NOTES

EAVESDROPPING UNDER THE FOURTH AND FOURTEENTH AMENDMENTS

At common law, eavesdropping[1] was an indictable offense.[2] Evidence obtained by eavesdropping was nevertheless admissible in criminal prosecutions against the person from whom it was thus illegally obtained.[3] This result followed from the rule then prevailing that if evidence was relevant to the issues at trial and otherwise admissible, the party against whom the evidence was admitted could not object because of the illegality by which it was obtained.[4] Within the last quarter of a century, however, grave problems have arisen in criminal prosecutions as to whether eavesdropping violates an accused's rights under the Fourth and Fourteenth Amendments.

This note will discuss the constitutional aspects of eavesdropping. The issues can be resolved into two basic problems which are only incidentally interrelated. The first problem is whether, and under what circumstances, eavesdropping by federal officers may be a violation of the Fourth Amendment. The second problem is whether, and under what circumstances, evidence obtained by state law enforcement officers by eavesdropping must be excluded, as a matter of due process, in a state criminal proceeding against the one from whom the evidence was obtained.[5]

EAVESDROPPING UNDER THE FOURTH AMENDMENT

With the invention of electronic devices, law enforcement officers now can obtain evidence not only by eavesdropping but also by means unknown to the writers of the Fourth Amendment who sought by the Amendment to protect persons against "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."[6]

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1. "Eaves-droppers . . . [are] such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales. . . ." 4 BL. COMM. *168.

2. State v. Davis, 139 N.C. 547, 51 S.E. 897 (1905); State v. Pennington, 40 Tenn. (3 Head) 299 (1859).

3. Schoborg v. United States, 264 Fed. 1 (6th Cir. 1920) (federal trial; evidence obtained by private citizens); Brindley v. State, 193 Ala. 43, 69 So. 536 (1915); People v. Cotta, 49 Cal. 166 (1874); State v. Minneapolis Milk Co., 124 Minn. 34, 144 N.W. 417 (1913).

4. "The Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question." 1 GREENLEAF, EVIDENCE § 254(a) (Lewis' ed. 1899). See 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

5. Inasmuch as the Fourth and Fourteenth Amendments apply, respectively, to the federal and state governments and their agents, this note will not cover the problems of eavesdropping when committed by private citizens.

6. Boyd v. United States, 116 U.S. 616, 630 (1886).

In 1928, in *Olmstead v. United States*,[7] the Supreme Court of the United States first met the problem of whether wiretapping, an electro-mechanical means of eavesdropping, was a violation of the Fourth Amendment. During a period of nearly five months, federal agents, by means of taps on the telephone wires leading to the homes of four of the defendants and to the office of one of them, acquired incriminating evidence which was subsequently used to convict the defendants of conspiring to violate the National Prohibition Act. The agents made the wire taps without the knowledge or consent of the defendants, and also without trespassing on any defendant's property. By a five to four decision the Court held that wiretapping did not constitute an unreasonable search and seizure, saying that the very wording of the Fourth Amendment shows that the proscribed conduct is the search of material things, such as one's person, house, papers or effects.[8] Mr. Chief Justice Taft, speaking for the majority of the Court, said:

> The Fourth Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.... The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendants' house or office.[9]

He refused to follow the suggestion of Mr. Justice Clarke in *Gouled v. United States*[10] that the Fourth Amendment should be liberally construed to accomplish the purpose of the framers of the Constitution and to "... prevent stealthy encroachment upon ... the rights secured by [the Fourth Amendment] ... by well-intentioned but mistakenly over-zealous executive officers."[11] By the majority's view, then, the protection of the Fourth Amendment was not to be afforded to conversations which could be secretly overheard by government officials without an actual and unlawful entry.

