

# Constitutional Law: The Validity of Eavesdropping Under the Fourth Amendment

Jeffrey R. Fuller

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### Repository Citation

Jeffrey R. Fuller, *Constitutional Law: The Validity of Eavesdropping Under the Fourth Amendment*, 51 Marq. L. Rev. 96 (1967).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol51/iss1/6>

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not include consequences resulting from associated peaceful picketing or other union activity."<sup>53</sup> The court stated that this rule only applies when peaceful and violent conduct are separable,<sup>54</sup> but, in view of this decision and the narrow majority in the *Linn* decision (5-4), the new *Linn* rule may be precariously perched, especially since the *Linn* majority saw fit to comment that if it should become necessary to "prevent impairment of the policy" needed for national labor regulation "the Court [would] be free to reconsider today's holding."<sup>55</sup>

WILLIAM J. DUNAJ

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**Constitutional Law: The Validity of Eavesdropping Under the Fourth Amendment:** In *Berger v. State of New York*,<sup>1</sup> the petitioner was charged with and convicted of conspiracy to bribe the chairman of the New York Liquor Authority. The state's case against Berger was based upon information and leads obtained by means of eavesdropping devices surreptitiously concealed in the offices of two co-conspirators.<sup>2</sup> The eavesdropping<sup>3</sup> was authorized by ex parte court orders issued pursuant to section 813-a of the New York Code of Criminal Procedures.<sup>4</sup> The petitioner, in his defense, alleged that section 813-a is unconstitutional in that it (1) permits trespassory intrusions into Constitutionally

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<sup>53</sup> *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966).

<sup>54</sup> *Id.* at 730.

<sup>55</sup> *Linn v. United Plant Guard Workers*, 383 U.S. 53, 67 (1966).

<sup>1</sup> *Berger v. State of New York*, 87 S. Ct. 1873 (1967).

<sup>2</sup> *Id.* at 1876.

<sup>3</sup> The term eavesdropping used in this article shall refer to electronic "bugging" as distinguished from wiretapping.

<sup>4</sup> N.Y. Code Crim. Proc. 813-a. Ex parte order for eavesdropping: "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958."

protected areas, (2) authorizes searches for mere evidence, and (3) invades the individual's privilege against self-incrimination.<sup>5</sup>

New York's court of last resort, the Court of Appeals, upheld the validity of section 813-a.<sup>6</sup> By affirming, the New York court appears to have considered the ex parte court order issued under section 813-a as equivalent to a search warrant as required for a search and seizure under the Fourth Amendment and thus justified the physical intrusion into the private offices by means of a trespassory eavesdrop.

The United States Supreme Court in a majority opinion by Mr. Justice Clark held that section 813-a was "too broad in its sweep, resulting in a trespassory invasion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments."<sup>7</sup> In its rejection of section 813-a, without qualifying such as only pertaining to trespassory eavesdrops, the Supreme Court seemingly evidenced an intent to include *all* electronic eavesdropping, whether trespassory or not, within the protection of the Fourth Amendment against unreasonable search and seizure. The inclusion of all eavesdropping under Fourth Amendment protection is directly contrary to the long recognized "physical invasion" rule of *Olmstead v. United States*.<sup>8</sup> Under this rule an eavesdropping did not have to meet the fourth amendment requirements for a valid search and seizure unless it resulted in an "unlawful invasion" of the physical premises.<sup>9</sup> The *Olmstead* case dealt with wiretapping and its "physical invasion"<sup>10</sup> rule was not applied in the field of "bugging" until 1942 in the case of *Goldman v. United States*.<sup>11</sup> In *Goldman* the Supreme Court stated it would adhere to the *Olmstead* decision.<sup>12</sup> Since there has not been extensive legislation passed in the area of eavesdropping as compared to wiretapping on both the federal<sup>13</sup> and state levels,<sup>14</sup> the "physical invasion" rule has been

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<sup>5</sup> The petitioner's Fifth Amendment argument was not discussed by the Court, probably because a similar argument was rejected by the Supreme Court back in *Olmstead v. United States*. However, it would appear that in view of recent developments concerning the right to counsel, the Fifth Amendment may find its way into eavesdropping.

<sup>6</sup> *Berger v. State of New York*, 18 N.Y.2d 638, 219 N.E.2d 295 (1966).

<sup>7</sup> Note 1 *supra*, at 1876.

<sup>8</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>9</sup> *Id.* at 466.

<sup>10</sup> Refers to the rule laid out in *Olmstead v. United States*.

<sup>11</sup> *Goldman v. United States*, 316 U.S. 129 (1942).

<sup>12</sup> *Id.* at 135.

