

## Electronic Eavesdropping--The Inadequate Protection of Private Communication

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### *Conclusion*

The joinder of facts in the *Escobedo* holding has wrought serious controversy over its meaning and effect. It is submitted, however, that the path hewn by the New York courts is at best tangential. This position is substantiated by the general tenor of the *Escobedo* opinion, and by the recent history of the Supreme Court which evidences a marked tendency toward proscribing prior law enforcement practices in favor of a countervailing interest in the protection of the individual.

Certainly, the underlying problem, that is, a denial of substantial justice to one accused of crime, remains the same whether there is a request for counsel or not. Vital individual rights cannot be mechanically denied, and the formalistic distinctions made in New York regarding the origin of a request are not even logically satisfying. When the accused is unaware, and is not advised of his rights, he is prone to the loss of defenses and privileges. It is this occurrence which truly makes the trial no more than an appeal from the interrogation, and this is exactly what the *Escobedo* Court attempted to eliminate. In fact, *Escobedo* concluded that a system of law enforcement which depends for success upon obtaining a confession will be less reliable and more subject to abuse than a system which depends on extrinsic evidence independently secured through skillful investigation.



## ELECTRONIC EAVESDROPPING—THE INADEQUATE PROTECTION OF PRIVATE COMMUNICATION

### *Introduction*

Electronic eavesdropping devices, the "tools"<sup>1</sup> which enable one to surreptitiously monitor and record a private conversation not conducted within his physical presence,<sup>2</sup> have become a problem

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<sup>1</sup> For a description of directional microphones, tape recorders, induction coils, and various other electronic eavesdropping devices currently available see DASH, SCHWARTZ & KNOWLTON, *THE EAVESDROPPERS* 305-81 (1959). For a discussion of the use of miniature microphones and radio transmitters, and the possibility of eavesdropping by laser light, see *Time*, March 6, 1964, pp. 55-56.

<sup>2</sup> Electronic eavesdropping may be classified into three general categories: (1) wiretapping, which may be accomplished by means of a physical connection to the tapped line, or by means of an induction coil, in which case no direct connection is necessary;

of grave concern. "Discovery and invention have made it possible for the Government . . . to obtain disclosure in court of what is whispered in the closet,"<sup>3</sup> and legal protection of private communication has been rendered ineffective by certain technological advances in electronics. It is generally agreed that some form of regulation and control of electronic eavesdropping devices is necessary.<sup>4</sup> However, there is no universal agreement as to the type or degree of control to be employed,<sup>5</sup> since such regulation necessarily involves the problem of balancing "the right of the individual against the need of society to protect itself from serious criminal activity."<sup>6</sup>

It is the purpose of this note to examine the law of eavesdropping, to point out the pertinent legal and social problems, and to suggest possible solutions.

### History<sup>7</sup>

#### *The Federal Level*

In *Olmstead v. United States*,<sup>8</sup> decided in 1928, the Supreme Court held that the privacy of telephone conversations was not constitutionally protected. The Court reasoned that the interception of such communications by means of a wiretap was not a trespass, and consequently, did not constitute an unreasonable search and

(2) "bugging," which involves the placing of a microphone, tape recorder, or miniature radio transmitter in the area wherein the conversation is to take place; and

(3) "long distance" eavesdropping, which includes all forms of eavesdropping by devices not included in the above-named categories, and which usually is accomplished by means of parabolic or directional microphones which can pick up conversations at distances of 100 feet or more.

<sup>3</sup> *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (dissenting opinion).

<sup>4</sup> See, e.g., *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. (1961) [hereinafter cited as *Committee Report*]; REPORT OF THE JOINT LEGISLATIVE COMMITTEE TO STUDY ILLEGAL INTERCEPTION OF COMMUNICATIONS, N.Y. Leg. Doc. No. 53 (1956).

<sup>5</sup> See *Symposium—The Wiretapping-Eavesdropping Problem: Reflections On The Eavesdroppers*, 44 MINN. L. REV. 813 (1960).

<sup>6</sup> *Committee Report* 449.

<sup>7</sup> At common law, eavesdroppers, those who "listen under walls or windows or the eaves of a house, to hearken after discourse," were indicted under the theory of common nuisance. 4 BLACKSTONE, COMMENTARIES\* 168. Electrical eavesdropping, in the form of interception of telegraphic messages, was employed during the Civil War, and New York police were using wiretapping in criminal investigations as early as 1892. DASH, SCHWARTZ & KNOWLTON, *op. cit. supra* note 1, at 23, 35.

<sup>8</sup> 277 U.S. 438 (1928).

seizure within the meaning of the fourth amendment.<sup>9</sup> This rule, which requires that a trespass is essential to the establishment of an unconstitutional infringement upon the rights of the individual, has endured to the present time.