Mr. Justice Brandeis, in a vigorous dissent,[12] thought that the Fourth Amendment should be liberally construed, reasoning that "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a ... capacity of adaptation to a changing world."[13] After noting that recent inventions had made it possible for law enforcement officers to obtain evidence by means far more effective than by physical force on the person of the suspect, he pointed out

7. 277 U.S. 438 (1928).
8. *Id.* at 464.
9. *Id.* at 464, 465.
10. 255 U.S. 298 (1921).
11. *Id.* at 304.
12. Olmstead v. United States, 277 U.S. 438, 471 (1928). Justice Brandeis thought the majority was unduly literal in their construction of the Fourth Amendment.
13. *Id.* at 472.

that scientific progress was not likely to stop with merely furnishing law enforcement agents with means by which secretly to obtain the expressed thoughts of individuals and he predicted that future "[a]dvances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions."[14] The Fourth Amendment furnishes protection against such invasions of individual privacy, he said, quoting with approval from *Boyd v. United States*:[15]

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .[16]

Justice Brandeis further maintained that the framers of the Constitution conferred on the people a right to be let alone, not only as to person and property, but also in their beliefs, their thoughts, their emotions and their sensations. He considered the Government's unauthorized invasion, by any means, of this fundamental right of privacy to be a violation of the Fourth Amendment.[17] He did not consider that a trespass to property constituted an essential element in the definition of an unreasonable search and seizure.

Six years after the *Olmstead* case, Congress passed the Communications Act of 1934.[18] The Supreme Court interpreted Section 605 of this statute as requiring the exclusion of evidence gained by wiretapping.[19] This interpretation, requiring the exclusion of wire-tap

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14. Olmstead v. United States, 277 U.S. 438, 474 (1928).

15. 116 U.S. 616, 630 (1886). This was the first case wherein the Supreme Court construed the Fourth Amendment. Lord Camden's judgment in Entick v. Carrington, 19 How. St. Tr. 1029 (1765), the classic English case on unreasonable search and seizure, was reviewed and relied upon by the Court in its opinion.

16. Olmstead v. United States, 277 U.S. 438, 474 (1928).

17. *Id.* at 473.

18. 48 STAT. 1064, 1104 (1934), 47 U.S.C. § 605 (1946) provides in part that:

> [N]*o person* not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to *any person*. . . . [Italics added.]

48 STAT. 1064, 1100 (1934), 47 U.S.C. § 501 (1946) provides a penalty for intentional violation of the above section by any person.

19. The Act was interpreted for the first time by the Court in Nardone v. United States, 302 U.S. 379 (1937), which construed the words "no person" to include federal agents and the inhibition on communication to "any person" as including testimony in a court as to the contents of an intercepted message. The second *Nardone case*, 308 U.S. 338 (1939), extended the rule of the first *Nardone* case by holding that evidence procured by the use of knowledge acquired from conversations illegally intercepted was inadmissible. In 1952, the Court in Schwartz v. Texas, 344 U.S. 199 (1952), decided that § 605 of the Federal Communications Act did not prevent telephone conversations intercepted in violation of the Act from being used as evidence in a criminal proceeding in a state court. Compare the *Schwartz* case with Adams v. Maryland, 347 U.S. 179 (1954), wherein the Court said that 52 STAT. 943 (1938), 18 U.S.C. § 3486 (1946), which provides that "[n]o testimony given by a witness . . . before any committee of either House . . . shall be used as evidence in any criminal proceeding against him in any court . . . ," prevents a state court from using testimony so acquired. The difference between the interpretation of the Communications

evidence, did not, of course, alter the holding of the *Olmstead* case on the constitutional point.

The problem of whether eavesdropping by government agents was a violation of the Fourth Amendment was again presented in *Goldman v. United States.*[20] Federal agents gained access to the office of one of the several individuals suspected of conspiring to violate the Bankruptcy Act. Unknown to this person, the agents installed a hidden microphone in his office with a wire extending into an adjoining office to which earphones were attached so that a conference planned by the conspirators could be overheard. The microphone failed to work but the agents were able to overhear the conference by means of a detectaphone[21] which they placed against the wall separating their office from that of the conspirators. The evidence thus obtained was used to convict the conspirators of violating the Bankruptcy Act. In affirming their conviction, the Court held that the use of the detectaphone by the government agents was not a violation of the Fourth Amendment. What was heard by its use was not made illegal by the trespass or unlawful entry of the agents into the office to install the microphone, since the trespass in installing the microphone was unrelated to the use of the detectaphone. The majority of the Court intimated that if the microphone had been used, however, its use might have violated the Fourth Amendment because the original trespass committed by the agents in installing the microphone could have been a continuing trespass accompanying its use.[22]

