impersonation violated § 605 of the Communications Act of 1934 and hence the product thereof was inadmissible, the court held that "impersonation of the intended receiver is not an interception within the meaning of the statute." 332 F.2d at 198. The approval with which *Pasha* was cited indicates that Congress intended to approve interception by impersonation. *See State v. Vizzini*, 115 N.J. Super. 97, 278 A.2d 235 (App. Div. 1971) (impersonation interception does not violate Title III, constitutionality of use of impersonation not discussed). The overruling of *Olmstead* in *United States v. Katz*, 389 U.S. 347, 353 (1967), however, revitalizes the constitutional claims of individuals in circumstances similar to those in *Pasha*. *See* text accompanying notes 106-08 infra.\]

\(^{104}\) See note 103 supra.

\(^{105}\) The federal courts, in the limited instances wherein they have faced the question, have held that interception by impersonation does not violate either the Constitution or federal statute. *See United States v. Pasha*, 332 F.2d 193 (7th Cir.), cert. denied, 379 U.S. 839 (1964). *See also United States v. Lewis*, 87 F. Supp. 970 (D.D.C.), rev'd on other grounds sub. nom. *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950). It should be noted, however, that these cases were decided prior to enactment of Title III and hence focused upon the word "intercept" as used in § 605 of the Communications Act of 1934. Although a New Jersey state court has held that interception by impersonation meets the statutory specifications of Title III, *see State v. Vizzini*, 115 N.J. Super. 97, 278 A.2d 235 (App. Div. 1971), the federal courts have not determined the constitutional and statutory merits of impersonation interception after the decisions in *Katz* and *White* and the enactment of Title III. Since such interceptions have been specifically authorized in at least one state, *see* Del. Code tit. 11, § 1336(b) (1974) (prosecutions for gambling offenses only), and apparently authorized by Congress, *see* note 103 supra, the critical question is the constitutionality of this technique.

Lopez and White do not reach the instant case. The principle underlying them is that when one reveals information to an individual, one takes the risk that one's confidence in that individual is misplaced . . . . But here the callers were deceived as to the identities of the individual with whom they were speaking.\(^{107}\)

Justice Douglas foresaw ominous implications in the impersonation concept:

Allowing the government to practice deception in this case carries the seeds of destroying a substantial part of the congressional plan in Title III and its constitutional underpinnings. . . . [T]he principle would seemingly extend beyond this situation, even to the situation where the police intercepted calls before they reached a recipient's telephone and mimicked the intended recipient's voice, inducing a conversation to which the police were "parties." . . . We have not yet reached the point where the people must use secret passwords to establish their identities when communicating by telephone.\(^{108}\)

One would hope and expect that our courts would never permit the type of impersonation interceptions feared by Justice Douglas. To avoid this result, it seems appropriate to require, under the fourth amendment, that such interceptions be made pursuant to a search warrant which contains an authorization to record the incoming phone calls, a direction that innocent calls be terminated as quickly as possible, and a limitation of the interception period to the time necessary to complete the physical search of the premises.\(^{109}\)

Since the receiving officers do consent to the interception, however, a wiretap warrant under Title III would be unnecessary.\(^{110}\) Interceptions by impersonation would thus be subjected to prior judicial scrutiny and remain limited to search warrant situations, thereby foreclosing the possibility of expansion feared by Justices Douglas, Brennan, and Marshall. At the same time, this law enforcement

\(^{107}\) 415 U.S. at 999 (Douglas, J., dissenting) (footnote omitted).

\(^{108}\) Id. at 999-1000.

\(^{109}\) Such provisions seem necessary to comply with the fourth amendment requirement that a search warrant "particularly describe the . . . thing to be seized," and to prevent the warrant from purporting to authorize the use of impersonation to conduct an impermissibly broad "general search" of all incoming calls. See also Berger v. New York, 388 U.S. 41, 58-60 (1967) (eavesdropping warrants must limit the time for and the conversations subject to interception).

technique would retain its needed flexibility by avoiding the time-consuming requirements of Title III.\textsuperscript{111}

Use of Private Citizen Interceptions

In enacting Title III Congress sought to protect the privacy of oral and wire communications from intrusion by private citizens as well as by law enforcement officials. Thus, interceptions by private citizens are proscribed unless a party to the conversation consents to the eavesdropping.\textsuperscript{112} Many states have gone even further, banning interceptions by private citizens altogether unless all parties to the communication consent to the interception.

When an individual intrudes upon the privacy of another, either inadvertently or deliberately, may law enforcement officials utilize the fruits of the interception against the victim of the intrusion? It is generally held that the fourth amendment excludes the fruits of unreasonable searches and seizures conducted by the state, but does not preclude the state from using the fruits of searches and seizures conducted by private citizens.\textsuperscript{113} Does this principle apply when the private "search and seizure" involves the interception of communications? If law enforcement officials may use the fruits of such interceptions, to what extent may they do so? Does it matter whether the interception was an inadvertent or a deliberate intrusion into the privacy of others in violation of law?

Title III expressly prohibits the admission of evidence gained through unlawful interceptions.\textsuperscript{114} Although there is little, if any, federal law interpreting the effect of this prohibition on eavesdropping by private individuals, the courts of several states have dis-

\textsuperscript{111} Congress intended to exclude impersonation eavesdropping from the Title III warrant requirements. See note 103 supra.

\textsuperscript{112} 18 U.S.C. § 2511(2)(d) (1970); see S. REP., supra note 2, at 69, reprinted in U.S. Code Cong. at 2156, where it states that "the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants." Moreover, while Title III states that it "shall not be unlawful" for a private citizen to intercept a wire communication when he is a party or a party has consented, it explicitly forbids consensual interceptions for criminal or tortious purposes. 18 U.S.C. § 2511(2)(d) (1970).


cussed the permissibility under state law of police use of information obtained by private citizen interceptions. These decisions are discussed in this section, with regard to both inadvertent and deliberate, unlawful interceptions by private citizens.

1. The Accidental Good Citizen Interception

When a private citizen inadvertently intercepts an incriminating conversation to which he is not a party and reports what he has heard to the authorities, it has generally been held that law enforcement officials may use this information. Such a result has been reached when incriminating conversations, inadvertently overheard on a partyline telephone, were reported to the police, resulting in the defendant’s conviction for homicide, and when a suspicious telephone conversation, accidentally overheard by a hotel desk clerk, led to the seizure of LSD and marijuana. In each case, the courts approved the use of the intercepted information by the police and the admission of the accidental eavesdropper’s testimony at trial despite the fact that the citizens listened for a fairly extended period of time.

The courts of two states have also had occasion to consider whether, subsequent to a private citizen’s inadvertent interception due to a crossing of telephone lines, the police may use the malfunctioning phone to monitor criminal conversations and gather evidence leading to the arrest of the person whose phone had crossed

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115 Roberts v. State, 453 P.2d 898 (Alas. 1969), cert. denied, 396 U.S. 1022 (1970). The interception in Roberts was truly inadvertent, as the subscriber had requested and received a private telephone line which the phone company then converted to party line service without advising the subscriber.

116 State ex rel. Flournoy v. Wren, 108 Ariz. 356, 498 P.2d 444 (1972) (en banc) (accidental interception not a violation of Title III). In Williams v. State, 507 P.2d 1339 (Okla. Crim. App. 1973), a hotel manager, answering a call to the switchboard from one of the rooms, overheard and recorded the commission of a murder. Reasoning that the hotel manager had not interfered with any telephone lines, but had instead recorded a conversation to which he was a party, the court stated that a Title III interception had not occurred and the statute's exclusionary rule did not apply. Id. at 1341-42. Consequently, the court, though it did not explicitly attach significance to the private-citizen status of the hotel manager, affirmed the conviction and held that the recording had been properly received in evidence. Although the result in this case is clearly justified, the interpretation of the term interception does not comport with congressional intent. See S. Rep., supra note 2, at 90, reprinted in U.S. Code Cong. at 2178. A preferable rationale would acknowledge that use of the tape recorder was an interception but, due to the hotel manager's consent, not one in violation of Title III. See 18 U.S.C. § 2511(2)(d) (1970).

with the private citizen's. In *State v. McCartin*, a local resident asked police to investigate strange noises and voices on his daughter's telephone. Listening in on the telephone, the police heard extensive discussions of horse race betting and afterwards recorded other conversations involving a gambling operation. The police used the information obtained from the eavesdropping to locate the defendants' premises and, following the issuance of a search warrant, seized money and gambling paraphernalia.

On a motion to suppress the evidence obtained as a result of the allegedly illegal interceptions, the defendant argued, in effect, that the police were prohibited by Title III and New Jersey's electronic surveillance statute from taking advantage of his bad luck. The New Jersey Superior Court, however, ruled that evidence of the overheard conversations would not be suppressed since there had not been a willful interception under either Title III or New Jersey law. With respect to the conversations overheard by the citizen, the court found that the citizen's actions had been inadvertent and unintentional, and thus not within the proscriptions of the federal and state statutes. As to the eavesdropping by the police, the court found that the phone was not a "device" since the statutory definition of that term excludes "any telephone furnished to the subscriber or user by a communication common carrier and being used by the subscriber or user in the ordinary course of its business." Consequently, according to the court, the police use of the phone was not an interception, which, by statute, only occurs when a communication is aurally acquired by a device.

