CHAPTER I

SURVEILLANCE AND THE LABOR ARBITRATION PROCESS

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Explosive advances in the technology of surveillance in the 1960s produced strong reaction against its moral and legal propriety. The courts, Congress, and state legislators suddenly increased their concern with rights of privacy.

What is so bad about this surveillance to which there has been such a reaction? Parents watch their children; teachers watch students; supervisors watch employees; policemen watch the streets and other public places; and government agencies watch the citizens' performance of various legal obligations and prohibitions.

Why should employees who have not committed a dischargeable offense worry whether their conversations might be overheard by a supervisor tapped in on the company telephone booth or listening to a broadcast from the locker room over an invisible, miniature microphone, commonly known as a "bug"? Why should truthful persons resist verifying their testimony through polygraph examination? Shouldn't anyone who appreciates the need for effective personnel placement accept personality testing?

In all these instances, some people point to the fact that, beyond the benefits of the surveillance to the organization, the individual himself can now prove his innocence, virtue, or talents by "science" and avoid the unjust assumptions frequently produced by "fallible" conventional methods. Why, then, the reaction against surveillance? Why this need for privacy?

Alan F. Westin, in his book *Privacy and Freedom*,[1] breaks down surveillance into three separate categories—surveillance

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[1] New York: Atheneum, 1967.

by observation, surveillance by extraction, and surveillance by reproduction—and tells us what the fuss is about in respect to each type separately.

With respect to the need to be free from surveillance by observation, Westin says:

> "Writings by leading social scientists have made it clear that observation by listening or watching which is known to the subject necessarily exercises a restrictive influence over him. In fact, in most situations this is exactly why the observational surveillance is set up—to enforce the rules. When a person knows his conduct is visible, he must either bring his actions within the accepted social norms in the particular situation involved or decide to violate those norms and accept the risk of reprisal. Sociological writing has stressed that there are degrees of observation in various types of groups (work forces, government agencies, and the like) which will prevent the particular group's members from performing effectively. Robert Merton has explained this phenomenon as follows:
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> " 'Few groups, it appears, so fully absorb the loyalties of members that they will readily accept unrestricted observability of their role-performance. . . . Resistance to full visibility of one's behavior appears . . . to result from structural properties of group life. *Some* measure of leeway in conforming to role-expectations is presupposed in all groups. To have to meet the strict requirements of a role at all times, without some degree of deviation, is to experience insufficient allowances for individual differences in capacity and training and for situational exigencies which make strict conformity extremely difficult.'
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> "Even though the authorities may accept evasion of the rules, the experience will be 'psychologically taxing' on both the observed person and the authorities, since the latter must decide whether or not to act against the noncomplying person and must measure the effects of not acting on the group perception of authority."[2]

The second category, surveillance by extraction, includes, for example, polygraph testing or personality testing—what Westin calls entries "into a person's psychological privacy by requiring him to reveal by speech or act those parts of his memory and personality that he regards as private." This type of surveillance is said to threaten individual "autonomy, that is, the right of an individual to govern his own life and to avoid being manipulated or dominated wholly by others."

Attempts by outsiders to extract from the mind of an individual his innermost secrets by means of his physical reac-

[2] *Id.* at 58.

tions to questions, or his answers to seemingly unrelated questions, are thought to be a sneaky way of giving the extracting person power that he ought not have to manipulate the person from whom the secret is obtained.

The third type of surveillance is what Westin refers to in his book as "reproductibility of communications." Through the new recording devices, it is now simple to obtain permanent sound records of subjects without their knowledge. This may be done by the person with whom the subject is talking, or by a third party.

The special character of this surveillance is that it gives the person who conducted the surveillance the power to reproduce, at will, the subject's speech or acts. When a person writes a letter or files a report, he knows that he is communicating a record and that there is a risk of circulation; thus he exercises care and usually tries to say what he really means. But in a speech that is overheard and recorded, all the offhand comments, sarcastic remarks, indiscretions, partial observations, agreements with statements to draw out a partner in conversation or to avoid argument, and many similar aspects of informal private intercourse are capable of being "turned on" by another for his own purposes. The right of individuals and organizations to decide when, to whom, and in what way they will "go public" has been taken away from them.