The defendants urged that their case be distinguished from the *Olmstead* case because in the latter case the Court had said that a person speaking into a telephone intends to project his voice beyond the limits of his home or office and consequently assumes the risk that he may be overheard. In the instant case, however, since the defendant was talking in his own office with the intent that the conversation be confined within that room, he could not be assumed to have taken the risk of someone overhearing his conversation by use of a sensitive receiver and powerful amplifier. Mr. Justice Roberts said for the majority, however, that this distinction was without a reasonable or logical

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Act and the statute involved in the *Adams* case can be explained by the fact that Congress did not intend by the Communications Act to promulgate a rule of evidence for use in the state courts, whereas the immunity statute was to apply to *all* courts. The use of wire tap evidence in the federal and Missouri courts is discussed in Note, 1953 WASH. U.L.Q. 340. For a discussion of the problem of the Congressional immunity legislation subsequently involved in the *Adams* case, see Note, 1953 WASH. U.L.Q. 313. For a discussion of the *Adams* case itself, see 1954 WASH. U.L.Q. 342.

20. 316 U.S. 129 (1942).

21. A detectaphone is a sensitive receiver capable of picking up sounds inaudible to the human ear and amplifying them so that they can be understood.

22. *See* Goldman v. United States, 316 U.S. 129, 134 (1942).

basis and was too technical to be drawn in applying the Fourth Amendment.

Mr. Chief Justice Stone and Mr. Justice Frankfurter, dissenting,[23] agreed that there was no distinction in principle between the facts in the *Olmstead* case and those in the instant case, but thought that the *Olmstead* case should be overruled on the basis of Justice Brandeis' dissenting opinion in that case.

Mr. Justice Murphy, in a separate dissent,[24] agreed with the majority that there was no physical entry in the case, but said that, because of scientific advances, a physical entry was no longer necessary for a search of one's home or office, and that a person's privacy could now be invaded by indirect means equally as offensive as the direct methods which inspired the Fourth Amendment. He refused to construe the search and seizure clause of the Fourth Amendment as was done in *Olmstead* because he felt this construction was too narrow and literal and that anomalous results followed from such a construction. He thought it was a strange result which protected the most mundane thoughts recorded on paper, but allowed the revelation of the most intimate or confidential thoughts uttered in the privacy of one's quarters. Justice Murphy also thought that, even if the *Olmstead* case were not overruled, the use of a detectaphone to overhear a conversation in a home or private office was an invasion and search of private quarters. He believed that the application of the detectaphone to the wall was a sufficient trespass by the federal agents on the property of the suspects to constitute an unreasonable search as defined in the majority opinion in *Olmstead.*

That a trespass to the property of a suspect by police is an essential element in the definition of an unreasonable search and seizure in the eavesdropping cases was high-lighted in the recent case of *On Lee v. United States.*[25] There the defendant was on bail pending trial for violation of the federal narcotics laws. Chin Poy, a former acquaintance of the defendant, entered the defendant's laundry and engaged him in conversation, during which the latter made self-incriminating statements. Unknown to the defendant, Chin Poy was acting as an undercover agent for the Bureau of Narcotics and had concealed on his person a small radio transmitter. Lee, another federal agent, was stationed outside the store and by means of a radio receiver was able to hear the conversation.[26]

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23. Goldman v. United States, 316 U.S. 129, 136 (1942).
24. *Ibid.*
25. 343 U.S. 747 (1952).
26. Lee also understood the conversation between Chin Poy and the defendant even though it was in Chinese. Although the Court did not discuss the problem in the instant case, it would appear difficult to find that the defendant had assumed the risk of being overheard, as the Court found the defendant in the *Olmstead* case had done.

