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Recommended Citation
Margaret Lybolt Rosenzweig, Law of Wire Tapping, 33 Cornell L. Rev. 73 (1947)
Available at: http://scholarship.law.cornell.edu/clr/vol33/iss1/4

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THE LAW OF WIRE TAPPING*

MARGARET LYBOLT ROSENZWEIG

PART IV

The Law of Wire Tapping in the States

Wire tapping involves first a physical interference with wires before the act of listening or interception of messages occurs. It was the first aspect which apparently seemed of prime importance to the state legislatures in the early days of telegraphic communication. Such acts appeared a double threat to the property of the telegraph companies and to uninterrupted public service. It is natural, therefore, that statutes prohibiting wire tapping should have been entitled in many instances "Injuries to Property" or "Injuries to Public Utilities" and included with the sections penalizing acts of malicious mischief. The intention of the legislatures to protect property is further evidenced by the provisions sometimes included for liability to the telegraph company for damages sustained by it. The statutes of some of the states even today reflect only a concern with the physical interference with the wires. A few of these states do not forbid wire tapping per se, but prohibit only acts such as injuring, cutting, molesting, or interfering with wires. The statutes of other states contain a clause forbidding "interference" with messages or current, or interruption of the communication. In states in these two categories, wire tapping would be punishable only if it resulted incidentally in physical damage or interference with service in the manner prescribed. By far the

*This is the second and final instalment of a study which was prepared for the New York State Bar Association. The first instalment appeared in the June 1947 issue at 32 CORNELL L. Q. 514.

174 NEV. COMP. LAWS § 7652 (Hillyer, 1929).
175 GA. CODE ANN. § 26-8114 (Park, et al., 1936) (misdemeanor to destroy or injure wires or other property of a magnetic telegraph company); IND. ANN. STAT. § 10-4518 (Burns, 1933); ME. REV. STAT., c. 139, § 12 (1930); MD. ANN. CODE GEN. LAWS, art. 27, § 579, art. 23, §§ 301, 304 (Flack, 1939); MICH. STAT. ANN. § 10423 (1927); MO. REV. STAT. ANN. § 4526 (1942); N. H. REV. LAWS, c. 442, § 3 (1942); VT. PUB. LAWS § 6440 (1933); W. VA. CODE § 5970 (Michie, et al., 1943).
176 MISS. CODE ANN. § 2381 (1942); S. C. CODE § 1201 (1942); R. I. GEN. LAWS c. 608, § 73 (1938); TEX. STAT. PEN. CODE, art. 335 (Vernon, 1938).
177 Southwestern Telegraph & Telephone Co. v. Priest, 31 Civ. App. 345, 72 S.W. 241 (1903) held that a cutting of dead wires was not an offense under a statute forbidding a cutting or breaking "in such a manner as to interfere with the transmission of messages along the line." Wire tapping would seem not to be punishable under this or similar provisions as it is usually accomplished without interference with the message.

In Young v. Young, 55 R.I. 401, 185Atl. 901 (1936), an appeal from a decree of a probate court, the court held properly admitted evidence of telephone conversations of the testatrix to which the contestant had listened by clamping radio headphones on the wire. The court stated that no part of the wire was destroyed, the free transmission of the messages was preserved, and the communication was not distorted.
greater number of states have provisions aimed specifically at wire tapping,178 although their statutes place various degrees of emphasis on the injury to property and the interference with the right of privacy. In some states more than one statute applicable to wire tapping has been enacted, the later one apparently representing an increased concern over the more intangible rights in need of protection.179 Many of the states penalize not only wire tapping but also communication or divulgence or use of wire tapped information.180 In some of these states, disclosure on order of the court is allowable, making it clear that testimony concerning or arising out of wire tapped conversations is not necessarily excluded.181 Delaware and New Jersey expressly forbid testifying to wire tapped information.182 In the other states, it has not been


determined whether testimony is included in the prohibition against divulgence, although the construction of section 605 of the Federal Communications Act constitutes a precedent for so holding.\footnote{Nardone v. United States, 302 U. S. 379, 58 Sup. Ct. 275 (1937). Cases, note 138 supra show, however, that the courts have not interpreted the prohibition against divulgence by telegraph employees to preclude testimony. See also subsequent discussion in this part of the article as to whether section 605 of the Federal Communications Act is binding on state courts.} Some of the statutes expressly exempt public officers from the application of their provisions,\footnote{\textit{LA. CODE CRIM. LAW & PROC. § 1183 (Dart, 1943); OKLA. STAT., tit. 21, § 1782 (1941). The Massachusetts Eavesdropping Act apparently is not aimed at wire tapping by public officers to secure evidence of crime since it penalizes wire tapping "with intent to procure information concerning any official matter or to injure another." See Valli v. United States, 94 F. 2d 687 (C.C.A. 1st 1938), cert. granted 303 U. S. 632, 58 Sup. Ct. 760 (1938), dismissed 304 U. S. 586, 58 Sup. Ct. 1053 (1938).} thus declaring a policy of permitting this method of detecting crime and securing evidence.

