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# Electronic Surveillance In Illinois

Richard A. Michael\*

Syndicated crime presents a major problem of law enforcement today. While significant victories have been won in isolated cases, no such victory has seriously impaired the operation of organized crime. Rather its influence and scope of activities is perhaps stronger today than ever. While a conflict has arisen in some areas of law enforcement between those who stress personal liberties and those who emphasize the needs of society, it is believed that no one would question that society faces a severe problem in its battle against syndicated crime. It is the thesis of this article that recent developments in the federal sphere have greatly increased the individual's protection against improper electronic surveillance, and in light of these developments, Illinois should re-evaluate its almost complete ban against electronic surveillance techniques, so that these weapons may be used by Illinois law enforcement officials in the battle against organized crime.

## THE DEVELOPMENT OF THE FEDERAL LAW GOVERNING ELECTRONIC SURVEILLANCE

### *Federal Law Prior to Berger and Katz*

Any history of the federal law of electronic surveillance must begin with the unfortunate decision in *Olmstead v. United States*,<sup>1</sup> which held that the search and seizure provisions of the fourth amendment relate only to physical items, and thus speech or messages over telephone wires are outside the ambit of their protection. Following this decision the federal law took separate paths in the areas of wiretapping and electronic eavesdropping because of the impact of the Federal Communications Act of 1934.<sup>2</sup>

In the area of wiretapping, a statutory ban provided some of the protection denied by the *Olmstead* decision. Section 605 of the Federal

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1. 277 U.S. 438 (1928).

2. 47 U.S.C. § 605 (1964).

Communications Act of 1934, a criminal statute, prohibited the interception and divulgence of telephone messages, interstate as well as local.<sup>3</sup> While this statute was not often the basis of criminal prosecutions, its significance lay in its use to exclude evidence obtained by wiretaps in court proceedings. Thus in *Nardone v. United States*,<sup>4</sup> it was held that the statute prohibited wiretapping by federal officers as well as private citizens and precluded such evidence from being admitted in the federal courts. The second *Nardone* opinion<sup>5</sup> extended this ban to evidence which was the indirect "fruit" of the wiretap. However, until the decision in *Lee v. Florida*<sup>6</sup> in 1968, this exclusionary rule did not apply to state prosecutions,<sup>7</sup> and was no bar to the introduction in state courts of wiretap evidence obtained in violation of section 605. With the *Lee* decision, however, wiretap evidence obtained in violation of federal statutory law<sup>8</sup> cannot be introduced in either state or federal prosecutions.

For many decades federal law provided much less protection against electronic eavesdropping than it did against wiretapping for here there was no applicable federal statute. Under the *Olmstead* rule that the fourth amendment protected only things of a physical nature, it was generally the rule that there had to be some physical violation of protected premises before the fourth amendment, the only federal protection in the area, was applicable. Thus in *Goldman v. United States*,<sup>9</sup> evidence obtained from a dictaphone placed against the outside wall of a private office was held admissible in a federal court, while in *Silverman v. United States*,<sup>10</sup> where a "spike mike" was inserted into the wall of a private home of the defendant, there was a physical trespass and the evidence thus obtained fell under the fourth amendment's protection. While *Clinton v. Virginia*<sup>11</sup> raised some doubts as to the continued validity of this distinction, the "physical trespass" rule was generally applied prior to *Katz v. United States*.<sup>12</sup> While evidence obtained from electronic eavesdropping which was in violation of the fourth amendment was not admissible in federal court,<sup>13</sup> it could be admitted

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3. *Weiss v. United States*, 308 U.S. 321 (1939).

4. 302 U.S. 379 (1937).

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

6. 392 U.S. 378 (1968).

7. *Schwartz v. Texas*, 344 U.S. 199 (1952).

8. Section 605 has been amended by Title III of the Crime Control Act of 1968 which will be discussed *infra*.

9. 316 U.S. 129 (1942).

10. 365 U.S. 505 (1961).

11. 377 U.S. 158 (1964).

12. 389 U.S. 347 (1967).

13. *Weeks v. United States*, 232 U.S. 383 (1914).

in a state court, if state law so provided, until the decision in *Mapp v. Ohio*<sup>14</sup> in 1961.

