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The Wiretapping-Eavesdropping Problem: A Professor’s View

Yale Kamisar*

I. TAPS, LAWS AND SOCIETY

[N]o doubt the cave-man looked back to the good old days when men were free to roam instead of being stuck in a damn hole in the ground.1

I hope that if we somehow manage to get past the bombs and the missiles, future historians will be able to report that we, too, marched forward with our faces turned backward. In the meantime, the more I think about The Eavesdroppers2 the better those “old days” look. Even crouching in a dark hole has some advantages over sitting in a glass house.

To illustrate:

One “private technician” has disclosed that between 1940 and 1956 he “bugged” five hundred residences—“from a tenement to a mansion in Beverly Hills”—for California police officials. And apparently he is still going strong.3 The files of a typical private tapper in Chicago reveal that, even though one cautious “subject” moved from one hotel room to another every day for four successive days, he was unable to shake off electrical surveillance. Microphones were secreted in each of the four rooms he occupied, and taps were placed on each of the four phones he used.4

We also learn from the book that unobtrusive vehicles “readily mistaken for the kind of truck used by plumbers, painters and carpenters” may be fully equipped “to monitor and record conversa-

* Professor of Law, University of Minnesota Law School.

I am indebted to Dean William B. Lockhart and Professors John J. Cound and Robert J. Levy of the University of Minnesota Law School for their valuable criticism of the manuscript. I am also indebted to Charles H. Slayman, Jr., Chief Counsel and Staff Director for the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary, for providing me with much legislative material before it became generally available.

1. Muller, The Uses of the Past 65 (1952).
3. Id. at 188–89.
4. Id. at 228–29.
tions being broadcast through tiny concealed transmitters.”

We learn, too, that those who plant hidden listening devices in the innermost places not infrequently appear in the guise of electrical repairmen, telephone company employees, or termite inspectors.

The outside and its dangers may have seemed terrible to the cave-man, but at least he had three walls and a big stone to close them off. The “outside and its laws,” may become even more terrible to modern man because he cannot shut them out. He does not have, or soon may not have, a place where “he can open his collar . . . and give vent to his own particular daydreams, his mutterings and snatches of crazy song, his bursts of obscenity and afflatus of glory.”

For whether or not Samuel Dash has penned a “thriller” in Part I of The Eavesdroppers, “The Practice,” as District Attorney Edward S. Silver charges, Dash’s colleague, Professor Richard F. Schwartz, certainly seems to have written a “chiller” in Part II, “The Tools.”

At the outset, Professor Schwartz pooh-pahs “a tendency to regard electrical and electronic eavesdropping as a kind of black magic,” but I find his treatment of “The Tools” all the more disturbing, all the more frightening, because it is a calm, conservative, matter-of-fact treatment of the subject. Nowhere, it seems, is one quite safe from the eavesdropper. Not in one’s home or office or automobile. Not even in one’s bathroom with the shower turned on!

The [wired] microphone itself may be hidden in the upholstery of a chair, in a pot of flowers, or in a desk drawer. In addition, microphones may be obtained through special suppliers which have all sorts of innocuous-looking housings, such as desk pads. Fine, almost invisible wires may be used . . . under rugs, along baseboards, or even through walls. . . .

5. Id. at 210.
6. Id. at 74–76, 185, 214–15, 283. In one case where a tap was put on the phone of a hospital patient, the subject—thinking the tapper was a telephone employee—even got out of bed to help install it! Id. at 214–15.
7. I have taken this phrase from CAHEN, THE SENSE OF INJUSTICE 151 (1949).
8. Ibid. If I may be permitted to add a homely footnote to this eloquent passage, I vividly recall the heated reaction of my company commander (who had been an enlisted man for many years) when, brand new infantry second lieutenant that I was, I entered the enlisted men’s latrine, looking for a certain corporal. “Stay the hell out of there,” he snapped; “that’s about the only place those ‘poor bastards’ have to cuss out officers, to ridicule them, to brag about how they outsmarted them, etc., and if they couldn’t do that much they’d probably ‘bust.’”

Apparently some captains of industry are less sensitive. Thus, Dash has reported elsewhere: “We learned . . . that some managers of plants were hiding microphones, in the men’s rooms and ladies’ rooms, to spy on their employees.” Transcript of The Big Ear, presented on “NBC Kaleidoscope,” March 22, 1959, p. 21, copy on file in University of Minnesota Law School Library [hereinafter cited as The Big Ear].

10. DASH 305.
Because of the small size, deceptive housings, and numerous types of microphones available, it is difficult to guarantee any certain way of detecting their presence.

It has been claimed that turning on a shower or creating some other sort of noise helps to foil a planted microphone. . . . [But] the frequency discrimination of some microphone structures might make the use of a shower of no value, since the audio frequencies in this type of noise are generally higher than those in the human voice.11

One investigator has reported building a wireless microphone circuit into a flat surface by using transistors and printed circuits. Such a construction enables the eavesdropper to plant the device [½ inch thick] behind a picture on a wall or under a rug.12

A typical problem [with a "parabolic microphone," one type of highly directive microphone] might be to try to eavesdrop on a conversation taking place in an office on the opposite side of a hundred-foot-wide busy street. . . . [It] is perfectly possible that a conversation might be picked up so as to be intelligible.

A second example of a possible use . . . is in the eavesdropping on a conversation in a restaurant or café from, say, a darkened balcony in the building. . . . [A] successful recording of the conversation could probably be made.13

A small, continuously operating transmitter can be placed on an automobile under surveillance, perhaps beneath a fender. Its signal is picked up by a receiver in another car or in a fixed plant. The use of two or more fixed plants would allow well-known triangulation techniques to be applied.14

Harold K. Lipset, who contributes the perspective and insights of a leading private investigator to this symposium, tells us The Eavesdroppers "should serve a useful purpose in allaying fears of the almost supernatural."15 I wonder. How "idle" are our fears when Lipset himself reports that both "an ultra-miniature wireless microphone, powered by atomic batteries and no larger than the eraser on a lead pencil" and "a complete recorder . . . built into a cigarette lighter" are "on the brink of reality"?16

The potentialities are almost infinite. Thus a former Massachusetts Institute of Technology professor recently dwelt on the possibilities of putting a listening device in someone else's suit:

[Y]ou could sew into it a very flexible, black, thin-looking thing — a man would not be aware of. This, for example, could be the transmitting antenna and this could be shaped and sewed into the shoulder on a suit—

11. Id. at 341–43.
12. Id. at 343–44.
13. Id. at 350–51. (Emphasis added.)
14. Id. at 379.
16. Id. at 888.
and the thread for radiating could be put up there. . . . And if the man were to wear this suit you could hear him . . . up to a thousand feet—and you'd hear anything he said while wearing this suit. And we would say the batteries might last for a month's time.17

What solace is there in the knowledge that these devices are "the natural outgrowth of technological advancement"?18 How does the fact that "there is nothing mysterious about the equipment itself or the methods employed"19 make wiretapping or electronic eavesdropping less fearsome? After all, there isn't anything really mysterious or supernatural about the hydrogen bomb or the intercontinental missile either, is there? If anything, doesn't the fact that the relevant principles and methods are knowable and explicable make the electronic equipment—or the bomb or missile for that matter—more awesome?

"Every new idea, every scientific discovery, every invention," it has been observed, "throws a burden on government—some of them tremendous burdens. Thus it is that the lawyer is primarily charged with keeping government attuned to all the other activities of the social order. . . . Every institution, every activity, must have its legal counterpart."20 What, then, has the law done about wiretapping and electronic eavesdropping?

One soon discovers that while the eavesdropping problem, that is, electronic threats to privacy other than wiretapping, is "far newer and far graver than the wiretapping problem . . . the law relating to eavesdropping is even more chaotic and outdated than the law of wiretapping."21 I think there are strong policy reasons for permitting some law enforcement tapping and, as I shall dwell on later, that such authorization would violate neither the letter nor the spirit of the fourth amendment. I cannot say the same for electronic eavesdropping. As Edward Bennett Williams has observed, not only does electronic eavesdropping loom as "the ultimate invasion of privacy,"22 but conceptually its employment by the police is less justifiable than tapping.23 For the reasons he presents24 I think electronic eavesdropping should be outlawed altogether.25

17. Dr. Leo Beranek, The Big Ear 34-35.
19. Id. at ibid.
20. Leon Green, in My Philosophy of Law 129, 137-38 (1941).
22. Id. at 866.
23. Id. at 864.
24. Id. at 862-68.
25. Even with Olmstead on the books, and even though the Communications Act of 1934 is inapplicable to non-telephonic conversations, I think the Supreme Court, by invoking the fourth amendment, and by exercising its supervisory power over the
As conspicuous as is the failure to distinguish between tapping and other forms of electronic eavesdropping and to focus on the greater dangers to privacy posed by the latter practices, this is still not the most salient feature of the "law" on the subject—that is, if one defines "law" broadly enough. Thus, despite Professor Robert Knowlton's incisive analysis of the applicable judicial pronouncements and legislative materials in Part III of The Eavesdroppers, I for one would regard Part I, "The Practice" more deserving of the title "The Law" than Part III, which actually bears that title. In any event, one of the few things clear about the "law" in this difficult and complex area is the striking divergence between the law-on-the-books and the law-in-action. Many law enforcement officers in the "permissive jurisdiction" of New York are said to be doing a good deal more than is permitted; 26 many in the "prohibition jurisdictions" of California and Illinois are quite uninhibited as a matter of fact:

[Los Angeles Police Chief] Parker believes that a police officer is a fool if he violates the wiretapping law. Parker says, however, that he knows that every federal agency in Los Angeles is wiretapping. He says that all state agencies, including the attorney general's office, are wiretapping. . . . 27

The wiretapping equipment of Scotland Yard [the popular name for the Chicago intelligence unit] was always in use. There were at least ten to twelve constant wiretaps going every day. In almost every major investigation the unit conducted, wiretapping was employed in one way or another. 28

Scotland Yard police are not eager to have any attempt made to have the legislature legalize wiretapping. They say that even if wiretapping is illegal, they are going to tap anyhow, and therefore can't see any reason to make it legal. Raising the question in the legislature, they believe, would only stir up controversy. . . . 29

The Eavesdroppers must come as no surprise to Gunnar Myrdal and his staff of sociologists:

[W]e find that this American, who is so proud to announce that he will not obey laws other than those which are "good" and "just," as soon as the discussion turns to something which in his opinion is bad and unjust, will emphatically pronounce that "there ought to be a law against [it]. . . ." To
demand and legislate all sorts of laws against this or that is just as much part of American freedom as to disobey the laws when they are enacted. America has become a country where exceedingly much is permitted in practice but at the same time exceedingly much is forbidden in law.30

Dash’s findings must be even less surprising to jurists such as Thurman Arnold. What Arnold said a generation ago about some of the criminal laws directed at private citizens may, I am afraid, be just as true today of some of the laws aimed at public officials:

Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.31

II. THE ENDS AND THE MEANS

Those who seek to legalize law enforcement tapping or eavesdropping soon find that they are “toiling uphill against that heaviest of all argumentative weights—the weight of a slogan.”32 They are charged with advocating “dirty business,”33 with invoking the “pernicious,”34 “odius”35 or “amoral”36 doctrine, as various judges in tapping or eavesdropping cases have called it, that the end justifies the means.37

The end-does-not-justify-the-means resistance to legislative change

30. MYRDAL, AN AMERICAN DILEMMA 17 (1944).
33. Mr. Justice Holmes, dissenting in Olmstead v. United States, 277 U.S. 438, 470 (1928).
34. Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 485 (1928).
37. It is interesting to note that while some of the most vigorous proponents of law enforcement tapping are troubled by this argument, see, e.g., PARKER, POLICE 111–12 (Wilson ed. 1957) (“We are not arguing that the end justifies the means; on the contrary, we argue that the means are neutral. . . .”), some of the most eloquent defenders of the present ban concede there may be situations where the end does justify reprehensible means, tapping or otherwise. Thus, while Professor Helen Silving observes that “government itself being a means and not a Leviathan engulfing its subjects, its choice of means is most significant” and takes the view that “a government which . . . taps wires, or eavesdrops has lost its moral right to punish,” she goes on to say that “where there is impending danger of a serious evil that cannot be averted except by use of wiretapping or eavesdropping, the ordinary rules of criminal law on ‘necessity’ afford ample grounds for resort to such remedies, notwithstanding their inherently criminal nature.” Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., pt. 8, at 677–78, 684 (1959) [hereinafter cited as 1959 Hearings]. Of course, most proponents of legalized tapping claim just such a “necessity.”
in this area rests on the notion that even if tapping were not banned by positive law, such activity would still be, for example, “ignoble,” “immoral,” “unethical,” and—no end can make it otherwise! I must confess I don’t see why not. I recall the observation that a wise Frenchman is supposed to have made to the effect that “we need not throw to the dogs all that is not fit for the altar of the gods.”

Did not he who coined the “dirty business” phrase also remind us that many, indeed, are the occasions when we do, we should, and we must, engage in just such business?

If conscripts are necessary for its army, it [society] seizes them, and marches them, with bayonets in their rear, to death. It runs highways and railroads through old family places in spite of the owner’s protest.

Opponents of legalized tapping, any legalized tapping, might well retort that in the administration of the criminal law, at least, the end should not justify the means. Then, may I ask, what about the

38. Certainly the dissents of Justices Holmes and Brandeis in Olmstead may be reasonably construed as condemning only resort to governmental methods which constitute specific violations of the criminal law. Thus, Holmes wrote, 277 U.S. at 469–70:

I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. . . . It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . .

[It] makes no difference that in this case wire tapping is made a crime by the law of the State, not by the law of the United States. . . . The reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

And Brandeis wrote, id. at 485:

If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

If this is all the Olmstead dissenters meant, proponents of new legislation have no quarrel with them; this is why they seek legislation. See Silver, supra note 9, at 852-53. To meet the contention that law enforcement tapping ought no longer to be a crime on the ground that it is a crime and officers of the law should not commit crimes is, to put it kindly, to miss the whole point.

