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Electronic Visual Surveillance And The Right Of Privacy: When Is Electronic Observation Reasonable?

ELECTRONIC VISUAL SURVEILLANCE AND THE RIGHT OF PRIVACY: WHEN IS ELECTRONIC OBSERVATION REASONABLE?

The threat to one's fourth amendment right of privacy[1] is great when the police utilize electronic visual surveillance[2] as part of their investigatory practices. Electronic eavesdropping[3] undertaken by law enforcement officers intrudes upon the privacy of an individual's spoken word, but surreptitious electronic videotape surveillance seizes the visual manifestations of an individual's actions as well as aural impressions. The prospect of private lives being publicly displayed in the courtroom as evidence of criminal or undesirable conduct through the use of videotape surveillance requires scrutiny under the guidance of the fourth amendment.[4] To adequately protect the individual's fourth amendment right of privacy, use of electronic visual surveillance must be reasonable and must be authorized by a search warrant which complies with the specific requirements of that amendment.[5] Electronic visual surveillance presents new fourth amendment problems for several reasons. Because electronic visual surveillance invades privacy to a greater extent than any currently practiced police investigative technique,[6] whether such surveillance can be a reasonable

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[1] *See* Katz v. United States, 389 U.S. 347, 353 (1967); Warden v. Hayden, 387 U.S. 294, 304 (1967); text accompanying notes 46-58 *infra*. *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) [hereinafter cited as Amsterdam].

[2] "Electronic visual surveillance" includes all observation through the use of devices capturing visual images, including videotape, closed-circuit television, infra-red cameras, and light pipes. *See generally* A. WESTIN, PRIVACY AND FREEDOM 70-73 (1967) [hereinafter cited as WESTIN]; Hodges, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?*, 3 HASTINGS CONST. L. Q. 261, 266-69 (1976) [hereinafter cited as Hodges].

[3] "Electronic eavesdropping" includes all interceptions of verbal communication through such methods as listening to telephone conversations through a wiretap, installing a "bug" which can pick up and transmit conversations to outside listeners, and "bugging" individuals to make them walking transmitters. *See generally* WESTIN, *supra* note 2, at 73-78.

[4] The fourth amendment to the United States Constitution provides:

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

U.S. CONST., amend. IV.

[5] *See* note 4 *supra*.

[6] Electronic visual surveillance never can be excluded because darkness and even walls are not necessarily a barrier to such surveillance if the proper equipment is used. *See* WESTIN, *supra* note 2, at 70-73; Hodges, *supra* note 2, at 266-69. One can avoid the invasion of privacy engendered by electronic eavesdropping simply by using another mode of communication than verbal expression. Moreover, the intrusion effected by electronic visual surveillance is greater than that of electronic eavesdropping. First, both aural impressions and visual images can be seized by use of videotape surveillance devices. Hodges, *supra* note 2, at 294; Comment, *Judicial Administration—Technological Advances—Use of Videotape in the Courtroom and the Stationhouse*, 20 DEPAUL L. REV. 924, 929 (1971) [hereinafter cited as *Videotape in the Courtroom*]. Second, an individual has no expectation that his communica-

search and seizure under the fourth amendment must be examined.[7] In addition, the guidelines under which a search warrant authorizing electronic visual surveillance would issue are unclear. These considerations parallel those evinced by the long debate over electronic eavesdropping prior to the definitive pronouncements of the Supreme Court in *Berger v. New York*[8] and *Katz v. United States*[9] and the congressional response to and adoption of the holdings of those decisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III).[10]

The Supreme Court spent forty years wrestling with the constitutional problems presented by electronic eavesdropping before establishing a conclusive approach to such surveillance in *Berger* and *Katz*.[11] In *Berger*, the

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tion will be kept confidential once it is made to another party, United States v. White, 401 U.S. 745, 750-52 (1971), but one is justified in believing his physical actions will be unobserved when they are undertaken alone in apparent privacy. Hodges, *supra* note 2, at 294; *cf.* Avery v. Maryland, 15 Md.App. 520, 292 A.2d 728, 743 (1972), *cert. denied*, 410 U.S. 977 (1973) (if transmittal of conversation to the police through the cooperation of an informer does not constitute an unreasonable seizure under *United States v. White*, then a video transmittal of the accused's conduct brought about by the cooperation of a party should not be interpreted as constituting an unreasonable seizure in violation of the defendant's "justifiable expectation of privacy"); State v. Johnson, 18 N.C.App. 606, 197 S.E.2d 592 (1973) (videotape recording of man alone at a desk in a hallway admissible as evidence to prove theft of money from billfold conspicuously placed atop desk).

[7] The initial draft of the fourth amendment was directed only to the essentials of a valid warrant and did not include the right to be secure against unreasonable searches and seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.

See Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PENN. L. REV. 169, 181 (1969) [hereinafter cited as Spritzer]. This draft clearly showed the framers' antipathy to searches conducted under general warrants and the enforcement of the customs laws by overly broad writs of assistance. *Id.; see* Boyd v. United States, 116 U.S. 616 (1886); Entick v. Carrington, 95 Eng. Rep. 807 (K. B. 1765); Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part Two*, 4 U. RICH. L. REV. 60 (1969). The final version of the fourth amendment, however, provides freedom from unreasonable searches and seizures and also requires a warrant issued upon probable cause. *See* note 4 *supra*. Thus, the history of the amendment supports the conclusion that some searches and seizures can be inherently unreasonable and invalid even with a warrant which otherwise accords with the warrant requirements of the amendment. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 103 (1937); Spritzer, *supra* at 182.

[8] 388 U.S. 41 (1967).

[9] 389 U.S. 347 (1967).

[10] 18 U.S.C. §§ 2510-20 (1976); *see* text accompanying notes 32-42 *infra*.

[11] The Supreme Court first considered electronic eavesdropping in Olmstead v. United States, 277 U.S. 438 (1928), a wiretapping case. *See* note 3 *supra*. Construing the fourth amendment literally, the Court held that a conversation seized through a wiretap was not a "material thing" and thus not entitled to constitutional protection. 277 U.S. at 464-68. The Court also held that because there was no physical trespass on Olmstead's premises in executing the wiretap, a search warrant was not required. *Id.* In Goldman v. United States, 316 U.S. 129 (1942), the Supreme Court first considered "bugging," *see* note 3 *supra*, holding that the warrantless seizure of conversations by means of a detectaphone without a physical trespass did not violate the fourth amendment. 316 U.S. at 135. A decade later, the Court

Supreme Court held that oral statements are protected by the fourth amendment[12] and that a warrant authorizing electronic eavesdropping must meet cetain minimum requirements.[13] The Court required the application for an electronic eavesdropping warrant to show probable cause that

held that an informer wired for sound transmitting an incriminating conversation to police stationed outside was not a search or seizure within the fourth amendment because the communications were not protected by the amendment and there was no physical trespass. On Lee v. United States, 343 U.S. 747 (1952).

Intangible voice communication first was held subject to the protections of the fourth amendment in Silverman v. United States, 365 U.S. 505 (1961). The *Silverman* Court held that the unauthorized physical penetration of the defendant's premises with a spike mike inserted into a party wall connected with defendant's premises was an unreasonable search and seizure because of the physical trespass into a constitutionally protected area. *Id.* at 509-12; *see* text accompanying note 26 *infra.* Although the Supreme Court emphasized that a physical trespass distinguished *Silverman* from *Olmstead,* Silverman v. United States, 365 U.S. at 509-12, the Court simply ignored *Olmstead's* limitation of fourth amendment protection to "material things." *Id.* In Lopez v. United States, 373 U.S. 427 (1963), the Court validated the warrantless tape recording by an IRS agent of incriminating statements made by a taxpayer who sought to bribe him. Without specifically reaffirming *On Lee,* the Court emphasized that "[t]he Government did not use an electronic device to listen in on conversations it could not otherwise have heard." *Id.* at 439. Lopez had known he was talking with a federal officer, and the only result of excluding the tape would have been to permit Lopez "to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment." *Id.; see* Osborn v. United States, 385 U.S. 323 (1966) (judicially authorized surreptitious tape recording of an incriminating conversation by an informant participating in the conversation held valid).