By a five to four decision,[27] the Supreme Court held that the conduct of Chin Poy and Lee did not constitute an unreasonable search and seizure. Defendant had sought to bring himself within the dictum of the *Goldman* case which had intimated that the installation and use of the microphone by federal agents in that case might have constituted an unreasonable search and seizure because of the trespass committed in its installation. The Court, speaking through Justice Jackson, said that the defendant could not raise the question left undecided in the *Goldman* case because here no trespass was committed. The Court said that Chin Poy had committed no trespass because he had entered the place of business with the consent, if not by the implied invitation, of the defendant; the majority rejected the defendant's claim that Chin Poy's entrance was a trespass by reason that consent to his entry was obtained by fraud. The Supreme Court had previously decided that the doctrine of trespass ab initio is not applicable in interpreting the Fourth Amendment;[28] therefore, no trespass by Chin Poy on that ground could be material. The Court also rejected the argument that Lee, who was able to overhear conversations inside the laundry by means of the radio transmitter and receiver, was a trespasser. The majority said that the trespass problem left undecided in the *Goldman* case would be before the Court only in the case of physical entry, either by force, by unwilling submission to authority, or without any express or implied consent. It was also decided that those cases[29] holding that there was an unreasonable search and seizure where tangible property had been unlawfully seized by government agents although entry was by subterfuge or fraud rather than by force were not pertinent in cases where electro-mechanical instruments were used to overhear conversation, "at least where access to the listening post was not obtained by illegal means."[30]

Justice Frankfurter again adopted Justice Brandeis' dissent in the *Olmstead* case and in his own dissenting opinion[31] stated that the *Olmstead* case should be overruled because "[t]he circumstances of the present case show how the rapid advances of science are made available for that police intrusion into our private lives against which the Fourth Amendment of the Constitution was set on guard."[32] He felt

27. Four separate dissenting opinions were filed.
28. McGuire v. United States, 273 U.S. 95 (1927). Under the doctrine of trespass ab initio, one who enters upon land by legal authority and seizes property or makes an arrest but subsequently engages in tortious conduct is held liable as a trespasser from the beginning. By a fiction, his abuse of authority relates back to his original act and makes it unlawful. PROSSER, TORTS 157 (1941). It seems there could be no trespass ab initio in this case because Chin Poy's entrance was by private permission, and not by legal authority.
29. United States v. Jeffers, 342 U.S. 48 (1951); Gouled v. United States, 255 U.S. 298 (1921).
30. On Lee v. United States, 343 U.S. 747, 753 (1952).
31. *Id.* at 758.
32. *Id.* at 759.

that for the Court to sanction such "dirty business" would make "for lazy and not alert law enforcement."[33]

Mr. Justice Douglas, who had been with the majority of the Court in the *Goldman* case, joined the dissenters[34] in *On Lee* to say that he was wrong in the *Goldman* case and, after quoting extensively from Justice Brandeis' dissent in *Olmstead,* stated that "the nature of the instrument that science or engineering develops is not important. The controlling, the decisive factor is the invasion of privacy against the command of the Fourth and Fifth Amendments."[35]

Mr. Justice Burton, dissenting,[36] stated that the protection of the Fourth Amendment should be extended to intangibles, including spoken words, and not limited to the seizure of tangible things. Going further, he was of the opinion that the place where the effects are seized should be the test in determining what constitutes a violation of the Fourth Amendment. Since here the words were picked up from within the defendant's "house," which is the place protected by the Fourth Amendment against unreasonable searches and seizures, Justice Burton thought that Lee's conduct was the same as if he had, without a search warrant or consent, entered into the defendant's shop and there overheard the conversation. By this analysis, it is possible to find the trespass or unlawful entry into the defendant's house necessary to make the action by the federal agents an unreasonable search as defined by the majority of the Court.

The *Olmstead* case intimated that the protection of the Fourth Amendment was to be afforded only to material things. Eavesdropping by wiretapping, the mere abstraction of a voice from wires which are not part of a person's house, therefore, could not fall within the prohibition of the Fourth Amendment. In the *Goldman* case, the Court indicated, without deciding, that eavesdropping could be an unreasonable search and seizure if coupled with a trespass. The *On Lee* decision left open the question of whether eavesdropping, when coupled with a trespass, is an unreasonable search and seizure, for no trespass was found in that case. The decision of the Court, however, again indictated that if there had been a trespass to property, coupled with the eavesdropping, the Fourth Amendment may have been violated. The *Goldman* and *On Lee* cases impliedly limit the dictum of the *Olmstead* case to the extent that the latter case intimated that there can be an unreasonable search and seizure only of material things. The *On Lee* case, however, also indicates that the Court will be reluctant to find the trespass necessary for a violation of the Fourth Amendment.

33. On Lee v. United States, 343 U.S. 747, 761 (1952).
34. *Id.* at 762.
35. *Id.* at 765.
36. *Ibid.* Justice Frankfurter concurred with Justice Burton's dissenting opinion.