However, there is reason to think that Mr. Justice Brandeis, at least, meant more:

That the wire-tapping decision shocked Brandeis deeply is indicated by the fact that he broke his generally observed rule not to discuss Court affairs informally. When questioned about the case in 1931 he said [to his niece]: “One can never be sure of ends—political, social, economic. There must always be doubt and difference of opinion; one can be 51 per cent sure.” There is not the same margin of doubts as to means. Here “fundamentals do not change; centuries of thought have established standards. Lying and sneaking are always bad, no matter what the ends.”

MASON, BRANDEIS: A FREE MAN’S LIFE 569 (1946).


40. HOLMES, THE COMMON LAW 43 (1881).
criminal law itself. How else do most of us justify the imposition of punishment? 41

To say that the end never justifies reprehensible means is to brush off as invalid per se the contention that law enforcement tapping can find justification in the need to meet the growing dangers posed by modern crime. Why then, how then, is it so easy to defend the prohibition against tapping—said to significantly reduce society's ability to detect crime and apprehend criminals—on the ground that the ban is needed to ward off totalitarianism?

All right, wiretapping is a "dirty business." What do you call allowing the criminal a greater measure of safety and freedom than might otherwise be the case? a sporting gesture? How do you regard throwing out narcotic or labor racket or even gambling convictions? esthetically pleasing? What else is the case against wiretapping but an application of the doctrine that the end, call it "liberty" or "freedom," "privacy" or "individuality," does justify the means? "The fervently repeated American cold-war formula that the end does not justify the means," an astute commentator on the contemporary scene has pointed out, "tends to become more than a wholly proper critique of Soviet ruthlessness: it encourages us to forget that we do need ends, precisely to justify, and criticize, our means." 42

Suffice to say that both sides must find and can find comfort in the thought that one of the many ways in which "man differs from other animals . . . is that he is willing to engage in activities that are unpleasant in themselves, because they are means to ends that he desires." 43

I am not unimpressed by the case against wiretapping; I am only unimpressed by the a priori arguments. It seems to me that those who say that the wiretapping ban should stand because the end does not and cannot justify the means and stop right there are not unlike those who embrace the immutable principles of "natural law." Both groups can claim the sanction of ultimate principles for their legal conclusions and thus make most reassuring and high-sounding pronouncements. The trouble is these claims also permit them to avoid the need to furnish specific support for their conclusions or

41. Since punishment consists in the infliction of pain it is, apart from its consequences, an evil; consequently, it is good and, therefore, just only if and to the degree that it serves the common good by advancing the welfare of the person punished or of the rest of the population. This is the position taken by Plato, Aristotle, Cicero, St. Thomas Aquinas, and the medieval church, as well as by Hobbes, Beccaria, Bentham, and many others in more modern times.

MICHAEL & WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 9-10 (1940).

42. RIESMAN, FACES IN THE CROWD 48 (1952).

43. RUSSELL, AUTHORITY AND THE INDIVIDUAL 37 (1949).
to submit them to the uncertain process of examination and analysis by others.\textsuperscript{44}

I do not claim that the ends put forth by law enforcement people do justify tapping or electronic eavesdropping. I simply contend one cannot say they do not without doing a good deal more than wining, however hard, at the means employed. Without considering, for example: How desirable are the ends said to justify these practices? How likely it is that the unpleasant means will achieve these ends? How essential is it to employ these means, as opposed to less unpleasant alternatives?

After all, it was a "liberal," however we define that emotive term, who observed:

Rigorous and unqualified obedience to the accepted ethical rules is generally admired as a virtue, but it really ought to be viewed as involving an obtuse insensitivity to the rich and subtle variety of human relations. The rules of ethics certainly have no securer scientific basis than the rules of hygiene have. Both sets are undoubtedly useful as general maxims. But only quacks rely on such maxims without further knowledge of the actual circumstances surrounding concrete cases.\textsuperscript{45}

Opponents of wiretapping do not, of course, rest their case on slogans alone.\textsuperscript{46} But once we get past the slogans and look at the particulars, the problem is not nearly so simple. For example, I had long sided with tapping opponents on one of the most sharply disputed issues of the debate—the effectiveness of wiretapping as a crime combatting measure.\textsuperscript{47} I had long assumed that the underworld must be so well "educated" against the use of the phone that invasions of privacy caused by tapping easily outweighed the small gains, if any, to law enforcement. However, while Dash's findings generally furnish little comfort to proponents of wiretapping,\textsuperscript{48} on this particular issue he lends them much support:

I believe as a result of our investigation in New York, our facts will refute the statement that wiretapping is not useful; that wiretapping does not obtain law enforcement success. There is no doubt about it, that people who commit crimes, especially those acting in an organized criminal manner in the rackets, gambling rackets and vice, talk on the telephone. These include the most sophisticated criminal. After hearing, say, District Attorney Hogan testify before the Celler committee, that his office wiretaps, the next day, a sophisticated hoodlum might well talk on the phone and

\begin{footnotesize}
\begin{enumerate}
\item[45.] M. R. Cohen, \textit{op. cit. supra note 39}, at 82.
\item[46.] For a number of powerful arguments against law enforcement wiretapping, see, e.g., Hemmings, \textit{supra note 28}; Schwartz, \textit{On Current Proposals to Legalize Wiretapping}, 103 U. Pa. L. Rev. 157 (1954); Williams, \textit{supra note 21}.
\item[47.] See, e.g., the discussion in Hemmings, \textit{supra note 26}, at 822–24.
\item[48.] See, e.g., Silver, \textit{supra note 9}, \textit{passim}.
\end{enumerate}
\end{footnotesize}
give incriminating evidence. Apparently, we have grown up using the telephone and don’t know how to talk without it.

Strangely enough, although many of these people began conversations with, “Be careful, the phone is tapped,” or “Don’t say anything,” within a minute or two the kitchen sink comes in. Apparently, they have not been able to use the kind of codes. They do try it sometimes. We have found that elaborate codes have been set up so that the person listening wouldn’t understand what they are saying, but very often the people who participate in these types of crimes are not very intelligent. They forget the code. They can’t understand and after a while they give the whole thing up and talk as freely as they can.49

Not only is talk of “means” versus “end” unhelpful—it is even misleading. The “end” cannot be cleanly and neatly torn from the

49. 1959 Hearings pt. 3, at 513–14. The point is made in more summary fashion in DAsH at 87. See also Silver, supra note 9, at 845, for an account of how law enforcement officers gain “cumulative information” by tapping. The effectiveness of governmental tapping is illustrated throughout THE EAvESDROPPERS. See, e.g., pp. 37–38, 167–68, 200.

It is interesting to note that while St. Louis prosecutor Thomas F. Eagleton is opposed to law enforcement tapping—at a nationwide meeting of county and prosecuting attorneys only he and one other voiced disapproval of legalized tapping—he does not dispute its usefulness as a weapon against crime:

On that score—on unadulterated practicality—the advocates of governmental wiretapping must prevail. There is nothing more practical than listening into a conversation between two narcotic peddlers. There is nothing more practical than tapping the line of an extortionist mercilessly bleeding his prey.

The district attorneys of this Nation can make an impressive case in support of wiretapping by detailing to you the dozens of cases they have cracked by use of wiretap—without which such cases could not have been made. In their recital of these events, they are unquestionably sincere.


Further support for the view that law enforcement tapping is, or at least can be, a potent force against crime comes from across the Atlantic:

[W]ith regard to the present day uses of interception, we received conclusive evidence of their effectiveness. We were told of many major wrong-doers who had been brought to justice, and of the frustration of espionage.

Between 1953 and 1956 the number of arrests made by the Metropolitan Police of important and dangerous criminals as the result of direct interception was 57 per cent of the number of telephone lines tapped. So far in 1957 every interception but one has led to an arrest. The number of cases of detection of major Customs frauds directly or indirectly due to interceptions of mail and telephone lines was 80 per cent. of the number of interceptions. Account should also be taken of the removal from the field of highly skilled operators and the deterrent effect upon others. The sums lost to the reserves and to the revenues might otherwise have reached considerably greater proportions.

It was emphasised in the evidence given to us that the use of methods of interception is strictly limited to the biggest and most dangerous offenders and that on the whole the most important captures and seizures are made as the result of interception.

"means" and placed alongside it for purposes of comparison. For "we do not really understand our 'ends' until we have considered the probable consequences of carrying them out in practice, and this we cannot do without knowing the means available for this purpose."50 In this sense, in a very real sense, "the means are part of the end."51

If this is what opponents of wiretapping-electronic eavesdropping mean, I have no quarrel with them. To maintain that the end can, and often does, justify the means is not to deny that "the means can produce their own set of evils that are as repressive as those which one sets out to remedy."52

When we realize that the by-products of a law may be as relevant to its valuation as its assumed purpose, when we accept the view that "what law does is part, and the most important part, of what law is,"53 more than one law seems to be worthy only of repeal.54 Is legalized law enforcement tapping such a law? Quite possibly, if Dash's findings are accepted. For whether or not such laws do achieve the designed ends of greater crime prevention, detection, and apprehension, they do seem to bring about certain undesirable consequences. They seem, for instance, to greatly facilitate and enhance police bribery and corruption. Two examples should suffice:

Julius Helfand, then the assistant district attorney in charge of the [Kings County (Brooklyn)] Grand Jury investigation, reported there were many instances of illegal wiretaps which were installed by members of the plainclothes division. He said that these wiretaps were made without court orders and were installed not for the purpose of apprehending bookmakers, but for the purpose of obtaining information as to the extent of the business the bookmakers were doing. This information was passed on to

50. Walter Wheeler Cook, in My Philosophy of Law 60–61 (1941) (discussing "the key" to John Dewey's "empirical theory of the evaluation of values").
51. Id. at 61. Or as Gandhi once put it: "The means may be likened to a seed, the end to a tree; and there is just the same inviolable connection between the means and the end as there is between the seed and the tree." Quoted by Mr. Justice Douglas, in We the Judges 854 (1956).
53. F. S. Cohen, Ethical Systems and Legal Ideals 51 (1933).

Every American criminal code identifies, as eligible for penal treatment, persons who indulge in certain types of conduct that might better be left to the exclusive concern of medicine, psychiatry, or the general moral sense of the community. Consider, for example, the matter of voluntary homosexual relations between adult participants. . . . If the objective of such laws is to prevent homosexual behavior, they have surely failed in their purpose. But these laws have other consequences, few of them desirable. One need not be overly sophisticated to understand that the most tangible result of this legislation is to place in the hands of unscrupulous police officers and others an instrument of blackmail through which money and property may be extorted from the homosexual under threat of exposure and prosecution.
other plainclothesmen who covered the areas being tapped. The book-
makers were approached by these plainclothesmen and shaken down for
sums of money commensurate with the business they were doing. Regular
payments were required thereafter if the bookmaker wanted to continue
to operate. A constant check on a bookmaker's telephones informed the
plainclothesmen when their price should go up or down, depending on the
fortunes of the bookmaker.

Some of these wiretaps, Helfand reported, were authorized by a court
order. The affidavit would contain information sufficient to satisfy the
New York law and the judge, but the facts would be untrue. The fraudu-
 lent applications were used to obtain authority for wiretapping to aid the
plainclothesmen in coercing illegal and corrupt payments from gamblers.56

The performance of the New Orleans Police Department has been
reported to be exceptionally poor in the area where wiretapping is most
employed by other police departments—organized racketeering.57 The
New Orleans crime investigating committee charged that the New
Orleans Police Department did not do a good job of law enforcement
against organized crime, but, on the contrary, was permeated with corrup-
tion and was protecting organized criminal activity, rather than serving
as a force against it.

The magnitude of the problem may be seen from the fact that
the great bulk of law enforcement tapping is done in gambling and
prostitution cases.58 I do not take lightly the point forcefully made
by so experienced and so respected a district attorney as Edward
S. Silver that “gambling is the very heartbeat of organized crime,”59
but does this not make so much the worse the police bribery and
extortion in this area reported by Dash?

Another undesirable consequence of legalized law enforcement
tapping or eavesdropping is that it seems to more or less immunize
similar practices by private detectives as well. At the very least, the
intimate relationship between public and private tappers and eaves-
droppers reported by Dash is hardly conducive to zealous enforce-
ment of criminal sanctions against the latter. Thus:

Private tappers in New York have sold equipment they themselves
manufactured to the police department and district attorney's of-
55. DASH 55-56. See also the extensive interview with a former New York plain-
clothesman, id. at 57-62, reprinted in large part in Silver, supra note 9, at 841-42. But
see Silver's accompanying discussion.
56. DASH 124-125.
57. E.g., id. at 66, 152, 280.
58. Silver, supra note 9, at 843.
59. DASH 82.
makes extensive use of wiretapping, relying "almost wholly on the services of a private detective for its . . . needs"; the latter also conducts "a brisk private practice." Fearful of a legislative crackdown, Massachusetts law enforcement agencies only keep a meager supply of eavesdropping equipment on hand, calling regularly on the good offices of a more generously endowed "private New York wiretapping specialist."62

Although a general ban against tapping has long existed in California, police have interpreted a recent decision, People v. Malotte,63 to permit tapping with the subscriber's permission, even though the parties to a particular conversation may not include the subscriber.64 For the purpose of installing bugs and wiretaps deemed legalized by Malotte, the district attorney's office in San Francisco has found it necessary to employ the city's "busiest electrical eavesdropper," as have California police agencies outside the San Francisco area, but his "principal work" still consists of private cases referred to him by lawyers.65 No doubt these practices help to account for "perhaps the most astonishing fact about private eavesdropping in the face of California's criminal sanctions"—

the open, boastful, and almost cavalier manner in which this private eavesdropping is done. Under the heading of "Detectives" in the classified section of the Los Angeles telephone directory appears a listing of sixty to seventy private detectives or private detective agencies. A large number of the private detectives promise in their listings to supply the latest in electronic surveillance. "Secret recordings" and "Complete line of modern electronic surveillance" are blatantly advertised. In one large advertisement, where secret recordings and electronic surveillance are promised, the private detective, in order that his meaning may strike home, supplies two drawings depicting this clandestine activity, one showing a figure with earphones connected to a telephone and another