Finally, in Warden v. Hayden, 387 U.S. 294 (1967), the Supreme Court paved the way for complete fourth amendment protection of intangible property as the Court stated that the fourth amendment protects privacy, not property. *Id.* at 304. The Court allowed the seizure of clothing belonging to the defendant as property constituting evidence of the commission of a crime. *Id.* at 302-03. The seizure of "mere evidence," which is evidence not constituting fruits or instrumentalities of the crime, or contraband, had been prohibited prior to *Hayden. See* Gouled v. United States, 255 U.S. 298, 309 (1921) (search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding. . . ."). The *Gouled* "mere evidence" rule was abandoned in *Hayden.* 387 U.S. at 310. In *Hayden,* the Supreme Court did not consider whether evidence which is "testimonial" or "communicative" in nature can be the object of a reasonable search and seizure, holding only that the siezure of the tangible property involved in that case was permissible. *Id.* at 302-03. The Court was concerned that the seizure of "testimonial" or "communicative" evidence might violate the fifth amendment privilege against self-incrimination. *Id.* In later decisions, however, the Supreme Court has held such "property" to be protected by the fourth amendment right of privacy and not the fifth amendment privilege against self-incrimination. *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); *cf.* United States v. Bennett, 409 F.2d 888, 896 (2d Cir.), *cert. denied sub nom.* Jessup v. United States, 396 U.S. 852 (1969) (protection of the "mere evidence" rule should be replaced with an approach geared to the objective of the fourth amendment to secure privacy rather than a fifth amendment approach based on the testimonial character of what is seized).

[12] 388 U.S. at 51.

[13] *Id.* The *Berger* Court struck down New York's former electronic eavesdropping statute for failure to comply with fourth amendment requirements. *Id.* at 43-44; *see* N. Y. CODE CRIM. PROC. §813-a (1958) (repealed L. 1968, c. 546, §1, eff. June 5, 1968; current version N. Y. CRIM. PROC. LAW, Article 700 (McKinney 1971)).

an offense has been or is being committed.[14] The application also was required to state with particularity the offense being investigated,[15] the place to be searched,[16] and the conversations to be seized.[17] In addition, the Court held that a neutral and detached person must approve the application and issue an order authorizing the surveillance.[18] The order must state with particularity the conversations to be seized,[19] must be executed with dispatch,[20] and must require that the surveillance not continue beyond the seizure of the conversations sought.[21] Finally, the *Berger* Court stated that exigent circumstances must justify the failure to notify the subject of the surveillance[22] and that a report of the eavesdropping results must be made to the issuing authority.[23] Thus, the Supreme Court in *Berger* not only expressly extended the protection of the fourth amendment to oral intangibles, but also enunciated specific guidelines to ensure the protection of those intangibles unless due cause exists to seize them.

In *Katz v. United States,*[24] the Supreme Court extended the *Berger* guidelines to protect one's justifiable reliance on privacy against warrantless searches and seizures regardless of whether a physical trespass occurs.[25] The Court thus abandoned the concept of constitutionally protected areas[26] and unwarranted physical trespasses of those areas as violative of

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[14] 388 U.S. at 55; *see* 18 U.S.C. §2518(1)(b), (3)(a),(b) (1976).

[15] 388 U.S. at 58-59; *see* 18 U.S.C. §2518(1)(b)(i) (1976).

[16] 388 U.S. at 55, 58; *see* 18 U.S.C. §2518(1)(b)(ii) (1976).

[17] 388 U.S. at 58; *see* 18 U.S.C. §2518(1)(b)(iii), (4)(c) (1976).

[18] 388 U.S. at 54; *see* Katz v. United States, 389 U.S. 347, 356 (1967) (issuing authority must be a judicial officer); 18 U.S.C. §2516 (1976) (issuing authority must be a judge).

[19] 388 U.S. at 58; *see* 18 U.S.C. §2518(1)(b)(iii), (4)(c) (1976).

[20] 388 U.S. at 59; *see* 18 U.S.C. §2518(5) (1976). The *Berger* Court indicated that the surveillance is not to be prolonged or extended over a greater period of time than is absolutely necessary under the circumstances. *See* 388 U.S. at 57.

[21] 388 U.S. at 59-60; *see* 18 U.S.C. §2518(1)(d), (4)(e), (5) (1976).

[22] 388 U.S. at 60; *see* 18 U.S.C. §2518(1)(c), (3)(c), (8)(d) (1976). The necessity of showing exigency for the surreptitious entry to place the "bug" is crucial if no notice is to be given in order to maintain secrecy. 388 U.S. at 60. "Exigent circumstances" are defined by N. Y. CRIM. PROC. LAW §700.05(7) (McKinney 1971) as "conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred."

[23] 388 U.S. at 60; *see* 18 U.S.C. §2518(8)(a) (1976).

[24] 389 U.S. 347 (1967).

[25] *Id.* at 353. Abandonment of the physical trespass rule in *Katz* was a dramatic shift from prior Supreme Court decisions where warrantless electronic eavesdropping was not invalidated because no physical trespass occurred. *See* note 11 *supra.*

[26] The *Katz* Court stated that "the Fourth Amendment protects people, not places." 389 U.S. at 351. Prior to *Katz,* certain areas were treated by courts as private and thus entitled to fourth amendment protection while other areas were accorded no protection because they were considered public. Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection,* 43 N. Y. U. L. REV. 968, 976 (1968). The concept of constitutionally protected areas was dependent on the idea of a physical trespass into enclosed or clearly defined places. *Id.* The Supreme Court has stated that a constitutionally protected area is an area holding an attribute of privacy which comes within the scope of protection offered by the fourth amendment. Lanza v. New York, 370 U.S. 139, 143 (1962).

the fourth amendment in favor or protecting one's "expectation of privacy" wherever justified.[27] *Katz* held that the bugging of a public telephone booth by law enforcement agents without a warrant violated the fourth amendment despite the lack of a physical trespass.[28] The *Katz* Court clearly stated, however, that despite one's expectation of privacy, a limited intrusion through electronic eavesdropping could constitute a reasonable search and seizure.[29]

In response to *Katz* and *Berger,* Congress enacted Title III[30] to control the use of electronic eavesdropping by federal law enforcement agents. Many states also have enacted state electronic eavesdropping statutes patterned after Title III.[31] The use of electronic visual surveillance, however, is not included within the scope of Title III or the state statutes.[32] Thus, the federal statute provides only an analogous set of guidelines in considering the constitutional prerequisites for the issuance of warrants authorizing the seizure of visual images. Title III requires prior judicial approval of all electronic eavesdropping by federal law enforcement agents, subject to

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In *Lanza,* the Court cited various cases in which such divergent areas as a business office, store, hotel room, apartment, automobile, and taxicab were held by the Court to be constitutionally protected areas. *Id.*

[27] 389 U.S. at 351-53. Justice Harlan in his concurring opinion in *Katz* coined the phrase "expectation of privacy," *id.* at 360 (Harlan, J., concurring), and courts have preferred this phrase to the majority's "privacy upon which [one] justifiably relied." *Id.* at 353; *see, e.g.,* United States v. White, 401 U.S. 745, 752 (1971).

[28] 389 U.S. at 353, 358-59.

[29] *Id.* at 354, 356-59. The *Katz* Court intimated that had the law enforcement agents established probable cause for the surveillance before a neutral magistrate, and been controlled in the execution of their surveillance by a warrant particularly limiting their discretion, electronic eavesdropping would have been proper. *Id.* at 356. Additionally, the officers would have been required to promptly notify the authorizing magistrate of the surveillance results. *Id.*

[30] 18 U.S.C. §§2510-2520 (1976); *see* S. REP. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U. S. CODE CONG. & AD. NEWS 2112, 2163.

[31] New York's electronic eavesdropping statute, for example, follows the language of Title III with little variation. *See* N. Y. CRIM. PROC. LAW, Article 700 (McKinney 1971). For a listing of other states that have and have not enacted electronic eavesdropping statutes, see 56 B. U. L. REV. 600, 601 nn.14 & 15 (1976).