In most instances, the penalty for violation of these statutes is light and the crime is a misdemeanor.\footnote{\textit{State v. Behringer,} like the later case of \textit{Goldman v. United States,} involved listening to one end of a telephone conversation without use of wire tapping. The defendant was indicted under an Arizona statute which prohibited attempting to learn the contents of any message "whilst the same is being sent over any telegraph or telephone line." The defendant secretly placed a dictograph over the transom of a hotel room in which there was a telephone transmitter, in order to hear any message the occupants of the room might send over the telephone.} Some of the legislatures have not amended their wire tapping statutes since the introduction of the telephone, and in these states the provisions refer only to telegraph wires and messages.\footnote{\textit{Davis v. Pacific Telephone Co.,} 127 Cal. 312, 59 Pac. 698 (1899). And see Attorney General v. Edison Telephone Co.; 6 Q.B.D. 244 (1880). Cf. Young v. Young, 56 R. I. 401, 185 Atl. 901 (1936).} It is debatable, however, whether the courts if called upon to interpret such provisions might not hold them applicable to the telephone as well, for it has been held that the term "telegraph" includes "telephone" under a statute forbidding the cutting of telegraph wires.\footnote{\textit{Ariz.} 502, 172 Pac. 660 (1918).} As in the case of section 605 of the Federal Communications Act, prosecutions for wire tapping in violation of state statutes seem to have been rare. In two reported cases, the prosecutions failed because the defendant's acts were not within the terms of the governing statute. \textit{State v. Behringer,} like the later case of \textit{Goldman v. United States,} involved listening to one end of a telephone conversation without use of wire tapping. The defendant was indicted under an Arizona statute which prohibited attempting to learn the contents of any message "whilst the same is being sent over any telegraph or telephone line." The defendant secretly placed a dictograph over the transom of a hotel room in which there was a telephone transmitter, in order to hear any message the occupants of the room might send over the telephone.
line. He connected the dictograph by a wire with the earpiece in another room. The court held that the defendant had committed no offense, for he would hear the messages as they were spoken into the transmitter and not while being sent over the line. The court stated that the defendant was an eavesdropper, and it expressed regret that the law did not reach him. One judge dissented. In *State v. Nordskog*, the defendant, as in the *Behringer* case, was a private individual. He was employed by a newspaper to tap the wires of a detective agency. The charge was framed under the Washington statute making it a misdemeanor wilfully and maliciously to "remove, damage, or destroy" a telephone line. The court found that the manner of tapping, which was accomplished by attaching thread-like wires through the cable box of the telephone apparatus, did not cause damage within the wording of the statute. It pointed out that the subtitle of the statute, "Injuring Public Utilities," indicated that its purpose was to preserve the efficiency of public utilities, and that to offend against it there must be such injury to the property that it would not meet the ordinary tests of efficiency. Despite its interpretation, this court also thought, like the Arizona court in the *Behringer* case, that the defendant's act deserved punishment. "The record before us warrants the assertion that there has been altogether too much of this form of pilfering going on in this state, and the omission of the law now disclosed calls aloud for legislative action."

The *Olmstead* decision of the United States Supreme Court, although an interpretation of the Fourth Amendment of the Federal Constitution having no binding effect on state courts, has influenced them in deciding whether wire tapping is a search and seizure within the meaning of their bills of rights. A Maryland statute provides that no evidence in the trial of misdemeanors shall be deemed admissible if it has been procured by an illegal search and seizure or a search or seizure prohibited by the Declaration of Rights. The Maryland Court of Appeals, citing the *Olmstead* case, held in *Hitzelberger v. State* and *Leon v. State* that this section did not preclude the admission of evidence secured through the use of wire tapping, inasmuch as wire tapping was not a search or seizure.

* supra. 76 Wash. 472, 136 Pac. 694 (1913).
* supra. See discussion of applicability of Fourth Amendment of Federal Constitution to state courts, Part II-B, * supra.*
103 174 Md. 152, 197 Atl. 605 (1938).
105 The court in *Young v. Young*, 56 R.I. 401, 185 Atl. 901 (1936), discussed * supra.*
The ineffectiveness of the law in most states with regard to wire tapping and admissibility of wire tapped evidence makes it the more important to determine how far the law which has arisen out of section 605 of the Federal Communications Act is applicable in the states. The Weiss case decided that section 605 extends so far as to prohibit the introduction in a federal court of evidence secured through interception of intrastate messages. The question remains whether section 605 proscribes the admission in state courts of evidence secured in violation of its terms.

This problem, like all those dealing with the interrelation of federal and state law is so complex that it is worthy of a detailed study and only an outline of the principal considerations can be suggested here. It appears that a strong case could be made for holding that the federal statute governs the admission in the state courts of evidence secured either directly or indirectly by wire tapping. The second clause of section 605 provides that "no person . . . shall intercept any communication and divulge or publish . . . to any person . . . " The broad terms "no person" and "any person" are applicable on their face to a witness in a state court. The word "divulge" was construed in the first Nardone case to prohibit testimony of intercepted conversations, and the policy of the statute was declared in the second Nardone decision to compel the extension of the prohibition to evidence secured even indirectly by wire tapping. If the effect of the statute as so construed is limited to exclusion of evidence in the federal courts, the protection afforded by it against invasion of privacy would be narrowed to the vanishing point, for the bulk of criminal prosecutions occur in the state courts; and moreover, many criminal offenses normally prosecuted in federal courts could by technical changes in the indictments be prosecuted in state courts, and all the

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note 177, also considered the Olmstead decision in holding that there was no bar to admission of wire tapped evidence.

Ex parte McDonough, 21 Cal. App. 2d 287, 68 P. 2d 1020 (1937), was on petition for a writ of habeas corpus by a petitioner who was imprisoned for contempt on refusal to answer as a witness certain questions before the grand jury concerning wire tapping by police officers. His refusal was based on the belief that should he answer, he would be aiding in the unlawful use of such information. The court, without referring to the California statutes, or the Olmstead case, held that there was no ground for petitioner's discharge from custody, since the unlawful manner of obtaining evidence is no reason for discarding it and petitioner, in answering the questions, would not be abetting an unlawful act. The opinion seems to overlook that "use" of wire tapped information, even in a court room, might be a crime under California statutes. Cal. Pen. Code §§ 619, 640 (Deering, 1941).

People v. Pustau, 39 Cal. App. 2d 407, 103 P. 2d 224 (1940), and State v. Raasch, 201 Minn. 158, 275 N.W. 620 (1937), raised the question of admissibility of evidence secured by wire tapping, but only on the basis of identification of the parties to the conversations.
wire tapped evidence secured by federal officers would be available in such prosecutions. Both the wording of the statute and the policy behind it indicate therefore, that it was intended to apply to state courts as well as federal courts.

It may of course be an answer to this line of reasoning that the broad ban on "divulgence" in the federal statute was not intended to apply to the state courts because Congress cannot constitutionally impose restraint on their procedure. Such was the holding in two Maryland cases, although the court entered into no extensive analysis of the question. The Supreme Court of California, on the other hand has on several occasions made its rulings on the assumption that section 605 was applicable to testimony in state courts. The sounder view would seem to be, that in pursuance of its power to regulate interstate commerce, and in order to preserve the inviolability of interstate communications, Congress may direct that no testimony concerning wire tapped conversations shall be received in any court. The federal law has reached into procedure in state courts in other instances. The provision of the Bankruptcy Act that no testimony by the bankrupt "shall be offered in evidence against him in any criminal proceeding" has been held applicable to subsequent criminal proceedings in state courts. It has been held also that internal revenue agents, prohibited by treasury department regulations from divulging official information, may not be compelled by state courts to testify in the forbidden manner. A close analogy to the present problem is found in the decisions of the state courts concerning the effect of the federal stamp law which provided for the exclusion from evidence "in any court" of documents not stamped as prescribed by the statute. The majority of state courts held that the words "in any court" were not intended to regulate state tribunals inasmuch as Congress was not empowered to enact a


law of such scope. The better reasoned minority view that unstamped documents are inadmissible in state courts is expressed by the Pennsylvania Supreme Court as follows: "The purpose of Congress was not to make rules of evidence, but to stamp the instrument of evidence, with a disqualification, which will prevent its use as evidence until the delinquent has paid his tax." Similarly, it may be said of the application of section 605, that its purpose is to prevent the use of tapped conversations in evidence in order to discourage interception of interstate communications.

