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Admissibility of Evidence Obtained by Wire Tapping

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ADMISSIBILITY OF EVIDENCE OBTAINED BY WIRE TAPPING

The United States Supreme Court was recently called upon to consider a novel aspect of the problem of search and seizure and the admissibility of illegally obtained evidence. Several persons had been convicted of a conspiracy to violate the National Prohibition Act. The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. The primary question considered by the Supreme Court was whether the use of such evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping by federal officers, amounted to a violation of the Fourth and Fifth Amendments to the Constitution of the United States.[1]

It appeared that secret wires were inserted along the ordinary telephone wires from the residences of four of the defendants and those leading from their chief office. The insertions, however, were made without trespass upon any property of the defendants, the taps being made in the basement of the office building and in the streets near the residences.

By a five to four[2] decision the judgment of the Circuit Court of Appeals upholding conviction[3] was affirmed, Mr. Chief Justice Taft writing the opinion of the Court.

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated....."

The Fifth Amendment provides:

"No person.....shall be compelled in any criminal case to be a witness against himself."

By means of a long line of decisions[4] from *Weeks v. United States* down to the present time the doctrine has become firmly established in our federal courts that evidence illegally obtained by federal officers in violation of the constitutional rights of an accused under the Fourth Amendment may not be used against him on trial.

In numerous decisions[5] the Court has asserted that to receive such evidence

1. Olmstead et al. v. United States (1928)—U. S.—, 48 S. Ct. 564, 72 L. Ed.—.
2. Mr. Justice Brandeis, Mr. Justice Holmes, Mr. Justice Butler, and Mr. Justice Stone dissented.
3. Olmstead et al. v. United States (1927) C. C. A., 19 F. (2nd) 842.
4. Weeks v. United States (1914) 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652; Silverthorne Lumber Co., Inc., et al. v. United States (1920) 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; Gouled v. United States (1921) 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; Amos v. United States (1921) 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; Agnello et al. v. United States (1925) 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145; Byars v. United States (1927) 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520; Gambino et al. v. United States (1927) 275 U. S.—, 48 S. Ct. 137, 72 L. Ed.—; Marron v. United States (1927) 275 U. S. 182, 48 S. Ct. 74, 72 L. Ed.—.
5. Boyd v. United States (1886) 116 U. S. 616, 633-635, 6 S. Ct. 524, 29 L. Ed, 746; Gouled v. United States, *supra*, note 4, 255 U. S. l. c. 306; Amos v. United States, *supra*, note 4, 255 U. S. l. c. 315-316; Agnello v. United States, *supra*, note 4, 269 U. S. l. c. 33-34; Marron v. United States, *supra*, note 4, 48 S. Ct. l. c. 75.
6. This reason for exclusion has been frequently suggested; see *e. g.*, Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures" (1925) 25 Col. L. R. 11, 26-27; Note, "Admissibility of Defendant's Property When Unlawfully Seized" (1922) 10 Calif. L. R. 165, 167; Rowan, "Admissibility of Evidence Obtained in Violation of Constitutional Rights" (1924) 2 Tex. L. R. 208, 210; Editorial Note (1922) 26 Law Notes 82.

would be to violate the provisions of the Fifth Amendment against compulsory self-incrimination. Whether that be the only reason, or whether aside from the Fifth Amendment it should be excluded as the only adequate means of giving effect to the Fourth Amendment,[6] it is not necessary to discuss in this article. Suffice it to say that the rule is well settled in the federal courts that such evidence is not admissible.

It may be conceded at the outset that the situation here involved does not come within any literal interpretation of search and seizure. Mr. Justice Butler in his dissent, however, asserts that "tapping the wires and listening in by the officers literally constituted a search for evidence".[7] It is difficult to disagree with this assertion, as no entrance upon the premises of the defendants for the purpose of finding and carrying away some physical object would seem to be necessary to constitute a search.[7a] But if it be conceded that technically there was no search and siezure, it must also be conceded that no literal interpretation or technical application of the search and seizure clause has been insisted upon by the Supreme Court. Instead, the Court has repeatedly declared that the Amendment must receive a liberal construction to the end that the liberty of the individual shall be protected.

