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Wire Tapping in Missouri

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MISSOURI SECTION

NOTES

WIRE TAPPING IN MISSOURI

WIRE TAPPING IN GENERAL

The law of wire tapping involves basically two problems: Is wire tapping legal? If not, is evidence obtained through the use of wire tapping admissible in court? The answers to these questions are interrelated to such an extent that it would be impractical to consider them separately. Furthermore, both together raise the important issue: Should wire tapping be legal?

The problem of wire tapping first arose in 1928 in *Olmstead v. United States*.[1] The United States Supreme Court there held that the interception of a telephonic communication by wire tapping was not an unreasonable search and seizure within the prohibition of the Fourth Amendment to the Constitution. It had previously been held that evidence obtained by a federal officer in violation of the Fourth Amendment was inadmissible in a federal criminal case.[2] Since wire tapping was not an unreasonable search and seizure, evidence thereby obtained was admissible in a federal criminal trial.[3] The Court in the *Olmstead* case further held that the admission into evidence of wire taps of a criminal defendant's telephone conversations did not violate his right against self-incrimination guaranteed by the Fifth Amendment to the Constitution; nor did the fact that the wire tapping was a misdemeanor by state statute and, thus, illegally conducted, prohibit the introduction in evidence of the information so obtained.[4] In 1934, however, Congress enacted the Federal Communications Act, Section 605 of which provides in part: ". . . no 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 . . . ."[5] A criminal sanction is elsewhere provided for violation

1. 277 U.S. 438 (1928).
2. Weeks v. United States, 232 U.S. 383 (1914).
3. Olmstead v. United States, 277 U.S. 438 (1928).
4. The federal courts have generally followed the common law rule that illegally obtained evidence is admissible, except where such evidence is obtained in violation of a constitutional provision or where such evidence is expressly excluded by statute. *Ibid.*
5. 605 is the section number of title 47 of the United States Code under which this provision appears. 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1946).

of this section.[6] In 1937 the Supreme Court held that "no person" under the above provision included the federal government, that "divulgence" included divulgence in court, and that evidence obtained by wire tapping was therefore inadmissible in a federal court.[7] In 1939 the rule was extended to exclude from evidence in the federal courts any information obtained by the prosecution through the use of wire tapping leads.[8] In 1939 also, Section 605 was construed to prohibit the interception and divulgence of intrastate, as well as interstate, communications and to exclude from evidence any information obtained therefrom.[9] In 1951 in *Coplon v. United States*,[10] the Court of Appeals for the District of Columbia suggested a further restriction on wire tapping in holding that interception of telephone calls between a defendant and his attorney during the period of trial violates the due process clause of the Fifth Amendment by denying to defendant the effective aid of counsel.

The Supreme Court, however, restricted somewhat the applicability of Section 605 by two 1942 decisions. In *Goldstein v. United States*[11] the Court held that a criminal defendant could not complain of the testimony of witnesses who were induced to testify by the use of wire tapping information where the defendant was not a party to the intercepted calls. The right to assert the statute as a bar to evidence rested solely in him whose communications had been intercepted.[12] *Goldman v. United States*[13] held Section 605 inapplicable where a telephone conversation was overheard by means of a detectaphone applied to a wall adjoining defendant's office.[14] Finally in *Schwartz v. Texas*[15] the Supreme Court

6. 48 STAT. 1100 (1934), 47 U.S.C. § 501 (1946).
7. Nardone v. United States, 302 U.S. 379 (1937).
8. Nardone v. United States, 308 U.S. 338 (1939). The basis behind this decision was that, if information obtained by wire tapping could be used for no purpose, wire tapping would cease.
9. Weiss v. United States, 308 U.S. 321 (1939). Since wire tapping does not distinguish interstate from intrastate calls, but rather intercepts all the calls on one line, it was held that regulation of intrastate calls was necessarily incidental to effective regulation of interstate calls.
10. 191 F.2d 749 (D.C. Cir. 1951).
11. 316 U.S. 114 (1942).
12. This result seems inconsistent with the reasoning of the Court in the second *Nardone* case. See note 8 *supra*.
13. 316 U.S. 129 (1942).
14. The rationale of this decision was that Section 605 protected the means of communication (telephone) rather than the substance of any communication intended for telephone transmission.
15. 344 U.S. 199 (1952). This decision has ben provocative of state legislative action. See the emergency clause, Section 5, of Senate Bill No.

recently held that Section 605 did not prohibit the admission in evidence in state courts of material obtained by wire tapping, but was rather a mere factor to be considered by states in establishing rules of evidence.