The crucial phase of the question of the extent of the federal law is the obligation of state courts to enforce it. Can they not disregard it as they would any other extra-jurisdictional legislation? The United States Supreme Court has given a definite answer in the negative to a similar query posed in the recent case of Testa et al. v. Katt. It was there held that a state court having jurisdiction was bound by the supremacy clause of the United States Constitution to enforce a claim under a section of the Emergency Price Control Act providing that a buyer of goods above the prescribed ceiling price might sue the seller "in any court of competent jurisdiction" for not more than three times the amount of the overcharge. Reaffirming a holding in a previous case, the Court stated:

"It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts and the people, 'any-thing in the Constitution or Laws of any State to the contrary notwithstanding.' It asserted that the obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."

The opinion thus leaves little room for doubt that a state court confronted with evidence secured in violation of the provisions of section 605 must constitutionally reject it if the federal statute is construed to apply to divulgence of wire tapped evidence in state courts or proceedings. If this view should be correct, the principle of the Testa case would be extremely important and

201 N. C. L. Rev. 229 (1940).
202 Chartiers and Robinson Turnpike Co. v. McNamara, 72 Pa. 278, 281 (1872).
204 Art. VI, § 2, reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
205 Claflin v. Houseman, 93 U. S. 130 (1876).
far reaching in the law of wire tapping. It would be immaterial that the
state had declared itself in favor of permitting the police to tap wires under
certain safeguards, as has been the case in New York. The Testa case is
positive in holding that no conflict of policy between the federal and state
law would excuse the state from enforcing a federal statute. Thus the federal
law of wire tapping would be established as all pervasive, and any conflicting
state law, a nullity. While doubt is cast on the constitutionality of the New
York provisions with regard to wire tapping, it is important to explore fully
all ramifications of those provisions. This discussion, therefore, will be with-
out regard to the foregoing analysis of the applicable principle of the Federal
Constitution.

PART V

The Law of Wiring Tapping in New York State

The law of wire tapping in New York grew up haphazardly, with only
one half-hearted attempt to improve it on the part of the 1938 Constitutional
Convention. With so little tending, it developed punily, unfitted to cope with
official determination to track down criminals by any means available. Some
of this weakness it inherited from the New York law of search and seizure.
The latter will therefore be examined briefly insofar as it has a bearing on
the law of wire tapping.

Until recently, the only guarantee in New York State against unreasonable
searches and seizures was statutory. This provision, slightly amended as to
wording, is still found in section 8 of the Civil Rights Law. It follows the
wording of the Fourth Amendment of the Constitution, reading as follows:
"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 can issue but upon probable cause supported by oath or affir-
mation, and particularly describing the place to be searched, and the persons
or things to be seized." Since the Federal Constitution contains no guarantee
against this form of infringement applicable to the states, the right of the
people of New York was dependent solely on the section just quoted. In
1938, however, on recommendation of the Constitutional Convention, an
amendment to the state Constitution was adopted which elevated the right

207 Until amended in 1923, the first clause read: "The right of the people to be secure in
their persons, houses, papers and effects, against unreasonable searches and seizures,
ought not to be violated. . . ."
208 See Part III supra.
to a constitutional guarantee. The amendment, contained in Article 1, section 12 of the Constitution is almost identical with its statutory counterpart. While the right against unreasonable searches and seizures was still only statutory, the courts were frequently confronted with the question whether evidence seized in violation of that right, should be received. In 1903, the Court of Appeals ruled in the affirmative in *People v. Adams.*\(^{209}\) The facts of this case have already been set forth in the discussion of *Adams v. New York,* in which the United States Supreme Court affirmed the decision of the New York court.\(^{210}\) Without stating whether the papers which were offered in evidence were legally or illegally seized, the Court of Appeals held in accordance with the common law rule that the court "when trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers, or other articles of personal property which are material and properly offered in evidence."

The lower courts did not follow the *Adams* decision undeviatingly. Apparently because of the influence of the *Weeks* case, several held that evidence obtained by illegal means must be returned on motion made before trial.\(^{211}\) Others held to the contrary, although the opinions seem to stress the fact that the disputed evidence was contraband or a nuisance, as a reason for not suppressing it, and do not declare unequivocally in favor of the common law view.\(^{212}\)

Any doubt concerning the position of New York was settled by the decision in 1926 of *People v. Defore.*\(^{213}\) The defendant in that case was con-

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\(^{209}\)176 N. Y. 351, 68 N. E. 636 (1903).

\(^{210}\)192 U. S. 585, 24 Sup. Ct. 372 (1904), discussed Part II-A supra.


victed of possessing a dangerous weapon. The evidence showed that a police officer had arrested the defendant in the hall of his boardinghouse on a charge of stealing an overcoat worth less than fifty dollars. A search of the defendant's room after the arrest led to the discovery of a blackjack in a bag. The defendant was later acquitted of the charge of larceny, but he was convicted as a second offender for possession of the weapon. A motion before trial to suppress the evidence on the ground that the search was illegal, was denied.