The above comments represent in general the areas of concern that have been expressed about the three categories of surveillance. Problems involving all three have arisen, or are certain to arise in the future, in the labor arbitration process. Most of the problems that have appeared to date relate to surveillance by extraction, specifically polygraph testing and personality testing.

As most of you are aware, the polygraph has been used widely by industry as a means of catching employee pilferers and as a means of testing employees for promotion. When pilfering occurs, all employees who may have had access to the stolen items are called in and asked "on the machine" about their guilt. When a promotional vacancy occurs, the potential "promotees" are called in, strapped to the machine, and

often asked highly personal questions dealing with attitudes toward the firm, the particular job, the sociopolitical attitudes, business life in general, and so forth. By 1965, as a result of this sort of thing, six states had totally forbidden employers to require or subject any employee to any lie detector test as a condition of employment or continued employment.

As is quite often the case, the legislatures were behind the arbitrators. Unless there is some specific provision in the contract to the contrary, arbitrators have almost universally held that an employer may not insist that the employee take a polygraph test and that polygraph tests cannot be used as "probative evidence" justifying discharge.[3] I myself have also rejected out of hand what I call "polygraph-stunting"; that is, an attempt by a witness in conflict with another to gain additional credence because he is willing to submit to a polygraph test when his opposite number is not.

Questions relating to psychological tests ordinarily come up in a different arbitration context than issues of polygraph testing. All arbitration decisions on psychological testing between 1947 and 1966 that could be found in BNA's *Labor Arbitration Reports* by George Hagland and Duane Thompson were compiled in a pamphlet they called *Psychological Testing and Industrial Relations.*[4]

The propriety of psychological tests ordinarily comes up in promotion cases, where the company has promoted someone with a better score on a psychological test than the senior man. Between 1947 and 1966, according to Hagland and Thompson, the company won 71 percent and the union 29 percent of the psychological-testing cases in that case group.[5]

This apparent acceptance by arbitrators of the prying and snooping inherent in personality tests collides head-on with another universally accepted line of arbitration cases. Almost from the start of the arbitration process, arbitrators in discharge cases have followed the rule that what an employee does away from the job is his private business and that the

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[3] *Id.* at 216-217.
[4] Hagland and Thompson, *Psychological Testing and Industrial Relations* (Iowa City: Center for Labor and Management, University of Iowa, Nov. 1969).
[5] *Id.* at 20.

employer has no right to intrude unless off-work conduct materially relates to the job. The big beef about validity of personality testing is that it permits the employer to intrude into nonwork areas of life which have never and may never even reach the action stage.[6]

The Hagland and Thompson study strongly implied that the miserable showing of the unions in these psychological-testing grievances resulted from the union's failure effectively to attack test validity and reliability:

> "Test validity and reliability were challenged in few instances, and unions had a difficult time convincing arbitrators that tests did not predict work or performance on specific jobs, or that test scores did not reliably indicate worker test performance. Companies were usually able to convince arbitrators that tests were valid on the basis of direct, unsupported testimony. Performance criteria used by employers to select employees were very often vague and poorly related to the test being used. Unions seldom took issue with management on this point. Both employers and unions must concern themselves with educating arbitrators in the complexities of psychological testing if they desire an intelligently conceived, well reasoned resolution of a dispute."[7]

The validity and reliability of these psychological tests, though seldom questioned in arbitration proceedings, have been challenged by liberals and conservatives alike. In 1963, Senator Barry Goldwater succeeded in persuading the Senate Labor and Public Welfare Committee to adopt an amendment to the National Defense Education Act (NDEA) stating that no personality testing could be undertaken on the testing, guidance, and counseling programs financed for seventh- and eighth-grade students. The amendment was passed by the Senate with the wording:

> "(N) No such program shall provide for the conduct of any test, or the asking of any question in connection therewith, which is designed to elicit information dealing with the personality, environment, home life, parental or family relationships, economic status, or sociological and psychological problems of the pupil tested."