It can thus be seen that until 1967, unless there was a physical intrusion into protected premises, federal law placed no restrictions on electronic eavesdropping or the introduction of wiretap evidence in state criminal proceedings.

### *The Berger and Katz Decisions*

In the *Katz* case the entire law in the area of surveillance was substantially revised. The defendant in that case was convicted of transmitting wagering information by telephone. Federal Bureau of Investigation agents who had placed an electronic listening device on the outside of the telephone booths from which the defendant had placed the calls, testified to these conversations. The United States Supreme Court held this evidence inadmissible under the fourth amendment saying:

[O]nce it is recognized that the Fourth Amendment protects people—and not simply “areas”—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

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The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” with the meaning of the Fourth Amendment.<sup>15</sup>

Thus it seems clear that the use of an electronic or mechanical surveillance device, whether of an eavesdropping or wiretapping nature, to overhear a conversation which the parties thereto reasonably rely on as being private now falls under the fourth amendment, which is applicable to the states through the fourteenth. It must, however, be recalled that these amendments do not prohibit all searches or seizures, but only unreasonable ones. Searches and seizures are reasonable if conducted pursuant to a valid warrant, as an incident to a valid arrest, and in certain other limited situations.<sup>16</sup> Apparently the valid arrest situation would not be applicable, and the exceptional situation was at least limited in *Katz* where the court said:

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14. 367 U.S. 643 (1961).

15. 389 U.S. at p. 353.

16. For examples of such other situations, consider *Carroll v. United States*, 267 U.S. 132 (1925); *Schlemberger v. California*, 384 U.S. 787 (1966); *Terry v. Ohio*, 392 U.S. 1 (1968).

The Government . . . urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirements of advance authorization by a magistrate upon a showing of probable cause. We cannot agree.<sup>17</sup>

Thus it seems that electronic surveillance will be allowed in the absence of exceptional circumstances only if it is done pursuant to a warrant. The leading case on the requirements of such a warrant is *Berger v. New York*.<sup>18</sup> In *Berger* the defendant was convicted of a conspiracy to bribe the New York State Liquor Authority. Based upon certain complaints, an informer was sent to an employee of the authority who mentioned a "price" and told him to contact a certain attorney. An interview between the informer and that attorney followed which supported the information. Based on this evidence a state court judge, pursuant to an applicable New York statute, authorized the installation of an eavesdrop in the attorney's office. On the evidence thus obtained the defendant was indicted, and relevant portions of the recording were received in evidence at his trial. In reversing the conviction, the United States Supreme Court held the New York statute which authorized the eavesdrop order invalid on four grounds.

The first was the fact that the statute did not require "belief that any particular offense has been or was being committed; nor that the property sought, the conversations, be particularly described."<sup>19</sup> This seems to require reference to a specific crime and a description of the conversations sought to be overheard. The description of the conversations may present a difficulty. The Court clearly indicated that identification of the one person whose conversations were to be intercepted is not sufficient.<sup>20</sup> It would seem necessary that either the other party to the discussion or at least the general nature of the conversations sought to be overheard be set out.

The second ground of invalidity was the fact that the two month period of the eavesdrop was "the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided."<sup>21</sup> The Court did not indicate in any way what it deemed to be the maximum for an eavesdrop authorized

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17. 389 U.S. at p. 358.

18. 388 U.S. 41 (1967).

19. 388 U.S. at p. 58-59.

20. "This does no more than identify the person whose constitutionally protected area is being invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized." 388 U.S. at p. 59.

21. 388 U.S. at p. 59.

by a single court order; only that sixty days was too long. As far as extensions are concerned the Court indicated each extension should be supported by "a showing of present probable cause for the continuance of the eavesdrop."<sup>22</sup>

The third objection was that "the statute places no termination date on the eavesdrop once the conversation sought is seized."<sup>23</sup> Thus it appears the order must state that the eavesdrop is to be discontinued once the conversation or conversations described in the order are overheard.

Finally the Court ruled the New York statute was defective because it did not provide for notice, "nor does it overcome this defect by requiring some showing of special facts."<sup>24</sup> These facts, the Court indicated, would have to establish some "exigent circumstances."<sup>25</sup> The nature of this "exception" is of critical importance since, of course, notice would destroy the very purpose of electronic surveillance.

