ELECTRONIC VISUAL SURVEILLANCE AND THE FOURTH AMENDMENT: THE ARRIVAL OF BIG BROTHER?

*By David P. Hodges**

I. Introduction

On February 8, 1974, Paul Castellano was holding a meeting in his office with three business associates. Apparently suspecting the group of involvement in organized crime, agents of the Federal Bureau of Investigation were using a hidden listening device to monitor the meeting and were also watching the group's activities by means of a television camera which they had secretly installed in the office. During the meeting Castellano suddenly discovered the listening device. As the agents watched on their television monitor, the men conducted a thorough search for other devices. The agents' view ended abruptly when the camera was discovered and smashed. Shortly thereafter, the agents entered the office. Unable to find the listening device, they arrested the four men for theft of government owned property.[1]

In an editorial referring to this incident, the *New York Times* commented that "it is an Orwellian act of official arrogance to assign inviolable status as government property to the instruments of clandestine intrusion on a citizen's office or home,"[2] and asked: "Must the target of a wiretap adjust to the bug as constant companion? Is it a must to stay on camera?"[3] The editorial conceded, however, that "presumably the equipment was installed by the F.B.I. with court sanction."[4] The latter comment provides the focus for this note: May a court constitutionally authorize the installation of clandestine electronic visual surveillance devices for law enforcement purposes?

A carefully circumscribed statutory procedure has been established under which wiretapping and electronic eavesdropping are permitted for law enforcement purposes when conducted in accordance with prior

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* Member, second year class.

1. N.Y. Times, Feb. 12, 1974, at 35, col. 1.
2. N.Y. Times, Feb. 13, 1974, at 38, col. 1.
3. *Id.*
4. *Id.*

judicial authorization.[5] The listening device installed in Mr. Castellano's office, if authorized and operated in the manner prescribed by this statute, was therefore a constitutionally permissible investigative tool.[6] However, the statute does not apply to the use of a hidden camera to spy on the activities of individuals,[7] nor has the Supreme Court ever considered the constitutionality of the use of such a device.[8] Nevertheless, the Castellano incident illustrates that "electronic snooping"[9] is now emerging as a tool of law enforcement. This development raises some serious constitutional questions involving the conflict between the legitimate need of society for effective law enforcement and the right of the individual members of society to be free from unreasonable governmental intrusions.[10]

The individual's "right of privacy" is a cherished value of American society. Yet the meaning of privacy varies depending on the factual context and the expectations of the individual concerned. Privacy has been defined, for example, as the right "to be let alone,"[11] the right of persons "to determine for themselves when, how, and to what extent information about them is communicated to others,"[12] and as the right

5. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970) [hereinafter referred to in text and notes as Title III]. See notes 107-116 *infra* and text accompanying.

6. The constitutionality of Title III has not been directly considered by the Supreme Court, but has been upheld by all of the federal courts of appeals that have considered the issue. *See, e.g.*, United States v. Sklaroff, 506 F.2d 837 (5th Cir.), *cert. denied*, 96 S. Ct. 142 (1975), and cases cited therein at 840.

7. Title III applies only to the "*aural* acquisition of the contents of any wire or oral communication . . . ." 18 U.S.C. § 2510(4) (1970) (emphasis added). *See* S. REP. No. 1097, 90th Cong., 2d Sess. 90 (1968) [hereinafter cited as SENATE REPORT] (other forms of surveillance not within the proposed legislation).

8. Research has revealed only one case that mentions the use of a hidden camera by law enforcement agents. In Sponick v. Police Dep't, 49 Mich. App. 162, 211 N.W.2d 674 (1973), F.B.I. agents concealed a camera in the wall of a bar to watch for suspected gambling activity. Since the bar was a public place, the court held that the use of the camera was not a search under the Fourth Amendment. *Id.* at 198, 211 N.W.2d at 690. See notes 69-75 *infra* and text accompanying.

9. The use of electronic devices for the purpose of visual surveillance will hereinafter be referred to as "electronic snooping," as distinguished from the use of electronic devices for the purpose of aural surveillance (including both wiretapping and bugging), which will hereinafter be referred to as "electronic eavesdropping." The term "electronic surveillance" will refer to both of these and to any other electronic methods for clandestine surveillance of persons. *See, e.g.*, United States v. Holmes, 521 F.2d 859 (5th Cir. 1975) ("beeper" attached to car for constant surveillance of car's location); United States v. Martyniuk, 395 F. Supp. 42 (D. Or. 1975) (same).

10. *See* Terry v. Ohio, 392 U.S. 1, 10-12 (1968); Camara v. Municipal Court, 387 U.S. 523, 528, 533 (1967); Frank v. Maryland, 359 U.S. 360, 363-65 (1959).

11. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

12. A. WESTIN, PRIVACY AND FREEDOM 7 (1967) [hereinafter cited as WESTIN].

which protects "the individual's interest in preserving his essential dignity as a human being."[13] The Supreme Court has held that there is a constitutional right of privacy which absolutely prohibits governmental interference in certain areas of individual activity.[14] But the Fourth Amendment contains no general right to privacy absolutely prohibiting governmental intrusion;[15] rather, it protects only against "unreasonable" governmental intrusions.[16] The primary constitutional question posed by electronic snooping is whether there are circumstances under which the invasion of privacy which it entails can be considered reasonable and thus permissible under the Fourth Amendment.

The question of the protection of individual privacy has come into sharper focus since the elctronic age has expanded the means by which searches and seizures may be accomplished. The drafters of the Fourth Amendment were concerned only with the permissible scope of a physical entry into a person's home or business and the seizure of physical objects. That "zone of privacy" which protected spoken words from overhearing and acts from observation was fixed by the inherent limits of the human senses. Privacy against prying eyes and ears could be insured when such privacy was desired. The advent of electronics, however, has eliminated the traditional zone of privacy with respect to one's spoken words since eavesdropping devices can detect what is said virtually anywhere.

Members of the Supreme Court, recognizing the impact on traditional notions of privacy of the "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society,"[17] have long expressed their apprehension over the predictable improvements in sophistication of such devices. In his famous dissent in the first wiretapping case considered by the Court, Justice Brandeis warned that "[t]he progress of science in furnishing the Government with

13. Hufstedler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 RECORD OF N.Y.C.B.A. 546, 550 (1971) [hereinafter cited as Hufstedler]. *See generally* Fried, *Privacy*, 77 YALE L.J. 475 (1968).

14. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973) (individual decision to have an abortion); Stanley v. Georgia, 394 U.S. 557 (1969) (possession of obscene materials in the home); Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives by married persons). A similar right has been recognized by state courts. *E.g.*, State v. Bateman, 25 Ariz. App. 1, 540 P.2d 732 (1975) (consenting sexual behavior by a married couple in private); Ravin v. State, 537 P.2d 494 (Alas. 1975) (possession of marijuana for personal use in the home).

15. Katz v. United States, 389 U.S. 347, 350 (1967).

16. Carroll v. United States, 267 U.S. 132, 147 (1925).

17. Silverman v. United States, 365 U.S. 505, 509 (1961).

means of espionage is not likely to stop with wire-tapping."[18] Justice Murphy foresaw that "new methods of photography that penetrate walls or overcome distances" would be "far more effective devices for the invasion of a person's privacy than the direct and obvious methods of oppression which were detested by our forebears . . . ."[19] Chief Justice Warren referred to the danger posed by "the fantastic advances in the field of electronic communication . . . ."[20] Justice Douglas expressed his concern that "[w]e are rapidly entering the age of no privacy, where everyone is open to surveillance at all times . . . ."[21]

These apprehensions have been realized by the development of electronic snooping devices, which now threaten to eliminate the barrier against visual intrusion upon an individual's traditional zone of privacy. The implications of electronic snooping are far more serious than those of electronic eavesdropping.[22] For this reason it is imperative that electronic snooping not be considered merely an extension of electronic eavesdropping, to be utilized in law enforcement subject to no greater constitutional or statutory restrictions. As an inherently more intrusive surveillance technique, electronic snooping must be separately evaluated against the constitutionally mandated standard of reasonableness.

Compelling reasons require that the legal community address this issue *now*, before the official use of electronic snooping becomes widespread. A time delay invariably exists between the introduction of a new technology and judicial consideration of its constitutional implications.[23] Recent technological progress, particularly in the field of electronics, has resulted in "a drastic acceleration of the process of innovation, invention and practical application of new technology."[24] Consequently this time delay has taken on increased significance where new

18. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

19. Goldman v. United States, 316 U.S. 129, 139 (1942) (Murphy, J., dissenting).

20. Lopez v. United States, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring in the result).

21. Osborn v. United States, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting).

22. "When—and this may be in the not-too-distant future—walls cease to be a barrier to visual aids, it will be the visual eavesdropper who poses the greatest threat to the right of privacy." Comment, *Electronic Eavesdropping: A New Approach*, 52 CALIF. L. REV. 142, 147 (1964).

23. *See generally* Green, *The New Technological Era: A View From the Law*, BULL. OF THE ATOMIC SCIENTISTS, Nov. 1967, at 12.

24. Green, *Technology Assessment and the Law: Introduction and Perspective*, 36 GEO. WASH. L. REV. 1033, 1034 (1968). For specific examples, see references cited in note 34 *infra*.

electronic surveillance techniques are concerned.[25] By the time Congress acted to bring electronic eavesdropping under statutory control, the technology had been in widespread use for many years.[26] A total ban on electronic eavesdropping, although proposed,[27] would have been unrealistic and probably unworkable under the circumstances.

Electronic snooping, on the other hand, is not yet in widespread use. Effective regulation of its use in law enforcement is therefore possible. Now is the critical time to ask whether the use of electronic snooping as a law enforcement tool should be permitted under any circumstances. This note will examine the constitutionality of electronic snooping techniques which intrude upon an individual's "reasonable expectation of privacy"[28] protected by the Fourth Amendment to the Constitution. The discussion will proceed by analogy to the constitutional principles relating to electronic eavesdropping,[29] taking into account relevant differences between the two techniques. It is appropriate to begin this inquiry with an examination of the exact nature of the technology of electronic snooping and its present and future capabilities.

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25. "Technological developments are arriving so rapidly and are changing the nature of our society so fundamentally that we are in danger of losing the capacity to shape our own destiny.

"This danger is particularly ominous when the new technology is designed for surveillance purposes, for in this case the tight relationship between technology and power is most obvious. Control over the technology of surveillance conveys effective control over our privacy, our freedom and our dignity—in short, control over the most meaningful aspects of our lives as free human beings." *Hearings on Surveillance Technology Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., June 23, 1975 (opening statement of Senator Tunney) (mimeographed copy obtained from Senator Tunney's office). "The law, though jealous of individual privacy, has not kept pace with [the] advances in scientific knowledge." Berger v. New York, 388 U.S. 41, 49 (1967). "[O]ur course of decisions, it now seems, has been outflanked by the technological advances of the very recent past." Lopez v. United States, 373 U.S. 427, 471 (1963) (Brennan, J., dissenting).

