ELECTRONIC SURVEILLANCE AND THE
ADMINISTRATION OF CRIMINAL JUSTICE

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The history of liberty has largely been the history of observance of procedural safeguards. Mr. Justice Frankfurter

On August 11th, 1966, two officers of the Metropolitan Toronto police force entered the premises of Robert Steinberg under a valid search warrant. The warrant authorized them to seize anything that might be evidence that Steinberg was keeping a common betting house. While in the house, the police planted an electronic listening device which was monitored by another officer and a tape recorder in a truck parked nearby. The police re-entered the house the next day and retrieved their microphone. On the basis of the evidence seized on the original entry, and of telephone conversations recorded on the tape, Steinberg was convicted and sentenced to three months in jail and a fine of $10,000.00.

On appeal, counsel for Steinberg argued that the tape recordings were inadmissible by reason of the police conduct. The rule as to admissibility of illegally obtained evidence was said to have been altered by sections 1(a) (the right to enjoyment of property) and 2(d) (protection against self crimination) of the Canadian Bill of Rights.

The Ontario Court of Appeal, through Mr. Justice Aylesworth, dismissed the Bill of Rights argument in two lines without giving reasons; affirmed the rule that the method of obtaining evidence does not affect its admissibility; noted that there was sufficient

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1 McNabb v. United States (1943), 318 U.S. 332, at p. 347.
2 Criminal Code, S.C., 1953-54, c. 51, as am., s. 176. This type of general search warrant in gambling cases is authorized by s. 171.
4 S.C., 1960, c. 44.
evidence other than the tapes to support the conviction, and dismissed the appeal. The court, however, was disturbed by the conduct of the police. It did not have "the appearance of justice" and "the appearance of justice is an important element to be considered in criminal matters". The fine was therefore reduced from $10,000.00 to $5,000.00.

This simple case raises vital issues affecting the administration of criminal justice in Canada. The first, and most obvious issue, is the use by the police of electronic surveillance—wiretapping and eavesdropping. A related, but much broader, and ultimately more important issue, is the role of the judiciary in controlling police practices, whether through giving content to the Bills of Rights or using their discretion to exclude evidence. It is these two issues that will be dealt with in this article. Extensive reference will be made to the experience in the United States as a similar debate over electronic surveillance is going on there. Moreover, the part played by the American judiciary in supervising police conduct through the development of exclusionary rules and application of their Bill of Rights provides an informative contrast to the attitude of the Canadian judiciary.


The first questions to be asked are what is the present extent of electronic surveillance in Canada and what are the methods employed? The answers, briefly, are that there is enough evidence to conclude that its use is extensive, and that the methods are as technologically dazzling as television and the movies have led us to believe.

Extent

Unlike the United States, where there have been a number of legislative inquiries into electronic surveillance, there have, with one exception, been no studies of the problem in Canada. A series of recent events in Toronto and Vancouver have, however, shown

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6 Ibid., at p. 736.
enough of the tip of this particular iceberg to indicate that the amount of wiretapping and eavesdropping in this country is indeed enormous.

The one inquiry was in Vancouver in 1967 by R. A. Sargent, a retired judge of the British Columbia County Court, under the British Columbia Public Inquiries Act. The event that led to the inquiry was a public allegation by an official of the Pulp and Paper Workers of Canada that rooms in a Vancouver hotel where the union was holding its convention were “bugged” by a private detective employed by a rival union. Although the Commission’s terms of reference did not exclude inquiry into the extent of electronic listening by the police, the inquiry was in fact limited to its use by business and private detectives. That this should have been so is both unfortunate and strange as the private detective involved was a former member of the Royal Canadian Mounted Police who had been recommended by two officers of the force’s security branch who were clearly involved in checking the activities of the union officers. Indeed, the Minister of Justice invoked the Official Secrets Act to prevent the Commissioner from ascertaining exactly what the role of the Royal Canadian Mounted Police in the affair was.

Although this article is primarily concerned with police practices, any proposed legislation must take account of the private use of electronic surveillance. Moreover, the Canadian public should be aware of the full extent of electronic listening as private surveillance is as much a threat to their individual liberty and personal security as official surveillance. The Sargent Report provides the only guide to private listening in a major Canadian city. Evidence revealed the following types of surveillance:

Car sales firms use “bugged booths” to listen in to the customers’ conversations and thereby ascertain, among other things, what was the minimum price they would take for their used cars, and what other factors would induce them to purchase.

Dance studios also use two-way intercom systems to listen in on their customers, presumably to enable them to make the most effective sales pitch. Dance studios in the United States are

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8 R.S.B.C., 1960, c. 315.
10 Vancouver’s Chief Constable did submit a brief outlining the police case for electronic surveillance, ibid., pp. 48-49.
12 Sargent Report, op. cit., footnote 9, pp. 6-7.
13 Ibid., pp. 11-23.
14 Ibid., p. 23.
said to use trained psychologists as listeners in order to prepare the most effective appeal to the customer.

Health studios use the same equipment as dance studios and for exactly the same purpose, although both the health and dance studio witnesses testified that one of the main uses of listening was to protect their employees from perverts.\textsuperscript{15} Real estate and finance companies have also been reported to use the same listening techniques.

Private detectives use listening equipment extensively. Typical cases cited were where one partner leaves town and wants to record the activities of the other partners;\textsuperscript{16} in matrimonial cases to secure evidence for a divorce action;\textsuperscript{17} by parents to check on their children's conversations;\textsuperscript{18} to tap stockbrokers' lines to obtain information\textsuperscript{19}—one detective testified he got a lot of work "de-bugging" stockbrokers' telephones;\textsuperscript{20} by employers to check on employees;\textsuperscript{21} and to trace obscene phone calls.\textsuperscript{22}

That the same practices are carried on across the country is indicated by the disclosure of a major American manufacturer of electronic listening equipment that his sales in 1965 were over thirty million dollars and that fifteen per cent of this total—four and one-half million dollars—were from sales in Canada.\textsuperscript{23}

In Toronto, the York Board of Education recently refused to give ratepayers details about listening devices installed in the schools. The Board would only say that the devices were used to counter vandalism.\textsuperscript{24} In Pointe aux Trembles, Quebec, the City Hall was wired so that the Mayor and others could eavesdrop on private conversations from their cars. The City's building inspector told a provincial inquiry that the Mayor suspected the City engineer of trying to award paving and snow removal contracts to companies other than those favoured by the Mayor.\textsuperscript{25}

Two major American studies are also instructive as to the extent of private listening.\textsuperscript{26} Among the instances of its use are the following: to bug the houses and offices of the executives of Schenley Industries when they were considering a confidential bid for the purchase of Schenley stock;\textsuperscript{27} in the construction industry to discover a competitor's bid;\textsuperscript{28} in industries such as the chemical

\textsuperscript{15} Ibid., p. 24.  \textsuperscript{16} Ibid., p. 35.  \textsuperscript{17} Ibid., p. 36.  \textsuperscript{18} Ibid., p. 36.  \textsuperscript{19} Ibid., p. 36.  \textsuperscript{20} Ibid., p. 36.  \textsuperscript{21} Ibid., p. 37.  \textsuperscript{22} Ibid., p. 36.  \textsuperscript{23} Toronto Star, Aug. 31st, 1966.  \textsuperscript{24} Toronto Globe and Mail, Oct. 29th, 1968, p. 5.  \textsuperscript{25} Ibid., Oct. 31st, 1968, p. 2.  \textsuperscript{26} Westin, Privacy and Freedom (1967); Dash, Schwartz and Knowlton, The Eavesdroppers (1959).  \textsuperscript{27} Westin, \textit{op. cit.}, ibid., p. 104.  \textsuperscript{28} Ibid.
drug, design and electronics, where trade secrets are vital; to learn a competitor's secrets in a contested pipeline route application before the Federal Power Commission; in Detroit to gain information about new car models; extensively by businesses to monitor their own executives and employees; by dissident stockholders in proxy fights; by employers to monitor union activities; extensive tapping of lawyers' conversations with clients in business, labour and government; by the press to record private political meetings; (the most recent example being the bugging of the hotel room of Hubert Humphrey at the Democratic Convention by a reporter for the National Broadcasting Company); and of course the widespread use in matrimonial affairs (about forty to seventy-five per cent of a private investigator's surveillance according to Westin's informants). This list is only a partial one, but it does reveal enough to create an Orwellian image not of 1984, but of 1968.

The extent of police use of electronic listening can only be estimated from those few cases in which electronic evidence has been introduced in court, from other fragmentary reports, and by extrapolation from the American evidence.

There have not been more than six or seven cases in Canada in which electronically recorded evidence has been used to secure a conviction. However, four have all been within the past few months which would indicate its use is on the increase. Steinberg in 1967 is one of the recent examples in Ontario. In September of this year a young woman was convicted in Toronto of attempting to procure the murder of her boy friend's wife, partially on the evidence of six hours of tape recording. In October, a Toronto man was convicted of attempted bribery of a magistrate on the basis of taped evidence. Also in October, recordings of a conversation in a Toronto doctor’s office were introduced in a case charging attempted extortion. The judge exercised his discretion to rule the tapes inadmissible and the accused was acquitted. In October, recordings of taped telephone conversations were introduced for the first time in a criminal trial in British Columbia. In 1963, two men were convicted of bribery and conspiracy in Saskatchewan after a trial in which tape recordings were ad-

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mitted. And in Manitoba an employee was convicted of theft and breaking and entering in 1956 on the basis of telephone conversations recorded by his employer.

The incident which aroused the greatest controversy with respect to electronic listening, however, was not a criminal trial but a public inquiry conducted by Mr. Justice Campbell Grant of Ontario. The inquiry was into the conduct of two Toronto magistrates and their fitness to perform their duties. At the hearings it was revealed that the police had tapped the telephone of one Vincent Alexander from March 31st to May 27th, 1968, and had recorded sixty hours of conversation. Some of the calls were between Alexander, a man with six theft convictions, and one of the magistrates in question. Mr. Justice Grant admitted a “master tape” that contained the conversations that were relevant to the inquiry.

The revelation that the Toronto police had tapped a man’s telephone for two months raised a storm of controversy in the Ontario Legislature and editorial demands that police tapping and eavesdropping be legislatively curbed. Why this particular case aroused such public feeling is not certain, but it was undoubtedly a combination of the fact that two members of the judiciary were involved and the realization that the police could tap a man’s telephone for two months without any authorization and without anyone but a few officers ever knowing—as indeed no one else would have known but for the fact of Alexander’s conversations with Magistrate Bannon.

The disclosure of electronic surveillance in seven criminal cases and two public inquiries would seem to indicate that its use by the police in Canada is very limited. But disclosure of such surveillance in court or before an inquiry is truly like sighting the tip of an iceberg. The fact that a few instances are revealed in-

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45 Under the Ontario Public Inquiries Act, R.S.O., 1960, c. 323.
46 Ontario, Inquiry Re Magistrate Frederick J. Bannon and Magistrate George W. Gardhouse (1968), pp. 11-24, hereinafter cited as the Grant Report.
49 Alexander’s telephone was tapped because of police suspicion of his involvement in a series of burglaries, not because of any suspicion of a link with the Toronto Magistracy. To the date of this writing, Alexander has not been charged with any crime since his telephone was first tapped on March 31st, 1968.
indicates that a great deal is going on. For the police, on their own admission, use wiretapping and eavesdropping not as a tool to gather evidence for presentation at trial, but as an aid to investigation—to keep under surveillance those they suspect of crime. Samuel Dash, a former Assistant District Attorney of Philadelphia, states in his book *The Eavesdroppers* that law enforcement tapping:

... is done only for the purpose of aiding investigation and never for the purpose of collecting evidence. The statute prohibiting wiretapping, (in California) of course, makes this policy necessary. However, police say that even if they were allowed to use wiretapping evidence, they would prefer not to do so, but to use their wiretapping only to obtain leads.\(^5\)

Aside from the fact that secret surveillance is highly desirable from a police point of view, disclosure of such surveillance in court inevitably leads to a public demand for controls. The police would be quite content to have the admission of wiretap and eavesdrop evidence barred in court—as long as they were free to use it for investigative purposes. This attitude of the police was confirmed to me in conversations with officials of the Metropolitan Toronto police force who described the investigative aspects of electronic listening as "something more than snooping and something less than a search for specific evidence under a search warrant".