A great deal of the difficulty created by this objection was apparently obviated in the *Katz* decision where in a footnote, the opinion of the Court states that advance notice is not required if it would result in the destruction of critical evidence.<sup>26</sup>

The Court in its discussion of the fourth objection in *Berger* also indicated some return on the warrant must be required.<sup>27</sup>

While the *Katz* case may raise some unanswered questions,<sup>28</sup> its authority appears to be unquestionable.<sup>29</sup> On the other hand the *Berger* court, although it voted six to three for reversal, split five to four on the issue of the invalidity of the New York statute. The four who voted in favor of the statute are still on the Court, while three of the five who held it invalid no longer sit. Hence its authority is questionable.

### *Exceptions to the Berger-Katz Rule*

It has long been held that one not a party to a conversation which has been intercepted may not object to the use of that evidence against him.<sup>30</sup> This rule was slightly broadened in the recent case of *Alder-*

22. 388 U.S. at p. 59.

23. 388 U.S. at p. 59-60.

24. 388 U.S. at p. 60.

25. 388 U.S. at p. 60.

26. 389 U.S. at p. 355, n. 16.

27. 388 U.S. at p. 60.

28. Cf. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133.

29. The Court voted seven to one to reverse in *Katz*.

30. *Goldstein v. United States*, 316 U.S. 114 (1942).

*man v. United States*<sup>31</sup> where it was held that a party could object to the introduction of such evidence if he were a party to the conversation or, if not, if the overheard conversation took place on his premises.

A more difficult question arises if one of the parties to the conversation authorizes its interception. The consent of one party has been held sufficient to take an eavesdrop out of the Federal Communications Act prohibition. Thus where an officer listened to a conversation over an extension phone with the consent of one of the parties, his testimony concerning the conversation was held admissible.<sup>32</sup> The question is, however, with the decision in *Katz*, whether any constitutional protections are violated.

The first significant case in this series is *On Lee v. United States*.<sup>33</sup> There a former acquaintance entered the defendant's laundry and in the course of the conversation that followed the defendant made incriminating statements. Without the defendant's knowledge, the friend had been equipped with a transmitter, and the conversation was monitored by a narcotics agent stationed outside the laundry. At trial, while the informer did not testify, the agent did, and a conviction resulted. The United States Supreme Court in a five to four decision affirmed. Emphasizing that no trespass was committed the Court said:

Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window.<sup>34</sup>

In *Lopez v. United States*,<sup>35</sup> believing from past conversations that an effort to bribe him would be made, an Internal Revenue agent kept an appointment with the defendant equipped with a pocket wire recorder. An offer was made, and in the ensuing attempted bribery prosecution, the agent testified and the recording was introduced. The Court in affirming the conviction stated:

Indeed this case involves no "eavesdropping" whatever in any sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled

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31. 394 U.S. 165 (1969).

32. *Rathbun v. United States*, 355 U.S. 107 (1956).

33. 343 U.S. 747 (1952).

34. 343 U.S. at p. 753-754.

35. 373 U.S. 427 (1963).

to disclose.

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Petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment, for no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.<sup>36</sup>

To this stage the law seemed abundantly clear. However, in *Osborn v. United States*,<sup>37</sup> a very similar situation arose except that two federal judges authorized the concealment of a tape recorder on the informer through which an attempt to bribe a juror was preserved. The Court elected to rest its decision not on *On Lee* or *Lopez* (although the Court stated that, "Unless *Lopez v. United States* is to be disregarded, therefore, the petitioner cannot prevail."<sup>38</sup>), but rather on the judicial authorization.