60. Id. at 135-36.
61. Id. at 139.
62. Id. at 153. Home grown private tappers are lightly regarded by all concerned in Massachusetts. Id. at 155.
63. 46 Cal. 2d 59, 292 P.2d 517 (1956) (admitting evidence of a phone conversation between defendant and a police officer defendant thought was one of her "customers"). It seems quite clear that Malotte is limited to situations where a party to the particular conversation has consented to the tap. For the contention that defendant's protection against unreasonable search and seizure was violated was rejected on the ground that "when a person discusses the commission of a crime with another . . . there is no unreasonable invasion of privacy when the other uses the conversation against him." Id. at 63, 292 P.2d at 519. The argument that a violation of section 640 of the California Penal Code had occurred was similarly disposed of: "There is no learning of the contents of a communication 'fraudulently, clandestinely, or in any other unauthorized manner' when one of the participants to the conversation consents to or directs its overhearing or preservation." Id. at 64, 292 P.2d at 520.
64. DAST 171.
65. Id. at 213.
showing a detective with earphones connected to a contact microphone attached to a wall.66

Until the summer of 1957, at least, when legislation was enacted banning all tapping in Pennsylvania, the shoe was on the other foot in Philadelphia. Here, evidently, the law enforcement eavesdroppers, not the private variety, have had the edge in know-how, equipment, and connections with former and present telephone company employees. Thus, according to Dash, “about a dozen Philadelphia police officers did private wiretapping for extra money. They worked for lawyers, labor unions, security chiefs in business houses, and private detectives.”67 The files of one private detective led to the disclosure that his electronics “expert” in domestic relations cases was a “popular police captain” who charged $200 per job.68

But the view that the means are part of the end, that what a law does bears most significantly on what a law is, cuts two ways. In our haste to demonstrate that laws permitting some wiretapping can be and have been much abused, let us not forget that laws forbidding any tapping can be and have been more or less completely disregarded. Indeed, one who reads The Eavesdroppers is tempted to slam the book shut, raise it high over his head, and shout: Scorecard! Get your scorecard! You can’t tell a “prohibition”

66. Id. at 208–09. Consider also the TV-sales talk from “Harvey’s Radio,” an audio equipment store in the Times Square area described by reporter Chet Huntley as “a good place to buy hi-fi components, amateur radio gear and devices which record in secret”:

Here’s another device. I see you have a tie on. . . . [T]his just slips across the tie — and you’ll see it just like that — that’s all you would see. The rest would go through your shirt and then up to the harness package. . . . Whatever I hear the microphone would hear, no matter where I am. And you can admit, it’s rather inconspicuous. A microphone like this would run around thirty-five dollars. . . . This is a microphone. . . . the type of thing that could fit under a ledge, anywhere — could fit inside of a concealed blotter — on top of a desk. . . . I would like to show you one more — something that’s rather new. It’s called the Edward’s Recorder. It’s the smallest thing known — at least the smallest that we’ve ever seen. Isn’t that something? It weighs under a pound. . . . Now, this type of microphone, you can envision, is certainly going to be no problem to hide. It has one different advantage over the others. These two cells that you see here are set up to record stereophonically. . . . Here’s two cells. Say that you’re travelling — you’re in a hotel or you’re in someone’s apartment where, for some reason or another, you want to record right off the phone. We know if you break into the phone — well, you don’t break into phones — you take this little wafer — put this right under the ring-box . . . that device will pick up the whole conversation — both sides — with no touching of wires. And then I’ve got something very special for the businessman — so to say. The businessman is anybody who works for a living, in a sense. . . .


67. Id. at 265.

68. Id. at 258. Dash points out that “the statements of the private detective and of the police captain admitting this practice were received by the police department, but no disciplinary action was taken.” Ibid.
jurisdiction from a "permissive" or a "virgin" one without a scoreboard.  

To illustrate:  
While California has prohibited law enforcement officers from tapping phones since 1905, "wiretapping is used constantly" by San Francisco police; "a number of taps are operating every day." Law enforcement tapping—  
is done only for the purpose of aiding investigation and never for the purpose of collecting evidence. The statute prohibiting wiretapping, of course, makes this policy necessary. However, police say that even if they were allowed to use wiretapping evidence, they would prefer not to do so, but to use their wiretapping only to obtain leads.  

Illinois has had an outright ban against tapping since 1927, but the intelligence unit in the Chicago police department has "at least ten to twelve constant wiretaps going every day," and has employed wiretapping "in almost every major investigation" it has conducted.  
Again, of course, information obtained through wiretapping was never used in evidence but only "as an investigative aid and for leads."  

On the other hand, while a Louisiana statute has long furnished "the broadest authorization for law enforcement wiretapping existing in this country," wiretapping is also used only as an aid to investigation and never for the purpose of introducing what is obtained into evidence. While such evidence is admissible in Louisiana courts, state law enforcement agencies, as Dash quaintly puts it, "are operating under strict instructions from the telephone company."  

69. "Prohibition" jurisdictions are those where wiretapping, including the law enforcement variety, is outlawed; Dash treats two, California and Illinois. "Permissive" jurisdictions covered are New York (by court order), Massachusetts (with the written permission of the district attorney or the attorney general), Louisiana (law enforcement tapping subject to no controls at all). The "virgin" jurisdictions of Nevada and Pennsylvania surveyed by Dash had no legislation dealing with the subject at the time of the study—an absence of law which enforcement agencies interpreted to mean freedom for police tapping. Legislation on the subject was passed in both states during the summer of 1957. Enforcement tapping was banned in Pennsylvania and made subject to court order in Nevada.  
70. DASH 165. That is, tapping not legalized by the Malotte decision.  
71. Ibid.  
72. Id. at 219.  
73. Ibid.  
74. Id. at 120. Since 1928, Louisiana law enforcement officers have been authorized by state law to tap for the "purpose of obtaining information to detect crime" subject to no controls.  
75. Id. at 122–23, 129.  
76. Id. at 122.  
In return for the considerable help the telephone company gives the police, which makes police wiretapping easy, the telephone company expects that the
police had “complete license” for tapping, and the Nevada courts do not exclude even illegally seized evidence, police tapping, as a matter of internal law enforcement policy, at least in Las Vegas, “has never been used for the purpose of obtaining evidence, but solely as an aid in investigation.”

One can say much more forcefully about the absolute bans against tapping what Mr. Justice Frankfurter said, forcefully enough, of the M’Naghten Rules. They are “very difficult for conscientious people and not difficult enough” for others; “they are in large measure abandoned in practice, and therefore . . . in large measure shams.” I do not know whether or not the police will ever become content with or can ever be made to conform to the limits prescribed by court-order wiretap legislation. But I think I do know that they will not — and cannot be made to — live with a total ban.

III. WHAT WAS LOST IN OLMSTEAD?

A labor lawyer has suggested that his brethren “sometimes conduct with great skill what may in fact be sham battles, battles in which the event is of no real importance, or even battles in which, if they were more aware of the real character of the outcome, they might be on the other side.” I think the continuing discussion over whether wiretapping should have been or ought to be held subject to the requirements of the fourth amendment well illustrates that other lawyers are not immune from the same criticism.

A. What if the Fourth Amendment Applied to Tapping?

For example, a recent commentator has complained that — one of the greatest handicaps in the debates today concerning wiretapping is the lack of a solid, firm legal basis upon which to formulate a comprehensive solution to the problems in this field, a base which Fourth Amendment rights and administrative provisions respecting searches and seizures would have provided. This is not to intimate that a legislative solution cannot be reached but Olmstead by its failure of vision has made the task infinitely more difficult.

As the same commentator takes pains to point out elsewhere, however, his objection to the holding in United States v. Olmstead, police will use the wiretaps only as leads and not for evidence in court and, above all, the police must not reveal that they are wiretapping. This secrecy, the company feels, is necessary to preserve public confidence in the telephone.

Ibid.

77. Id. at 278.
81. 277 U.S. 438 (1928).
that wiretapping is neither a "search" nor a "seizure" is "not founded on the belief that all wiretapping should be abolished but that it should be brought within the administrative process of the search warrant as provided in the Fourth Amendment." 82

I fail to see how reliance on the serpent-windings of the many search and seizure rules which have plagued the courts for decades promises either solidity or firmness. And if we are to fall back on the search and seizure warrant, why not also on the precarious weighing of values characterizing the recurring problem of when officers can search without a warrant? Drawing upon search and seizure cases to ascertain when taps can be made without a court order should be good for one or more bitterly contested 5-4 decisions per year.

So long as it is accepted that a contrary decision would not have banned all tapping, it is not easy to see how the Olmstead case might have offered a solid basis for controlling wiretap abuses. It is even more difficult to see how it can be said, long after section 605 of the Federal Communications Act was construed in the Nardone cases83 to place a total ban on tapping, that Olmstead "disabled" the Supreme Court from effectively handling the problem 84 or dealt "a crippling blow to judicial administration in the field of civil liberties." 85 For not only is an absolute ban immeasurably simpler than a ruling permitting some tapping on principles analogous to search and seizure law, but it is immeasurably safer. If, as liberals believe, and as Dash reports,86 in permissive jurisdictions such as New York many judges issue wiretap orders perfunctorily, while those who do not are carefully avoided—as may well be the case with search warrants generally87—what solace would there be in a ruling that the fourth amendment applies to—but still permits some—tapping?

That the applicability of the fourth amendment would provide something less than a happy solution to the wiretapping problem may be seen from the cases which engrafted search and seizure concepts onto the unqualified language of section 605. The Communications Act contains no requirement that the defendant be a party to the tapped conversation in order to object, and the Nardone

82. BESEL, op. cit. supra note 80, at 33.
84. BESEL, op. cit. supra note 80, at 33.
85. Id. at 34.
86. See the extracts from THE EAVESDROPPERS and the accompanying discussion in Hennings, supra note 26, at 819–20.
87. This is the conclusion I draw from field reports and other data contained in the unpublished report of the American Bar Foundation pilot project on the administration of criminal justice in the United States. Professor Fred E. Inbau of the Northwestern University Law School, a consultant to the project, reaches the same conclusion.
cases seemed to forbid all direct and derivative use of tapping in federal courts. Nevertheless, in *Goldstein v. United States*, 88 "the Court retreated, importing into Section 605 the Fourth and Fifth Amendment concept of victim's privilege," 89 that is, if the defendant is not himself the victim of the unreasonable search, he has no standing to suppress the illegally seized evidence. Not only did search and seizure concepts weaken the force of the statute in *Goldstein*, but such concepts were also resorted to in *Schwartz v. Texas* 90 to greatly curtail the sweep of the Communication Act's exclusionary rule, the only real sanction for enforcing the statutory ban. In *Schwartz*, despite the wording of 605 prohibiting the "divulgence" of the existence, substance or meaning of intercepted communications in state as well as federal courts, the Court held state-gathered wiretap evidence admissible in state cases on analogy to the landmark search and seizure case of *Wolf v. Colorado*. 91 Where due regard for federal-state relations had only precluded the development of a federal exclusionary rule for state search and seizure cases, in *Schwartz* it overrode an exclusionary rule built right into the federal statute. 92

On the other hand, it is when the Court has steered clear of search and seizure concepts and confined itself to the "express, absolute prohibition against the divulgence of wiretapping" contained in section 605 93 that the hearts of the liberals have been gladdened. Thus, in *Benanti v. United States*, 94 the Court checked what might be called its "retreat by analogy" by excluding state-gathered wiretap evidence preferred in a federal prosecution, even though to date the great weight of authority permits federal prosecutors to use evidence obtained by illegal state searches so long as there is no "collusion" between the two sovereignties. 95

So far my niggardly appraisal of the *Olmstead* debate rests on the
view that a contrary ruling would still have permitted some tapping. But this view has been challenged by so many able students of the problem that it merits extensive analysis.

B. If the Fourth Amendment Applied, Would It Permit Some Tapping?

Although the government successfully contended in *Olmstead* that no wiretapping was subject to the requirements of the fourth amendment, the Court did not necessarily treat the matter as an "all or nothing" proposition. Mr. Justice Brandeis asked, "Can it be that the Constitution offers no protection" against wiretapping and other scientific devices? Not, whether it offers complete protection. The government, he noted, had conceded that "if wiretapping can be deemed a search and seizure within the Fourth Amendment, such wiretapping as was practiced in the case at bar was an unreasonable search and seizure. . . ." And Mr. Justice Butler, dissenting separately, conceived "the single question for consideration" to be whether the government may "have its officers, whenever they see fit, tap wires..."

Of course, Mr. Justice Brandeis did assert that "as a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping," but this comment is not unequivocal. When compared with the unlimited and indiscriminate tapping permitted by the majority—yes. When compared with the tapping in *Olmstead* itself—a five month long operation embracing eight phones and producing 775 typewritten pages of notes of conversations overheard—quite possibly. But they are hardly "puny instruments" when compared with, for example, the current New York procedure—whereby a high-ranking officer must establish upon oath or affirmation "reasonable ground to believe that evidence of crime may be obtained" and must identify the telephone particularly, as well as the person or persons whose messages will be intercepted—to say nothing of even more guarded proposals.

96. 277 U.S. at 474. (Emphasis added.)
97. Id. at 472. (Emphasis added.)
98. Id. at 486. (Emphasis added.)
99. Id. at 476.
100. Id. at 471 (Brandeis, J., dissenting).
102. Probably the most complete and most thoughtful wiretapping legislative proposal is one put forth by Professor Alan Westin. See Westin, supra note 89, at 200–208. He suggests, *inter alia*, that wiretapping should be allowed only (1) when there are reasonable grounds to believe that a crime threatening human life has been or is about to be committed, there are the same grounds to believe that evidence will be obtained.
A brief look at the historical background of the fourth amendment

When one recalls their arbitrary and sweeping nature, it is difficult indeed to regard the writs of assistance and general warrants as precedents for the view that legalized tapping, no matter how rigidly proscribed, would violate the spirit and intendment of the fourth amendment. These old devices were not child's play, by any standard.