[32] Section 2511 of Title III, 18 U.S.C. §2511 (1976), limits the scope of the statute to the interception of wire and oral communications as defined in 18 U.S.C. §2510 (1976). Section 2510(4) defines "interception" as the aural acquisition of any wire or oral communication. Electronic visual surveillance was clearly not contemplated by the draftsmen of Title III. The scope of New York's eavesdropping statute also extends only to the aural seizure of communications and not to the seizure of visual images. *See* N. Y. CRIM. PROC. LAW §§700.05(1), (2), & (3); 700.10 (telephonic or telegraphic communications, conversations, discussions may be seized under eavesdropping warrants); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 104 (Approved Draft 1971) (standards expressly limited to aural surveillance; visual surveillance not considered at that time). The second edition of the ABA draft currently being written also expresses no view on visual surveillance. Letter from Randolph Baker, Director of Project to Update Criminal Justice Standards, Standing Committee on ABA Standards for Criminal Justice, May 4, 1978 (on file WASH. & LEE L. REV.).

several exceptions.[33] Section 2518[34] requires the officer seeking the warrant to establish probable cause for the search[35] and requires the approval of the surveillance by a judge.[36] The order authorizing the surveillance must state with particularity the communication to be seized[37] and must require the minimization of the interception of conversations unrelated to the alleged criminal activity.[38] Finally, both the application for the warrant and the authorizing order must be premised on a finding that normal investigative techniques have been or will be unavailing or too dangerous.[39] Thus, electronic eavesdropping is a permissible law enforcement technique, but is subject to legislative limitation and judicial control through Title III and the various state equivalents.

Fourth amendment protection has evolved from protection of "material things" and a prohibition against physical trespass[40] to protection of the individual's justifiable "expectation of privacy." This evolution reached its apex in *Katz* and was given effect by Title III, but was subsequently constricted by *United States v. White*.[41] The *White* Court upheld the warrantless monitoring by police of private conversations between a consenting informant and the defendant.[42] The Supreme Court stated that there

[33] *See* 18 U.S.C. §2511(2)(c) (1976) (interception without prior judicial authorization of communication is lawful where person acting under color of law is a party to the communication or one of the parties to the communication gave prior consent to such interception); *id.* at §2511(2)(d) (person not acting under color of law may intercept communications to which he is a party or to which one of the parties has given prior consent to such interception, without prior judicial approval); *id.* at §2511(3) (President may intercept communications for national security purposes without judicial authorization). For other circumstances in which warrantless electronic eavesdropping is permissible, see *id.* at §2511(2)(a), (b).

[34] 18 U.S.C. §2518 (1976).

[35] *Id.* at §2518(1)(b), (3)(a), (b), (d). Before issuing an electronic eavesdropping order, the judge must determine, based on the facts submitted by the applicant, that there is probable cause for belief that an individual is committing, has committed, or will commit a crime. *Id.* at §2518(3)(a). Probable cause to believe that communications concerning that crime will be intercepted by the surveillance and that the place where the interceptions are to be made is used in connection with the crime must also be shown. *Id.* at §2518(3)(b), (d).

[36] *Id.* at §2518(1).

[37] *Id.* at §2518(4)(c).

[38] *Id.* at §2518(5).

[39] *Id.* at §2518(1)(c), (3)(c).

[40] *See* note 11 *supra*.

[41] 401 U.S. 745 (1971).

[42] *Id.* at 753-54. The *White* Court held that the defendant had no justifiable expectation of privacy because "one contemplating illegal activities must realize and risk that his companions may be reporting to the police." *Id.* at 752. In addition, the *White* Court noted that *Katz* was to be given only prospective effect, *see* Desist v. United States, 394 U.S. 244 (1969), and the eavesdropping in *White* occurred before the *Katz* decision. 401 U.S. at 754; *id.* at 755 (Brennan, J., concurring). The Court of Appeals in *White* had read *Katz* as overruling *On Lee*, *see* note 11 *supra*, and thus prohibiting the warrantless transmission of a conversation to police stationed outside. United States v. White, 405 F.2d 838, 847-48 (7th Cir. 1969). The Supreme Court disagreed, refusing to overrule *On Lee*, 401 U.S. at 750, by a plurality vote. *Id.* at 755 (Brennan, J., concurring). Yet, three justices indicated that they interpreted *Katz* as overruling *On Lee*. *Id.*; *id.* at 758-61 (Douglas, J., dissenting); *id.* at 769, 773-93 (Harlan, J., dissenting). Given the retirements of the late Justice Harlan and Justice Douglas, *On Lee* is probably still good law.

was no constitutional difference between an agent immediately transcribing the conversation, simultaneously tape recording the conversation, or broadcasting the conversation to third parties because all are outside the pale of the fourth amendment.[43] Reasoning that such actions are not subject to fourth amendment protections because one contemplating illegal activities assumes the risk that his accomplices may be reporting to the police and thus has no justifiable expectation of privacy,[44] the Court's concern over individual privacy and personal liberty as championed in *Katz* was eviscerated somewhat by its holding in *White*.[45]

To the extent that electronic videotape surveillance invades privacy and involves a seizure of visual as well as aural images, its use is not directly subject to the controls of electronic eavesdropping legislation.[46] The underlying rationale of the *Katz* decision indicates, however, that the fourth amendment is applicable to visual images where the individual has justifiably relied on his privacy.[47] The seizure of one's physical actions conducted in private is an extreme intrusion upon one's right of privacy, expecially since careful preparatory steps to ensure privacy cannot close out the unwanted electronic eye from observing and recording the most intimate activities for others to examine in detail.[48] Since the Supreme Court has formulated the test of a reasonable search under the fourth amendment as a balance between the need to search and the invasion such search would entail,[49] an evaluation of the necessity of electronic visual surveillance is paramount in determining the reasonableness of such surveillance under the fourth amendment.

The debate over whether electronic eavesdropping is a necessary tool of law enforcement has long plagued its use,[50] but both the Supreme Court

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[43] 401 U.S. at 751; *see* note 42 *supra*.

[44] 401 U.S. at 751.

[45] *See* United States v. White, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting); *id.* at 768 (Harlan, J., dissenting); Amsterdam, *supra* note 1, at 406-07 (the voluntary assumption of risk of confidants who are also police informants is "wildly beside the point" that the fourth amendment protects privacy).

[46] *See* text accompanying note 32 *supra*. The electronic eavesdropping portion of a videotape order may be authorized by existing eavesdropping statutes, however, even though the video portion is not so authorized. *See* FINAL RESEARCH REPORT OF THE VIDEOTAPE STUDY COMMITTEE, CRIMINAL LAW SECTION, VIRGINIA STATE BAR 70-71 (1978) [hereinafter cited as VIDEOTAPE STUDY COMMITTEE]; text accompanying notes 72-74 *infra*.

[47] *See* Katz v. United States, 389 U.S. at 351 (1967); Warden v. Hayden, 387 U.S. 294, 304 (1967).

[48] *See* text accompanying notes 1, 2, & 6 *supra*.

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

[50] The primary justification asserted in support of electronic eavesdropping is that it is necessary in combating organized crime and sophisticated criminals. *E.g.*, S. REP. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U. S. CODE CONG. & AD. NEWS 2112, 2157; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 96-97 (Approved Draft 1971); Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835, 854 (1960). Those opposed to the use of electronic surveillance point to its invasion of privacy, its chilling effect on free speech and association, and the minimal return on the tremendous amount of surveillance undertaken. *E.g.*, H. SCHWARZ, TAPS, BUGS, AND FOOLING THE PEOPLE 15-25, 33-34 (1977); H. SCHWARZ, A

and Congress have accepted electronic eavesdropping as constitutional and have permitted its limited use.[51] Videotape surveillance, however, incorporates the added intrusion of the seizure of visual images in addition to the seizure of aural impressions, thus creating an extreme invasion where one has a justifiable expectation of privacy. If electronic visual surveillance cannot be justified as necessary because other less intrusive methods will suffice, then such surveillance cannot be reasonable under the Supreme Court's balancing test.[52] If less intrusive means will not suffice, the fourth amendment protection of individual privacy must be measured against the government's duty to protect and preserve the public well-being.[53] Each application for an electronic visual surveillance warrant thus requires an examination on its merits to determine necessity and reasonableness.[54] Whether electronic visual surveillance is necessary in law enforcement or is simply a means for lazy policework has not been documented, but several courts have admitted the fruits of such surveillance into evidence in criminal trials. Conventional law enforcement techniques and electronic eavesdropping, however, may be adequate in handling most investigations of criminal activity.[55] Electronic visual surveillance gener-

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REPORT ON THE COSTS AND BENEFITS OF ELECTRONIC SURVEILLANCE 29-33, 45-46 (1971); Spritzer, *supra* note 7, at 200-01; *see* United States v. White, 401 U.S. 745, 756 (Douglas, J., dissenting); Lopez v. United States, 373 U.S. 427, 446 (1963) (Brennan, J., dissenting).

[51] *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); 18 U.S.C. §§2510-2520 (1976).

[52] *See* text accompanying note 49 *supra*.

[53] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976); United States v. Himmelwright, 551 F.2d 991, 994 (5th Cir. 1977); United States v. Bobo, 477 F.2d 974, 979 (4th Cir. 1973).