26. *See* Berger v. New York, 388 U.S. 41, 45-47 (1967).

27. S. 928, 90th Cong., 1st Sess. (1967) (Right of Privacy Act of 1967). *See generally* SENATE REPORT, *supra* note 7, at 161-62 (individual views of Senator Long and Senator Hart).

28. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). See notes 69-75 *infra* and text accompanying.

29. Electronic snooping is more closely analogous to electronic eavesdropping than to an ordinary physical entry because it involves the same electronic extension of the unaided senses, the same lack of presearch notice, and normally the same kind of search for evidence from the acts of the suspect himself rather than from the seizure of a specific tangible object which may be found in the place searched. But see note 125 *infra* and text accompanying. Thus the constitutional issues raised by electronic snooping are most logically approached by analogy to the law relating to electronic eavesdropping.

II. The Tools

A. Miniature Television Cameras

The potential usefulness of hidden television cameras to view areas otherwise inaccessible to unaided visual perception has long been recognized.[30] Writers have described visual surveillance systems consisting of cameras installed between walls and fitted with a ninety-degree mirror to observe the adjoining room,[31] mounted on a telephone pole to look into apartment windows across the street,[32] and placed in the ventilators of public restrooms to detect and apprehend homosexuals.[33] But these systems have not been widely used for visual surveillance of private areas since they generally lacked portability and were difficult to install, conceal and maintain.

These problems have been virtually eliminated by the introduction of cameras equipped with a very recently developed solid-state image sensor called a "charge-coupled device" (CCD).[34] Currently about the size of a nickel, the CCD replaces the bulky and expensive tubes which were previously the heart of a television camera. The development of the first complete closed-circuit camera system using CCD technology was announced in 1973.[35] The camera was hand-held, measured three inches by two inches by one inch and weighed six ounces. Only one month later a considerably more sophisticated sensor was unveiled,[36] and early in 1975 a camera became available which incor-

30. *See, e.g.*, WESTIN, *supra* note 12, at 71-72; S. DASH, R. SCHWARTZ, & R. KNOWLTON, THE EAVESDROPPERS 375-78 (1959) [hereinafter cited as DASH].

31. Sanford, *TV for Surveillance*, LAW AND ORDER, Dec. 1964, at 16.

32. Shaw, *An Introduction to Law Enforcement Electronics and Communications, Part III*, LAW AND ORDER, May 1965, at 36.

33. WESTIN, *supra* note 12, at 131.

34. *See generally* Amelio, *Charge-Coupled Devices*, SCIENTIFIC AMERICAN, Feb. 1974, at 22; Gilmore, *Tiny TV Camera With a Big Future*, POPULAR SCI., Aug. 1972, at 28. The CCD is the latest product of the burgeoning semiconductor electronics industry, which, although less than thirty years old, has already had a remarkable impact on society. For a glimpse of the speed with which the industry is inventing and improving new electronic devices, *compare* Vacroux, *Microcomputers*, SCIENTIFIC AMERICAN, May 1975, at 32, *with* Hittinger & Sparks, *Microelectronics*, SCIENTIFIC AMERICAN, Nov. 1965, at 57. CCD technology may similarly be expected to undergo rapid development, leading to greatly improved sophistication and further reduction in size.

35. N.Y. Times, Aug. 22, 1973, at 54, col: 1; BUS. WEEK, Aug. 25, 1973, at 21.

36. N.Y. Times, Sept. 19, 1973, at 68, col. 4. "Sophistication" in this sense refers to the sensor's resolution, image quality, and light-gathering efficiency, which are dependent upon the number of independent "elements" (literally, "eyes") contained in each sensor. The original CCD contained 10,000 elements; the later device contained 120,000. The rapid improvement typical of new semiconductor devices is thus strikingly illustrated.

porated this sensor and was fully compatible with existing television monitors, videotape recorders and other equipment.[37]

Such miniaturized cameras can easily be concealed in a briefcase, a kitchen cabinet, a lamp base, a room heating duct, an overhead lighting fixture or even in an electrical outlet or light switch. One writer has predicted the development of wireless, battery-powered electronic "eyes" as small as buttons.[38] This prospect seems assured with the advent of CCD technology. Thus the capability currently exists to gain visual access to virtually any private area, in a manner similar to the use of miniature listening devices to overhear private conversations.[39]

B. Light Pipes

Another recent development which can be utilized in conjunction with miniature television cameras is the technology of "fiber optics."[40] This technology employs a small bundle of thin, transparent and flexible fibers called a "light pipe" which can conduct light or visual images from one end of the bundle to the other even when the fibers are twisted or completely coiled up. At one end of the pipe is a lens and at the other a television camera, which can be located at a convenient distance from the area under surveillance. Only the lens need actually intrude into the target area, and its presence can be easily concealed. There are few places into which an expertly installed light pipe cannot intrude. Any installation difficulties attending the use of television cameras for surveillance would thus be eliminated.

C. Low Light Level Television

Another facet of a comprehensive electronic snooping system is the ability to virtually "see in the dark." One means by which this may be accomplished is through the technology of Low Light Level Television (LLLTV),[41] which utilizes an extremely sensitive visual detector. An

37. N.Y. Times, Jan. 28, 1975, at 48, col. 4.

38. WESTIN, *supra* note 12, at 86.

39. *See generally* DASH, *supra* note 30, at 330-58. One difference between visual and aural "bugs," of course, is that the visual device must be in plain sight in the area under surveillance. Nevertheless, appropriate camouflage techniques can be employed to minimize the risk of inadvertent detection.

40. *See generally* Goldberg, *Fiber Optics*, POPULAR PHOTOGRAPHY, Nov. 1971, at 100.

41. *See generally* Norwood, *"Available Dark" Photography*, INDUSTRIAL PHOTOGRAPHY, Nov. 1971, at 24 (describing the development of LLLTV technology for use in Vietnam, and its conversion to domestic law enforcement purposes upon declassification of information about the system).

area which appears dark to the naked eye can be viewed on a television screen as if in bright daylight by the use of such systems. Under grants from the Law Enforcement Assistance Administration, LLLTV systems have been installed in several cities to provide remote surveillance of downtown business areas in an effort to reduce street crime and better utilize police resources.[42] With the development of charge-coupled devices incorporating low light level capabilities,[43] electronic snooping systems can now provide surveillance of enclosed areas under any conceivable lighting conditions. No longer is darkness a barrier to an electronic snooper.

D. Infrared Television Cameras

Another method of "seeing in the dark" involves the use of devices which detect infrared radiation.[44] Originally developed for night vision use by the military, these devices now have been adapted for civilian purposes.[45] The earlier models utilized the "direct viewing" system, in which invisible infrared radiation illuminates the area under observation and the reflections are detected by a television camera sensitive to such radiation, just as visible radiation is detected by an ordinary camera.[46] A more sophisticated method uses the "thermal imaging" system, which directly detects infrared radiation and converts it into electrical energy.[47] By discriminating between the minute differences in temperature of various parts of the body, this system can produce a high-resolution black and white television image of a person, including all facial details, at a distance of several hundred yards, even on an overcast night or through dense fog.

Although these infrared sensors can be used in miniature television cameras as an alternative to the LLLTV technique, the most signficant

42. *See generally* Donner, *Political Intelligence: Cameras, Informers, and Files*, 1 CIV. LIB. REV. 8, 13 (1974); Note, *Police Use of Remote Camera Systems for Surveillance of Public Streets*, 4 COLUM. HUMAN RIGHTS L. REV. 143-53 (1972).

43. *See generally* Carnes & Kosonocky, *Sensitivity and Resolution of Charge-Coupled Imagers at Low Light Levels*, 33 RCA REV. 607 (1972).

44. Infrared radiation may be more familiarly described as heat. For example, because of its warmth the human body emits infrared radiation. Although not visible to the human eye, such radiation can be detected by appropriate electronic devices.

45. *See, e.g.*, THE ENGINEER, July 5, 1973, at 23 (describing an infrared surveillance system for security against intruders).

46. *See* Swift & Thompson, *Seeing in the Dark*, 42 THE RADIO AND ELECTRONIC ENGINEER 403 (1972). A drawback of this system was that if the person being observed also possessed an infrared detector he could detect the presence of the viewer and guard against it.

47. *See id.* at 408.

feature of infrared technology is that eventually it may provide a means to literally see through walls. Most present building materials, such as wood and brick, are as opaque to infrared radiation as they are to visible light. However, certain substances in widespread use, such as plastics, are excellent transmitters of infrared energy even when painted and thus opaque to visible light.[48] To a lesser extent glass and derivative materials such as fiberglass also transmit infrared radiation. The day may soon arrive when the infrared emanations from a human body, passing through the four walls which have traditionally afforded privacy from visual intrusions, can be detected and reconstructed into a television picture by a nearby snooper. Such a development would remove the last barrier to unwanted visual observation of private areas.

E. Videophones

One other means of visual intrusion, the videophone, deserves brief attention. The videophone is an ordinary telephone incorporating a television camera and viewing screen which permit the parties to a conversation to see each other while they talk. Although their development has not been as rapid as originally predicted,[49] videophones may eventually become commonplace in private homes and businesses.[50] In a manner analogous to present methods of wiretapping,[51] an electronic snooper equipped with a television monitor could intercept both the visual images and the oral communications of the parties to a videophone conversation.[52]

III. Is Electronic Snooping A Search?

The Fourth Amendment to the United States Constitution provides:

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

48. *Cf.* WESTIN, *supra* note 12, at 71 (describing wall panels made of a special substance which transmits infrared).

49. *See* Hardeman, *When Will Picturephone Break Out?*, ELECTRONICS, Nov. 8, 1971, at 97.

50. A major step toward the mass production of a low cost, reliable videophone may be the recent development of a CCD for use in videophones. *See* N.Y. Times, Jan. 4, 1975, at 29, col. 4.

51. *See generally* DASH, *supra* note 30, at 306-30.

52. Interception of the visual portion of the communication is not presently prohibited. See note 7 *supra.*

In determining the applicability of the Fourth Amendment to a particular type of official conduct, two questions must be considered:

1. Does the conduct constitute a search or seizure within the meaning of the amendment?
2. Is the conduct unreasonable?[53]

Only if both of these questions are answered in the affirmative will the conduct constitute a violation of the Fourth Amendment.[54]

A. The Original Trespass Doctrine

The Supreme Court long ago declared that the protection of the Fourth Amendment applies "to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life."[55] Notwithstanding the breadth of this language, the terms "search" and "seizure" were originally limited to an actual physical trespass into a person's dwelling or place of business and to the seizure of tangible objects.[56] With the increasingly prevalent use of electronic eavesdropping, however, came the realization that wiretapping and bugging intruded upon the privacies of life protected by the Fourth Amendment just as effectively as did the more traditional physical entry into the home. When an actual physical trespass occurred, the Court was quick to find a Fourth Amendment violation even though only conversations had been "seized."[57] The Court soon explicitly held that conversation, although an intangible, could be the subject of Fourth Amendment

53. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 16-20 (1968); Boyd v. United States, 116 U.S. 616, 621-22 (1886).