Thus, wire tapping is generally not violative of any provision of the United States Constitution,[16] but federal statutory and decisional law make "interception" and "divulgence" of telephonic communications without consent a crime.[17] Federal law further forbids the use of information obtained by wire tapping as evidence in the federal courts,[18] but leaves to the states the power to determine their own rules of evidence.[19]

What then are the restrictions on state action in relation to wire tapping? First, there is no restriction imposed by the Federal Constitution. Should the Supreme Court one day declare that wire tapping is violative of the Fourth Amendment, as several justices have advocated,[20] this limitation would probably be imposed on the states through the due process clause of the Fourteenth Amendment by the reasoning of *Wolf v. Colorado*.[21] Mr. Justice Frankfurter there declared: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[22] The Court further held, however, that evidence obtained by unreasonable search and seizure, though inadmissible in a federal court, was admissible in a state court.[23] Therefore, even if wire

198, which was proposed to the 67th General Assembly of Missouri on February 11, 1953.

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

17. 48 STAT. 1100 (1934), 47 U.S.C. § 501 (1946) and 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1946).

18. Nardone v. United States, 308 U.S. 338 (1939). It should be noted that there is some current activity in Washington on the subject of wire tapping legislation. Saint Louis Post-Dispatch, May 21, 1953, p. 14D, col. 3. The action in Washington, however, has not reached a stage worthy of comment.

19. Schwartz v. Texas, 344 U.S. 199 (1952). For a good discussion on the development of the federal law, see Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L. Q. 514 (1947).

20. See for example Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 471 (1928).

21. 338 U.S. 25 (1949).

22. *Id.* at 27.

23. The court's reasoning was that the right to be free from unreasonable search and seizure is a fundamental right protected by the Fourteenth Amendment, but the exclusionary evidence rule applied in federal courts is not a necessary incident of the fundamental right.

tapping is held to be an unreasonable search and seizure, the adoption or rejection of an exclusionary rule of evidence so obtained will be left to the states.

The only other federal limitation on state action, Section 605 of the Federal Communications Act, has already been considered. It should be noted, however, that the criminal sanction thereby imposed is, as a practical matter, illusory, there having been only one reported conviction since 1934.[24]

State wire tapping may be restricted or prohibited by state constitutional or statutory provisions. Since state courts are not bound to interpret state constitutional provisions in the same way the United States Supreme Court interprets similar federal constitutional provisions, wire tapping may be considered an unreasonable search and seizure within the appropriate clause of a state constitution.[25] The problem has generally not been raised in the state courts. Even if the states considered wire tapping an unreasonable search and seizure, most states would still admit evidence so obtained in the courts.[26] Missouri, in the minority, does not admit into evidence in the courts information obtained by unreasonable search and seizure in violation of the Missouri Constitution.[27] At least one state has an express constitutional provision specifically prohibiting unreasonable interception of telephonic communications but allowing limited wire tapping pursuant to warrants similar to search warrants issued by the court.[28]

State statutes regulating wire tapping vary considerably, and since their content and effect have been thoroughly considered by other writers,[29] they will not be discussed further here.

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24. United States v. Gruber, 123 F.2d 307 (2d Cir. 1941).

25. State courts would be more likely to follow the lead of the United States Supreme Court in Olmstead v. United States, 277 U. S. 438 (1928). See Leon v. State, 180 Md. 279, 23 A.2d 706, *cert. denied sub nom.* Neal v. Maryland, 316 U.S. 680 (1942).

26. In Wolf v. Colorado, 338 U.S. 25 (1949), there appear complete tables of states which adopt the rule that evidence obtained by an unreasonable search and seizure is admissible. *Id.* at 33.

27. State v. Wilkerson, 349 Mo. 205, 159 S.W.2d 794 (1942). This decision was based on Mo. CONST. Art. II, § 11 (1875), which is the same as MO. CONST. Art I, § 15 (1945).

28. N.Y. CONST. Art. I, § 12 (1938).

29. *E.g.* Rosenzweig, *The Law of Wire Tapping*, 33 CORNELL L. Q. 73 (1947).

