

See; Minutes of Subcommittee No. 1  
9/22/69, p. 6, Vol. X, Tape #82

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CRIMINAL LAW REVISION COMMISSION  
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ARTICLE 27. OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Preliminary Draft No. 1; September 1969

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Subcommittee No. 1

ARTICLE 27. OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

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Section 1. Offenses against privacy of communications; definitions. As used in this Article, unless the context requires otherwise:

Existing Law
ORS 165.535

(1) Except as provided in section 6, "conversation" means the transmission between two or more persons of a private oral communication which is not a telephonic, telegraphic, radio or television communication.

(2) "Eavesdropping device" means any instrument, device or equipment designed for, adapted to or commonly used in wiretapping or mechanical overhearing or recording of a conversation.

COMMENTARY - OFFENSES AGAINST PRIVACY OF COMMUNICATIONS; DEFINITIONS

A. Summary

Subsection (1) defines "conversation" in terms of a private oral communication transmitted without the aid of mechanical or electronic equipment. The exception in section 6 involves violating a private conversation; such a conversation may be a unilateral discussion carried on over the telephone or via a two-way radio.

Subsection (2) defines "eavesdropping device" to include any type of equipment which may be used in wiretapping or "bugging".

B. Derivation

Subsection (1) is taken from ORS 165.535 (1).

Subsection (2) is derived from New York Revised Penal Law section 250.10.

C. Relationship to Existing Law

Oregon is one of seven states that imposes criminal liability for interception of communications. ORS 141.720 provides a means of obtaining an ex parte order to legally obtain such information. Only Illinois allows no wiretapping or "bugging" under any circumstances. The definitional section and those that follow continue existing Oregon law.

It might be noted that in light of the United States Supreme Court decision in Berger v. State of New York, 388 US 41, 87 S Ct 1873 (1967), subsection (6) of ORS 141.720 is probably unconstitutional. The Court invalidated the New York statute providing for ex parte orders for interception of communications. The specific grounds given for invalidation of the statute (New York Penal Code section 813-a) were that it permitted invasions of privacy without attendant constitutional safeguards by not requiring a description of the particular conversations to be seized, by allowing a two month period for the surveillance, by permitting further extensions of the order without the necessity of showing probable cause, by omitting a provision requiring notice in the absence of exigent circumstances and by failing to require both a termination of the order once the evidence had been seized and a return on the order.

ORS 165.535 defines four terms used in 165.540 to define the crime of interception of communications. Only "conversation" has been retained as essential to the form and structure of this Article.

TEXT OF REVISIONS OF OTHER STATES

Text of Illinois Criminal Code of 1961

§ 14-1. Definition

(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.

(c) Principal.

A principal is any person who:

- (1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or
- (2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or
- (3) Directs another to use an eavesdropping device illegally on his behalf. 1961, July 28, Laws 1961, p. 1983, § 14-1.

Text of New York Revised Penal Law

§ 250.00 Eavesdropping; definitions of terms

The following definitions are applicable to this article:

1. "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment. The normal operation of a telephone or telegraph corporation and the normal use of the services and facilities furnished by such corporation pursuant to its tariffs shall not be deemed "wiretapping."

2. "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.

3. "Unlawfully" means not specifically authorized pursuant to section eight hundred thirteen-a or section eight hundred thirteen-b of the code of criminal procedure. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code

[Definitions]

Sec. 5601. The following definitions apply to this chapter:

(a) "Eavesdrop" means to overhear, record, amplify or transmit any part of the private discourse of others without the consent of at least one of the persons engaged in the discourse, except as otherwise provided by law.

(b) "Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group of the public has access.

(c) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person observed.

Text of Proposed Connecticut Penal Code

§ 197. Eavesdropping; definition of terms

The following definitions are applicable to this article:

1. "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment. The normal operation of a telephone or telegraph corporation and the normal use of the services and facilities furnished by such corporation pursuant to its tariffs shall not be deemed "wiretapping."

2. "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.

3. "Unlawfully" means not specifically authorized by law.

This article does not apply to wiretapping by criminal law enforcement officials in the lawful performance of their duties and does not affect the admissibility of evidence in any proceedings other than a prosecution for eavesdropping or tampering with private communications.

Section 2. Eavesdropping. A person commits the crime of eavesdropping if, without legal authority granted under ORS 141.720, he intentionally:

(1) Overhears or records a conversation by means of an eavesdropping device, without the consent of all the persons engaged in the conversation; or

(2) Intercepts or records a telephonic or telegraphic communication by means of an eavesdropping device, without the consent of at least one of the persons engaged in the communication; or

(3) Installs an eavesdropping device in a place knowing that it is to be used for criminal eavesdropping.

Existing Law
ORS
141.720
141.730
141.990
41.910
165.540
165.545

COMMENTARY - EAVESDROPPING

A. Summary

Criminal liability in this section is premised upon three types of conduct directed towards the interception of private communications:

(1) "Bugging" conversations surreptitiously by means of a mechanical device without the consent of all the parties to the conversation.

(2) "Wiretapping" telephonic and telegraphic communications by means of a mechanical device without the consent of at least one of the parties to the communications.