EAVESDROPPING UNDER THE FOURTEENTH AMENDMENT

The states have the primary responsibility of enforcement in the field of criminal justice, but with the adoption of the Fourteenth Amendment the Supreme Court acquired the power[37] to insure that no person be deprived by a state of "life, liberty or property without due process of law."[38] While the Supreme Court was interpreting the Fourth Amendment as applied in the federal courts, it also re-defined, in *Wolf v. Colorado*[39] and *Rochin v. California*,[40] the Fourteenth Amendment's effect on state criminal proceedings.

Evidence obtained as a result of an unreasonable search and seizure by federal agents is inadmissible in the federal courts in criminal proceedings against the person from whom it was taken, and the trial court's failure to sustain the defendant's objection to the admission of such evidence is grounds for reversal. This was the rule established in *Weeks v. United States*,[41] and subsequently followed in criminal proceedings in the federal courts in cases defining an unreasonable search and seizure.[42]

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37. 28 U.S.C. § 1257 (1946) provides in part that:
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States.

38. Apart from permitting Congress to use criminal sanctions as a means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States. The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any "Bill of Attainder" or "ex post facto Law," Constitution of the United States, Art. I, § 10. This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government but merely by restricting the freedom theretofore possessed by the States in the making and the enforcement of their criminal law.
Mr. Justice Frankfurter concurring in Malinski v. New York, 324 U.S. 401, 412 (1945).

39. 338 U.S. 25 (1949).

40. 342 U.S. 165 (1952).

41. 232 U.S. 383 (1914).

42. United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949); McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U.S. 10 (1948); United States v. Di Re, 332 U.S. 580 (1948); Nathanson v. United States, 290 U.S. 41 (1933); Grau v. United States, 287 U.S. 124 (1932); Taylor v. United States, 286 U.S. 1 (1932); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Gambino v. United States, 275 U.S. 310 (1927); Byars v. United States, 273 U.S. 28 (1927); Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Private detectives may use methods to obtain evidence not open to officers of the law. Burdeau v. McDowell, 256 U.S. 465 (1921). *See* Feldman v. United States, 322 U.S. 487, 492 (1944); McGuire v. United States, 273 U.S. 95, 99 (1927). *Cf.* Lustig v. United States, 338 U.S. 74 (1949). The defendant who objects to the admission of evidence must claim some proprietary or possessory interest in that which was unlawfully searched or seized. See, *e.g.*, Steeber v. United States, 198 F.2d 615, 617 (10th Cir. 1952); Connolly v. Medalie, 58 F.2d 629 (2d Cir. 1932). *See* Wolf v. Colorado, 338 U.S.

In *Wolf v. Colorado*,[43] the problem before the Supreme Court was whether a conviction by a state court violated the Due Process Clause of the Fourteenth Amendment solely because evidence admitted at the trial would have been inadmissible in a federal criminal proceeding for the reason that the evidence was obtained by an unreasonable search and seizure.

Mr. Justice Frankfurter, speaking for the majority of the Court, answered this question in the negative. In determining what limitations were to be imposed upon state courts in their criminal proceedings, the court adhered to the doctrine of *Palko v. Connecticut*.[44] In that case Mr. Justice Cardozo had stated that the rights of the individual to be protected from infringement by the states by the Due Process Clause were those which were "implicit in the concept of ordered liberty."[45] Although the Due Process Clause does not incorporate all of the first eight Amendments to the Constitution,[46] Justice Frankfurter said in the *Wolf* case that it does include the protection against unreasonable searches because "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to free society."[47] But he held that the Fourteenth Amendment did not require that the rule of the *Weeks* case be applied to the states through the Due Process Clause. He said that the rule of the *Weeks* case was a rule of evidence and procedure developed by the Supreme Court for use in the federal courts and "was not derived from the explicit requirements of the Fourth Amendment" nor was it "based on legislation expressing Congressional policy in the enforcement of the Constitution."[48] Thus, although it was

25, 30-31 (1949); Goldstein v. United States, 316 U.S. 114, 121 (1941). *Cf.* United States v. Jeffers, 342 U.S. 48 (1951). But the defendant is not entitled to the benefit of the *Weeks* rule when he commits perjury in testifying in his own behalf. This evidence may be used, however, solely for impeachment. Walder v. United States, 347 U.S. 62 (1954). For an analysis of the problem in the *Weeks* rule, see 4 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).