This was the state of the law when *Berger* and *Katz* were decided. Do those decisions impair the validity of these precedents? In *Berger* the opinion of the Court states that in *Osborn*, the recording "Although an invasion of the privacy protected by the Fourth Amendment, was admissible because of the authorization of the judges . . . ."<sup>39</sup> This would seem to imply that absent the authorization, a constitutional violation was present. However, the questionable continued validity of the opinion of the Court in *Berger* has already been noted, and Mr. Justice White concurring in *Katz* stated, *Lopez* and *On Lee* "are undisturbed by today's decision."<sup>40</sup>

Because of this uncertainty, there are conflicting decisions in the courts of appeal on this issue. The Second Circuit in *United States v. Kaufner*<sup>41</sup> limited *Katz* to cases where neither party to the conversation had knowledge of the surveillance. This decision was affirmed *per curiam* by the Supreme Court on the basis of *Desist v. United States*<sup>42</sup> which held *Katz* not to be retroactive in application. On the other hand, the Seventh Circuit in *United States v. White*<sup>43</sup> held *On Lee*, but not *Lopez*, overruled by *Katz*, drawing the distinction between cases where the informer testifies himself and is supported by the conversa-

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36. 373 U.S. at p. 439.

37. 385 U.S. 323 (1966).

38. 385 U.S. at p. 327.

39. 388 U.S. at pp. 56-57.

40. 389 U.S. at p. 363 (footnote).

41. 406 F.2d 550 (2nd Cir. 1969).

42. 394 U.S. 244 (1969).

43. 405 F.2d 838 (7th Cir. 1969).

tion monitored, and where only the recorded conversation is introduced. In the opinion of the court, the former situation remains constitutional while the latter does not.

It is submitted that this distinction is invalid and that *Kaufer* represents the sounder view. Where one party to the conversation consents to it being recorded or monitored there is no unconsented to search or seizure. *Katz* states that there was a search and seizure because there was an eavesdrop and recording which "violated the privacy upon which the [defendant] justifiably relied."<sup>44</sup> It is believed that a speaker has no constitutional right to rely on the fact that the person to whom he speaks will keep the conversation private.<sup>45</sup> Whether that person later reports it, writes it out, or consents to it being monitored or recorded, he has not violated the speaker's privacy because the speaker entrusted the words to him. The speaker's complaint is not that there has been illegal search and seizure, but that some one he trusted has violated that trust. This complaint appears to be outside the ambit of the fourth amendment protections.

In any event the United States Supreme Court has granted *certiorari* in *White*,<sup>46</sup> so it may be assumed that this area of uncertainty will soon be resolved.

### *The Impact of the Omnibus Crime Control and Safe Streets Act of 1968*

The area of electronic surveillance has been significantly controlled by Title III of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>47</sup> Governing both wiretapping and electronic and mechanical eavesdropping, it purports to establish a single set of rules to determine when surveillance of this nature is, and is not, permissible.

A brief overview of its provisions will help clarify its general significance, but only those provisions which directly relate to state authorized electronic surveillance are germane to this article and will be discussed in any detail.

In brief, the Act makes criminal any unauthorized willful interception of any wire or oral communication and the willful disclosure of any information so intercepted.<sup>48</sup> The willful use of any eavesdropping device is also prohibited in those situations which the draftsmen believed

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44. 389 U.S. at p. 353.

45. Cf. *Hoffa v. United States*, 385 U.S. 293 (1966).

46. 394 U.S. 920 (1969).

47. 18 U.S.C. 2510 *et seq.* (1964).

48. 18 U.S.C. 2511(1) (1964).

were within the area of federal legislative jurisdiction.<sup>49</sup> Excepted from this ban are telephone and switchboard employees acting in the course of their duties, Federal Communication Commission employees, interceptions made with the consent of one party to the communication if the interception is made under color of law and, even if it is not, unless it is done for a criminal or tortious purpose, and interceptions authorized by the President in the interest of National Security.<sup>50</sup> The manufacture, distribution, possession, and advertising of communication-intercepting devices where interstate commerce is involved are also made criminal.<sup>51</sup>

The confiscation of any eavesdropping device which violates one of the criminal provisions is authorized.<sup>52</sup> The act also authorizes immunity grants in enforcing its criminal provisions.<sup>53</sup> It further provides evidence obtained in violation of its provisions shall be inadmissible in any governmental proceeding, federal, state or local, whether the proceeding is judicial, legislative or executive.<sup>54</sup>

The act, however, does provide that surveillance otherwise prohibited under its provisions may be authorized by court order under certain circumstances. Section 2516(1) provides for federally authorized surveillance. More significantly for purposes of this article, 2516(2) allows state court judges "if authorized by statute of that state" to permit the interception on application of the principal prosecuting authority of the state or of any of its principal subdivisions. For this purpose the interception must be in connection with the investigation of the commission of, or a conspiracy to commit, certain enumerated crimes or any "other crime dangerous to life, limb, or property and punishable by imprisonment for more than one year."