The Court of Appeals, by Judge Cardozo, held that because defendant's arrest was unlawful, it conferred no right to make an incidental search of the premises. The search and seizure were consequently illegal. The court nevertheless affirmed the conviction for the reason that the evidence secured by an unlawful act is admissible under the decision in the *Adams* case. "The officer might have been resisted, or sued for damages or even prosecuted for oppression (Penal Law, sections 1846, 1847). He was subject to removal or other discipline at the hands of his superiors." These liabilities attended a violation of section 8 of the Civil Rights Law, but the court refused to attach further consequences unless some public policy required them. It found on examination that exclusion of evidence unlawfully seized would affect society adversely. "The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. . . . We may not subject society to these dangers until the Legislature has spoken with clearer voice." In response to the argument that the protection of the statute would become illusory unless the evidence should be excluded, the court pointed to the case of *Entick v. Carrington*, which established the right against unreasonable searches and seizures in English law. That was a suit by the victim of a raid against the messengers who ransacked his premises, and resulted in a substantial verdict. The Court of Appeals thought that a modern jury would not be "more indifferent to its liberties" than "when the immunity was born." The Court reviewed the decisions of the United States Supreme Court following the *Weeks* case, but found that the majority of the states were still opposed to the federal rule. It criticized the distinction drawn by the Supreme Court between evidence secured by federal officers and state police as follows: "The professed object of the trespass rather than the official character of the trespasser should test the rights of government. . . . The incongruity of other tests gains emphasis

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214 *Id.* at 19, 150 N. E. at 586.
215 *Id.* at 23, 24, 150 N. E. at 588.
216 *Id.* at 23, 24, 150 N. E. at 588.
217 *How. St. Tr.* 1030 (1765).
from the facts of the case before us. The complainant, the owner of the overcoat, co-operated with the officer in the arrest and the attendant search. Their powers were equal, since the charge was petit larceny, a misdemeanor. . . . If one spoke or acted for the State, so also did the other. A government would be disingenuous, if, in determining the use that should be made of evidence drawn from such a source, it drew a line between them. This would be true whether they had acted in concert or apart. We exalt form above substance when we hold that the use is made lawful because the intruder is without a badge of office."

The defendant contended that admission of the illegally seized evidence would constitute a denial of his rights under the due process clause of the Fourteenth Amendment of the United States Constitution and under Article 1, section 6 of the State Constitution, which confers an immunity against self-incrimination. As to the first, the court restated the well established rule that the Fourteenth Amendment does not guarantee against infringement by the states of the privileges against self-incrimination and unreasonable searches and seizures. It was further held that Article 1, section 6 of the State Constitution was inapplicable because it was limited "to cases where incriminatory disclosure had been extorted by the constraint of legal process directed against a witness."

The Defore case, the first pronouncement of the Court of Appeals after the Weeks decision, arrayed New York with the states following the majority rule in admitting illegally seized evidence. Since a motion had been made before trial, it obviated any possibility that later cases might reach a contrary result by holding, as often occurred in other states, that a collateral issue could not be considered on trial, but that the illegal seizure might be contested by a preliminary application.

The Defore case is usually cited as directly opposed to the Weeks case, and this is correct so far as it concerns the intention of the Court of Appeals and its basic policy towards illegally seized evidence. Technically, however, the Weeks and Defore cases are reconcilable. The United States Supreme Court was ruling in the Weeks case with reference to evidence seized in violation of a constitutional right, which it clearly distinguished in later cases from statutory rights even when the illegal act was committed by public officers, as in the Olmstead case. The Defore case is comparable in some ways to this latter class of cases in that it concerned the obtention of evidence by violation only of a statutory right,—that created by section 8 of the Civil Rights Law.

The ruling of the Defore case and the position of New York State with regard to admission of illegally seized evidence was the subject of animated debate at the Constitutional Convention of 1938. The form of the safeguard against unreasonable searches and seizures which was finally recommended by the Convention for adoption, followed the wording of the Fourth Amendment of the Federal Constitution and made no provision for the exclusion of evidence secured in violation of its terms.

The omission of such a provision was bitterly debated, and the approval of the present form was due in part to the vote of delegates who hoped the Legislature or the courts would remedy the omission. Time has proved the falsity of these hopes. The Legislature has taken no action, and the courts when the question has been presented, have followed the Adams and Defore cases in construing the 1938 amendment to the Constitution. The refusal of the Convention to adopt a clause excluding illegally seized evidence has in fact been taken as a clear indication that no change in the law was intended. The most recent ruling of the Court of Appeals on this point was in 1943 in People v. Richter's Jewelers, Inc. The evidence in that case consisted of a diamond ring displayed in the defendant's store window with a tag attached reading, "1Ct. Perfect Diamond." The ring and tag were taken by an inspector in the belief that the tag was false. On an appeal from a conviction for publishing a misleading advertisement, the Court of Appeals refused to pass upon the defendant's contention that the seizure was unlawful. It restated the rule of the Adams and Defore cases that the court will not notice the manner of obtaining evidence and held that this was unaffected by the incorporation of the statutory provision into the Constitution without change of language. It did not comment on the distinction sometimes drawn by the courts and commentators between evidence obtained through infringement of constitutional rights and in violation of a statute. It might have

221See note 220 supra.
employed this distinction as theoretical justification for rejecting evidence seized in violation of the new guarantee contained in the Constitution, but it preferred, more realistically, to hold that the case before it was governed by the *Adams* and *Defore* cases, which presented similar facts.

The Constitutional Convention of 1938 also adopted a proposal guaranteeing the right of security against unreasonable interception of telephone and telegraph communications. Before the effects of this provision are considered, however, some reference is necessary to the earlier law of wire tapping in New York. Section 639, subdivision 7 of the Penal Code of 1881 forbade the displacement, removal, injury or destruction of telegraph lines or apparatus. In 1892, in an act entitled, "An Act to amend section six hundred and thirty-nine of Chapter fourteen of the Penal Code of the State of New York, relating to malicious mischiefs and other injuries to property," the earlier section was expanded into the provision now contained in section 1423, subdivision 6 of the Penal Law. This section reads, "A person who wilfully or maliciously displaces, removes, injures or destroys: . . . 6. A line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, tap or make connection with any telegraph or telephone line, wire, cable or instrument, or read or copy in any unauthorized manner any message, communication or report passing over it, in this state; or who shall wilfully prevent, obstruct or delay, by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery, in this state of any authorized message, communication or report by or through any telegraph or telephone line, wire or cable, under the control of any telegraph or telephone company doing business in this state; or who shall aid, agree with, employ or conspire with any person or persons to unlawfully do, or permit or cause to be done, any of the acts hereinbefore mentioned, or who shall occupy, use a line, or shall knowingly permit another to occupy, use a line, a room, table, establishment or apparatus to unlawfully do or cause to be done any of the acts hereinbefore mentioned . . . is punishable by imprisonment for not more than two years." The section is included in the Article on "Malicious Mischief." The only other section of the Penal Law under which the act of wire tapping might be indictable is section 552, subdivision 1, which provides, "A person who: 1. Wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic or a telephonic message by connivance with a clerk, operator, messenger, or other employee of a

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telegraph or telephone company ... is punishable by a fine of not more than one thousand dollars or by imprisonment for not more than two years, or by both such fine and imprisonment." Under the latter section, however, proof of connivance would be required, an element usually absent, especially in the cases of public officers who employ their own professional wire tappers.