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120 135 N.J. Super. at 89, 342 A.2d at 595.
121 Id. at 87-88, 342 A.2d at 595.
122 Id.
124 N.J. STAT. ANN. § 2A:156A-2d(1) (West 1971); see 18 U.S.C. § 2510(4) (1970). While the result in McCartin is satisfying from a law enforcement perspective, the court might more logically have based its decision upon the common law obligation of the police to investigate reports of criminal activity, rather than upon a strained interpretation of the statutory definition of "device." The Tenth Circuit, dealing with the apparent use of an extension telephone to surreptitiously record a conversation, held that an extension telephone is a device within the Title III definition when it is used, without consent, to monitor a telephone conversation. United States v. Harpel, 493 F.2d 346, 351 (10th Cir. 1974). The telephone exclusion within the definition, 18 U.S.C. § 2510(5)(a) (1970), was inapposite, the court reasoned, because an extension utilized for unauthorized monitoring is not being used within the ordinary course of business of the subscriber. Accord, People v. Tebo, 37 Mich. App. 141, 148-50, 194 N.W.2d 517, 521-22 (1971). Application of this rationale to the McCartin situation would seemingly require suppression of the evidence of conversations overheard by the police. Since the contin-
By contrast, in State v. Toomey, a Georgia appellate court, applying only Georgia law, upheld the suppression of evidence gathered by police in circumstances very similar to McCartin. Significantly, unlike New Jersey law, the Georgia eavesdropping statute does not exclude a subscriber's telephone which is used in the ordinary course of business from the definition of device. Thus, the police officer's nonwarrant use of a citizen's malfunctioning phone to overhear the defendant's conversations was an unlawful interception.

These two cases, though decided under different statutory schemes, are illustrative of the competing values present in the eavesdropping area. When the initial inadvertent interception reveals criminal activity, but the information obtained is insufficient...
to identify the conversants, a requirement that further investigation must await the issuance of a wiretap warrant frustrates both the enforcement of the law and the cooperation between the police and citizenry. Not only is the citizen deprived of the convenience and privacy he expects of his telephone service during the waiting period, but suppression of evidence seized by prompt police action implies, as the McCartin court noted, "that it was a useless gesture for this public-spirited citizen to report possible criminal activity to the police." On the other hand, the importance of the fourth amendment guarantees, including the interposition of "the deliberate, impartial judgment of a judicial officer . . . between the citizen and the police," bespeaks the need to exercise great caution in fashioning exceptions to its protection. Resolution of this problem must ultimately rest on an analysis of the particular facts and applicable statutes presented in each case, with due regard given to the interests of the private citizen and the urgency of the situation. Nonetheless, as a general principle, police should be permitted to exploit the situation, provided they limit the extent and duration of the monitoring.

2. The Intentional, Unlawful Interception

In recent years, four state's courts have had to decide whether law enforcement authorities may use conversations intercepted by private citizens in violation of state laws either similar to or more restrictive than Title III. In three of the four cases, such use was permitted.

130 It is manifest that the procedures spelled out by Title III and the state laws modeled on it, while necessary to assure that ex parte wiretaps and eavesdrops are not casually sought or authorized, are inherently time consuming. In the prosecutor's office for the New York special narcotics courts, the typical application — admittedly, involving a more complex showing of probable cause than existed in Toomey — takes at least a week from the initial drafting to final approval by the district attorney and the judge.

131 135 N.J. Super. at 87, 342 A.2d at 595.


133 The Toomey decision, requiring an investigation warrant prior to eavesdropping by the law enforcement official, is unsatisfactory for several reasons. In Toomey, it would have taken at least a day, perhaps more, to obtain an investigation warrant. During this period the complaining subscriber, Cunningham Industries, would have been deprived of the convenience and privacy it expected from its telephone service. In addition, an authorized wiretap under these circumstances would have involved the police in intercepting not only the defendant's conversations, but also, even if only for a few seconds on each call, the subscriber's, thus invading the latter's legitimate expectations of privacy and doubtless offending many of the subscriber's employees, customers, and suppliers who would have learned of the tap only after its termination. Given these circumstances, the action taken by the investigator in Toomey, i.e., listening to a few telephone calls to confirm the complaint, then obtaining a search warrant for the defendant's premises, seems entirely proper.
California prohibits the interception of "confidential communications" by private citizens unless all parties to the conversation consent to the interception. Yet, in *People v. Ayers*, conversations intercepted by one party in furtherance of an unlawful scheme were admitted in a criminal prosecution against the nonconsenting party. Ayers and his codefendant, Mrs. Popeil, sought to have Mr. Popeil murdered. They offered the job to two men, and discussed with them, on a number of occasions, the best method of accomplishing their purpose. The two purported killers-for-hire decided that they would attempt to obtain advance payment and then renege on their part of the bargain. During the negotiations, they recorded four conversations with Ayers. Subsequently, they reported the matter to the authorities, turned over the tapes, and, under police supervision, recorded three additional incriminating conversations.

All seven tapes were played at trial and the defendants were

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134 Cal. Penal Code § 632(a) (West 1970); see id. § 631. Communications in furtherance of certain crimes, however, are specifically exempted from this broad provision by id. § 633.5, which states:

> Nothing in Section 631 or 632 shall be construed as prohibiting one party to a confidential communication from recording such communication for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to such communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person . . . .

Thus, under § 633.5 one party may record conversations if one of the enumerated criminal activities is reasonably believed to be involved.

California statutory law also contains another exception to the blanket prohibitions of § 631 and § 632. Under § 633, neither § 631 nor § 632 can be construed as prohibiting the state attorney general, any district attorney, or any other enumerated official, including police officers acting under their direction, "from overhearing or recording any communication which they could lawfully overhear or record prior to the effective date of this chapter." Cal. Penal Code § 633 (West 1970). Prior to this legislation, the law enforcement officials specified in § 633 could legally eavesdrop when authorized by their department chiefs "or by a district attorney when such use and installation [were] necessary in the performance of their duties in detecting crime and in the apprehension of criminals." Act of May 31, 1941, ch. 525, § 1, 1941 Cal. Stats. 1833 (repealed 1967). Section 633 has been termed "a confusing legislative procedure," and has raised the fear that "by failing to heed the Berger guidelines, [§ 633] continues the unconstitutional mode of its predecessor." Note, *Electronic Surveillance After Berger*, 5 San Diego L. Rev. 107, 130 (1968). It is clear, however, that application of § 633 to allow government officials to intercept conversations with the consent of one party would not raise constitutional problems. See note 207 infra.


136 Id. at 374, 124 Cal. Rptr. at 286. After the two conspirators agreed to cooperate, several conversations between one of them and the defendants were recorded with equipment supplied by the police and subsequent meetings were observed and photographed by the police. As the court noted, "[t]hese conversations left no doubt of Eloise and Ayers' intent and desire to hire someone to murder Samuel Popeil. Eloise said she 'wanted him dead' by any means and if it was necessary also to kill the maid to put the bodies in bed together." Id.
convicted. On appeal, the convictions were affirmed and the admission in evidence of all seven tapes was approved, despite a statutory provision prohibiting the use of an illegal recording in any judicial proceeding. The court reasoned that just as the exclusionary rule in the constitutional context only operates to deprive the constitutional violator, viz., the government, of the use of the evidence, so too, in the statutory sphere, this prohibition only operates to deprive the statutory violator, viz., the private citizen, of the use of the evidence. Since the government had not engaged in the illegal conduct in Ayers, it was not precluded by the statute from introducing the evidence at trial. In support of this rationale, the court viewed these private citizen recordings as being within an express exception to the statutory exclusionary rule that allows a participant to record conversations and the government to use these recordings if they were made to obtain evidence of certain enumerated crimes.

A similar result was reached in People v. Warner, where a motel switchboard operator deliberately and unlawfully listened

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132 Id. at 376-77, 124 Cal. Rptr. at 287-88, citing Cal. Penal Code § 631(c) (West 1970).
134 The Ayers court found that the acts of the so-called killers fit within the exception to Cal. Penal Code §§ 631-32 (West 1970) carved out by id. § 633.5, which exempts the interception or eavesdropping by a party to a conversation which involves one of the particular major crimes specified in the statute. 51 Cal. App. 3d at 377, 124 Cal. Rptr. at 287-88.

The defendants in Ayers conceded that the recordings obtained by the police after they were informed of the conspiracy fit within § 633 of the California Penal Code, Cal. Penal Code § 633 (West 1970), discussed in note 134 supra, and argued instead that § 633 was impliedly repealed by a 1974 amendment to the California Constitution. The court rejected this contention, finding nothing "that calls into question the validity of the carefully drawn statutes." 51 Cal. App. 3d at 376, 124 Cal. Rptr. at 287-88. But cf. Note, Electronic Surveillance After Berger, 5 San Diego L. Rev. 107, 130 (1968) (§ 633 violates Berger guidelines).

135 51 Cal. App. 3d at 377, 124 Cal. Rptr. at 287-88. As further support for its holding, the court noted that both informers testified at the trial and could have testified to the conversations preserved on the tapes without violating the defendants' rights. Moreover, since the police recordings were as harmful to the defendants as those obtained by the informants prior to police involvement, any error committed in admitting the earlier tapes was harmless. Id. at 378, 124 Cal. Rptr. at 288.

A similar result was reached in People v. Livingston, 64 Mich. App. 247, 236 N.W.2d 63 (Ct. App. 1975). There, a suspicious husband illegally wiretapped the phone in his home and discovered that his wife was planning to have him murdered. Noting that the Michigan legislature had provided certain criminal and civil penalties for violation of the wiretap statute but had not adopted an exclusionary rule, the court refused to create a barrier to the admission of evidence obtained by private citizens in violation of the eavesdropping statute. Consequently, the Court of Appeals of Michigan reversed a lower court's suppression of the tape. Id. at 255, 236 N.W.2d at 67.

137 Under Michigan law "any person . . . who wilfully uses any device to eavesdrop upon [a private] conversation without the consent of all the parties thereto . . . is guilty of a felony . . . ." Mich. Comp. Laws § 750.539c (1970) (emphasis added). The use or divulgence of any information which the user knows or reasonably should have known was gathered
to a lodger's telephone conversation, overheard evidence that the lodger possessed drugs in her room, and reported the matter to the police, claiming to have overheard the conversation accidentally. Based on this lead, the police quickly accumulated additional evidence, seized the contraband, and arrested the defendant in the motel room. After noting in passing that the lower court had held that the defendant was not an aggrieved person under Title III, the Court of Appeals of Michigan, applying only state law, reversed the lower court's suppression of the conversation and dismissal of the action. The court stated that because the police did not know that the call had been illegally intercepted, they could use the information as the basis of further investigation. Consequently, the arrest and seizure were lawful.  