Senator Goldwater's objections went to the validity of psychological testing, his idea being that the testing improperly invaded strictly private matters.

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[6] See, for example, cases collected at Para. No. 118.634, The Bureau of National Affairs, Inc., *Labor Arbitration Cumulative Digest and Index.*

[7] Hagland and Thompson, *supra,* note 4, at 29-30.

The reliability of psychological tests has also been frequently attacked. Dr. Karl U. Smith, professor of industrial psychology at the University of Wisconsin, stated:

"(a) Psychological testing has no critical relations with experimental psychology or any other branch of experimental science and reflects none of the recent advances in scientific understanding of the mechanisms of behavior;

"(b) Testing is based largely on estimating deviations from social norms and has no significant means within itself of dealing with the individual;

"(c) There are no objective scientific principles to guide test construction;

"(d) The criterion groups of population samples against which tests were originally validated by no means represent the population as a whole; that is to say, representative samples have never been used in this field;

"(e) Test research in schools and industry is rarely objective and unbiased, and test validation programs have rarely been free of the influence of on-going personnel and administrative operations.[8]

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"The basic objection on privacy grounds to the typical personality tests used in personnel selection today—with its questions on such topics as sex and political values—is that many individuals do not want to be sorted and judged according to standards that rest on the unexplained evaluations of professional psychologists in the employ of 'institutional' clients. Liberals fear that a government or industrial psychologist will enforce conformist and elitist norms. Conservatives fear that school or government testing might not only 'reward' liberal ideology and penalize conservative ideas, but also 'implant' ideas through the testing process itself. Negroes are concerned that psychologists might enforce standards of personality that penalize minority groups and that the personality test might enable the 'white power structure' to accomplish covertly discrimination it can no longer carry out openly. . . . In addition, the basic aim of test psychology is admittedly to search for norms of conduct and to use these for judgment in 'trait' and 'prediction' matters. The intellectuals who lead the anti-personality-testing campaigns know how far they themselves are from any type of 'bland' normality, how many conflicts and personal disturbances lie behind their social masks, and yet how useful they are in their area of work, whether it is business, law, government, teaching, or the ministry. Many intellectuals are aware of the test psychologist's answer that he does not advise the selection of 'normals' only, that the test can reward imag-

[8] Quoted in Westin, *supra*, note 1, at 265-266.

ination, initiative, and other traits. But, knowing how fundamentally emotional tension and creativity are linked in the individual, intellectuals are not willing to submit themselves or the majority of their fellow citizens to the judgment of psychologists on that point.

"One of the basic functions of privacy is to protect the individual's need to choose those to whom he will bare the true secrets of his soul and his personality. . . . Finally, from the literature of psychology and psychiatry, as well as from personal experience, critics of personality testing know that many individuals go through life with personal problems and conflicts that they keep under control. These 'managed' conflicts may involve sex, struggles over self-image, careers, and similar matters. Most of these people can grow old without having these conflicts become serious enough to impair their capacities at work, in the family, or as citizens. If these capacities are impaired, of course, the individual needs help; he may seek it himself, or it may be offered to him when his difficulties become observable.

"The problem presented by the spread of personality testing is that it may, by the pressures of testing and of rejection in selection, bring to the surface personality conflicts that might otherwise never have become critical in the individual's life, and may thus precipitate emotional crises. It can be argued that it is healthy to bring such problems to the surface and to lead the disturbed individual to professional help. Perhaps we are moving toward an age of preventive mental health by personality testing, when individuals will get their emotional 'check-up' just as they have their bodies, eyes, and teeth checked. Before we accept this trend in American life, however, we had better be more certain than we are now that we can cure the wounds opened by such a process, or that awareness is a good thing even though a cure is not always possible. Until then, resistance to such extraction will be invoked as a way of saying, 'I want to go on managing my problems myself; and what might force me to a self-confrontation that I do not want, invades my privacy in the deepest way.' " [9]