Even where wiretapping is permitted only under court order, there is evidence that the number of orders granted does not give an accurate account of its actual use. A New York District Attorney testified that in 1952 police in that city obtained 480 court orders.\(^32\) However, Dash (a former District Attorney) told the Senate Subcommittee that on his direct observation of the checking of wiretap equipment by New York police officers, and from reports from plainclothesmen, he estimated that in the course of a year the New York police operated at least 13,000 taps and possibly twice that number.\(^33\) A former telephone company employee who had worked with New York plainclothesmen told Dash that for every ten taps authorized by the court there were ninety illegal taps.\(^34\) Westin also told the Subcommittee that

\(^{50}\) Dash, *op. cit.*, footnote 26.
\(^{51}\) Ibid., p. 165. Dash quotes similar expressions of opinion from the police in Chicago, New York and Las Vegas.
\(^{53}\) Ibid., p. 521.
\(^{34}\) Dash, *op. cit.*, footnote 26, p. 68.
his investigations led him to conclude that there was "a good deal of wiretapping without obtaining court orders".\(^{55}\) In his book, Dash quotes police officers from Chicago, Los Angeles, San Francisco, New Orleans and Las Vegas to the same effect.\(^{56}\) Secret surveillance is just too easy and effective a method of investigation for the police to forego. It would be irrational to assume that the attitudes of the Canadian police are any different from those of their American counterparts. My limited investigations indicate that they are exactly the same.

To sum up, the limited number of public disclosures of police use of electronic surveillance in Canada does not indicate limited use. On the contrary, the expressed police preference for its use for investigation only, and their expressed desire to keep evidence of it out of court, makes the fact of a number of disclosures within the past year indicative of increasing and probably frequent police use. Moreover, electronic surveillance is just in its infancy in Canada. Now that the Ontario,\(^{57}\) Manitoba\(^{58}\) and Saskatchewan\(^{59}\) Courts of Appeal have ruled on its legality and the admissibility of evidence gathered by it, there is every reason to believe that its use will greatly increase.

**Methods**

The Sargent Report\(^{60}\) in Canada, and the works of Westin\(^{61}\) and Dash\(^{62}\) in the United States again provide the essential information. If McLuhan is right, no citizen over the age of ten years will be surprised by the electronic wizardry evidenced by the listening devices. But I suggest that we will all be a little surprised, and perhaps alarmed, to realize that the marvellous gadgets we see in the spy shows on our television screens are readily available for relatively few dollars to the private and official listeners. They are essential tools of the business of listening and watching. The sophistication of the equipment lends validity to the following comment and prediction:

It is becoming increasingly possible to invade privacy without trespassing—that is, to invade it by remote control. Man can now photograph from afar, conceal microphones in tiepins, observe by closed-
circuit television, tap telephone lines, pick up conversations in another
room by the use of electronic devices, and determine the content of
mail without opening it. There is no reason to doubt that the tech-
nology will continue to improve—probably at a geometric rate—and
that by the year 2000 it will be possible to place a man under constant
surveillance without his ever becoming aware of it. Moreover, since the
culture will become cognizant of this advance, men will live with the
constant possibility that they are under surveillance without ever being
able to be sure whether this is so.63

Modern technology makes possible three general types of
surveillance; physical surveillance, psychological surveillance and
data surveillance.64 Although each type can constitute a threat
to individual privacy, this article is confined only to physical
surveillance, and only to the listening devices. Physical surveil-
lance, properly understood, includes observing a person’s location,
acts, speech or private writing without his knowledge.65 Some of
the more common listening devices, almost all of which were
described to Judge Sargent as being used in Canada, are as
follows:

Microphones that through micro-miniaturization have been re-
duced to the size of a match-head. The transmission range is from
300 feet to more than a quarter of a mile. These tiny mikes can
be placed inside a telephone, a flower pot, a picture frame or in
any other object in the room. A common practice is to tape them
to the underside of furniture. No wires are required for the FM
microphones which have a built-in battery-operated radio trans-
mitter. They can give a constant transmission for five days with
a one and one-half ounce battery. (These FM transmitters are
sold under such trade names as the “Sugar Lump”, “Tiny Tattler”,
“Little Sentry”, and “Tiny Tim”.)66 It was presumably such a
device that was used by the Toronto police in Steinberg.

When entry into the room to plant the “bug” is not possible,
a contact microphone (lima-bean size) can be attached to the
opposite side of a wall in the room. When sound waves set up by
speech strike the wall, the contact mike picks up enough of the
vibration to permit accurate recording.67 When the walls are too
thick, a variation on the contact microphone, a “spike-mike” is
used. The vibrations are transmitted through spikes (the size of a
small nail) to contact mikes and then recorded.68

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63 Kalven, The Problems of Privacy in the Year 2000, in Daedalus,
(Summer, 1967), at pp. 876-877.
64 Westin, op. cit., footnote 26, p. 68.
65 Ibid.
67 Westin, op. cit., footnote 26, p. 75.
68 Ibid. p. 76.
The most sophisticated development for recording speech from a closed room is a tiny device that uses a reflector made of a thin diaphragm and a microwave antenna. The device is activated by a microwave beam that goes through solid walls and has a range of a city block. When activated it sends the vibrations in the room to an outside receiver and the conversation is recorded.69

If a window is left open a directional microphone can “zero in” and pick up speech from a room across the street.70 The same type of microphone is used to listen to conversations out of doors.

If a party to a conversation wants to record it he can use either a fountain pen or tie clip microphone. The speech can be recorded by equipment a block away, or by a recorder smaller than a package of cigarettes in the party’s pocket. (A tie clip recorder was supplied to Toronto Magistrate David Coon by the police before he talked to Francis Choma. Choma was subsequently convicted of bribery.)71

The most common method of listening to both sides of a conversation is the telephone tap. The classic method is the direct cut into telephone wires and splices into a set of earphones. The development of the induction coil, however, has made direct cut tapping almost obsolete. The great advantage of the coil, about two inches in size, is that it does not require breaking into the telephone wires or equipment. It is merely placed near the telephone and, as it is in the magnetic field carrying the voice signal, draws off some of that signal and carries it to a receiver for recording. The recorders do not require constant attendance as they may be set to turn on automatically when the telephone receiver is lifted. Induction coils can also be used as portable devices when carried in a pocket and wired to a pocket recorder.

The equipment described above, and its extensive use, is not a forecast of the future, but a fact of life in Canada today. The vital question for society then is what controls on its use exist and are they adequate? Whether they are adequate depends on how one answers such complex questions as what is the proper balance to be struck between public order, that is, crime control, and individual liberty and security; what in fact are the dimensions of crime in Canada and do they require increased police powers; who in society will control police powers and by what meaningful methods; and does the cry for increased police powers deflect

69 Ibid., p. 77.
70 Ibid., p. 76.
our attention from the real problems of crime and their possible solution?

II. Electronic Surveillance: The Law.

For the purpose of discussing the legality of electronic surveillance it is necessary to separate wiretapping—the interception of a conversation along a telephone line—from all other third party eavesdropping. The reason is that there are both federal and provincial statutes that deal with interference with telephone lines and equipment. The real legal issue, however, is the admissibility in a criminal trial of evidence acquired by any form of eavesdropping. For if the judicial rule is that relevant evidence is admissible regardless of how it is obtained, then it is irrelevant, for the purposes of the trial, whether the method of acquisition contravened a Telephone Act, exceeded the search provisions of the Criminal Code, offended against a rule of evidence, or was contrary to the tenets of the Bill of Rights. (It may, of course, be very relevant for a public prosecution, a private right of action, or administrative discipline.)

The Anglo-Canadian case law is barren of any appreciation or discussion of the problems posed for the administration of justice by the new technology. Judicial concern has centered almost exclusively on the reliability of the recordings and the opportunities for tampering. That this should be so is a natural consequence of the "everything that is relevant is admissible" rule. Exclusionary rules, on the other hand, require that the judiciary determine, not in the abstract, but on a hard look at the facts of individual cases, the proper balance to be struck between police power and individual rights. They also provide a framework within which the development of new methods of search and surveillance may be examined, and accepted, restrained or rejected. This process of judicial adjustment within the context of exclusionary rules is nowhere better illustrated than in the decisions of the United States Supreme Court with respect to electronic listening from the time of the first case in 1927 to its most recent ruling in 1968. These decisions will be examined after a survey of the Anglo-Canadian jurisprudence on eavesdropping and the admissibility of illegally obtained evidence.

There has been very little consideration of the problem in Canadian legal literature: Chorney, Wiretapping and Electronic Eavesdropping (1964-65), 7 Crim. L.Q. 434; Cornfield, The Right to Privacy in Canada (1967), 25 U. of T. Fac. L. Rev. 103. Mr. Justice Grant discussed the matter in his inquiry report, op cit., footnote 46, pp. 11-24.
The first case of eavesdropping to come before the courts in Canada resulted from an employer's surveillance of his plant rather than from police investigation. In *Foll*,' the employer had planted a tape-recorder that was activated when the light in the room was turned on. The accused's voice was recorded making incriminating telephone calls and he was charged with breaking and entering. After satisfying himself that the recording had not been revised or interfered with, and that the voice had been identified as that of the accused, Mr. Justice Freedman admitted the recording. In doing so, he relied on the admission of recorded evidence in two civil cases" and a brief report of a criminal case (which did not give the judge's reasons) in the *Criminal Law Review*.

The Manitoba Telephone Act,' however, prohibits wiretapping and it was argued that the recording was inadmissible for that reason. Although he held the Act did not apply because there had been no interception of messages passing along the telephone wires, it is important to note that Mr. Justice Freedman was of the opinion that the rule as to the admissibility of illegally obtained evidence would have prevailed even if the recording had contravened the Act. His Lordship, however, was concerned to point out that he was not faced with a case in which the eavesdropping had been done by the police. He observed that if this were so, it might raise some problems with respect to the law of confessions. The United States Supreme Court has also expressed concern about the relationship between police eavesdropping and the rules relating to confessions and self-incrimination.

In *Sommerville*" the accused was convicted of attempting to bribe a police officer. An important part of the evidence was a tape recording of his conversation with the officer. In upholding the admission of the recording, the Saskatchewan Court of Appeal relied on a civil case" and two short comments in the *Canadian Bar Review* and the *Criminal Law Review*. Neither of these comments discussed the complex legal and social problems involved in electronic listening. Both assumed that the problem in

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73 *Supra*, footnote 44.
75 [1956] Cr. L. Rev. 442.
76 S.M., 1955, c. 76, s. 36.
77 *Supra*, footnote 44, at p. 664.
criminal cases is the same as that in civil cases: have the recordings been altered and can the voices be identified? Both questions were answered satisfactorily and the evidence was admitted.

The only other reported Canadian case dealing with electronic eavesdropping is Steinberg, the facts of which have been noted above. There are some essential differences between Steinberg, and Foll and Sommerville that must be noted. Foll involved the recording of one side of an employee's conversation by his employer. Sommerville was a case of the recording of a conversation by one of the parties to it, the words spoken constituting the actual offence. Steinberg was a case of police officers entering a home under a search warrant which authorized them to seize anything which might be evidence that an offence under section 179 of the Criminal Code (keeping a common gaming house) was being committed. While in the house they planted the listening device and then left with the evidence they were authorized to seize. They then kept Steinberg under electronic surveillance for approximately twenty-four hours, returning the next day to retrieve the microphone.