(3) Installing a wiretapping or "bugging" device with knowledge that it is to be used for illegal eavesdropping.

The section requires that the prohibited activity be intentional. It exempts from criminal liability those acts done pursuant to a judicially approved ex parte order obtained in accordance with ORS 141.720.

B. Derivation

Subsection (1) is taken from New York Revised Penal Law section 250.00 (2).

Subsection (2) is taken from New York Revised Penal Law section 250.00 (1).

Subsection (3) is based generally on Michigan Revised Criminal Code section 5615.

C. Relationship to Existing Law

The problem of protecting the privacy of communications has been complicated by modern advances in electronic technology. The privacy of the business office, the automobile and the bedroom have all become vulnerable to the professional telephone line splicer and cleverly concealed "bug". The demand for information is insistent and insatiable; recourse to surreptitious electronic surveillance becomes irresistible. Competing and conflicting interests are involved in this moral and legal tug-of-war. Law enforcement agencies insist on access to private communications to combat organized crime, while private citizens demand recognition of and adherence to a constitutional right to "be left alone".

This summary will attempt to explore some of the historical antecedents of the problem and to justify proposed legislation devised to balance the conflicting equities.

67 U. of Mich L Rev 455 (1967), "The Legitimation of Electronic Eavesdropping - The Politics of Law and Order":

"The chief argument against the constitutionality of most kinds of eavesdropping is that the resulting search and seizure is unavoidably too sweeping to comply with the particularity requirements of the fourth amendment. When a continuous tap is placed on a telephone, the eavesdropper almost inevitably hears all the conversations of everyone who talks on that line whether the subject calls out from the tapped number, calls in to that number, or is called by someone using that phone, and no matter how irrelevant or privileged the communication. A bug can be even more intrusive, for it can catch every intimate, irrelevant, or privileged utterance of each person in the room or area bugged. Because these devices intrude so deeply and grossly, they discourage people from speaking freely; as Justice Brennan has warned, if these devices proliferate widely, we may find ourselves in a society where the only sure way to guard one's privacy 'is to keep one's mouth shut on all occasions'." (Lopez v. U.S., 373 US 427,450 (1963) ).

Is eavesdropping a problem new to the law? The United States Supreme Court, in Berger v. State of New York, 388 US 41, 87 S Ct 1873 (1967), discusses its historical background:

"Eavesdropping is an ancient practice which at common law was condemned as a nuisance. 4 Blackstone Comm. 168. At one time the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse. The awkwardness and undignified manner of this method as well as its susceptibility to abuse was immediately recognized. Electricity, however, provided a better vehicle and with the advent of the telegraph surreptitious interception of messages began. As early as 1862 California found it necessary to prohibit the practice by statute....

"The telephone brought on a new and more modern eavesdropper known as the 'wiretapper'. Interception was made by a connection with a telephone line. This activity has been with us for three quarters of a century.... In 1934 the Congress outlawed the interception without authorization and the divulging or publishing of the contents of wiretaps by passing Section 605 of the Communications Act of 1934....

"Sophisticated electronic devices have now been developed (commonly known as 'bugs') which are capable of eavesdropping on anyone in most any given situation. They are to be distinguished from 'wiretaps' which are confined to the interception of telegraphic and telephonic communications.... Since 1940 eavesdropping has become a big business. (See, Westin, Science, Privacy, and Freedom; Issues and Proposals for the 1970's, 66 Columbia L Rev 1003, 1005-1010).

"As science developed these detection techniques, lawmakers, sensing the resulting invasions of individual privacy, have provided some statutory protection for the public. Seven states--California, Illinois, Maryland, Massachusetts, Nevada, New York, and Oregon--prohibit surreptitious eavesdropping by mechanical or electronic devices. However, all save Illinois permit official court-ordered eavesdropping. Some 36 states prohibit wiretapping. But of these, 27 permit 'authorized' interception of some type. Federal law prohibits interception and divulging or publishing of the contents of wiretaps without exception.

"In sum, it is fair to say that wiretapping on the whole is outlawed, except for permissive use by law enforcement officials in some states; while electronic eavesdropping is--save for seven states--permitted both officially and privately. And, in six of the seven states, electronic eavesdropping ('bugging') is permissible on court order." (Berger v. New York, supra, pp 1877-1888).

Constitutional issues involving privacy of communications have been framed in terms of the 4th and 9th amendments to the U. S. Constitution.

Constitution of the United States:

Amendment IV: "Security from unreasonable searches and seizures. 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."

Amendment IX: "Rights retained by the people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

A long line of U. S. Supreme Court cases, extending from 1914 to 1967, have dealt with interception of private communications as it relates to "unreasonable searches and seizures":

Weeks v. U. S., 232 US 383, 34 S Ct 341, 58 L Ed 652 (1914), Supreme Court formulated and pronounced the federal exclusionary rule prohibiting the use in federal courts any evidence seized in violation of the Fourth Amendment.

Olmstead v. U. S., 277 US 438, 48 S Ct 564, 72 L Ed 944 (1928), First wiretap case considered by the Court. Olmstead's telephone line was tapped without entry upon his premises and was, therefore, found not to be proscribed by the Fourth Amendment. Established "physical trespass" rule.