After reviewing everything available on the subject, Westin reaches a different conclusion than that of most arbitrators, as reported by Hagland and Thompson:

"Much of life as well as law depends on deciding who has the burden of proof in any situation in which action is to be taken. In deciding whether there are alternative methods less violative of individual and organizational privacy than proposed surveillance devices and processes, the burden of proof that other techniques are not available should be on those seeking authorization. . . . The same approach to alternative methods should apply in such matters as personality testing. Record analysis, interviews that stay within

[9] *Id.* at 60-62.

decent boundaries of privacy, aptitude and achievement tests (including simulation tests), and on-the-job trial testing seem to provide completely adequate available alternatives to the use of personality tests. There has never been evidence secured under scientific control procedures, in either industry or government, to show that employees selected by personality measures are more successful than those selected without such tests. Nor has there been the slightest proof that employees selected by organizations which do not use personality testing are less effective, successful, or well-adjusted, than those from companies which have bought the fad of personality testing. The survey that I conducted in 1965 of 208 industrial firms showed that 53.6 percent were not using personality tests (indicating, happily, a trend away from such use, compared to the 1950s). Among the companies operating without such tests are American Motors, Bristol-Myers, duPont, Florida Power & Light, A & P, Gulf Oil, Litton Industries, Metropolitan Life Insurance, Northern Pacific Railroad, Pabst Brewing, and RCA, none of which—or the thousands of companies like them—seem to be centers for emotionally disturbed employees or executives. . . . As already indicated, no body of data proves that personality tests of any kind, objective or projective, can predict the future performance of individuals in an employment situation in percentages significantly greater than other existing selection methods. Given the fact that the questions used in such tests intrude into otherwise protected areas of personal life and private beliefs, and that preserving an attitude of non-confession toward authorities is a high social goal in American society, privacy-invading type of personality tests fails to meet minimum reliability requirements." [10]

So much for psychological testing, until the critics come on.

The next area is physical surveillance. Although I am certain that none of you people from industry or labor in the audience would be guilty of intercepting phone communications or oral communications with sophisticated electronic devices, it has been reported:

"The installation of listening or watching devices by businesses to survey their own executives and employees is another rapidly spreading use of surveillance in the business community. In a recent attempt to measure the extent of this type of eavesdropping, a survey of security officers was conducted in 1965 by an editor of the law enforcement journal *Law and Order*. The survey drew responses from 87 industrial, business-office, retail store and laboratory organizations, whose work forces range from 200 to 3,400 employees. The results established that 23 firms—26.4 percent of the sample—engaged in eavesdropping. Industrial firms which used eavesdrop-

[10] *Id.* at 371-373.

ping said that they placed miniature transmitter devices in conference rooms, hid microphones in rest rooms and lounge areas, and monitored inside 'selected groups' of telephone extensions. Nine out of the 14 retail stores surveyed said they 'had employed hidden microphones in washrooms and dressing rooms.' Three of the 11 laboratory groups indicated that they used telephone monitoring, hidden microphones and other devices.

"The main purposes for which these companies used wire tap surveillance devices were to check on nonbusiness use of company telephones, 'gather information as to what opinions of the company the employees might be passing on to outsiders,' and 'discover if any employees were passing on trade secrets to competitors.'

"Hidden microphones were principally used 'to collect data on the number of people loitering in washrooms during working hours; to gather information about the opinions employees had about supervision and management; to listen in on the way stockroom personnel handled material orders; to find out how sales people talked to customers and customer reaction. . . .'

"The security-company officers interviewed for the surveys said that 'upper management' requested the eavesdropping in the 'majority of cases.' . . . Regular monitoring of company switchboards and of the public pay phones located on company property has been growing as a theft-control system. In 1964, in response to a request from the California Public Utilities Commission, Pacific Telephone & Telegraph Company reported that 15 Santa Clara firms purchased devices to monitor employee calls. The telephone company estimated that it supplies such monitoring equipment to perhaps 1,000 subscribers and reported that any subscriber could request such equipment for use on his own phone. Telephone companies themselves have used microphones hidden in dummy desk calendars to monitor telephone-company employees in their relations with customers who come in to telephone company offices."[11]

Management, however, apparently has no monopoly on eavesdropping with the new electronic devices. Westin reports that "many other instances of eavesdropping by unions on management and within union ranks during internal disputes have been cited. . . . In fact, leading private electronic eavesdroppers, in describing their professional activities to legislative committees and the press, list 'union jobs' or 'labor union clients' as a standard type of work."[12]

What relevance has all of this to the arbitration process?