In *Gouled v. United States*[8], Mr. Justice Clarke, delivering the opinion of a unanimous court and speaking of the Fourth and Fifth Amendments, said;

> "It has been repeatedly decided that these amendments should receive a *liberal construction*, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned, but mistakenly over-zealous, executive officers."

Later Mr. Justice Sutherland, speaking for the full court in *Byars v. United States*[9] and referring to the application of the Fourth and Fifth Amendments, asserted:

> ".....the Court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be *liberally construed*, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon'."

Statements of a similar tenor by the courts calling for a liberal rather than a literal interpretation in dealing with these amendments might be multiplied.[10]

The rights guaranteed by these amendments are fundamental and declared by the Court to be "indispensable to the full enjoyment of personal security, personal liberty, and private property;.....they are regarded as of the very essence of constitutional liberty."[11] Such rights, it is recognized, must be equally enforced in favor of the guilty and the innocent,[12] and the fact that such enforcement may result

7. *Supra*, note 1, 48 S. Ct. l. c. 576.

7a. See Ex parte Jackson (1877) 96 U. S. 727, 24 L. Ed. 877, holding sealed matter in the mails to be protected by this Fourth Amendment, and Boyd v. United States, *supra* note 7, holding that an order compelling production of private papers may operate as an unreasonable search and seizure.

8. *Supra*, note 4, 255 U. S. l. c. 304. (Italics the writer's.)

9. *Supra*, note 4, 273 U. S. l. c. 32. (Italics the writer's.)

10. Boyd v. United States, *supra*, note 5, 116 U. S. l. c. 635; In re Lobosco (1926) 11 F. (2d) 892, 894; Wallace v. State (1927) 157 N. E. 657, 660,—Ind.—; Flum v. State (1924) 193 Ind. 585, 590, 143 N. E. 353; Kalwin Business Men's Ass'n. v. McLaughlin (1926) 214 N. Y. S. 507, 511, 216 App. Div. 6.

11. Mr. Justice Clarke in Gouled v. United States, *supra*, note 4, 255 U. S. l. c. 304.

12. Byars v. United States, *supra*, note 4, 273 U. S. l. c. 29; Agnello v. United States, *supra*, note 4, 269 U. S. .l. c. 32; Kirvin v. United States (1924) C. C. A. , 5 F. (2d) 282, 285; Atlantic Food Products Co. v. McClure (1922) 288 F. 982, 984; Ashbrook v. State (1923) 92 Okla. 287, 288-289, 219 P. 347.

in defeating the enforcement of the prohibition law in a particular case is immaterial as the constitutional provisions are paramount.[13]

Half a century ago the Supreme Court decided in *Ex parte Jackson*[14] that sealed matter in the mails was under the protection of the Fourth Amendment and could be opened only with a valid search warrant. Any literal interpretation or narrow application of the Fourth Amendment would not appear to include letters in the mails, yet the soundness of that decision stands unquestioned.

In *Boyd v. United States* [15] the statute of 1874 authorizing an order in revenue cases requiring defendant or claimant to produce his private papers, books and invoices or else the allegations of the govenment attorney be taken as confessed, was held to violate the Fourth Amendment. Yet the facts in that case, so much relied on in the later development of our law of search and seizure, and which has been recently reaffirmed by our Supreme Court,[16] did not come within any literal interpretation of the Fourth Amendment. The Court admitted in the *Boyd* case that technically there was no search and seizure but held that an act which operated with the same effect and served the same purpose as an illegal search and seizure offended against the Fourth Amendment, when they said:

> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, *in all cases in which a search and seizure would be; because it..... effects the sole object and purpose of search and seizure.*"[17]

Again in the same opinion, speaking of the statute involved and the information in the case, the Court said:

> ".....we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both."[18]

The Court said in the same case, speaking of Lord Camden's opinion in *Entick v. Carrington*,[19] upon which the whole law of search and seizure is so largely based:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court; *they apply to all invasions on the part of the government and its employees of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rumaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal*

13. United States v. Bookbinder (1922) 278 F. 216, 218; State v. Jokosh (1923) 181 Wis. 160, 163, 193 N. W. 976; Bruner v. Commonwealth (1921) 192 Ky. 386, 388, 233 S. W. 795.