Nardone v. U. S., 302 US 379, 58 S Ct 275, 82 L Ed 314 (1937), and 308 US 338, 60 S Ct 266, 84 L Ed 307 (1939), extended the exclusionary rule to wiretap evidence offered in federal prosecutions.

Goldman v. U. S., 316 US 129, 62 S Ct 993, 86 L Ed 1322 (1942), First "bugging" case considered by the Court. Court found that the use of a detectaphone placed against an office wall in order to hear private conversations in the office next door did not violate the Fourth Amendment because there was no physical trespass in connection with the relevant interception.

Wolf v. Colorado, 338 US 25, 69 S Ct 1359, 93 L Ed 1782 (1948), recognized the constitutional right of individual privacy, stating, "The security of one's privacy against arbitrary intrusion by the police...is...implicit in the 'concept of ordered liberty' and as such enforceable against the State through the Due Process Clause".

On Lee v. U. S., 343 US 747, 72 S Ct 967, 96 L Ed 1270 (1952), held that since "no trespass was committed" a conversation between Lee and a federal agent, occurring in the former's laundry and electronically recorded, was not condemned by the Fourth Amendment.

Mapp v. Ohio, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961), held that "the Fourth Amendment's right of privacy is enforceable against the States through the Due Process Clause of the 14th Amendment".

Silverman v. U. S., 365 US 505, 81 S Ct 679, 5 L Ed 2d 734 (1961), involved a spikey with a microphone attached that was inserted under a baseboard into a party wall until it made contact with a heating duct that ran through the entire house. The Court found "that eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners." Holding such intrusion to be in violation of the Fourth Amendment, the Court stated, "our decision does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area". (At 5212, 81 S Ct at 683).

Wong Sun v. U. S., 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963), held for the first time that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects". (At 485, 83 S Ct at 416).

Lopez v. U. S., 373 US 427, 83 S Ct 1381, 10 L Ed 462 (1963), confirmed that the Court had "in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear....It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area". (At 438-439, 83 S Ct at 1387).

Dissenting to the majority opinion, Justice Brennan articulated what was later to become the central philosophy of a majority of the Court:

"Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society....Freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office."

Berger v. State of New York, 388 U S 41, 87 S Ct 1873 (1967), held that conversation is within the Fourth Amendment's

protections and use of electronic devices to capture it is a "search" within meaning of the Amendment. "Basic purpose of Fourth Amendment is to safeguard privacy and security of individuals against arbitrary invasions by government officials".

Katz v. U. S., 389 US 347, 88 S Ct 507 (1967), held that the "trespass" doctrine enunciated by Olmstead and Goldman can no longer be regarded as controlling:

"What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected under the Fourth Amendment. The Fourth Amendment protects people, not simply areas, against unreasonable searches and seizures, and its reach cannot depend upon presence or absence of a physical intrusion into any given enclosure. Search and seizure, without prior judicial sanction and attendant safeguards, conducted by electronic surveillance by way of an electronic listening and recording device attached to outside of public telephone booth from which defendant had placed calls did not comply with constitutional standards."

The Omnibus Crime Control and Safe Streets Act of 1968, Public Law No. 90-351, Title III, Ch 119, Section 2518 (3), authorizes electronic surveillance for 30 days, with the possibility of an unlimited number of 30 day extensions, if a judge makes an ex parte determination that:

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) that there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

This legislation was based upon the following Congressional findings, published as a preamble to the Act:

"Title III--Wiretapping and Electronic Surveillance:

"Findings

"Sec. 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

"(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

"(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

"(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

"(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court.

Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused."

9 Arizona L Rev 439 (1968) comments on the state of the law following the Katz decision:

"The result in Katz could have been foreseen as the climax of the recent trend to abolish the traditional notion that a physical intrusion into a constitutionally protected area is necessary to constitute a Fourth Amendment violation. Katz defines the scope of constitutional protections against eavesdropping in terms of an individual's right to privacy, as measured by the reasonableness of his reliance on the fact that his conversation will remain confidential. The rationale adopted by the Court is sound, for regardless of the means employed to obtain evidence, the evil against which the individual should be protected is the invasion of his privacy, and with the sophisticated nature of modern electronic devices, his right to privacy will be in extreme danger if law enforcement agencies are not reasonably restricted in the employment of such devices."

ORS 141.720: Order for interception of telecommunications, radio communications or conversations.

ORS 141.730: Proceedings under expired order prohibited.

ORS 141.990 (2): Violation of ORS 141.730 punishable by \$3,000 fine and 3 years.

ORS 41.910: Evidence of communications obtained in violation of ORS 165.540 and without a court order under ORS 141.720 shall not be admissible in any state court.

ORS 165.540: Interception of communications.

ORS 165.545: Prohibitions not applicable to fire or police activities; inadmissibility of recordings.