In contrast to the result reached in Michigan and California, a Florida court, applying an eavesdropping statute almost identical to Title III, held that a private citizen's testimony concerning a conversation she had overheard on an extension phone must be suppressed when the eavesdropping was neither consented to by a party to the conversation nor authorized by the telephone subscriber. In *Horn v. State,* a woman, who admitted she was simply "being nosy," had listened on an extension telephone to a conversation between a coworker and the latter's husband; shortly there-

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142 65 Mich. App. at 274-75, 237 N.W.2d at 287-88. In People v. Livingston, 64 Mich. App. 247, 236 N.W.2d 63 (Ct. App. 1975), discussed in note 139 supra, the court held that evidence obtained in violation of the Michigan eavesdropping statute, but not in violation of either the state or Federal Constitutions should not be suppressed since the legislature had not adopted an exclusionary rule. The combined effect of *Livingston* and *Warner,* which at least intimates that a police officer may not knowingly use illegal eavesdropping evidence, is to allow the prosecuting attorney to introduce the evidence in court but to deny a police officer the use of that evidence in his investigations.

143 **FLA. STAT.** § 934.01-.10 (1973 & Supp. 1976).

144 *Horn* v. *State,* 298 So. 2d 194 (Fla. Dist. Ct. App. 1974). The nonconsent of the subscriber was particularly important in *Horn* since the eavesdropping involved the surreptitious use of an extension phone. Under Florida law, as under Title III, violation of the statutory scheme and hence the exclusion of evidence rests upon a determination that an oral or wire communication has been intercepted through the use of a device. The essential question in *Horn* was whether the telephone extension was a device. As defined by the statute, an extension phone is *not* a device unless it is being used outside the ordinary course of the subscriber's business. **FLA. STAT.** § 934.02(4)(a) (1973). In *Horn,* the court held that the unauthorized use of the extension was outside the subscriber's ordinary course of business and thus illegal. 298 So. 2d at 198, citing United States v. Harpel, 493 F.2d 346 (10th Cir. 1974). Therefore, the evidence was obtained illegally and had been wrongfully admitted at trial.

after, the coworker was murdered and her husband arrested for the crime. At trial, the "nosy" woman testified to what she had heard, testimony which constituted circumstantial evidence of the defendant's guilt. Finding this evidence prejudicial, the appellate court reversed, holding that the clear language of the statute compelled the conclusion that testimony concerning this illegal surveillance was not admissible in evidence.148

Perhaps the most unique case in this area, with respect to both the facts and the ingenuity of the court's rationale, was decided by the Supreme Court of Washington. In *State v. Smith*,147 the defendant, a burglary detective, had arrested one Kyreacos. Ellich, the complaining witness in the Kyreacos prosecution, was murdered shortly before trial, and Kyreacos was suspected in the killing. Some days later Kyreacos received an anonymous phone call about the Ellich homicide; the caller invited Kyreacos to meet him in an alley. After equipping himself with a concealed tape recorder, Kyreacos kept the appointment and met the defendant, who shot and killed him. At the defendant's trial for homicide, he admitted shooting Kyreacos but claimed that the latter had had a gun and that he, Smith, had acted in self-defense. The state, however, produced the tape recorder Kyreacos had been wearing, a tape which proved that Smith had committed murder.

Washington had recently enacted a statute which provides that no one, including the state, can "intercept, record or divulge any . . . [p]rivate conversation, by any device . . . without first obtaining the consent of all the persons engaged in the conversation."148 Nevertheless, the court ruled that the recording was pro-

148 *Id.* at 198-99. In denying the state's petition for a rehearing, the court emphasized that it had not balanced the crime of murder against the crime of eavesdropping and determined that the scale tipped toward the latter. Rather, the court felt it had "passed upon admissibility of evidence and not upon comparability of crimes." *Id.* at 201. The court also declared the state's contention that the eavesdropping was purely private conduct and not within the constitutional prohibitions against infringement of the right of privacy to be inapposite to the court's decision. The court emphasized that its decision had not been based on the Constitution, but had rested "upon the clear language of Chapter 934 Florida Statutes." *Id.* Finally, the court dismissed the argument that prior law supported the admissibility in criminal but not civil cases of evidence obtained by an illegal eavesdrop. *Id.*

147 85 Wash. 2d 840, 540 P.2d 424 (1975) (en banc).

148 WASH. REV. CODE § 9.73.030 (1974). Washington statutory law includes only three exceptions to the exclusionary rule formulated in § 9.73.030: the activities of a communications common carrier in connection with providing services, *id.* § 9.73.070; the recording of incoming emergency phone calls by police and fire personnel, *id.* § 9.73.090(1); and the video and audio recording by the police of the activities of individuals in custody, *id.* § 9.73.090(2). Even if the evidence is within these exceptions, its admissibility is somewhat questionable. See *State v. Wanrow*, 14 Wash. App. 115, 538 P.2d 849 (1975) (recording of emergency phone
properly admitted, since "the events here involved do not comprise 'private conversation' within the meaning of the statute. Gunfire, running, shouting, and Kyreacos' screams do not constitute 'conversation' . . . ." 149 The justification for the court's conclusion is readily apparent from an examination of the facts. 150 In order to reach this conclusion, however, the court was forced, by the absolute nature of the statutory exclusionary rule, to employ a rationale which can, at best, be termed doubtful.

The purpose of the judicially created exclusionary rule is the protection of society from overreaching by the state, even at the expense of suppressing important evidence or returning a criminal, unpunished, to society. 151 Applied to state action, the rule is an imperfect, but usually effective, means of safeguarding individual rights. An extension of the exclusionary rule to the isolated acts of private individuals, however, accomplishes no articulable social end, provided private citizens do not engage in widespread eavesdropping to "help" the police. Thus, the courts have consistently refused to so extend the rule. 152

The legislative adoption of an absolute exclusionary rule is similarly of questionable merit. This is illustrated by the ration-

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119 85 Wash. 2d at 846, 540 P.2d at 428. Presumably, had Smith merely threatened Kyreacos, extorted money from him, or solicited his participation in unlawful acts, the tape would have been inadmissible as a recording of "private conversation." See State v. Wanrow, 14 Wash. App. 115, 538 P.2d 849 (1975).

120 The corroborating testimony of several prosecution witnesses in Smith, coupled with the clear reproduction of the fatal event on the tape, strongly indicated the defendant's guilt. 85 Wash. 2d at 847-48, 540 P.2d at 428. Even the dissenting judge recognized the existence of overwhelming proof and stated that it would "seem incredible that evidence as plainly probative as this tape recording would be unusable in a criminal trial." Id. at 857, 540 P.2d at 434 (Utter, J., dissenting). Nevertheless, Judge Utter refused to join the court's holding that the tape was not within the exclusionary umbrella of Washington law. Although agreeing that the tape contained more than normal conversation, he found that its basic content was conversation and hence it fell within the statutory proscription. Id. at 858, 540 P.2d at 434.


122 See note 113 and accompanying text supra. In most states, it is a crime for a private citizen to intentionally intercept the communications of others. See, e.g., CAL. PENAL CODE §§ 631-632 (West 1970); FLA. STAT. § 934.03 (1973 & Supp. 1976); MICH. COMP. LAWS § 750.539c (1970); WASH. REV. CODE § 9.73.030 (1974). The victims of such interceptions may sue the eavesdropper either in state court pursuant to the applicable statute or in federal court pursuant to 18 U.S.C. § 2520 (1970). Such provisions seem sufficient to deter widespread unlawful interceptions by private citizens. In those rare instances in which an unlawful private interception reveals the commission of a crime by those whose conversations are intercepted, prosecutors and the courts must decide, as they are frequently called upon to do in other contexts, which offender to pursue and which to immunize from prosecution.
ales of Warner and Smith and the decision in Horn. Certainly the unlawful interceptions by the coworker and the motel operator violated the defendants' expectations of privacy; certainly if those conversations had been intercepted by or at the request of the police, the fruits of the interceptions should have been suppressed. But to bar law enforcement officials from making use of these private interceptions could lead to absurd results even if, as in Warner, the prohibition is limited to knowing use. For example, should a motel operator unlawfully overhear a telephone call, in which a lodger was telling a co-conspirator that "I am going to kill our hostage if you do not receive the ransom in five minutes," and then, admitting the illegality of the interception, report what he heard to the police, under the rationale of Warner, the police would have no right to enter the room in time to save the victim. Undoubtedly, the police would do so; however, Warner would most likely render the kidnapper-attempted murderer immune from prosecution without deterring future illegal electronic surveillance. Such a result would hold the law up to contempt, and deservedly so.

In the area of private, unlawful interceptions, which unquestionably are invasions of privacy, the appropriate redress lies in the creation of meaningful civil remedies which can be pursued by an aggrieved person. Additionally, the proper deterrent to such activity is the imposition and enforcement of criminal sanctions and the exclusion of any evidence gathered when the utilization of that evidence would benefit the illicit eavesdropper. Penalizing the gov-

152 See Horn v. State, 298 So. 2d 194 (Fla. Dist. Ct. App. 1974); People v. Warner, 65 Mich. App. 267, 237 N.W.2d 287 (1975). In Horn, not only the defendant's expectation of privacy, but the murder victim's as well would have been violated.