14. (1877) 96 U. S. 727, 733-735, 24 L. Ed. 877; Hoover v. M'Chesney (1897) C. C., 81 F. 472, 481 et seq.

15. *Supra*, note 7, 116 U. S. l. c. 621-622.

16. Byars v. United States, *supra*, note 4, 273 U. S. l. c. 249; Gouled v. United States, *supra*, note 4, 255 U. S. l.c. 306.

17. *Supra*, note 5, 116 U. S. l. c. 622. (Italics the writer's)

18. *Supra*, note 5, 116 U. S. l. c. 633.

19. (1765) 19 Howell's State Trials, 1029.

security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense....."[20]

It is submitted that "the sanctities of a man's home and the privacies of life" and "the indefeasible right of personal security, personal liberty and private property' are as seriously invaded in the principal case as in *Boyd v. United States* or *Ex parte Jackson.*

Since sealed matter in the mail is under the protection of the Fourth Amendment, an officer who, without proper warrant, opened and read a letter would not be permitted to testify to its contents. [21] Yet, is the surreptitious reading of a letter by a federal officer and later testifying to its contents so materially different from, in like manner, surreptitiously listening, by means of his own illegal tapping, to the transmission of a similar message by telephone and later testifying to the contents of the message, as to make the latter a proper matter of evidence while the former is protected by the Fourth and Fifth Amendments?

The majority opinion in the principal case emphasizes the fact that there is "no evidence of compulsion to induce the defendants to talk over their many telephones. They were continuously and voluntarily transacting business without knowledge of the interception."[22] How much different is this from the voluntary sending of letters through the mails, wrongfully and illegally intercepted, as here, opened and read, and then sent on to the addressee, and an attempt made to have the intercepting officer testify to the contents? True the physical letter is taken possession of for the time being, while no physical evidence is so taken into the possession of the officer in the principal case. But it is the contents of the message, not the mere paper upon which the letter is written, that is protected by the Fourth Amendment. Could it be successfully contended that a letter which was read by means of some device without breaking the seal would not be protected? If it would be protected would not that case be sufficiently analogous to that of a telephone communication to place the two in the same category?

Judge Rudkin, dissenting from the judgment affirming the conviction below, asks:

> "What is the distinction between a message sent by letter and one sent by telegraph or telephone?" "True," he says, "the one is visible, the other invisible; the one tangible, the other intangible; the one sealed, the other unsealed; but these are distinctions without a difference." [23]
>
> "The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, altho proper, confidential, and privileged, may be overheard. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping."[24]

The Fourth Amendment should be so construed as to prohibit effectively the type of evil which it must have been the purpose of the framers to prevent, rather

20. Boyd v. United States, *supra*, note 5, 116 U. S. l. c. 630 (Italics the writer's)
21. See Silverthorne Lumber Co. v. United States, *supra*, note 4, 251 U. S. l. c. 392; Watson v. United States (1925) C. C. A., 6 F. (2d) 870, 871; United States v. Dziatlus (1923) 289 F. 837, 843; United States v. Lydecker (1921) 275 F. 976, 980; Flagg v. United States (1916) 147 C. C. A. 367, 233 F. 481, 483 et seq; White v. Commonwealth (1927) 221 Ky. 535, 537-538, 299 S. W. 168.
22. *Supra*, note 1, 48 S. Ct. l. c. 567.
23. Olmstead et al. v. United States, *supra*, note 3, 19 F. (2d) l. c. 850.
24. Mr. Justice Brandeis' dissent, 48 S. Ct. l. c. 571.

than that it be restricted in its application to those acts of governmental oppression which had created a demand for the constitutional guaranty, or which a literal construction of the words therein would embrace. It is because the Court has given effect to the broader purposes of the Amendment rather than the literal meaning of its words that *Ex parte Jackson* and the *Boyd* case were brought within the scope of its protection.