These facts raise the vital issue in police use of electronic eavesdropping. It is that such listening is a return to the practice of the general search, a practice condemned and prohibited by the English courts in the eighteenth century. A practice which was one of the aggravating factors that led to the American Revolution and supplied the reason for the Fourth Amendment to the United States Constitution which banned them. And a practice which is proscribed under section 429 of the Canadian Criminal Code. It is noteworthy that the requirements that must be met under section 429 before a place may be lawfully searched are almost exactly the requirements of the United States Fourth Amendment. They are that a judicial officer must be satisfied upon oath that there are reasonable grounds to believe that articles relating to a specific crime will be found at the place; that the things to be seized must be specifically identified; and that the

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82 Supra, footnote 9.
83 Entick v. Carrington (1753-70), 19 Howell's State Trials 1029.
84 Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937); Boyd v. United States (1886), 116 U.S. 616.
85 Article IV: "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."
fruit of the search must be returned to the judicial officer. Then, and only then, (apart from arrest) may a citizen's right to security of his person and property be lawfully interfered with. Moreover, the courts have made it clear that search warrants are not to be used to carry out a general search. The warrant must be sufficiently particular to enable the police officer to know exactly what it is that he is to seize.  

The general warrant was a device favoured by the Court of Star Chamber to examine the files and papers of political suspects. A typical example is a warrant issued in 1593 which authorized messengers to search for and arrest everyone suspected of publishing libels “and for that purpose to enter all houses and places where any such shall be remaining”. In 1640 the Star Chamber was abolished and general warrants condemned. But their value to officers of the Crown who desired to discover and silence all opposition was such that they continued to flourish. Finally, two judgments of Lord Chief Justice Camden, in which he denounced and voided general warrants, led to Parliament declaring that they were universally invalid, except as authorized by an Act of Parliament.

The first case was *Huckle v. Money* which arose out of a warrant issued by the Secretary of State authorizing his messengers “to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper . . . and them, or any of them, having found, to apprehend and seize, together with their papers”. Lord Camden (then Chief Justice Pratt) held the warrant invalid. “To enter a man's house by virtue of a nameless warrant”, said the Chief Justice, “in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour”.

In *Entick v. Carrington*, another writ issued by Lord Halifax came before Lord Camden. The writ was specific as to the person, the journalist John Entick, but general as to the papers to be

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90 Lasson, *op. cit.*, footnote 84, p. 27.
89 (1763), 95 E.R. 768; See also *Wilkes v. Wood* (1766), 98 E.R. 489, (1753-70), 19 Howell's State Trials 1153.
91 Lasson, *op. cit.*, footnote 84, p. 45.
92 *Ibid.*, p. 44. The judgment was affirmed by the Court of King's Bench (1765), 97 E.R. 1050.
93 *Supra*, footnote 83.
seized. In voiding the warrant, the Lord Chief Justice commented: 93

If this point should be decided in favour of the government, the secret cabinets and bureaus of every subject in this Kingdom would be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel. A person's house is rifled, his most valuable papers are taken out of his possession, before the paper, for which he is charged, is found to be criminal by any competent jurisdiction, and before he is convicted of writing, publishing, or being concerned in the paper. Such is the power, and therefore one would naturally expect that the law to warrant it should be as clear in proportion as the power is exorbitant.

It is remarkable that the Supreme Court of the United States has used the history of the general warrant, and Lord Camden's judgment in Entick v. Carrington, as the foundation upon which to build a jurisprudence of civil liberties within the context of the Fourth Amendment, 94 while the Canadian courts have been concerned only to admit relevant evidence regardless of the methods used to obtain it.

Electronic eavesdropping of the kind used in Steinberg and described in the Grant Report 95 is a general search of a kind never dreamt of by the Star Chamber. How much better for those in authority to be able to secretly survey a suspect's activities than to have to announce their search by physical entry. How much better to be able to act without having to secure a judicial grant of authority and without having the exercise of the warrant subject to judicial scrutiny. How much better to be able to silently search on mere suspicion, rather than to have to swear to the probable presence of particular property that relates to a specific crime. In 1763 Lord Camden described the discretionary power of law officers to search "wherever their suspicions may chance to fall" as a practice "totally subversive of the liberty of the subject". 96 How much worse the unchecked police practice of 1968 of carrying out, but rarely revealing, electronic searches based on suspicion?

The conduct of the Metropolitan Toronto police as described in

93 Ibid., at p. 1064.
96 Wilkes v. Wood, supra, footnote 89, at p. 1167 (St. Tr.).
the Grant Report is a classic example of official interference with an individual’s right to privacy without due process of law. There had been a sharp increase in burglaries in Toronto in late 1967 and early 1968. The police suspected one Vincent Alexander who had a record that included six theft convictions. Wiretaps were placed on his telephone line from March 31st to May 27th, 1968. Over sixty hours of telephone conversation were recorded. To the date of this writing Alexander has not been charged with any crime. The recorded conversations with Magistrate Bannon that led to the Grant inquiry were a fortuitous result of the tapping.

It is important to note that the police did not apply to secure a warrant to search Alexander’s house. The reason, presumably, was that there was no evidence upon which a judicial officer could properly act. Hence the extra-legal decision to search, and to continue to search for fifty-eight days, without warrant. Legal technicians may object that there was no search within section 429 of the Criminal Code as there was no physical entry into the house. Moreover, the Ontario Telephone Act does not make it an offence to wiretap per se. Therefore, there was nothing “extra-legal” about the police decision to eavesdrop. There is no law that forbids it.

Section 429 dates from 1886, a time at which electronic surveillance was not contemplated. What was contemplated—entry into a man’s house to search for tangible property—was allowed only in a few instances subject to judicial control. What is sought to be protected by search and seizure laws, whether found in a criminal code or in a constitution, is not a man’s property but his right to privacy. The right to be free from official interference in any aspect of his life, whether it be his person, his papers or his communications, except according to law. Electronics have made a man’s thoughts and speech as susceptible of search and seizure as his files and papers. Accordingly the law, whether through judicial extension of section 429, application of the Bill of Rights, or specific legislation, must be made to protect them.

It is unlikely that the Canadian judiciary would stretch section 429 to cover electronic surveillance. Its words are too specifically directed to tangible property that is “in a building, receptacle or place”. What is to be hoped for, however, is that some creative judge, alive to the fundamental issues involved, will give content to the fine phrases of the Canadian Bill of Rights by declaring electronic search to be contrary to its intent.

97 R.S.O., 1960, c. 394, s. 112. 98 R.S.C., 1886, c. 174, ss 51-52.
The Bill of Rights

Counsel in *Steinberg* argued that the eavesdropping in that case was contrary to sections 1(a) and 2(d) of the Bill of Rights. The Ontario Court of Appeal contented itself with holding that neither “. . . of these sections . . . [are] applicable to or governing the facts at bar . . .”.[99] Counsel argued, and the court repeated the argument,[100] that the police action had breached the accused’s right to “enjoyment of property” within section 1(a). But with respect, the issue was not the right to enjoyment of property but “the right not to be deprived thereof except by due process of law”. Moreover, it would have been better to argue that it was “security of the person” not property, that the accused had been deprived of by the police action.[101] Section 1(a) reads as follows:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

What process of law preceded the police deprivation of Robert Steinberg’s and Vincent Alexander’s personal security—their right to privacy? The right to security of the person must, if it means anything, include the right to privacy; in this case the right to keep confidential one’s communications. If one cannot speak without fear that the government is listening, then the Bill of Rights has been reduced to a collection of words in a statute book. Search and seizure laws “interpose a magistrate between the citizen and the police”.102 In the absence of laws dealing with wiretapping and eavesdropping, the courts must interpose the Bill of Rights between the citizen and the police.

The due process of law clause, whether in the Bill of Rights or in the proposed constitutional Charter of Human Rights,[103] provides a touchstone which the Canadian courts can use, if they are so minded, to fashion a jurisprudence of criminal procedure. When the Bill of Rights was before the House of Commons, there was considerable debate as to what interpretation would be given to the phrase “due process of law”. The narrowest interpretation would be “according to existing law”, and therefore any of the rights granted could be taken away by a validly enacted law, regardless of how unjust.[104] The broader interpretation is that it

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101 “Security of the person” was argued in the appellant’s memorandum of fact and law. I do not know whether counsel pressed it in oral argument. The court did not mention it in its judgment.
102 *Warden v. Hayden*, *supra*, footnote 93, at p. 304, per Brennan J.
must be "interpreted as a limitation on law which to a degree of unreasonableness affects personal liberties or property". This is the meaning that the Minister of Justice indicated that the government intended, and he expressed the hope that the Canadian courts would look to the American experience in so interpreting it.

The American experience is particularly relevant as it is the due process clause in the Fourteenth Amendment that the United States Supreme Court has used to apply the Fourth Amendment's guarantee against unreasonable search and seizure to the criminal procedure of the States. (The first eight amendments to the United States Constitution, the Bill of Rights, are really a Federal Bill of Rights and are not applicable to the states. The Fourteenth Amendment, passed in 1868, provided that no state shall "... deprive any person of life, liberty, or property, without due process of law...". Any citizen who feels he has been deprived by state law of any of the rights guaranteed to him by the first eight amendments must therefore seek the protection of the Fourteenth Amendment. The Supreme Court has thus been constantly faced with the problem of giving content to "due process of law".)

Reference to four of the leading cases is sufficient to illustrate the elastic quality of due process in the hands of a court prepared to stretch it to cover changing challenges to civil liberties. The issue in Palko v. Connecticut was the right of a state to appeal from an acquittal in a criminal trial. The appellant claimed to be entitled, through the Fourteenth Amendment, to the Fifth Amendment's protection against double jeopardy. The Supreme Court was urged to hold that whatever would be a violation of the Bill of Rights if done by the federal government was equally unlawful by force of the Fourteenth Amendment, if done by a state. The court refused to adopt such a broad proposition. It took a more general approach that left a wider ambit of discretion to the states.

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Tarnopolsky's section on due process, pp. 148-158, contains a much more detailed study of the matters referred to above.


107 Mapp v. Ohio, supra, footnote 94.


110 The accused had been charged with murder in the first degree. A jury found him guilty of second degree murder and the State appealed. The appeal was upheld and a new trial ordered. At the second trial a verdict of first degree murder was returned and a death sentence passed.
Was the right in question one that was "implicit in a concept of ordered liberty"?¹¹¹ If so, state law could not abridge it; if not, the states were free to act. An example of the former would be the right to freedom of speech; of the latter, the right to trial by jury. In the instant case, the right of a state to appeal when it alleges there has been substantial legal error was held not to violate any of the appellant's fundamental rights.

The issue in *Adamson*¹¹² was the validity of a provision in the California Penal Code that allowed a court to comment upon the failure of an accused to explain or deny evidence against him. The accused argued that the provision, in effect, compelled him to give testimony against himself. The Supreme Court held that due process guaranteed the accused the right to a fair trial, but that to require (not coerce) testimony from an accused is not necessarily contrary to that right.¹¹³ A more important aspect of the judgment for our purposes, however, is the opinion of Mr. Justice Frankfurter with respect to the scope to be given to due process.

Following Mr. Justice Cardozo's decision in *Palko*,¹¹⁴ Mr. Justice Frankfurter not only said that the Fourteenth Amendment did not incorporate all the protections of the Bill of Rights, he also contended that the due process clause had an independent function. The first eight amendments could not possibly contemplate all the abuses of freedom which might reveal themselves in the course of time.

Judicial review of the guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offences. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied.¹¹⁵

This "independent function" of the due process clause was

¹¹³ This holding was subsequently overruled in *Malloy v. Hogan* (1964), 378 U.S. 1.
¹¹⁴ *Supra*, footnote 109.
¹¹⁵ *Supra*, footnote 112, at pp. 67-68.
demonstrated by Justice Frankfurter in *Rochin*.\(^{116}\) During a struggle with the police, the accused swallowed two capsules. He was taken to a hospital where his stomach was pumped and the capsules retrieved. They were proved to contain morphine. The accused argued that his Fifth Amendment privilege against self-incrimination had been breached. The Supreme Court had decided in *Adamson*.\(^{117}\) however, that the privilege was not applicable to state criminal procedure. Nevertheless, Mr. Justice Frankfurter used the due process clause to reverse the conviction. "The police conduct", he said, "shocks the conscience. . . . States in their prosecutions [must] respect certain decency of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a sense of justice."\(^{118}\)

The supervisory powers inherent in a due process clause were made manifest by the Supreme Court in *Mapp v. Ohio*.\(^{119}\) Twelve years prior to *Mapp*, in 1949, the court had held\(^{120}\) that the Fourth Amendment prohibited unreasonable search and seizure by state officers. At the same time it declined to rule that illegally obtained evidence was inadmissible in a state court. In *Mapp*, the court changed its mind and applied to state proceedings the exclusionary rule that had been in force in the federal courts since 1913.\(^{121}\) The court's change of mind was not one of caprice, but was based on a study of criminal procedure in the states. As long as there was no exclusionary rule, state officers were tempted to, and often did, obtain evidence by unlawful means. Thus the only way to make


\(^{117}\) *Supra*, footnote 112.