THE MISSOURI SITUATION

The law concerning wire tapping in Missouri has been highly speculative. The constitution and statutes of Missouri prior to 1953 did not deal directly with wire tapping, and prolonged research has failed to reveal a single Missouri decision on the subject. Section fifteen of the Missouri Bill of Rights[30] protects the people from unreasonable searches and seizures of their "persons, papers, homes and effects." The Missouri court could have construed this provision broadly to include wire tapping. Had the court done this, official wire tapping would have been absolutely prohibited, and any information thereby obtained would have been inadmissible in court.[31] Proposed Missouri legislation would accomplish the same result;[32] therefore, the question would not arise in the Missouri courts if the proposed legislation becomes law.

No Missouri statute prior to June, 1953, expressly prohibited or allowed wire tapping. Section 560.310 of the Revised Statutes of Missouri prohibits physical injury to telephone wires and equipment. This section has not been construed by the Missouri courts in relation to wire tapping, but the Washington Supreme Court construed a similar statute to be inapplicable to wire tapping, which was not destructive of telephone equipment.[33] In light of the technological development of wire tapping equipment,[34] whereby no physical contact need be made with the telephone wires, it is difficult to see how the above statute could have any bearing on the law of wire tapping.

Section 392.170 of the Revised Statute of Missouri makes telephone companies liable civilly for disclosure of telephone messages by the companies' employees. This section has little application to wire tapping since tapping generally occurs far from the telephone company and without the knowledge of any company employees.

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30. MO. CONST. Art. I, § 15 (1945).
31. State v. Wilkerson, 349 Mo. 205, 159 S.W.2d 794 (1942) holds that evidence obtained by an unreasonable search and seizure is inadmissible in court.
32. Mo. Senate Bill No. 393, 67th Gen. Assembly (1953) as amended by House Committee Amendment No. 1.
33. State v. Nordskog, 76 Wash. 472, 136 Pac. 694 (1913).
34. See Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Problem*, 52 COL. L. REV. 165, 197 (1952), for a discussion of wire-tapping methods.

It has been generally acknowledged that some type of legislation should be enacted to clarify the law.[35] On February 11, 1953, a bill on wire tapping was introduced to the Missouri Senate pursuant to a proposal by the Senate Criminal Law Revision Committee.[36] A substitute bill was later submitted and passed by the legislature with minor amendment.[37] This bill is now on the governor's desk. The original bill[38] provided for the issuance of *ex parte* orders by courts for wire tapping, such orders to be issued on the oath of the attorney general, a prosecuting or circuit attorney, a sheriff, or certain police officers in cities of over seventy-five thousand population. The oath was to contain an identification of the line to be tapped, a description of the person whose line was to be tapped, a statement of reasonable ground for belief that evidence of crime could be thus obtained, and a statement of the purpose for the tap. The order was to be effective for no longer than six months unless extended by the court. The bill further made the interception of a telephonic communication by any person without authority under the act a felony.

The bill now on the Governor's desk,[39] which is substantially the original substitute Senate bill, provides that "[n]o person shall intercept or direct the interception of any telegraphic or telephonic communication, nor shall any person divulge or publish the existence, contents, substance, purport, effect or meaning of any intercepted telegraphic or telephonic communication. . . ." Violation of this act is made a felony, and evidence obtained in violation thereof is expressly excluded from admission as evidence "in any cause whatsoever."

The original bill and the final bill present graphically the underlying question: Should limited wire tapping, closely con-

35. See the report of the Committee on Criminal Courts, Law and Procedure of the St. Louis Bar Association dated January 21, 1953, on file in the Washington University Law Library.

36. Mo. Senate Jour., 67th Gen. Assembly (Feb. 11, 1953), p. 219.

37. Mo. Senate Bill No. 393, 67th Gen. Assembly (1953) as amended by House Committee Amendment No. 1. The original Senate Substitute Bill No. 198 provided for an absolute prohibition of wire tapping with no exceptions. Bill No. 393, as sent to the House, exempted telephone and telegraph company employees from this prohibition. The final bill as passed was clarified so as to limit this exemption of these employees to when they are "acting in the regular course of conducting the communication business of such companies."