[54] *Cf.* Berger v. New York, 388 U.S. 41 (1967) (electronic eavesdropping warrant cannot issue without a particular showing of the relevant circumstances in each case); 18 U.S.C. §2518 (1976) (judge must make particular findings on every application for electronic eavesdropping warrant).

[55] *See* United States v. McMillon, 350 F. Supp. 593 (D.D.C. 1972) (pictures and videotape of marijuana growing in defendant's fenced-in back yard taken without a warrant does not violate the fourth amendment because plants in plain view); Avery v. Maryland, 15 Md.App. 520, 292 A.2d 728 (1972), *cert. denied*, 410 U.S. 977 (1973) (observation of defendant sexually molesting woman in her premises through use of closed-circuit television secreted in her apartment with her co-operation and consent not within the protection of fourth amendment under United States v. White, *see* text accompanying notes 44-45 *supra*); Sponick v. City of Detroit Police Dep't, 49 Mich.App. 162, 211 N.W.2d 674 (1973) (police officers videotaped in bar talking with known criminals did not have a "reasonable expectation of privacy" because officers observed in a public place); People v. Teicher, 90 Misc.2d 638, 395 N.Y.S.2d 587 (Sup. Ct. 1977) (judicially authorized videotape of dentist molesting a female patient in his offices does not violate the fourth amendment because warrant obtained). *But cf.* United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976) (telescopic observation into room of defendant's premises without a warrant violates defendant's fourth amendment right of privacy); People v. Abruzzi, 52 App.Div.2d 499, 385 N.Y.S.2d 94 (1976) (warrantless visual observation of defendant's office by police officer required to trespass on defendant's land, climb a seven-foot ladder, and peer through heavily curtained window invalid because violative of one's reasonable expectation of freedom from governmental intrusion); People v. Diaz, 85 Misc.2d 41, 376 N.Y.S.2d 849 (Crim. Ct. N.Y. 1975) (warrantless visual observation of department store fitting room unreasonable search under fourth amendment).

[56] Hodges, *supra* note 2, at 290-96. In United States v. Bobo, 477 F.2d 974 (4th Cir. 1973),

ally provides corroborating evidence of crime and does not enable the prosecution of suspected criminals without more evidence.[57] Courts have noted, however, that in some cases electronic visual surveillance may provide the only evidence of criminal activity sufficient to prosecute.[58]

In *People v. Teicher*,[59] a New York trial court recently determined the requirements to be met for issuance of an electronic visual surveillance warrant and the scope of such a warrant. The court held that the aural seizure of communications through the use of a videotape device was authorized under the state electronic eavesdropping statute,[60] while seizure of the visual images was authorized under the general New York search warrant statute.[61] In the alternative, the court held that the warrant was authorized under the inherent power of the trial court to aid criminal investigations and issue necessary judicial process toward that end.[62] Under both theories, the *Teicher* court held the issuance of the warrant to strict requirements of probable cause for the search and seizure, particularity in the description of the premises to be searched and the "property" to

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the court quoted from the affidavit of an FBI agent investigating a gambling conspiracy seeking an electronic eavesdropping warrant:

> Physical surveillances on gambling operations . . . have failed to furnish substantial information of a federal gambling violation because there is little or no personal contact between these persons. If surveillance is conducted on a regular basis, it would jeopardize the investigation. Furthermore, the utilization of undercover agents would not likely prove a federal violation due to the small number of people who have access to the overall plan or scheme.

Id. at 983. If there is little or no personal contact between the conspirators, electronic visual surveillance would provide little if any evidence of the conspiracy. Videotaping the exchange of money between alleged conspirators, for example, provides little more than corroborative evidence of a gambling conspiracy. The videotaped exchange of a package in return for money does not constitute sufficient evidence of a drug sale. Intercepting communications between conspirators, and not recording physical actions, is the most likely means of obtaining incriminating evidence of an illegal activity. Hodges, *supra* note 2, at 293. Nevertheless, the silent, physical crime against another poses the most likely situation in which electronic visual surveillance would be necessary in order to obtain evidence sufficient to prosecute. *See* Avery v. Maryland, 15 Md. App. 520, 292 A.2d 728 (1972); People v. Teicher, 90 Misc.2d 638, 395 N.Y.S.2d 587 (Sup. Ct. 1977).

[57] *See* note 56 *supra.*

[58] *See* Avery v. Maryland, 15 Md.App. 520, 292 A.2d 728 (1972); People v. Teicher, 90 Misc.2d 638, 395 N.Y.S.2d 587 (Sup. Ct. 1977).

[59] 90 Misc.2d 638, 395 N.Y.S.2d 587 (Sup. Ct. 1977).

[60] 395 N.Y.S.2d at 591-93; *see* text accompanying notes 72-74 *infra.*

[61] 395 N.Y.S.2d at 592-93; *see* text accompanying notes 75-92 *infra.* N. Y. CRIM. PROC. LAW §690.10 (McKinney 1971) provides:

> Personal property is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it:
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> 1. Is stolen; or
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> 2. Is unlawfully possessed; or
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> 3. Has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense; or
>
> 4. Constitutes evidence or tends to demonstrate that an offense was committed or that a particular person participated in the commission of an offense.

[62] 395 N.Y.S.2d at 592-93; *see* text accompanying notes 93-101 *infra.*

be seized, a showing of necessity for the electronic visual surveillance, and minimization of the intrusion.[63]

Teicher, a Manhattan dentist, was accused of molesting three female patients while they were under examination in the dental chair.[64] Because Teicher was a professional, the district attorney and police sought corroboration of the patients' complaints through the use of electronic visual surveillance before making an arrest.[65] Videotape surveillance was considered necessary by the prosecution because Teicher allegedly gave the patients drug injections, rendering them "physically helpless" and thus subjecting their accounts of what happened to attack as being unreliable.[66] The police thus obtained a warrant authorizing videotape surveillance of the examination room when females cooperating with the police were in the dental chair. The videotape camera was secreted in the examination room[67] and Teicher was subsequently videotaped molesting an undercover policewoman.[68] Teicher sought to suppress the videotape on the grounds that there was no statutory authority for the issuance of an electronic visual surveillance warrant in New York[69] and, alternatively, that the warrant issued was faulty in several procedural respects.[70] The trial court nevertheless denied Teicher's motion to suppress the videotape, holding that it would be admissible as evidence at trial.[71]

The *Teicher* court analyzed the admissibility of the videotape by considering its individual components, the aural impressions and the visual images. The court correctly decided that the aural seizure fell within the authorization of the New York eavesdropping statute.[72] That statute allows the seizure under a warrant of "intercepted communications," including conversation intentionally recorded through the use of recording equipment by persons not present.[73] The aural seizure effected through videotaping by recording sound impulses thus falls within the purview of the New York eavesdropping statute.[74]

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[63] 395 N.Y.S.2d at 593-96.

[64] *Id.* at 589.

[65] *Id.* at 594 n.6.

[66] *Id.* at 589, 594, 596.

[67] *Id.* at 589, 595.

[68] *Id.* at 589, 596.

[69] *Id.* at 590-93.

[70] *Id.* at 590, 593-96. The defendant objected to the warrant as having the following procedural defects: the affidavits supporting the application for the electronic eavesdropping warrant were based on unsupported hearsay and thus did not establish probable cause for the search and seizure, *see* text accompanying notes 102-11 *infra;* there was inadequate particularization of the place to be searched and the things to be seized, *see* text accompanying notes 112-20 *infra;* the warrant did not provide for sufficient minimization of the intrusive interceptions, *see* text accompanying notes 121-29 *infra;* and there was an inadequate showing of necessity for the search. 395 N.Y.S.2d at 593-96; *see* text accompanying notes 130-33 *infra.*

[71] 395 N.Y.S.2d at 596.

[72] *Id.* at 591-93; *see* N. Y. CRIM. PROC. LAW §§700.05, 700.10, 700.15 (McKinney 1971); VIDEOTAPE STUDY COMMITTEE, *supra* note 46, at 70-71.

[73] *See* N. Y. CRIM. PROC. LAW §§700.05(2), (3)(b), 700.10(1) (McKinney 1971).