54. The consequence of a Fourth Amendment violation is that no evidence thus obtained is admissible in a state or federal criminal prosecution. Mapp v. Ohio, 367 U.S. 643 (1961) (state prosecution); Weeks v. United States, 232 U.S. 383 (1914) (federal prosecution). *But see* United States v. Peltier, 422 U.S. 531 (1975) (extension of exclusionary rule not retroactively applied); United States v. Calandra, 414 U.S. 338 (1974) (refusing to extend the exclusionary rule to grand jury proceedings); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 412-24 (1971) (Burger, C.J., dissenting) (questioning the wisdom of continued adherence to the exclusionary rule).

55. Boyd v. United States, 116 U.S. 616, 630 (1886).

56. Olmstead v. United States, 277 U.S. 438 (1928). In *Olmstead* the use of a wiretap to overhear the defendant's phone conversations was held not to constitute a search because there was no physical entry into a protected area and because the protection of the Fourth Amendment did not extend to intangibles such as conversation. *Id.* at 464-65. *See* Goldman v. United States, 316 U.S. 129 (1942) (no search where listening device was placed against defendant's hotel room wall).

57. Silverman v. United States, 365 U.S. 505 (1961). In *Silverman* a "spike mike" penetrated into the suspect's premises and contacted a heating duct, allowing the officers to hear conversations throughout the house. *Id.* at 506-07.

protection.[58] The illogic of continued adherence to the trespass doctrine was obvious, since the privacy interest invaded by electronic eavesdropping on conversations is the same whether or not a trespass has been committed.[59]

Meanwhile, a similar development was occurring with regard to visual observations by law enforcement officers. Following the maxim that the eye cannot commit a search,[60] the Court originally held that observation of activity in the "open fields" with the unaided eye is not within the protection of the Fourth Amendment.[61] This led to the development of the "plain view" doctrine: whenever a law enforcement officer is in a position where he has a right to be, and sees instrumentalities or fruits of crime, contraband or "mere evidence"[62] in plain view, it is not a violation of the Fourth Amendment for him to seize such items.[63] The doctrine applies even when officers use visual aids to extend the normal capability of the human eye. Thus the use of a flashlight at night to see what would have been visible to the naked eye during the day has been held not to constitute a search.[64] Similarly, observations made by the use of binoculars do not constitute a Fourth Amendment search.[65] When the officers made their observations during an unauthorized trespass onto the curtilage of an individual's property, however, a Fourth Amendment violation was found even though

58. Wong Sun v. United States, 371 U.S. 471, 485 (1963).

59. "[T]he invasion of privacy is as great in one case as in the other." Silverman v. United States, 365 U.S. 505, 512-13 (1961) (Douglas, J., concurring).

60. *See* McDonald v. United States, 335 U.S. 451, 454 (1948).

61. Hester v. United States, 265 U.S. 57 (1924).

62. *See* Warden v. Hayden, 387 U.S. 294 (1967).

63. Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971) (plurality opinion); Harris v. United States, 390 U.S. 234 (1968). *See, e.g.*, Ker v. California, 374 U.S. 23, 43 (1963). In *Coolidge* it is stated that the viewing must be "inadvertent," but as this was the opinion of only a plurality of the Court, other courts, depending on the circumstances of the case, have sometimes held that "inadvertence" is not required. *E.g.*, State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974). *See, e.g.*, Weaver v. Williams, 509 F.2d 884 (4th Cir. 1975) (officer stepped onto axle of truck in order to see over siding): " 'Plain view' in this context means whatever can be seen, whether accidentally or by intentional scrutiny." *Id.* at 886. *See generally* Mascolo, *The Role of Functional Observation in the Law of Search and Seizure: A Study in Misconception*, 71 DICK. L. REV. 379 (1967).

64. *E.g.*, United States v. Lee, 274 U.S. 559 (1927); United States v. Booker, 461 F.2d 990 (6th Cir. 1972). *Contra*, Pruitt v. State, 389 S.W.2d 475 (Tex. Crim. App. 1965).

65. *E.g.*, United States v. Grimes, 426 F.2d 706 (5th Cir. 1970); Fullbright v. United States, 392 F.2d 432 (10th Cir.), *cert. denied*, 393 U.S. 830 (1968); *cf.* On Lee v. United States, 343 U.S. 747, 754 (1952) (dictum). *But see* People v. Ciochon, 23 Ill. App. 3d 363, 319 N.E.2d 332 (1974) (remanded on question of whether a reasonable expectation of privacy from binocular observation was exhibited).

no tangible objects were seized.[66] Again, with respect to visual observations the illogic of the trespass doctrine is apparent. The same privacy interest is invaded whether the observation is made during a trespass or by extrasensory means without the necessity of a trespass.

B. A "Reasonable Expectation of Privacy"

In *Berger v. New York*[67] the Court explicitly held that the use of electronic devices to capture conversation is a search within the meaning of the Fourth Amendment, without making reference to any trespass on the part of the electronic device into a "constitutionally protected area."[68] Shortly thereafter, in *Katz v. United States*,[69] the Court repudiated the trespass doctrine and returned to a focus on privacy as the primary determinant of whether a Fourth Amendment search and seizure had occurred.

In *Katz* the bugging of a telephone booth in order to overhear the suspect's side of phone conversations was held a violation of the Fourth Amendment in the absence of prior judicial authorization even though the listening device did not trespass into the phone booth. Holding that the Fourth Amendment "protects people, not places,"[70] and extends to "the recording of oral statements" as well as to "the seizure of tangible items,"[71] the Court concluded that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[72] By entering the phone booth and closing the door, the defendant exhibited a "reasonable expectation of privacy"[73] in his conversations. The bugging constituted a search and seizure under the Fourth Amendment because it "violated the privacy upon which [Katz] justifiably relied while using the telephone booth. . . ."[74]

The present test for determining when official conduct constitutes a

66. *E.g.*, California v. Hurst, 325 F.2d 891, 898 (9th Cir. 1963); McGinnis v. United States, 227 F.2d 598, 603 (1st Cir. 1955); Brock v. United States, 223 F.2d 681, 685 (5th Cir. 1955); *see* Wong Sun v. United States, 371 U.S. 471, 485 (1963) (dictum); McDonald v. United States, 335 U.S. 451, 453 (1948). The plain view doctrine is not applicable in such cases because the officer is not positioned where he has a right to be. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971) (plurality opinion).

67. 388 U.S. 41 (1967).

68. *Id.* at 51.

69. 389 U.S. 347 (1967).

70. *Id.* at 351.

71. *Id.* at 353.

72. *Id.*

73. *Id.* at 360 (Harlan, J., concurring).

74. *Id.* at 353.

search or seizure is most clearly stated in Justice Harlan's concurrence in *Katz*:

> My understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.[75]

C. Application to Electronic Snooping

The *Katz* decision does not affect the "plain view" doctrine because no one can have a reasonable expectation of privacy in an activity which can be viewed by the unaided senses of others.[76] But when a person

75. *Id.* at 361 (Harlan, J., concurring). A possible interpretation of this language is that whenever an actual expectation of privacy is absent, there is no Fourth Amendment search. One commentator has observed that if this interpretation is taken literally, "the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) [hereinafter cited as Amsterdam]. At least one court has suggested this very method of eliminating an actual expectation of privacy. State v. Bryant, 287 Minn. 205, 211, 177 N.W.2d 800, 804 (1970) (store could eliminate expectation of privacy in public toilet stall by posting signs warning users of possible surveillance). *See* Comment, 55 MINN. L. REV. 1255 (1971); *cf.* United States v. Bynum, 485 F.2d 490, 501 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974) (expectation of privacy could be eliminated by suspect's awareness that his phone was tapped); People v. Superior Court (Stroud), 37 Cal. App. 3d 836, 839, 112 Cal. Rptr. 764, 765 (1974) (no expectation of privacy from helicopter observation when the area was the subject of a regular air patrol). *But cf.* United States v. Davis, 482 F.2d 893, 905 (9th Cir. 1973) (expectation of privacy in airline carry-on luggage not diminished by frequency of intrusions). "Fortunately, neither *Katz* nor the fourth amendment asks what we expect of government. They tell us what we should demand of government." Amsterdam, *supra*, at 384. This note will assume that an actual expectation of privacy from electronic snooping could not be defeated in the manner suggested by a literal reading of Justice Harlan's phraseology.

76. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). A number of courts have held, in effect, that no expectation of privacy existed if there was *any* way in which a skillful and determined snooper could intrude using only his unaided senses. The burden is placed on the victim of the intrusion to guard his privacy against any conceivable invasion lest he lose it. *E.g.*, United States v. Vilhotti, 323 F. Supp. 425, 431 (S.D.N.Y. 1971); People v. Becker, 533 P.2d 494, 496 (Colo. 1975); Commonwealth v. Hernley, 216 Pa. Super. 177, 181, 263 A.2d 904, 907 (1970), *cert. denied*, 401 U.S. 914 (1971). This approach has produced vigorous criticism in light of the growing

takes reasonable steps to insure the actual privacy of his activity against visual intrusion, an invasion of that privacy which can only be accomplished by electronic means must be considered a search under the Fourth Amendment. Under the pre-*Katz* trespass doctrine, observations as well as conversations which were "seized" by means of an unlawful trespass were suppressed as having been obtained in violation of the Fourth Amendment.[77] The development of highly sophisticated electronic listening devices prompted the Court to declare that their use to capture conversation was a search regardless of whether a trespass had occurred.[78] Even in the absence of the *Katz* decision, the development of equally sophisticated electronic viewing devices would logically have led to the same result when observations were accomplished by the use of such devices.

Although *Katz* involved the specific problem of electronic eavesdropping, its explanation of a reasonable expectation of privacy was not so limited:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[79]

Furthermore, Justice Harlan's statement that activities exposed to plain view are excluded from Fourth Amendment protection[80] implies that activities not so exposed would be protected from observation.

Numerous other authorities recognize that the Fourth Amendment

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sophistication of the means of intrustion. "Is it not important to our American way of life that when a citizen does as much as ordinary care requires to shield his sanctuary from strangers his constitutional right to maintain his privacy should not be made to depend upon the resources of skillful peepers and eavesdroppers who can always find ways to intrude?" United States v. Wright, 449 F.2d 1355, 1369 (D.C. Cir. 1971) (Wright, J., dissenting), *cert. denied*, 405 U.S. 947 (1972). After an extensive analysis of the cases dealing with plain view observations, one writer concludes that the result is "the specter of a fourth amendment which protects any man . . . who is wealthy enough to afford a windowless, soundproof house, built on an extensive area of land, and surrounded by high fences, and . . . who is willing to live the life of a hermit, staying inside his house at all times, prepared to take affirmative action to counter any new technological methods of intrusion with which the government might be equipped." Note, *Katz and the Fourth Amendment: A Reasonable Expectation of Privacy or, A Man's Home Is His Fort*, 23 CLEVE. ST. L. REV. 63, 72 (1974). *See* Amsterdam, *supra* note 75, at 402; Comment, *Police Helicopter Surveillance*, 15 ARIZ. L. REV. 145, 167 (1973); Comment, *Constitutional Standards for Applying the Plain View Doctrine*, 6 ST. MARY'S L.J. 725, 736, 741 (1974).