\(^{118}\) *Rochin v. California*, *supra*. footnote 116, at p. 172. Some due process cases, however, do evidence idiosyncratic rather than general standards. In *Irvine v. California* (1954), 347 U.S. 128, the court upheld a conviction which involved repeated illegal entries into the accused's house to install and move around a microphone in order to eavesdrop for over a month. Mr. Justice Frankfurter dissented on the basis of *Rochin*. Chief Justice Warren, joined by Justices Black and Douglas, also dissented. Black and Douglas JJ. have always rejected "selective incorporation" in applying the Bill of Rights to the states. They have continually urged that the only safe course is to apply the entire Bill of Rights to the states. Their view has never prevailed, although the court, on a "selective incorporation" basis, is slowly applying each of the amendments to state criminal procedure. *Mapp*, *Ohio*, *supra*, footnote 94, would now control in a case like *Irvine*, and *Malloy v. Hogan*, *supra*, footnote 112, has overruled *Palko* and *Adamson*. *Gideon v. Wainwright* (1963), 372 U.S. 335. applied the Sixth Amendment's right to counsel and *Duncan v. Louisiana* (1968), 88 S. Ct. 1444, applied the same amendment's right to a jury trial in a criminal case.

\(^{119}\) *Ibid.*

\(^{120}\) *Wolf v. Colorado*, *supra*, footnote 94.

\(^{121}\) *Weeks v. United States* (1913), 232 U.S. 383.
meaningful the right to privacy guaranteed by the Fourth Amendment, and incorporated in the due process clause, was to apply the exclusionary rule to the states.

What is likely to be the attitude of the Canadian courts in interpreting the due process clause? Will they take up Judge Rand’s challenge to use it to apply to the law a standard of reasonableness? Will they look to the American experience and view due process as an “historic and generative principle” that dictates that law and procedure be subjected to canons of decency and fairness? The experience since the passage of the Bill of Rights in 1960 is too limited to draw any conclusions, although the few cases that there are, are not encouraging.

The Supreme Court of Canada has twice had the opportunity to define due process but has declined to do so. Both cases involved deportation orders under the Immigration Act. Their issuance was alleged to have been contrary to due process of law. In Rebrin, Chief Justice Kerwin said “There was no infringement as the appellant has not been deprived of her liberty except by due process of law”. In Yuet Sun, he declared that the applicant “has not been deprived of her liberty except by due process of law”.

In Martin, the Alberta Appellate Division seemed to take both a narrow and broad approach at the same time. The accused, who was charged with impaired driving, had been given a number of physical tests without being warned that the evidence might be used against him. It was argued that the conviction had not been according to due process of law. The court upheld the admissibility of the evidence and concluded:

It would be difficult, indeed unwise, to attempt an inclusive definition of the phrase “due process of law” except to state that in my view in the case at bar it means the law of the land as applied to all the rights and privileges of every person in Canada when suspected of or charged with a crime, and including a trial in which the fundamental principles of justice so deeply rooted in tradition apply.

Two other cases in which the clause was argued do not contain

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107 Ibid., at p. 381.
108 Ibid., at p. 72.
110 Ibid., at p. 72.
112 Ibid., at p. 290, per MacDonald J.A.
any significant analysis, although in one a magistrate assumed "that due process and the law of the land are synonymous". The one case which has arisen since 1960 which was particularly ripe for the application of due process standards of criminal procedure was Steinberg. The facts, and the court's rejection of the Bill of Rights argument, without reasons, have already been noted. On the narrowest possible construction of due process—that it only means "according to existing law"—there was still room for the Ontario Court of Appeal to act. For no lawful process whatsoever preceded the police action in monitoring the accused's conversations. The search warrant which was used as the ruse to enter the house to plant the microphone, authorized the police to "seize anything found therein that may be evidence that an offence under section 176 . . . is being committed. . .". It did not authorize the police to remain in the house and listen to the accused's every word for twenty-four hours. Yet this in effect is what they did through their electronic equipment. Under present law, as noted above, no lawful warrant could issue to validate such conduct. There was no process of law. On the contrary, the whole history, purpose and language of the search and seizure provisions in the Criminal Code are against our law ever validating such a gross invasion of the citizen's right to privacy. If the facts of Steinberg do not yield to a due process determination, it is difficult to imagine facts that would.

The fact that a search warrant could not be obtained to wiretap or eavesdrop was well known to the Metropolitan Toronto police. In 1947 the Ontario Provincial Police and the Bell Telephone Company arranged a test case to determine whether a warrant would issue to trace telephone calls. With the aid of the Attorney General's department a search warrant was drawn up and issued by a justice of the peace against a suspected bookmaker. As agreed, Bell moved to quash the warrant and the case came before Chief Justice McRuer. In quashing the warrant the Chief Justice said:

... the fundamental thing is that the purpose of the search warrant is to secure things that will in themselves be relevant to a case to be proved, not to secure an opportunity of making observations in respect of the use of things, and thereby obtain evidence. In this respect, I think the warrant is defective and an order will go quashing it.

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130 Regina v. Jensen, ibid., at p. 326.  
131 Supra, footnote 5.  
132 Cornfield, op. cit., footnote 72, at p. 113.  
133 Re Bell Telephone Co. of Canada, [1947] O.W.N. 651. 89 C.C.C. 196.  
134 Ibid., at p. 655.
Although the warrant was directed to tracing telephone calls, the Chief Justice's judgment is equally applicable to a warrant that would seek to authorize wiretapping or eavesdropping.

The Exclusionary Rule

A due process determination that would have excluded the recorded evidence in Steinberg would have meant the abandonment of the "admissible if relevant" rule in the Canadian courts. A due process standard, once formulated, would be applicable to all evidence obtained otherwise than according to a lawful process. It becomes necessary to ask, therefore, whether it would be sound policy to change the rules with respect to the admissibility of illegally obtained evidence?

The case that sanctified the rule that illegally obtained evidence, if relevant, is admissible against an accused is the judgment of the Privy Council in Kuruma.\(^{135}\) The accused had been stopped, stripped and searched by two constables while cycling along a highway in Kenya. Two rounds of ammunition and a pocket knife were found in his shorts. He was sentenced to death for being in unlawful possession of ammunition under the emergency regulations then in force. The regulations provided, however, that such a search could only be carried out by a police officer of or above the rank of assistant inspector. Thus the case was appealed to the Privy Council on the ground that the evidence had been illegally obtained and was therefore not admissible.

Lord Goddard C.J. reached back to 1861 to find a case to support his ruling that if the evidence is relevant "... the court is not concerned with how the evidence was obtained".\(^{136}\) In Leatham,\(^{137}\) Crompton J. had said: "It matters not how you get it; if you steal it even, it would be admissible".\(^{138}\) Lord Goddard cited a civil case\(^{139}\) to the same effect and observed: "There can be no difference in principle for this purpose between a civil and a criminal case."\(^{140}\) Moreover, the Judicial Committee was of the opinion that the admissibility of illegally obtained evidence was "plainly right in principle".\(^{141}\)

In an incredible display of shoddy scholarship in so important a case, Lord Goddard completely misinterpreted Scottish and


\(^{136}\) Ibid., at p. 203.  

\(^{137}\) (1861), 8 Cox C.C. 498.

\(^{138}\) Ibid., at p. 501.  

\(^{139}\) Calcraft v. Guest, [1898] 1 Q.B. 759.

\(^{140}\) Kuruma v. The Queen, supra, footnote 135, at p. 204.

\(^{141}\) Ibid., at p. 203.
American cases to the opposite effect that were cited to him. *Laurie v. Muir* is the leading Scottish case in which the Full Bench of the High Court of Justiciary was specially convened to decide the point. The court held that illegally obtained evidence was not necessarily admissible. The rule was to be that unlawful police conduct had to be excused by the circumstances of the case before the court would exercise its discretion to admit it. Yet Lord Goddard cited *Laurie v. Muir* as supporting "the view that if evidence is relevant it is admissible".

With respect to the American decisions that excluded illegally obtained evidence, Lord Goddard appeared to think that they depended on the unconstitutionality of admitting such evidence. But there is nothing in the Fourth Amendment that prohibits admission. The exclusionary rule is one of judicial implication to make meaningful the guarantee against unreasonable searches. As we have seen, unreasonable searches by state officials are unconstitutional, but until the decision in *Mapp* in 1960, illegally obtained evidence was admissible in state courts. In other words, the exclusionary rule in the United States is a result of the United States Supreme Court's answer to a question that the Judicial Committee did not ask itself: Can the laws that protect the citizen against official interference with his property and person be any protection if the courts give their sanction to illegally obtained evidence?

Lord Goddard left open one ground of exclusion. "... [I]n a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused." Lord Goddard thought that "if a document had been obtained from the defendant by a trick...the judge might properly rule it out". Finally, Lord Goddard emphasized that their Lordships were not qualifying in any way the rule with regard to the admissibility of confessions.

The Supreme Court of Canada has never directly considered the point. It is unfortunate, however, that Chief Justice Kerwin, in *obiter*, adopted the *Kuruma* ruling in *Begin*. The accused was convicted of motor manslaughter on evidence obtained from a blood test that indicated he had been drinking. He had consented to the test but was not warned that it might be used against him in

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143 *Kuruma v. The Queen*, supra, footnote 135, at p. 204.
144 *Mapp v. Ohio*, supra, footnote 94.
145 *Kuruma v. The Queen*, supra, footnote 135, at p. 204.
The Chief Justice ruled that no warning was necessary as blood tests were not analogous to admissions and confessions. His Lordship then observed that the results of the test would have been admissible even if the accused had not consented (and, it must follow, the police had assaulted him). Such an important matter of judicial policy should not be decided by an offhand obiter comment.

It is interesting to note that there is a long line of cases dating back to 1886 in which Canadian trial and appellate courts have upheld the rule that illegally obtained evidence is admissible if relevant. In England, on the other hand, there were no cases from 1870 until the judgment in Kuruma (on appeal from Kenya) in 1955. This may well be indicative of a difference in police practices in the two countries. And such a difference may well justify a change from the "admissible if relevant" rule. (Of course the number of cases in which the rule is invoked does not give an accurate picture of police conduct. If there is no exclusionary rule, there is no motive to argue that the evidence was illegally obtained.)

Two other judicial rules should be contrasted with the rule as to illegally obtained evidence. The first is the confessions rule. If a confession is not shown to have been freely and voluntarily made, that is, if it was induced by promise of favour or fear of threat, it is not admissible. The rationale for the rule is that a confession that is not voluntary is not trustworthy. But an equally important rationale surely is that the courts will not be party to police conduct that forces a confession from an accused, whether through force or promise. The exclusionary rule is a judicial check on police practices.

Another judicial rule, not uniformly applied in Canada, is that there is no jurisdiction to try an accused who has been illegally arrested without a warrant. If a trial is held, a conviction will be quashed on appeal. Here the rationale is clearly the protection of the public from unlawful police interference. Again judicial rules

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140 Ibid., at pp. 211-212.


are used to check police conduct. The matter was put succinctly by the Chief Justice of Alberta.\textsuperscript{122}

While the difficulties in enforcing the law are great, particularly in certain classes of cases, it is essential, if respect for the observance of the law is to be expected from the public, that those charged with its enforcement be most careful in its observances.