<sup>13</sup> In wiretapping, Section 605 of the Federal Communications Act, 47 U.S.C. 605 (1964), was passed six years after the *Olmstead v. United States* (*supra*) decision was construed in *Nardone v. United States*, 308 U.S. 338 (1939), to exclude evidence obtained by wiretapping from federal courts. This statute was held not to apply to eavesdropping in *Goldman v. United States* (*supra*) and the legislature has not passed a similar act to cover eavesdropping.

<sup>14</sup> Legislation concerning wiretapping can be found in thirty-six states but only seven states (California, Illinois, Maryland, Massachusetts, Nevada, New York, and Oregon) have statutes prohibiting electronic eavesdropping, with all except Illinois permitting official court ordered eavesdropping. See note 1 *supra*, at 1876.

the standard by which the Fourth Amendment was applied to eavesdropping on the federal and most state levels.<sup>15</sup>

The rationale behind the "physical invasion" rule was grounded upon two doctrines accepted by the Supreme Court at that time. The first was that intangibles were not protected within the "enumeration of persons, houses, papers and effects of the Fourth Amendment."<sup>16</sup> This doctrine has since been discarded by the Court in *Wong Sun v. United States*,<sup>17</sup> where it recognized that "The Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects'."<sup>18</sup> The second doctrine behind the "physical invasion" rule was that a physical trespass was necessary in order to constitute a search under the Fourth Amendment.<sup>19</sup> This too has become antiquated since the Supreme Court now refuses to base its decisions concerning Fourth Amendment protections upon "ancient niceties of tort or real property law."<sup>20</sup> The Court reiterated this repudiation in *Silverman v. United States*.<sup>21</sup> In finding that a spike microphone which penetrated the wall of a building came within the protections of the Fourth Amendment, the Court specifically stated that its decision did "not turn upon the technicality of a trespass upon a party wall as a matter of local law" but rather "upon the reality of an actual intrusion into a constitutionally protected area."<sup>22</sup> It was these changes that the majority opinion in *Berger* was referring to when it stated:

They [subsequent cases] found 'conversation' was within the Fourth Amendment's protections, and that the use of electronic devices to capture it was a 'search' within the meaning of the Amendment, AND WE SO HOLD. (Emphasis added.)<sup>23</sup>

The *Berger* decision further pointed out the Supreme Court's recognition of the tremendous technological advances in the area of eavesdropping in the last twenty years.<sup>24</sup> Probably the most significant of these advances in the field of "bugging" is the projection of "electronic rays beamed at walls or glass windows (which) are capable of catching voice vibrations as they bounce off the latter."<sup>25</sup> As a result of these scientific innovations, the eavesdrop device is capable of intruding into an individual's privacy without a "physical invasion" of the premises.

<sup>15</sup> See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), where the Supreme Court held that "All evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." As a result of this holding, the *Olmstead Rule* is applicable in both federal and state courts.

<sup>16</sup> *Olmstead v. United States*, *supra* note 8, at 466.

<sup>17</sup> *Wong Sun v. United States*, 371 U.S. 471 (1963).

<sup>18</sup> *Id.* at 485.

<sup>19</sup> *Olmstead v. United States*, *supra* note 8, at 466.

<sup>20</sup> *Jones v. United States*, 362 U.S. 257, 266 (1960).

<sup>21</sup> *Silverman v. United States*, 365 U.S. 505 (1961).

<sup>22</sup> *Id.* at 512.

<sup>23</sup> *Berger v. State of New York*, *supra* note 1, at 1879.

<sup>24</sup> *Id.* at 1877.

<sup>25</sup> See Dash, Schwartz, Knowlton, *The Eavesdroppers* (1959).

The fundamental purpose of the Fourth Amendment, as was recently reiterated in *Camera v. Municipal Court of San Francisco*,<sup>26</sup> is "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."<sup>27</sup> The Supreme Court also recently recognized that the "specific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>28</sup> This penumbra theory was acknowledged by the Court in order to protect the basic guarantees of the Bill of Rights from modern innovations not imaginable by the framers of the Bill of Rights. It would appear that the field of eavesdropping falls within this theory since technological advances in this area permit the invasion of individual privacy by means far beyond those comprehended at the time the Bill of Rights was drafted. With this in mind, the inadequacy of the "physical invasion" rule as the standard by which the Fourth Amendment is to be applied to eavesdropping becomes apparent, since today an eavesdrop device can invade individual privacy as easily without a trespass as with one. To let the *Olmstead* rule stand would infer that since the framers did not think of modern advances in technology, it is permissible to disregard the underlying purpose of the Fourth Amendment. This in effect rejects the theory that the Constitution is a living and growing document. The majority in *Berger* did not specifically mention the penumbra theory but accomplished the same objective by recognizing individual privacy as the basic purpose of the Fourth Amendment,<sup>29</sup> and by adding that:

The law, though jealous of individual privacy, has not kept pace with these advances in scientific knowledge. This is not to say that individual privacy has been relegated to a second-class position for it has been held since Lord Camden's day that intrusions into it are 'subversive of all of the comforts of society.'<sup>30</sup>

Even though verbal expressions have been included within the protections of the Fourth Amendment,<sup>31</sup> the possibility of a valid search warrant for conversations has been hampered by the "mere evidence" rule. This rule prohibits a search for "mere evidence" as distinguished from a search for the fruits and instrumentalities of a crime.<sup>32</sup> In effect, the only time a search for conversations would be valid under this rule would be in crimes such as bribery and jury tampering. This obstacle to searches for words in other areas was recently removed by the Supreme Court in *Warden, Md. Penitentiary v. Hayden*.<sup>33</sup> There the Court

<sup>26</sup> *Camera v. Municipal Ct. of San Francisco*, 87 S. Ct. 1727 (1967).

<sup>27</sup> *Id.* at 1730.

<sup>28</sup> *Griswold v. State of Connecticut*, 381 U.S. 479, 484 (1965).

<sup>29</sup> *Berger v. State of New York*, *supra* note 1, at 1880.

<sup>30</sup> *Id.* at 1878.

<sup>31</sup> *Wong Sun v. United States*, *supra* note 17.

<sup>32</sup> *United States v. Lefkowitz*, 285 U.S. 452 (1932).

<sup>33</sup> *Warden, Md. Penitentiary v. Hayden*, 87 S. Ct. 1642 (1967).

repudiated the "mere evidence" rule, basing its decision upon the theory that as long as the probable cause and particularity requirements of the Fourth Amendment are met, then an invasion of privacy is permitted.<sup>34</sup> The Court, having established this premise, stated that there can be "no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits and instrumentalities" if the Fourth Amendment requirements for search and seizure are to be met.<sup>35</sup> This decision had tremendous impact in the field of eavesdropping, since if the "mere evidence" rule was recognized, then the inclusion of all electronic eavesdropping under the Fourth Amendment protections, for the most part, would eliminate electronic eavesdropping as an effective means of law enforcement.<sup>36</sup> The fear of such a loss to law enforcement could have been one of the key factors in prolonging the life of the *Olmstead* "physical invasion" rule. With the removal of this fear, fresh in the mind of the Supreme Court when it decided the *Berger* case, the *Olmstead* rule was definitely in jeopardy.

With the irrationality and impracticality of the "physical invasion" rule established, the Court in *Berger* turned its attention to the New York permissive eavesdrop statute. In discussing the invalidity of section 813-a under the Fourth Amendment requirements for a valid search and seizure, the Court laid down the following ground rules for future permissive eavesdrop statutes.<sup>37</sup>

- 1) The warrant must particularly describe the person and place to be searched and the conversations sought.
- 2) The warrant must be based upon probable cause required by the Fourth Amendment.
- 3) The warrant must authorize only one limited intrusion and not a series of intrusions or continued surveillance.
- 4) A continuation of the eavesdrop period must be based on a showing of present probable cause.
- 5) The statute must provide for an automatic termination date in the event the conversation sought is seized before the limited period of the eavesdrop ends.
- 6) The officer must make a return on the warrant showing how it was executed and what was seized.
- 7) The statute must provide that the evidence and leads obtained as a result of such eavesdropping will be used solely in connection with the investigation and prosecution of the stated crime.

<sup>34</sup> *Id.* at 1651.

<sup>35</sup> *Ibid.*

<sup>36</sup> See Justice Brennan's dissent in *Lopez v. United States*, 373 U.S. 427, 463 (1963).

<sup>37</sup> *Berger v. State of New York*, *supra* note 1, at 1881-1886.

- 8) The statute must provide that there be a showing of exigent circumstances before the eavesdrop warrant can be obtained.