154 Many states allow the recovery of damages in a civil action for the violation of their privacy statutes, e.g., CAL. PENAL CODE § 637.2 (West 1970); FLA. STAT. § 934.10 (1973). Indeed, some states allow recovery for mental pain and suffering, e.g., WASH. REV. CODE § 9.73.060 (1974), punitive damages, e.g., FLA. STAT. § 934.10(2) (1973); MICH. COMP. LAWS § 750.539h(c) (1970), and reasonable attorneys' fees, e.g., FLA. STAT. § 934.10(3) (1973). Furthermore, some jurisdictions set up a minimum recovery for the violation of their eavesdropping statutes. See, e.g., CAL. PENAL CODE § 637.2(1) (West 1970) ($3000); FLA. STAT. § 934.10(1) (1973) ($100 per day for each day of violation but not less than $1000).

156 The California eavesdropping statute, CAL. PENAL CODE § 632(a) (West 1970), provides an excellent illustration of the use of criminal sanctions to deter private eavesdropping. Section 632 imposes a fine of up to $2500 and a jail term of up to three years for the illegal eavesdropping upon or recording of a private communication. Id. A recidivist under this statute, is confronted with a maximum fine of $10,000 and possible imprisonment of up to five years. Id. With respect to preventing the private eavesdropper from benefiting by his actions, the court in People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (Ct. App. 1975), found that the California statutory scheme restrains private citizens "by denying to the violators of those sections any personal benefit from the evidence so obtained but not neces-
ernment and, in turn, society itself by forbidding the use of this unsolicited evidence in the enforcement of the criminal laws, however, will not deter the private citizen, who is not under the government's direct control, and can only benefit the avowed law-breaker.

DEFINING CONSENT

Title III authorizes nonwarrant, government interceptions when "one of the parties to the communication has given prior consent to such interception." The insistence upon prior consent may be traced to Weiss v. United States, where the government had utilized a concededly unlawful wiretap to intercept communications between Weiss and a co-conspirator, and then used the evidence obtained from the wiretap to force the co-conspirator to turn informer against Weiss and to consent to the divulgence of the illegally intercepted conversation. Suppressing this evidence, the Supreme Court declared that the authorization obtained in this case was not "consent" under section 605 of the Communications Act of 1934. The incorporation of the Weiss prior consent requirement

sarily [preventing] the government from making use thereof." Id. at 376-77, 124 Cal. Rptr. at 287. See also Pennington v. State, 19 Md. App. 253, 310 A.2d 817 (Ct. App. 1973), cert. denied, 419 U.S. 1019 (1974); People v. Livingston, 64 Mich. App. 247, 236 N.W.2d 63 (1975). Interestingly, the deterrent effect of the constitutional exclusionary rule in criminal prosecutions, which rule focuses directly on government action, has recently been subjected to increasing criticism. Chief Justice Burger has emphasized that despite "the high price it extracts from society—the release of countless guilty criminals"—it has not been shown that the exclusionary "rule actually deters illegal conduct of law enforcement officials." Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). One commentator, examining empirical evidence indicating the rule's lack of progress toward its asserted goal, viz., deterrence, has concluded that it should be replaced with a traditional tort remedy against culpable police officials. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). See generally Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 479 (1955). Given the increasing doubt surrounding the traditional exclusionary rule in criminal prosecutions, an extension of that rule to cover statutory violations and to encompass acts of private citizens as well as those of government officials appears to be unwise.


14 308 U.S. 321 (1939).

into Title III precludes the use of the illegally obtained evidence to coerce a victim into ratifying the unlawful eavesdropping.\textsuperscript{100}

Although Title III does specify when the consent must be obtained, it neither defines this term, assigns the burden of proof, or indicates what that burden is to be. When the consenting participant is an undercover police officer, a paid informant, a crime victim seeking redress or protection, or a public-spirited citizen, a finding of voluntary consent is almost automatic. However, when the consenting party is one who himself has been apprehended by law enforcement officials and has been persuaded to cooperate by the threat of prosecution or the promise of leniency, several questions arise. Do these factors render an informer's consent to interception coerced and therefore involuntary? Is the burden and standard of proving consent to interception the same as that required to establish consent to a search of a person or premises? If the informer is unavailable or unwilling to testify, or simply is not called as a witness, how will this effect a determination of whether or not his consent was voluntary? These issues are discussed herein.

The Supreme Court has said little on the subject, and what it has said related to section 605 of the Communications Act of 1934 and not Title III. While Weiss held the co-conspirator's consent involuntary because, inter alia, it was given "in the hope of leniency,"\textsuperscript{101} the blatant illegality of the interception, which itself provided the evidence used to force the co-conspirator's cooperation, distinguishes Weiss from the subsequent cases reaching the issue of consent. Although at least one court has analyzed Rathbun v. United States\textsuperscript{102} as implicitly endorsing the concept that a promise of leniency to an apprehended criminal does not necessarily vitiate the voluntariness of the informer's consent,\textsuperscript{103} such endorsement, if intended, was mere dictum. In On Lee,\textsuperscript{104} where the in-

\textsuperscript{100} "Retroactive authorization, however, would not be possible. (Weiss v. United States, 308 U.S. 321 (1939)) . . . ." S. Rep., supra note 2 at 94, reprinted in U.S. Code Cong. at 2182.

\textsuperscript{101} 308 U.S. at 330-31.

\textsuperscript{102} 355 U.S. 107 (1957). In Rathbun, the Court held that evidence of a conversation obtained by two officers who listened on a telephone extension with the consent of one of the parties did not violate § 605 of the Communications Act. Although Congress had not explicitly created this consensual exception, the Court reasoned that an interception, the act prohibited by the statute, did not occur in the facts presented. Id. at 109.

\textsuperscript{103} United States v. Zarkin, 250 F. Supp. 728, 733-44 (D.D.C. 1966), citing Rathbun v. United States, 355 U.S. 107 (1957). The Zarkin analysis, however, is suspect. The Zarkin court stated that Rathbun had ratified, by citation in a footnote, certain lower court decisions approving police prompting of an informant. Examination of the cases cited by the Rathbun Court, however, reveals that generally these cases are silent on this question.

\textsuperscript{104} See notes 16-17 and accompanying text supra.
The former did not testify at trial, the nature of the informer's consent was not raised; in *White*, the Court declined to discuss the issue. Since *White*, certiorari has been denied in all consensual eavesdropping cases.

**Consent: Burden of Proof, The Absent Informer, and the Question of Coercion**

Almost without exception, the burden of establishing a participant's consent to the interception of a conversation is placed upon the prosecution. Most courts have held that a failure to call the informer, or an inability to produce him, does not necessarily require a finding of no consent which would mandate the suppression of the evidence. To the contrary, the officers who were with and supervised the informer when the conversations were intercepted are permitted to testify that the informer consented to the interceptions, and such testimony is generally sufficient to establish the voluntariness of the absent informer's consent.

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165 See text accompanying notes 33-46 supra.

166 The *White* Court stated: "White argues that Jackson [the informer], though admittedly 'cognizant' of the presence of transmitting devices on his person, did not voluntarily consent thereto. Because the court below did not reach the issue of Jackson's consent, we decline to do so." 401 U.S. at 747 n.1. On remand, the Seventh Circuit, since the defendant had not raised the issue earlier, likewise declined to consider the voluntariness of the consent. 454 F.2d 435 (7th Cir. 1971), cert. denied, 406 U.S. 962 (1972).

167 Cf. *Bumper v. North Carolina*, 391 U.S. 543 (1968) (prosecutor has burden of proving consent to search of premises); United States v. Napier, 451 F.2d 552 (5th Cir. 1971) (dictum) (under § 605 of Communications Act of 1934, prosecution has burden of proving voluntary consent). See also United States v. Bolin, 514 F.2d 554 (7th Cir. 1975); United States v. Miley, 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975); United States v. Agosto, 502 F.2d 612 (9th Cir. 1974); Bradley v. Cowan, 500 F.2d 380 (6th Cir. 1974); United States v. Garcia, 496 F.2d 670 (5th Cir. 1974), cert. denied, 420 U.S. 960 (1975). The voluntariness of the consent may be challenged by a defendant who was either a party to the monitored conversation or the target of the interception, see 18 U.S.C. § 2510(11) (1970), in his motion to suppress this evidence as unlawful under Title III. See id. § 2518(10)(a).

168 See United States v. James, 495 F.2d 434 (5th Cir.), cert. denied, 419 U.S. 899 (1974) (informant murdered shortly before trial); United States v. Rangel, 488 F.2d 871 (5th Cir.), cert. denied, 416 U.S. 984 (1974) (informant was "unavailable"); United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974) (informant committed suicide shortly before trial); United States *ex rel.* Seaman v. Cryan, 329 F. Supp. 875 (D.N.J. 1971) (informant available, but not called as a witness by the government). In all of these cases, after the intercepting officers testified that the informant had consented to the interception, the conversations were held admissible. See also United States v. Ransom, 515 F.2d 885 (5th Cir. 1975); United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974); United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973). But see *Tollett v. State*, 272 So. 2d 490 (Fla. 1973), wherein the court ruled that absent the testimony of the consenting party, intercepted conversations will be excluded from evidence. In that case, the informer had allegedly consented to the interception of four telephone conversations with the defendant while the informer was incarcerated in the county jail. A police captain testified to the informer's consent, but the informer was not called and no evidence was offered concerning his unavailability. The Florida Supreme
A more difficult question arises when the informer’s consent is attacked as coerced because it was motivated by a threat of prosecution or the possibility of leniency. The overwhelming majority of courts that have considered this issue, however, have held that consent under these circumstances is not necessarily involuntary. Indeed, United States v. Laughlin is the only reported federal decision in which intercepted conversations were suppressed on the basis of coerced consent. There, the District Court for the District of Columbia, relying on the cooperating witness’ testimony that she had not wanted to make a taped phone call but had done so in an effort to avoid indictment for perjury, found that this consent was coerced and therefore involuntary. While the facts in Laughlin provide strong evidence that the informer cooperated against her