The general warrants of the famous North Briton cases\textsuperscript{103} authorized the apprehension of undescribed persons and the indiscriminate seizure of their papers. Pursuant to a warrant from the Secretary of State "to search for the authors, printers and publishers of a [specified] seditious and treasonable paper," forty-nine persons were arrested in three days.\textsuperscript{104} It is true that the person to be seized happened to be particularly described in the most famous English seizure case of all, Entick v. Carrington,\textsuperscript{105} but at stake was whether—

the secret cabinets and bureaus of every subject in this Kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

[Under this warrant... the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and

essential to the solution or prevention of such crime, and no other means are readily available; (2) similarly, in the investigation of crimes of treason, espionage and sabotage. Westin would also require that all law enforcement wiretapping devices be registered with the FCC, which would be empowered to supervise tapping, promulgate regulations, hold hearings and issue cease and desist orders to law enforcement agencies.

As to crimes affecting the safety of human life, tapping would be restricted to the offices of state district attorneys. As to crimes against national security, the Attorney General would not be required to apply for court orders, a proposal from which I dissent for the reasons set forth in Donnelly, Comments and Caveats on the Wire Tapping Controversy, 63 YALE L.J. 799, 807–08 (1954), and Williams, The Wiretapping-Eavesdropping Problem: A Defense Counsel's View, 44 MINN. L. REV. 855, 868–69 (1960).

Many other students of the problem are unwilling to authorize law enforcement tapping except where crimes against national security are at stake, and even then subject to rigorous safeguards. See, e.g., Donnelly, supra at 807–08; Schwartz, supra note 48, at 165–66 (and possibly capital offenses); Williams, supra at 868.


105. 19 Howell's State Trials, col. 1029 (Ct. C.P. 1765).
carried away; for it is observable, that nothing is left either to the discretion or to the humanity of the officer.\textsuperscript{106}

[The party] has no power to reclaim his goods, even after his innocence is cleared by acquittal...\textsuperscript{107}

[N]o charge is requisite to prove that the party has any criminal papers in his custody...\textsuperscript{107}

Lord Camden was not persuaded that “such a power can be justified by the common law”;\textsuperscript{108} this is not to say he was persuaded it could not be justified under any conditions:

If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution. All these particulars must be explained and proved to be law, before this general proposition can be established.\textsuperscript{109}

Indeed, to no small extent \textit{Entick} can be distinguished away on the ground that it dealt with seditious materials. The grave threat to what we now call first amendment liberties posed by relatively unrestrained searches and seizures in the area of seditious libel did not, I am sure, escape Lord Camden.\textsuperscript{110} No more than it has a number of modern commentators who explicitly and emphatically exclude from any proposal for limited wiretapping, investigations in connection with loyalty programs and those “national security” or “defense” offenses which are really sedition laws.\textsuperscript{111}

The writs of assistance, which were used by customs officers for the detection of smuggled goods, “were even more arbitrary in their nature and more open to abuse than the general warrants of the \textit{North Briton} cases.”\textsuperscript{112} The writ—

was not returnable at all after execution, but was good as a continuous license and authority during the whole lifetime of the reigning sovereign. The discretion delegated to the official was therefore practically absolute and unlimited. The writ empowered the officer and his deputies and servants to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye.\textsuperscript{113}

If, as has been said, James Otis’ epochal argument against writs of

\textsuperscript{106.} Id. at cols. 1063–64.
\textsuperscript{107.} Id. at cols. 1066–67.
\textsuperscript{108.} Id. at 1072.
\textsuperscript{109.} Ibid.
\textsuperscript{110.} Id. at cols. 1070, 1071, 1074. See also Fraenkel, \textit{Concerning Searches and Seizures}, 34 \textit{Harv. L. Rev.} 361, 362–63 (1920).
\textsuperscript{112.} Lasson, \textit{supra} note 104, at 54.
\textsuperscript{113.} Ibid.
assistance in 1761 "was enshrined in the Massachusetts Constitution of 1780" \(^{114}\) and "when Madison came to deal with safeguards against search and seizure in the United States Constitution . . . [he] based his proposal on the Massachusetts form." \(^{116}\) I find nothing in this form to preclude limited tapping by court order. The terms of article 14 of the Massachusetts Declaration of Rights are:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued, but in cases, and with the formalities prescribed by the laws.\(^{116}\)

Nor is it at all difficult to square limited tapping by court order with the famous Virginia Bill of Rights of 1776, "the first American precedent of a constitutional character for the Fourth Amendment," \(^{117}\) or with the Pennsylvania Declaration of Rights, adopted later the same year, "the first precedent which closely approximated what is now the Fourth Amendment. . . ." \(^{118}\)

All in all, I find the governmental abuses which led to the adoption of the fourth amendment much more aggravated than need be law enforcement tapping. I fail to see how the history of the fourth amendment renders every kind of tapping, no matter how guarded the permission, no matter how limited the areas, a violation of the spirit and intendment of the amendment.

Nor does the wording of the amendment bother me very much. The amendment does call for a warrant "particularly describing" the "things to be seized." However, if to rule that conversations are not

\(^{114}\) Mr. Justice Frankfurter, joined by Justices Murphy and Rutledge, dissenting in Harris v. United States, 331 U.S. 145, 158 (1947).

\(^{115}\) Ibid.

\(^{116}\) Reprinted, id. (Emphasis added.) This article was the first to use the phrase "unreasonable searches and seizures"; other states had merely condemned general warrants. See Lasson, supra note 104, at 82.

\(^{117}\) Lasson, supra note 104, at 79. It condemned general warrants whereby—an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence. . . .

Id. at 79 n.3. See also the statement of desired amendments adopted by the Virginia Convention after ratifying the Federal Constitution, GREENMAN, WIRE-TAPPING: ITS RELATION TO CIVIL LIBERTIES 9–10 (1938).

\(^{118}\) Id. at 81. It outlawed—warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property. . . .

Id. at 81 n.11.
"papers" or "effects" or capable of being "seized" is to read the fourth amendment "with the literalness of a country parson interpreting the first chapter of Genesis," 119 to contend on the other hand that such conversations are not only constitutionally protected, but incapable of being "particularly described" in advance, and therefore beyond the reach of any court order, 120 is not to display much more sophistication. Surely wiretapping opponents do not have to be reminded that "it is a Constitution we are expounding." 121

(2) Justices Douglas and Murphy on limited wiretapping

No less adamant defenders of civil liberties than Mr. Justice Douglas and the late Mr. Justice Murphy seem to support the view that application of the fourth amendment would not ban all tapping.

Mr. Justice Douglas does not seem to have focused on the specific problem of limited tapping to the extent that Mr. Justice Murphy did, but in two of his recent books, he at least blithely assumes that if Olmstead were to be overruled taps could and would be conducted in much the same manner that other "searches" have long been lawfully made:

[N]ever has a majority of the Court held that wiretapping was within the protection of the Fourth Amendment. The Court has refused to require the police and prosecutor to get a search warrant based on probable cause in order to tap a person's wire. 122

The main struggle here has not been to prohibit wiretapping absolutely, as Puerto Rico does, but to bring wire-tapping under the Fourth Amendment. That is to say, the controversy in the United States has been whether wiretapping is a "search" within the meaning of the Amendment. If so, it requires a showing of probable cause to a magistrate that a crime has been or is being committed before a wire can be tapped. 123

Mr. Justice Murphy lends me support in, of all places, his Brandeis-like dissent in Goldman v. United States. 124 Indeed he indicated on that occasion that even if such practices were held to be governed by the fourth amendment, not only some tapping, but some electronic eavesdropping as well, would still be permissible:

119. BEISEL, op. cit. supra note 80, at 32.
122. DOUGLAS, WE THE JUDGES 375 (1956).
Such invasions of privacy, unless they are authorized by a warrant issued in the manner and form prescribed by the Amendment, or otherwise conducted under adequate safeguards defined by statute, are at one with the evils which have heretofore been held to be within the Fourth Amendment. . . .

A warrant can be devised which would permit the use of a detectaphone. Cf. article 1, § 12 of the New York Constitution (1938) . . . . Some method of responsible administrative supervision could be evolved for the use of the detectaphone which, like the valid search warrant, would adequately protect the privacy of the individual against irresponsible and indiscriminate intrusions by Government officers. . . .

While the detectaphone is primarily used to obtain evidence, and while such use appears to be condemned by the rulings of this Court . . . I am not prepared to say that this purpose necessarily makes all detectaphone "searches" unreasonable, no matter what the circumstances, or the procedural safeguards employed.

Deep down, Mr. Justice Murphy may have really believed this. Perhaps not. Perhaps he may have simply concluded that while a majority of the Court might someday be sold on the idea that the fourth amendment applies to tapping and eavesdropping, a majority—let alone the public—would never buy the idea that the Constitution prevents law enforcement officers from engaging in any such practices under any conditions. I do not know. I am not at all sure it makes any difference.

(3) The ban on searches for objects of "evidentiary value only"

As Mr. Justice Murphy recognized in the passage above, any proposal for limited tapping must reckon with the rule articulated in Gouled v. United States and other cases that objects of "evidentiary value only" are beyond the reach of an otherwise valid warrant. Although the rule is often pronounced in, and confused with, cases of "exploratory" searches, that is, general searches for the sake of discovering evidence or in the hope that evidence, particularly documents, might be uncovered, the rule has a force of its own. It applies however elaborately described the particular
"evidentiary" object sought. Thus, those who resist any modification of the present ban can say:

[I]t appears that wiretapping is a more drastic interference than is constitutionally permissible under search warrant. A search warrant must specify the things for which the officer is to search and, in general, these must be either articles used to commit the crime or else the proceeds of crime. A search for an object of purely evidentiary significance would almost certainly be held unconstitutional, as in case the warrant purported to authorize the seizure of a personal diary containing an account of the alleged crime. But wire tapping is unavoidably a hunt for evidence, pure and simple, i.e., for incriminating admissions.130

As formulated, the rule does indeed loom as an awesome barrier to proponents of limited tapping. On reading the most comprehensive and careful study of the problem, however, it becomes considerably less imposing:

"In most instances, the courts have accepted the Gouled rule upon faith or have neglected to make explicit the reasons for applying the rule";131 on close inspection none of the various rationales trotted out in defense of the rule can be regarded as acceptable;132 not infrequently the courts, to put it kindly, just don't take the rule very seriously.133

If the rise of a crime wave,134 real or imagined, or the needs of a

130. Schwartz, supra note 111, at 163. See also, e.g., Rosenzweig, The Law of Wire Tapping, 33 CORNELL L.Q. 514, 531-32 (1947); Williams, supra note 102, at 857-58, 870-71.

131. Chicago Comment 332.

132. After a painstaking analysis of various suggested rationales (for example: the privilege against self-incrimination is violated by a seizure of evidentiary objects; the invalidation of such a seizure turns on the "title" or "stake" the possessor has in the objects, unlike the case of stolen property or contraband; the rule enhances the protection of privacy by immunizing from seizure certain personal property), the conclusion is reached in Chicago Comment 330 that "the Gouled rule lacks an acceptable rationale."

After some valiant earlier efforts to explain the Gouled rule, United States v. Poller, 43 F.2d 911 (2d Cir. 1930), United States v. Kirschenblatt, 16 F.2d 202, 204 (2d Cir. 1926), the Second Circuit has more or less thrown up its hands, Matthews v. Correa, 135 F.2d 534, 537 (2d Cir. 1943) (per Clark, J.): "The line between fruit of the crime itself and mere evidence thereof may be narrow; perhaps this turns more on the good faith of the search than the actual distinction between the matters turned up."

133. See text at notes 137-142 infra.

134. It has been suggested that "the Court in the Olmstead case decided the issue
national emergency,\textsuperscript{135} valid or otherwise, generate sufficient pressure to push some reasonably well-drafted bill for limited tapping through Congress and such a statute collides with the limitation on seizure of "evidentiary" objects, aptly called "a rule in search of a reason."\textsuperscript{136} I suspect the rule, not the statute, will be much the worse for it. If the rule does survive such an encounter, I venture to say, it will be because proponents of limited tapping need not demolish it; they can go through, over, and all around it quite nicely.

Look at the precedents we have on the books right now: In one customs case, letters and other seized papers prepared by or sent to the defendant, many of them routine and unoffending in themselves, were admitted since they were said to be "used . . . to perpetrate the crime in question";\textsuperscript{137} in another customs case, a seized memorandum simply listing various watch movements defendant intended to smuggle into the country was admitted because "some such list was a necessity in this type of smuggling";\textsuperscript{138} the seized correspondence between the defendant and German radio and other officials "to obtain employment" with a German station was allowed in evidence as "means through which an alleged treason, namely performance of the duties of a news editor in the . . . station . . . was accomplished.\textsuperscript{139}

Only a short six months before \textit{Olmstead} (when, according to many commentators, a ruling that the tapping was a "search" would in favor of constitutionality in order to permit Congress to regulate wiretapping or outlaw it in accordance with the rise or ebb of the crime wave." Rosenzweig, \textit{supra} note 130, at 531. Relying on the \textit{Gouled} doctrine, Rosenzweig takes the position that a contrary ruling in \textit{Olmstead} would have precluded even the most closely supervised tapping because if tapping "were held a search it must be an unreasonable search." \textit{Id.} at 532.

135. A strong movement arose during World War II to permit wiretapping in the prosecution of the war, one which not even the civil liberties groups opposed. See Westin, \textit{supra} note 89, at 180 n.71. Professor Westin suggests that the disputed Roosevelt "authorization" of tapping at this time rendered the issue moot. \textit{Ibid.} See notes 210-11 \textit{infra} and accompanying text.

136. See note 129 \textit{supra}. Professor Maguire similarly refers to the "obscurely implied grounds" for considering objects sought solely for their evidential value improper subjects of governmental search. \textit{Maguire, Evidence of Guilt} 183 (1959).