Why ought the courts to be party to illegal police searches when they refuse to be party to illegal use of force or illegal arrest? Is it that entering a person's home under a defective search warrant is seen to be less offensive than police brutality, or seizing a citizen without a warrant? Surely such fine lines ought not to be drawn. It is not the function of the courts to make themselves party to illegal police conduct so that relevant evidence might be admitted. A coerced confession may be very relevant, and the courts are quite able to determine whether it is trustworthy. It is the function of the court to stand between the citizen and the police and to refuse to countenance police action that is outside the law. There are values in a criminal trial that transcend the conviction of the guilty.

The Scottish rule of discretion, which often works as an exclusionary rule in practice, provides an informative contrast to the Anglo-Canadian rule of admissibility.

In Laurie v. Muir,\textsuperscript{133} inspectors for the Milk Marketing Board searched the accused's premises under a warrant which they erroneously, but in good faith, believed to authorize the entry. A three-judge bench of the High Court of Justiciary considered the question of the admissibility of such importance that they referred it to a Full Bench for a ruling. Lord Cooper, for the court, laid down the discretionary rule that "an irregularity in the obtaining of the evidence does not necessarily make the evidence inadmissible".\textsuperscript{134} The irregularity would "need to be excused" from the circumstances of the case before the evidence would be admitted. In the instant case, the evidence was excluded, notwithstanding that the inspectors acted in good faith. "Persons who possess powers of search under a warrant", said Lord Cooper, "ought to know its limits".\textsuperscript{135}

Lord Cooper applied the rule a few months later in M'Govern.\textsuperscript{136} The accused, who was suspected of safecracking, went voluntarily with the police to the station. While there, but

\textsuperscript{133} Supra, footnote 142.
\textsuperscript{134} Ibid., at p. 24.
\textsuperscript{135} Ibid., at p. 26.
before he was arrested and without his consent, his fingernails were scraped. Traces of the explosive used to blow open the safe were found and formed an important item of the evidence, almost all circumstantial, at the trial. The High Court said it was not disposed to excuse the police conduct. If the apprehension and charge of the accused were justified, they should have preceded not followed the examination of his person. Lord Cooper observed that laws that seek to control official interference with the person were necessary for the protection of the public. "The principles under which police investigations are carried out must be adhered to with reasonable strictness."\(^\text{157}\)

The discretionary rule was extended in *Turnbull*\(^\text{158}\) to the fruits of an illegal search carried out under a valid arrest. The warrant was directed to the files of a particular client of the accused accountant. Other files were also removed which resulted in four new charges of fraud. In excluding the evidence, Lord Guthrie ruled that seizure of property not referred to in the warrant was the equivalent of searching without a warrant.

To reach the opposite conclusion would largely destroy the protection which the law affords to the citizen against invasion of his liberties by its requirement of the specific warrant of a magistrate for interference with these liberties.\(^\text{159}\)

The ruling that the Scottish courts would have made on the facts of *Steinberg* is clear beyond doubt. There is a passage in *Laurie v. Muir*\(^\text{160}\) that describes the police conduct in *Steinberg*:\(^\text{161}\)

That principle [the discretionary principle of fairness to the accused] would obviously require consideration in any case in which the departure from the strict procedure had been adopted *deliberately* with a view to securing the admission of evidence obtained by an unfair trick.

An exclusionary rule has been in force in the United States federal courts since the decision in *Weeks*\(^\text{162}\) in 1913. This has meant that the Federal Bureau of Investigation, the most respected and effective law enforcement agency in that country, has had to operate within the confines of the rule since that date. The Bureau has its critics on a number of scores, but there seems to be general agreement on its high standard of conduct in connexion with investigation, arrest and detention. A standard infinitely higher than that displayed by most metropolitan police forces. Undoubtedly, the Federal Bureau of Investigation's much stiffer

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\(^{159}\) *Ibid.*, at p. 102, per Lord Guthrie.

\(^{160}\) *Supra*, footnote 142.

\(^{161}\) *Ibid.*, at p. 27, per Lord Cooper.

\(^{162}\) *Supra*, footnote 121.
entrance requirements and consequent sense of elitism is part of the reason, as is the fact that they deal with a different criminal element and perform a different function than do the metropolitan police. But another part of the reason surely is that the federal courts have demanded a high standard and have been slow to countenance any departure from it. (The "high standard" is nothing more than an insistence on compliance with the law—surely not an odd position for a court to take.)

In Weeks,\(^\text{163}\) the accused's home was searched and evidence seized by officers acting without a warrant. The Supreme Court justified the judicial creation of the remedy of exclusion by contending that without it the "right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution".\(^\text{164}\) The efforts of law enforcement officials "to bring the guilty to punishment" were not to be aided by sacrificing the rights guaranteed to all citizens.

Almost forty years later, in 1949, the court divided on the question of whether the exclusionary rule was to apply to proceedings in state courts.\(^\text{165}\) As has been noted above, Mr. Justice Frankfurter held that the security of one's privacy against arbitrary intrusion by the police was implicit in "the concept of ordered liberty" and the Fourth Amendment was therefore applicable to the states through the due process clause. But the remedies deemed appropriate for breach of the right might well vary and the states did not have to adopt, as England had not, the remedy of exclusion. Moreover, the law provided other remedies. A private tort action for trespass or false arrest against the offending officers, public prosecution if the criminal law has been violated, and administrative discipline within the police force, are all remedial possibilities.

The minority were of the opinion that the exclusionary rule should be applied to the states for the same reason Weeks had applied it to the federal government—the rights guaranteed by the Fourth Amendment cannot be secured without it. Mr. Justice Murphy also took up the important point of alternative remedies. He concluded that to talk of alternatives conveyed the false "impression that one possibility is as effective as the next". ". . . there is but one alternative to the rule of exclusion. That is no sanction at all. . . ."\(^\text{166}\) Tort actions are not likely to be brought by the types of people who are the victims of illegal searches. If action is

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\(^{163}\) Ibid.  \(^{164}\) Ibid., at p. 393, per Mr. Justice Day.  \
\(^{165}\) Wolf v. Colorado, supra, footnote 94.  \
\(^{166}\) Ibid., at p. 41.
brought, damages for trespass will only be nominal. Even if they were more than nominal, there is every likelihood the police officers involved would not have the resources to pay them. As to public prosecution or administrative discipline, prosecutors and senior police officials are not likely to proceed against the men they work with and depend upon every day.\footnote{For an excellent discussion of the pros and cons of the exclusionary rule see Paulsen, The Exclusionary Rule and Misconduct by the Police in Sowle, Police Power and Individual Freedom (1962).} \ldots one remedy exists to deter violations of the search and seizure clause. That is the rule that excludes illegally obtained evidence.\footnote{\textit{Wolf v. Colorado}, supra, footnote 94, at p. 44, per Mr. Justice Murphy (dissenting).}\footnote{\textit{Supra}, footnote 94.}

In \textit{Mapp v. Ohio},\footnote{\textit{Ibid.}, at p. 659, per Mr. Justice Clark.} the court reversed its holding of twelve years earlier, and applied the exclusionary rule to state criminal proceedings. An examination of state practices indicated that without exclusion there would indeed be "no sanction at all". The court was quite aware that it was inviting the criticism that it was putting judicial roadblocks in the path of police efforts to convict the guilty. "There are those who say, as did Justice (then Judge) Cardozo, that under our ... exclusionary doctrine '[t]he criminal is to go free because the constable has blundered'. In some cases, this undoubtedly will be the result. But ... 'there is another consideration—the imperative of judicial integrity'. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws. ..."\footnote{\textit{Ibid.}}

The conclusion that the very existence of a government may be destroyed if the courts sanction illegal search and seizure may seem to be a spectacular judicial overstatement. But the sense of Justice Clark's judgment is that the legal order, if it is to function, must command the respect of the people. Those at the visible front line of the administration of justice are the police. If they are seen to be lawbreakers, the strength of that front line, in the sense of public acceptance and support, will be seriously weakened. If the courts then sanction official lawlessness, there is a further erosion in public respect for the administration of justice. The importance of public faith—of belief in and acceptance of the legal order—cannot be overestimated. The majority of citizens obey the law not because they are deterred by the sanctions for its breach, but because they share a sense of the rightness of the patterns of conduct enforced by the criminal law. It is vital that
this shared moral sense, and consequent moral stigma that attaches to a breach of the law, not be weakened by the law itself.\textsuperscript{171} Law and order was the central domestic issue in the recent American presidential election. Our television sets daily bring us scenes of clashes between the police and various elements of the populace in almost every country of the West. If the police, supported by the courts, are seen to be unchecked and beyond the law, this process of breakdown will surely accelerate. This is particularly so when it is appreciated that those who are most often clashing with the police are those whom the legal order normally depends upon for support—middle class students, workers and professionals. In our short term passion for increased law enforcement, we must be careful that we do not do long term damage to the fabric of society. Viewed in this perspective, Justice Clark's conclusion is not as overstated as it might first appear to be.

Apart from not involving the court in unlawful acts, the exclusionary rule is said to have an emphasis forward—to act as a deterrent to further unlawful conduct. "The rule is calculated to prevent, not to repair."\textsuperscript{172} Does the exclusionary rule in the United States act as a deterrent?\textsuperscript{173} There is little evidence either way, and the matter may be impossible of measurement. But if there are to be exclusionary rules, there must be concern with the realities and demands of police work and the effect, if any, of judicial decisions on police practices. Unfortunately, the judges know as little about what policing really consists of as the average constable knows about judicial decision-making. Yet the court must set standards that will be understood and adhered to by the police. This assumes, of course, that these standards are communicated to each police officer and that he is educated in the requirements of the law. This process of communication and the educative function that must be assumed by those who direct our police departments, is a vital and difficult subject that is beyond the scope of this article. But it must be appreciated that judicial rules will not by themselves affect police conduct.

The need for the courts to set standards that are meaningful and can be adhered to by the police suggests that the Scottish rule

\textsuperscript{172} Elkins v. United States (1960), 364 U.S. 206, at p. 217.
of discretion is preferable to the American rule of absolute exclusion. The criminal should not go free because the constable has blundered, to paraphrase Justice Cardozo's famous aphorism. But evidence should be excluded if there has been a deliberate violation of the law (as in M'Govern or Steinberg) or if the police conduct is otherwise excessive. But where there has been a "blunder" there is no need to exclude, as for instance where an item is seized that is beyond the terms of the warrant. Indeed one wonders at the need for exclusion in Laurie v. Muir\(^\text{174}\) where the inspectors acted in good faith. Such a judicial line between deliberate, excessive conduct and an overstepping of the boundary, sets a standard that can be readily understood and adhered to by the police.

The Supreme Court of Canada has never had the question of the admission of illegally obtained evidence before it for determination. Some of the judges, in obiter, have indicated acceptance of the Kuruma rule of admissibility. That rule is a judicial rule of evidence that like all such rules can be changed by the judiciary to meet changing circumstance. The House of Lords may some day change the Kuruma rule as it recently changed the evidentiary rule with respect to Crown privilege in the production of documents.\(^{175}\) The Supreme Court should give expression to its responsibility in the administration of criminal justice in Canada by abandoning the Kuruma rule and adopting the Scottish rule of discretion.

The Telephone Acts

One federal and five provincial statutes\(^{176}\) prohibit or restrain interference with telephone equipment. The Alberta\(^{177}\) and Manitoba\(^{178}\) statutes contain the only provisions that can be said to be

\(^{174}\) Supra, footnote 142.


\(^{176}\) An Act to Incorporate the Bell Telephone Company of Canada, S.C., 1880, c. 43, s. 25; The Alberta Government Telephones Act, S.A., 1958, c. 85, ss 22, 23; The Manitoba Telephone Act, supra, footnote 76, ss 36, 37; The Telephone Act, supra, footnote 97, ss 111-112; The Telegraph and Telephone Company Act, R.S.Q., 1964, c. 286, ss 23, 24; The Rural Telephone Act, R.S.N.S., 1954, c. 255, s. 44.

\(^{177}\) Ibid., s. 23(1) "... no person shall use any device ... for the purpose of intercepting and listening to messages passing through a telephone. ..."). City of Edmonton By-law 2295 (The Telephone By-law) allows wiretapping by the Edmonton police where a warrant has been granted by a magistrate. This apparent violation of the provincial Act is justified on the ground that the Edmonton telephone system is owned by the city and not by the Alberta Telephone Commission to which the Act refers.