[74] Videotaping consists of the simultaneous use of a camera and microphone to convert

The court further stated that the visual images captured by the videotape were "property" constituting evidence or demonstrating that a crime had been committed and were within the scope of the general New York search warrant statute.[75] This contention that visual images are "property" and can be seized under a search warrant as evidence demonstrating the commission of an offense is a possible interpretation of the general New York search warrant statute. The statutory provision[76] is broadly drafted and arguably can encompass the seizure of intangible property. The statute, however, states that "personal property" subject to seizure includes property that is stolen, unlawfully possessed, or used to commit or conceal the commission of an offense.[77] All such property is necessarily tangible. Thus, the further provision authorizing the seizure of personal property constituting evidence of a crime or tending to demonstrate the commission of an offense,[78] without specifically extending the statute's scope to intangibles, arguably also is limited to tangible property.[79] The fact that aural intangibles can only be seized under the strict guidelines of New York's electronic eavesdropping statute[80] also militates against the view that intangibles can be seized under the general search warrant statute. To argue that visual images are "personal property" subject to seizure under a statute that appears to allow only the seizure of tangible property is a tortuous construction of the statute.[81]

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light energy into electronic signals and sound waves into electronic impulses, both of which are recorded on tape for future viewing and listening. *Videotape in the Courtroom, supra* note 6, at 929.

[75] 395 N.Y.S.2d at 592-93; *see* note 61 *supra.*

[76] *See* note 61 *supra.* "Personal property" is broadly and generally defined as "everything that is the subject of ownership, not coming under denomination of real estate. A right or interest in things personal, or right or interest less than a freehold in realty, or right or interest which one has in things movable." BLACK'S LAW DICTIONARY 1382 (4th rev. ed. 1968). To construe intangible visual images as "personal property" within the general definition is not a reasonable interpretation of the English language.

[77] N. Y. CRIM. PROC. LAW §690.10(1), (2), (3) (McKinney 1971).

[78] *Id.* at 690.10(4).

[79] *See* note 81 *infra.*

[80] *See* N. Y. CRIM. PROC. LAW, Article 700 (McKinney 1971).

[81] A comparison of similar statutes in other states supports the view that general search warrant statutes are limited to the authorization of the seizure of tangible property. Virginia allows the seizure of "any object or thing, including without limitation, documents, books, papers, records or body fluids, constituting evidence of the commission of crime." VA. CODE §19.2-53(4) (1975). The enumeration of tangible items within the provision in question supports the limitation of the statute to tangible property or things. Several state statutes expressly provide that the property subject to seizure as evidence of a crime is tangible property. *See* GA. CODE ANN. §27-303(e) (1978); IND. STAT. ANN. §35-1-6-1(a), (b) (Burns 1975); NEV. REV. STAT. §§179.015, 179.035 (1975). Hawaii's statute provides that a search warrant will be issued "to discover *articles* necessary to be produced as evidence or otherwise at the trial of any one accused of a criminal offense." HAWAII REV. STAT. §803-32(5) (1976) (emphasis added). Several statutes have comments following them which indicate that the provisions allowing the seizure of property constituting evidence of a crime were enacted to take advantage of the overruling of the "mere evidence" rule in Warden v. Hayden, 387 U.S. 294 (1967), which held that the seizure of tangible evidence of a crime is admissible at trial. *See* N. Y. CRIM. PROC. LAW §690.10, Practice Commentary (McKinney 1971); WIS. STAT. ANN.

Other courts, however, have given similarly broad constructions to the property concept in general search warrant statutes. The Sixth Circuit in *Michigan Bell Telephone Co. v. United States*[82] concluded that under Federal Rule of Criminal Procedure 41(b)(1),[83] which authorizes the seizure of property constituting evidence of the commission of a crime, federal courts should allow the seizure of intangible property because of the expanding use of electronic surveillance.[84] In *Michigan Bell,* the intangibles seized under a warrant were telephone impulses recorded by telephone company equipment. The court stated that the definition of property subject to seizure enunciated in Rule 41(b) is not all inclusive and that the scope of the property included should expand to include intangibles as their seizure becomes possible through advanced technology.[85] In an earlier New York case on which the *Teicher* court relied, *People v. Abruzzi,*[86] testimony concerning visual observations by a police officer were suppressed as evidence flowing from an unlawful search of the defendant's office because no search warrant was obtained.[87] In order to make the observations, the

§968.13, Comment of the Judicial Council Criminal Rules Committee (1971); note 11 *supra.* The general search warrant statutes which are ambiguous in their scope, *see, e.g.,* N. Y. CRIM. PROC. LAW §690.10 (McKinney 1971), were not intended to extend to the seizure of intangible property because of the wording of prior enumerations in the statutes which effectively limit property properly seizeable to tangible property. *See* VIDEOTAPE STUDY COMMITTEE, *supra* note 46, at 70-71.

[82] 565 F.2d 385 (6th Cir. 1977).

[83] FED. R. CRIM. P. 41(b) states:

> (b) Property Which May Be Seized With a Warrant. A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

[84] 565 F.2d at 389.

[85] *Id.* Rule 41(b), however, appears to have been intended to cover only tangible property. The legislative history of the Rule states that subdivision (b) was amended to accord with Warden v. Hayden and the overruling of the "mere evidence" rule. *See* 18 U.S.C.A. FED. R. CRIM. P. 41, Notes of Advisory Committee on Rules, 1972 Amendment, p. 484 (1976); note 11 *supra.* The language of *Hayden* itself supports a limitation of property seized as evidence to tangible property. The *Hayden* Court speaks of "items of evidential value," which connotes tangible property, not property seizeable because they are "testimonial" or "communicative." Warden v. Hayden, 387 U.S. 294, 302-03 (1967). The holding of *Hayden* was that tangible property may be seized as evidence of criminal activity. *Id.* at 300-10; *see* note 11 *supra.* Moreover, the Committee on Rules of Practice and Procedure has proposed an amendment to Rule 41(b) changing the heading from "Property Which May Be Seized With a Warrant" to "Objects Which May Be Seized With a Warrant," thus supporting the view that the scope of the Rule is to be limited to tangible property. The Committee offered as the reason for the change the inclusion of persons who can be seized with a warrant. Nevertheless, "object" does not connote intangible property. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (1978), *reprinted in* 77 F.R.D. 507, 581; note 83 *supra.*

[86] 52 App.Div.2d 499, 385 N.Y.S.2d 94 (1976); *see* People v. Teicher, 395 N.Y.S.2d 587, 592 (Sup. Ct. 1977).

[87] 52 App.Div.2d at 500, 385 N.Y.S.2d at 95.

officer trespassed on the defendant's property and climbed a seven-foot ladder to peer through the open portion of a heavily curtained window.[88] The court in *Teicher* stated that the *Abruzzi* court's holding that a search warrant was required to authorize the officer's visual observations involved an implicit recognition by that court that a search warrant could have issued for such observations under the general search warrant statute.[89] The *Abruzzi* court, however, clearly took no position on whether intangible visual images could be seized and recorded under the authority of the general search warrant statute.[90] Moreover, the difference between eyewitness testimony and a video reproduction is significant because the unaided use of an officer's physical senses does not constitute as great an invasion of privacy as does the use of a hidden camera which extends those senses.[91] Thus, while the question of whether intangible property can be seized under a general search warrant statute is not yet settled, the legality and constitutionality of extending the statute beyond its apparent scope or grafting the electronic eavesdropping and general search warrant statutes together to create a hybrid authorizing electronic visual surveillance appears doubtful.[92]

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[88] *Id.* at 501, 385 N.Y.S.2d at 96.

[89] People v. Teicher, 395 N.Y.S.2d at 592. *But see* text accompanying notes 75-81 *supra.*

[90] The *Abruzzi* court did not decide whether a search warrant would have issued, thus authorizing the visual observation by the officer. The court noted that search warrants are required wherever one has a justifiable expectation of freedom from governmental intrusion, subject to several carefully defined exceptions, such as plain view, hot pursuit, and other definitive exigent circumstances. 52 App.Div.2d at 501, 385 N.Y.S.2d at 96. Since the search in *Abruzzi* did not fall within any of the exceptions, *id.*, 385 N.Y.S.2d at 96, a search warrant of some type was required to validate the search. The fact that a warrant was not obtained and not whether one could have been obtained was the issue the court considered. *Id.*, 385 N.Y.S.2d at 96. There are two problems with concluding, as did the *Teicher* court, that a search warrant in *Abruzzi* could have been issued to authorize the officer's visual observations. The New York general search warrant statute does not appear to allow the seizure of visual images where one has a justifiable expectation of privacy. *See* text accompanying notes 75-81 *supra.* Moreover, there is a recognized distinction between the intrusion visited by an officer's unaided eye and that of an all-seeing electronic eye. *See* text accompanying note 91 *infra.* At most, *Abruzzi* is authority for the proposition that a search warrant would issue to allow a police officer to pierce one's justifiable expectation of privacy and "search" actions with his own eyes. However, the decision is not authority for the issuance of videotape warrants.