The scope of authorized use of such intercepted communications is specified.<sup>55</sup> More importantly, the procedure for obtaining judicial authorization is carefully detailed.<sup>56</sup> A system of reports is also provided under which each judge before whom such a petition is brought, and the prosecuting attorneys, are required to make interim reports to the Administrative Office of the United States Courts, and that office is required to report yearly to Congress.<sup>57</sup> An action providing for the re-

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49. 18 U.S.C. 2511(1) (1964).

50. 18 U.S.C. 2511(2) (1964).

51. 18 U.S.C. 2512 (1964).

52. 18 U.S.C. 2513 (1964).

53. 18 U.S.C. 2514 (1964).

54. 18 U.S.C. 2515 (1964).

55. 18 U.S.C. 2517 (1964).

56. 18 U.S.C. 2518 (1964).

57. 18 U.S.C. 2519 (1964).

covery of actual damages in addition to the recovery of punitive damages and attorney's fees is established for anyone whose communications are illegally intercepted.<sup>58</sup>

The procedure which is specified for obtaining judicial permission to intercept communications contains many protections. The application for the order must be made under oath or affirmation. It must include the details of the particular offense under investigation, the facilities from which or place where the communication is to be intercepted, the type of communications sought to be intercepted, and the identity of the person whose communications are to be overheard. In addition, a statement of what other investigative procedures have been unsuccessfully used, and why those not used have not been utilized is required.<sup>59</sup> Before the judge may grant the order authorizing the interception he must find reasonable cause for belief that an individual has committed or is about to commit a crime for which interception is authorized, and that particular communications concerning that offense will be obtained through the interception; that normal investigative procedures have been tried and failed or are unlikely to succeed; and that there is reasonable cause for belief that the facilities from which or the place where the communication is to be intercepted are being or are about to be used in connection with an appropriate crime, or are commonly used by the person suspected.<sup>60</sup> The order authorizing the surveillance must state five items. The identity, if known, of the person whose communications are to be intercepted, the place where the interception is to occur, the type of communication sought and the crime to which it relates, the person authorized to make the interception and the person authorizing the application, and the period of time for which the interception is authorized.<sup>61</sup>

The interception may not be authorized for longer than thirty days unless an extension is obtained by the same means and on the same showings required for the initial order.<sup>62</sup>

The communication intercepted is to be recorded if possible in a manner which will protect it from alterations, and shall be made available to the judge issuing the order, who shall determine who is to have custody of it. Not later than ninety days after the termination of the authorized interceptions, the judge shall notify the parties whose communications

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58. 18 U.S.C. 2520 (1964).

59. 18 U.S.C. 2518(1) (1964).

60. 18 U.S.C. 2518(3) (1964).

61. 18 U.S.C. 2518(4) (1964).

62. 18 U.S.C. 2518(5) (1964).

have been intercepted (or for whose communications an application for interception has been made and denied) of that fact.<sup>63</sup>

While this discussion does not purport to be all inclusive, it gives an overview of the provisions of the act and the protections provided to prevent abuse.

Some of the questionable areas of this act do not relate to state communication interceptions, and are thus outside the scope of the article.<sup>64</sup> Certain questions it raises, however, warrant discussion.

The first and perhaps overriding question is the legislative jurisdiction of Congress to act in regard to state eavesdropping. Of course to the extent it relates to communications media, including the telephone, the Congressional power is not subject to question, but where there is an electronic interception by police officials of a conversation in a room, the Congressional legislative authority is not readily apparent. It is, however, probably authorized, in light of the *Katz* decision, by section five of the fourteenth amendment which provides that, "The Congress shall have the power to enforce, by appropriate legislation, the provision of this article."