43. 338 U.S. 25 (1949).

44. 302 U.S. 319 (1937). Palko contended that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth Amendment also, and that a state could not violate that provision of the Fifth Amendment which prohibits double jeopardy without violating the Due Process Clause of the Fourteenth Amendment. The court rejected this contention, and held that the double jeopardy to which Connecticut had subjected Palko was not violative of the fundamental principles of liberty and justice. Justice Cardozo said for the Court that those ". . . immunities that are valid as against the federal government by force of the specific pledges of particular amendments . . ." and which ". . . have been found to be implicit in the concept of ordered liberty . . .," have, ". . . through the Fourteenth Amendment, become valid as against the states. . . ." Palko v. Connecticut, 302 U.S. 319, 324 (1937).

45. *Id.* at 325.

46. Palko v. Connecticut, note 43 *supra* (double jeopardy); Adamson v. California, 332 U.S. 46 (1947) (privilege against self-incrimination); Twining v. New Jersey, 211 U.S. 78 (1908) (privilege against self-incrimination); Hurtado v. California, 110 U.S. 516 (1884) (indictment by grand jury).

47. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

48. *Id.* at 28.

stated in *Wolf v. Colorado* that, through the Fourteenth Amendment, the individual has a right to be protected from an unreasonable search and seizure by state officers, his remedy for its violation need not be the exclusion of evidence secured by such means in a criminal action against him by the state. The states, at their discretion, may refuse to apply the *Weeks* doctrine as a rule of evidence in their criminal proceedings.

Three dissenting opinions were filed in the *Wolf* case, agreeing that the principle of the Fourth Amendment was to be included within the protection afforded by the Fourteenth, but disagreeing with the majority holding that evidence obtained by state police in violation of the principle of the Fourth Amendment could be admitted in a state court and employed to convict the accused from whom it was thus obtained. The dissenters thought that the only effective means to prevent the violation of the principle of the Fourth Amendment was to exclude the evidence secured by its violation in the state, as well as in the federal courts.[49]

In *Rochin v. California*,[50] the Court again was faced with the problem of the admissibility of illegally obtained evidence in a state criminal proceeding. Suspecting that Rochin was selling narcotics, state officers entered his home without a search warrant and forced their way into a bedroom occupied by Rochin and his wife. Lying on a bedside table were two capsules. Rochin quickly swallowed them, despite forcible attempts by the officers to remove them from his mouth. The officers then took him to a hospital where an emetic was pumped into his stomach against his will. He vomited two capsules which were found to contain morphine. These were admitted into evidence in a state court and used to convict him of violating a state law forbidding the possession of morphine.

On appeal to the Supreme Court the state court conviction was reversed because it was obtained in violation of the Due Process Clause. Justice Frankfurter, again writing the opinion of the Court, said that:

> Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the *whole course of the proceedings* . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses."[51] [Italics added.]

Under this test he concluded that, in the instant case, the entire proceedings by which Rochin's conviction was obtained was "conduct that shocks the conscience," offensive even to hardened sensibilities.

49. Wolf v. Colorado, 338 U.S. 25, 40 (1949).
50. 342 U.S. 165 (1952).
51. *Id.* at 169, quoting in part from his opinion in Malinski v. New York, 324 U.S. 401, 416 (1945).

The Court said these methods were "too close to the rack and the screw to permit of constitutional differentiation."[52]

The *Wolf* case was not mentioned in the *Rochin* case although the conduct of the state officers in the *Rochin* case constituted an unreasonable search and seizure. In the *Wolf* case, state officers used no physical violence on the defendant; in the *Rochin* case they did. The conviction in the *Wolf* case was not obtained in contravention of the Fourteenth Amendment; the conviction in the *Rochin* case was. The distinguishing factor, then, between the two cases would appear to be that the officers in the *Rochin* case employed physical violence, a stomach pump, upon the accused to secure the evidence subsequently used to convict him.