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171 The government did not appeal the suppression of the tapes. Instead, it brought a new indictment, litigated the admissibility of the tapes anew before a different district judge, received a favorable ruling, and then used the tapes at trial. The court of appeals ruled that the government was collaterally estopped from relitigating the consent issue and suppressed the tapes without reaching the merits of the original district court decision. United States v. Laughlin, 344 F.2d 187 (D.C. Cir. 1965).
will,\textsuperscript{172} the result, nonetheless, appears ill advised. In \textit{United States v. Jones},\textsuperscript{173} the Court of Appeals for the District of Columbia Circuit, confronted with the coercion issue under more normal circumstances, reversed a finding of involuntariness. In \textit{Jones}, the defendant and an attorney named Bromley both perjured themselves before a federal grand jury. Upon learning that the government was preparing to prosecute him on a number of charges, Bromley, after consulting with counsel, agreed to cooperate, and permitted the government to record both telephone and face-to-face conversations between himself and the defendant in the hope, but without any certainty, of obtaining some leniency.\textsuperscript{174} On a motion to suppress these recordings, the district court found that Bromley's consent had been coerced by the "constant presence" of government officials and Bromley's fears of "indictment, loss of his job, and the eventual foreclosure of the mortgage on his home."\textsuperscript{175} Reversing, the circuit court "[looked] only to what the concept of voluntariness has ordinarily been understood to involve in order to conclude that Bromley's repeated manifestations of consent were not nugatory in this instance."\textsuperscript{176}

Adopting a similar approach, the Court of Appeals for the

\textsuperscript{172} A grand jury witness agreed to make a telephone call to the defendant and to permit the government to tape it after the following exchange in the grand jury between the witness, Mrs. Gross; the prosecutor, Mr. Sullivan; and the deputy foreman of the grand jury:

[Mr. Sullivan:] The only possible way of getting the people who are putting up the money and instigating the plans of this operation is by the cooperation of someone who is in between . . . . We need Mrs. Gross' cooperation and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation.

[Mrs. Gross:] I realize your point but I say I would rather not. If I did not have to I would rather not. If I had to I would. There is nothing I can do.

DEPUTY FOREMAN: If we don't get cooperation and can't get those [behind the over-all operation] we'll get the ones we can . . . . We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

222 F. Supp. at 267. In suppressing the recordings, the \textit{Laughlin} court found support for its holding in \textit{Weiss v. United States}, 308 U.S. 321 (1939), \textit{discussed in} notes 158-61 and accompanying text \textit{supra}.


\textsuperscript{174} 433 F.2d at 1177. The court noted that Bromley, in fact, never was indicted. \textit{Id. n.4.}

\textsuperscript{175} \textit{Id. at} 1180, \textit{quoting} 292 F. Supp. 1001, 1008-09.

\textsuperscript{176} "It is certainly true," the court concluded, "that people who testify falsely before grand juries do not find themselves in the happiest of conditions, and are under the necessity of taking thought for the future. But that hardly means that a decision to tell the truth and cooperate with the authorities is thereby coerced or involuntary in any meaningful sense." \textit{Id.} The \textit{Jones} court did not refer to \textit{Laughlin}.  
Third Circuit in *United States v. Osser*\(^{177}\) framed the consent issue as "whether the consent was voluntary and uncoerced, not whether the motivations for it were altruistic or self-seeking."\(^{178}\) The court carefully distinguished *Laughlin*, noting that in *Osser* "[n]o implied threats were made" to the cooperating witness, who testified "that he did not feel pressured by the Government request" that he allow his conversations to be taped "and that he believed his promised immunity would be forthcoming whether or not he consented."\(^{179}\)

Even where the inducements to cooperate have gone beyond a promise of immunity or leniency, an informer's consent has nonetheless been upheld as valid. In *United States v. Franks*,\(^{180}\) a prosecution for illegal use of explosives, taped conversations between the defendants and several government informers were admitted into evidence. On appeal, one defendant challenged the consent of the informer, claiming:

Davis has a long criminal record and had numerous charges pending against him. The Government placed him under full protective custody, gave him an extremely nice apartment for he [sic] and his girlfriend, provided him with a living allowance, secured for his use a new Cadillac automobile and gave him other special considerations. Additionally, Davis was never tried for or sentenced for any of the crimes of which he was charged prior to his agreement to cooperate with the Government.\(^{181}\)

Without discussing the truth of these allegations, the court simply commented: "We find, however, sufficient consent to shield the government recordings."\(^{182}\)

In *United States v. Palazzo*,\(^{183}\) wherein an arrested defendant agreed to make a monitored phone call only after the government had violated several of his constitutional rights, his consent was nonetheless held to be valid.\(^{184}\) Finally, even where the informer

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\(^{178}\) 483 F.2d at 730.

\(^{179}\) *Id.* The promise of immunity was given to the informer before he decided to cooperate with the government. Moreover, when the informer was asked to consent to a tape recording of a telephone conversation with the defendant, he was informed that his promised immunity would not be affected by his decision. *Id.* at 729.

\(^{180}\) 511 F.2d 25 (6th Cir.), cert. denied, 422 U.S. 1042 (1975).

\(^{181}\) 511 F.2d at 31, quoting Brief for Defendant Mitchell.

\(^{182}\) 511 F.2d at 31.

\(^{183}\) 488 F.2d 942 (5th Cir. 1974).

\(^{184}\) Palazzo, the "consenting" participant to a taped phone call, had been arrested after an illegal search of his luggage had revealed marijuana. Although he had asked to consult with an attorney, he was kept incommunicado for nearly two hours, and finally agreed to
testified that he did not consent to the interception of his conversations, consent was nonetheless found in United States v. Ransom.185

If Franks, Palazzo, and Ransom are any indication, the concept that a coerced consent renders the intercepted conversation inadmissible is losing whatever force it may have had. Few courts, however, have articulated the definition or standard of consent which apparently underlies such decisions.

The Bonanno Test: Knowledge Equals Consent

What most federal and state courts seem to be saying implicitly, the Court of Appeals for the Second Circuit made explicit in United States v. Bonanno.186 There, Spiros Dendrinos agreed to cooperate with the government after he had been arrested for selling counterfeit money to a Secret Service agent. Dendrinos made a phone call from Secret Service headquarters to the defendant, who agreed to sell Dendrinos $5200 in counterfeit twenty dollar bills for $1250. An agent monitored and recorded the call. Shortly thereafter the defendant met Dendrinos, passed him the counterfeit money, and was arrested.

At a suppression hearing, a Secret Service agent187 testified that Dendrinos had agreed to the taping of the telephone call and that the taping and monitoring equipment was physically and visibly attached to the phone on which Dendrinos made the call. Defense counsel then called Dendrinos as a witness; Dendrinos “promptly

make a taped phone call to Viagran, the person who had sold him the marijuana. Palazzo and Viagran were tried jointly, and the seized marijuana and taped conversations were admitted in evidence. On appeal from their convictions, the Fifth Circuit reversed Palazzo’s conviction, holding that the marijuana had been seized illegally and was, therefore, inadmissible against Palazzo. As a result of this determination, the court found it unnecessary to rule on the propriety of using the tape against the consenting party. Id. at 944-45. As to Viagran, however, the court held that he lacked standing to object to the use of the marijuana, id. at 947-48, and further stated that Palazzo’s consent was sufficient to legitimize the recording of the phone conversation, id. at 948.

185 515 F.2d 885 (5th Cir. 1975). At the suppression hearing, a police officer testified that the informer had consented to the interception of his conversation with the defendant. The informer took the stand and denied having consented. “Faced with this credibility choice, the district court concluded that . . . [the informer] consented. This conclusion is supported by the evidence and it must stand.” Id. at 890.

186 487 F.2d 654 (2d Cir. 1973).

187 The agent who actually monitored and taped the call was not available to testify, having been assigned to guard John F. Kennedy, Jr., then in Mexico. Another agent, present at the tapping, testified to the circumstances under which the tape was made. The court acknowledged that “[w]hile it would have been preferable for the Government to have called [the monitoring agent] to testify to Dendrinos’ consent, there is no rule requiring the production of the best witness.” Id. at 659.
claimed the privilege against self-incrimination with respect to practically all questions and specifically those concerning the telephone call and his consent to its being monitored and recorded." Nonetheless, the trial court ruled that Dendrinos had consented to the interception of the phone call. In upholding that ruling, the Second Circuit expressed what most other courts, faced with similar issues, had only implied:

We observe at the outset that the extent of proof required to show that an informer consented to the monitoring or recording of a telephone call is normally quite different from that needed to show consent to a physical search whether by the defendant himself or by some person in a position to give an effective one. . . . In cases involving physical search, the person alleged to have consented is doing something apparently contrary to his own interests or to those of another who often is in some way connected with him. An informer's consent to the monitoring or recording of a telephone conversation is an incident to a course of cooperation with law enforcement officials on which he has ordinarily decided some time previously and entails no unpleasant consequences to him. Hence, it will normally suffice for the Government to show that the informer went ahead with a call after knowing what the law enforcement officers were about.

There is nothing to impeach the judge's ruling under this easy test . . . .

The logic of the Second Circuit's analysis is compelling and is supported on two additional grounds. First, it is not uncommon for a defendant to become an informer because he faces severe penalties for his own crimes if he does not cooperate and has been promised or hopes to receive leniency if he does cooperate. Often that coop-

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183 Id. at 656. It developed that Dendrinos' unwillingness to testify was probably "due as much to fear of physical violence as to worry about self-incrimination." Id. After learning that Dendrinos had also taken methadone just before the hearing, the trial judge apparently concluded that Dendrinos was not competent to testify, and suggested to counsel that neither side call him as a witness at trial; both sides agreed not to do so. Id.