[91] *See* United States v. Fisch, 474 F.2d 1071, 1078 (9th Cir.), *cert. denied,* 412 U.S. 921 (1973); United States v. Kim, 415 F. Supp. 1252, 1255 (D. Hawaii 1976). The *Kim* court differentiated between situations where the police used artificial amplification devices and where they did not. Where there is no trespass but a justifiable expectation of privacy, an aided visual search is unreasonable without a warrant, but an unaided search is valid. *Id.* Under this analysis, the physical trespass in *Abruzzi* was unreasonable, but the visual observation was not necessarily invalid because the officer's eyesight was not extended. Thus, under N. Y. CRIM. PROC. LAW §690.05(2) (McKinney 1971), a search warrant could have issued to allow the physical trespass, but the oficer's action in peering through curtained windows would have been subjected to a fourth amendment reasonableness test to determine whether the seizure of the visual observations was proper or validated by an exception to the requirement of a warrant to protect privacy.

[92] *See* VIDEOTAPE STUDY COMMITTEE, *supra* note 46, at 70-71. The Committee concluded

The alternative ground relied upon by the *Teicher* court as authority for the issuance of an electronic visual surveillance warrant was that the issuing court had inherent power to employ necessary judicial process to assist in criminal investigations.[93] In support of this proposition, the court cited the practice of New York trial courts in colonial and immediate post-revolutionary days to issue search warrants based solely on their inherent power to do so.[94] Regardless of the early practice of courts in New York, a search warrant in New York and other states today can be issued only pursuant to statutory authorization.[95] Thus, as the law currently stands in New York, courts cannot legally issue warrants for electronic seizure of visual images because there is no statutory provision authorizing the issuance of such warrants.[96] Moreover, the fact that the legislature has deemed it necessary to codify the search warrant process in the electronic eavesdropping field arguably supports the contention that the seizure of intangible property through an invasion of privacy requires express legislative authorization.[97]

To ensure that the issuing judge complies with the requirements of the fourth amendment and to clarify any confusion surrounding the use of

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that if a videotape warrant is to be issued in Virginia, either the general search warrant statute or the eavesdropping statute would have to be amended to allow the seizure of visual images, or an electronic visual surveillance statute would have to be enacted. *Id.* at 71.

[93] 395 N.Y.S.2d at 592-93.

[94] *Id.* Citation of colonial and early American examples of inherent power to issue search warrants offers little aid in determining whether the present New York trial courts have the power as no statutes authorizing courts to issue search warrants existed at that time. *See* A. CORNELIUS, THE LAW OF SEARCH AND SEIZURE §§151, 155 (2d ed. 1930) [hereinafter cited as Cornelius].

[95] *See* White v. Wagar, 185 Ill. 195, 57 N.E. 26, 28 (1900); State v. Creel, 152 La. 888, 94 So. 433, 434-35 (1922); State v. Tunnell, 302 Mo. 433, 259 S.W. 128, 129 (1924); People *ex rel.* Robert Simpson Co. v. Kempner, 208 N.Y. 16, 101 N.E. 794, 795-96 (1913); People v. Richter, 265 App.Div. 767, 40 N.Y.S.2d 751, 755-56, *aff'd*, 291 N.Y. 161, 51 N.E.2d 690 (1943); State v. Peterson, 27 Wyo. 185, 194 P. 342, 351 (1920). *See generally* CORNELIUS, *supra* note 94, at §155; H. ROTHBLATT, CRIMINAL LAW OF NEW YORK - THE CRIMINAL PROCEDURE LAW §569, at 464 (1971); J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 278, 437 (2d ed. 1974). The *Teicher* court cited *In re* Steinway, 159 N.Y. 250, 258, 53 N.E. 1103, 1105 (1899), as authority for its inherent power to issue necessary judicial process in aid of police investigations. 395 N.Y.S.2d at 593. In *Steinway*, the New York Court of Appeals had stated that "we have the powers of the court of kings bench and the court of chancery as they existed when the first [state] constitution was adopted [in 1777], blended and construed in the supreme court of the state, except as modified by constitution or statute." 159 N.Y. at 258, 53 N.E. at 1105. In a later Court of Appeals case, however, the court stated that the basis for a search warrant had progressed from the discretion vested in a justice of the peace under the English practice to a statutory system which foreclosed the prior unbounded discretion of the English justices of the peace. People *ex rel.* Robert Simpson Co. v. Kempner, 208 N.Y. 16, 101 N.E. 794, 796 (1913). The *Simpson* Court concluded that under the statutory scheme, a search warrant could not be issued for any purpose except as stated by statute. 101 N.E. at 795. Whatever vitality *Steinway* had in 1899 seems to have been eliminated by *Simpson*. *See* N. Y. CRIM. PROC. LAW, Articles 690 & 700 (McKinney 1971).

[96] *See* text accompanying notes 81-95 *supra*.

[97] *See* S. REP. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U. S. CODE CONG. & AD. NEWS 2112, 2153-63; note 92 *supra*.

electronic visual surveillance, the guidance of a statute, which requires specific findings and codifies warrant issuance procedures offers the most pragmatic way to protect privacy without crippling law enforcement.[98] Title III requires the issuing judge to make numerous findings before he can issue an eavesdropping warrant.[99] The highly intrusive reality of electronic visual surveillance, particularly videotape surveillance, mandates a thorough investigation of the application for a warrant by the issuing judge.[100] A specific electronic visual surveillance statute will provide best that the proper investigation is made.

Because New York had no electronic visual surveillance statute, Teicher objected to the warrant as failing to comply with the New York electronic eavesdropping law.[101] His objections highlight the difficulty of issuing an electronic visual surveillance warrant in accordance with fourth amendment protection. First, Teicher maintained that there was an insufficient finding of probable cause for an electronic visual surveillance warrant to issue.[102] Probable cause for a search exists where the applicant for a warrant has knowledge, through reasonably trustworthy information, of facts and circumstances warranting a man of reasonable caution to believe that an offense has been or is being committed.[103] The applicants in

[98] *Cf.* United States v. Brown, 351 F. Supp. 38, 41 (W.D.N.C. 1972) ("Wiretapping, of dubious constitutionality at best, should be sanctioned if at all only under the strictest view of the strict procedures laid down by a careful Congress."); Carter v. State, 274 Md. 411, 337 A.2d 415, 425 (1975) (electronic surveillance may be conducted only when done in accord with rigid constraints imposed by a statutory scheme such as Title III); S. REP. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U. S. CODE CONG. & AD. NEWS 2112, 2153 (legislation would clarify the confusion swirling around electronic eavesdropping) & 2163 (as of 1968, all living attorneys general [except Ramsey Clark] advocated legislation to authorize law enforcement use of electronic eavesdropping).

[99] *See* 18 U.S.C. §2518 (1976).

[100] In People v. Kaiser, 21 N.Y.2d 86, 97 n.2, 233 N.E.2d 818, 824 n.2, 286 N.Y.S.2d 801, 809 n.2 (1967), *aff'd sub nom.* Kaiser v. New York, 394 U.S. 280 (1969), the New York Court of Appeals stated that "[i]t is precisely because eavesdropping poses such a threat to the right of privacy that it should be undertaken under strict judicial supervision and subject to the severest constitutional restraints." In People v. Brenes, 53 App.Div.2d 78, 385 N.Y.S.2d 530, 531 (1976), the court stated that the most exacting and meticulous standards should be required to authorize electronic eavesdropping before an intrusion into the right of individual privacy is permitted.

[101] *See* note 74 *supra.*

[102] 395 N.Y.S.2d at 590, 593-94.