Gouled v. United States [25] is justified and distinguished by the Court on the ground that there had been an "actual entrance into the private quarters of the defendant", which is shown by the *Boyd*[26] case not to be essential, "and the taking away of something tangible."[27] But is the difference between tangible and intangible to control? If instead of carrying away the tangible papers there had been an attempt to produce testimony as to what had been observed to be the contents of such papers, that likewise should have been excluded.[28]

The issuance of a subpoena *duces tecum* for the production of papers, not unduly sweeping in its terms, and compelling obedience thereto, does not constitute an unreasonable search and seizure.[29] Yet in *Silverthorne Lumber Co. v. United States*,[30] where the tangible evidence illegally seized had been returned and it was sought to compel its production, the Court held, even in the case of a corporation which cannot claim the benefit of the privilege against self-incrimination guaranteed by the Fifth Amendment,[31] that the Fourth Amendment afforded protection, and that evidence cannot be thus secured and used where the information upon the basis of which the subpoena was issued was obtained by the wrongful act of government officers in violation of constitutional rights. [32]

A warrant issued solely for the purpose of securing evidence, and not to seize some property which the government has a right to take and which is unlawfully or wrongfully possessed by the individual, is void, and any such search and seizure, with

25. *Supra*, note 4, 255 U. S. 298. Here a representative of the Intellignce Department of the Army, pretending to make a friendly call, gained admission to defendant's office and secretly abstracted certain papers which were later sought to be used in evidence.

26. In the Boyd case an order to produce papers under a statute requiring the defendant to so produce or the allegations of the government attorney be taken as confessed was held to be in violation of the Fourth Amendment.

27. *Supra*, note 1, 48 S. Ct. l. c. 567.

28. See Silverthorne Lumber Co. v. United States, *supra*, note 4, 251 U. S. l. c. 392; In re Oryell (1928) 28 F (2d) 639, 640; Watson v. United States, *supra*, note 21, 6 F. (2d) l. c. 871; United States v. Dziadus, *supra*, note 21, 289 F. l.c. 843; United States v. Lydecker, *supra*, note 21, 275 F. l. c. 980; Flagg v. United States, *supra*, note 21, 233 F. l. c. 483 et seq.; White v. Commonwealth, *supra*, note 21, 221 Ky. l. c. 537.

29. Brown v. U. S. (1928)—U. S.—, 48 S. Ct. 288, 290, 72 L. Ed.—; Wheeler v. United States (1913) 226 U. S. 478, 489, 33 S. Ct. 158, 57 L. Ed. 309; Consolidated Rendering Co. v. Vermont (1908) 207 U. S. 541, 553-554, 28 S. Ct. 178, 52 L. Ed. 327. But if too sweeping in its terms it may violate the Fourth Amendment. Hale v. Henkel (1906) 201 U. S. 43, 76-77, 26 S. Ct. 370, 50 L. Ed. 652.

30. *Supra*, note 4, 251 U. S. l. c. 392.

31. Esgee Co. of China v. United States (1923) 262 U. S. 151, 155-156, 43 S. Ct. 514, 67 L. Ed. 917; Wheeler v. United States, *supra*, note 29, 226 U. S. l.c. 489, 490; Wilson v. United States (1911) 221 U. S. 361, 382-383, 31 S. Ct. 538, 55 L. Ed. 771; American Lithographic Co. v. Werckmeister (1911) 221 U. S. 603, 611, 31 S. Ct. 676, 55 L. Ed. 573; Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission (1911) 221 U. S. 612, 622, 31 S. Ct. 621, 55 L. Ed. 878; Hale v. Henkel, *supra*, note 29, 201 U. S. l. c. 74, 75; State ex inf. Hadley, Attorney-General, v. Standard Oil Co. (1909) 218 Mo. 1, 375, 376, 116 S. W. 902.

32. For similar holding where search warrant is based on information illegally obtained, see White v. Commonwealth (1927) 221 Ky. 535, 537-538, 299 S. W. 168.

33. Gouled v. United States, *supra*, note 4, 255 U. S. l. c. 309; Boyd v. United States, *supra*, note 5, 116 U. S. l. c. 623, 624; Kirvin v. United States, *supra*, note 12, 5F. (2d) l. c. 285; Veeder v. United States (1918) 164 C. C. A. 338, 252 F. 414, 418.

or without a warrant would be unreasonable and illegal.[33] The purpose served by the officers in the tapping of wires is identical. While not technically a search and seizure it is an unreasonable and illegal interference with the individual's privacy and should be condemned for the same reason that a search and seizure purely for evidence purposes is held to be unreasonable and therefore unconstitutional.