77. See notes 57-58, 66 *supra* and text accompanying.

78. See text accompanying note 68 *supra*.

79. Katz v. United States, 389 U.S. 347, 351-52 (1967) (citations omitted).

80. *Id.* at 361 (Harlan, J., concurring).

may protect an individual's activities from unwanted observation by electronic devices.[81] Absent prior judicial authorization, a camera lens which can view an area otherwise inaccessible to observation is not positioned where it has a right to be so that the plain view doctrine might apply.[82] The conclusion is inescapable: electronic snooping must be considered a search subject to the limitations imposed by the Fourth Amendment when it intrudes into an area where a reasonable expectation of privacy from observation exists. The next question to be considered, therefore, is whether electronic snooping can meet the standard of reasonableness prescribed by the Fourth Amendment.

IV. The Warrant Requirement and Electronic Snooping

A. Reasonableness and the Warrant Requirement

The judicial determination of Fourth Amendment reasonableness turns, "at least in part, on the more specific commands of the warrant clause."[83] In general, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . ."[84] It does not follow, however, that if a search has been authorized by a technically proper warrant it is automatically reasonable.[85] The Fourth Amendment's two clauses

81. "While the Katz case involved evidence obtained by listening and the case before us involves evidence obtained by visual observation, we think the results are the same." State v. Bryant, 287 Minn. 205, 210, 177 N.W.2d 800, 803 (1970). *See* People v. Spinelli, 35 N.Y.2d 77, 81n., 315 N.E.2d 792, 794n., 358 N.Y.S.2d 743, 747n. (1974) (recognition that a "technologically aided viewing" might in itself constitute a "constitutionally cognizable search"); Amsterdam, *supra* note 75, at 404; Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. REV. 1, 17-18 (1975); Rehnquist, *Is an Expanded Right of Privacy Consistent With Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 U. KANS. L. REV. 1, 4 (1974) (freedom from observation part of the "core" concept of privacy embodied in the Fourth Amendment).

82. See note 63 *supra* and text accompanying.

83. United States v. United States District Court, 407 U.S. 297, 315 (1972).

84. Katz v. United States, 389 U.S. 347, 357 (1967). *See* Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); Johnson v. United States, 333 U.S. 10, 14 (1948). Under certain conditions involving "exigent circumstances" making it unnecessary or unreasonable to obtain a warrant before conducting a search, prior judicial approval is unnecessary. The Court in *Katz* discounted the idea that any of these exceptions could apply to electronic eavesdropping. 389 U.S. at 357-58. The present discussion will make the same assumption as to electronic snooping. *But see* 18 U.S.C. § 2518(7) (1970), permitting electronic eavesdropping subject to subsequent judicial ratification within 48 hours in cases of emergency situations involving conspiratorial activities threatening national security or characteristic of organized crime.

85. Osborn v. United States, 385 U.S. 323, 350 (1966) (Douglas, J., dissenting), *citing* Boyd v. United States, 116 U.S. 616 (1886) ("a validly executed warrant does not

are to a certain extent independent. The first prohibits all unreasonable searches and seizures, and the second states the elements required for a valid warrant.[86] The present inquiry will consider these two clauses separately. The warrant requirement will first be discussed by analogy to the requirements for electronic eavesdropping orders. The general standard of reasonableness will then be applied to a judicial order for electronic snooping.

B. Constitutional Standards for Electronic Eavesdropping: Berger and Katz

In *Berger v. New York*[87] the Court considered the constitutionality of a New York statute which permitted electronic eavesdropping by law enforcement officers under specified conditions. The statute authorized a judge to issue an eavesdropping order upon oath or affirmation of an appropriate official stating the existence of reasonable ground to believe that evidence of crime would be obtained thereby, and particularly describing the persons whose conversations were to be overheard and the telephone number involved. The eavesdrop was limited to a two month period unless extended.[88]

Relying in part on the circumstances surrounding the judicially authorized use of an electronic recording device approved in *Osborn v. United States*,[89] the Court in *Berger* held the New York statute unconstitutional for the following reasons:

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necessarily make legal the ensuing search and seizure"). *See, e.g.*, Bowden v. State, 510 S.W.2d 879 (Ark. 1974) (judicial order for surgery to remove bullet invalidated as authorizing an unreasonable search and seizure); *cf.* People v. Bracamonte, 15 Cal. 3d 394, 400 n.3, 540 P.2d 624, 628 n.3, 124 Cal. Rptr. 528, 532 n.3 (1975) (suggestion that certain bodily intrusions may not be constitutional even if authorized by search warrant). "Far from looking at the warrant as a protection against unreasonable searches, [our constitutional fathers] saw it as an authority for unreasonable and oppressive searches . . . ." T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1967).

86. "The Court has frequently observed that the Fourth Amendment's two clauses impose separate, although related, limitations upon searches and seizures; the first 'is general and forbids every search that is unreasonable'; the second places a number of specific constraints upon the issuance and character of warrants." Berger v. New York, 388 U.S. 41, 94 (1967) (Harlan, J., dissenting) (citation omitted). *See, e.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-57 (1931).

87. 388 U.S. 41 (1967).

88. *Id.* at 54.

89. 385 U.S. 323 (1966). In *Osborn* a recording device was concealed on the person of an informant pursuant to judicial authorization based on an affidavit detailing previous conversations between the informant and an attorney concerning the bribery of potential jurors in a pending criminal trial. *Id.* at 325-29.

1. Failure to require probable cause to believe that a "particular offense" has been or is being committed;[90]
2. Failure to require that the conversations sought be "particularly described";[91]
3. Authorization of "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause" because of the sixty-day period of permissible surveillance, lack of a requirement of prompt execution, and lack of a requirement for present probable cause for an extension of the authorization;[92]
4. Failure to require termination of the eavesdrop once the conversation sought was obtained;[93]
5. Failure to require "some showing of special facts" to overcome the absence of notice necessarily resulting from the need for secrecy;[94] and

90. 388 U.S. at 58. "The purpose of the probable-cause requirement of the Fourth Amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed, is thereby wholly aborted." *Id.* at 59. In contrast, the affidavit in *Osborn* alleged "the commission of a specific criminal offense directly and immediately affecting the administration of justice . . . ." *Id.* at 57, *quoting* Osborn v. United States, 385 U.S. 323, 330 (1966).

91. *Id.* at 58-59. This failure "gives the officer a roving commission to 'seize' any and all conversations. . . . As with general warrants this leaves too much to the discretion of the officer executing the order." *Id.* at 59. In *Osborn* "the order described the *type of conversation* sought with particularity, thus indicating . . . the limitations placed upon the officer executing the warrant." *Id.* at 57 (emphasis added). "The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope." Thus " 'a heavier responsibility [is imposed] on this Court in its supervision of the fairness of procedures . . . .' " *Id.* at 56, *quoting* Osborn v. United States, 385 U.S. 323, 329 n.7 (1966).

92. *Id.* at 59. As a result "the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation." *Id.* Authorization of an extension upon a showing that it would be "in the public interest" was held insufficient to constitute present probable cause. *Id.* In *Osborn* the order authorized only a single seizure of a conversation betweeen two known participants. A new order based on new probable cause was issued for a second seizure, and the orders were executed with dispatch. "In this manner no greater invasion of privacy was permitted than was necessary under the circumstances." *Id.* at 57.

93. *Id.* at 59-60. Termination was thus "left entirely in the discretion of the officer." *Id.* at 60. In *Osborn* "once the property sought, and for which the order was issued, was found the officer could not use the order as a passkey to further search." *Id.* at 57.

94. *Id.* at 60. "Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when

6. Failure to provide for a return on the warrant.[95]

The Court further clarified the constitutional standards for a valid electronic eavesdropping order in *Katz v. United States*.[96] In that case, government agents began their eavesdropping only after investigation had established strong probability that the telephone was being used in violation of federal law.[97] Surveillance was limited to the discovery of the contents of the communications, confined solely to the periods when the suspect was actually using the telephone booth, and conducted so that only the conversations of the suspect himself were overheard. The Court concluded that a magistrate "could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place."[98] But even though the agents "reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end,"[99] the search was held unreasonable for failure to satisfy the constitutional precondition of prior judicial authorization.[100]

C. Title III Provisions

Relying on the guidelines provided by the Court in *Berger* and *Katz*, and spurred by rising crimes rates and calls for "law and order,"[101] Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[102] Title III prohibits the use of electronic eavesdropping to intercept wire or oral communications[103] without the con-

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conventional procedures of search and seizure are utilized." *Id.* The Court made no specific reference, however, to any such showing in *Osborn*.

95. *Id.* The statute thereby left "full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties." *Id.* In *Osborn* "the officer was required to and did make a return on the order showing how it was executed and what was seized." *Id.* at 57.

96. 389 U.S. 347 (1967). See text accompanying notes 69-75 *supra*.

97. *Id.* at 354.

98. *Id.*

99. *Id.* at 356-57.

100. *Id.* at 359.

101. *See* Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455-56 (1969).

102. 18 U.S.C. §§ 2510-2520 (1970).

103. *Id.* § 2511(1) (1970). "Wire communications" are communications made over telephone or telegraph lines. *Id.* § 2510(1) (1970). "Oral communications" are "any oral communication[s] uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* § 2510(2) (1970). "Intercept" is defined as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4) (1970).

sent of one of the parties to the communication[104] except under carefully limited conditions for law enforcement purposes. The strict procedural requirements of Title III, derived from the constitutional standards prescribed by *Berger* and *Katz*, are contained in section 2518.[105]

First, this section requires that an application for an interception order be supported by "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued."[106] A judge may issue an order only upon a finding of treble probable cause, that is, probable cause to believe that:

1. An individual has committed, is committing, or is about to commit a particular offense;[107]
2. Particular communications concerning that offense will be obtained through such interception;[108] and
3. The facilities from which, or the place where, the wire or oral communications are to be intercepted are being used,

104. Interception with the consent of one of the parties to the communication is not prohibited. *Id.* § 2511(2)(c) (1970). Such "consent" eavesdropping is not considered a search and seizure under the Fourth Amendment. United States v. White, 401 U.S. 745 (1971); Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952). *Contra*, People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975), *cert. denied*, 96 S. Ct. 152 (1975) (relying on state constitution). The theory is that no one can have a reasonable expectation "that a person with whom he is conversing will not then or later reveal the conversation to the police." United States v. White, 401 U.S. 745, 749 (1971) (plurality opinion). For constitutional purposes the use of a tape recorder or transmitter to make the report to the police is irrelevant. 401 U.S. at 751 (plurality opinion).