[103] Berger v. New York, 388 U.S. 41, 55 (1967). In an early Supreme Court decision, Chief Justice Marshall defined probable cause as evidence which would merely warrant suspicion and not condemnation. Locke v. United States, 11 U.S. 560, 7 Cranch 339, 348 (1813). In Stacey v. Emery, 97 U.S. 642 (1878), the Court stated that if "facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient" and probable cause exists. *Id.* at 645; *see* Steele v. United States No. 1, 267 U.S. 498, 504-05 (1925); Carroll v. United States, 267 U.S. 132, 161 (1925). A finding of probable cause may rest upon evidence which is not legally competent in a criminal trial, Draper v. United States, 358 U.S. 307, 311 (1959), so hearsay may be the basis for issuance of a warrant as long as there is a "substantial basis" for crediting the hearsay. Jones v. United States, 362 U.S. 257, 272 (1960); *accord* Aguilar v. Texas, 378 U.S. 108, 114 (1964). Thus, the presence of facts and circumstances sufficient to warrant a reasonable man

Teicher relied primarily on hearsay information supplied by the three named women complaining of indecent liberties taken by Dr. Teicher without their consent.[104] Reliance upon hearsay information to establish probable cause is permissible only if the issuing magistrate is informed of the underlying circumstances relied on by the hearsay informant in reaching his conclusion of criminal activity, as well as the circumstances from which the applicant concluded that the informant was credible or that his information was reliable.[105] If the applicant's affidavit fails to meet either of these criteria, probable cause may still be established if the affidavit also recites corroborative evidence which buttresses either the informant's reliability or the reliability of his information.[106] Implicit in the determination of probable cause is the view that affidavits should be read in a common sense rather than a hypertechnical manner.[107] In establishing probable cause, the *Teicher* court relied on the similarity of the women's stories as providing corroboration for the various accounts,[108] the greater credence given to named citizen informants,[109] and independent police corroboration of the women's stories.[110] Thus, the court in *Teicher* reasonably found probable cause sufficient to believe a crime had been committed.[111]

Second, Teicher contended that the electronic visual surveillance warrant did not state with sufficient particularity the place where the videotape camera was to be installed, the conduct to be observed, and the duration of the observation.[112] Because visual images are intangible and because predicting the precise conduct expected to take place is impossible, specifying conduct to be observed and "seized" can be accomplished only through the use of a general description of that conduct.[113] The order[114]

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to suspect a crime has been committed or is contemplated has sufficed in finding probable cause.

[104] 395 N.Y.S.2d at 593-94; *see* text accompanying note 66 *supra.*

[105] Aguilar v. Texas, 378 U.S. 108, 114 (1964).

[106] Spinelli v United States, 393 U.S. 410, 415-18 (1969).

[107] United States v. Ventresca, 380 U.S. 102, 108-09 (1965).

[108] 395 N.Y.S.2d at 594.

[109] *Id.* at 594 & n.5.

[110] *Id.* at 594. In *Teicher,* the defendant had admitted administering drugs to the first patient/complainant. In addition, he was tape-recorded saying he had kissed the second patient and enjoyed it, later met the second patient at a bar and made more statements about how she had kissed him then but not for the first time, and was recorded calling the third patient on the phone for a date and expressing his desire to come to her apartment and bring his "bag of goodies." These additional facts corroborated the women's accounts. *Id.*

[111] Several courts have credited the information given by victims of crime without examining the reliability of the hearsay and its source as required by the Supreme Court. *See* United States v. Burke, 517 F.2d 377, 380 (2d cir. 1975); United States v. Bell, 457 F.2d 1231, 1238-39 (5th Cir. 1972); text accompanying notes 105-07 *supra.*

[112] 395 N.Y.S.2d at 594; *see* N. Y. CRIM. PROC. LAW §700.30 (McKinney 1971).

[113] Hodges, *supra* note 2, at 283; *cf.* United States v. Cohen, 530 F.2d 43, 45-46 (5th Cir. 1976) (orders authorizing electronic interception of conversations must be sufficiently broad to allow the interception of any incriminating statements); United States v. Tortorello, 480 F.2d 764, 780 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973) (order must be broad enough to allow interception of any statements concerning a specific crime pattern); People v. Grossman, 45

authorizing visual surveillance in *Teicher* stated with particularity the place to be searched[115] and described the conduct sought to be seized with specific reference to past acts cited by the complainants.[116] A warrant description is sufficiently particular if the officer executing the search warrant can ascertain and identify with reasonable effort the place to be searched and the things to be seized.[117] The officer need not rely on his discretion to ascertain the scope of the search, and the specter of a general warrant and search is thereby avoided.[118] Thus, the order is issued to circumscribe the search. Failure to particularly state in the order what area is to be searched and what thing is to be intercepted is a flaw the Supreme Court has found fatal.[119] The court in *Teicher,* however, correctly found the warrant described the place to be searched and the conduct to be seized with adequate particularity.[120]

Teicher's further objection that the order lacked particularity as to the duration of the visual surveillance was essentially an argument that the

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Misc.2d 557, 257 N.Y.S.2d 266, 277 (Sup. Ct. 1965) (advance specificity of description of verbal statements to be seized is impossible although some limiting required).

[114] The supporting affidavits were affixed to the order in *Teicher.* Thus, many of the particular directives for the executing officers were found in the affidavits and not in the order itself. Phone conversation with Linda Fairstein, Assistant District Attorney in charge of the prosecution of Teicher, April 13, 1978. N. Y. CRIM. PROC. LAW §700.30(4) (McKinney 1971) requires an eavesdropping warrant to contain a particular description of the communications to be intercepted and the conduct to which the communications relate. Whether or not this information was contained in the order itself or in the attached affidavits is an important consideration. The officers executing the warrant should be able to read the order and carry it out without having to page through affidavits for particular guidance. In United States v. Tortorello, 480 F.2d 764, 778-81 (2d Cir. 1973), the court stated that while attaching affidavits to the order is not prejudicial error, the better procedure is for the judge to state precisely in the order what those authorized to execute the warrant are entitled to search for and seize. In electronic visual surveillance cases, the order should contain all of the court's findings and instructions so nothing will be left to the discretion of the officers executing the warrant. *See* text accompanying notes 115-20 *infra.*

[115] 395 N.Y.S.2d at 595. The affidavits attached to the order clearly required the camera to be installed on the first floor of the building where defendant had his offices and where his patients received treatment. *Id.* The affidavits specified that the camera would be placed in the first examining room on the left, but instead it was placed in the second room. *Id.* The court found no error. *Id.; see* United States v. Darensbourg, 520 F.2d 985, 987-88 (5th Cir. 1975) (search warrant listing incorrect address of place to be searched does not invalidate the search); United States v. Sklaroff, 323 F. Supp. 296, 321 (S.D. Fla. 1971) (apartment listed in warrant as being on the second floor rather than third floor of building does not invalidate the search); People v. Brooks, 54 App.Div.2d 333, 335, 388 N.Y.S.2d 450, 452 (1976) (warrant listing erroneous name and apartment number, but the correct building does not invalidate the subsequent search). *But see* Hodges, *supra* note 2, at 283 (precise room within premises where electronic visual surveillance to be undertaken must be specified).

[116] 395 N.Y.S.2d at 595.

[117] *See* Marron v. United States, 275 U.S. 192, 196 (1927); Steele v. United States No. 1, 267 U.S. 498, 503 (1925); Cook, *Requisite Particularity in Search Warrant Authorizations,* 38 TENN. L. REV. 496, 505-07, 512-16 (1971).

[118] *See* Stanford v. Texas, 379 U.S. 476, 485 (1965); Marron v. United States, 275 U.S. 192, 196 (1927); People v. Neives, 36 N.Y.2d 396, 369 N.E.2d 26, 369 N.Y.S.2d 50, 57 (1975).

[119] *See* Berger v. New York, 388 U.S. 41, 55-56, 58-59 (1967).

[120] 395 N.Y.S.2d at 594-95.

order did not provide for minimization of the intrusive observation.[121] The New York electronic eavesdropping statute requires the inclusion of a provision in the surveillance order that the eavesdropping will be conducted in such a manner as to minimize the interception of unrelated communications.[122] The New York statute additionally requires electronic eavesdropping to cease when the objective of the surveillance is achieved.[123] The *Teicher* order provided that the videotape camera was to be activated only when females cooperating with the police were in the dental chair.[124] In addition, the order was neither to automatically terminate upon the video recordation of the described conduct nor to continue in excess of thirty days.[125] While the order provided for adequate minimization by only filming Teicher with cooperating females,[126] the order was too broad in authorizing observation after incriminating evidence had been obtained. The court excused this irregularity because the district attorney originally intended to film more than one incident to establish that the dentist's conduct was a repeated, ongoing crime.[127] Where no further information was

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[121] *Id.* at 595-96.

[122] N. Y. CRIM. PROC. LAW §700.30(7) (McKinney 1971) states:

> An eavesdropping warrant must contain: . . .
>
> 7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

See 18 U.S.C. §2518(5) (1976).