The Fourth Amendment prohibits only such searches as are unreasonable, but leaves us to rely upon the principles of the common law for a determination of what constitutes an unreasonable search.[34] According to Judge Sims in *McClannan v. Chaplain*, "an unreasonable search at common law is a search which is unreasonably oppressive in its general invasion of the liberty of the citizen. What is a reasonable or an unreasonable search or seizure at common law is purely a judicial question, and in determining it the court must look to all the circumstances."[35] As new situations may arise with the passage of time and changing conditions, which might constitute unreasonable searches in the light of the principles of the common law, so the guaranty in our Constitution, whose necessity was no doubt suggested by the evils of general warrants and writs of assistance, must be held to include situations not considered by the framers of the Amendment. "The meaning of constitutional guaranties never varies, but the scope of their application must expand or contract to meet new and different conditions which are constantly coming within the field of their operation."[36] "In the application of a constitution.....our contemplation cannot be only of what has been but of what may be."[37] The principle involved in the application of constitutional provisions to new conditions was tersely stated by Mr. Chief Justice Marshall when he said, "We must never forget that it is a constitution we are expounding."[38]

Acting upon the principle thus asserted the Court has continued to sanction the exercise of power by Congress as applied to objects and conditions which could not have been in the minds of those who framed and adopted our Constitution,[39] and has construed limitations either on the federal government or the states so as to permit the enforcement of statutes which at an earlier time and under different conditions would have been "rejected as arbitrary and oppressive."[40]

> "Clauses guaranteeing to the individual protection against specific abuses of power must have a similar adaptation to a changing world." [41]

The Fifth Amendment has ever been given a broad and liberal interpretation in accord with the above general principle. It has been held to apply alike to a party or a mere witness, in civil as well as in criminal cases, in all manner of proceedings in which testimony is taken, in all methods of interrogaton before a court, in investigations before a grand jury, and in investigations by a legislature or a body having legislative functions.[42]

34. People v. Chiagles (1923) 237 N. Y. 193, 195, 142 N. E. 583.
35. (1923) 136 Va. 1, 14-17, 116 S. E. 495; Agnello v. United States (1923) 290 F. 671 682; Mason v. Rollins (1869) 16 Fed. Cas. 1061, 1063, Fed. Case No. 9252, 2 Biss. 99.
36. Village of Euclid v. Ambler Realty Co. (1926) 272 U. S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303; Fowler v. Obier (1928)—Ky.—, 7 S. W. (2d) 219, 225.
37. Weems v. United States (1910) 217 U. S. 349, 373, 30 S. Ct. 544, 54 L. Ed. 793.
38. McCulloch v. Maryland (1819) 4 Wheat. 316, 407, 4 L. Ed. 579.
39. Brooks v. United States (1925) 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699; Dakota Central Telephone Co. v. South Dakota (1919) 250 U. S. 163, 39 S. Ct. 507, 63 L. Ed. 910; Northern Pac. Ry. Co. v. North Dakota (1919) 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897; Pensacola Telegraph Co. v. Western Union Telegraph Co. (1877) 96 U. S. 1, 9, 24 L. Ed. 708.
40. Village of Euclid v. Ambler Realty Co., *supra*, note 35, 272 U. S. l. c. 387.
41. Mr. Justice Brandeis' dissent, 48 S. Ct. 570.
42. Wigmore, Evidence, 2d ed., vol 4, p. 835, sec. 2252; McCarthy v. Arndstein (1924) 266 U. S. 34, 40, 45 S. Ct. 16, 69 L. Ed. 158; Counselman v. Hitchcock (1892) 142 U. S. 547, 562, 12 S. Ct. 195, 35 L. Ed. 1110.