Wiretapping, or "cutting in" without use of a mechanical device, was first raised as an issue in Oregon in DeLore v. Smith, 67 Or 304, 132 P 521 (1913):

"Since a time practically concurrent with the use of the telephone as a medium of communication, the courts have held that a conversation had over the telephone was admissible when the witness could testify he recognized

the voice of the party speaking. While the practice of eavesdropping or 'cutting in' on a telephone is most despicable, yet we cannot say as a rule of evidentiary law that the practice of this impropriety disqualifies a person who has qualified himself by testifying he recognized the voice of the speaker...."

In Elkins v. U. S., 364 US 206, 80A S Ct 1437 (1960), defendant was indicted for intercepting and divulging telecommunications in violation of 47 USC 501, 605 and 18 USC 371. He was convicted in the U. S. District Court in Oregon. In two earlier decisions the Oregon state courts had held that the evidence used in the federal prosecution had been illegally obtained and was therefore inadmissible in state court.

The United States Supreme Court held that evidence obtained by state officers during search which, if conducted by federal officers, would have violated defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.

In Re Langley, 230 Or 319, 370 P2d 228 (1962), involved a State Bar disciplinary proceedings wherein evidence of wrongdoing was based upon illegally obtained voice recordings. Dismissing the proceedings, the Court stated:

"We hold that it would not be desirable for the Bar to employ in its disciplinary operations illegal tape recordings, evidence secured unlawfully by wire-tapping, or other fruits of criminal eavesdropping.... To permit the Bar to use illegal tape recordings would be inconsistent with the public policy expressed by ORS 165.540...."

State v. Cartwright, 246 Or 120, 418 P2d 822 (1967), involved securing evidence for a search warrant by prolonged auditory surveillance of the defendant through a thin partition separating his bedroom from the adjacent apartment. No mechanical device was employed. In affirming defendant's conviction the Court commented:

"Electronic eavesdropping is a phenomenon concerning which there is widespread and justifiable public concern.... In Oregon, as in some other states, statutes have been enacted to control electronic eavesdropping...."

"Conventional eavesdropping...is not, apparently, much indulged in by the police, and it is not to be compared as a menace to the privacy, whether of law abiding persons or of criminals, with the use of modern electronic devices.... No Oregon statute prohibits conventional eavesdropping."

Professor Beany, op cit 233-234, in his discussion of the Silverman case, asks: "But is it not the intention of all electronic eavesdropping to make an 'auditory trespass'?" There is a similar suggestion in United States v. Stone, 232 F Supp 396, 399 (ND Tex 1964):

"Privacy of a protected area [in earlier times] was invaded only by an actual physical intrusion. But today electronic devices without physical presence enable an intrusion upon the air, light and sound waves of a person's property as real as any physical trespass.

"We have no occasion to inquire whether in these observations may be found a sound basis for drawing a distinction between conventional eavesdropping and electronic eavesdropping in their relationship to the application of the Fourth Amendment. It must be enough for us that on the question of Federal constitutional law before us the Supreme Court has spoken and this court is bound by its decisions. They committed no trespass, technical or otherwise, and the information they gained by listening at the wall could properly be made the basis for the issuance of a search warrant."

There was a strong dissent by Justice Sloan, which is discussed in the commentary to section 7, criminal surveillance.

The Cartwright decision is reviewed in 46 OLR 353 (1967) in an article entitled "Unreasonable Search & Seizure--Admissibility of Evidence Obtained by Eavesdropping":

"Eavesdropping as a generic term has been applied in the law to three distinct types of activity...wire-tapping of a suspect's telephone line, electronic eavesdropping or 'bugging', and conventional eavesdropping.... The fact that nontrespassory electronic eavesdropping may soon be brought within the Fourth Amendment requires attention to be focused upon an issue discussed, but not decided, in the Cartwright opinion, viz., whether there is any constitutional difference between conventional and electronic eavesdropping....Although the distinction between electronic and conventional eavesdropping is arguably too fine for constitutional differentiation it should be noted that the Oregon legislature has drawn such a distinction. OR. Rev. Stat. Secs. 165.535-165.545 (1965) prohibit electronic eavesdropping, with certain exceptions, but as noted in the Cartwright case, there is no Oregon statute prohibiting conventional eavesdropping....Unless the [U.S. Supreme Court] justices advocating prohibition of eavesdropping under the Fourth Amendment rationale abandon the distinction they seem to have drawn between electronic and conventional eavesdropping...the Cartwright decision may well outlive the electronic eavesdropping precedents upon which it is based...."

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 250.12. Violation of Privacy.

(1) Unlawful Eavesdropping or Surveillance. A person commits a misdemeanor if, except as authorized by law, he:

(a) trespasses on property with purpose to subject anyone to eavesdropping or other surveillance in a private place; or

(b) installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in such place, or uses any such unauthorized installation; or

(c) installs or uses outside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there.

"Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access.

(2) Other Breach of Privacy of Messages. A person commits a misdemeanor if, except as authorized by law, he:

(a) intercepts without the consent of the sender or receiver a message by telephone, telegraph, letter or other means of communicating privately; but this paragraph does not extend to (i) overhearing of messages through a regularly installed instrument on a telephone party line or on an extension, or (ii) interception by the telephone company or subscriber incident to enforcement of regulations limiting use of the facilities or to other normal operation and use; or

*incident* (b) divulges without the consent of the sender or receiver the existence or contents of any such message if the actor knows that the message was illegally intercepted, or if he learned of the message in the course of employment with an agency engaged in transmitting it.