A reading of section 1423, subdivision 6 is by itself sufficient to raise strong doubts whether an officer of law tapping a wire in the scope of his duties, would be guilty of the offense therein described. The title and placing of the section indicate that it was aimed at acts of malicious mischief. To come within the terms of the section, the act of tapping must be done "unlawfully and wilfully." That official wire tapping is not conduct of this description is confirmed by the cases construing this section. It has been held that a person who removed telephone wires from his premises when his service was discontinued on his failure to pay dues did not act "unlawfully and wilfully." The court said: "This is a penal statute and must be strictly construed. The act of the defendant was intentional, headstrong, and voluntary. In order to find him guilty of the crime charged, the court must find that his act was wantonly malicious and done with desire and intention to injure the complainant and destroy its property." The Court of Appeals, held that an inspector for a park commission, who, acting for the commission, had disconnected a water pipe, was not guilty of an offense of "wilfully or maliciously" disconnecting a water pipe. "The word 'wilfully', in the statute, means something more than a voluntary act, and more, also, than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness." The only direct reference by a court to the applicability of section 1423 (6) to official wire tapping is found in People v. Hebberd in which the judge, sitting as committing magistrate, stated that the complaint against one of the defendants, a police commissioner, had been dismissed in open court "for the all-sufficient reason that it was conclusively established that he had committed no crime, but that, on the contrary, the knowledge of conversations conducted over the telephone wires in question was acquired solely in his official capacity as police commissioner for the purpose of detecting crime and which, in fact, resulted in the conviction of a number of individuals, and that the knowledge of such conversations was only utilized for the purpose of detecting sus-

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pected criminality." The statute under which the police commissioner had been charged was not cited.

The New York statutes make it a misdemeanor for an officer to exceed his authority in executing a search warrant or to seize property without a warrant.\textsuperscript{226} It is unlikely, however, that these sections would be held applicable to an officer making an unlawful interception, inasmuch as the Olmstead case holding that wire tapping was not a search or a seizure, would probably be followed by the courts of this state as it has been in other states.

The constitutional provision adopted in 1938 forms the second paragraph of section 12 of Article I, of which the first paragraph is composed of the recently adopted guaranty against unreasonable searches and seizures. The second paragraph reads:

"The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and \textit{ex parte} orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communications, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

In 1942 the Legislature enacted section 813-a of the Code of Criminal Procedure to provide a procedure whereby warrants for interception might be issued as required by the Constitution. That section reads:

"Sec. 813-a. \textit{Ex parte} order for interception.

An \textit{ex parte} order for the interception of telegraphic or telephonic communications may be issued by any justice of the general sessions of the county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the

\textsuperscript{226}N. Y. \textsc{Penal Law} §§ 1846, 1847; \textsc{Code Crim. Proc.} § 812. See People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926) on construction of \textsc{Penal Law} § 1847.
original order upon satisfying himself that such extension or renewal
is in the public interest. Any such order together with the papers upon
which the application was based shall be delivered to and retained by
the applicant as authority for intercepting or directing the interception
of the telegraphic or telephonic communications transmitted over the in-
strument or instruments described. A true copy of such order shall at
all times be retained in his possession by the judge or justice issuing
the same."

With the adoption of the foregoing provision, New York became the first
state to provide a procedure for supervised wire tapping. The method pro-
vided resembles the procedure prescribed by federal law for interception of
mail by post office employees on authorization of the Postmaster General in
- case the employee has reason to believe mailable matter is being transported
contrary to law. In the case of wire tapping, application to a court for
a warrant seemed preferable to issuance of an order by the chief prosecuting
officer, who might be unduly prejudiced in favor of using this method of
investigation on a wide scale to secure convictions. The procedure provided
by section 813-a is calculated to insure secrecy in the issuance of the order,
and thus preserve the value of the wire tapping operation.

The only case reference to either of the new provisions is contained in
Martinelli v. Valentine, which was an application for a peremptory writ
of mandamus to the Police Commissioner of New York City requiring the
return to the petitioner of six telephone instruments detached and removed
by city policemen from petitioner's premises. The court granted the appli-
cation; holding the seizure illegal and pointing out that no criminal charges
had been preferred against the petitioner. The Commissioner attempted to
justify his acts on the ground that the telephones were being used unlawfully
to transmit racing information. The court, referring to the right of inter-
ception of messages permitted under Article I, section 12 of the Constitution,

Prior to 1938, the law of New York afforded no solid basis for holding
that an officer acted illegally in tapping wires to secure evidence of crime.
No reason existed therefore for exclusion of evidence so obtained. Even
had official wire tapping been illegal, it was to be expected that New York, as
one of the states which admit illegally seized evidence, would receive evi-
dence of wire tapped conversations. Such was the holding in People v. Mc-

\(^{227}\text{REV. STAT. § 4026 (1872), 39 U.S.C.A. § 700 (1926).}\)

\(^{228}\text{179 Misc. 486, 39 N. Y. S. 2d 233 (Sup. Ct. 1942).}\)
Donald, a decision of the Appellate Division in 1917. The defendant in that case contended that evidence secured by the police in tapping wires leading to his house was illegally obtained and should be excluded. The court ruled that it was unnecessary to decide whether such conduct was prohibited by section 552 or section 1423 (6) of the Penal Law, for the doctrine of the Adams case controlled and no "collateral" inquiry would be permitted as to how the evidence had been secured.

Twenty years later, evidence of intercepted conversations was admitted by the Appellate Division in disbarment proceedings against an attorney for aiding and abetting in the "policy" racket. The court emphasized that the wires were not tapped in order to secure evidence for the present proceeding, but that the proffered testimony related to conversations intercepted by federal agents and police officials before the disbarment proceeding was commenced or even contemplated, in order to secure evidence against a notorious criminal. The court warned of the dangers of indiscriminate wire tapping and said, "This is especially true when the wires of a lawyer's office are tapped. Not only the business of the attorney is disclosed but that of every person who calls the attorney. By that means the privileged communications and conversations as well as the secrets of his clients and their private business is pried into by strangers." The court implied that evidence secured by tapping the wires of any attorney or other person except in connection with suspected crime, would be inadmissible, but it did not explain why such consequences would attend acts which, so far as shown, would not have been illegal.