\(^{178}\) Supra, footnote 176, s. 37(2) "No person in the province shall use any recording equipment to record messages transmitted along, over, or through the lines or wires of the system ...".
directed at wiretapping. But as Mr. Justice Freedman commented in *Foll*, the illegally obtained evidence rule would permit the admission of evidence obtained in contravention of a statute. Prosecution under any of the statutes appears an unlikely possibility. Moreover, their minimal penalties are hardly a deterrent. I know of no official report of any such prosecutions. A story in a Toronto newspaper reported that the only prosecution relating to wiretapping in Canada was of a Hamilton detective who was fined $25.00 under the Ontario Telephone Act in 1963. Provincial telephone legislation is not the place to look for a solution to the wiretapping problem.

**England**

The power of the police to intercept communications in England was made the subject of a Privy Council inquiry in 1957. The incident which led to the inquiry was the police recording of telephone conversations between a prominent underworld figure and a lawyer named Marrinan. The Home Secretary forwarded the tape to the Bar Council which was investigating Marrinan's conduct. The subsequent concern over police use of electronic eavesdropping led to the appointment of the Birkett Committee.

In a letter to the Metropolitan Police in 1951, the Home Office had indicated the principles on which it acted in granting warrants to intercept communications. The reason for the letter was an increase in applications and an increase in rejections by the Home Office. The letter said that interception was “an inherently objectionable” procedure; that “the power to stop letters and intercept telephone calls must be used with great caution”; and that it must be regarded as “an exceptional method”. Three conditions were laid down that had to be satisfied before a warrant could be issued:

1. The offence must be really serious.
2. Normal methods of investigation must have been tried and failed, or must, from the nature of things, be unlikely to succeed if tried.
3. There must be good reason to think that an interception would result in a conviction.

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179 *Supra*, footnote 42.
The Birkett Report particularly stressed that the Home Office’s internal procedures insured that warrants would only be granted if they complied with the above conditions. A request for a warrant could only be sent to the Home Office by the Chief of the authority concerned (police, customs and excise, security service) or his deputy. All applications were reviewed by senior officers in the Criminal Department. If the application was approved it was sent to the Permanent Under-Secretary of State. If he considered that a sufficient case had been made out he sent it to the Secretary of State for his decision. All the Secretaries of State since 1939 testified that they gave close personal attention to every request for a warrant.184

A further letter was sent to the police by the Home Office in 1956 drawing attention to an increase in warrants granted and the need to keep applications to a minimum. As a result, the Metropolitan Police established a more effective system of review and brought about an increase in the proportion of arrests to warrants.185 The number of interceptions authorized dropped from 241 in 1955 to 159 in 1956.186 In 1957, to the date of the Report, every interception but one led to an arrest.187

The Report rejected a suggestion that warrants should be issued only on a sworn information before a magistrate or a High Court judge. If a number of judicial officers had the power to grant warrants, the control over their issue would be weakened. Strict maintenance of controls was necessary to insure that interception was limited to the use for which it was intended.188

The Report stressed that electronic surveillance as strictly regulated by the Home Office was not equivalent to the general search that had been condemned by Lord Camden in Entick v. Carrington.189 "...the exercise of the power to intercept communications by the Secretary of State has never been regarded as a general power, but as a power carefully restricted to special and well-defined circumstances and purposes, and hedged about with clearly formulated rules and subject to very special safeguards.”190 As a result, the majority Report did not recommend any further safeguards.191

The Report did contain a number of important recommendations. Among these were that there be a monthly review of outstanding warrants; that warrants should only be valid for a defined

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184 Ibid., p. 18. 185 Ibid. 186 Ibid., p. 41. 187 Ibid., p. 25. 188 Ibid., p. 20. 189 supra, footnote 83. 190 Birkett Report, op. cit., footnote 181, p. 31. 191 Ibid.
period (normally one month); and that full records setting out the details and history of each warrant should be kept at the Home Office.\textsuperscript{192}

A reservation was entered by one of the three members of the committee, Patrick Gordon Walker. He was of the opinion that new and stricter standards should be set, particularly in regard to the detection of crime. Wiretapping should be confined to extreme and urgent cases such as when "a dangerous criminal or lunatic" who is likely to commit violence was at large. Such a standard would mean that interception "would in practice cease to be used for long periods of time".\textsuperscript{193} Mr. Walker contended that the adoption of his standard would not seriously impede the police efforts to fight crime. Figures for "certain recent years" showed that "the number of arrests made by the Metropolitan Police as the result of interceptions was 0.13 per cent of the total number of arrests for indictable offences".\textsuperscript{194}

The Home Office control of electronic surveillance is a neat and peculiarly English solution to the problem. There is every reason to believe that it works in practice in the sense that lawful wiretapping is kept to an essential minimum, and the police do not resort to it on their own motion. But crime, the police, and government regulation of law enforcement are very different things in England than they are in Canada, and we should be careful of assuming that what is an effective solution there would also be one here.

Canadian police work, to a large extent, is directed towards gambling, narcotics, liquor offences and prostitution. Search warrants and electronic surveillance are used extensively with respect to these crimes. Moreover, this is the most difficult type of crime to fight as there are no complainants. Those who become involved do so, for the most part, of their own volition. Hence the telling phrase "crimes without victims".\textsuperscript{195} As with any commodity that a sizeable element of the population wants, there must be an economic organization to supply it. In this case, the suppliers are known generically as organized crime. Thus the innocuous crimes of gambling, bootlegging and prostitution, and the personal tragedy of narcotic addiction, take on a larger and more sinister significance. Police enforcement is marginally effective against the con-

\textsuperscript{192} Ibid., p. 37. \textsuperscript{193} Ibid., p. 39. \textsuperscript{194} Ibid.

\textsuperscript{195} Schur, Crimes Without Victims: Deviant Behavior and Public Policy (1965); Skolnick, Coercion to Virtue: The Enforcement of Morals (1968), 41 S. Calif. L. Rev. 588.
sumers, and almost ineffective against the large suppliers. The result is a good deal of "extra-legal" harassment (including electronic surveillance) of the offenders by the police and contempt for the law by both sides.

In England, by contrast, gambling, narcotics, liquor and prostitution form an insignificant part of police work. This is because they are not all crimes, because of different social attitudes, and because of different social solutions to such problems as narcotic addiction. Absent the problem of illicit consumption there is no need for an illicit supply organization. Thus organized crime, as that term is understood in North America, is almost unknown in England. Search warrants in England are used primarily in connexion with stolen goods and electronic surveillance is similarly used in the attempt to control robbery.\(^{196}\)

Most importantly, public control of the police, public attitudes towards them, and police attitudes towards the public are very different in the two countries.\(^{197}\) In England the Home Office is responsible for, and answerable in Parliament about, the conduct of the police. In a unitary state with a relatively homogeneous population where the Home Office, Parliament, Scotland Yard and the national newspapers are centered within a short distance of each other in the capital city, this control not only is, but is seen to be, a reality of government. In Canada, on the other hand, part-time police commissions with a changing makeup of members with no particular expertise are the ostensible controllers. The reality, and it is seen by the public to be the reality, is that the police are self-controlling and that internal administrative discipline, insofar as it does control, is the only real control. The respect for civil rights by the police in the two countries is also very different. This, in large part, is probably due to the different crime control function, outlined above, that each carries out. Moreover, a heterogeneous, unsettled, immigrant population confronts the police with a very different set of problems and public attitudes than does a homogeneous, settled population. Respect for civil rights is reflected back in civic respect for the police. Law breaking by the police, for which they are largely unanswerable, is reflected back not only in disrespect for the police but in a lack of faith in the entire legal order. The very real differences in crime, the

\(^{196}\) For a discussion of these points see Karlen, Anglo-American Criminal Justice (1967), pp. 97-100 and 129-134.

\(^{197}\) For a comparative analysis of the relationship between the police and the public in the United States and England see Banton, The Policeman in the Community (1965).
police and public control between England and Canada should make us cautious of automatically adopting English solutions.

United States of America

The history of the legality of electronic surveillance in America is primarily written in bitterly divided decisions of the Supreme Court between 1928 and 1967. The basic issue was whether wiretapping and eavesdropping were prohibited by the Fourth Amendment's guarantee against unreasonable search and seizure. The polar cases are *Olmstead* which in 1928 decided that they were not, and *Katz* which in 1967 decided that they were. Between *Olmstead* and *Katz* there was legislation which attempted, unsuccessfully, to prohibit interception, and following *Katz* there was legislation which allows interception subject to safeguards. How the new legislation, which was passed in June, 1968, will fare in the Supreme Court remains to be seen.

In *Olmstead* the court ruled that wiretapping was not unconstitutional as the Fourth Amendment protected only tangible property and only against physical invasions and trespass. The tapped wires were outside the house and the Fourth Amendment did not extend to "projected voices". Thus wiretapping, and the admission in federal courts of evidence gathered thereby, was allowed. Justice Holmes and Brandeis wrote two now famous dissents.

Justice Holmes forever branded wiretapping "a dirty business" and attempted to balance the conflicting issues raised: The desire to detect criminals against the policy that the government should not be seen to be a violator of its own laws. "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Justice Brandeis argued that the reach of the Fourth Amendment could not be frozen to cover only those intrusions that were in the minds of the framers at the time the Constitution was drafted. "They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the

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individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.\textsuperscript{203}

\textit{Olmstead} was vigorously criticized and Congress debated but did not pass, specific legislation outlawing wiretapping. In 1934 the Federal Communications Act\textsuperscript{204} was passed. Section 605, which was not even debated, contained the following provision:

\begin{quote}
[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . .
\end{quote}

The Supreme Court used section 605 in \textit{Nardone}\textsuperscript{205} in 1938 to reverse a conviction in which part of the evidence was based on intercepted telephone conversations. In an opinion that reflected the spirit of the dissents of Holmes and Brandeis in \textit{Olmstead}, the court interpreted “no person” to include federal agents, and the prohibition of divulgence “to any person” to preclude admissibility in a federal court.\textsuperscript{206}

On the re-trial the accused were again convicted. The case reached the Supreme Court a second time\textsuperscript{207} on the important issue of what use the prosecution had made of the intercepted messages that were inadmissible. In reversing once again, the court extended the prohibition of section 605 to evidence gathered as a result of knowledge gained from illegal wiretaps. The defendant had the right to examine the Government about use made of wiretap recordings. To prohibit the admission of wiretap evidence but to allow wiretap knowledge to be used to gather admissible evidence would be to nullify the intent of the section which was to prohibit wiretapping.

Three subsequent decisions of the Supreme Court, and the Justice Department’s own interpretation of section 605, soon diluted the effect of the \textit{Nardone} cases. The Justice Department interpreted “intercept . . . and divulge” as a single prohibition; that is you could intercept as long as you did not divulge.\textsuperscript{208} Federal

\begin{footnotes}
\item[203] Ibid., at p. 478.
\item[205] \textit{Nardone v. United States} (1937), 302 U.S. 379.
\item[207] \textit{Nardone v. United States} (1939), 308 U.S. 338.
\end{footnotes}
agents have since relied on that internal ruling of 1941 to wiretap extensively.\textsuperscript{199}

In \textit{Goldman}\textsuperscript{210} the court opened a wide door to eavesdropping by holding that there was neither an "interception" nor a "communication" within section 605 where one side of a telephone conversation was recorded by a listening device placed on the wall of an adjoining room. (As in \textit{Olmstead}, there was no trespass on the accused's property.) In \textit{Goldstein}\textsuperscript{211} the Supreme Court opened the door further by holding that one not a party to tapped conversations had no standing to object to their use by federal agents. In \textit{Schwartz}\textsuperscript{212} the court held that section 605 did not prohibit state officers from using wiretap evidence in state proceedings. The result of these judicial and executive rulings was that electronic surveillance was virtually unchecked in the United States until the decision in \textit{Katz}\textsuperscript{213} in 1967.