[123] N. Y. CRIM. PROC. LAW §700.10(2) (McKinney 1971); *see* Berger v. New York, 388 U.S. at 59-60; 18 U.S.C. §2518(1)(d), (4)(e), (5) (1976); note 122 *supra.*

[124] 395 N.Y.S.2d at 596. Under United States v. White, 401 U.S. 745 (1971), Teicher arguably had no expectation of privacy because his actions were undertaken in the presence of another who had consented to the video intrusion. *See* text accompanying notes 40-45 *supra;* note 6 *supra.* There is a difference, however, between reporting actions previously observed and surreptitiously recording those actions on film. While a conversation may later be reported to police verbatim by an informant, physical actions can only be described generally. Moreover, in *White* the visual surveillance was undertaken in the apartment of the party consenting to the search while in *Teicher* the videotape surveillance occurred in Teicher's office. Thus, while one has no right to consider his actions as private when undertaken in the presence of another, neither do the police have the right to videotape those actions because the other party could have reported them. Therefore, the *White* rationale is too simplistic and should not be dispositive in this context.

[125] 395 N.Y.S.2d at 596.

[126] *Id.*

[127] *Id.* The *Teicher* court cited People v. Gnozzo, 31 N.Y.2d 134, 286 N.E.2d 706, 335 N.Y.S.2d 257 (1972), *cert. denied sub nom.* Zorn v. New York, 410 U.S. 943 (1973), for the contention that once incriminating evidence has been obtained, prolonged electronic eavesdropping is valid because of a continuous, repeated crime. *Gnozzo* can be distinguished from *Teicher* on the basis of the nature of the crime involved. In *Gnozzo,* the law enforcement agents were trying to uncover the participants in a gambling conspiracy by monitoring calls to and from known gamblers. 335 N.Y.S.2d at 259-62. Evidence was not merely being sought against the parties named in the eavesdropping warrants, but the effort was directed at obtaining evidence against numerous unknown individuals. Continued monitoring under these circumstances after one unknown person is inculpated is reasonable and does not

to be gained by viewing Teicher's additional acts except cumulative evidence of the same offense, continuing observation would have been an abuse of the police power and clearly not a minimization of intrusive observation. After the initial illegal act was viewed, no further surveillance was necessary because Teicher was immediately arrested.[128] Nevertheless, the order, authorizing surveillance beyond that statutorily permitted, could have tainted the evidence gathered by the electronic visual surveillance had the surveillance continued.[129]

Finally, Teicher argued that visual surveillance was unnecessary because other less intrusive techniques were available to the police.[130] Due to the unique circumstances of the case, however, no other investigative technique previously employed by the police or available to them was feasible.[131] Thus, the necessity of electronic visual surveillance in the case was clearly established if the women's complaints were to be validated or disproved. The New York electronic eavesdropping statute requires the issuing judge to find that normal investigative techniques have failed or are too dangerous before an eavesdropping warrant can issue.[132] The *Teicher* court found that this condition was met.[133]

The *Teicher* court's reliance on the New York eavesdropping statute to test the validity of an electronic visual surveillance order is unsound, however, because the eavesdropping statute does not incorporate visual as well as aural surveillance within its scope.[134] While eavesdropping statutes provide some structure and certainty in the difficult area of electronic visual surveillance, they do not provide sufficient safeguards to adequately protect the individual's right of privacy against the pervasive invasion of videotape surveillance. Authorization to videotape or conduct other electronic visual surveillance should not be found in a patchwork formed from statutes or the common law which neither concern nor comprehend such surveillance. Rather, electronic visual surveillance should be specifically treated in a statute structured along the lines of Title III.[135] The New York trial court's opinion in *Teicher* establishes that electronic visual surveillance may be necessary and reasonable under certain circumstances. Nevertheless, the court did not recognize that under the current New York statutory scheme, electronic visual surveillance cannot be utilized because

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evidence a lack of minimization of the intrusive surveillance. This rationale is not pertinent to or persuasive in *Teicher*.

[128] 395 N.Y.S.2d at 596 n.7.

[129] *See* Stanford v. Texas, 379 U.S. 476, 485-86 (1965); N. Y. CRIM. PROC. LAW §710.20 (McKinney Supp. 1977) (suppression statute).

[130] 395 N.Y.S.2d at 596.

[131] *Id.* In *Teicher*, aural seizures outside Teicher's office had proved unavailing; use of an undercover agent would have been fruitless because she would have been drugged; electronic eavesdropping of the "examination" would not have provided evidence of defendant's acts of sexual abuse. *Id.*

[132] N. Y. CRIM. PROC. LAW §700.15(4) (McKinney 1971); *see* 18 U.S.C. §2518(3)(c) (1976).

[133] 395 N.Y.S.2d at 596; *see* text accompanying note 131 *supra*.

[134] *See* text acompanying note 32 *supra*.

[135] *See* VIDEOTAPE STUDY COMMITTEE, *supra* note 46, at 71.

courts are powerless to issue valid warrants.

To adequately protect the individual's right of privacy when electronic visual surveillance is considered, courts should undertake fourth amendment analysis in such a way that the amendment's protection of privacy against governmental intrusion is a central element in determining the reasonableness of a particular intrusion.[136] Additionally, courts should give effect to the fourth amendment so that increasing degrees of intrusiveness require higher standards of justification and more stringent procedures for establishing that justification.[137] Law enforcement agents should be required to show the necessity of electronic visual surveillance. Therefore, such surveillance should be justified in terms of the need for the best practicable investigatory techniques to combat specified criminal activity. Nevertheless, to control officer discretion, all applications for electronic visual surveillance should be scrutinized through police rule-making subject to judicial review for reasonableness and should be limited by definitive legislation.[138]

The legislation patterned after Title III authorizing electronic visual surveillance should give effect to additional safeguards. The authorization for electronic visual surveillance should be withheld absent a showing that all other feasible and less intrusive investigatory techniques have been tried and have failed, unless they are simply too dangerous.[139] Although a prior description particularly specifying the precise conduct to be seized by the camera is impossible, an order authorizing electronic visual surveillance should set forth to the greatest degree possible the exact conduct sought to be filmed. In this way, the surveillance can be controlled and does not become a general search.[140] The current Supreme Court standard for determining probable cause[141] of a "reasonably cautious man's" belief that an offense has been committed should be given a narrow construction when considered under the electronic visual surveillance statute. Finally, the time authorized for the operation of an electronic surveillance warrant should be as short as is practicable and the camera should be stopped the moment the narrowly described conduct sought to be seized is recorded. Moreover, minimization of the interception of unrelated conduct should be strictly observed through the liberal administration of the exclusionary rule.[142]

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[136] *See* Terry v. Ohio, 392 U.S. 1, 17-18 n.15 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

[137] *See* Amsterdam, *supra* note 1, at 390.

[138] *See* United States v. Kim, 415 F. Supp. 1252, 1256-57 (D. Hawaii 1976); Amsterdam, *supra* note 1, at 409-28.

[139] *Cf.* 18 U.S.C. §2518(3)(c) (1976) (normal investigative procedures have been attempted and have failed *or reasonably appear unlikely to succeed if tried*). To conform to the fourth amendment, police investigations should be required to intrude as little as possible on individual privacy.

[140] *See* note 7 *supra.*

[141] *See* text accompanying note 103 *supra.*

[142] *See* Amsterdam, *supra* note 1, at 409-10, 428-38; Spritzer, *supra* note 7, at 201 n.154. *But see* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-27 (1971) (Burger, C.J.,

Under such comprehensive rules and regulations providing a thorough examination of the necessity, scope, objective, and execution of electronic surveillance, such surveillance, if statutorily mandated, should be utilized and would not violate the fourth amendment.[143] However, such surveillance is a dangerous police weapon that requires confining and defining statutory directives to ensure that today's technology for combating crime is not tomorrow's tyranny over personal liberty and the individual's right of privacy.[144]

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dissenting) (replace exclusionary rule in favor of administrative or quasi-judicial remedy against the government to afford compensation and restitution for fourth amendment violations).

[143] The argument that videotape surveillance should be utilized simply because it provides a complete picture of an individual's actions without reliance on witness testimony is specious. The privacy of people is protected by the fourth amendment and videotape surveillance should not be utilized if its use would unreasonabley intrude on the individual's privacy. Easy justifications for electronic visual surveillance are inviting, but ill-considered and incomplete.

[144] *See* Amsterdam, *supra* note 1, at 416-17.