There is no reason to suppose that the adoption of the constitutional prohibition against unreasonable interception of wire communications has changed the law with regard to admissibility. If the statutory procedure prescribed by the Code of Criminal Procedure is followed, no question arises under the New York law. Even if this procedure is disregarded, however, the evidence thereby secured is apparently admissible. The constitutional provision stamps indiscriminate wire tapping as illegal, but does not state that the results of such methods shall be exclusion of the evidence. Reasoning parallel to that in People v. Richter's Jewelers leads to the conclusion that the failure of the Constitutional Convention to provide for the exclusion of evidence of illegally intercepted conversations, particularly in the face of

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two decisions admitting such evidence, must be taken as an indication that no such result was intended.

The inquiry is natural at this point as to what legal effect attaches to disobedience of the constitutional and statutory provisions for supervised wire tapping. The constitution states, "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated." It purports to create a right, but it is difficult to determine how that right may be enforced. No penal sanction existed, so far as public officers were concerned, prior to 1938, and none has since been created. Evidence secured in violation of the constitutional provision appears to be admissible. Is the citizen whose rights are invaded by unreasonable eavesdropping on his private wires to be relegated to a civil action against the intruders? This would seem to be a slender security and a slight deterrent against official transgression of constitutional rights.

PART VI
Analysis of the Considerations Supporting the Conflicting Views as to the Practice of Wire Tapping.

Opinions concerning the extent of protection the law should afford against wire tapping by the police are divided sharply into two categories,—those favoring legalized wire tapping under supervision of the courts or a superior officer232 and those favoring an absolute prohibition against official wire tapping.233 The other extreme, allowing the police free rein in the use of this method, has not won approval from any commentator, probably because the analogy to searches and seizures suggests that wire tapping should at least be subject to the test of reasonableness and to some effectual control, as by the issuance of warrants.

The basic consideration at the root of the policy of permitting supervised wire tapping is the effectiveness of this weapon in combatting crime.234 Ac-

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232Professor Wigmore is in the forefront of those advocating wire tapping on condition that it is properly supervised. 8 Wigmore, Evidence § 2184 b (3d ed. 1940). See also Greenman, Wire Tapping, Its Relation to Civil Liberties 44 (1939); Plumb, Illegal Enforcement of the Law, 24 Cornell L. Q. 337, 367 (1939); Notes, 53 Harv. L. Rev. 863 (1940), 28 Geo. L. J. 789 (1940).


234Enforcement officers seem to differ in their estimates of the value of wire tapping. District Attorney Thomas E. Dewey called it "one of the best methods available for uprooting certain types of crime." 1 Rev. Record N. Y. Const. Con. 372 (1938). J. E. Hoover, Director of the Federal Bureau of Investigation, termed it an archaic and inefficient practice which "has proved a definite handicap or barrier in the development of ethical, scientific, and sound investigative technique." Letter to Harvard Law Review,
cording to this view, the police should be permitted to avail themselves of every means even though morally reprehensible, in order to apprehend the dangerous criminals with whom they must deal. To fail in this function would bring the law into greater disrepute, it is argued, than to employ a method generally condemned. The police should not be expected to maintain a high level of "fair play" against the enemies of society who do not abide by any such rules. A complete ban on wire tapping would allow criminals to further their schemes over the telephone without fear of police interception. Even if the telephone communication itself should constitute a violation of the law, as in the case of conspiracy or unlawfully disclosing information affecting national defense, the police would be severely handicapped in discovering it. The right of privacy in use of the telephone should not be protected to a greater extent than one's house or papers under the Fourth Amendment; the police should have the right to intercept messages for the purpose of crime detection to a reasonable extent, under regulations similar to those embodied in the New York Code of Criminal Procedure. Such plan minimizes the danger feared by those who oppose even supervised wire tapping, that a system of political espionage may be established. Such fear is groundless in any event, so long as it is not a crime to hold an opinion, and a government bent on undermining constitutional guarantees would not be deterred from using wire tapping to further its end regardless of the stringency of the laws against it. But even conceding that legalized wire tapping carries with it certain dangers and disadvantages, the law should sanction its use under proper supervision lest the police should yield to the temptation to resort to this method in the face of a statute forbidding it and indiscriminate wire tapping result. So runs the argument of the proponents of this view.

The advocates of an absolute prohibition against the use of wire tapping by the police stress its inherent danger to the right of privacy. Whatever

Feb. 9, 1940, 53 HARP. L. REV. 863 (1940). He further stated in a press release of the Department of Justice, March 15, 1940, in opposition to a bill then pending in Congress which would have legalized wire tapping, "While I concede that the telephone tap is from time to time of limited value in the criminal investigative field, I frankly and sincerely believe that if a statute of this kind were enacted the abuses arising therefrom would far outweigh the value which might accrue to law enforcement as a whole."

235 With reference to Mr. Justice Holmes' labeling of wire tapping as "dirty business" in his dissent in the Olmstead case, Professor Wigmore says, "Kicking a man in the stomach is 'dirty business,' normally viewed. But if a gunman assails you, and you know enough of the French art of 'sabotage' to kick him in the stomach and thus save your life, is that 'dirty business' for you?" 8 WIGMORE, EVIDENCE § 2184 b (3d ed. 1940).


238 28 GEO. L. J. 789 (1940).
limitations the law may impose, the tapping of a telephone line will disclose both ends of the conversation. A warrant may specify the line to be tapped, but it cannot limit the subjects of conversation which are to be overheard nor the persons whose conversations will be publicized. Anyone speaking to the suspect over the tapped line will open his business to the ears of the law. Communications which are otherwise wrapped in privilege, as those between attorney and client, may be revealed to the listener. The law forbids searches which are to be made solely in order to procure evidence;\textsuperscript{238} tapping a line even under warrant is as general, and therefore as obnoxious, as an exploratory search.\textsuperscript{239} Justice Brandeis in his dissent in \textit{Olmstead v. United States} expressed this view aptly when he said, "As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."\textsuperscript{240} Wire tapping is a much more dangerous instrument in the hands of the police than the right of search and seizure, for abuses of the latter are known to the victim and may lead to legal action or at least protest and adverse publicity. On the other hand, persons whose messages have been intercepted are frequently unaware that this has occurred, unless an attempt is made to introduce evidence of the conversations on trial. They are therefore helpless to protect themselves, and the police may employ it as they will without fear of recrimination.