38. Mo. Senate Bill No. 198, 67th Gen. Assembly (Feb. 11, 1953).

39. Mo. Senate Bill No. 393, 67th Gen. Assembly (1953) as amended by House Committee Amendment No. 1.

trolled, be allowed, or should wire tapping be absolutely prohibited? To reach a sound conclusion to this problem, it is necessary to consider both the policies involved and the practical applicability of both the original bill and the bill as passed.

The basic conflicting policies are one favoring detection of crime and another favoring the protection of the individual liberties, including a right of privacy. The arguments of the supporters of a limited system of government wire tapping center around the importance of the detection and elimination of the criminal element of society.[40] It has been suggested that methods equally distasteful, such as eavesdropping, spying, and the use of informers, are used daily by the police in crime detection. Criminals are bound by no set of ethical standards, and those fighting crime cannot operate effectually when put at a disadvantage by the imposition of undue ethical restraints. Since police cannot operate well with hands bound, the elimination of wire tapping might induce them to resort to methods of obtaining evidence which are even more repulsive to the proponent of individual liberties, such as the "third degree." It is further argued on policy grounds that the decent citizen is not affected by limited wire tapping; his privacy is not disturbed.

The proponents of an absolute prohibition of wire tapping emphasize the right of privacy and security and point out the possible abuses of legalized wire tapping.[41] Interception of calls is similar to a police-state action. It is a shotgun method of detection seeking evidence in general and continuing over an extended period of time. It is unlike a legal search by warrant which seeks a specific thing and occurs at one time with the knowledge of the one against whom the warrant is issued. A search by warrant

40. Thomas E. Dewey in an oft-quoted remark said wire tapping is ". . . one of the best methods available for uprooting certain types of crimes . . . ." 1 REV. RECORD N.Y. CONST. CON. 372 (1938). Wigmore presents strong arguments in favor of limited wire tapping. 8 WIGMORE, EVIDENCE § 2184 b (3d ed. 1940).

41. The majority report of the Committee on Criminal Courts, Law and Procedure of the St. Louis Bar Association dated January 21, 1953, on file in the Washington University Law Library presents a concise summary of the arguments against legalized wire tapping. Numerous magazine articles have complained forcefully about the use of wire tapping. See Ickes, *A Dirtier "Dirty Business"*, New Republic, Jan. 9, 1950, p. 17; Fly, *The Wire-Tapping Outrage*, New Republic, Feb. 6, 1950, p. 14, for typical arguments supporting an absolute prohibition of wire tapping. The Missouri Bar Association also endorsed an absolute prohibition of wire tapping, 9 J. MO. BAR 64 (1953).

does not infringe upon the privacy of the individual for more than a short time. It is also to be noted that wire tapping infringes not only upon the privacy of the one against whom a warrant issues but also upon the privacy of the second party to the call. Wire tapping, by its nature a general dragnet procedure, is a potential violator of all the privileged and confidential relationships such as the attorney-client relationship. It is further argued that wire tapping is unnecessary to effective police action, that it is in fact detrimental to the police in that the adoption of unethical procedures lowers the general respect of the people for the law.[42] It should also be remembered that, in spite of failure in enforcement, federal law still makes wire tapping a federal crime.[43]

Aside from the policy factors to be considered, there is the equally important consideration of practicality. The federal law prohibits wire tapping absolutely and evidence so obtained is inadmissible in court.[44] This in substance is what the pending Missouri statute provides. What has been the effect of the federal rule? First, it has not stopped wire tapping, either by private individuals or by government agencies.[45] Second, it has not eliminated the use of wire tapping in obtaining evidence. In reference to wire tapping by the Federal Bureau of Investigation, it has been said:

> Taking their cue from this top-level lawlessness, the Post Office Department, the Narcotics Bureau, the Alcohol Tax Unit, the Internal Revenue Bureau, the Customs Bureau, and the Department of the Interior have all used wire tapping. . . . President Truman's telephone was tapped at the direction of Senator Tobey during the recent Reconstruction Finance Corporation hearings. . . .[46]

J. Edgar Hoover has himself admitted that the F.B.I. does tap wires.[47] This official wire tapping is justified by the strained construction of Section 605 that "divulge" as used in the federal