137. United States v. Poller, 43 F.2d 911 (2d Cir. 1930) (per L. Hand).

138. Landau v. United States, 82 F.2d 285 (2d Cir. 1936).

139. United States v. Best, 76 F. Supp. 857, 861 (D. Mass. 1948). See also United States v. Bell, 48 F. Supp. 986 (S.D. Cal. 1943), where, in a prosecution for conspiracy to violate the Espionage Act, "closets and cabinets were opened, and large quantities of letters, printed literature, documents, pamphlets, and the like" were admitted, \textit{id.} at 989, because "connected with" the commission of the crime, or because they "supply proof relating to the transaction out of which it arose," \textit{id.} at 985, whatever that means; Matthews v. Correa, 135 F.2d 594, 597 (2d Cir. 1943), where the seizure of seven address books and an account book from a woman charged with concealing property from her trustee in bankruptcy was sustained on the ground that "these books, though dealing in part with matters subsequent to the bankruptcy, did properly concern matters with which the trustee was concerned."
also have meant that all taps were forbidden searches for evidence) in a prosecution for conspiracy to violate the National Prohibition Act, a unanimous Supreme Court not only upheld the admission of a seized ledger showing inventories of liquors, receipts, and expenses but gas, electric, and telephone bills as well. The bills, it seems, were "convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on." \(^{140}\) If this double-talk can be topped, another prohibition case did so by not only admitting order books, stock books, invoices and price lists—"means and instrumentalities of committing [the] . . . conspiracy" \(^{141}\)—but also a typewriter and adding machine! They were "shown to have been used in the business by the records made with them." \(^{142}\)

I do not mean to suggest that other courts have not come out differently on similar fact situations. They have.\(^{143}\) My point is that the area is so cluttered with inconsistencies and uncertainties as to permit much freedom of movement.\(^{144}\) While "a search for an object of purely evidentiary significance" may be taboo, objects have been and will continue to be found to possess a bit more than "purely evidentiary significance" just about whenever a resourceful judge wants to so find.

If memoranda, in themselves unoffending, may properly be seized because "necessary" or "convenient" to record some detail of defendant's nefarious activities, as may written communications passing between actors because somehow they are "means" or "instrumentalities" used in the commission of a crime, why not phone conversations? For example, phone conversations by members of "organized and vicious rackets and criminal syndicates [who] . . . could not organize or operate their syndicates without the telephone." \(^{145}\) Or by enemy agents who because "the success of their plans frequently rests upon piecing together shreds of information

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\(^{140}\) Marron v. United States, 275 U.S. 192, 199 (1927).

\(^{141}\) Foley v. United States, 64 F.2d 1, 2 (5th Cir. 1933).

\(^{142}\) Id. at 4.

\(^{143}\) See Chicago Comment 320–22 & n.22; Annot., 129 A.L.R. 1296, 1300–01 (1940).

\(^{144}\) The confusion is only compounded by the Supreme Court's decision admitting into evidence as "the means" by which the government had been defrauded a cancelled check seized in the course of an audit. Zap v. United States, 328 U.S. 624, 629 n.7 (1946). The dissent complained that "papers the possession of which involved no infringement of law" had been seized for "evidentiary use," yet seemed to agree that such evidence could have been secured by a lawful warrant. Id. at 632–33. The difficult task of reconciling Zap with Gouled was undertaken by the late Professor Reynard in Freedom from Unreasonable Search and Seizure—a Second Class Constitutional Right, 25 IND. L.J. 259, 282–86 (1950).

received from many sources" and because they themselves are "often dispersed and stationed in various strategic positions in government and industry" are said to turn to the phone "as a matter of necessity." The retort, no doubt, is that criminals, organized or otherwise, either do not utilize the phone in their working hours, or do so in such a discriminating manner that next to nothing is to be gaining by permitting law enforcement personnel to tap. That is another question. The instant question is: if sufficient need for law enforcement tapping is demonstrated, can a statute to this effect be drawn which does not violate the spirit and history of the fourth amendment?

I have argued at some length that if the question presented in *Olmstead* had been decided the other way, as it should have been and may yet be, some law enforcement tapping would still be constitutionally permissible. But I am not at all sure that I need to so contend in order to make the argument that the present arrangement offers more protection against tapping—or at least as much—than would have been achieved by a contrary ruling in that celebrated case. That when all is said and done at least nothing much was lost in *Olmstead*.

C. What if the Fourth Amendment Applied To—But Permitted No—Wiretapping?

From this point on, I am willing to assume arguendo that if tapping had been held subject to the requirements of the fourth amendment all tapping would have been forbidden by the amendment to the extent all "unreasonable searches" currently are. But we already have such a ban now, and have had for a generation. Moreover, in a number of respects the protection now afforded by section 605 goes well beyond anything that would or even could be furnished by the fourth amendment.

(1) A comparison of the scope of protection afforded by the fourth amendment and section 605

The constitutional distinction drawn last term in *Frank v. Maryland* between searches designed to enforce "civil" regulations and those for evidence to be used in "criminal" proceedings raises anew

147. See text at notes 47–49 *supra*.
a host of questions about the fourth amendment protection afforded “quasi-defendants,” that is, the many persons—whether they be government employees charged with disloyalty or aliens facing deportation or public figures investigated by legislative committees—who “get into difficulties with government . . . and are exposed to the danger of suffering the most severe penalties, without being in a position to claim the [criminal] defendant’s rights.”

The difficulties are well illustrated by the fourth amendment problems in connection with deportation proceedings, problems which badly split the Court as recently as this term in *Abel v. United States.* Since petitioner had not made the challenge below, Mr. Justice Frankfurter, writing for the majority, purported to reserve judgment until another day on the validity of Immigration and Naturalization “administrative” warrants for arrest preliminary to deportation. However, while the question was said to be “not entitled to our consideration,” Mr. Justice Frankfurter proceeded to give it his most serious consideration—leaving little doubt that he would sustain such warrants.

All the Court had to decide in *Abel* was that a search incident to an administrative arrest was valid at least when no broader than and analogous in purpose to those permitted as incidents to “criminal” arrests. Some hints were dropped, however, that warrantless searches by immigration officers transcending the limits permitted law enforcement officers might also be sustained. Why not?

If the issuance and execution of a warrant for arrest pending deportation need not comply with the requirements of the fourth amendment, and there is much authority to this effect, why must

149. FELLMAN, *THE DEFENDANT’S RIGHTS* 213 (1958). “They are at best only quasi-defendants, and therefore, to paraphrase Justice Holmes, their rights are shaded by a quasi.” *Ibid.* For excellent general treatments of the problem see 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 7 (1958); FELLMAN, supra at ch. 12.

150. 362 U.S. 217 (1960) (permitting evidence seized during a warrantless search incident to an arrest under an administrative deportation warrant to be used in a criminal prosecution).

151. *Id.* at 230.

152. *Id.* at 230–34.

153. *Id.* at 236.

154. If anything, we ought to be more vigilant, not less, to protect individuals and their property from warrantless searches made for the purpose of turning up proof to convict than we are to protect them from searches for matter bearing on deportability. According to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions. Searches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government’s intrusion into privacy; although its protection is not limited to them, it was at these searches which the fourth amendment was primarily directed.

a search? Or, at least one pertaining to alienage or to an alien's commission of deportable offenses? Is it too simple to assert that either the fourth amendment applies to procedures preliminary to deportation proceedings or it does not? The fourth amendment guarantees "the right of the people to be secure" first of all "in their persons." 156 Is not, then, an unreasonable seizure of the person a greater evil than the similar seizure of one's "effects"? 157

Put it this way. Suppose Olmstead had outlawed all wiretapping to the extent the fourth amendment now prohibits "unreasonable searches." Suppose, further, that in addition to their current power to issue administrative warrants for arrest pending deportation whenever "necessary or desirable," 158 the Attorney General and his delegate were also given comparable statutory authority to issue orders to tap aliens' phones. I am not nearly as sure as I would like to be that such a statute would be found unconstitutional.

Put it another way. Suppose Olmstead had banned wiretapping and section 605 had never been enacted or, if so, not interpreted as it has been. Suppose, further, that immigration officials—without statutory authority—had tapped an alien's phone and sought to use evidence so obtained in a deportation proceeding against him. I have little doubt the Court would have some unkind things to say to the immigration officials, but I seriously doubt whether such evidence would be suppressed. 159 Even in a state prosecution for a capital offense, due process does not demand the exclusion of logically relevant evidence obtained by an unreasonable search and seizure. 160 Why, then, must or should the Court invoke the exclusionary rule in a deportation proceeding? After all, "according to the uniform decisions of this Court," Mr. Justice Frankfurter reminded us in Abel, "deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions." 161

156. U.S. CoNsr. amend. IV.
160. Wolf v. Colorado, 338 U.S. 25 (1949). Wolf itself was not a capital case, but it is quite clear that the decision covers capital cases as well.
161. 362 U.S. at 237.

The Court ruled in Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) that since "the order of deportation is not a punishment for crime ... the provisions of the Constitution ... prohibiting unreasonable searches and seizures ... have no application." One commentator has regarded this ruling "limited" by United States ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923), where Mr. Justice Brandeis is said to have "stated for the Court" that evidence obtained via illegal search and seizure could not be made the basis of a finding in a deportation proceeding. See Wray, Application of the Fourth Amendment to Civil Proceedings, 14 Food Davc Cosm. L.J. 594, 544–45 (1959). However, Brandeis expressly assumed this was the law, 263 U.S. at 155, in order to quickly dispose of appellant's contention, for he had not been subjected to a search or seizure at all, illegal or otherwise. Ibid.
On the other hand, the unqualified language of section 605 and its "built-in" exclusionary rule make it a good deal clearer, if not absolutely clear, that aliens facing deportation and other "quasi-defendants" can invoke its protection. Indeed the broad sweep of the statute seems to extend even to ordinary civil litigation with the United States, perhaps even to all private civil litigation in the federal courts as well.\textsuperscript{162}

There is some lower federal court authority for the view that an alien facing deportation is entitled to the protection of the fourth amendment, see Wray, \textit{supra}, at 544-45; Comment, 34 N.Y.U.L. Rev. 619, 620 (1959), but the cases cited take the general approach that the Constitution's safeguards are as applicable to deportation as criminal proceedings—an approach emphatically rejected by the Supreme Court in recent decisions. See Marcellio \textit{v.} Bonds, 349 U.S. 302 (1955) (that hearing officer was subject to supervision and control of investigating and prosecuting officers does not deprive alien of due process); Carlson \textit{v.} London, 342 U.S. 524 (1952) (detention of certain classes of aliens without bail, at the Attorney General's discretion, pending determination as to their deportability, violates neither due process nor right to bail); Harisiades \textit{v.} Shaughnnessy, 342 U.S. 580 (1952) (prohibition against \textit{ex post facto} enactments inapplicable to deportation acts).

\textsuperscript{162}. See \textit{Maguire, Evidence of Guilt} 203 n.16 (1959).

Although the chief counsel for the Senate Select Committee on Improper Activities in the Labor or Management Field (McClellan Committee) made frequent use of recordings covering intercepted phone conversations in the Committee's 1957 hearings, the decision to do so—made prior to the \textit{Benanti} decision—was based on the grounds that the tapping had been conducted by \textit{state} officers and much, perhaps all, had been pursuant to New York court order. See the discussion in \textit{Maguire, supra} at 247 n.16.

Whether section 605 can be invoked to ban the use of information \textit{derived from wiretap "leads"} in a non-criminal proceeding is unclear. Viewing the \textit{Nardone} and \textit{Benanti} cases, which forbid the use of such derivative information in federal prosecutions, as an exercise of the Court's supervisory powers over the administration of federal criminal justice, Professor Howard Sacks concludes that since "in the case of administrative proceedings . . . no such supervisory power exists . . . it would appear that the Supreme Court would have no basis on which to directly forbid a loyalty tribunal from considering information derived from wiretapping." Sacks, \textit{Federal Civilian Employees Security Program: An Analysis of the Wright Commission Report}, 52 Nw. U.L. Rev. 715, 745 n.114 (1958). However, Professor Sacks goes on to suggest that on analogy to Rea \textit{v.} United States, 350 U.S. 214 (1956) (a federal court can enjoin a federal officer from using his illegal search and seizure as the basis of testimony in a state prosecution), a federal court could similarly enjoin a federal employee from giving derivative wiretap evidence at a loyalty hearing. \textit{Ibid}.

While there is language in the second \textit{Nardone} and \textit{Benanti} cases to support Professor Sack's view, a more reasonable interpretation of these cases, I submit, is that whenever wires are tapped in violation of section 605, the use of evidence derived from such misconduct also constitutes "a violation of the purpose and policy of that statute," as the Court put it, looking back on the second \textit{Nardone} case in Goldstein \textit{v.} United States, 316 U.S. 114, 118 (1942). In a federal administrative proceeding, as well as in a federal judicial proceeding, it would seem that "the essence of a provision forbidding the acquisition of evidence in a certain way is that . . . it shall not be used at all." . . . A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose." \textit{Nardone v. United States}, 308 U.S. at 340-41. Whatever may be said for the opposing demands of federalism in a \textit{state} proceeding, \textit{cf. Schwartz v. Texas}, 344 U.S. 199 (1952), the fact that the derivative use of wiretap information constitutes a violation of the purpose and policy of section 605 should operate to exclude such evidence from \textit{any federal proceeding}, administrative or judicial.
Furthermore, even where the proceedings are “criminal,” the fourth amendment, as construed to date, could not strike at wiretapping to the extent that section 605 can. The present ban operates to exclude all wiretap evidence from the federal courts regardless of who did the tapping; not so the fourth amendment. Absent a showing that federal officers participated in the enterprise—no easy task for the defendant—private individuals or local police could tap despite a fourth amendment ban and turn the evidence over to federal authorities for use in a federal prosecution.164

As I have contended elsewhere, in an era of overlapping state and federal crime legislation and hand-in-hand state and federal law enforcement, this exception to the federal exclusionary rule presents an alarming temptation to, and opportunity for, circumvention.165 The dangers are only enhanced when wiretapping is substituted for illegal search and seizure. For example, suppose city or state tappers merely furnish federal authorities with “leads.” The federal court must be satisfied that (1) defendant was tapped, (2) federal authorities collaborated with local law enforcement tappers, (3) the evidence proffered by the federal prosecutor was obtained primarily from the state tap, not from independent state sources, (4) nor from independent federal sources. Taken together, these evidentiary difficulties are virtually insurmountable.166

Furthermore, once a government witness admits that a tap had been placed on the subject at some point, this in itself is a specific violation of the statute. “For Section 605 forbids the divulgence of ‘the existence . . . ’ of the intercepted message,” Benanti v. United States, 355 U.S. at 100, as well as apparently, the continued use of “evidence now linked to a disclosed wiretap.” Id. at 101. Quaere, does not the use of evidence derived from wiretapping also violate the wording in section 605 that “no person having become acquainted with the contents, substance, purport, effect or the meaning of [the intercepted communication] . . . shall . . . use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto”? (Emphasis added.)