In reaction to *Olmstead*, Congress enacted the Federal Communications Act<sup>10</sup> (hereinafter referred to as the Federal Act), which prohibits the interception and divulgence of radio and wire communications. The Supreme Court has held that evidence obtained in violation of the Federal Act is inadmissible in a federal court.<sup>11</sup> However, such evidence is admissible in a state court<sup>12</sup> even though divulgence of the information secured through the use of a wiretap constitutes a federal crime.<sup>13</sup>

Since the Federal Act proscribes only interception and divulgence of *wire* and *radio* transmissions, other, more sophisticated forms of electronic eavesdropping, are not prohibited. Thus, in *Goldman v. United States*,<sup>14</sup> where federal agents had placed a detectaphone against a common wall in order to eavesdrop, the evidence so obtained was admissible since "what was heard . . . was not made illegal by *trespass* or *unlawful entry*."<sup>15</sup>

Similarly, in *Lopez v. United States*,<sup>16</sup> where a wire recorder was concealed on the person of an Internal Revenue agent, evidence of attempted bribery, thereby recorded, was admissible. The Court rejected the argument that the conduct of the federal agent constituted an unreasonable search and seizure.<sup>17</sup>

In *Silverman v. United States*,<sup>18</sup> however, where federal police officers had driven a "spike mike" into a party-wall in order to eavesdrop, the Court held this conduct to be an illegal invasion of a constitutionally protected area, and ruled that evidence

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<sup>9</sup> The fourth amendment provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>10</sup> 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1964). The pertinent parts of this section are as follows: "no person receiving . . . or transmitting . . . any interstate or foreign communication by wire or radio shall divulge or publish the . . . contents . . . thereof . . . and no person not being authorized by the sender shall intercept any communication and divulge . . . the . . . contents . . . of such intercepted communication. . . ."

<sup>11</sup> *Nardone v. United States*, 302 U.S. 379 (1937) (evidence obtained by federal agents); *Benanti v. United States*, 355 U.S. 96 (1957) (evidence obtained by state agents).

<sup>12</sup> *Schwartz v. Texas*, 344 U.S. 199 (1952).

<sup>13</sup> See *id.* at 202; RICHARDSON, EVIDENCE § 147 (Prince ed. 1964).

<sup>14</sup> 316 U.S. 129 (1942).

<sup>15</sup> *Id.* at 134. (Emphasis added.)

<sup>16</sup> 373 U.S. 427 (1963).

<sup>17</sup> *Id.* at 438-39.

<sup>18</sup> 365 U.S. 505 (1961).

so obtained was inadmissible. The Court's decision was based on the *physical intrusion* into Silverman's premises in violation of the search and seizure provisions of the fourth amendment.

Thus, where there is no illegal invasion of a constitutionally protected area, evidence obtained through the use of electronic eavesdropping devices is admissible in federal courts. However, where the electronic eavesdropping is accomplished by means of an illegal *trespass*, the evidence so obtained is inadmissible in a federal court as having been obtained through an illegal search and seizure.

### *The State Level*

State regulation of eavesdropping is by no means uniform, and it varies in degree from absolute prohibition to complete freedom from control; the New York position is located between the two extremes.<sup>19</sup>

While some states have enacted no statutory scheme to control eavesdropping,<sup>20</sup> Illinois has prohibited all forms of eavesdropping by device,<sup>21</sup> and evidence obtained in violation of the statute is inadmissible in a civil or criminal trial.<sup>22</sup> However, consent by *one* of the parties to the monitored conversation will defeat the purpose of the statute, since a violation occurs only where the consent of neither party has been obtained.<sup>23</sup> Thus, a conversation may be monitored where one party has consented, even though the other party is unaware that it is being overheard by a third person.

In New York, electronic eavesdropping may be performed by state officers,<sup>24</sup> subject to certain exceptions,<sup>25</sup> and only after obtaining a court order.<sup>26</sup> Even though the New York procedure apparently authorizes a violation of the Federal Act, the New

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<sup>19</sup> See generally *Committee Report*.

<sup>20</sup> *Committee Report* 550-51, 554.

<sup>21</sup> ILL. ANN. STAT. ch. 38, §§ 14-1(b), 14-2 (Smith-Hurd 1964).

<sup>22</sup> ILL. ANN. STAT. ch. 38, § 14-5 (Smith-Hurd 1964).

<sup>23</sup> See *Magee v. Williams*, 329 F.2d 470, 474 (7th Cir. 1964); *United States v. Pullings*, 321 F.2d 287, 295 (7th Cir. 1963).

<sup>24</sup> N.Y. CODE CRIM. PROC. § 813-a, b.