By the time of the decision in \textit{Silverman}\textsuperscript{214} in 1961, it was becoming clear that the Supreme Court was moving towards a broader theory of privacy in interpreting the Fourth Amendment. The decision itself was perfectly consistent with \textit{Olmstead}. The listening device (a spike mike) had been pushed through the wall of an adjoining house until it touched the heating duct of the accused's home. Thus the element that was missing in \textit{Olmstead}, trespass, was present and the Fourth Amendment was applied to exclude the evidence. But Mr. Justice Stewart's language presaged his decision six years later in \textit{Katz}. "Inherent Fourth Amendment rights", he said, "are not inevitably measurable in terms of ancient niceties of tort or real property law".\textsuperscript{215}

In \textit{Katz}, Federal Bureau of Investigation agents had attached a listening device to the outside of a public telephone booth from which the accused made his calls. There had been no physical entrance into the area occupied by the accused and it was assumed that \textit{Olmstead} would apply to admit the evidence. In sweeping aside the trespass argument, Mr. Justice Stewart construed the

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\begin{itemize}
\item \textsuperscript{199} \textit{Westin, op. cit.}, footnote 26, at pp. 172-174.
\item \textsuperscript{210} \textit{Goldman v. United States} (1942), 316 U.S. 129.
\item \textsuperscript{211} \textit{Goldstein v. United States} (1942), 316 U.S. 114.
\item \textsuperscript{212} \textit{Schwartz v. United States} (1952), 344 U.S. 199. In \textit{Benanti v. United States} (1957), 355 U.S. 96, the Supreme Court excluded from the federal courts wiretap evidence obtained by state officials pursuant to a New York statute. \textit{Schwartz} was distinguished as dealing with a state rule of evidence.
\item \textsuperscript{213} \textit{Supra}, footnote 199.
\item \textsuperscript{214} \textit{Silverman v. United States} (1960), 365 U.S. 505. A judicial theory of a right to privacy was enunciated four years later in \textit{Griswold v. Connecticut} (1965), 381 U.S. 479.
\item \textsuperscript{215} \textit{Ibid.}, at p. 511.
\end{itemize}
Electronic Surveillance

Fourth Amendment in terms that are certain to be quoted often in the future. "[T]he Fourth Amendment", he said, "protects people not places. . . . what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected".\textsuperscript{216} Olmstead and Goldman\textsuperscript{217} were thus overruled, and Brandeis' theory of the Fourth Amendment as a guarantor of a broad right of privacy was adopted. Electronic eavesdropping will only be permissible if it has been judicially authorized under proper standards and safeguards.\textsuperscript{218} Just how stringent these standards are will be discussed later in this article.

III Electronic Surveillance: Crime and Public Policy.

The justifications for electronic surveillance reduce themselves to one overriding consideration: crime control. This justification has three faces. The first is that crime is on the increase and we need every reasonable technique at our command to combat it. The second is that it is needed to fight organized crime—the Mafia—which presents the police with very different problems than does the individual criminal. The third is that the criminal will use the new technology to aid his endeavours and the police should not be handicapped by having its use denied to them.

Prominent public officials and many judicial officers have put the demands of crime control foremost in considering electronic surveillance. The President-elect of the United States stated that "[I] would use the wiretapping devices in order to get at the heart of the organized crime problem".\textsuperscript{219} In his Report, Judge Sargent, after extensive reference to American material said:\textsuperscript{220}

One would be living in a fool's paradise if he did not consider that organized crime will move or attempt to move into Canada. . . . the police should be provided with the very best means of carrying out their duties. The use of these [electronic] devices . . . should be controlled, but not so strictly that the authorities in pursuing an investigation are unduly hampered.

An unsigned editorial in The Ontario Magistrates Quarterly was unstinting in its support of police use of wiretapping:\textsuperscript{221}

\textsuperscript{216} Katz v. United States, supra, footnote 199, at pp. 351-352.
\textsuperscript{217} Supra, footnote 210. As Katz is based on the Fourth Amendment, the decision, following Mapp v. Ohio, supra, footnote 94, is applicable to both state and federal proceedings.
\textsuperscript{220} Sargent Report, op. cit., footnote 9, pp. 43 and 49.
\textsuperscript{221} (1968), 5 Ontario Magistrates Quarterly, editorial page. Magistrate S. Tupper Bigelow of Toronto is the editor.
The police are well justified in using it if they are to try to combat the rising crime rate. . . . Professional criminals . . . are using electronic devices . . . so why should the police be hamstrung by unrealistic and crime-producing restrictions on their activities in detecting crime? . . . What I think we should do is get the crime rate down. And if wire-tapping will do it, that suits me very well, and should likewise suit all law-abiding citizens.

New York City District Attorney Frank Hogan has been a consistent supporter of wiretapping.222

[I] believe, as repeatedly I have stated, that telephone interception, pursuant to court order and under proper safeguards, is the single most valuable and effective weapon in the arsenal of law enforcement, particularly in the battle against organized crime.

Some questions must be asked with respect to the above opinions. What is organized crime? Does it exist in Canada? What kind of crimes does organized crime primarily participate in? Would electronic surveillance be an effective method of combating them? As to crime generally, is there really an increasing crime rate? If so, are any particular groups in society committing more crimes? If so, what crimes are they committing and would electronic surveillance be effective in combating them? Is it possible, both as to organized crime and the increase in crime, that we should be looking for some solutions outside the criminal law system?

Organized Crime

Organized crime is simply the application of corporate principles to the business of crime. It is sound economics and politics to aggregate human and physical resources into large organizations that provide central management and control, a division of labour, and prudent allocation of profits. In the United States, the Mafia or Cosa Nostra, is the monopolistic crime corporation. Its illegal activities are primarily supplying gambling, narcotics, women, money and liquor to willing customers.223 It is now said to be plowing its huge profits into legitimate businesses. All these crimes are, as noted above, crimes without victims, and for that reason are almost impossible to combat. All these crimes involve imposing someone's idea of morality on somebody who has a different idea. It is "coercion to virtue"224 through the law. If the

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224 Skolnick, op. cit., footnote 195.
criminal sanction is of little utility in these areas is it not time we stopped to ask exactly what functions the criminal sanction can perform, and which ones we really want it to perform? Is it not particularly urgent that we ask this question if in the attempt to legislate morality we have spawned an infinitely worse evil—organized crime?

There is no doubt that organized crime exists in the United States. There is little, if any, evidence that it exists in Canada. The testimony of law enforcement officials is that it does not—though individuals or groups may have connections with the organization in the United States. The Assistant Commissioner of the Ontario Provincial Police said recently that the Mafia had part control of betting on sports events in Ontario but had no control over the events themselves. Commissioner Graham said there is contact between two United States Mafia families and criminals in Ontario, “but it could not be said with any certainty what influence they had on the Ontario crime scene”. There are undoubtedly Mafia connections in Canada and some Mafia money is probably invested in Canada, but organized crime, as that term is understood in the United States, does not exist here.

In 1961 there was a public inquiry into crime in Ontario. The Commissioner, after an investigation that included extensive consultation with the Royal Canadian Mounted Police, Ontario Provincial Police, metropolitan police chiefs, and the United States Attorney General’s Organized Crime and Racketeering Section, concluded that “... there has never been ... any syndicated crime in this Province...” The Commissioner did say that there was organized crime in gambling, but by this he meant not that the Mafia was operating, but that a group of men had joined forces to control gambling in Ontario. “[T]here was no evidence before me that it [the Mafia] does subsist or that any of the activities of those engaged in organized crime were in any way associated with the Mafia.” The Commissioner stressed that it was the cooperation of law-abiding citizens who wanted to place a bet that allowed what organized crime there was to flourish. He quoted the then United States Attorney General Robert Kennedy

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226 Ibid., p. 357.
227 Ibid., p. 5.
228 Ibid., p. 364.
229 Ibid., p. 357.
230 Ibid., p. 364.
to the effect that if the public stopped placing bets they would "bring organized crime down to size quicker than all the combined efforts of the federal and local law-enforcement agencies". Surely such a conclusion should cause us to ask some basic questions about what is a crime and the efficacy of the criminal sanction.

Even with organized crime being the enormous problem it is in the United States, the President's Commission on Law Enforcement was divided on the question of using electronic surveillance to combat it. The majority recommended its use subject to "stringent limitations". The minority felt that without a "searching inquiry" into electronic surveillance there was "insufficient basis to strike this balance against the interests of privacy". In Canada, where there is nothing remotely approaching the same problem, the spectre of organized crime ought not to be raised to frighten the public and Parliament into authorizing wiretapping. Authorized wiretapping would produce exactly what it does now—the odd conviction of a bookmaker as in Steinberg in Canada, or as in Goldman, Goldstein, Silverman and Katz in the United States, without making any significant difference to illegal gambling. The possible loss of a few convictions (if indeed any would be lost; as in Steinberg, conventional methods of gathering evidence might be quite sufficient) is not reason enough to introduce electronic surveillance with its great threat to privacy and personal security.

**Crime Rates**

There is an increase in the absolute number of crimes in both Canada and the United States. In 1941 there were 528 indictable offences in Canada per 100,000 population. In 1951 the number had dropped to 422 per 100,000; in 1961 it had risen to 608, and for 1966 it stood at 615. But to take comparative figures of the absolute number of crimes per 100,000 of population without considering the increase in population and the age makeup of that increase can be seriously misleading. Criminal statistics in both Canada and the United States tell us that crime has always been committed in disproportionate amounts by those in the sixteen to twenty-five year old group. The post-war baby boom has

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233 Packer, op. cit., footnote 225.
235 Ibid.
236 Ibid.
meant that the proportion of the young in our society has been increasing rapidly. Moreover, the young have not gotten any better, they still commit a disproportionate amount of the crime.

The increase in the amount of crime, however, is greater than the increase in the proportion of young people in the population, which means that crime really is increasing. But the President's Commission estimated that at least one-half the increase in crime is due to demographic change. Commission studies based on 1960 arrest rates indicate that between 1960 and 1965 about 40 to 50 per cent of the total increase in the arrests reported... could have been expected as the result of increases in population and changes in the age composition of the population." Canadian statistics tell a similar story.

By taking 1950 as the base year of 100 we see that the crime rate for those other than in the younger groups is actually decreasing. Crimes against property without violence in 1966 had risen fifty-three per cent for the sixteen-seventeen year old group and dropped eleven per cent for the thirty-five-thirty-nine year old group. Malicious offences against property rose sixty-three per cent in the eighteen-nineteen year old group and dropped twenty-three per cent in the thirty-five-thirty-nine year old group. The only increase in the thirty-five-thirty-nine year old group in 1966 was a six per cent rise in crimes against property with violence. The increases in the same crimes for the sixteen-seventeen and eighteen-nineteen year old groups were fifty-seven per cent and twenty-four per cent respectively. It should be noted that the crimes that are increasing are against property—that is, theft, robbery and breaking and entering. Things are apt to get worse before they get better as another large increase in the sixteen-twenty-four year old group in the population is indicated in the next few years.

The following Table gives an informative picture of serious crime (indictable offences) in Canada today:

<table>
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<tr>
<th>Offence Class</th>
<th>16-17</th>
<th>18-19</th>
<th>35-39</th>
<th>40-44</th>
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<td>Against the Person</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Against Property with Violence</td>
<td>593</td>
<td>443</td>
<td>37</td>
<td>24</td>
</tr>
<tr>
<td>Against Property without Violence</td>
<td>1,032</td>
<td>910</td>
<td>188</td>
<td>162</td>
</tr>
</tbody>
</table>

\[\text{Dominion Bureau of Statistics, 1966 statistics.}\]
What do the statistics tell us about the increase in crime and the police demand for electronic surveillance to cope with it? They tell us, I suggest, that electronic surveillance will have no effect on the increasing propensity of an increasing number of young people to commit crimes, particularly against property. Car theft, theft, robbery and breaking and entering will hardly be amenable to prevention or solution by electronic listening. It probably is an effective device with respect to professional thieves who need to make contact with the professional “fences”. But it is a serious matter when we let the police delude us, probably because we want to be deluded, into believing that the increase in crime can be handled by more efficient police methods. The hard truth may be that we can do nothing in terms of the administration of the criminal law that will make any significant difference to the increasing crime rate. If that is so, then perhaps we had better start asking some different questions about what is crime, who is a criminal, and what is the nature of the society that fosters them?