164. See note 95 supra and accompanying text.
166. The substantial difficulties confronting the defendant who seeks to establish simply that taps were placed on him in the first place are ably considered in Note, 61 YALE L. J. 1221 (1952). When and if this initial hurdle is cleared, it is unsettled whether the burden remains on the defendant to convince the court that such tapping “led” to the preferred evidence or falls on the prosecution to prove that the connection between such evidence and the tapping has, in the language of the second Nardone case, 308 U.S. at 341, “become so attenuated as to dissipate the taint.” A number of cases place both burdens on defendant. See generally, MACÜRE, op. cit. supra note 162, at 221–25; Bernstein, The Fruit of the Poisonous Tree, 37 ILL. L. REV. 99 (1942); Annot., 28 A.L.R. 1055 (1953).

That law enforcement officials accumulate and piece together valuable information by listening into numerous phone conversations, many of which are guarded and largely unintelligible in themselves, see Silver, supra note 101, at 845, only serves to aggravate the problems of proof. Consider, e.g., Sullivan v. United States, 95 U.S.
True, in *Schwartz v. Texas*,\(^ {167}\) section 605 was held not to prevent the divulgence of state-gathered wiretap evidence in state courts any more than does the constitutional protection against unreasonable search and seizure.\(^ {168}\) But the statement in *United States v. Benanti*,\(^ {169}\) excluding wiretap evidence obtained by state officers pursuant to state law from the federal courts, that "Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy"\(^ {170}\) may spell the beginning of the end for state court admissibility in the wiretapping area.\(^ {171}\)

Even if *Schwartz* survives, the statutory ban offers more possibilities for effectuating the prohibition against tapping in state cases than would a constitutional ban. While the illegal search and seizure is complete before trial, the wording of section 605 renders a disclosure of wiretap evidence at a state trial, a federal crime at that time. Unless and until the Supreme Court of the United States rules to the contrary, a conscientious state trial judge "faced with the unsavory alternative of allowing a federal crime in his court or of not following the state's rule of evidence"\(^ {172}\) may well balk at the former alternative.

Further, the fact that the use of wiretap evidence in a state trial would be the commission of a federal crime may enable a federal court to enjoin a state prosecutor from introducing such evidence.

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\(^ {167}\) 344 U.S. 199 (1952).


\(^ {169}\) 355 U.S. 96 (1957).

\(^ {170}\) Id. at 105–06.


Further evidence of the questionable status of the *Schwartz* rule is in the campaign the New York police and district attorneys have been waging to secure congressional enactment of the following Keating-Celler Bill:

No law of the United States shall be construed to prohibit interception, by any law enforcement officer or agency of any State (or any political subdivision thereof) in compliance with the provisions of any statute of such State, of any wire or radio communication, or the divulgence, in any proceeding in any court of such State, of the existence, contents, substance, purport, effect, or meaning of any communication so intercepted, if such interception was made after determination by a court of such State that reasonable grounds existed for belief that such interception might disclose evidence of the commission of a crime.


\(^ {172}\) Dash at 399.
Just recently, a regular division of the Second Circuit, fully aware that similar intervention in a state search and seizure case is precluded,\(^1\) enjoined the admission of wiretap evidence in a state prosecution,\(^2\) only to be reversed by the Circuit sitting en banc, 3-1.\(^3\) Judge Waterman, however, concurred "principally" on the expectation that the state judges will exclude such evidence on their own,\(^4\) and less than a week later one New York judge did just that.\(^5\)

Until the High Court is heard from, the whole area of wiretapping and federal-state relations must be regarded as quite unsettled. At the moment, one can say at least that the prospects for overruling Schwartz are a good deal brighter than they are for overruling Wolf and that the case for enjoining the use of wiretap evidence in a state trial is considerably stronger than for similar intervention in a state search and seizure case.

The statutory prohibition against tapping can be compared with the constitutional protection against unreasonable search and seizure in still another area. While Goldstein v. United States\(^6\) has sometimes been viewed as authority for the proposition that a defendant who is not a party to the tapped call can no more invoke section 605 than can one who is not a direct victim of an unreasonable search and seizure invoke the Constitution,\(^7\) it is far from clear that the analogy to the fourth amendment cases was ever so complete. Goldstein's co-conspirators were induced to confess and turn state's evidence by divulging to them the contents of intercepted telephone messages. At the trial, as the Supreme Court was careful to point

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\(^1\) Stefanelli v. Minard, 342 U.S. 117 (1951).
\(^2\) Pugach v. Dollinger, 275 F.2d 503 (2d Cir. 1960). Judge Medina, who wrote the majority opinion, had resorted to search and seizure analogy in Benanti, only to be reversed by a unanimous Supreme Court. Evidently, he was determined not to make that mistake again.
\(^3\) Pugach v. Dollinger, 28 U.S.L. WEEK 2527 (2d Cir. April 14, 1960). Judge Medina, the author of the earlier opinion to the contrary, did not sit.
\(^4\) Id. at 2528. Judge Waterman branded "presumptuous" the assumption that "any New York state trial judge will acquiesce to the commission of a crime against the United States in his presence." If subsequent state action no longer renders this thought "presumptuous," I take it Judge Waterman would side with dissenting Judge Clark.
\(^5\) Nassau County Court Judge Widlitz in the case of People v. O'Rourke relying heavily on Judge Waterman's concurring opinion in Pugach. See N.Y. Times, April 20, 1960, p. 34, col. 2. As in the Pugach case, defendant in the O'Rourke case had sought to enjoin the admission of wiretap evidence in the state criminal proceeding; however, his petition was denied. O'Rourke v. Levine, 181 F. Supp. 947 (E.D.N.Y. 1960). And this denial was affirmed by the Second Circuit en banc in a companion case to Pugach, 28 U.S.L. WEEK 2527 (2d Cir. April 14, 1960).
\(^6\) 316 U.S. 114 (1942).
out, they "did not testify either to the existence of the communications or to their contents." Thus, even before the Supreme Court handed down the Benanti opinion a keen observer suggested that if such a divulgence were to occur in federal courts it "would probably be barred even against those not party to the tapped conversation, either on the theory that a defendant has standing to object to the commission of a crime at his trial or on the theory that a federal court cannot tolerate the commission of a federal crime in its presence." After Benanti, emphasizing as it does the fact that the conviction was brought about by the commission of a federal crime in federal court, it is fairly clear that Goldstein is so limited. Indeed, the next time around the court may well extirpate what remains of the notion, imported from fourth and fifth amendment cases, that assertion of one's rights under section 605 is a personal matter. In any event, I think it may fairly be said that here, too, the statute already provides broader protection against tapping than would the fourth amendment.

(2) The problem of non-telephonic eavesdropping

Section 605 does furnish the protection against tapping Olmstead failed to provide, but what about other forms of electronic eavesdropping? Is not what was really lost in Olmstead—and remains lost— the protection against the detectaphone and the concealed microphone?

I think it fair to say that inadequate protection exists in this area, not so much because the Court took the wrong road in Olmstead but because it refused to call a halt along the way although there were ample opportunities to do so.

Chief Justice Taft, writing for the majority in Olmstead, took "the reasonable view" that—

[O]ne who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

180. 316 U.S. at 118. See also id. at 122.
182. See Dash 397-98.
183. "[I]f the conviction were actually brought about by the criminal use of an intercepted communication before the trial, as in the Goldstein case, the conviction would appear to be equally untenable." Dash 398.
185. 277 U.S. at 466.
Thus, *Olmstead* could have been readily distinguished in the two wireless eavesdropping cases the Court has decided since: *Goldman v. United States*\(^{186}\) and *On Lee v. United States*.\(^{187}\) In *Goldman*, by placing a detectaphone against the wall of a private office, federal officers overheard conversations the petitioners did not intend to project beyond their walls. Thus, petitioners did not "assume the risk" that the messages might be intercepted. In *On Lee*, the words were picked up via a "wired for sound" former acquaintance of petitioner working for the Narcotics Bureau who stood "within the constitutionally inviolate 'house' of a person."\(^{188}\)

Indeed, that *Olmstead* did not control the *On Lee* case is evidenced not only by dissenting Justices Burton and Frankfurter who distinguished *Olmstead*:

\[\text{[T]he fact that Chin Poy [the old acquaintance], without warrant and without petitioner's consent, took with him the concealed radio transmitter to which [Narcotics Bureau] agent Lee's receiving set was tuned . . . amounted to Chin Poy surreptitiously bringing Lee with him.}\(^{189}\)

But it was also evidenced by the majority, per Mr. Justice Jackson, who contended that petitioner's conviction should be affirmed even "if he could persuade the Court to overturn . . . *Olmstead*," because:

\[\text{Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver to be sure, but with the same effect on his privacy as if agent Lee had been eavesdropping outside an open window . . . It would be a dubious service to the genuine liberties protected by the Fourth Amendment to . . . liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure.}\(^{190}\)

*Olmstead* is hardly an insurmountable barrier in this area today for another, more pervasive reason. While the *Goldman* majority could still say that "no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the *Olmstead* case,"\(^{191}\) less than a year later the Court drew—and underlined—just such a distinction in the famous illegal detention case of *McNabb v. United States*.\(^{192}\) The *McNabb* line of cases\(^{193}\) amply demonstrates the Court's considerably greater

\(\text{\begin{footnotes}
\item[186.] 316 U.S. 129 (1942).
\item[187.] 343 U.S. 747 (1952).
\item[188.] Id. at 767 (Burton, J., dissenting).
\item[189.] Id. at 766.
\item[190.] Id. at 753-54.
\item[191.] 316 U.S. at 135.
\item[192.] 318 U.S. 332 (1943).
\item[193.] See Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); Anderson v. United States, 318 U.S. 350 (1943). See generally McCormick, Evidence 246-51 (1954); Maguire, op. cit. supra note 162, at 155-166;
\end{footnotes}}\)
power to formulate and apply standards of procedure and evidence in federal tribunals than to review state convictions under the Federal Constitution.

Thus, even if Olmstead still stands, it can hardly stand in the way of a Court bent on excluding the fruits of electronic eavesdropping "in the exercise of its supervisory authority over the administration of criminal justice in the federal courts." To be sure, this approach still would not prevent the use of state eavesdrop evidence in state courts, but then, so long as Wolf is with us, neither would overruling Olmstead.

It is true that the petitioner invoked McNabb to no avail in On Lee, but the Court did not reject the principle—only its application to the facts of the particular case:

Exclusion would have to be based on a policy which placed the penalizing of Chin Boy's breach of confidence above ordinary canons of relevancy. For On Lee's statements to Chin Boy were admissions. . . . The normal manner of proof would be to call Chin Boy and have him relate the conversation. . . . We should think a jury probably would find the testimony of agent Lee to have more probative value than the word of Chin Boy. . . . No good reason of public policy occurs to us why the Government should be deprived of the benefit of On Lee's admissions because he made them to a confidante of shady character. . . . However unwilling we as individuals may be to approve conduct such as that of Chin Boy, such disapproval must not be thought to justify a social policy of the magnitude necessary to arbitrarily exclude otherwise relevant evidence. 195

It is not too difficult to see how or why the Court could deprive federal authorities of the benefits of Goldman-type eavesdropping


195. 343 U.S. at 756–57. Earlier in the opinion for the majority, Mr. Justice Jackson did distinguish On Lee from McNabb on the ground that no specific federal violation by federal officers occurred in the former case as did in the latter. Id. at 754. But it has since become clear, if it had not been, that the administration of federal justice may be fatally tainted by means other than specific violations of federal statutes or rules. See the comments of the Court, speaking through Mr. Justice Frankfurter, author of the McNabb opinion, in Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115, 124 (1956). Consider, too, the concurring opinion of Mr. Justice Frankfurter, joined by justices Douglas, Harlan and Brennan, in Sherman v. United States, 356 U.S. 369, 380–82 (1958).

In any event, in his On Lee opinion Mr. Justice Jackson went on to recognize that "rules of evidence . . . are formulated by the courts to some extent, as 'a question of sound policy in the administration of the law,'" 343 U.S. at 755, but found "no good reason of public policy" for exclusion in the particular case. See text at this note.

Even aside from McNabb and its radiations, "recently [1948], Congress has confirmed the authority asserted by this Court . . . to determine admissibility of evidence in federal criminal proceedings under the 'principles of the common law as they may be interpreted . . . in the light of reason and experience.' Fed. Rules Crim. Proc. 26." Hawkins v. United States, 358 U.S. 74, 76–77 (1958).
after McNabb while it continues to admit the fruits of On Lee-type breaches of confidence. It is still easier to see how or why the Court could balk at the admission of evidence obtained by secreting a microphone in petitioner's home or office, that is, "the case of physical entry, either by force . . . by unwilling submission to authority . . . or without any express or implied consent" which Mr. Justice Jackson explicitly left open in On Lee. Indeed, Jackson himself has elsewhere pointed the way to exclude such evidence under the fourth amendment, even with Olmstead on the books. At the very least, such an invasion would seem to call into play the Court's supervisory powers over the administration of federal justice.