To the extent the act applies to interceptions by non-law-enforcement officials, where no interception of messages over communications facilities are involved, its validity is questionable because of the absence of state action.<sup>65</sup>

A question can be raised concerning the authority for an interception order to remain in effect for thirty days without an extension. It has been previously indicated that *Berger* held sixty days too long for such an order. Assuming *Berger* would be followed today, it is doubted that a thirty day order meets the intent of that aspect of the case. On the other hand it is difficult to determine just how long a period would be acceptable. The American Bar Association project on Minimum Standards for Criminal Justice recommends a fifteen day limit.<sup>66</sup> This appears to be a safer approach.

The Act provides that when, acting pursuant to a judicial authorization, a communication is intercepted relating to a crime other than that specified in the order, the scope of its authorized use by law enforcement

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63. 18 U.S.C. 2518(8) (1964).

64. Consider for example the national security powers it gives the President.

65. A question as to whether state action is required to be involved in legislation enacted under section five of the fourteenth amendment is raised by the concurring opinions joined in by six justices in *United States v. Guest*, 383 U.S. 45 (1966).

66. *Standards Relating to Electronic Surveillance*, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (1968) pp. 8-9.

officials is substantially the same as if it had been the communication described.<sup>67</sup> This provision is of questionable constitutional validity. In the normal search warrant situation *Marron v. United States*<sup>68</sup> indicates that, with the possible exception of contraband, only the items described in the warrant may be seized. While questions have been raised as to the continued validity of this requirement,<sup>69</sup> it has never been overruled, and because of the nature of surveillance of the type here involved, especially its surreptitious character, it is submitted that the *Marron* rule is particularly desirable and should be followed in this area.

Finally, the Act authorizes interception without a court order when the principal prosecuting attorney determines that:

- (A) An emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
- (B) There are grounds upon which an order could be entered under this chapter to authorize such interception.<sup>70</sup>

The act, however, requires an application for an order be made within forty-eight hours thereafter.

This provision seems in conflict with that aspect of the *Katz* decision which held that the electronic surveillance there in question could not be exempted from the normal rules requiring a warrant.<sup>71</sup>

On the other hand, the *Katz* opinion did not indicate any particular facts on which a strong case of an emergency situation could be made, and the provision in the act finds some support in the decision of *Schmerber v. California*.<sup>72</sup> There a blood test without a warrant was upheld when made of a driver who was suspected of being intoxicated because in the time it would take to obtain a warrant the alcohol content of the blood would decrease, and hence the delay would cause the loss of the evidence.

It is believed *Schmerber* authorizes emergency interceptions as con-

67. 18 U.S.C. § 2517(5) (1964).

68. 275 U.S. 192 (1927).

69. See *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961). This problem is discussed in LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"*, 1966 ILL. LAW FORUM p. 255 at pp. 274-277. Consider also the possible impact of *Warden v. Hayden*, 387 U.S. 294 (1967) and *Harris v. U.S.*, 390 U.S. 234 (1968) on this question.

70. 18 U.S.C. § 2518(7).

71. See discussion *supra* note 17 and accompanying text.

72. 384 U.S. 757 (1966).

templated under the act, although it seems that forty-eight hours is too long a delay to apply for the authorization except, perhaps, in the most extreme cases.

It appears that while the act does have some questionable provisions, with minor modifications it will satisfy the requirements of the *Berger* and *Katz* decisions, and in some areas it gives greater protections to individuals whose communications are to be intercepted than those decisions require.

### THE ILLINOIS POSITION

In contrast to federal law, Illinois is one of the very few states which has an almost absolute ban on electronic surveillance.<sup>73</sup> It prohibits not only electronic surveillance but surveillance by "any device capable of being used to hear or record oral conversation. . . ."<sup>74</sup> The only qualification is that the surveillance must be "without the consent of any party thereto."<sup>75</sup> Among the exceptions are the use of hearing aids,<sup>76</sup> and public radio, wireless, and television communications.<sup>77</sup> Every use of a telephone seems to fall under this bar but their use has been excluded by court decision.<sup>78</sup> Criminal and civil<sup>79</sup> sanctions are provided for violation of the act, and evidence obtained in violation of the statute is declared to be inadmissible in any judicial, administrative or legislative proceeding.<sup>80</sup>

The principal area of controversy under the act has been the status of conversations which are overheard or recorded with the consent of one of the parties thereto. Although language in an earlier decision indicated to the contrary,<sup>81</sup> the Illinois Supreme Court in *People v. Kurth*<sup>82</sup> held that a recording of a conversation with the consent of one of the parties to it was inadmissible when objected to by the other party. Thus the statutory language which exempts the interception of a conver-

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73. A.B.A. PROJECT *supra* note 66 at p. 20 n. 38.

