

Spring 1964

Wiretapping and Electronic Surveillance

Edward S. Silver

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Edward S. Silver, Wiretapping and Electronic Surveillance, 55 J. Crim. L. Criminology & Police Sci. 114 (1964)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

WIRETAPPING AND ELECTRONIC SURVEILLANCE*

EDWARD S. SILVER†

The proponents of wiretapping would have been wise to have adopted the term "audio surveillance," as tapping and bugging are called by the Central Intelligence Agency,¹ and thus avoided a "semantic trap." To altogether too many people who know little or nothing of the tough problems of law enforcement, "wiretapping" is a dirty word. However, when prosecuting attorneys and other law enforcement officers use the word "wiretapping," they mean intercepting telephone conversations *only of persons engaged in criminal activities*—persons whose victims are almost always law abiding citizens.

Many well-meaning people who do not understand law enforcement problems are, to say the least, very careless about what they say with reference to the problem of wiretapping. Many persons like to wrap around themselves the robes of Mr. Justice Holmes and refer to wiretapping as "dirty business"; however, they use the phrase much more flippantly than did the Justice. There are those who have their own axes to grind and use the term "dirty business" as a red herring to muddy the waters of discussion. I doubt whether even one percent of those people have read the opinion in *Olmstead v. United States*² where the phrase "dirty business" was used. Probably not many more realize that the *Olmstead* case dealt with a situation where federal officers wiretapped to procure evidence in a bootlegging case *in violation* of a Washington State statute and, on the basis of those *unlawful* taps, obtained convictions.

In *Olmstead*, the "great dissenter," Justice Holmes, was absolutely right when he said that officers of the law should not violate the law in fighting crime. Nobody should dispute this. But the principle announced in *Olmstead* has no bearing on a situation such as exists under the laws of

* This article is a condensation of an address delivered by Mr. Silver before the Criminal Law Section of the American Bar Association in Chicago, Illinois, August, 1963.

† District Attorney, Kings County, Brooklyn, New York.

¹ See Allen Dulles, *The Craft of Intelligence*, Harper's, April, 1963, p. 148.

² 277 U.S. 438 (1928).

New York State and under similar statutes of other states, as well as in proposed federal legislation presently under consideration by Congress. *Olmstead* has no application where a state constitution or a state statute *authorizes* district attorneys and high ranking police officials to tap wires under specified conditions and with *meaningful* safeguards to our liberties. To those who like to quote Mr. Justice Holmes regarding the "dirty business" of illegal wiretapping, may I suggest a consideration of what he said on another occasion:

"At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."³

There may be those who think wiretapping is a "dirty business," but who among us can deny the fact that murderers, narcotic smugglers and peddlers, labor racketeers, corrupters of public officials, bank robbers, burglars, and extortionists, are engaged in far dirtier businesses? Such crime must be eradicated not only for the sake of preserving democracy itself, but also because of its corollary effects. Failure to apprehend and convict criminals breeds disrespect for law and order and particularly affects the minds of many of our young people. It produces a contempt on their part for the law and those charged with enforcing it. It leads them to deride discipline, decency and good conduct, and thus promotes juvenile delinquency. Law enforcement agencies are seeking adequate weapons with which to fight this "dirty business."

Although law enforcement officers are severely restricted in their use of modern electronic equipment, *the criminal element avails itself of modern means of this type while engaging in their nefarious practices, and in avoiding detection and apprehension.*

For instance, in a recent bank robbery case in Brooklyn, in which a bank guard was killed, questioning of witnesses elicited information that one of the bandits was wearing a hearing aid. Ultimately we learned that what was believed to have

³ *Kepner v. United States*, 195 U.S. 100, 134 (1904).

been a hearing aid was actually a small transistor radio, carried in the robber's ear, by means of which he received instructions and messages from a lookout who was in an automobile outside the building.

Walkie-talkie devices were used by robbers in a Bank of America hold-up in December, 1954, and again in a bank robbery in Maryland a few months ago.

It is common knowledge that many public officials, including district attorneys, have their telephones checked periodically to make sure they are not being tapped by persons engaged in unlawful activities.

There have been a number of known instances of criminals intercepting police broadcasts.

In one interesting instance, electronically minded homeowners in a Midwestern city discovered they were prime targets for electronically minded burglars. A number of residents in the city's higher-priced neighborhoods had been using transmitters installed in their automobiles to open the garage doors of their homes by means of radio waves. Enterprising burglars began using similar transmitters to gain entrance to the homes. After selecting a residence which was equipped with such a radio device, the burglars reportedly sent out signals on different wave lengths until the garage door opened for them. They then proceeded to enter the house through a door opening into the garage.

Contrast the criminal element's utilization of electronic devices with the effects of depriving law enforcement officers of similar opportunities. In New York City, a 19 year old girl died after an alleged abortion. She was thereafter dismembered, and her body hacked into small pieces for disposal in a sewer. Yet it might not have happened had the police and prosecutor not been deterred by a federal court decision from obtaining a wiretap order for the alleged doctor-abortionist's telephone; for, as it turned out, the police were aware of this doctor's abortion activities prior to the incident and had sought, but were unsuccessful in obtaining, a wiretap for the abortionist's telephone. As a result, evidence sufficient to warrant an arrest for the doctor's criminal conduct could not be obtained in time to prevent this tragedy.

It is most important always to keep in mind that we do not advocate interception of a telephone conversation without a court order based on a sworn statement by a responsible person giving *facts* on which it can be stated under oath that there are reasonable grounds to believe that such interception will produce evidence of crime. And when I say "we," I mean all of us. I cannot stress too much that the right to tap is a right given not to the district attorneys or police as such, but to them as agents of the public, as agents sworn to fulfill their obligations to the public.