Opponents of official wire tapping point out that the invasion of the right of privacy by use of this technique is no mere chimera, but an accomplished fact brought about by the widespread adoption of this method by investigative agencies. It is reported that the federal agencies train their own employees in wire tapping and sometimes local police as well.\textsuperscript{241} It is further stated that federal police, in the course of a single investigation, have tapped a telephone wire "for months at a time" and "made thousands of mechanical recordings".\textsuperscript{242} The possible perversion of the practice is illustrated by an

\textsuperscript{238}See Part II-A supra.

\textsuperscript{239}The right against general exploratory searches appears to have suffered serious inroads as a result of the recent decision of the United States Supreme Court in \textit{Harris v. United States}, 330 U. S. 386, 67 Sup. Ct. 1098 (1947). While expressing opposition to such searches, the Court nevertheless held legal the seizure of unlawfully possessed draft cards found concealed in a bureau drawer after a five hour search. No search warrant was issued. The search leading to the discovery of the cards was conducted by federal agents following the arrest of the defendant under a warrant of arrest issued for an unrelated crime—violation of the Mail Fraud Statute.

\textsuperscript{240}\textit{277 U. S. 438, 476, 48 Sup. Ct. 564, 571 (1928).}

\textsuperscript{241}\textit{Wire Tapping, Congress and the Department of Justice, 9 INT'L. JURID. Ass'N. Bull. 97, 100 (1941).}

\textsuperscript{242}Id. at 99.
"Wire tapping, dictographing, and similar devices are especially dangerous at the present time, because of the recent resurgence of a spy system conducted by Government police. Persons who have committed no crime, but whose economic and political views and activities may be obnoxious to the present incumbents of law-enforcement offices, are being investigated and catalogued [sic]. If information gathered from such investigations is being obtained by wire tapping, dictographing, or other reprehensible methods, and if it is some day offered as evidence in a Federal criminal trial, the courts may have an opportunity to apply the principles of the Boyd case and of the Nardone cases. But on the other hand, the information may perhaps never be offered in such a case, because the victims of wire tapping and similar methods may perhaps never be charged with a crime. In this event, the information may be used in extra-legal controversies where the courts may have no opportunity to adjudicate the matter. Wire tapping and other unethical devices may lead to a variety of oppressions that may never reach the ears of the courts. They may, for example, have the effect of increasing the power of law enforcement agencies to oppress factory employees who are under investigation, not for any criminal action, but only by reason of their views and activities in regard to labor unions and other economic movements; this is no fanciful case—such investigations are a fact today. In short, unauthorized and unlawful police objectives may be aided by wire tapping and dictographing practices, the extent of which we are not in a position to estimate without a careful inquiry into all the facts."

Finally, in addition to the dangers to the right of privacy and possible infringement of personal liberties resulting from wire tapping as a device for crime detection, it is contended that use by the government of a method so generally detested would breed disrespect for the law. It is better, according to this view, that some offenders escape the penalty for their crime than that the government blacken itself in this manner. Those who adopt this view conclude that it is impossible to draft a good law legalizing wire tapping and that the only answer to the problem lies in enactment of statutes similar to section 605 of the Federal Communications Act aimed at the abolition of official wire tapping.

If enforcement officers are restrained from wire tapping by statute, either absolutely or qualifiedly, the question remains whether evidence secured by

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243 SEN. REP. NO. 1304, 76th Cong., 3d Sess., 1 Senate Miscellaneous Reports, 76th Cong., 2d and 3d Sessions (1940).
interception of telephone communications in violation of law should be re-
ceived by the courts. The various considerations shedding light on this prob-
lem have been more fully developed in the field of searches and seizures, but
they are equally applicable here and will therefore be borrowed from the
other source in order to present both sides of the controversy as fully as
possible. The arguments in favor of admitting evidence secured by unlawful
wire tapping may be summarized as follows:
1. Exclusion of the evidence violates the ancient rule that evidence is
admissible regardless of the manner in which it was obtained. The reason
behind this rule is a sound one, and supports its retention, namely, the court
will not interrupt the trial to determine a "collateral" issue, but will receive
all relevant evidence offered in order to do justice on the issue before it.
2. Evidence of intercepted conversations as it is usually offered in the
form of dictograph or phonograph records, is the most reliable evidence ob-
tainable and particularly valuable therefore in proving the guilt or innocence
of the accused.
3. The terms of the statute are usually, as in the case of New York,
silent concerning the exclusion of evidence obtained in violation of its pro-
visions. The courts should not read into it a clause which the legislature
did not include.
4. The wire tapping statute was intended to operate on the departments
of government, not on private individuals. An officer violating its provisions
is acting outside the scope of his authority, and thereupon ceases to be a
governmental agent for whose acts the state is responsible.
5. An officer who violates the wire tapping statute is subject to a civil
action instituted by the victim of the act. He may also be punished crimi-
nally, or held for contempt of court, if he disobeyed a warrant, or demoted
or disciplined by his superior officer. The statute prohibiting or regulating
wire tapping should be enforced by one of these direct means rather than
indirectly by exclusion of the evidence.
6. Suppression of illegally intercepted conversations enables any law en-
forcement officer, by some negligent disregard of the prescribed procedure
for obtaining the warrant, to tie the hands of the court in determining the
guilt of an offender.
7. A court's rejection of relevant proofs will often lead to freeing of
a dangerous criminal. This result does incalculable harm without in any way
compensating the victim of the illegal interception or punishing the guilty
officer.
In opposition to these considerations, the following arguments have been advanced:

1. Interruption of the trial is not a reason for ignoring the illegal source of evidence. It is customary to halt proceedings and exclude the jury whenever a question of law arises concerning admissibility of the evidence.

2. A court, in receiving evidence of illegally intercepted conversations, ratifies the act of the offending officer in acting outside the scope of his authority. The judicial branch of the government cannot accept the fruits of misconduct of the executive department without creating a general distrust of the law.

3. The right which the law seeks to protect in the provisions directed against wire tapping is sufficiently important to warrant the escape of an occasional offender, if necessary, in order to give it practical effect. Many of the fundamental guarantees of personal liberties are enforced at an equal cost—the right of confrontation, the reasonable doubt rule, even the right to trial by jury.