An analogous problem could arise in the use of electronic snooping technology. For example, an informant could carry a briefcase containing a concealed camera, or indeed could have a minature camera lens concealed on his person. See text accompanying note 38 *supra*. Acts of the suspect with whom the informant was meeting could be transmitted to a remote location for videotaping. A mechanical application of the *White* rationale would lead to the conclusion that there was no reasonable expectation that the informant would not report to the police the suspect's appearance, physical description, and activities that he observed, and that a surreptitiously made videotape recording is merely a more accurate way to make such a report. A videotape recording, however, would convey considerably more information about a person than a recording of his spoken words. Such an intrusion should at least be considered a search under the Fourth Amendment. "Although one assumes the risk that a guest may verbally divulge his appearance he does not assume the risk that the same guest may photograph him without his consent." Comment, *Consent to Electronic Surveillance by a Party to a Conversation: A Different Approach*, 10 TULSA L.J. 386, 389 (1975).

105. 18 U.S.C. § 2518 (1970). *See* SENATE REPORT, *supra* note 7, at 88-108.

106. 18 U.S.C. § 2518(1)(b) (1970).

107. *Id.* § 2518(3)(a) (1970).

108. *Id.* § 2518(3)(b) (1970).

> or are about to be used, in connection with the commission of such offense.[109]

Second, in satisfaction of the particularity requirement the statement of facts and circumstances must include:

1. Details as to the particular offense that has been, is being, or is about to be committed;
2. A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;
3. A particular description of the type of communication sought to be intercepted; and
4. The identity of the person, if known, committing the offense and whose communications are to be intercepted.[110]

Third, the applicant must make a statement of the period of time for which the interception is required to be maintained.[111] If additional communications of the same type are expected, the facts establishing probable cause to believe that such additional communications will occur after the first one has been obtained must be particularly described.[112] The order may authorize interception only for as long as necessary to achieve the objective of the authorization and in no event longer than thirty days.[113] In addition, every interception must be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.[114]

Finally, the application must contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous.[115] An order may be issued only if the judge finds, upon the facts presented by the applicant, that normal investigative procedures

109. *Id.* § 2518(3)(d) (1970).

110. *Id.* § 2518(1)(b) (1970). *See* United States v. Kahn, 415 U.S. 143 (1974).

111. 18 U.S.C. § 2518(1)(d) (1970).

112. *Id.*

113. *Id.* § 2518(5) (1970). Extensions for up to 30 days may be obtained upon a new showing of probable cause. *Id.*

114. *Id. See generally* Note, *Minimization and the Fourth Amendment*, 19 N.Y.L.F. 861 (1974) (constitutional basis of the minimization requirement); Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411 (1974).

115. 18 U.S.C. § 2518(1)(c) (1970). *See generally* Note, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 HAST. CONST. L.Q. 571 (1975).

have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.[116]

D. Procedural Requirements for an Electronic Snooping Order

Central to the Court's decision in *Berger* was its recognition that without a carefully circumscribed authorization procedure the use of electronic eavesdropping would constitute a general search in violation of the Fourth Amendment.[117] In order to avoid this result the Court emphasized throughout its opinion the need to eliminate any discretion on the part of the officer executing the order.[118] The Court summarized its holding by finding that the New York statute in question was "without adequate judicial supervision or protective procedures."[119]

Title III has been found constitutional on the ground that its provisions are "as precise and discriminate . . . as are the demands of *Berger* and *Katz*."[120] To the extent that Title III's provisions tend to restrict the executing officers' discretion, therefore, they may be said to be constitutionally based on *Berger*'s demand for adequate protective procedures. Moreover, to the extent that any clandestine electronic intrusion upon an individual's privacy would constitute a general search in the absence of such protective procedures, *Berger* and Title III may be said to indicate a broad outline of the facial requirements of any electronic surveillance order. The next section will discuss the reasonableness of electronic snooping with respect to four requirements that appear to be constitutionally mandated: particularity, length of surveillance, minimization and necessity.

V. Is Electronic Snooping Reasonable?

The oft-repeated rule for determining the reasonableness of a Fourth Amendment search is that a balancing test is to be utilized: "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[121]

In practice electronic snooping might be used in conjunction with a

116. 18 U.S.C. § 2518(3)(c) (1970).

117. 388 U.S. at 58.

118. *Id.* at 57-60. See notes 91, 93, 95 *supra.*

119. *Id.* at 60.

120. United States v. Cafero, 473 F.2d 489, 495 (3d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974), *quoting* United States v. Cox, 449 F.2d 679, 687 (10th Cir. 1971), *cert. denied,* 406 U.S. 934 (1972).

121. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

listening device authorized under Title III, thus providing an accurate visual record of the events which took place during a valid electronic eavesdrop.[122] This does not imply, however, that the constitutional standards governing the use of the listening device similarly would authorize the use of the camera. Because of the significantly different privacy interests invaded by its use, the reasonableness of electronic snooping must be evaluated on its own terms by reference to the balancing test. This evaluation requires an examination of the law enforcement justification for electronic snooping and the extent to which it intrudes upon personal privacy. In considering the constitutionality of this latest method for clandestine intrusion upon individual privacy, it is important to keep in mind a twice-repeated warning of the Supreme Court:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.[123]

A. Procedural Requirements in Factual Context

1. Particularity

Electronic snooping could be utilized either to view a "private act,"[124] in a manner similar to electronic eavesdropping on private conversations, or to observe a particular tangible object[125] and to record its presence in the area under surveillance. In either case the first consideration is the degree of particularity required of the application and order.

The issuance of an electronic snooping order would require the existence of probable cause to believe that a specific offense[126] was under investigation and that at an identifiable location[127] particular acts or objects related to the commission of that offense would be ob-

122. For example, see text accompanying note 1 *supra.*

123. Silverman v. United States, 365 U.S. 505, 512 (1961), *quoting* Boyd v. United States, 116 U.S. 616, 635 (1886).

124. A "private act" may be defined, by analogy to electronic eavesdropping, as an act performed by a person exhibiting an expectation that such act is not subject to viewing under circumstances justifying such expectation. See note 103 *supra.*

125. Electronic snooping might be employed for this purpose when the object is one which may be easily disposed of or destroyed. By recording the object's presence in the area under surveillance, its evidentiary value would be preserved even if it were not seized intact in a subsequent physical search. For example, such objects might include narcotics paraphernalia or gambling records.

126. See notes 90, 107 *supra* and text accompanying.

127. See text accompanying note 110 *supra.*

served.[128] Presumably a detailed description of the "type of act"[129] or of the specific tangible object[130] would sufficiently describe the thing to be seized. An adequate description of the place to be searched would be more difficult. A camera's usefulness is necessarily limited to observation of acts or objects within the room where the camera is located. Therefore, the application and order would have to specify the precise location *within* the premises where the acts were expected to take place or the objects were expected to be located.[131] This particularity is necessary for the existence of probable cause to believe that the officer's placement of the camera will actually reveal the acts or objects to be viewed.[132] In the absence of such an exacting requirement the officer could exercise his own discretion as to the placement of the camera, thereby permitting the search of unauthorized areas in violation of the requirements of *Berger*.[133]

2. *Length of Surveillance*

An electronic snooping order could presumably authorize observation of private acts over a period of time sufficient to attain the objective

128. See text accompanying note 108 *supra*. This would indicate "the specific objective of the Government . . . and the limitations placed upon the officer executing the warrant." Berger v. New York, 388 U.S. 41, 57 (1967).

129. See note 91 *supra* and text accompanying. An act, like an oral communication, cannot be more particularly described until after it has occurred. *See* United States v. Tortorello, 480 F.2d 764, 780 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

130. *See* Marron v. United States, 275 U.S. 192, 196 (1927). *See generally* Cook, *Requisite Particularity in Search Warrant Authorizations*, 38 TENN. L. REV. 496, 505-07 (1971).

131. For example, the criminal acts might be taking place in a bedroom; installation of a camera in the living room would be useless.

132. This problem clearly does not exist when wiretapping is employed; identification of the premises where the telephone to be tapped is located provides sufficient particularity as to the place to be searched. The absence of a similar problem with respect to "bugging" is not so clear, at least when conversations in a multiroom house or similar premises are to be overheard. Due to the relatively small number of bugging authorizations, the precise problem may not have arisen. See note 153 *infra*. Also, bugging frequently may be conducted under circumstances permitting the interception of all conversations because of the limited size of the premises under surveillance. *See* Katz v. United States, 389 U.S. 347 (1967) (phone booth); Berger v. New York, 388 U.S. 41 (1967) (law office); Goldman v. United States, 316 U.S. 129 (1942) (hotel room). Finally, the eavesdropping method employed may enable the overhearing of conversations throughout the entire premises. *See* Silverman v. United States, 365 U.S. 505 (1961) ("spike mike" contacting heating duct).

133. 388 U.S. at 57. As an alternative, cameras might be installed in *each* room on the premises where it is likely that the acts or objects will be viewed. However, this procedure might well constitute such a "broadside authorization" as to result in "general searches by electronic devices" of the type condemned in *Berger*. *Id.* at 58. *See id.* at 65 (Douglas, J., concurring); *cf.* Irvine v. California, 347 U.S. 128 (1954).

of the snooping. Termination upon observation of an incriminating act would not be required if probable cause existed to believe that similar acts would thereafter occur.[134] A different situation would exist, however, if the order authorized a search for a tangible object. In order to satisfy the particularity requirement as to the place to be searched, there would have to be probable cause to believe that the object would be viewed in the particular room where the camera was installed, at the time the camera was activated.[135] If the object were not observed at that time, the probable cause to believe that it would be observed would no longer exist. Without a new authorization based on new probable cause, a subsequent search for the same object would be invalid as constituting "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause."[136]

The result is that electronic snooping for a tangible object could only be used on a "one-time-only" basis. For each showing of probable cause, the camera could be activated only once and left on only as long as reasonably necessary to determine the presence or absence of the item in question. If the item were observed, the objective of the authorization would be accomplished and the observation would have to be terminated.[137] If it were not observed, the officers could not unreasonably prolong their search or expand it with the hope of seeing something incriminating beyond the scope of their authorization.[138]

3. Minimization

Title III requires that every interception of wire or oral communications be conducted in such a way as to minimize the interception of communications not otherwise subject to interception.[139] While the specific form of this provision has been referred to as a "statutory command,"[140] the principle which it embodies is clearly constitutionally based. The Court has held that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable

134. See text accompanying notes 111-113 *supra*. Title III's limitation of 30 days is a maximum, and can be shortened by the authorizing judge on a case-by-case basis depending on the specific objective of the interception. *See* United States v. Cafero, 473 F.2d 489, 495 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

135. See text accompanying note 131 *supra*.

136. Berger v. New York, 388 U.S. 41, 59 (1967). *See* Sgro v. United States, 287 U.S. 206, 211 (1932).

137. Berger v. New York, 388 U.S. 41, 57 (1967).

138. *Id.*

139. 18 U.S.C. § 2518(5) (1970). See text accompanying note 114 *supra*.