Thus, Olmstead need not, and may not, prevent the Court from excluding the fruits of all electronic eavesdropping except that conducted with the connivance of a party to the conversation. As already indicated, however, it seems this exception would still exist

196. 343 U.S. at 752-53.
197. In McDonald v. United States, 335 U.S. 451 (1948), District of Columbia police forced their way into a rooming house, proceeded to defendant's room, looked through the transom and observed the commission of a crime, only to have the evidence then seized thrown out of court as the product of a violation of the fourth amendment. Looking through a transom is no more a "search," than listening at the door. As Mr. Justice Jackson stressed in his concurring opinion, however, "the police gained access to their peeking post" by illegal means, id. at 458; "having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry . . . followed every step of their journey inside the house and tainted its fruits with illegality." Id. at 459.

There seems little doubt that if, in Irvine v. California, 347 U.S. 128 (1954), federal, rather than state, police had entered petitioner's home without a warrant to install concealed microphones therein, the resulting evidence would have been barred. Although the Court declined to exclude the evidence for the reasons set forth in Wolf v. Colorado, Mr. Justice Jackson, who announced the judgment of the Court and wrote a four-man opinion, observed that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government." Id. at 132. See Paulsen, Safeguards in the Law of Search and Seizure, 52 Nw. U.L. Rev. 65, 69 (1957).

Compare Silverman v. United States, 275 F.2d 173 (D.C. Cir. 1960). A majority of the court sustained the validity of a search warrant based on eavesdropping by means of a device inserted into a party wall, finding neither an unreasonable search nor a violation of the Communications Act. For the forceful argument that since Silverman involved the insertion of a spike at least half way into a party wall, a trespass according to the law of party walls (unlike Goldman where a detectaphone was merely placed against a wall) the police conduct constituted a violation of the fourth amendment, see 27 Geo. Wash. L. Rev. 735, 738-39 (1959) (discussion of lower court opinion).

Dissenting Judge Washington argued that if the eavesdropping did not abridge fourth amendment rights "it does violate . . . our fundamental concept of ordered liberty, as embodied in the due process clauses." 275 F.2d at 179. However, neither he nor the majority nor the case note considers the possibility that the warrant should have been struck down in the "application of proper standards for the enforcement of the federal criminal law in the federal courts." McNabb v. United States, 318 U.S. 332, 341 (1943).
even if Brandeis, Holmes & Co. had prevailed in *Olmstead*, or if the case were to be overruled.

**D. What Was Won in the Nardone Cases?**

I have asked, *what was lost in Olmstead?* Those who carry on the brave fight that Justices Brandeis and Holmes waged unsuccessfully in *Olmstead* might well point to the dismal lack of enforcement under section 605 and retort, *what was won in the Nardone cases?*

I would hate to have to argue that very much was won, but I do not think I need to. I do not claim that section 605 has accomplished much; I simply maintain that the fourth amendment would not have achieved any more. That there has been a notable failure to comply with the requirements of section 605 cannot be denied. But is there any reason to think that a fourth amendment ban would have fared any better? Is there not ample evidence to support the observation that "no other constitutional guarantee is so openly flouted with so little public outcry"?  

(1) The “troublesome” wording of section 605

Those who still debate the *Olmstead* case may say that if the Constitution, rather than the Federal Communications Act, prohibited tapping, at least the troublesome wording of section 605 would be gone—and with it the strained argument that law-enforcement tapping is legal so long as there is no divulgence outside the Department of Justice.  

I wonder whether the ingenuity of government lawyers can be so easily suppressed. I doubt that those who managed to contrive the present tortured rationalization for law enforcement tapping would be stopped cold by the language of the fourth amendment.  

In any event, my doubts about the efficacy of substituting other language for section 605 have deeper roots. It is quite evident, I think, that the statutory argument now put forth by the Department of Justice is merely a symptom—and that the illness will not be eradicated simply by resorting to the language of the fourth amendment. Public indifference toward, if not approval of, extra-legal tapping in "appealing cases" such as "offenses endangering the safety of the nation or the lives of human beings" will remain. So will the insistence by law enforcement officials that their tapping “is a


necessary concomitant of our present-day pursuit of spies, saboteurs, and other subversives” and “no worse . . . than is the use of informants, decoys, dictaphones, peeping, and the like—all of which have been accepted practices for many years.” As will the extraordinary difficulties of establishing not only that defendant’s phone was tapped at all, and by public officers, but, even if this hurdle can be cleared, that the evidence finally proffered in court was obtained primarily from such tapping rather than from independent sources—problems of proof which render the present protection against tapping largely illusory.

It is interesting to note that a 1931 provision in the F.B.I. manual authorizing tapping when “prior authorization of the Director of the Bureau has been secured” was not superseded until March 18, 1940 more than two years after the Court in the first Nardone case had interpreted section 605 to “include within its sweep federal officers as well as others” and more than three months after the second Nardone case had banned “leads” as well. This delay in compliance took place although the contention had not yet been made that section 605 puts no restraint on interception alone nor on interception plus intra-governmental divulgence.

Indeed the very release by Attorney General Jackson disclosing this change in F.B.I. policy, issued as late as 1941, contained the concessions that the Nardone cases “have in effect overruled the contentions of the Department that it might use wiretapping in its crime suppression” and that “under the existing state of the law and decisions” even tapping in a limited class of cases . . . cannot be done unless Congress sees fit to modify the existing statutes.

The Supreme Court was not presented with another wiretapping case until more than two years later—nor did it then, nor has it yet—supported the current Department of Justice interpretation of section 605. Nevertheless, in May of 1940, a short two months

202. See note 166 supra.
204. 302 U.S. at 384.
206. According to Donnelly, Comments and Caveats on the Wire Tapping Controversy, 63 Yale L.J. 799, 801 (1954), no judicial support for the Department’s position appeared until Judge Reeves’ dictum in United States v. Coplon, 91 F. Supp. 867, 871 (D.D.C. 1950), rev’d on other grounds, 191 F. 2d 749 (D.C. Cir. 1951) that section 605 “does not make wire-tapping an offense, but the interception and disclosure . . . constitute the crime.” In the New York Coplon case, both Judge Ryan, 88 F. Supp. 921, 925 (S.D. N.Y. 1950), and Chief Judge Learned Hand, speaking for a unanimous Second Circuit, 185 F.2d 629, 636 (1950), indicated that interception without more was unlawful.

While the statutory language is obviously susceptible of the interpretation that
after these concessions were made, F.B.I. tapping resumed. After these concessions were made, F.B.I. tapping resumed.

Although Attorney General Jackson told Chairman Summers of the House Committee on the Judiciary in March of 1941 that "there is no Federal statute that prohibits or punishes wiretapping alone," only a month earlier he wrote to Summers:

In the interests of national defense, as well as of internal safety, the interception of communications should, in a limited degree, be permitted to Federal law-enforcement officers. . . . I recommend legislation to carry out the foregoing recommendation.

Jackson, it turns out, was going through the motions of asking Congress for legislation to authorize what the Department was already doing. Tapping had resumed in May of 1940 pursuant to a confidential presidential directive authorizing the Attorney General to approve wiretapping "when necessary in situations involving the defense of the nation." Can it be seriously contended that in the face of such a directive a more precisely worded statute, or even a fourth amendment ban, would have succeeded where section 605 failed?

only an interception and divulgence constitute the offense, it seemed fairly clear from the language in the second Nardone case, 308 U.S. at 340-41, if not from the language in the first, 302 U.S. at 382, that either would suffice. See Kamisar, Wolf and Lustig: Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 MINN. L. REV. 1088, 1111 n.92 (1959). It is true that the Court appeared to reserve this question in Benanti, 355 U.S. at 100 n.5, "because both an interception and a divulgence are present in this case," while state officers alone "intercepted" the communications and federal authorities alone "divulged" its existence, the Court treated "divulgence" alone as a violation of section 605, id. at 100, 102. If the Court reads "no person . . . shall intercept any communication and divulge the . . . existence" to mean "intercept or divulge," in order to find "divulgence" alone a violation, how can it avoid reading the same statutory language in the disjunctive to find "interception" alone a violation?

In any event, the Justice Department must also clear a second — and higher — hurdle, that is, the use and dissemination of wiretap information still does not constitute a violation so long as it takes place within the Department. Not only does the view that divulgence by one government agent to another does not "really constitute "divulgence" seem to "defy the plain words of the statute and the decisions of the Supreme Court," Williams, supra note 199, at 860, but, as close readers of section 605 have pointed out, it also ignores the provision which bans the "use" of intercepted communications "or any information therein contained," for any one's benefit. See Moreland, Modern Criminal Procedure 144-45 (1959); Donnelly, supra at 801; Williams, supra at 859-60.

207. See text at note 210 infra.
209. Id. at 17. (Emphasis added.)
210. So described in Hoover, supra note 200, at 423. See also Rogers, supra note 201, at 795 & n.15. This memorandum has never been made public and Alan Barth reports that "attempts to obtain it from the Department of Justice have been of no avail." BARRIE, THE LOYALTY OF FREE MEN 172 n.16 (1951). See also Helfeld, A Study of Justice Department Policies on Wire Tapping, 9 LAW GUILD REV. 57, 60 n.84 (1949).
211. If federal officers resumed tapping in 1941 without any such directive, as
The February 1941 testimony of Judge Holtzoff, then a special assistant to the Attorney General, in favor of proposals to permit limited tapping is also illuminating:

[W]e want this authority not only in cases of sabotage. . . . We need it, also, for some of the crimes which do not affect national defense. For instance, in cases of kidnaping, tapping the telephone wires of the victim's home is one of the necessary things in every kidnaping investigation, and without permission to do so, if a kidnaping should occur in the future, the Department would be greatly handicapped . . . and I venture to say that such permission should exist in narcotic cases. 212

A month later, however, Holtzoff's superior disclosed that the Department was tapping in kidnaping cases:

A short time ago a small child was kidnaped in California. There was reason to expect that demands would be made upon the parents by telephone. If the voice making such a call were recorded . . . it might be decisive in saving the life of the child, or in convicting the kidnapper, and it might be equally decisive in clearing an innocent person . . . .

Of course, I directed Mr. Hoover to put a recording device on that line. 213

Can it be seriously contended that if the statutory language more precisely prohibited "interceptions" alone, or even if tapping were banned by the fourth amendment, Jackson would have told Hoover to go twiddle his thumbs? Can it even be seriously contended that if at the time the fourth amendment had been construed to prohibit tapping under such circumstances the Attorney General would have been at all bashful about telling the chairman of a House committee that, of course, he directed Mr. Hoover to tap?

Nor is it amiss to note that, when Francis Biddle held his first

suggested in Helfeld, supra note 210, they would appear to be even less likely to be affected by a constitutional or tighter statutory ban.

212. Hearings, supra note 208, at 7. (Emphasis added.)

213. Letter from Attorney General Jackson to Chairman Sumners, March 19, 1941, id. at 19. At the time and for many years thereafter, on the authority of Judge Learned Hand's opinion in United States v. Polakoff, 112 F.2d 888 (2d Cir.), cert. denied, 311 U.S. 653 (1940), it was thought that an interception of a phone conversation could not be made even with the consent of one of the parties to the call. It is interesting to note that the author of one of the most powerful articles against wiretapping ever written nevertheless contended that law enforcement officials should have the right to tap in such a situation. "The risk to which the nonconsenting party is subjected is not really a wiretapping risk," he observed, "but the risk of betrayal by the other party who acquiesced in the tap, a risk inherent in any form of communication with him." Schwartz, On Current Proposals to Legalize Wire Tapping, 103 U. Pa. L. Rev. 157, 168-67 (1954). See also Bernstein, The Fruit of the Poisonous Tree, 37 Ill. L. Rev. 99, 109-14 (1942). This view prevailed in Rathbun v. United States, 355 U.S. 107 (1957). The police can undoubtedly obtain the consent of the parents of the kidnapped child to install a tap in most cases, but there have been and there will continue to be situations where, although the parents have notified the authorities of the crime, because of the kidnapper's threats or otherwise they do not want the police to take any action at all until the child is returned safe and sound.
press conference as Attorney General in October of 1941, he is re-
ported to have told the assembled reporters:

[T]he stand of the Department of Justice would be, as indeed it had been
for some time, to authorize wire tapping in espionage, sabotage and kid-
napping cases, where the circumstances warranted. . . .

... 

[H]e understood that former Attorney General Jackson had relaxed the
general ban in the Department of Justice against tapping wires in order
to deal effectively with espionage and he thought this leeway might be
extended to extortion cases.  

Can it be seriously contended that Attorneys General—and Bid-
dle is hardly the worst one we have ever had—who openly contem-
plate building on extra-legal precedents, and who unashamedly
play fast and loose with statutory language and Supreme Court
decisions, would be stymied, albeit more troubled, by tighter statu-
tory wording or even by a fourth amendment ban?

(4) Section 605, the fourth amendment, and possible legislative
encroachment

Perhaps the most appealing reason for relying on the fourth
amendment rather than on the Communications Act is that such a
course would—

bring an end to attempted legislative encroachment upon present pro-
hibitions. Congress can amend or repeal the Communications Act, but it
cannot amend or repeal the fourth amendment.  

The short answer is that if a protection is illusory it does not really
make too much difference on what paper it is written. But too often
short answers are not full ones. To say that law enforcement officers
do not take the tapping prohibition very seriously is hardly to say
that either they or the public are completely uninfluenced by it.  
The ban has some effect on their actions, and there is certainly some-
thing to be said for placing it beyond the reach of Congress.

However, those who look to the fourth amendment for permanent
protection cannot be sure of even this much. The substantive pro-
tection furnished by the fourth amendment may not be the subject
of legislation, but what about the exclusionary rule which imple-
ments it?

In Wolf v. Colorado, Mr. Justice Frankfurter left this question

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214. Quoted in Hoover, supra note 200, at 423. (Emphasis added.)
215. See Williams, supra note 199, at 862.
216. For the view that "the law" can modify and create public attitudes and
affect police practice, and for illustrations of how it has, see Hall, supra note 198, at
161; Kostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193,
208-09 (1952). See also Paulsen, supra note 197, at 67 (rules restricting police
"have a symbolic value of highest importance").
only two members of the Court flatly rejected “any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment.” In *Irvine v. California*, Mr. Justice Jackson, in a four-man opinion, looked back on *Wolf* as a case which “declined to make the subsidiary procedural and evidentiary doctrines developed by the federal courts limitations on the states”; neither the concurring Justice nor the four dissenters explicitly challenged this characterization of the federal exclusionary rule. Indeed, Mr. Justice Black, one of the *Irvine* dissenters, had earlier viewed the exclusionary rule as “a judicially created rule of evidence which Congress might negate.”