4. Exclusion of illegally intercepted communications is the only practicable method of enforcing the wire tapping statute. A penal sanction, if it exists, will not be invoked. Cases of illegal searches and seizures are innumerable, as shown by the many times the courts are confronted with the

244 This position is taken by 8 WIGMORE EVIDENCE § 2184 (3d ed. 1940); Plumb, Illegal Enforcement of the Law, 24 CORNELL L. Q. 337 (1939); GREENMAN, WIRE TAPPING, ITS RELATION TO CIVIL LIBERTIES 45 (1938); Patterson, A Case for Admitting in Evidence Liquor Illegally Seized, 3 ORE. L. REV. 334 (1924); 24 KY. L. J. 191 (1936).

245 Commentators opposed to admission of illegally seized or intercepted evidence are CORNELIUS, SEARCHES AND SEIZURES § 8 (2d ed. 1930); Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 MICH. L. REV. 191 (1930); Atkinson, Admissibility of Evidence Obtained through Unreasonable Search and Seizure, 25 COL. L. REV. 11 (1925); Rosebraugh, A Case for the Exclusion of Evidence Obtained by Illegal Search, 3 ORE. L. REV. 323 (1924); 16 TENN. L. REV. 470 (1940); 8 FORD. L. REV. 110 (1939).

246 Senator Wagner, as delegate to the Constitutional Convention in 1938 said: "I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself. The exclusion of the evidence is only the sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of this sanction."

"It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. If those rules, defining the scope of the search which may be made without a warrant, the requirements which must be met to obtain a warrant once the scope of a search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation." 1 REV. RECORD OF N. Y. CONST. CON. 560 (1938).
question of admissibility of illegally seized evidence, and yet prosecutions of officers for making the illegal seizures are extremely rare. The illegal act is often performed at the direction or in pursuance of the policy of the head of the department charged with law enforcement. At least it is committed for the purpose of securing a conviction, which will make a better record for the prosecutor. He cannot be expected, therefore, to invoke a penal sanction against a guilty subordinate. If the criminal act was done negligently and not maliciously, too stern an attitude towards the offender might even discourage enforcement of the law in cases where there may be any doubt of legality.

The possibility of disciplinary measures is insufficient to deter the police from making illegal interceptions, since the chief law enforcement officer will be reluctant to proceed in this manner for the same reason that he refuses to invoke penal sanctions.

Punishment of the offending officer for contempt of court is also inadequate as a remedy for an illegal interception. If the illegal act was a wilful violation of a court order, the court would doubtless have jurisdiction to proceed against the responsible person for contempt. The absence of any person sufficiently interested to take the initiative in instituting the proceedings would, however, make this remedy ineffectual. In the most egregious cases, those in which the wires are tapped without any attempt to comply with the law by obtaining an order of the court, the offender would seem to be beyond the reach of a contempt proceeding.

A civil action against an officer by the victim of any illegal interception is no more feasible than other remedies. Where the tapping occurs on the premises of the plaintiff, an action of trespass might be maintained, but the injury to property is usually infinitesimal and would lay the foundation for only nominal damages. In the more usual case where the tapping occurs outside the premises, the plaintiff could claim invasion only of a right of privacy. As previously noted, recovery has been allowed in two courts for eavesdropping on private conversations on the theory that violation of this right is actionable. It seems doubtful, however, whether it would be recognized in all jurisdictions. But whatever the theoretical right of the person whose telephone wires have been tapped, it is certain that a jury would grant him only nominal damages unless he could prove a substantial injury by the disclosure of his business. The evidence necessary would often violate the

\[247\text{Cornelius, Searches and Seizures §§ 8, 9 (2d ed. 1920); Atkinson, Admissibility of Evidence Obtained through Unreasonable Searches and Seizures, 25 Col. L. Rev. 11 (1925).}\]
very secrecy which he hoped to maintain. The expectation of nominal dam-
egages is insufficient to induce most persons to spend the time and money to
institute a civil action, regardless of the value of the right which they would
thus seek to protect. A person who had been indicted and convicted of a
crime would receive no consideration from a jury in any action of damages
which he might institute for illegal interception of messages which tended
to prove his guilt. The impediments in the way of any recovery by an inno-
cent victim of wire tapping would usually prove insurmountable. Out of the
many officers usually involved in an illegal wire tapping operation, it is dif-
ficult to choose as defendants those whom a jury would be likely to hold
responsible for the illegal act. If damages should be awarded, the defendant
would often be judgment proof.

In the light of these various considerations for and against exclusion of
evidence obtained by illegal interception, one conclusion concerning the law
of New York seems inescapable. This state has led the way in adopting a
policy of supervised wire tapping for the purposes of crime detection. This
was the considered position of the Constitutional Convention and the Legis-
lature, and the arguments in its favor and in favor of an absolute prohibition
against official wire tapping are so evenly balanced that in the absence of
clear-cut factual studies it is difficult to decide conclusively which is the
wiser course.

It is clear, however, that the right to be secure against unreasonable inter-
ceptions conferred by the New York Constitution and statutes is a hollow
right in the present status of the law. Its violation by a public officer is not
even punishable criminally. A penal sanction is not, however, sufficient to
give this right meaning if it rests with the chief prosecuting officer to enforce
it. It has been suggested that the weakness of a penal provision might be over-
come by the adoption of a summary proceeding by which the court might take
the initiative in prosecuting the offending officer upon the affidavit of the in-
jured party and hearing of the officer. The proceeding would thus be set
in motion without the intervention of the department of law enforcement.
Serious objections might be raised, however, on the score of unconstitution-
ality in a proceeding, criminal in its nature, which denied the right to formal
indictment.

The soundest and most effective measure for giving meaning to the pro-
visions against unreasonable wire tapping would be an express direction to

249Id. at 388.
the courts to exclude evidence secured by illegal interceptions.\textsuperscript{250} The knowledge that the fruits of forbidden wire tapping would be useless to them on trial should cause the police to adhere strictly to the requirements of the procedure for securing an \textit{ex parte} order from the court authorizing tapping of a particular line. To obviate the possibility that the blunder of the police might mar the usefulness of an entire wire tapping operation, the provision for exclusion of the evidence might attempt some distinction between interceptions undertaken in violation of the fundamental right, as those where no warrant was obtained or the warrant was void on its face, and interceptions made under a warrant inadvertently issued with a minor defect. This distinction would discourage deliberate flouting of the law, but at the same time, avoid freeing a criminal because of an oversight on the part of an officer.

\textsuperscript{250}This suggestion is offered on the assumption that the wire tapping provisions of the New York Constitution and statutes are not invalid by reason of their conflict with section 605 of the Federal Communications Act. See Part IV, \textit{supra}. 