140. *E.g.*, United States v. Cox, 462 F.2d 1293, 1300 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974).

intensity and scope."[141] Lack of an attempt to minimize interception of innocent or irrelevant conversations results in the seizure of "the conversations of any and all persons coming into the area covered by the device . . . without regard to their connection with the crime under investigation."[142] Electronic eavesdropping conducted in this manner, even pursuant to a properly particularized court order, would undoubtedly be of such "intolerable intensity and scope" as to be unreasonable.[143] Moreover, minimization has been referred to as one of the "protective procedures"[144] by which the electronic eavesdropping authorized by Title III is found to be reasonable.[145] Thus Title III's minimization requirement appears to be based upon the constitutional limitations inherent in any Fourth Amendment search as well as upon *Berger's* procedural safeguards against the inherent dangers of clandestine surveillance. By analogy, it will be assumed that minimization in the execution of an electronic snooping order similarly would be constitutionally mandated.

Compliance with the minimization requirement is to be measured by whether "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion."[146] Minimization is accomplished by avoiding interception of all calls falling within nonpertinent categories, as soon as

141. Terry v. Ohio, 392 U.S. 1, 18 (1968); *see* Von Cleef v. New Jersey, 395 U.S. 814 (1969); Kremen v. United States, 353 U.S. 346 (1957); People v. Bracamonte, 15 Cal. 3d 394, 400, 540 P.2d 624, 628, 124 Cal. Rptr. 528, 532 (1975).

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

143. *See* United States v. United States District Court, 407 U.S. 297, 326 (1972) (Douglas, J., concurring); Von Cleef v. New Jersey, 395 U.S. 814, 817 (1969) (Harlan, J., concurring in the result); United States v. George, 465 F.2d 772 (6th Cir. 1972). *See generally* Note, *Minimization and the Fourth Amendment*, 19 N.Y.L.F. 861, 875-78 (1974).

144. Berger v. New York, 388 U.S. 41, 60 (1967). See text accompanying notes 117-120 *supra.*

145. United States v. Kahn, 415 U.S. 143, 154 (1974); United States v. Focarile, 340 F. Supp. 1033, 1038, 1044 (D. Md.), *aff'd on other grounds sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); United States v. King, 335 F. Supp. 523, 532, 541 (S.D. Cal. 1971), *modified on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); United States v. Leta, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971); *see* Bynum v. United States, 96 S. Ct. 357 (1975) (Brennan, J., dissenting from denial of certiorari).

146. United States v. Tortorello, 480 F.2d 764, 784 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *see* United States v. Scott, 504 F.2d 194, 198-99 (D.C. Cir. 1974). Factors to be taken into account in determining the reasonableness of minimization procedures include the scope of the criminal enterprise under investigation, the location and operation of the subject telephone, whether a pattern of incriminating conversations emerges, and the degree of supervision by the authorizing judge. United States v. James, 494 F.2d 1007, 1019-21 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974).

the agents have sufficient information to establish such categories.[147] These principles allow the minimization procedures applicable to electronic snooping to be compared and contrasted with those used in wiretapping and bugging.

a. Analogy to Wiretapping

The officers executing a wiretap order normally become aware of the commencement of a conversation whose interception may be authorized by the occurrence of a trigger "signal" in the form of either the ringing or the dialing of the tapped telephone. A minimization decision based on the contents of the communication can be made within a short time thereafter.[148] Thus the privacy of the premises where the phone is located is invaded by a wiretap only when an activity of the type whose seizure has been authorized is actually in progress. The minimization requirement insures that the invasion of privacy will terminate promptly if the conversation is not in an incriminating category. In addition, a wiretap only invades the privacy of the actual parties to the conversation. In this way the objective of the authorization is fulfilled while "the danger of an unlawful search and seizure [is] minimized."[149]

An attempt to fulfill the objective of an electronic snooping order, however, necessarily involves a much more indiscriminate intrusion. Although probable cause would exist to believe that incriminating acts would be viewed on the premises, there would be no signal, as in the case of wiretapping, to alert the snoopers to the commencement of an act whose viewing might be authorized. The snoopers would presumably have to "tune-in" on the premises at random intervals in order to determine whether an act was occurring which might properly be observed. Such intrusions might view only an empty room or an individual engaged in no activity, so that the minimization requirement would dictate that the intrusion terminate. Shortly after the termination,

147. United States v. Scott, 516 F.2d 751, 754-55 (D.C. Cir. 1975); United States v. Tortorello, 480 F.2d 764, 785 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). But interception of calls of short duration need not be terminated before the nature of the calls and the identities of the parties can be determined. United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974).

148. This is subject to the qualification that conspirators who know they may be under surveillance frequently use code words or deliberately discuss innocent matters at the beginning of a call, which may justify a longer period of listening to determine the actual nature of the call. *See* United States v. Armocida, 515 F.2d 29, 39 n.12 (3d Cir. 1975); United States v. Quintana, 508 F.2d 867, 874-75 n.6 (7th Cir. 1975); United States v. James, 494 F.2d 1007, 1019 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974).

149. Berger v. New York, 388 U.S. 41, 57 (1967).

however, acts might take place whose viewing in fact was authorized. Without a signal to alert them that such an act was occurring the snoopers would be unaware of it and the objective of the authorization would be frustrated.

From a practical standpoint, therefore, the effectiveness of electronic snooping in attaining its objective might be seriously undermined unless the snooping were virtually continuous. Only in this way would the agents, not knowing when an incriminating act was likely to occur, have a reasonable chance of actually observing the act when it did occur. While this might be all that the agents reasonably could do to avoid unnecessary intrusion and still accomplish their objective, the resulting invasion of privacy might well exceed the "precise and discriminate" standard required by *Berger*[150] and *Katz*.[151]

b. Analogy to Bugging

No cases have been found which deal with the question of minimization in the context of electronic bugging. Presumably the minimization requirement applies to the extent that it is consistent with the effectiveness of the bug.[152] In such cases a "tune-in" procedure such as described above for electronic snooping would seem to be appropriate.[153] To this extent the two surveillance techniques would be on an

150. *Id.*

151. 389 U.S. at 355.

152. Situations are conceivable in which the continuous monitoring of a listening device for a limited period of time might be fully justified, such as for surveillance of a meeting of organized crime leaders or other known conspirators. Some courts have upheld the continuous monitoring of all telephone conversations as a reasonable compliance with the minimization requirement when virtually all conversations were incriminating or when no predictable pattern or category of innocent calls could be determined. United States v. Scott, 516 F.2d 751, 758-60 (D.C. Cir. 1975); United States v. Quintana, 508 F.2d 867, 873 (7th Cir. 1975); United States v. James, 494 F.2d 1007, 1018-23 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974). With respect to minimization, the continuous use of electronic snooping in such situations would presumably be valid as well.

153. As in the case of electronic snooping, however, it might be difficult to properly minimize interception of innocent conversations in this way and still intercept the information for which the eavesdrop was authorized. This difficulty may be a significant factor in the very low percentage of Title III authorizations for bugging rather than wiretapping. *See, e.g.*, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS FOR THE PERIOD JANUARY 1, 1973 TO DECEMBER 31, 1973, at 16 (1974) [hereinafter cited as 1973 REPORT] (90% of all authorizations were for phone wire interceptions).

equal footing with respect to the reasonableness of their minimization procedures.[154]

Aside from the greater personal interest invaded by electronic snooping, however, even a valid attempt to minimize observation of innocent acts would entail a more severe intrusion upon privacy than minimization in the context of electronic eavesdropping. An electronic eavesdropping tune-in might result in overhearing nothing at all, if no conversations were taking place at the time of the intrusion. The visual tune-in, however, would always see something, even if only an empty room. In both cases a search has taken place, because of the intrusion into an area protected by a reasonable expectation of privacy.[155] But when nothing is overheard there has been no seizure of an individual's private conversations, whereas the visual observation constitutes a simultaneous search and seizure.[156] The visual tune-in "seizes" a view of an area protected by a reasonable expectation of privacy against such viewing even when no private acts are observed. Due to the nature of electronic snooping, therefore, even minimization procedures identical to those used in electronic eavesdropping will result in a more serious intrusion upon personal privacy.

4. Necessity

Title III provides that an interception order may be issued only if the judge finds that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.[157] That this provision supplies the "exigency" demanded by *Berger*[158] in order to avoid presearch notice to the victim of a clandestine intrusion is now generally recognized.[159] This requirement also follows directly from the Fourth Amendment balancing test: if "the scope of the particular intrusion, in light of all the exigencies of

154. Neither the Court nor Title III makes a constitutional distinction between wiretapping and bugging, despite the arguably greater breadth of the intrusion resulting from the use of listening devices. *See* United States v. Escandar, 319 F. Supp. 295, 301 (S.D. Fla. 1970), *remanded on other grounds sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam). Indeed, both *Berger* and *Katz* involved interception of communications by bugging rather than wiretapping.

155. Katz v. United States, 389 U.S. 347 (1967).

156. "The Government's activities in electronically *listening to* and *recording* the petitioner's words . . . constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353 (emphasis added).

157. 18 U.S.C. § 2518(3)(c) (1970).

158. 388 U.S. at 60.

159. *See* Note, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 HAST. CONST. L.Q. 571, 577-86 (1975), and cases cited therein at 585 n.77.

the case,"[160] exceeds what is reasonably necessary to accomplish a legitimate law enforcement goal, the intrusion should be declared unreasonable.[161]

The reasonableness of electronic snooping will therefore depend on whether other less intrusive techniques can be utilized to accomplish the same law enforcement objective. Now, however, these currently available less intrusive techniques include electronic eavesdropping. Whenever the same objective can be accomplished by a conventional search and seizure, or by a conventional search and seizure supplemented with electronic eavesdropping, electronic snooping will fail to satisfy the necessity requirement.

B. Application of the Necessity Requirement

1. Viewing of Tangible Objects

As discussed above,[162] electronic snooping for tangible objects where destruction of the evidence is feared would be limited to use on a one-time-only basis, for if the authorized observation did not reveal the object the probable cause supporting the order would no longer exist. This one-time-only use of electronic snooping, however, should be held unreasonable for failure to satisfy the necessity requirement.

In *Ker v. California*,[163] the Court recognized a judicial exception to the general requirement that the officers executing a search warrant announce their identity and purpose before entering in cases where they reasonably believe that the announcement will provoke the destruction of critical evidence.[164] This exception permits the accomplishment of

160. Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968).

161. It may be that in the context of conventional searches and seizures, a search is not made unreasonable simply because the public interest could have been protected in a less intrusive manner. *See* Cady v. Dombrowski, 413 U.S. 433, 447 (1973). The *Berger* opinion made it clear, however, that in the case of electronic surveillance, a "heavier responsibility" is placed on the Court because of the broad scope and inherent dangers involved. 388 U.S. at 56. As interpreted by lower courts, *Berger* may in fact state a doctrine of "less intrusive means" when considering the reasonableness of any kind of clandestine electronic surveillance. "[T]he Court has long been critical of secret searches. Electronic surveillance cannot be justified unless other methods of investigation are not practicable." United States v. Tortorello, 480 F.2d 764, 774 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973) (citation omitted). It is "a touchstone consideration in surveillance that 'no greater invasion of privacy [be] permitted than was necessary under the circumstances.'" United States v. Martyniuk, 395 F. Supp. 42, 44 (D. Or. 1975), *quoting* Berger v. New York, 388 U.S. 41, 57 (1967). *See* Comment, *Police Helicopter Surveillance*, 15 ARIZ. L. REV. 145, 170 (1973).