I do not say that if and when the occasion arises the Court will hold that Congress can negate the exclusionary rule. But I cannot forget there is at least a significant possibility that it might so hold. And this in turn raises the possibility that if the Constitution, rather than a statute, frustrated would-be law enforcement tappers, more extreme measures might be advocated. That is to say, sufficient pressure mounted to amend a statutory ban against tapping in, for example, espionage or narcotic or labor racketeering might sweep up search and seizure as well and lead to a relaxation of the federal exclusionary rule for all fourth amendment violations in such cases. In viewing the fourth amendment as a much more

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217. While Mr. Justice Black, concurring in *Wolf*, agreed “with what appears to be a plain implication of the Court’s opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate,” 338 U.S. at 39-40, the implication of Frankfurter’s opinion for the majority was anything but plain. See the discussion in Note, 50 Col. L. Rev. 364, 366-67 (1950).

218. Mr. Justice Rutledge, dissenting, joined by Mr. Justice Murphy, 338 U.S. at 48.


220. *Id.* at 132. (Emphasis added.)

221. See note 217 *supra*.


223. Consider the Michigan experience. Its Supreme Court adopted the federal exclusionary rule, but by a 1936 constitutional amendment seizures of dangerous weapons or things were excepted and by further amendment in 1952 narcotic drugs were also excepted. Mich. Const. art. 2, § 10. Consider also the Maryland experience. A 1928 Act made an exception to the common law rule of admissibility in misdemeanor cases, but subsequent amendments have made prosecutions for unlawfully carrying a concealed weapon, for violations of health-narcotic drugs laws and, in certain counties, for violations of various gambling laws exceptions to the exception. Md. Ann. Code, art. 85, § 5; art. 27, § 299 (1957). The history of the Maryland legislation in this field is traced in Salzburg v. Maryland, 346 U.S. 545 (1954), which upheld the state’s checkered pattern against contentions that it violated the equal protection clause. At present there is reported to be “marked pressure” in California.
majestic battlefield than section 605 on which to pitch a stand against wiretapping, liberals may make the mistake of overlooking the fact that a good deal more may ride on the outcome of such a battle.

E. Wiretapping-Eavesdropping, Other Invasions of Privacy, and “the Man in the Street”

Whatever the historical reasons, and a major one may well be the long-held habit of “leaving it to the judges,” the current indifference of the American people to invasions of civil liberties other than wiretapping—for example, illegal detention, wrongful arrest, unreasonable search and seizure—makes me most reluctant to bank too much on public opinion in these areas. Talk long and loud as you like about police mistreatment of a “squalid huckster of bad liquor” paving the way for government suppression of political liberties or the knock on the door of an opium smoking den being the knock on Everyman’s door. I am sure that the man on the street—and a good many off it—are quite unimpressed.

Who cares what is happening today to the subversives, the narcotics peddlers, the labor racketeers or even the gamblers—or what is about to happen to them tomorrow? For too many the reassuring thought is that so far at least our liberties, that is, the liberties of decent citizens, have been in no way impaired. I do not know whether it is true that “clever men . . . are impressed by their differences from their fellows” while “wise men are conscious of their resemblance to them.” But if it is true, I am afraid we are suffering from an acute shortage of wisdom. I do not know whether, as has been said, “no society can long survive if each of its members in the last analysis calls himself ‘I’ and regards all others as a kind of inanimate ‘They.’” But I do know that many members of our society have been doing just that for quite some time.

The wiretapping-eavesdropping problem, however, is different, quite different. Here, at least, law enforcement officers have discovered that they must reckon with a public opinion nurtured by numerous and extensive legislative debates and hearings, front-page bugging or tapping scandals, and frequent newspaper editorial com-

225. See United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926) (per L. Hand).
They must reckon with a public opinion which on this aspect of civil liberties probably more than any other, if still not fully enlightened, is most alert and most vigorous.

It is well known that wiretapping is not restricted to "not very nice people" and "sordid little cases"; it touches all kinds, the reputable, the rich and the powerful as well as the notorious, the poor and the miserable, and it affects many, many persons.

A 1940 congressional investigation disclosed taps on such prominent persons as J. P. Morgan and John W. Davis and on such prominent corporations as the Guaranty Trust Company and the Soviet Amtorg Trading Company. It was learned in 1955 that "captives" of the 55th street "wiretap factory," capable of intercepting conversations over 100,000 phones, were "large law firms; gigantic business and financial houses; major publishing companies; aristocratic hotels patronized by the wealthy and the famous ... and other subscribers who daily on the telephone made decisions, plans, and compacts, the knowledge of which was priceless to competing or adversary interests." In the same year, the District Attorney of Philadelphia released to the press transcripts of telephone taps he had made on the lines of Teamster organizers. More recently, a New York joint legislative committee revealed electronic spying by the New York Transit Authority on the Motormen's Benevolent Association during the 1957 transit strike.

In 1948 various offices in the State Building in Los Angeles, including the attorney general's office, were tapped and/or bugged at the direction of an assistant attorney general. A bar committee was told the same year by a former secretary to Mayor Jimmy Walker that "when municipal investigations are in progress, every--

229. As Professor Westin has observed, "even Daddy Warbucks in the comic strip 'Little Orphan Annie' learned to his anger that agents of 'The Syndicate' were tapping his calls." Westin, Wiretapping: The Quiet Revolution, 29 Commentary 333, 334 (1960).

Most of the incidents cited at notes 231-41 infra were featured by the mass media. For a survey of editorial opinion on the subject up to 1952, much of which condemned F.B.I. tactics revealed in the Coplon trials and sharply criticized the announced policy of the Attorney General to permit law enforcement tapping on his say-so, see Westin, The Wire-Tapping Problem: An Analysis and a Legislative Proposal, 52 Colum. L. Rev. 165, 189-92 (1952). "While many newspapers desired a complete ban on wire tapping, the majority favored a system of guarded permission in limited areas, with tight judicial control and effective sanctions against officials who misused their wire-tapping powers." Id. at 191.


232. Id. at 86.


234. Dash 96-97.

235. Id. at 204.
body is wiretapped." In 1955 the phone of Mayor Morrison of New Orleans was tapped at a time when he was a candidate for governor. A Senate Committee learned in 1951 that a District of Columbia police lieutenant had tapped a United States Senator and officials of a major airline at a time when efforts were being made to arrange a merger between major airlines.

The Mayor of New York hired a private investigator in 1945 to tap the phones of certain UNRRA employees suspected of dishonesty. "There are charges that wiretapping may be an essential part of the Federal Bureau of Investigation's population-wide 'loyalty' probe. And recently complaints have been made that telephones of United Nations delegates and employees are under surveillance, as well as the telephones of foreign embassies, legations, and missions in the United States." Apparently not even the Supreme Court of the United States and the White House have escaped unscathed.

It is much easier to see in a wiretapping case than in one involving search and seizure why "the progress is too easy from police action unscrutinized by judicial authorization to the police state." It is also much easier to grasp the message that the "rights of everyone are immediately imperilled when the rights of even the outcast, the disdained, and the powerless, are trampled over with impunity."

For —

When a telephone is monitored, all who use it are overheard. These may include persons who are not under suspicion at all — guests and servants in the home of the suspect as well as anyone who happens to be on the other end of the line. They may include conversations which have nothing whatever to do with the alleged crime under investigation. They may entail the breach of confidential relations which the law has always regarded as privileged. In monitoring telephones in the Coplon case, the FBI recorded talks between the defendant and her mother, a quarrel between a husband and wife who had no connection with the case, and even conferences between the defendant and her lawyer. It learned, incidentally, about an affair, altogether unrelated to espionage, between Miss Coplon and a Justice Department attorney.

Nor is this the end of the matter:

Plainclothesmen also set up wiretap "dragnets" in areas where there are

236. Id. at 33.
237. Id. at 136–37.
238. Id. at 32.
239. Id. at 32–33.
241. Asia 29 (both incidents seem to have taken place about 1935).
243. Worthington v. United States, 166 F.2d 557, 568 (6th Cir. 1948).
large concentrations of people. One such area contains a bus stop, a subway station, and a railroad station. Another favorite spot is the bus stop from which the buses leave the race track. Here, it is an easy matter to locate the terminal boxes for the various public telephones and then tap these lines for a short period of time each day.\textsuperscript{245}

Only this year, a master of the subject reported that "a civil liberties revolt has taken place in America over wiretapping and electronic eavesdropping".\textsuperscript{246}

Since 1953, eighteen states have had legislative debates over wire tapping control laws. Of these, four have joined New York in placing official wire tapping under court-supervised warrant procedures and outlawing private interceptions. Two states have banned all wire tapping, whether done by private detectives or the state police. Five states have gone beyond telephone eavesdropping and enacted controls on all types of electronic monitoring—by radio, microphone, or electric beam. Three states have had judicial rulings which declared wire tapping to be illegal under existing laws and have excluded wiretap evidence from state trials. One state (Texas) passed a new law excluding wiretap evidence from state trials.\textsuperscript{247}

Before 1953, as surveys unequivocally showed, community sentiment ran in favor of official taps at official discretion, not against them. Today, in the states which have enacted controls and in many others where legislation is under consideration, the trend of community sentiment is in the other direction. The most potent method of dealing with recalcitrant police officials is surveillance by special legislative committees (like the Forbes Committee in New Jersey, the Savarese Committee in New York, and the Regan Committee in California) which have been active since 1958 and which possess the necessary political power to take on law enforcement officials who disregard their legal limitations.\textsuperscript{248}

Nor have wiretapping opponents fared badly at the national level. It is well to remember that through hot war and through cold war law enforcement officials have sought in vain to amend section 605. They have insisted that they needed such legislation to deal with treason, espionage and sabotage; they have told Congress much about Japanese, German, and Russian spies. They have dwelt at even greater length on kidnappers of little children. Over twenty years—and over fifty bills\textsuperscript{249} later—they have nothing whatever to show for their efforts.

The liberals may have lost a battle in \textit{Olmstead}, but by carrying the fight to the court of public opinion I think they are winning

\textsuperscript{245} DASH 70.
\textsuperscript{247} Ibid.
\textsuperscript{248} Id. at 337.
\textsuperscript{249} See the Legislative Reference Service compilation of the legislative history of wiretapping-eavesdropping bills introduced during 1919–1959, 1959 \textit{Hearings} pt. 4, at 781–1031 (1959) (app. to pt. 3).
much more. They are winning in an arena where they must win—where they have not won nearly often enough. If those who strive to restrict police practices on grounds of "policy and common sense" cannot win on the wiretapping issue, where can they?

I do not predict that the civil liberties, labor and other groups who have successfully resisted any relaxing of section 605 will do as well against the next fifty proposals as they have against the last fifty. I do not even say they should. I only say that if talk of the "free society," the dignity of man," avoidance of "an atmosphere of anxiety" or the preservation of an atmosphere of freedom and respect for individuality is ever to reach the man in the street above the clamor for weapons to deal with "treason, espionage, sabotage and the kidnapping of little children," to wage war against "the criminal cartels," to guard "the safety of our Nation," wiretapping is the battlefield. The irony of it is that a contrary ruling in Olmstead might well have deprived us of this battle.

CONCLUSION

We know a good deal more about wiretapping-eavesdropping practices than we did before Samuel Dash and his colleagues wrote The Eavesdroppers. But we do not know all we would like to know. I doubt that we ever will.

Even if somehow, some way, the many "facts" were to stand long enough for us to get at them, I am not at all sure what we

250. "[W]e shall have to recognize that the problems [of criminal procedure] are, in the larger part, not those of the limits of constitutional power but of policy and common sense." Allen, Law and the Future: Criminal Law and Administration, 51 Nw. U.L. Rev. 207, 215 (1956).
251. Donnelly, supra note 206, at 806.
253. Id. at 682.
256. PARKER, POLICE 104 (Wilson ed. 1957).
258. Although THE EAVESDROPPERS was published in late 1959, much of it deals with the situation prior to 1958. See, e.g., DASH 79, 128, 231, 276. A report by Professor Westin published in April of this year indicates that in the meantime a number of significant changes have taken—or at least are taking—place. For example:

[Private tapping has without question been pushed back from the high tide of the early 1950's. A good many of the nation's leading private tappers have been tried and convicted . . . .]

Undoubtedly, private tapping continues in the major cities. . . . But the old, virtually open flaunting of private wire tapping (including ads in the yellow pages . . .) is passing away. Moreover, the former camaraderie between the
would have then achieved. Surely, the whole-truth-and-nothing-but-the-truth about this ever so complicated business would not point plainly to a single resolution of the fundamental issues posed. Rather, I think that here, as elsewhere, "when the last factual survey has been completed and the last questionnaire has been returned and tabulated, we shall still have to decide" and to do so we shall still have to resort to "the natural process of compromise by which such issues are actually settled in a peaceful society." 259

Here, as elsewhere, I think, sooner or later we will, and we should, remove some "keep-off-the-grass" signs and "pave the paths cut by trespassing feet." 260 Indeed, the best measure for really keeping the police off the grass at many points may well be taking down the barriers at others. "[I]f the rules make sense in the light of a policeman's task, we will be in a stronger position to insist that he obey them." 261 And if an absolutely-unconditionally-positively-no-tapping sign makes little or no sense to a policeman I really cannot say I blame him.

The observation has been made that "a government which acts genuinely in the interests of the general public runs a risk of being thought by each section to be perversely ignoring the interests of that section." 262 Thus, I have a hope, as well as an expectation, that fewer signs will be removed than law enforcement officials desire, yet more than many opponents of wiretapping would like to see.

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261. Paulsen, supra note 197, at 66.

262. RUSSELL, AUTHORITY AND THE INDIVIDUAL 41 (1949).