In view of the past decisions of the Supreme Court dealing with constitutional limitations upon the powers of government and with guaranties of the liberty of the individual, it may be asserted that it has been the purpose of the Court to give to constitutional provisions, in the light of changed conditions and circumstances, that interpretation and application which will render them effective to serve the general purpose intended by the framers. The Fourth Amendment was framed and adopted as a means of protecting the individual against the evils of government officials prying into his private affairs in an unreasonable and oppressive manner. Particularly was the use of general warrants and writs of assistance intended to be forbidden. But was it not also within the intention of the framers to provide a protection for the privacy of the individual against such other practices as might be employed by the government, whose effect is to violate in similar fashion the individual's right of privacy, liberty, and personal security? If it is true that "subtler and more far-reaching means of invading privacy have become available to the government"[43] than those contemplated by the framers of the Amendment—and that cannot be denied—was it not the purpose of the framers to effectuate a protection against them also?

Consistent with the intended purposes of the Amendment and the liberal interpretation of the Constitution in general and the Fourth Amendment in particular, it is submitted that the position of the dissenting judges in the principal case represents the logical application of the Fourth and Fifth Amendments to a set of conditions which could not have been within the contemplation of the framers but which is so closely akin to the evils intended to be guarded against as to be properly held to come within their prohibition.

The fact that the officers in question violated a criminal statute of the State of Washington [44] is not material to the question of admissibility of the evidence under the Fourth and Fifth Amendments. Yet it is a significant fact, indicative of the attitude of the public and of the state and federal governments toward such snooping activities, that twenty-six states[45] have made it a crime to intercept a message sent by telephone or telegraph, and thirty-five states [46] have made it a criminal offense for a company engaged in the transmission of such messages or its employees to

43. Mr. Justice Brandeis' dissent, 48 S. Ct. l. c. 570.

44. Remington's Compiled Statutes of State of Washington, (1922) sec. 2656 (18).

45. Alabama, Code (1923) sec. 5256; Arizona, R. S. (1913) Penal Code, sec. 692; Arkansas, Crawford and Moses' Digest (1921) sec. 10246; California, Deering's Penal Code (1927) sec. 640; Colorado, Compiled Laws (1921) sec. 6969; Connecticut, General Statutes (1918) sec. 6292; Idaho, Compiled Statutes (1919) secs. 8574, 8586; Illinois, R. S. (1927) c. 134, sec. 16; Iowa, Code (1927) sec. 13121; Kansas, R. S. (1923) c. 17, sec. 1908; Michigan Compiled Laws (1915) sec. 15403; Montana, Penal Code (1921) sec. 11518; Nebraska, Compiled Statutes (1922) sec. 7115; Nevada, R. L. (1912) secs. 4608, 6752 (18); New York, Cahill's Consolidated Laws (1923) c. 41, sec. 1423 (6); North Dakota, Compiled Laws (1913) sec. 10231; Ohio, Page's General Code (1926) sec. 13402; Oklahoma, Compiled Statutes Annotated, 1926 Supplement, c. 6, Art. 41, sec. 2229; Oregon, Olson's Laws (1920) sec. 2265; South Dakota, Revised Code (1919) sec. 4312; Tennessee, Shannon's Code (1917) secs. 1839, 1840; Utah, Compiled Laws (1917) sec. 8433; Virginia, Code (1924) sec. 4477 (2); Washington, Remington's Compiled Statutes (1922) sec. 2556 (18); Wisconsin, Statutes (1927) c. 348, sec. 348.37; Wyoming, Compiled Statutes (1920) sec. 7148. Statutes collected by Mr. Justice Brandeis in his dissent, 48 S. Ct. l. c. 573.

46. Alabama, Code (1923) secs. 5543, 5545; Arizona, R. S. (1913) Penal Code, secs. 621, 623, 691; Arkansas, Crawford & Moses' Digest (1921) sec. 10250; California, Deering's Penal Code (1927) secs. 619, 621, 639, 641; Colorado, Compiled Laws (1921) secs. 6966 6968, 6970; Connecticut, General Statutes (1918) sec. 6292; Florida, Revised General Statutes (1920) secs. 5754, 5755; Idaho, Compiled Statutes (1919) secs, 8568, 8570; Illinois, R. S. (1927) c. 134, secs. 7, 7a; Indiana, Burns' R. S. (1926) sec. 2862; Iowa, Code (1924) sec. 8305; Louisiana, Acts (1918) Act No. 134, p. 228; Maine, R. S. (1916) c. 60, sec. 24; Maryland, Bag-

disclose them, while Congress by Act of 1918,[47] applicable during the period of federal control, made it criminal to tap telephone or telegraph wires, or disclose the contents of any message to persons not authorized to receive the same.