162. See text accompanying notes 135-38 *supra*.

163. 374 U.S. 23 (1963).

164. *Id.* at 37-41. *See* Katz v. United States, 389 U.S. 347, 355-56 n.16 (1967).

the same objective as electronic snooping with much less serious consequences to the individual's privacy.[165] Since the needs of law enforcement can be met[166] by use of this judicial exception to the notice requirement, the use of electronic snooping to determine the presence of tangible objects should be considered unreasonable under the Fourth Amendment.

2. Viewing of "Private Acts"

The need for the use of electronic eavesdropping in law enforcement stems primarily from its unique ability to acquire information in certain kinds of cases involving organized crime, gambling conspiracies or drug rings,[167] which is vital to the successful prosecution of these offenses and can be acquired in no other way.[168] Title III was intended specifically as a tool to combat organized crime, and is considered particularly useful for this purpose because of the dependence of organized crime on telephone communications to coordinate its worldwide

165. Justice Brennan objected to this judicial exception to the "announcement of purpose" requirement on the ground that "[i]nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion." Ker v. California, 374 U.S. 23, 57 (Brennan, J., dissenting). The Court in *Katz* discounted the idea that this objection would be relevant to electronic eavesdropping. 389 U.S. at 355-56 n.16. This should not be taken to indicate that electronic snooping would somehow have less serious consequences upon a person's privacy than an unannounced police intrusion. Shock, fright and embarrassment would be felt as a result of an unannounced police intrusion whether the intrusion was direct and physical or indirect by means of an electronic eye. The latter invasion would in fact have more serious consequences for the individual's sense of security simply because an individual can adjust his conduct in an appropriate manner upon becoming aware of a physical intrusion, whereas he may not learn of the electronic invasion until long afterwards.

166. The officers would need probable cause to believe that the object would be found in a certain location within the premises before sufficient particularity for the issuance of an electronic snooping order would exist. See notes 131-33 *supra* and text accompanying. Similarly there would have to be probable cause to believe that the object would be observed in plain view, because otherwise television observation would be useless. With such a high degree of particularity an unannounced physical intrusion would almost certainly accomplish the seizure successfully, because the officers would know exactly where to look.

167. Narcotics and gambling cases comprise the great bulk of the investigations in which electronic eavesdropping is authorized. *See, e.g.*, 1973 REPORT, *supra* note 153, at 8 (75% of all intercept orders were for gambling or narcotics).

168. The factors rendering conventional investigative methods ineffective in organized crime investigations include the insulation of street workers known to police from the leaders of the conspiracies, a code of silence preventing testimony of those who might be able to provide evidence against the leaders, and the inability of informants to penetrate the conspiracy. *See generally* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 198-201 (1967) [hereinafter cited as THE CHALLENGE OF CRIME IN A FREE SOCIETY].

activities.[169] However, because of its "inherent dangers,"[170] electronic eavesdropping cannot be considered reasonable except when other less intrusive methods of acquiring the same information prove inadequate.[171] Similarly, electronic snooping would be permissible only if it would provide information to law enforcement agencies which is both essential and currently unavailable through the use of conventional methods, including electronic eavesdropping.

In the investigation of gambling conspiracies, for example, the interception of telephone communications may be the only way to gather the critical information necessary for a successful prosecution. Large-scale gambling conspiracies conduct their operations almost exclusively by telephone, the members of the conspiracy generally keep meager written records, and informants are normally unable to gain access to the overall scheme.[172] Physical surveillance is normally ineffective because "there is little or no personal contact between these persons."[173] In the case of federal prosecutions, without wiretapping it may be impossible to establish "the interstate nature of the gambling operation."[174]

These arguments provide no justification for the additional use of electronic snooping in gambling investigations. If there is little or no personal contact between the members of a gambling conspiracy, a camera would provide little or no evidence of gambling transactions which cannot be acquired currently through electronic eavesdropping. The most that a strategically located camera might provide would be visual evidence of money changing hands, which would tend to corroborate the intercepted conversations concerning the illegal transactions but would not constitute independent evidence of a crime by itself or lead to conspirators who cannot be identified otherwise. It is unlikely

169. SENATE REPORT, *supra* note 7, at 70-71.

170. Berger v. New York, 388 U.S. 41, 60 (1967).

171. 18 U.S.C. § 2518(1)(c) & (3)(c) (1970). However, electronic eavesdropping is not necessarily barred by the necessity requirement even if an informant is available to testify or if probable cause for an arrest is present. *See* United States v. Staino, 358 F. Supp. 852, 857 (E.D. Pa. 1973); United States v. Lanza, 356 F. Supp. 27, 30 (M.D. Fla. 1973). Frequently the objective of the interception is to identify other members of a conspiracy who are as yet unknown to both the police and the informant. *See, e.g.*, United States v. Armocida, 515 F.2d 29, 38 (3d Cir. 1975); Note, *Electronic Surveillance, Title III, and the Requirement of Necessity*, 2 HAST. CONST. L.Q. 571, 613 n.176 (1975) (averment to this effect contained in every wiretap application examined).

172. *See, e.g.*, United States v. Bobo, 477 F.2d 974, 982-83 (4th Cir. 1973), *cert. denied*, 421 U.S. 909 (1975).

173. *Id.* at 983 (agent's affidavit).

174. *Id.*; *see, e.g.*, United States v. Leta, 332 F. Supp. 1357, 1362 (M.D. Pa. 1971).

that visual observation of a closed area would provide evidence of the interstate nature of the operation. In fact, interception of long distance phone calls appears to be an ideal method of acquiring such evidence.[175] Also, due to the absence of written records little tangible evidence would normally be observed by a hidden camera in gambling cases. Moreover, there is no indication at present that properly restricted electronic eavesdropping is ineffective in the investigation and prosecution of gambling conspiracies. Therefore there is no apparent law enforcement need for the additional tool of electronic snooping, because there is no showing that its use would result in the conviction of gamblers who presently escape prosecution.

Similarly, at present there is no indication of the necessity for electronic snooping in the investigation and prosecution of large narcotics operations. Electronic eavesdropping has proven to be an effective technique in cases involving the use of telephone facilities to coordinate the world-wide shipment and distribution of narcotics.[176] Conventional investigative techniques are often ineffective because of the inability of informants to penetrate the conspiracy and the drug dealer's extreme caution.[177]

If the leaders of a narcotics conspiracy use the telephone exclusively to direct the operation without face-to-face meetings with other members of their distributing network, interception of these telephone conversations would provide the evidence necessary to prove the crime and electronic snooping would serve no additional purpose.[178] Possibly

175. *See* United States v. Cafero, 473 F.2d 389, 493 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

176. *See* United States v. Focarile, 340 F. Supp. 1033, 1042-43 (D. Md.), *aff'd on other grounds sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); United States v. King, 335 F. Supp. 523, 535 (S.D. Cal. 1971), *modified on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); United States v. Scott, 331 F. Supp. 233, 242 (D.D.C. 1971), *vacated on other grounds*, 504 F.2d 194 (D.C. Cir. 1974); United States v. Escandar, 319 F. Supp. 295, 303 (S.D. Fla. 1970), *remanded sub nom.* United States v. Robinson, 472 F.2d 973 (5th Cir. 1973) (per curiam).

177. *See, e.g.*, United States v. Armocida, 515 F.2d 29, 38 (3d Cir. 1975); United States v. James, 494 F.2d 1007, 1013-16 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974).

178. The recent Report of the President's Domestic Council Task Force on Drug Abuse recommended a focus on prosecution of the leaders of high-level trafficking networks as the most effective way to cut off drug supplies. The report stated that conspiracy cases are the only effective means for the law to reach these leaders since they "normally insulate themselves from *overt illegal acts* by delegating these acts to subordinates." 18 CRIM. L. REP. 2128, 2129 (1975) (emphasis added). If the leaders commit no overt illegal acts themselves then electronic snooping on their activities would provide no independent evidence of crime.

clandestine observation of a plant for the processing of illegal narcotics would yield useful evidence. But the strict particularity required prior to the issuance of an electronic snooping order would fully justify a conventional search and seizure. A clandestine method of intrusion would be necessary only to develop further information as to the nature and scope of the conspiracy without alerting the suspects to the surveillance. Electronic snooping would be no more useful for this purpose than electronic eavesdropping. Also, electronic snooping appears to be an ineffective technique for observation of actual drug sales to the users of the drugs. Evidence of such sales can be provided by the use of wired informers or undercover agents who purchase drugs with marked money.[179] Often sales take place with insufficient advance notice to permit the installation of electronic snooping equipment. Frequently, too, sales take place on the street or in other semi-public places where traditional camera surveillance can be employed,[180] even at night,[181] with sufficient advance warning to allow the installation of the equipment. Thus the unique ability of electronic eavesdropping to provide information vital to narcotics investigations finds no parallel in electronic snooping.

The primary justification for any clandestine information-gathering technique in law enforcement therefore appears to be its ability to uncover the full scope of a criminal conspiracy without alerting already known suspects to the existence of the investigation. Since any broad conspiracy of this type necessarily involves the extensive use of oral communications between the conspirators, interception of these communications is the primary investigative tool.[182] It follows logically that the only other area in which electronic snooping might be effective is in the investigation of small-scale or individual offenses, such as personal drug use, prostitution or a neighborhood poker game. In such cases electronic surveillance is unnecessary since there is no conspiracy whose scope is to be uncovered. The probable cause necessary for the issuance of an electronic snooping order would support a conventional search and seizure, which would be equally effective. Therefore, in the investigation of either large-scale conspiracies or individual offenses, electronic snooping would fail to satisfy the necessity requirement.

179. *See* United States v. Quintana, 508 F.2d 867, 872-73 (7th Cir. 1975).

180. *Id.*

181. See text accompanying notes 41-47 *supra.*

182. Electronic eavesdropping "has a well-established record of producing positive results against the veteran practitioners of organized crime." 18 CRIM. L. REP. 2082, 2083 (1975) (remarks of F.B.I. Director Clarence M. Kelley).

C. Application of the Balancing Test

1. Nature of the Invasion of Privacy

Electronic snooping clearly intrudes upon individual privacy to a greater extent than does electronic eavesdropping. During the surveillance the invasion of privacy by observation is continuous rather than limited to periods of actual communication as in the case of electronic eavesdropping. Electronic snooping is thus literally inescapable, even in the dark, whereas electronic eavesdropping can at least be avoided by maintaining silence.