[11] *Id.* at 106-107.
[12] *Id.* at 109.

Questions concerning the propriety of electronic surveillance evidence or evidence derived therefrom have rarely arisen in the past. This could be for one of several reasons: (1) The possessor of such evidence might not have wanted to reveal it for fear of embarrassment. (2) Advocates presenting arbitration cases recognize that the arbitration process is analogous to civil rather than criminal legal procedure, and therefore there would be little chance of keeping such evidence out, even if it had been illegally obtained. (3) It may just have been assumed by lay advocates that such evidence could not be excluded. And, when arbitrators have considered the admissibility of evidence secretly gathered by electronic devices, the results have followed no pattern.[13]

There have been some startling developments, however, in recent years in respect to electronic evidence secretly gathered. The developments culminated in *Katz* v. *United States*.[14]

For many years prior to *Katz*, the Supreme Court of the United States had followed the rule that electronic surveillance by government agents without any trespass on a particular geographical area and without the seizure of any material object, was not subject to the Fourth Amendment to the Constitution of the United States, commonly known as the "Search and Seizure" provision. But in *Katz*, the Supreme Court reversed itself and held that evidence gathered by sticking a microphone on the outside of a public telephone booth from which an alleged bookmaker conducted his "business," came within the Fourth Amendment's provisions.

Although the *Katz* case had immediate relevance only to prosecutions by the state or Federal Government in which either one attempted to use electronic surveillance evidence, *Katz* contributed directly to a federal statute and to state statutes which very definitely affect the admissibility of secret electronic evidence in all court civil proceedings and in all probability in all arbitration proceedings.

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[13] See, for example. *Needham Packing Co., Inc.,* 44 LA 1057 (1965), in which the arbitrator refused to consider telephone recordings secretly made in corroboration of the testimony of a witness; and *Sun Drug Co., Inc.*. 31 LA 191 (1958), in which the arbitrator received a secret tape recording offered in support of a discharge.

[14] 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (Dec. 18, 1967).

Congress, reacting in part to *Katz,* included in the Omnibus Crime Bill passed June 19, 1968, a chapter on "Wire Interception and Interception of Oral Communications." [15] State legislatures, anxious to get certain monies which would follow in the event they passed state statutes similar to the federal statute, quickly followed with wire tapping and electronic surveillance statutes of their own.[16]

In general, the federal statute and the state statutes which followed make it illegal willfully to intercept or disclose any wire or oral communication without a court order. The statute provides punishment up to $10,000 and five years for violation. Title 18, Section 2520 also provides:

> "Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter, shall
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> "(1) have a civil cause of action against any person who intercepts, discloses, or uses or procures any other person to intercept, disclose or use such communication, and
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> "(2) be entitled to recover from any such person--
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> "(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1000, whichever is higher;
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> "(b) punitive damages; and
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> "(c) a reasonable attorney's fee and other litigation costs reasonably incurred."

But, most importantly for the arbitration process, the federal statute in Title 18, Section 2515 and, for example, the Florida statute in Section 6, provide:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority, of the United States, a state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter."

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[15] Title 18, U.S.C. §§ 2510-2520.

[16] See, for example, Ch.69-17, Laws 1969, 1st Regular Sess., Fla. Sess. Law Service.

The above provision radically changes the ordinary rule of admissibility of this type of evidence in civil cases.