Text of Illinois Criminal Code of 1961

**§ 14-2. Elements of the Offense**

A person commits eavesdropping when he:

- (a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or
- (b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device. 1961, July 28, Laws 1961, p. 1983, § 14-2.

**§ 14-4. Penalty**

Any person convicted of eavesdropping shall be fined not to exceed \$1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 14-4.

**§ 14-5. Evidence Inadmissible**

Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings. 1961, July 28, Laws 1961, p. 1983, § 14-5.

Text of New York Revised Penal Law

**§ 250.05 Eavesdropping**

A person is guilty of eavesdropping when he unlawfully engages in wiretapping or mechanical overhearing of a conversation.

Eavesdropping is a class E felony. L.1965, c. 1030, eff. Sept. 1, 1967.

OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Text of Michigan Revised Criminal Code

[Eavesdropping]

Sec. 5605. (1) A person commits the crime of eavesdropping if he intentionally uses any device to eavesdrop, whether or not he is present at the time.

(2) Eavesdropping is a Class C felony.

Text of Proposed Connecticut Penal Code

**§ 199. Eavesdropping**

A person is guilty of eavesdropping when he unlawfully engages in wiretapping or mechanical overhearing of a conversation.

Eavesdropping is a class D felony.

Section 3. Possession of an eavesdropping device. A person commits the crime of possession of an eavesdropping device if he possesses an eavesdropping device with the intent that it be unlawfully used by himself or another for eavesdropping.

COMMENTARY - POSSESSION OF AN EAVESDROPPING DEVICE

This section is analogous to "possession of burglar's tools" made an offense in Article \_\_\_\_, section 4, Burglary and criminal trespass.

The offense proscribed by this section consists of two elements: (1) Possession of an eavesdropping device with (2) Intent that it be used for unlawful eavesdropping.

There is no comparable provision in Oregon law. The concept of making criminal possession of certain instruments used in committing crimes is represented in Oregon by the following:

ORS 166.220 - Carrying dangerous weapon with intent to use it.

ORS 166.240 - Carrying concealed weapon.

ORS 166.250 - Unlawful possession of weapons.

ORS 166.510 - Possession of slugging or stabbing weapons.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

**§ 250.10 Possession of eavesdropping devices**

A person is guilty of possession of eavesdropping devices when, under circumstances evincing an intent to use or to permit the same to be used in violation of section 250.05, he possesses any instrument, device or equipment designed for, adapted to or commonly used in wiretapping or mechanical overhearing of a conversation.

Possession of eavesdropping devices is a class A misdemeanor.  
L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Michigan Revised Criminal Code

**[Criminal Possession of Eavesdropping Device]**

Sec. 5620. (1) A person commits the crime of criminal possession of an eavesdropping device if he possesses, manufactures, sends or transports any device designed or commonly used for eavesdropping; and:

- (a) Intends to use that device to eavesdrop; or
- (b) Knows that another intends to use that device to eavesdrop.

(2) Criminal possession of an eavesdropping device is a Class C felony.

Section 4. Forfeiture of eavesdropping devices. Any eavesdropping device installed or used in violation of this Article shall be forfeited to the state for disposition by the Department of State Police.

COMMENTARY - FORFEITURE OF EAVESDROPPING DEVICES

This section is designed to increase the deterrent and preventive effect of the prohibitory provisions of the Article. The court would enter the order of forfeiture upon conviction, and disposition of the device would be made by the Oregon State Police.

There is ample authority in existing Oregon law for this type of forfeiture legislation:

ORS 167.540: Seizure and destruction of slot machines.

ORS 142.080: Forfeiture of conveyances used unlawfully to conceal or transport stolen property.

ORS 453.990 (9): Forfeiture and destruction of adulterated drugs.

ORS 471.660: Seizure of conveyances transporting liquor.

ORS 471.610: Confiscation of liquor and property by Oregon Liquor Control Commission.

ORS 474.140: Forfeiture and destruction of unlawfully possessed drugs.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Forfeiture of Eavesdropping Device]

Sec. 5635. Any eavesdropping or surveillance device possessed or used in violation of this chapter is forfeited to the state, and shall by court order be turned over to the department of state police for whatever disposition its director may order.

Section 5. Divulging an eavesdropping order. A person commits the crime of divulging an eavesdropping order if, having information concerning the existence or content of a court order issued pursuant to ORS 141.720, or concerning any facts or circumstances attending an application for such an order, he discloses that information to another person without specific legal authority.

Existing Law
ORS
141.740
141.990 (2)

COMMENTARY - DIVULGING AN EAVESDROPPING ORDER

Section 6 substantially restates the provision of existing ORS 141.740, which by virtue of ORS 141.990 (2) has a penalty of 3 years or \$3,000 fine.