The government, in the principal case, was forced to rely entirely for conviction upon the evidence obtained by wire tapping and expose the criminal conduct of its own officers, acting on behalf of the government, in obtaining the evidence for the sole purpose of using it to convict the defendants of a crime that pales into insignificance when compared with the blow to the very foundations of civil liberty itself struck by those same officers in invading the privacy of the defendants.

Certainly the Court must have a choice to refuse to become, or permit the government to become, a party to the crime committed by these officers by appearing to ratify it, as must be true if they make use of such evidence, the mere production of which reveals the crime by which it was officially obtained. The government is as one pointing a finger of disapproval at the act of the officers, denying any authorization and refusing to accept responsibility for such conduct, and at the same time reaching out a hand and dragging in the spoils of the crime and making them its own, telling the officers that, althought their conduct is disapproved, any evidence obtained in the future by similar crimes on their part will be accepted by the Court and used in the same manner.

If the federal government, by accepting evidence of violation of the Volstead Act secured by state troopers without a warrant in a state where no other statute was violated, was so ratifying the wrongful acts of the troopers as to make them its own to the extent that to use such evidence would violate the Fourth and Fifth Amendments,[48] it is more clearly a ratification so as to make the government a party thereto where, as in the principal case, it is accepting, paying for, and using such evidence illegally obtained by the criminal acts of its own officers.

If it were plausible to argue, with Mr. Justice Brandeis and Mr. Justice Holmes in their dissent in *Burdeau v. McDowell*,[49] that the using of evidence obtained by the theft of a private individual, thus appearing to put the Court's stamp of approval upon such conduct, would not promote respect for law because it constituted a resort, "in its enforcement, to means which shock the common man's sense of decency and fair play", what must be the effect of such a decision as that in the principal case? The ordinary layman cannot view such a proceeding in any other light than as an act by the government, through its officers, committing a deliberate crime and an outrage against the fundamental rights of the citizen for the very purpose of inflicting punishment upon him whose rights have thus been violated. The government, by placing thereon it final stamp of approval through its highest court, becomes a party thereto. This, at a time when a waning respect for law and the courts is widely viewed as a problem of serious proportions, it can ill afford to do.

by's Code (1926) art. 27, sec. 489; Michigan, Compiled Statutes (1915) sec. 15104; Minnesota, General Statutes (1923) secs. 10423, 10424; Mississippi, Hemmingway's Code (1927) sec. 1774; Missouri, R. S. (1919) sec. 3605; Montana, Penal Code (1921) sec. 11494; Nebraska Compiled Statutes (1922) sec. 7088; Nevada, Revised Laws (1912) secs. 4603, 4605, 4609, 4631; New Jersey, Compiled Statutes (1910) pp. 5319-5320, secs. 12, 13; New York, Cahill's Consolidated Laws (1923) c. 41, secs. 552, 553; North Carolina, Consolidated Statutes (1919) secs. 4497, 4498, 4499; North Dakota, Compiled Laws (1913) sec. 10078; Ohio, Page's General Code (1926) secs. 13388, 13419; Oklahoma, Compiled Statutes Annotated, 1926 Supplement, c. 6, art. 41, sec. 2256; Oregon, Olson's Laws (1920) secs. 2260, 2262, 2266; Pennsylvania, Statutes (1920) secs. 6306, 6308, 6309; Rhode Island, General Laws (1923) sec. 6104; South Dakota, Revised Code (1919) secs. 4346, 9801; Tennessee, Shannon's Code (1917) secs. 1837, 1838; Utah, Compiled Laws (1917) secs. 8403, 8405, 8434; Washington, Pierce's Code (1921) secs. 8982, 8983; Wisconsin, Statutes (1927) c. 348, sec. 348.36, 348.361. Statutes collected by Mr. Justice Brandeis in his dissent, 48 S. Ct. l. c. 573.