That physical coercion on the person of the accused is the distinguishing factor between these two cases is evidenced by the recent case of *Irvine v. California.*[53] In the *Irvine* case, state law enforcement officers, suspecting Irvine of violating a state anti-gambling law, entered his home during his absence and installed a microphone connected by means of a wire to earphones in a nearby garage. Agents were stationed in the garage to listen in on Irvine's conversations in his home by means of this device. Five days later, the officers again entered Irvine's home during his absence and moved the microphone to the bedroom where Irvine and his wife slept. After allowing the microphone to remain in the bedroom for twenty days, the officers again entered the home and moved the microphone to a closet and continued to eavesdrop on Irvine's conversations. The police did all of these things without a search warrant and without the knowledge or consent of Irvine. Incriminating statements made by Irvine during this period and overheard by means of the device were admitted into evidence in a state court over his objection and were used to convict him on a charge of gambling.

Relying on the *Wolf* case, the Supreme Court affirmed Irvine's conviction in a five to four decision. Mr. Justice Jackson, who had written the majority opinion in *On Lee v. United States,*[54] also wrote for the majority in the instant case.[55] He said the use of the microphone was the same, legally, as if an eavesdropper had been hidden in the house to obtain the evidence. The methods employed in the *Irvine* case, if used by federal agents, would have violated the Fourth Amendment and the evidence thus secured would have been inadmissible in the federal

52. Rochin v. California, 342 U.S. 165, 172 (1952).

53. 347 U.S. 128 (1954).

54. See text supported by notes 27-30 *supra.*

55. Justice Jackson wrote the opinion of the Court in which Chief Justice Warren and two other justices concurred. Justice Clark, in a separate opinion, concurred in the result.

courts.[56] Although the *Wolf* case said that the principle of the Fourth Amendment was to be embodied within the Due Process Clause of the Fourteenth Amendment, that case refused to impose upon the states the rule of the *Weeks* case requiring the exclusion of evidence in the federal courts when secured in violation of the Fourth Amendment. The majority held that the holding in the *Wolf* case was decisive and that the evidence which the state officers obtained with the microphone was admissible.

Irvine sought to bring his case within the rule of the *Rochin* case, but this effort was rejected by the majority of the Court on the ground that the element of physical coercion, present in that case, was lacking here. Justice Jackson said: "However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping."[57]

Mr. Justice Clark concurred with the majority,[58] but said that if he had been present when the *Wolf* case was decided, he would have applied the rule of the *Weeks* case to the states. It should be noted that, although the *Irvine* decision was five-four, only one of the four dissenting justices thought that the *Wolf* case should be overruled. Thus, even if Justice Clark had voted with the dissenters, the result would not have been an overruling of the *Wolf* case but rather a finding that the conviction had been secured in violation of the Due Process Clause within the meaning of the *Rochin* case. Justice Clark did not feel that the facts of the instant case fell within the doctrine of the *Rochin* case, however, as he thought that the actions of the state officers here constituted only an unreasonable search and seizure. He therefore concurred with Justice Jackson's opinion that this case fell within the doctrine of the *Wolf* case.

Justice Frankfurter dissented, saying ". . . Wolf did not and could not decide that as long as relevant evidence adequately supports a conviction, it is immaterial how such evidence was acquired."[59] He thought that Irvine's conviction should be set aside on the basis of the *Rochin* case. He rejected the contention that the presence or absence of physical violence is determinative of the applicability of the *Rochin*

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56. Justice Jackson and Chief Justice Warren thought that the clerk of the Court should be directed to furnish the Attorney General with a copy of the record and opinion in the case so that the state officers could be prosecuted in a federal court for violating 62 STAT. 696 (1948), 18 U.S.C. § 242 (Supp. 1952), which provides that whoever, under color of any law, willfully subjects any resident of any state to the deprivation of any rights secured by the Constitution shall be fined or imprisoned. Irvine might also have been able to bring a civil action against the officers for damages. The use of a hidden microphone is an invasion of the right to privacy. McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

57. Irvine v. California, 347 U.S. 128, 133 (1954).

58. *Id.* at 138.