189 Id. at 658-59 (citations omitted) (emphasis added). The court added that Dendrinos' consent was established even if measured by a "more stringent" test, since he had agreed to arrange a meeting between an undercover agent and Bonanno before making the phone call. The court's rationale is further supported by the fact that Dendrinos made the purchase of counterfeit money for the agents after the phone call. Finally, the court observed that Dendrinos' drug use on the day of the hearing, see note 188 supra, "which, in the judge's view, made him of dubious competence as a trial witness, has no tendency to show he was in a similar condition on the night of the telephone call." 487 F.2d at 659.

190 Defendants have also challenged the consent when the informer has received "other special considerations." See United States v. Franks, 511 F.2d 25, 31 (6th Cir.), cert. denied, 422 U.S. 1042 (1976).
eration will include undercover activity — meeting with the targets of an investigation, purchasing contraband from them, drawing them into conversation about past or present crimes, and learning first hand about their illegal acts. Very often the informer is called upon to testify about his undercover activities in prosecutions based upon those activities. Such testimony is admissible.

Given that an informer’s testimony concerning his undercover activities is admissible, even if those activities and that testimony might have been coerced by threats of punishment or promises of leniency, it is illogical to suppress tape recordings of his undercover activities on the ground that his consent to the interception and recording of those activities was similarly coerced. Additionally, if a trial is a search for the truth, it runs contrary to the interests of justice to put an informer on the stand and ask a jury to determine the credibility of his testimony while denying the jury access to the best evidence of the true facts.

The merit of the Bonanno consent test is further indicated by its consistency with congressional intent. Congress sought to maintain the existing law on standing to raise a motion to suppress by

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191 Use of informers as undercover operatives is, of course, particularly vital in investigations into organized crime, narcotics traffic, political corruption, and bribery.

192 In Hoffa v. United States, 385 U.S. 293 (1966), discussed in note 17 supra, the Supreme Court rejected a “general attack upon the use of a government informer” as an undercover operative and witness, even where “the risk that [the informer’s] testimony might be perjurious is very high.” 385 U.S. at 311. While it is “quite correct” that an informer may have a substantial motive to lie, “it does not follow that his testimony [is] untrue, nor does it follow that his testimony [is] constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.” Id.

193 One can, of course, hypothesize tactics and pressures so shocking and outrageous (e.g., physical torture, threats to fabricate a case against an innocent loved one) that justice might mandate suppression, not only of tape recordings, but of the informer’s testimony as well. But to the author, it is neither outrageous nor shocking for the authorities in effect to say to an offender: “Cooperate, testify, and let us tape your conversations so the jury will recognize the truth, and we will make life as pleasant for you as circumstances permit; otherwise we will seek the maximum penalties against you the law allows.”

194 See text accompanying note 252 infra. A conscientious prosecutor would prefer to record an informer’s conversations even if the tapes were inadmissible, to assure that his witness’ testimony will be, not only “helpful,” but also truthful. Tape recordings can constitute as powerful evidence of innocence as of guilt.

195 S. Rep., supra note 2, at 91, reprinted in U.S. CODE CONG. at 2179-80, citing, inter alia, Goldstein v. United States, 316 U.S. 114 (1942). “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.” Brown v. United States, 411 U.S. 223, 230 (1973) (standing to seek suppression of physical evidence). In Alderman v. United States, 394 U.S. 165 (1969), the Court declared that a person’s fourth amendment rights are violated when he is a party to an unlawfully intercepted conversation or when he is the owner of the premises within which the unlawful interception is perpetrated.
allowing anyone whose conversations were intercepted or who was the target of the interception to move for suppression under Title III.\textsuperscript{196} There is, however, no indication that Congress intended a defendant to win suppression of his incriminating res gestae statements by showing that a co-conspirator succumbed to lawful, albeit intense, pressure to cooperate. Rather, the legislative design envisioned the use, consistent with safeguarding "the privacy of innocent persons,"\textsuperscript{197} of eavesdropping, both consensual and ex parte, to investigate and apprehend, in particular, "organized criminals" — the class of offenders against whom such pressure tactics to recruit informers and obtain cooperation are most often needed.\textsuperscript{198} The \textit{Bonanno} definition of consent is consistent with this intent;\textsuperscript{199} under

Consequently, the Court held that a defendant in either instance would have standing to object to the use against him of evidence obtained through the illegal eavesdropping. \textit{Id.} at 176.

\textsuperscript{196} 18 U.S.C. § 2510(11) (1970) defines "aggrieved person" as "a person who was a party to any intercepted oral or wire communication or a person against whom the interception was directed." \textit{Id.} § 2518(10)(a) provides that "[a]ny aggrieved person . . . may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that — (i) the communication was unlawfully intercepted . . . ." In \textit{Alderman v. United States}, 394 U.S. 165 (1969), the Court stated that "Congress has provided only that an 'aggrieved person' may move to suppress the contents of a wire or oral communication intercepted in violation of the Act [Title III]. . . . The Act's legislative history indicates that 'aggrieved person,' . . . should be construed in accordance with existing standing rules." \textit{Id.} at 175 n.9. \textit{See also} \textit{United States v. Ahmad}, 347 F. Supp. 912 (M.D. Pa. 1972), \textit{aff'd in part, rev'd in part on other grounds sub nom. United States v. Berrigan}, 482 F.2d 171 (3d Cir. 1973).

\textsuperscript{197} The congressional findings which accompany Title III of the Omnibus Crime Control and Safe Streets Act of 1968 states that "[t]o safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communications has consented to the interception should be allowed only when authorized by a court of competent jurisdiction . . . ." Omnibus Crime Control and Safe Streets Act of 1968, ch. 119, tit. III, § 801(d), 82 Stat. 211.

\textsuperscript{198} The congressional findings introducing Title III state in part: Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice. Omnibus Crime Control and Safe Streets Act of 1968, ch. 119, tit. III, § 801(c), 82 Stat. 211.

\textsuperscript{199} The \textit{Bonanno} test should be inapplicable, however, if the prosecution seeks to use the interception against the party who consented, since in this instance the informer is apparently waiving his fourth and fifth amendment rights. The appropriate standard here should be either the consent necessary for a search of premises or person, or a knowing and intelligent waiver of fifth amendment rights after the mandatory warnings. In contrast, where evidence against the defendant is obtained as a result of the consent of the \textit{other} party to a conversation, a waiver of constitutional rights by the defendant is not involved. \textit{See United States v. White}, 401 U.S. 745 (1971); \textit{Hoffa v. United States}, 385 U.S. 293 (1966). Moreover, neither can the defendant object to the waiver of the other party's rights. \textit{See note 195 supra}. 


such a definition, the \textit{Palazzo, Franks,} and \textit{Ransom}\textsuperscript{200} decisions flow more logically from the facts. While the \textit{Bonanno} “knowledge equals consent” test\textsuperscript{201} is logical and persuasive, a final reading on its acceptance awaits further developments.\textsuperscript{202}

\textbf{ALTERNATE APPROACHES TO CONSENSUAL INTERCEPTIONS: A COMPARISON OF STATUTORY PROVISIONS}

Many states have adopted the Title III provisions concerning consensual interceptions; others have enacted statutes which differ from those provisions in varying degrees. This section will discuss the laws of eleven states which have striven for a middle ground between the broad authority granted by section 2511(2)(c) and 2511(2)(d) of Title III on the one hand and the total prohibition of the practice on the other. These eleven states will be divided into two categories: states which permit some consensual interceptions without a court order while imposing greater restrictions than those in Title III, and states which require a court order as an antecedent to consensual interceptions.

\textit{States Permitting Consensual Interceptions Without a Court Order}

California, Florida, Georgia, Massachusetts, and Michigan have statutory schemes which are similar in prohibiting consensual interceptions by private citizens unless all parties to the communi-

\textsuperscript{200} In \textit{Palazzo, Franks,} and \textit{Ransom,} the circumstances of the taping and monitoring in each case clearly indicated the informer’s knowledge that his calls were being taped. See United States v. Ransom, 515 F.2d 885, 888 (5th Cir. 1975); United States v. Franks, 511 F.2d 25, 30 (6th Cir.), \textit{cert. denied}, 422 U.S. 1042 (1975); United States v. Palazzo, 488 F.2d 942, 944 (5th Cir. 1974).

\textsuperscript{201} Law enforcement agencies have employed a variety of methods to establish that an informer is aware of and consents to the interception of his conversations. Execution by the informer of an “advice of rights and consent to monitor” form prior to each interception has been accepted by at least one court as proof of consent. United States v. Bastone, 526 F.2d 971, 977 (7th Cir. 1975). In New York City, the police department’s narcotics division regularly has undercover officers and informers record a “heading” on the tape which gives the date, place, and identity of the officer or informer, a brief description of the anticipated conversation, and a statement that the officer or informer consents to the recording of the conversation for use as evidence. Should the \textit{Bonanno} test win wider and more explicit acceptance, use of such methods to establish the informer’s knowledge of the interception would virtually assure the admissibility of the intercepted conversation.

\textsuperscript{202} The \textit{Bonanno} test has been cited approvingly in United States v. McMillan, 508 F.2d 101, 104 n.2 (8th Cir. 1974), \textit{cert. denied}, 421 U.S. 916 (1975), and United States v. Baynes, 400 F. Supp. 285, 292 (E.D. Pa. 1975). In \textit{White,} it was conceded that the informer knew, at the time, that interceptions were occurring. The Supreme Court did not rule on the issue of consent, however, because the circuit court had not reached the issue. United States v. White, 401 U.S. 745, 747 n.1 (1971).
cation consent, while permitting law enforcement officers or their agents to utilize the technique with the consent of one participant. Within this common approach, however, there are significant differences in the specific statutes.