74. 38 ILL. REV. STAT. 1969, § 14-1 (1968).

75. 38 ILL. REV. STAT. 1969, § 14-2(a) (1968).

76. *See* note 74, *supra*.

77. ILL. REV. STAT. 1969, § 14-3(a) (1968). Section 14-3 sets out three other exceptions: employees of wire communication carriers in the performance of their duties; radio and television broadcasts; and emergency communications.

78. *People v. 5948 West Diversey Ave.*, 95 Ill. App. 2d 479, 238 N.E.2d 229 (1968).

79. ILL. REV. STAT. 1967 ch. 38, §14-4, 14-6.

80. ILL. REV. STAT. 1967 ch. 38, §14-5. The "fruit of the poisoned tree" doctrine applies to any information obtained from leads intercepted illegally under statute. *People v. Maslowsky*, 34 Ill. 2d 456, 216 N.E.2d 669 (1966), *app. dis.* 385 U.S. 11 (1967).

81. *People v. Dixon*, 22 Ill. 2d 513, 177 N.E.2d 224 (1961).

82. 34 Ill. 2d 387, 216 N.E.2d 154 (1966).

sation with "the consent of any party thereto" has been interpreted to require the consent of "all" parties to it before the exemption is established. As pointed out in concurring opinions in *Kurth* this interpretation apparently makes a businessman who records an order he receives over the phone to insure accuracy, liable for the criminal sanctions of the act.<sup>83</sup> A 1969 amendment to the Act now allows the interception of a conversation with the consent of one of the parties "at the request" of the state's attorney.<sup>84</sup>

The Illinois ban was originally enacted at a time when any electronic eavesdrop or wiretap not involving a physical trespass could be introduced in a state prosecution without violating federal law. It is easy to see how the abuses the federal law allowed led Illinois to adopt this complete ban. However with the substantial protections now accorded by the *Katz* and *Berger* cases and the 1968 Omnibus Act, it is time that our position be re-evaluated. Indeed the draftsmen of our new Criminal Code in 1961, long before the federal protections became applicable, evidenced a serious doubt whether our law was in accordance with the best interests of the people of the state. In the Committee Comments the following statement is made:

By retaining in this Code, the former legislation in substantially the same form, the Committee specifically refrained from endorsing it as desirable or practical.<sup>85</sup>

If, prior to the time the federal protections were established this serious a doubt of the wisdom of the Illinois Act was exhibited, surely now its desirability is in grave question. A fuller discussion of the advantages of electronic surveillance as a weapon against organized crime, it is believed, will establish that Illinois should amend its law to allow the issuance of electronic surveillance orders in accordance with the 1968 Omnibus Act.

#### POLICY CONSIDERATIONS

Is electronic and mechanical surveillance desirable? To answer this question, it is necessary to draw a line between the individual's right to privacy and society's right to the enforcement of its criminal laws against all law breakers. It is contended that electronic surveillance falls on the latter side of the line.

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83. See Mr. Justice Underwood's and Mr. Justice Schaefer's concurring opinions in *Kurth* in which they challenge this requirement that *all* parties must consent.

84. Public Act 76-1110 (1969).

85. ILL. REV. STAT. 1967 ch. 38, p. 740.

First it must be recognized that electronic surveillance is of no use in the investigation of routine cases of robbery, burglary or even murder. It is only in a limited class of crimes that the interception of messages is helpful in the police function. The first of these are those carried on by organized crime. Where there is an organization there must be communication between its members, and if these communications can be intercepted, the plans of the organization can be seriously disrupted. Next there are crimes such as gambling or bribery where the illegal transactions themselves are often made through channels of communication. Finally there are crimes such as kidnapping and extortion where illegal demands are often made on others through verbal communications.

Electronic surveillance is a powerful weapon for use in the fight against organized crime today for three reasons: the nature of the crimes committed, the nature of the criminal organization, and the use of terrorist tactics by organized crime to prevent testimony against its members.