> "The general rule at common law that the fact that evidence was illegally or improperly obtained did not affect its admissibility, had been applied in many cases in holding admissible evidence obtained by violation of the constitutionally protected right against unreasonable search and seizure, prior to the decision in *Mapp* v. *Ohio* (1961), 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, 84 A.L.R. 2d 1933; *rehearing denied,* 368 U.S. 871, 7 L.Ed. 2d 72, 82 S.Ct. 23, which held that the inhibition against the use of such evidence, implicit in the Fourth Amendment of the United States Constitution, was made applicable to criminal prosecutions in the state courts by the Fourteenth Amendment.
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> "The *Mapp* case leaves open the question whether evidence obtained by violation of the right against wrongful search and seizure might also be applied to exclude evidence proper in a civil case. Several cases decided both before and after the *Mapp* decision have held that such evidence was admissible, at least where it was not obtained by the action of governmental agents."[17]

Title 18, Section 2515 definitely represents a significant departure from the law concerning admissibility of illegal wiretap or "bugging" evidence in civil cases. The statute clearly applies to any arbitration concerning public employees. Although there is probably no legal obligation on arbitrators to follow the statute in arbitrations involving employees of private companies, arbitrators in such cases will probably be strongly tempted to do so.

Congress found in connection with passing this statute that

> ". . . (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 or competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communication 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."[18]

Congress also found

> ". . . (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,

[17] 5 A.L.R.3d 670.
[18] § 801 of Public Law 90-351.

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 into evidence in courts and in administrative proceedings."

It seems to me that any arbitrator who permitted the use of electronic surveillance evidence obtained in violation of this statute would certainly be running against the public policy of the United States and of those states such as Florida that have adopted their laws following the federal statute. It is a radical enough departure that the statute forbids illegally obtained electronic surveillance evidence to be used in civil cases, but this was a development that was to be expected—and soon.

Title 18, Section 2515 goes further and makes what has become known as the "fruit of the poisonous tree" doctrine applicable where a party has employed electronic devices in violation of the provisions of the new federal statute. Under the "fruit of the poisonous tree" doctrine, every piece of evidence derived from an illegally intercepted wire or oral communication becomes inadmissible at trial.[19] Title 18, Section 2515 states that "No part of the contents of such communication and no evidence derived therefrom may be received in evidence. . . ."

In all probability, then, the "fruit of the poisonous tree" cases will be prime precedents in all cases where wire or oral communications have been intercepted in violation of the statute. This "fruit of the poisonous tree" doctrine would make inadmissible any written statements obtained after playing a recording of an illegally intercepted wire or oral communication and would reach any evidence which was obtained from leads traceable to an illegally intercepted wire or oral communication.

Thus, in the future, it may become necessary, when one or the other party to an arbitration alleges that certain evi-

[19] See, for example, *Fahy* v. *State of Connecticut*, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963); *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Silverthorne Lbr. Co.* v. *United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).

dence expected to be offered by the other side is traceable to an illegally intercepted wire or oral communication, to conduct preliminary examination on that question.

One provision of the new act which is certain to present problems is Title 18, Section 2511 (d), which reads as follows:

> "(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication *where such person is a party to the communication, or where one of the parties to the communication has given prior consent to such interception,* unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitutional law of the United States or of any state, or for the purpose of committing any other injurious act." [Emphasis added.]

This provision, of course, offers no consolation to strangers to any wire or oral communication, but it does make defensible in some circumstances recording by one of the parties to the communication or someone whom one of the parties has authorized to record the communication.

Even in such circumstances, however, the interceptor of the communication would assume a substantial risk. For who knows when the interceptor intercepts a communication "for the purpose of committing any . . . tortious act . . . or for the purpose of committing any other injurious act"? Does a supervisor intercept "for the purpose of committing any other injurious act" when he intercepts for the purpose of obtaining evidence which will serve as the basis for the discharge of an employee?

Interfering with the right of privacy is a common law tort. Does a management which listens in on a conversation broadcast from a locker room over a secretly planted "bug," when one employee in the locker room has given consent, violate the law? Don't the employees have a right to expect that their conversations in the locker room are "not on the record"?

Time only can answer these and other questions about the new statute.