California's invasion of privacy statute, which predates the enactment of Title III,\(^2\) prohibits wiretapping\(^2\) and eavesdropping on confidential communications\(^5\) without the consent of all parties.\(^2\) In the declaration of finding and intent accompanying the statute, however, the California Legislature stated that it did not intend "to place greater restraints on the use of listening devices and techniques by law enforcement agencies than existed prior to the effective date of this chapter."\(^2\) The statute also specifies that "[n]othing in [the invasion of privacy statute] shall be construed as rendering inadmissible any evidence obtained by . . . [law enforcement officials] by means of overhearing or recording any communication which they could lawfully overhear or record prior to" the enactment of the law.\(^2\) Since eavesdropping with the consent of a party had been a permissible law enforcement technique,\(^2\) the California statute apparently does not restrict police use of consensual interceptions.\(^2\)

Florida's security of communications law\(^2\) prohibits interceptions by private persons without the consent of all parties to the


\(^2\) Id. § 631(a).

\(^2\) Id. § 632(a).

\(^2\) Id. §§ 631(a), 632(a). Section 633.5, however, apparently allows the recording of a confidential communication by a party for the "purpose of obtaining evidence reasonably believed to relate to the commission by another party to such communication of the crime of extortion, kidnapping, bribery, any felony involving violence against the person, or a violation of Section 653m, [telephone calls made with intent to annoy] . . . ." Id. § 633.5. The section also provides that nothing therein shall be construed as rendering inadmissible in a prosecution for the above crimes "or any crime in connection therewith, any evidence so obtained." Id. See generally People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (Ct. App. 1975).

\(^2\) CAL. PENAL CODE § 630 (West 1970). Consensual interceptions by law enforcement personnel were and are permitted. See, e.g., People v. Murphy, 8 Cal. 3d 349, 503 P.2d 594, 105 Cal. Rptr. 138 (1972) (en banc), cert. denied, 414 U.S. 833 (1973); People v. Dement, 48 Cal. 2d 600, 311 P.2d 505 (1957) (en banc); People v. Carbonie, 48 Cal. App. 3d 679, 121 Cal. Rptr. 831 (Ct. App. 1975); People v. Standifer, 38 Cal. App. 3d 733, 113 Cal. Rptr. 653 (Ct. App. 1974).


\(^2\) See note 207 supra.

\(^2\) The California Supreme Court, however, has held that in some instances consensual police interceptions which do not pertain to criminal activity may be prohibited as having a "chilling effect" on the exercise of first amendment freedoms. See White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975), discussed in text accompanying note 258 infra.

\(^2\) FLA. STAT. § 934.01-.10 (1973 & Supp. 1976).
communication, but permits a “law enforcement officer or a person acting under the direction of a law enforcement officer” to intercept a communication with only one party’s consent when “the purpose of such interception is to obtain evidence of a criminal act.” Massachusetts, like Florida, permits law enforcement officials to conduct one-party consensual interceptions but restricts the practice to “investigation(s) of a designated offense as defined” in its eavesdropping statute. Similarly, Georgia’s invasion of privacy law permits consensual interceptions only “in those instances wherein the message . . . shall constitute the commission of a crime or is directly in the furtherance of a crime . . . .” The Georgia statute has been interpreted as permitting a private citizen, as well as law enforcement officials, to consensually record conversations pertaining to criminal activity.

Michigan’s eavesdropping statute permits consensual interceptions conducted by “a peace officer or his agent . . . while in the performance of his duties.” However, that state’s supreme court has ruled that the state constitution requires a search warrant in “participant monitoring” (transmitter) situations, and at least

212 Id. § 934.03(d) (Supp. 1976).
213 Id. § 934.03(c). Interception is lawful under the chapter if made by a “party to the communication or [if] one of the parties to the communication has given prior consent to such interception . . . .” Id.
214 Mass. Gen. Laws Ann. ch. 272, § 99(B)(4) (West 1970), discussed in Commonwealth v. Jackson, 349 N.E.2d 337 (Mass. 1976). “Designated offense” is defined as including the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming . . . , intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.
216 See id. § 750.539g(a), which provides that the act should not be construed to prohibit “[e]avesdropping or surveillance not otherwise prohibited by law by a peace officer or his agent of this state or federal government while in the performance of his duties.”
217 People v. Beavers, 393 Mich. 554, 567, 227 N.W.2d 511, 514, cert. denied, 423 U.S. 878 (1975). Beavers was factually akin to United States v. White, 401 U.S. 745 (1971). Defendant Beavers contended that he was deprived of his right to be free from unreasonable searches and seizures when a police informant was wired and transmitted a conversation between them to officers waiting outside defendant’s apartment building. The court, adop-
one appellate court has found the same requirement for consensual interceptions of telephone conversations.\textsuperscript{221}

\textit{States Requiring Judicial Authorization of Consensual Interceptions}

Six states—Illinois, Maryland, Nevada, Oregon, Washington, and Wisconsin—require court orders before conversations can be consensually intercepted by law enforcement officials and then disclosed in court.

Wisconsin imposed this warrant requirement judicially, rather than legislatively. Its eavesdropping statute,\textsuperscript{222} similar in many respects to Title III, regulates consensual interceptions\textsuperscript{223} with language virtually identical to the federal provisions. Yet, Wisconsin's highest court, reasoning that the statute does not specifically authorize consensual interceptions but only declares them "not unlawful," ruled that while law enforcement use of this technique for investigative purposes is permissible, absent a prior court order the fruits of the interception cannot be introduced into evidence.\textsuperscript{224}

The status of Maryland law is, to say the least, confused. Its

\textsuperscript{21} People v. Plamondon, 64 Mich. App. 413, 236 N.W.2d 86 (1975). Defendant Plamondon was convicted of extortion as a result of his attempt to collect money owed his codefendant by Wagner. \textit{Id.} at 416, 326 N.W.2d at 86-87. Wagner contacted the police and consented to the recording of two subsequent phone conversations with the defendant. \textit{Id.} at 416-17, 236 N.W.2d at 87. Defendant claimed that the recording was a violation of his right to be free from unreasonable searches and seizures. Citing \textit{Beavers}, the court applied a very similar analysis and concluded that the tapes should not have been admitted into evidence. \textit{Id.} at 419, 425, 236 N.W.2d at 88, 90. Cf. People v. Livingston, 64 Mich. App. 247, 236 N.W.2d 63 (1975).

\textsuperscript{22} Wis. Stat. § 968.27-.33 (1973).

\textsuperscript{23} Id. § 968.27(2)(b)-(c).

\textsuperscript{24} State ex rel. Arnold v. County Court, 51 Wis. 2d 434, 187 N.W.2d 354 (1971). The \textit{Arnold} court discerned an intent on the part of the legislature, although it enacted language identical to Title III, to reach a result which contradicts the one reached by Congress. \textit{Id.} at 443-44, 187 N.W.2d at 359.
Title III

Wiretapping laws require a court order unless all parties give prior consent to the interception of their conversations. Nonetheless, its wiretapping statute apparently allows one participant to record the conversation, but seemingly does not allow that participant to consent to third party monitoring. The Maryland eavesdropping statutes prohibit the use of a device to overhear or record "words spoken to or by any person in private conversation without the knowledge or consent, express or implied, of that other person."

Provision is made for the issuance of a warrant authorizing the use of such a device. Additionally, one court has suggested that while Maryland law may make eavesdropping with the consent of one, but not all, parties to an oral communication a crime, the fruits of such monitoring may nonetheless be admissible in a grand jury proceeding since the activity does not involve a constitutional violation and the legislature, although it outlawed this activity, did not specifically ban the use of evidence obtained by its use.

Until recently, Illinois regulated consensual interceptions in an unusual fashion: the practice was permitted when one party consented and a state's attorney "requested," i.e., authorized, the interception. Effective July 1, 1976, however, amendments to the law require the equivalent of a Title III eavesdropping warrant for consensual interceptions.

Notwithstanding this otherwise absolute...
lute requirement, some flexibility is retained through an emergency provision which authorizes a nonwarrant, consensual interception if the officer does not have sufficient time within which to obtain a court order and "the conversation to be overheard will occur within a short period of time or the use of the device is necessary for the protection of the law enforcement official." Even in such a situation, the approval, if possible, of a state's attorney is necessary, and, in all cases, a retroactive application for a court order must be made within 48 hours. This warrant, in turn, may only issue after the judge finds both a sufficient showing of probable cause at the time of the interception and the existence of a statutorily defined emergency. If the judge denies the retroactive application for a warrant, the contents of the intercepted communication are treated as obtained in violation of the statute.

Nevada's regulatory scheme is similar to the new Illinois law. The requirements for one-party consensual interceptions are identical to those for an ex parte eavesdropping warrant, and an emergency provision permits an interception with the consent of one party to precede the procurement of a warrant when "it is impractical to obtain a court order." Ratification of the use of the emergency provision must be sought within 72 hours.