In addition, the privacy interest invaded is significantly greater. Electronic snooping invades not merely the oral expression of thoughts but the intimate province of freedom from physical exposure of one's body to the view of others. An oral communication has already lost some of the privacy accorded to pure thought merely by the fact of communication to another person. Therefore no absolute expectation of privacy exists in any oral communication, because the listener can always inform the police of what he has heard.[183] But the expectation of privacy in activity performed in the absence of any known observation is *absolute*. The act of viewing such activity by clandestine means must be considered a more serious intrusion upon individual privacy and integrity than the overhearing of oral communications to other persons.

Finally, in its practical operation electronic snooping would unavoidably constitute a greater invasion of privacy than electronic eavesdropping. The application of minimization principles to the execution of an electronic snooping order would inevitably invade the individual's privacy to a greater extent than the corresponding search conducted by electronic eavesdropping.[184] This greater invasion of privacy would be unreasonable under the Fourth Amendment in the absence of correspondingly greater law enforcement justification.

2. Law Enforcement Justification

As discussed above,[185] there is no apparent necessity for electronic snooping in law enforcement because of the availability of electronic eavesdropping and other conventional investigative tools. While electronic snooping might provide corroborating evidence of crime it would not by itself enable the prosecution of criminals who presently escape prosecution because of the inability of law enforcement officials to gath-

183. United States v. White, 401 U.S. 745 (1971).
184. See text accompanying notes 148-156 *supra*.
185. See text accompanying notes 162-182 *supra*.

er sufficient evidence. If rather than to obtain direct evidence of crime, electronic snooping were to be used, for example, to identify the participants in a suspected meeting of organized crime leaders or other conspirators, less intrusive alternative techniques again could accomplish the same objective. Such techniques as visual surveillance outside of the premises, including methods for overcoming darkness or distance,[186] and conventional voice identification methods applied to the oral communications which could be overheard by a listening device authorized by Title III, should prove adequate for individual identification without resort to electronic snooping.

The other major argument in favor of legalized electronic eavesdropping is that because organized crime is making free use of the telephone in furtherance of its criminal objectives, wiretapping is a necessary law enforcement response in opposition to this "perversion of the telephone to criminal use."[187] The addition of electronic snooping to the police arsenal cannot be supported by this same justification. Undoubtedly criminals still commit murders, store stolen merchandise and grow marijuana plants in violation of the law within the confines of their homes or offices. Yet they do so not with the aid of television or any other new technological development which might justify a law enforcement response in kind, but behind the same four walls which have traditionally protected them from unwanted visual intrusions.[188] In the absence of any new development preventing or hindering the exercise of conventional search and seizure power, it is an insufficient justification for any new technique for clandestine intrusion upon indi-

186. See text accompanying notes 41-47 *supra.*

187. Sullivan, *Wiretapping and Eavesdropping: A Review of the Current Law*, 18 HASTINGS L.J. 59, 60 (1966). *See* THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 168, at 200-01. "The marked acceleration in technological developments and sophistication in their use have resulted in new techniques for the planning, commission, and concealment of criminal activities. It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens." United States v. United States District Court, 407 U.S. 297, 312 (1972).

188. Consider a California police chief's justification for the use of television in law enforcement insofar as it might apply specifically to electronic snooping: "Throughout the years, it has traditionally been the criminal who has first taken advantage of technological advances . . . . The automobile and the two-way radio are prime examples; law-breakers were the first to employ them, and the police then adopted their use *in self-defense*. But now police departments are taking the offensive in moving into new areas before the law-breakers. Our own use of closed-circuit television as an important law enforcement tool is a step forward in this direction. We're learning to use CCTV extensively to enforce the law before someone figures out a way to break the law with it." O'Brion, *VTR: New Lawman*, INDUSTRIAL PHOTOGRAPHY, Nov. 1971, at 26 (emphasis added).

vidual privacy to say that it should be used merely because it is available and is an easier or more convenient way to gather evidence of crime.[189]

The only remaining justification for electronic snooping seems to be that it would provide a videotape of a defendant's activities which, as a piece of physical evidence at a criminal trial, might have considerable influence on a jury. In addition to an informer's or undercover agent's testimony, physical evidence that has been seized, and the defendant's own words intercepted by a wiretap or bug, the jury could observe the private acts of the defendant on television. However, this use of electronic snooping completely ignores the constitutional requirement that conventional methods be *inadequate* to obtain the same or similar evidence. The necessity requirement must not be read as permitting the use of any technological improvement which produces more convincing proof of the same facts provided by other methods.

The law enforcement justification for electronic snooping is therefore clearly no greater than that for electronic eavesdropping, and indeed may be less compelling. Undoubtedly, however, the intrusion upon personal privacy inherent in electronic snooping is considerably greater than that resulting from electronic eavesdropping. A consideration of all the factors on both sides of the scales leads to the conclusion that the present justification for electronic snooping does not outweigh the degree of intrusion upon personal privacy occasioned by its use. By Fourth Amendment standards, electronic snooping must therefore be considered an unreasonable law enforcement tool under any circumstances.

VI. Conclusion

Prior to 1968 the propriety of legalized electronic eavesdropping had been the subject of a long and heated national debate.[190] Against claims of the need for electronic eavesdropping in the war against sophisticated criminals[191] opponents of eavesdropping objected that "we destroy exactly what we are seeking to preserve when we try to protect

189. "One must be careful to distinguish betweeen constraints on police conduct which limit effective police enforcement and those constraints which merely make effective police enforcement more burdensome.

. . . Duties of law enforcement officials are extremely demanding in a free society. But that is as it should be. A policeman's job is easy only in a police state." People v. Spinelli, 35 N.Y.2d 77, 81-82, 315 N.E.2d 792, 795, 358 N.Y.S.2d 743, 747-48 (1974).

190. *See generally Symposium: The Wiretapping-Eavesdropping Problem: Reflections on The Eavesdroppers*, 44 MINN. L. REV. 811 (1960).

191. *See* Berger v. New York, 388 U.S. 41, 61-62 (1967). See notes 167-169 *supra* and text accompanying.

democracy with essentially totalitarian tools."[192] The debate finally resulted in a national consensus, expressed through the Congress, that the usefulness of electronic eavesdropping in certain areas of law enforcement outweighed the risks resulting from its indiscriminate nature and potential for abuse when it was permitted only under conditions of strict judicial control.

Now, another technological development for surreptitious surveillance of individuals has emerged. Electronic snooping carries the threat that every physical act of an individual may be subject to observation by an unseen viewer through the medium of an electronic eye. If allowed to go unexamined, the use of electronic snooping devices might eventually become so widespread, as have the tools of electronic eavesdropping,[193] that a true feeling of security from clandestine visual intrusions may become a thing of the past.[194] The psychological fact, even if not the physical reality, would be the arrival of the world of 1984, because " 'Nineteen Eighty-Four' is largely a state of mind; for many, the appearance of repression has the impact of reality."[195] Today "anyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet."[196] With the advent of electronic

192. Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 855, 856 (1960).

193. *See, e.g.*, O'Toole, *Harmonica Bugs, Cloaks, and Silver Boxes*, HARPER'S MAGAZINE, June 1975, at 36 (describing the current state of the art of some eavesdropping devices); *The Ways and Means of Bugging*, TIME, May 28, 1973, at 28. Despite Title III's ban on the advertisement and sale of eavesdropping devices, 18 U.S.C. § 2512 (1970), devices easily adapted to surreptitious listening are still freely advertised. *See, e.g.*, PLAYBOY, Nov. 1975, at 223: "MICRO MINI MIKE. WIRELESS. Among world's smallest. Improved solid state design. Picks up and transmits most sounds without wires through FM radio up to 300 ft. Use as mike, music amp., babysitter, burglar alarm, hot line, etc. For fun, home and business. Batt. incl. Money back guar. . . . Only $14.95 plus 50¢ Post and hdlg."

194. For example, because of his legal representation of politically sensitive causes, Stanford Law Professor Anthony G. Amsterdam admits that he no longer has any actual expectation of privacy in his private conversations. Amsterdam, *supra* note 75, at 384. Justice Douglas wrote that he was "morally certain" that the Supreme Court conference room had been bugged. Heutsche v. United States, 414 U.S. 898 (1973) (denial of bail motion) (Douglas, J., dissenting). Representative Ronald V. Dellums of California recently revealed that a wiretap of his Berkeley office phone was discovered in 1972 and that he now operates under the assumption that both his Berkeley and Washington offices are bugged. San Francisco Chronicle, Oct. 10, 1975, at 6, col. 1.

195. Miller, *The Right of Privacy: Data Banks and Dossiers*, in ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, PRIVACY IN A FREE SOCIETY 72, 75 (1974).

196. Amsterdam, *supra* note 75, at 402.

snooping, a person wishing to assure the privacy of his actions from visual observation will have no absolute protection even by resort to these extreme measures.

Fortunately, our society is presently in a position to deal effectively with the problems posed by electronic snooping. We have experienced the controversy over electronic eavesdropping and have observed the results of the implementation of a strictly supervised system for its limited use.[197] We have also become aware of the technology of electronic snooping while it is still in its infancy. Informed, effective decisions are therefore possible. No currently available evidence indicates that electronic snooping would fill a law enforcement need caused by the inadequacy of other presently available investigative techniques. Thus the considerations which prompted acceptance of electronic eavesdropping as a law enforcement tool are not present to justify the use of electronic snooping even under restrictions similar to those imposed by Title III. In balancing the legitimate needs of law enforcement against the personal interests invaded, a court faced with a challenge to evidence obtained by electronic snooping, whether or not authorized by court order, should declare the technique unreasonable per se under the Fourth Amendment.

The present conditions of rapid technological development demand that the impact of new technology upon individual privacy be evaluated and controlled before its use becomes widespread, for failure to do so would eventually "dim the right [of privacy] almost to the point of extinction."[198] Because considerable time may pass before judicial consideration of electronic snooping, legislation should be enacted to prohibit the use of electronic visual surveillance techniques when such use intrudes upon an individual's reasonable expectation of privacy from such surveillance. Strict enforcement and control procedures should be included in the legislation. Only in this way will the citizen's right to privacy be *affirmatively asserted* before electronic snooping technology advances beyond manageable proportions.

The continuing evolution of highly sophisticated electronic devices clearly demonstrates the dangers inherent in their automatic adaptation to law enforcement use solely because of their availability. Those who would utilize new methods of clandestine intrusion upon individual privacy must bear the heavy burden of justification for such use. In the

197. For contrasting views on the results, *compare* Schwartz, *Six Years of Tapping and Bugging*, 1 CIV. LIB. REV. 26 (1974) *with* Cranwell, *Judicial Fine-Tuning of Electronic Surveillance*, 6 SETON HALL L. REV. 225 (1975).

198. Hufstedler, *supra* note 13, at 550.

case of electronic snooping this burden simply has not been met. The farsighted words of Justice Brandeis, penned at a time when electronic eavesdropping was similarly in its infancy, evoke the present danger:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[199]

199. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).