Syndicated crime engages in criminal activities of such a nature that electronic surveillance is necessary for proper enforcement of the law. Its principal activities involve illegal traffic in narcotics, loan-sharking, gambling and prostitution. All of these are "willing victim" crimes in which there is no victim to complain of the violation of the law to the police. Thus if these unlawful activities are to be discovered and prosecuted, some other means for learning of them must be utilized. The only effective methods are to utilize informants, police agents or others who are willing to cooperate with the police, and the interception of messages concerning these crimes. These two methods are often effectively utilized together. The agent informs of some planned criminal activity, and the police are then able to intercept messages concerning it.

Furthermore, because of the organization of syndicated criminals, the real leaders never actually participate in the crimes themselves. They are separated by two or more levels of intermediate leaders from the workers who actually engage in the criminal activity. If convictions are to be obtained of the top leaders, it is necessary, to prove their complicity, to intercept the messages between them and those subject to normal arrest procedures.

Finally because of the terror and violence organized crime focuses on those who would testify against it, intercepted messages which cannot be threatened or disposed of, are extraordinarily valuable.

Thus in certain classes of cases and especially in the battle against

organized crime, electronic surveillance can be a powerful weapon. The American Bar Association study contains the following significant passage:

The testimony of the great majority of knowledgeable law enforcement officials is that "the evidence necessary to bring criminal sanctions to bear consistently on the higher echelons of organized crime will not be obtained without the aid of electronic surveillance techniques."<sup>86</sup>

Are there any contravailing policy reasons why such surveillance should not be utilized to the extent permitted under federal law?

It must be recalled that under federal law electronic surveillance can be utilized only if authorized by a court order equivalent to a warrant except perhaps where a warrant is not required because of the emergency nature of the situation.

Should verbal communications be given greater protection than physical evidence? There appears to be no valid reason to support such a conclusion. If with a proper warrant a person's home may be validly invaded, searched, and incriminating evidence seized, why should his communications not be intercepted under the same circumstances? Some would place greater emphasis on speech, the communication of ideas, than physical evidence, but these forget that letters containing the communication of ideas may be the subject of a valid search and seizure pursuant to a warrant. It appears that verbal communications are deserving of no greater protection than written communications. Others would contend that electronic surveillance differs from an ordinary search with a warrant because of its surreptitious nature. It is granted that this distinction exists in many cases. While a search with a warrant may occur under such circumstances that it is unknown, it does not depend for its success on its hidden nature as does electronic surveillance. On the other hand the surreptitious character of other law enforcement techniques has never been held to invalidate either their legality or desirability. The reference here is primarily to the use of secret agents and police informers.<sup>87</sup> On the same basis that authorizes the use of police informers, the surreptitious nature of electronic surveillance should not preclude its use as a tool of law enforcement.

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86. A.B.A. Project *supra* note 66 at p. 50. The quoted matter within the citation is from the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* at p. 201.

87. *Cf. McCray v. Illinois*, 386 U.S. 87 (1967); *Hoffa v. United States*, 385 U.S. 293 (1966).

Finally it should be noted that failure to change the Illinois law will give its citizens no assurance that their communications are not being intercepted. They may be intercepted by federal agents acting pursuant to a valid federal court order. On similar grounds it is submitted Illinois law enforcement officers should be given the same tools allowed for their federal counterparts.

#### CONCLUSION

Electronic and mechanical surveillance is illegal today in Illinois. This ban, however, was adopted at a time when there were insufficient federal protections in the area to prohibit serious abuse, and the legislature logically decided to bar it completely. Within the last three years there has been a thorough revision of the federal law in the area so that today such surveillance can be permitted only under the same circumstances that would authorize a search for physical evidence. Therefore, the reason for the Illinois ban no longer exists.

Electronic surveillance can be a significant weapon in the fight against crime, especially organized crime, and no valid reason exists to protect verbal communications more strictly than written communications or other physical evidence.

Therefore, it is submitted that Illinois law should be revised to allow electronic and mechanical surveillance under the conditions specified in Title III of the Omnibus Crime Control and Safe Street Act of 1968 with the exceptions that an order should not be valid for longer than fifteen days, and communications which were intercepted but not covered by the judicial order should not be permitted to be used for any purpose.