The section is taken from New York Revised Penal Law section 250.20, as amended 1968.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

§ 250.20 Divulging an eavesdropping order

A person is guilty of divulging an eavesdropping order when, possessing information concerning the existence or content of a court order issued pursuant to section eight hundred thirteen-a of the code of criminal procedure, or concerning any circumstance attending an application for such an order, he discloses such information to another person; except that such disclosure is not criminal or unlawful when made in a legal proceeding, or to a law enforcement officer or agency connected with the application for such order, or to a legislative committee or temporary state commission, or to the telephone or telegraph corporation whose facilities are involved.

Divulging an eavesdropping order is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

Section 6. Violating a private conversation. (1) A person commits the crime of violating a private conversation if, without the aid of an eavesdropping device, he obtains information by secretly overhearing the conversation of a person in that person's home or usual place of abode.

(2) Notwithstanding the definition of "conversation" in subsection (1) of section 1 of this Article, the term as used in this section includes any oral communication, whether or not the other party to the conversation is actually present.

COMMENTARY - VIOLATING A PRIVATE CONVERSATION

The proposed section is designed to discourage surreptitious invasions of private communications not aided by mechanical or electronic apparatus. The prohibition is limited to a person's home or usual place of abode. It is in this area that a person may justifiably expect to be protected from casual or hostile invasions of privacy.

There is no comparable provision in Oregon law. As a criminal statute, it is an advanced and progressive expression of the individual's right to privacy when within the confines of his home. It goes beyond traditional eavesdropping legislation to protect private communication from invasion by means other than mechanical devices.

The proposed section, in effect, adopts the view forwarded by Justice Sloan in State v. Cartwright, 246 Or 120, 418 P2d 822 (1967). The police in that case obtained damaging evidence by listening to private conversations taking place in Cartwright's bedroom by means of auditory surveillance through an adjoining room. In dissenting to the majority opinion, Justice Sloan states clearly his abhorrence to this type of privacy invasion:

"I cannot join in consenting to this kind of insidious police invasion of my home. If they break down my door and enter and ransack, we denounce it. But I would prefer the latter. I at least know they are there and can take means to oust them. I cannot know if they are crouching in the bushes under my window or listening through the thin wall between my apartment and the next or are tapping my telephone or using electronic eavesdropping devices a block away...."

"We know now, not just surmise, that a complete search of our life in our house can be accomplished without any form of physical intrusion....The use of physical trespass as a means to test the extent of the right to personal security from unreasonable search is obsolete and unworkable....

"I fail to see any difference in the use of a spike driven into the wall, or a sensitive microphone placed either against the wall or a block away, or the human ear pressed to the outer side of a thin wall. All should be ostracized from permissive invasion.

"It would be true that if I openly shout in my house, knowing that it can be heard from without that I could not claim the protection. But that does not mean that I must take my family or guests and 'whisper in the bathroom'. Jerome Frank's dissent in U. S. v. On Lee at 193 F2d 306, 317 (1951).

"It is also urged that to prohibit this kind of search would limit the right of the police to keep surveillance on the outside of the house. This need not be so. It is one thing to observe who comes and goes. It is quite another to surreptitiously peep and eavesdrop to the thoughts and opinions stated inside the house. That is a search for evidence, nothing more. It is this kind of exploratory search that is otherwise prohibited no matter how accomplished. We zealously guard against any other search for evidence only. See State v. Chinn, 231 Or 259, 373 P2d 392 (1962). We should exercise greater effort to protect ourselves from the much more dangerous search the majority now approves...."

It should be noted that the majority opinion in Cartwright rested upon the "physical trespass" theory which has since been abandoned by the U. S. Supreme Court in the Katz decision, wherein the Court stated:

"....The Fourth Amendment protects people, not simply areas, against unreasonable searches and seizures, and its reach cannot depend upon presence or absence of a physical intrusion into any given enclosure...."

It is submitted by your reporter that the proposed section is a logical constitutional extension of the protection guaranteed by the Fourth Amendment against unreasonable searches and seizures.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

[Criminal Surveillance]

Sec. 5610. (1) A person commits the crime of criminal surveillance if he intentionally engages in surveillance while trespassing in a private place.

(2) Criminal surveillance is a Class B misdemeanor.

Section 7. Divulging illegally obtained information. A person commits the crime of divulging illegally obtained information if he intentionally uses or divulges information he knows to have been initially obtained through a violation of section 2 or 6 of this Article.

(	
(	Existing
(	<u>Law</u>
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(	ORS
(	165.540 (1) (e)
(	

COMMENTARY - DIVULGING ILLEGALLY OBTAINED INFORMATION

Section 7 penalizes using or divulging information known to have been obtained through illegal eavesdropping or criminal surveillance.

A person who hires an eavesdropper or assists in the unlawful act would be a party to the substantive offense. All that is within the reach of this section is the taking advantage of eavesdropping information already obtained by another. Its primary utility will be to encourage the person obtaining the information "second-hand" to cooperate with the police by testifying against the eavesdropper himself.

The section, as it relates to eavesdropping, is a restatement of ORS 165.540 (1) (e) which prohibits the use or divulgence to others of any conversation, telecommunication or radio communication obtained by means prohibited by law.

TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code

**[Divulging Illegally-Obtained Information]**

Sec. 5625. (1) A person commits the crime of divulging illegally-obtained information if he knowingly or recklessly uses or divulges information obtained through eavesdropping or surveillance.

(2) Divulging illegally-obtained information is a Class B misdemeanor.

Section 8. Defenses. It is a defense to a prosecution under this Article that:

(1) The person charged was a peace officer performing official duties in compliance with ORS 141.720; or

(2) The person charged was an employe of a communication common carrier who overheard a communication transmitted through the facilities of his employer while acting in the ordinary course of his employment; or

(3) The communication intercepted or recorded consisted of a radio or television broadcast transmitted for the use of the general public, or was an emergency communication made in the normal course of operations by, or to, a federal, state or local public agency dealing in emergency services.

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(	Existing
(	<u>Law</u>
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(	See Section 2
(	ORS 165.540 (2)
(	(a) and (4)
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COMMENTARY - DEFENSES

Section 8 provides certain exemptions from criminal liability framed in terms of a defense.

Subsection (1) exempts a police officer acting in the lawful performance of his duties. The lawful performance of his duties in the area of eavesdropping means that the officer is acting under a judicially approved order for interception of communications granted in conformity with ORS 141.720.

Subsection (2) exempts the monitoring activities of telephone, telegraph and radio company employees.

Subsection (3) exempts communications transmitted for consumption by the general public and those made in connection with emergency radio calls.

These exemptions are essentially a restatement of existing law embodied in ORS 165.540, subsections (2) and (4). Subsection (3) of that statute exempts subscribers and members of their family who perform the acts prohibited in their homes. This exemption has not been retained. Subsection (5) of ORS 165.540 exempts law enforcement officers engaged in the investigation of crimes involving drugs and narcotics. Insofar as the constitutional issue of unreasonable search and seizure affects the validity of evidence obtained by eavesdropping without court approval, there would appear to be no rational basis for distinguishing this type of police activity from other criminal investigations. Subsection (5) applies only to "bugging" by a police officer or someone under his direct supervision, as applied to conversations in which the officer is himself involved.

These defenses are not categorized as affirmative defenses. The defendant would have the burden of coming forward with the evidence negating criminal liability if he wished to avail himself of the defense, but the burden of proof would remain upon the state.

TEXT OF REVISIONS OF OTHER STATES

Text of Illinois Criminal Code of 1961

**§ 14-3. Exemptions**

The following activities shall be exempt from the provisions of this Article:

(a) Listening to radio, wireless and television communications of any sort where the same are publicly made;

(b) Hearing conversation when heard by employees of any common carrier by wire incidental to the normal course of their employment in the operation, maintenance or repair of the equipment of such common carrier by wire so long as no information obtained thereby is used or divulged by the hearer;

(c) Any broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made;

(d) Recording or listening with the aid of any device to any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency or institutions dealing in emergency services, including, but not limited to, hospitals, clinics, ambulance services, fire fighting agencies, any public utility emergency repair facility, civilian defense establishment or military installation. 1961, July 28, Laws 1961, p. 1983, § 14-3.

Text of Michigan Revised Criminal Code

[Defenses]

Sec. 5630. (1) A person does not commit a crime under this chapter if:

(a) He is, or acts at the request of or in cooperation with a peace officer engaged in the lawful performance of his duties; or

(b) He is an employee of a communications common carrier who while acting in the course of his employment hears a communication transmitted through the facilities of his employer.

(2) The burden of injecting the issue under subsection (1) is on the defendant, but this does not shift the burden of proof.

Section 9. Tampering with private communications. A person commits the crime of tampering with private communications if, knowing that he does not have the consent of the sender or receiver, he:

<u>Existing Law</u>	
	ORS
	165.505
	165.510
	165.515
	165.520
	758.060
	758.990 (2)

(1) Intentionally opens or reads a sealed private communication; or

(2) Obtains in any manner from an employe or officer of a telephone or telegraph company information regarding the contents or nature of a telephonic or telegraphic communication; or

(3) Knowingly divulges to another person the contents or nature of a telephonic or telegraphic communication, while an employe or officer of a telephone or telegraph company.

COMMENTARY - TAMPERING WITH PRIVATE COMMUNICATIONS

A. Summary

Section 9 substantially restates Oregon law evidenced by a number of related provisions.

Subsection (1) prohibits the unauthorized opening or reading of a sealed private letter or other communication. Interference with mail moving in federal commerce is controlled by federal law.

Subsections (2) and (3) prohibit the obtaining or divulging of telephonic or telegraphic communications.

B. Derivation

The section is taken from New York Revised Penal Law section 250.25.