<sup>25</sup> New York police officers may use electronic eavesdropping devices without court order when they have reasonable grounds to believe that evidence of a crime may thereby be obtained and time does not permit application for an order. The application must be made within twenty-four hours after the commencement of the eavesdropping. However, in all instances, wiretapping must be authorized by court order. *Supra* note 24.

<sup>26</sup> N.Y. CONST. art. 1, § 12 (1954); N.Y. PEN. LAW § 739; N.Y. CODE CRIM. PROC. § 813-a.

York Court of Appeals has upheld the statute, and has admitted evidence so obtained.<sup>27</sup>

### *The Current Conflict*

In *Nardone v. United States*,<sup>28</sup> the Supreme Court, in construing the Federal Act, held evidence obtained by federal officers in violation of that statute inadmissible in a federal court. The Court did not consider the *constitutionality* of the admission of evidence obtained by use of a wiretap, but decided the case solely on the grounds of the *statutory prohibition*.

The *Nardone* rule is to be distinguished from the exclusionary rule established in *Weeks v. United States*.<sup>29</sup> In *Weeks*, the Court had held that evidence obtained by federal agents in violation of the fourth amendment was inadmissible in a federal court. This exclusionary rule was inapplicable in *Nardone* since, by the rule of *Olmstead*, wiretapping is not violative of the fourth amendment.

It is apparent, therefore, that there are, in reality, *two* federal exclusionary rules applicable to evidence obtained by means of electronic eavesdropping. Under the *Nardone* rule, wiretap evidence is inadmissible in a federal court; under the *Weeks* rule, evidence obtained by those forms of electronic eavesdropping which involve an unreasonable search and seizure is inadmissible in a federal court.

The *Nardone* rule has not been applied to the states, and therefore, the *admissibility* of evidence obtained by means of a wiretap is determined by state rules of evidence. Thus, such evidence obtained by wiretap is *admissible* in New York courts, even though divulgence constitutes a federal crime. Illinois, however, will admit wiretap evidence only where the consent of a party to the conversation has been obtained.

While each state is free to determine whether or not wiretap evidence will be admissible in its courts, discretion in determining the admissibility of evidence obtained by other forms of electronic eavesdropping has been limited by the Supreme Court. In the celebrated case of *Mapp v. Ohio*,<sup>30</sup> the exclusionary rule of *Weeks* was made binding upon the states. Under the *Mapp* decision, all evidence obtained by use of electronic eavesdropping

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<sup>27</sup> *People v. Dinan*, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406, *remititur amended*, 11 N.Y.2d 1057, 184 N.E.2d 184, 230 N.Y.S.2d 212, *cert. denied*, 371 U.S. 877 (1962). However, where the statutory provisions for eavesdropping by court order are not complied with, evidence obtained in violation of the statute is inadmissible in a New York court. CPLR 4506.

<sup>28</sup> 302 U.S. 379 (1937).

<sup>29</sup> 232 U.S. 383 (1914).

<sup>30</sup> 367 U.S. 643 (1961).

devices which involve an unreasonable search and seizure *must* be excluded from both state and federal courts. The states are no longer allowed to admit evidence which has been obtained in violation of the fourth amendment, and any rule of evidence to the contrary is now unconstitutional.

In *People v. Grossman*,<sup>31</sup> police officers, after obtaining an eavesdropping order, planted a "bug" in the defendant's house, and thus, the New York supreme court was directly presented with the question of the constitutionality of the state's procedure for eavesdropping sanctioned by court order. In holding the evidence so obtained inadmissible, the court stated that "insofar as any statute or court order attempts to authorize such *physical invasion or intrusion*, it would be unconstitutional."<sup>32</sup> The court based its decision on the finding of a physical intrusion in violation of the search and seizure provisions of the fourth amendment, and in reference to the totality of the New York procedure for eavesdropping by court order, stated:

a search warrant under the Warrant Clause of the Fourth Amendment must be in advance of the search and specify with particularity the *things* to be seized. Obviously, a State eavesdropping order cannot specify with particularity in advance the conversations or verbal statements to be seized.<sup>33</sup>

Thus, while New York presently permits electronic eavesdropping, the well-reasoned opinion in *Grossman* has cast grave doubt upon the constitutional validity of this practice.

### Possible Solutions

#### Unreasonable Search and Seizure

The Supreme Court could, by defining *all forms* of electronic eavesdropping as unreasonable searches and seizures, impose the exclusionary rule of *Weeks* upon the states through the authority of *Mapp*. It has been suggested that "the distinction made between the *Goldman* and *Silverman* cases [*i.e.*, the prerequisite trespass to establish unconstitutionality] seems too unsubstantial to long remain part of the law."<sup>34</sup> Mr. Justice Douglas has stated that wiretapping is violative of the fourth amendment,<sup>35</sup> and has expressed his belief that prior decisions of the Court to the contrary are erroneous.<sup>36</sup>

<sup>31</sup> 45 Misc. 2d 557, 257 N.Y.S.2d 266 (Sup. Ct. 1965).