47. C. 197; 40 Statutes 1017; Compiled Statutes, 1919 Suplement, sec. 3115¼XX.

A court will, in proper cases,[50] recognize a defense of entrapment at the hands of public officials and refuse to convict, not because of the absence of a criminal intent but in cases where no criminal intent need be shown,[51] and not because the government has, by its officers, consented to the crime,[52] but because it is deemed good policy to do so. In such cases the court is unwilling to make itself a party to any such wrongful conduct, believing that respect for law and its effective administration will be hindered rather than helped by appearing to sanction such wrongful acts. So in the principal case, it would have been sound policy on the part of the Court to have excluded the evidence,[53] by means of which respect for law and the courts, and ultimate law enforcement would have been better served.

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48. Gambino v. United States, *supra*, note 4, 48 S. Ct. l. c. 138. This case arose in New York. The acts in question took place after repeal of the state prohibition enforcement law and the state troopers secured the evidence for the purpose of turning it over to federal officers. For other cases of ratification see Dodge v. United States (1926) 272 U. S. 530, 531, 532, 47 S. Ct. 191, 71 L. Ed. 392; O'Reilly de Camara v. Brooke (1908) 209 U. S. 45, 52, 28 S. Ct. 439, 52 L. Ed. 676; The Paquete Habana (1903) 189 U. S. 453, 464-465, 23 S. Ct. 593, 47 L. Ed. 900; Taylor v. United States (1844) 3 How. 197, 205-206, 11 L. Ed. 559; Wood v. United States (1842) 16 Pet. 342, 359, 10 L. Ed. 987; The Caledonian (1819) 4 Wheat. 100, 103, 4 L. Ed. 523.

49. (1921) 256 U. S. 465, 477, 41 S. Ct. 574, 65 L. Ed. 1048.

50. Gargano et al v. United States (1928) C. C. A., 24 F. (2d) 625, 626; Cline v. United States (1927) C. C. A., 20 F. (2d) 494, 495-496; Silk v. United States (1926) C. C. A., 16 F. (2d) 568, 570; Capuano v. United States (1925) C. C. A., 9 F. (2d) 41, 42-43; Newman v. United States (1924) C. C. A., 299 F. 128, 131; Ritter v. United States (1923) C. C. A., 293 F. 187, 189; United States v. Certain Quantities of Intoxicating Liquors (1923) 290 F. 824, 826-827; Butts v. United States (1921) C. C. A., 273 F. 35, 37-38; United States v. Lynch (1918) 256 F. 983, 984-985; Peters v. United States (1919) 166 C. C. A. 509, 255 F. 433; United States v. Echols (1918) 253 F. 862; Voves v. United States (1918) 161 C. C. A. 227, 249 F. 191, 192; Sam Yick v. United States (1917) 153 C. C. A. 96, 240 F. 60, 65; Woo Wai v. United States (1915) 137 C. C. A. 604, 223 F. 412, 415; United States v. Healy (1913) 202 F. 349, 350; United States v. Adams (1894) 59 F. 674, 677.

51. Voves v. United States, *supra*, note 50, 249 F. 191; United States v. Healy, *supra*, note 50, 202 F. l. c. 350.

52. People v. Mills (1904) 178 N. Y. 274, 70 N. E. 786; Bishop, Criminal Law, 9th Ed., vol. 1, sec. 926y.

53. The court asserts in the principal case (p. 569) that the courts have no discretion to exclude evidence in such a situation, the admission of which is not unconstitutional. It is submitted, however, that it was largely a matter of choice of policy that determined the exclusion of the evidence in the *Silverthorne Lumber Co.* case (*supra*, note 30) and the *Gambino* case (*supra*, note 48). For instances of state courts using their discretion to exclude, as matter of policy, evidence illegally obtained by federal officers, see State v. Rebasti (1924) 306 Mo. 336, 346 et seq., 267 S. W. 858; State v. Horton (1925) 312 Mo. 202, 207, 278 S. W. 661; Walters v. Commonwealth (1923) 199 Ky. 182, 186-187, 250 S.W. 839; Vick v. Commonwealth (1924) 204 Ky. 513, 264 S. W. 1079; Roberts v. Commonwealth (1924) 206 Ky. 75, 76, 266 S. W. 880. The Court might reach the same result, by way of analogy to the entrapment cases, by refusing to convict where to do so would make it, in effect, a party to the crime by which the only evidence of guilt was obtained.