C. Relationship to Existing Law

ORS:

165.505: Opening or procuring telegraphic message addressed to another

165.510: Learning contents of telegraphic message sent to another

165.515: Bribery of telegraph company agents to disclose contents of message

165.520: Opening, reading or publishing letter; federal jurisdiction

758.060: Wrongful disclosure or alteration of telegraphic message

758.990 (2): Violation of ORS 758.060 punishable by \$1,000 fine and 1 year imprisonment

There is no relevant Oregon case law involving these statutes.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

**§ 250.25 Tampering with private communications**

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or
2. Knowing that a sealed letter or other sealed private communication has been opened or read in violation of subdivision one of this section, he divulges without the consent of the sender or receiver, the contents of such letter or communication, in whole or in part, or a resume of any portion of the contents thereof; or
3. Knowing that he does not have the consent of the sender or receiver, he obtains or attempts to obtain from an employee, officer or representative of a telephone or telegraph corporation, by connivance, deception, intimidation or in any other manner, information with respect to the contents or nature thereof of a telephonic or telegraphic communication; except that the provisions of this subdivision do not apply to a law enforcement officer who obtains information from a telephone or telegraph corporation pursuant to section 250.35; or
4. Knowing that he does not have the consent of the sender or receiver, and being an employee, officer or representative of a telephone or telegraph corporation, he knowingly divulges to another person the contents or nature thereof of a telephonic or telegraphic communication; except that the provisions of this subdivision do not apply to such person when he acts pursuant to section 250.35.

Tampering with private communications is a class B misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

Text of Proposed Connecticut Penal Code

**§ 198. Tampering with private communications**

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the consent of the sender or receiver, he obtains from an employee, officer or representative of a telephone or telegraph corporation, by connivance, deception, intimidation or in any other manner, information with respect to the contents or nature of a telephonic or telegraphic communication; or

2. Knowing that he does not have the consent of the sender or receiver, and being an employee, officer or representative of a telephone or telegraph corporation, he knowingly divulges to another person the contents or nature of a telephonic or telegraphic communication.

Tampering with private communications is a class A misdemeanor.

Section 10. Civil liability for offenses against privacy of communication. Any person violating section 2, 5, 6, 7 or 9 of this Article shall be liable in treble damages to any party injured by reason of such wrongful act, and for any punitive damages which may be awarded by the court or by a jury.

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(	Existing
(	Law
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(	ORS
(	30.780
(	165.505
(	165.510
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COMMENTARY - CIVIL LIABILITY FOR OFFENSES AGAINST  
PRIVACY OF COMMUNICATION

A. Summary

Section 10 authorizes treble damages for injury caused by unlawful eavesdropping or criminal surveillance. Punitive damages are also authorized in the discretion of the court or jury. Traditional tort liability would govern the burden of proof.

B. Derivation

The section is derived from existing Oregon law.

C. Relationship to Existing Law

ORS 30.780 establishes civil liability for damages caused by illegal interception of communications.

ORS 165.505 authorizes treble damages for opening or procuring telegraphic messages addressed to another.

ORS 165.510 establishes civil liability for learning contents of telegraphic message sent to another.

The expanding reach of civil liability for unlawful eavesdropping is discussed in Westin, Privacy & Freedom, (1967) p. 360:

"The search for new public-law controls over misuse of surveillance devices has been matched by new vitality in the private-law field. Between 1958 and 1964, decisions in three cases upheld

common law recovery for wiretap or microphone invasions of privacy, the cases being spread geographically from West Virginia to Ohio and New Hampshire. [Roach v. Harper, 143 W Va 869, 105 SE2d 564 (1958); LeCrone v. Ohio Bell Telephone Company, 120 Ohio App 129, 201 NE2d 533 (1963); Hamberger v. Eastman, 206 A2d (N H) 239 (1964).]

"If the peeping Tom, the big ear and the electronic eavesdropper (whether ingenious or ingenuous) have a place in the hierarchy of social values, it ought not to be at the expense of a married couple minding their own business in the seclusion of their bedroom who have never asked for or by their conduct deserved a potential projection of their private conversations and actions to their landlord or to others.' (Quoting the Hamberger case).

"A final point to observe in charting new developments in the private-law area is that many of the state statutes passed recently to control electronic eavesdropping provide a private right of action against violators of the prohibition. In Pennsylvania a person whose telephone conversations are tapped is given a right to sue for 'treble damages' the wiretapper and anyone who uses the recordings....Illinois provides an even broader right of private action against any electronic eavesdropper, his employer or supervisor, or any landlord or building-operator who assists in the eavesdropper enterprise..."

The real value in a treble damage provision is in its strong deterrent effect, particularly in connection with eavesdropping in the private sector. It should serve to encourage greater reliance on judicially approved eavesdropping orders.

TEXT OF REVISIONS OF OTHER STATES

Text of Illinois Criminal Code of 1961

**§ 14-6. Civil Remedies to Injured Parties**

Any or all parties to any conversation upon which eavesdropping is practiced contrary to this Article shall be entitled to the following remedies:

(a) To an injunction by any court of competent jurisdiction prohibiting further eavesdropping by the eavesdropper and by or on behalf of his principal, or either;

(b) To all actual damages against the eavesdropper or his principal or both;

(c) To any punitive damages which may be awarded by the court or by a jury;

(d) To all actual damages against any landlord, owner or building operator, or any common carrier by wire who aids, abets, or knowingly permits the eavesdropping concerned;

(e) To any punitive damages which may be awarded by the court or by a jury against any landlord, owner or building operator, or common carrier by wire who aids, abets, or knowingly permits the eavesdropping concerned. 1961, July 28, Laws 1961, p. 1983, § 14-6.