To sum up, whether one is concerned about organized crime or the increase in crime, the case for electronic surveillance in Canada has not been made out. “The core of the argument of necessity [for electronic surveillance] is no more than this: in some cases wiretapping may be the easiest way to secure evidence. . . . It is conceivable that enforcement people are fascinated by wiretapping somewhat in disregard of rational considerations of cost. There is a certain satisfaction in being the unseen viewer, the unknown overhearer of the private exchanges of others. . . . [This] may be the easy way to enforce the law, but the experience of centuries shows that convenience of the police is not synonymous with public interest or necessity.”

No two public officials have been more concerned with the problems of crime than President Johnson and his Attorney General, Ramsey Clark. Yet both have been strongly opposed to legalized wiretapping. In his state of the Union address in 1967, the President stated:

We should protect what Justice Brandeis called the “right most valued

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241 (1968), 7 U.S. Code Congressional and Administrative News 1755.
by civilized men"—the right to privacy. We should outlaw all wire-
tapping—public and private—wherever and whenever it occurs, ex-
cept when the security of the Nation itself is at stake—and then only
with the strictest safeguards. We should exercise the full reach of our
constitutional powers to outlaw electronic "bugging" and "snooping".

Attorney General Clark stressed that wiretapping is not a panacea
for crime:242

Public safety will not be found in wiretapping. Security is to be found
in excellence in law enforcement, in Courts and in corrections. . .
Nothing so mocks privacy as the wiretap and electronic surveillance.
They are incompatible with a free society. Only the most urgent need
can justify wiretapping and other electronic surveillance. Proponents
of authorization have failed to make a case—much less meet the heavy
burden of proof our values require. Where is the evidence that this is
an efficient police technique? Might not more crime be prevented and
detected by other uses of the same manpower without the large scale,
unfocused intrusions on personal privacy that electronic surveillance
involves?

IV. Electronic Surveillance: Statutory Solution.

I have argued that the case for electronic surveillance has not
been made out. In the shifting balance between the requirements
of public order and the right to personal freedom, the scales tip
in this instance to the individual. In a time when crime has become
a major public issue, we are prone to grant the police the powers
they claim they need to protect us. But it is at just such a time
that we should be most careful to scrutinize the validity of such
claims. For there are many powers we deny to the police that, if
granted, would undoubtedly increase their efficiency. Yet we
withhold the grant, not because we wish to hamper law enforce-
ment, but because there are values we place above efficient police
work. In the instant case the right to privacy—"the right most
valued by civilized men"—should take precedence over the unsub-
stantiated claims that electronic surveillance would be an effective
aid to crime control. Given the gross effects of such surveillance—
that it is an intrusion into the lives of all those who communicate
with the suspect as well as into his life, there would have to be
overwhelming evidence of its urgent need and efficacy before we
would be justified in authorizing its general use.

The likelihood, however, is that the federal government will
introduce legislation next year that will permit electronic inter-
ception in certain cases, and prohibit it in all others. If there is to
be legislation, careful consideration must be given to the crimes in

242 Ibid., at pp. 1754-1755.
which it is to be permitted, and the procedural safeguards that are to surround its authorization and use. Once again the American experience, both in the legislatures and the courts, provides some useful guidelines.

In *Berger*²⁴³ the United States Supreme Court considered the validity of a New York statute²⁴⁴ which permitted electronic eavesdropping subject to judicial authorization. An order to eavesdrop could only issue upon oath by a district attorney, the attorney general, or any police officer above the rank of sergeant, that there was reason to believe that evidence of a crime may be obtained thereby. The person whose conversations were to be overheard had to be described, the purpose of the surveillance stated, and in the case of wiretapping, the telephone number identified. The order had to specify the duration of the order “not to exceed two months”. As in the case of search warrants, the judge had power to examine on oath the applicant, and had to satisfy himself of the existence of reasonable grounds on which to grant the application.

The Supreme Court found the New York statute unconstitutional on its face. The statute did not provide for the protective safeguards and judicial supervision that the Fourth Amendment required. The “indiscriminate use” of eavesdropping permitted by the statute amounted to a general search. Neither the crime nor the conversations sought had to be particularly described. Merely naming the person without “particularly describing” the conversations to be seized, gave the police a roving commission to seize any and all conversations. Authorization for a two-month period was the equivalent of a series of searches and seizures pursuant to a single showing of probable cause. No termination date was placed on the authorization once the conversation sought was seized. Finally, the statute did not provide for return of the warrant, leaving the subsequent use of the seized conversations of innocent as well as of guilty parties to the discretion of the police.

The court contrasted the New York statute with its decision in *Osborne*²⁴⁵ in which it upheld the judicial grant of a warrant for eavesdropping. In *Osborne*, one Vick alleged by affidavit that he had been approached by a lawyer to bribe a juror. A federal judge authorized the Federal Bureau of Investigation to supply Vick with a device to record further conversations with the lawyer

²⁴⁵ (1966), 385 U.S. 323.
in order to determine the truth of the allegations in the affidavit. The order required a return showing how it was executed and what was seized. Under these "precise and discriminate" circumstances where one intrusion was authorized and executed with dispatch and a return made, the court held the requirements of the Fourth Amendment had been met.

In *Katz*, the case which overruled *Olmstead* and held all judicially unauthorized eavesdropping unconstitutional, the court intimated that the facts and procedures involved would have met the *Osborne* tests if there had been a judicial order. The eavesdropping was limited not only with respect to time and place, but also to a specific person and specific conversations. Federal Bureau of Investigation agents had established that Katz used certain public telephones at one location at a certain time to transmit bets. The listening device on the telephone booth was activated by the agents only when Katz entered the booth. Only Katz's end of the conversation was recorded and the bug was turned off when he left.

What the court has been attempting to do in these cases is to set the same standards for search by electronics as it has set for entry and search by police officers. As the cases indicate, this is a very difficult thing to do as electronic surveillance is by its nature almost always a general search.

Following *Katz*, Congress passed legislation, over the vigorous objections of President Johnson and Attorney General Clark, that authorizes electronic eavesdropping in specified crimes and outlaws its use by private and public persons in all other instances. As Congress sought to meet the standards set by the Supreme Court, it is worth considering the legislation in some detail. The important points are as follows:

1. Any person who intercepts or attempts to intercept any oral or wire communication, except as authorized by the Act, is liable to a fine of $10,000.00 or five years imprisonment, or both. The same penalties are applicable to anyone who manufactures, advertises, sells or possesses any device that he knows is primarily useful for intercepting oral or wire communications.

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2. The Attorney General or any Assistant Attorney General may apply to a federal judge for an order authorizing eavesdropping where such interception may provide evidence of the following crimes:

b. Murder, kidnapping, robbery and extortion.
c. Bribery, obstruction of justice, counterfeiting and bankruptcy fraud.
d. Narcotics offences.
e. Conspiracy to commit any of the above offences.251

3. The application for an order must be particular as to the facts and circumstances relied upon by the applicant, the offence, the place of interception, the type of communication to be intercepted, the identity of the person whose communications are to be intercepted, whether other investigative techniques have been tried and failed, and the time for which the interception is to be maintained.252

4. The authorizing judge must be satisfied that there is probable cause for belief that the crime has been committed or is about to be committed, that communications concerning the offence will be obtained, and that normal investigative techniques have been tried and failed or appear unlikely to succeed if tried.253

5. The maximum authorization period is thirty days. Extensions may be granted in restricted circumstances. The judge may require that reports be made to him showing what progress has been made under the order. A record of all applications made and orders granted must be kept for ten years.254

6. All recordings made pursuant to an order must be returned to the judge and sealed under his orders. The presence of the seal is a prerequisite to the use or disclosure of a recording.255

7. Within a period not more than ninety days after an application has been denied, or after the termination of an order, the judge shall cause to be served on the person named in the application an inventory that includes notice of the fact of the

251 Ibid., s. 2516. This list is only a partial one but it contains the main offences and indicates the type of crime in which interception may be authorized. The list of crimes for the states is broader and refers to "any crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year".
252 Ibid., s. 2518(1).
253 Ibid., s. 2518(3).
254 Ibid., s. 2518(5), (6) and 8(b).
255 Ibid., s. 2518(8)(a).
application and its denial or approval, and whether communications were or were not intercepted. Upon motion, the judge may in his discretion make available to the party concerned or his counsel such portions of the communications as he determines to be in the interests of justice. Ten days notice must be given before any intercepted communication may be used in court.²⁵⁶

8. No communication that has been intercepted otherwise than in accordance with the Act, and no evidence derived therefrom, may be used in any trial, hearing or other proceeding.²⁵⁷

9. Once each year a full report of the number of applications made, and orders granted or denied, must be made by the Attorney General to Congress. The report must contain a summary and analysis of the orders granted, the time periods authorized, the crimes specified, the approximate number of persons whose communications were intercepted, the number of arrests resulting from interceptions, the number of trials and the number of convictions resulting.²⁵⁸

10. A civil cause of action is given against any person who intercepts, discloses or uses any intercepted communications otherwise than in accordance with the Act. An aggrieved person may recover actual damages (not less than $100.00 per day of violation or $1,000.00 whichever is higher), punitive damages, and an attorney’s fee and costs.²⁵⁹

Whether the surveillance that may be authorized under the Crime Control Act is so “narrowly circumscribed” as to meet the constitutional standards set by the Supreme Court in Berger and Katz remains to be seen. It may be that the section that authorizes the continuance of an order for up to thirty days may be too indiscriminate. Electronic surveillance for such a duration will inevitably be a general search through a great many conversations, and may be unconstitutional for that reason. Also the court has emphasized that the conversation to be seized must be specifically identified. The terms of the Crime Control Act allow for much broader surveillance.

If there is to be wiretapping legislation in Canada it should, at a minimum, contain each one of the prohibitions and protections

²⁵⁶ Ibid., s. 2518(8)(d) and (9).
²⁵⁷ Ibid., s. 2515. ²⁵⁸ Ibid., s. 2519.
²⁵⁹ Ibid., s. 2520.
of the Crime Control Act that have been noted above. The particular crimes to which authorization should extend should only be decided after consultation between the chiefs of police and officials of the Justice Department. If the police are to be expected to conform to legislative standards, their voice should be heard in the setting of those standards. If powers which they think they require to fight crime are to be denied to them, it should only be after full consultation and explanation. The major crimes listed in the Crime Control Act provide a reasonable category of crimes in which authorized eavesdropping may be urgently or uniquely required for detection and to save lives. They are security cases, murder, kidnapping, extortion, bribery, obstructing justice, and narcotics trafficking (though not use or possession).

The last point to be considered is the procedure for application and authorization. Like many things in Canada, the best solution is probably an amalgam of the English and American procedures. The application for a warrant should be made by the chief of the authority concerned or his deputy, to the provincial Attorney General’s department. If the officials in the department, and then the Attorney General personally, approve the application, the Attorney General should then apply to the Chief Justice of the trial division, or a judge specifically authorized by him, for a warrant to eavesdrop.” The Attorney General of each province should forward an annual return to the federal Attorney General containing a summary of the applications and orders similar to that required by the Crime Control Act. The Federal Attorney General should then table an annual consolidated summary in Parliament. If it be objected that the above procedure is difficult, the answer is that such an extraordinary police power as electronic surveillance demands difficult procedures to ensure that it is not lightly granted, and that uniform standards are maintained. Application by a police officer before a justice of the peace as in the case of search warrants, would be a totally unacceptable procedure that would inevitably lead to widespread use of wiretapping and eavesdropping.

“...we must understand, that the law enforcement net cannot be tightened for the guilty without enmeshing the innocent; that decent law enforcement is possible without impairing the bulwarks

269 Provision would have to be made for emergency situations in which it was not possible, or there was not time, to follow the required procedures. In every case, however, there should be judicial validation of the warrant at some time.
against injustice and tyranny; and that the worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry."^{261}