<sup>32</sup> *Id.* at 574, 257 N.Y.S.2d at 283.

<sup>33</sup> *Id.* at 567, 257 N.Y.S.2d at 276.

<sup>34</sup> RICHARDSON, EVIDENCE § 148 (Prince ed. 1964).

<sup>35</sup> *On Lee v. United States*, 343 U.S. 747, 762 (1951) (dissenting opinion).

<sup>36</sup> *Supra* note 12, at 205 (dissenting opinion).

In reference to non-wiretap eavesdropping, Mr. Justice Douglas has maintained that "the depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury."<sup>37</sup> It is his position that the command of the fourth amendment should not be "limited by nice distinctions turning on the kind of electronic equipment employed."<sup>38</sup>

### *The Right of Privacy*

The emerging and not yet clearly defined right of privacy might well provide a basis for protection of private communications, since the Supreme Court has several times alluded to the existence of such a constitutional right.<sup>39</sup> In *Griswold v. Connecticut*,<sup>40</sup> basing its position on the guarantees of the Bill of Rights, the Court flatly declared that such a right does indeed exist within the boundaries of marriage. It was stated that the idea of allowing police officers to search the "sacred precincts of marital bedrooms" for evidence of the use of contraceptives is "repulsive to the notions of privacy surrounding the marital relationship."<sup>41</sup>

Present laws, however, do not prevent the police from electronically eavesdropping on conversations held in that same bedroom for evidence of crimes. The right to be secure from physical intrusions of the home means very little if the same information can be purloined by the use of "long distance" eavesdropping devices.

Mr. Justice Clark has not restricted the right of privacy to the realm of the marital relationship. In *Mapp v. Ohio* he stated:

having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be

<sup>37</sup> *Silverman v. United States*, 365 U.S. 505, 513 (1961) (concurring opinion). (Emphasis added.) It is interesting to note that Mr. Justice Douglas, who wrote the majority opinion, has not always recognized a constitutionally protected right of privacy. He had agreed with the majority in *Goldman* in holding that there was no constitutional objection to surreptitious recording of a private conversation. However, in *On Lee v. United States*, a case almost indistinguishable from *Goldman* on its facts, Justice Douglas, in his dissent, stated that the right of privacy is guaranteed by the fourth amendment. After discussing various types of electronic eavesdropping devices then in use, he stated: "I now more fully appreciate the vice of the practices spawned by *Olmstead* and *Goldman*." *Supra* note 35.

<sup>38</sup> *Ibid.*

<sup>39</sup> See, e.g., *Mapp v. Ohio*, *supra* note 30; *Frank v. Maryland*, 359 U.S. 360 (1959); *Boyd v. United States*, 116 U.S. 616 (1885).

<sup>40</sup> 381 U.S. 479 (1965).

<sup>41</sup> *Id.* at 486.

secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, *we can no longer permit that right to remain an empty promise.*<sup>42</sup>

It is conceivable, therefore, that a basis for protection of private communications may be founded in an extension of the right of privacy as it is now recognized and protected by the Supreme Court.

### *Conclusion*

Constitutional guarantees should not be limited in scope to prohibit only those invasions which were possible at the time of the enactment of the Bill of Rights. It is not the *device* which must be examined, but rather the *nature of the right* which is sought to be protected. The right to be secure from unreasonable searches and seizures and the right to enjoy the privacy of one's home should not be made to depend upon the state of technology at any given time. Recognition of the essential *nature of the rights* and their protection against encroachment by the federal and state governments, will insure that technology will not reduce such rights to mere "empty promises."

While recognition of the unconstitutionality of electronic eavesdropping by police officers would render evidence so obtained inadmissible in both state and federal courts, such recognition would not, ipso facto, bring an end to the practice. Although the Constitution affords protection to the individual against acts of the government, it does not protect against the acts of private citizens. In the absence of legislation, private individuals would still be free to use electronic and other devices for the purpose of eavesdropping.

It would appear, therefore, that the true solution to the problem lies not only in holding eavesdropping to be an unreasonable search and seizure and a contravention of the right of privacy, but also in enacting comprehensive legislation on the federal level. Such legislation, proscribing *all* forms of *eavesdropping by device*, except with consent of *all* parties to the conversation, and providing severe penalties for violation, would discourage the practice of electronic eavesdropping, and provide a measure of protection for private communications not found under present law.

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<sup>42</sup> *Mapp v. Ohio*, *supra* note 30, at 660.