59. *Id.* at 143.

doctrine. In his opinion, the methods employed here were as shocking to the conscience as those in the *Rochin* case. It was his view that there was more than a mere unreasonable search and seizure involved, and that the methods used gave ". . . a more powerful and offensive control over the Irvines' life than a single, limited physical trespass."[60] Justice Frankfurter concluded that "[o]bservance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained"[61] and that

> [W]hen a conviction is secured by methods which offend elementary standards of justice, the victim of such methods may invoke the protection of the Fourteenth Amendment because that Amendment guarantees him a trial fundamentally fair in the sense in which that idea is incorporated in due process.[62]

Mr. Justice Douglas, in a separate dissent[63] reiterating the views he expressed in the *Wolf* case, thought that the only effective remedy to prevent unreasonable searches and seizures by state officers was by excluding evidence so obtained and that the rule of the *Weeks* case should be extended to apply to state criminal proceedings.

CONCLUSION

The Fourth Amendment, forbidding unreasonable searches and seizures, does not extend so far as to forbid a federal officer to listen to a private conversation. It is believed, however, that the guarantee against unreasonable search and seizure would forbid a forcible official intrusion even though the intrusion was not followed by any actual rummaging. If federal agents, then, commit a trespass on the private quarters of a suspect to gain access to a listening post, the Court would very probably find this action to be a violation of the Fourth Amendment. The information acquired by the federal officers in the latter situation could never be used, under the *Weeks* rule, in a federal prosecution against the person from whom it was taken. Wiretapping does not violate the Fourth Amendment and therefore does not fall within the ban of the *Weeks* rule; but the Supreme Court has interpreted the Communications Act to require the exclusion of such evidence.

The Supreme Court said in the *Wolf* case that the "security of one's privacy against arbitrary intrusion by the police" is "enforceable against the States through the Due Process Clause."[64] But the Court there held that the Fourteenth Amendment does not require the exclusion of evidence so obtained. The state will violate the rights of a person under the Fourteenth Amendment, accordingly, if it, in order

60. Irvine v. California, 347 U.S. 128, 145 (1954).
61. *Id.* at 148.
62. *Ibid.*
63. *Id.* at 149.
64. Wolf v. Colorado, 388 U.S. 25, 27 (1949).

to eavesdrop on his conversations, also commits a trespass upon his private quarters to gain access to the listening post; still, the information is admissible against him in a state prosecution. This result was obtained in the *Irvine* case by following the principle in the *Wolf* case that, although state officers obtained the evidence by means which the Fourteenth Amendment condemned, it did not follow that the Amendment forbids its use as evidence.

The wisdom of the decision in the *Irvine* case remains in question. It is difficult to determine whether the eavesdropping committed by the state officers in the *Irvine* case falls within the principles of the *Rochin* decision or is merely an unreasonable search. The *Rochin* doctrine imposes an inherently subjective standard of judgment on the Court, which will result in the reversal of a conviction when the Court finds that it was obtained by outrageous conduct on the part of the state officers. The *Irvine* decision establishes, on the other hand, a rule of upholding convictions regardless of how offensive the methods by which they were secured may appear, so long as a physical assault on the person is not employed.

This writer reaches no conclusion on the correctness of the holding that the methods employed by the state resulting in a conviction in the *Irvine* case constituted only an unreasonable search, and that the admission of evidence so obtained did not violate the Due Process Clause. The decision is, however, open to question. There are two basic factors that should be considered in deciding the problems arising in a situation such as that in the *Irvine* case. The first is whether the use of physical violence or coercion in securing evidence to obtain a conviction *is* the determinative factor in deciding what "conduct shocks the conscience;"[65] the second is whether it *should* be. Inasmuch as the Supreme Court said in the *Irvine* case that the use of coercion is the determining factor, it appears that an accused's conviction will never be reversed by the Court in cases where state officers have obtained, by eavesdropping, the evidence used to convict him, no matter where the listening post is located or how access to it is acquired, so long as their actions are not affirmatively sanctioned by the state. This prediction is, of course, based on the fact that eavesdropping, by definition, does not involve coercion or physical violence. The question remains, however, whether the use of physical violence or coercion by state officers in securing evidence *should* be the criterion in deciding what conduct violates the Due Process Clause of the Fourteenth Amendment.

RICHARD C. BEARD

65. Justice Frankfurter, who wrote the opinion of the Court in both *Wolf v. Colorado* and *Rochin v. California*, the facts of which cases led to the distinction seized on by the majority, dissented in the *Irvine* case because he thought that the use of physical coercion or violence *is not* the determinative factor in deciding what conduct by state officers violates due process. See text at notes 59-61 *supra*.