The last requirement appears to be the hardest obstacle to overcome in drafting a valid permissive eavesdrop statute. Eavesdropping is "almost inherently indiscriminate" in that it listens in on all conversations during the eavesdrop period.<sup>38</sup> The Fourth Amendment requires that all warrants particularly describe "the place to be searched, and the person or thing to be seized."<sup>39</sup> The words "particularly describe" have been construed to mean that "[a]s to what is to be taken, nothing is to be left to the discretion of the officer executing the warrant."<sup>40</sup> The Court in *Berger* was well aware that the random nature of eavesdropping presented problems in meeting the "particularity" requirement, and attempted to point out under what "precise and discriminate" circumstances the particularity requirement could be met. The Court affirmed its decision in *Osborn v. United States*<sup>41</sup> where the Court upheld an eavesdrop warrant as meeting the requisites of a valid search and seizure under the Fourth Amendment. There an eavesdrop order was issued for the narrow purpose of determining the veracity of an affidavit by a witness stating in detail prior conversations between the witness and a third party (an attorney) pertaining to the bribery of jurors. The Court in *Osborn* felt that the eavesdrop was lawful "because there was sufficient proof to obtain a search warrant for the limited purpose outlined in the order by the judges."<sup>42</sup> This was achieved by a description of the particular "type of conversation sought with particularity, thus indicating the specific objective of the Government in entering the constitutionally protected area."<sup>43</sup> By spelling out the type of conversation sought, the officer was limited to the authorized area. It would reasonably follow that in order to have a "precise and indiscriminate" warrant as required by the Supreme Court in *Berger*, the type of conversation sought as well as the person and place to be searched must be particularly described.

In laying down the requirement that a warrant shall authorize one limited intrusion rather than a series of intrusions,<sup>44</sup> the Court pointed out that the two-month period in section 813-a "is the equivalent of a series of intrusions."<sup>45</sup> As to what constitutes "one limited intrusion" the Court was only specific to the point of saying that "no greater invasion of privacy [is to be] permitted than [is] necessary under the

<sup>38</sup> *Lopez v. United States*, *supra* note 1, at 4653.

<sup>39</sup> U.S. Const. Amend. IV.

<sup>40</sup> *Marron v. United States*, 275 U.S. 192, 196 (1927).

<sup>41</sup> *Osborn v. United States*, 385 U.S. 323 (1966).

<sup>42</sup> *Berger v. State of New York*, *supra* note 1, at 1882.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.* at 1883.

circumstances."<sup>46</sup> The Court cites *Osborn v. United States*<sup>47</sup> as an example of this. In *Osborn* the warrant was "executed by the officer with dispatch, not over a prolonged and extended period."<sup>48</sup> Thus it appears that the Court will apply a weighing process with the governmental need and seriousness of the alleged crime on one side and the resultant effect on individual privacy on the other side, but in no case will a continued surveillance be tolerated. With continued surveillance condemned by the Court, it appears that the Government must know with some degree of certainty that a meeting or phone conversation will take place which could disclose the sought after information. A continued eavesdrop of many such meetings would seemingly violate the Fourth Amendment, since for each intrusion there must be a present showing of probable cause.<sup>49</sup> The Court was specific in requiring that there must be an automatic termination of the warrant in the event the conversation sought is seized before the limited period of the eavesdrop terminated.<sup>50</sup>

Since the effectiveness of eavesdropping depends upon the lack of notice to the suspect, there can be no notice requirement as in conventional methods of search and seizure without rendering the eavesdrop impotent. The Court in *Berger* recognized this fact by requiring the alternative to the notice requirement under the Fourth Amendment, which is a showing of exigent circumstances.<sup>51</sup> An example of exigent circumstance can be found in the *Osborn*<sup>52</sup> case where alleged jury tampering was directly affecting "the administration of justice."<sup>53</sup> The issue concerning the presence of exigent circumstances is sure to become a much litigated point in the future.

After the eavesdrop warrant has terminated, the Court requires that the officer "make a return on the order showing how it was executed and what was seized."<sup>54</sup> This requisite is for the individual's protection against the use by law enforcement officials of conversations that do not pertain to the stated purpose of the eavesdrop order.

Now this writer feels that a valid permissive eavesdrop statute should take a step further by requiring a conference after the eavesdrop has terminated between the individual subjected to the eavesdrop and the law enforcement agency using the eavesdrop. At this conference the suspect should be able to hear all the recordings seized so he will be in a position to attack the use of any unauthorized conversations by the government or another. The suspect's defense to the use of unauthorized

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Osborn v. United States*, *supra* note 41.

<sup>48</sup> *Berger v. State of New York*, *supra* note 1, at 1883.

<sup>49</sup> *Id.* at 1884.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Osborn v. United States*, 385 U.S. 323 (1966).

<sup>53</sup> *Id.* at 328.

<sup>54</sup> *Berger v. State of New York*, *supra* note 1, at 1883.

conversations can be based upon the seventh requisite for a permissive eavesdrop statute, that evidence and leads obtained as a result of such eavesdropping will be used solely in connection with the investigation and prosecution of the particularly described crime.