Washington and Oregon are the most restrictive states of the eleven examined. In Washington, an eavesdropping warrant must be obtained prior to the interception of any communication, unless all parties consent. Moreover, evidence obtained pursuant to such a warrant is inadmissible except in a criminal action against a defendant charged with a crime which jeopardizes national security. Additionally, some Washington courts have indicated, in dicta, that the statutory exclusionary rule may not only suppress the fruits of an unlawful interception, but also the testimony of any witnesses who consented to the interceptions of their conversations with an-

\[\textit{Id. }\textsection\text{108A-6} (\text{Supp. 1976}).\]
\[\textit{Id. }\textsection\text{108A-6(a)}.\]
\[\textit{Id. }\textsection\text{108A-6(b)}.\]
\[\textit{Id.}\]
\[\textit{Id. }\textsection\text{108A-6(c)}.\]
\[\textit{NEV. REV. STAT. }\textsection\text{200.610-690} (1973).\]
\[\textit{NEV. REV. STAT. }\textsection\text{200.620(1)} (1973).\]
\[\textit{Id.}\]
\[\textit{Id. }\textsection\text{9.73.030} (1974).\]
\[\textit{Id. }\textsection\text{9.73.050}.\]

Oregon’s laws are almost as restrictive. Protecting oral and wire communications differently, the Oregon Legislature has declared that oral communications are protected from interception unless all parties to the conversation are informed of the interception,\footnote{Or. Rev. Stat. § 165.540(1)(c) (1975).} or the conversation to be intercepted is between a law enforcement official or someone he is directly supervising and a person reasonably believed to be engaging in a “crime involving narcotics or dangerous drugs.”\footnote{Id. § 165.540(5)(a).} In the context of wire communications, interceptions are prohibited unless the consent of at least one participant is obtained.\footnote{Id. § 165.540(1)(a).} Eavesdropping orders permitting interceptions otherwise proscribed in the oral and wire communications areas are restricted to investigations of crimes endangering human life or threatening the national security.\footnote{Id. § 133.725(1)(a).}

**CONCLUSION**

There are four possible resolutions to the questions of whether, and under what circumstances, law enforcement officials should be permitted to intercept communications with the knowledge and consent of one party to the communication: First, to permit the practice without restriction; second, to permit its use in specified situations only, \textit{e.g.}, in the investigations of “designated offenses”; third, to permit its use only with a court order; and fourth, to forbid the practice altogether. The issue is whether the benefits of preserving accurate and reliable evidence of criminal activity outweigh the diminution of individual privacy and the possible resultant “chilling effect” on the exercise of first amendment freedoms.

In a perfect society, an absolute ban on the use of consensual interceptions might be the appropriate choice, for there would be no need for this technique of obtaining evidence of criminal conduct. But we live in a society which is plagued by organized criminal activity, in which whole neighborhoods and communities are destroyed by narcotics traffic, and in which public officials occasionally succumb to bribes or other improper blandishments. The primary purposes of our system of criminal justice include the
deterrence of such activity and the protection of society from those who engage in it. The failure to achieve these purposes constitutes the gravest imaginable threat to the enjoyment of individual liberty. "Freedom" and "privacy" are empty words to a person who is afraid to walk the streets, and would be virtually nonexistent in a society whose economy and government were controlled by criminal organizations.

Although the problem of crime is societal, the response by the criminal justice system must be specific, since individual defendants are brought to trial on particularized allegations of unlawful conduct. "The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant." In the context of an individual trial, the argument against admitting relevant evidence obtained by consensual interception amounts to saying that [a defendant] has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.

The American Bar Association has approved the use of consensual interceptions because recordings are "the best and most reliable evidence:"

[W]here informants, whose credibility may be suspect, are used, where victims of crimes are engaged in key conversations with the perpetrators themselves, or where the investigators as such are individually involved and their credibility will be a significant factor in the subsequent trial, every effort should be made to record the conversations through the best available means. For a recording will reproduce the very words spoken with all the added significance that comes from inflection, emphasis and the other aspects of oral speech.

The existence of a recording of key conversations also minimizes the possibility "that the informant will change his mind, . . . that threat or injury will suppress unfavorable evidence and . . . that cross-examination will confound the testimony." Additionally,
the use of the technique can help ensure the safety of undercover officers and informers, and also help protect the innocent against unfounded accusations based upon fabricated testimony.\textsuperscript{254}

Assuming that law enforcement agencies should be permitted to utilize consensual interceptions as an investigative and evidence-gathering technique, the question becomes whether judicial authorization is to be required as a prerequisite to its use. The argument against warrantless consensual interceptions by law enforcement officials was expressed eloquently and succinctly by District Judge Gerhard Gesell in \textit{United States v. Kline}:\textsuperscript{255}

A Government agent can plant a broadcasting transmitter in a person's home, car or office without Court approval and transmit conversation of a consenting informer so long as the informer's presence is known and accepted by the other occupants even though they are completely unaware of and indeed affirmatively misled as to the informer's purpose.

This is an enormously dangerous and insidious power to place in the unsupervised hands of the public and the police. There are no restrictions as to time, place or circumstances. Without court supervision, abuses will continue unchecked. We are becoming a society that must exist in constant hazard from official snooping. Whatever incidental good flows from this invasion of privacy is submerged by the growing appearance of police surveillance so typical of totalitarian states.\textsuperscript{256}

Another court has melodramatically warned, of "the ominous spectre of the Orwellian Big Brother."\textsuperscript{257}

Unfortunately, law enforcement agencies occasionally indulge in acts which add fuel to the fire. In Los Angeles, for example, a professor at the University of California at Los Angeles brought a suit alleging that the police department had instructed officers to enroll as students and record lectures, classroom discussions, and campus organization meetings for "intelligence purposes" not relating to illegal activity. Chief of Police Davis demurred to the com-

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\item \textsuperscript{254} No one would seriously urge suppression of a recording establishing, for example, the defendant's innocence or the existence of entrapment on the basis that the police violated the law by making the recording.
\item \textsuperscript{256} Id.
\item \textsuperscript{257} People v. Beavers, 393 Mich. 554, 563, 227 N.W.2d 511, 514, cert. denied, 423 U.S. 878 (1975). Both \textit{Kline} and \textit{Beavers} involved the use of transmitters rather than tape recorders. Several learned jurists find a fundamental distinction between the two. \textit{See} notes 44-45 supra. The only differences apparent to the author are that recorders tend to be more reliable and that transmitters are less likely to be discovered and, if found, may enable monitoring officers to rescue the wearer.
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plaint; the California Supreme Court held that the plaintiff had alleged a justiciable cause of action, reasoning that the practice would have a chilling effect on the exercise of first amendment freedoms.\textsuperscript{258}

On the other hand, requiring law enforcement officials to obtain judicial authorization prior to conducting consensual interceptions would make the procurement of the "best and most reliable evidence" more difficult in every case, legally impossible in some cases, and frequently more dangerous. The time and energy required to prepare an application and order, find a judge, and obtain the necessary warrant—all simply to win permission to accurately preserve an anticipated encounter which itself needs no prior authorization—would sorely tax law enforcement resources, which in many jurisdictions are already stretched dangerously thin. Moreover, in situations requiring prompt police action, prior judicial approval could not be obtained.\textsuperscript{259} In other cases, legal impossibility would prevent the procurement of this "best and most reliable evidence." For instance, law enforcement officials often obtain potentially valuable information from an informer whose reliability is uncertain. Here, consensual interceptions are frequently used to establish the informer's trustworthiness and to accumulate probable cause to arrest, search, or obtain an ex parte eavesdrop or wiretap warrant. Adopting a court order prerequisite to consensual interceptions "would require officers to have probable cause to use a device for obtaining probable cause."\textsuperscript{260} As a result, certain transactions like those involving drugs would require two meetings instead of one: "the first to establish probable cause, the second to record the conversation."\textsuperscript{261} This would prove not only impractical and time consuming—there is no assurance that a statement made to an investigator at the "probable cause meeting" will be repeated at a second meeting—but also dangerous. Organized criminals quickly discover the problems and procedures of law enforcement agencies\textsuperscript{262} and are

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\textsuperscript{258} White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (en banc).

\textsuperscript{259} An emergency provision authorizing retroactive application for and approval of consensual interceptions, as is permitted in Illinois, see text accompanying notes 233-38 supra, and Nevada, see text accompanying notes 239-42 supra, would ease this problem somewhat.

\textsuperscript{260} NATIONAL COM'N FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE REPORT 117 (1976) (footnote omitted) [hereinafter cited as NATIONAL WIRETAP COM'N REPORT].

\textsuperscript{261} Id. (footnote omitted).

\textsuperscript{262} "[Narcotics] dealers know what's going on. They read about police work the way other people read the stock market." N.Y. Times, Dec. 8, 1975, at 49, col. 5 (remarks of Lt. Stephen Herrer, Narcotics Division, New York City Police Department).
\end{footnotesize}
likely to become suspicious of someone who repeatedly seeks additional meetings to discuss what normally would be agreed upon or transacted at one meeting.

As in the past, law enforcement agencies will, no doubt, adapt to the procedural requirements imposed upon them by the courts, the legislatures, and their own hierarchies. However, should the prerequisites to the use of a particular investigative technique become too time consuming or burdensome, that technique will fall into disuse. As the National Wiretap Commission reported, "the use of consensual surveillance is infrequent" where court authorization of consensual interceptions is required. In such jurisdictions, "the best and most reliable evidence" is often not obtained because of the legal and practical difficulties involved, a result foreseen by the American Bar Association when it recommended that "[t]he use of [electronic surveillance] techniques . . . should be encouraged, not discouraged, and they should not be encumbered with administrative procedure."

So long as law enforcement agencies restrict the use of consensual interceptions to the investigation of criminal activity, there is little to be gained and much to be lost by requiring prior or subsequent court authorization. Legislation restricting the official use of participant eavesdropping to investigations of criminal conduct while hopefully unnecessary to protect the privacy of innocent communications, might serve both the police and the citizenry by clarifying the parameters of permissible investigatory practice. But, beset as we are by criminal activity in so many aspects of our society, we cannot afford to erect unnecessary barriers "to relevant and probative evidence" of crime, evidence "which is also accurate and reliable."

An example will illustrate this point. From 1969 through 1972, narcotics division police in Manhattan obtained an average of 852 search warrants a year, the overwhelming majority of which, when executed, resulted in the seizure of the sought-after contraband. In 1973, the police department, reacting to adverse publicity engendered by the Collingswood raids conducted by federal narcotics agents in the Midwest, imposed rigid prewarrant application procedures upon its personnel. These requirements have proved to be so time consuming that in the period from 1973-1975 the number of search warrants sought dropped to fewer than 75 a year. The practical result is that sizeable quantities of narcotics which the courts would have authorized the police to seize were left undisturbed by officers unable to comply with the police department's procedural demands.

Prosecutors in those jurisdictions did not appear to feel particularly hindered by this requirement." Id.

ABA Standards, supra note 252, at 126.

The intrusion involved upon the privacy of the average citizen is minuscule; the importance of such evidence in the fight against crime is immense.