It is the opinion of this writer that the Supreme Court in *Berger v. State of New York* had two primary objectives: (1) "to overrule the 'physical invasion' rule of *Olmstead v. United States* and its offspring and bring wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment"<sup>55</sup> and (2) to lay out under what "precise and discriminate circumstances" eavesdropping can meet the requirements of the Fourth Amendment for a valid search and seizure. The majority bolstered the first of the above mentioned objectives in its discussion of the argument that an eavesdropping statute could not be drawn to satisfy the Fourth Amendment by declaring: ". . . [i]f that be true then the 'fruits' of eavesdropping devices are barred under the Amendment."<sup>56</sup> From this last statement by the court plus the recognition of the irrationality of the *Olmstead* rule, it would reasonably follow that the "physical invasion" has been cast aside.<sup>57</sup> In so doing the majority in *Berger* appeared to follow the suggestion of the dissent in *Lopez v. United States* that ". . . until the Court holds inadmissible the fruits of an electronic search made, . . . with no attempt whatever to comply with the requirements of the Fourth Amendment, there will be no incentive to seek an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated."<sup>58</sup> The *Berger* decision goes one step further by laying the ground rules for future statutes. It is not questioned that the inclusion of all eavesdropping within the Fourth Amendment will give the individual greater protection as has been the trend of recent Supreme Court decisions,<sup>59</sup> but it also opens the door to a voluminous amount of litigation concerning whether the eavesdrop warrant or the eavesdrop statute itself satisfies the Fourth Amendment requirements. Questions such as whether an eavesdrop device can be used effectively under a statute as described by the court will also be raised. The only answers to the effectiveness of the inclusion of eavesdropping within the Fourth Amendment lie in future court decisions, but it can be concluded now that an individual is one step closer to being able "to

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<sup>55</sup> See Mr. Justice Douglas' concurring opinion to *Berger v. State of New York*, *supra* note 1, at 1886.

<sup>56</sup> *Berger v. State of New York*, *supra* note 1, at 1885.

<sup>57</sup> See *Berger v. State of New York*, *supra* note 1, at 1885, where Mr. Justice Clark says, "On the other hand this Court has in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices" and then cites *Goldman v. United States*. This is contrary to the flow of the case and is unexplained.

<sup>58</sup> *Lopez v. United States*, *supra* note 36, at 465.

<sup>59</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

retreat into his home and there be free from unreasonable governmental intrusion."<sup>60</sup>

JEFFREY R. FULLER

**Criminal Law: Evidence of Prior Misconduct: Whitty v. State:** Thomas James Whitty was found guilty of indecent behavior with a 10-year-old girl.<sup>1</sup> According to the state's evidence, Whitty accosted a group of playing children and asked a 10-year-old girl to help him find a rabbit which he said he had lost. To help with the search the girl accompanied Whitty to a basement, where he took indecent liberties with the child.

During the trial, Whitty testified that he had, on the day previous to the day of the alleged crime, not been in the same neighborhood. He also denied ever asking any children to help him find a rabbit and specifically denied attempting to take indecent liberties with an 8-year-old girl, a playmate of the girl allegedly assaulted.

The 8-year-old girl, who was called as a rebuttal witness by the state, testified that Whitty had attempted to take indecent liberties with her by using a technique similar to that allegedly used the next evening. The prosecution initially had tried to introduce this evidence in its principal case, but the trial court admitted it only after the defendant, with the aid of several witnesses, had attempted to establish an alibi. Three times the judge alerted the jury that the testimony of the 8-year-old was not to be considered proof of guilt but was allowed only for the purpose of identifying the defendant in connection with the crime charged. It seems that the trial court considered the testimony allowable because the identity of the alleged attacker was at issue under the alibi defense, not because it impeached the credibility of the defendant.

#### GENERAL CHARACTER RULE

The general character rule can only be understood as a species of a larger rule, the rule on prior and collateral acts. Proof of such acts may only be admitted if the facts are relevant to the issues of the case and there is a logical similarity "between the condition giving rise to the fact offered and the circumstances surrounding the issue or fact to be proved."<sup>2</sup> The general character rule and its philosophical basis is well stated in *Paulson v. State*.<sup>3</sup>

From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined

<sup>60</sup> *Silverman v. United States*, *supra* note 21, at 511.

<sup>1</sup> *Whitty v. State*, 34 Wis.2d 278, 149 N.W.2d 557 (1967).

<sup>2</sup> 1 JONES, EVIDENCE §156 (5th ed. 1958).

<sup>3</sup> 118 Wis. 89, 98, 94 N.W. 771, 774 (1903).