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42. *Ibid.*
43. 48 STAT. 1100 (1934), 47 U.S.C. § 501 and 48 STAT. 1103 (1934), 47 U.S.C. § 605 (1946).
44. Nardone v. United States, 302 U.S. 379 (1937).
45. *F.B.I—Outside the Law?*, 170 NATION 99 (Feb. 1950); *Button Your Lip*, BUSINESS WEEK, Jan. 8, 1949, p. 24. These two articles point out the widespread use of wire tapping.
46. Westin, *Wire Tapping: Supreme Court vs. F.B.I.*, 174 NATION 172, 173 (Feb. 1952).
47. J. Edgar Hoover, *A Comment on the Article "Loyalty Among Government Employees"*, 58 YALE L.J. 401, 405 (1949).

statute does not prohibit communication of intercepted messages from a wire tapper to his superior within one department of the government.[48] It is very possible that the F.B.I. would find another means of justifying wire tapping even if interception alone were a crime within Section 605.

There are two difficulties blocking effective enforcement of a restriction on wire tapping. The first applies to tapping by whomever done. That is the difficulty of detecting a wire tap. Modern technological development has made interception of telephone calls inexpensive and easy. It can now be done without physical contact with the telephone wire and without a noticeable loss of power.[49] With large office buildings and apartments it is a simple matter for one to gain access to the wire he wants to tap. For these reasons wire tapping is generally discoverable only through the mistakes of the tapper or the indiscreet use of the information so obtained.

The second difficulty applies only to restrictions on government wire tapping. The problem is that such a restriction works to the detriment of the police and those whose duty it is to prosecute criminal cases. In other words, it is to the direct benefit of those whose duty it is to enforce the restriction not to enforce it. The rule which excludes evidence obtained by the use of wire tapping would, at first, seem to solve this problem by removing the incentive to tap.[50] It does not.[51] Intercepted information can be used to acquire leads through which independent evidence can be obtained. Although this evidence is theoretically inadmissible in court, it is almost impossible for the objecting party to prove that a tap occurred.[52] The prosecution can further protect itself

48. This construction is spelled out but disapproved in *Split Hairs and Tapped Wires*, 153 NATION 360 (Oct. 1941).

49. See note 35 *supra*.

50. This was the reason behind the decisions in Nardone v. United States, 302 U.S. 379 (1937) and Nardone v. United States, 308 U.S. 338 (1939).

51. This should be obvious from the continued extensive use of wire tapping by the Federal Bureau of Investigation and other government departments. See Westin, *Wire Tapping: Supreme Court vs. F.B.I.*, 174 NATION 172 (Feb. 1952).

52. This is true because all the wire tap information is in the hands of the prosecution. The procedure to be followed is set out in Nardone v. United States, 308 U.S. 338 (1939). The one attempting to exclude evidence as obtained through the use of wire taps must move for its suppression before trial if he is then aware of the fact that a wire tap occurred, and he must sustain the burden of showing that a tap occurred. If a wire tap is shown, a hearing will be granted to determine what part of the prosecution's evidence was thereby obtained. There must be, however, a fairly

by claiming that the original leads were obtained from confidential informers, the divulgence of whose names is protected by privilege.[53] Thus the federal prohibition has not been effective to the extent of eliminating wire tapping. It has had some restrictive effect.[54]

The original Senate bill,[55] allowing wire tapping pursuant to court order is in substance very similar to the New York statutory provision.[56] There is a marked difference of opinion as to what the effect of the New York statute has been.[57] It has not eliminated illegal wire tapping. The same difficulties which arise in the enforcement of an absolute prohibition arise likewise in the enforcement of the restrictive provisions of a limited wire tapping statute. Not only has illegal wire tapping been conducted by private individuals, but the police have failed to comply with the statutory requirements and, even when the legal procedure has been followed, the police have misused the information so acquired.[58] The procedure has been used primarily for the detection of minor crimes and misdemeanors, rather than for the detection of major criminals, for which purpose it was intended. Warrants issue for periods up to six months in length and there is no report kept of the intercepted information except what is reported by the tapper to his superiors. The use of tapping for minor crimes and the failure to install an adequate check on the tappers led to blackmail and extortion under the guise of a legalized police procedure.[59] As to the value of wire tapping in the detection of crime in New York, there have been both adverse and favorable com-

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conclusive showing that a tap occurred before a hearing will be granted. United States v. Flynn, 103 F. Supp. 925 (S.D.N.Y. 1951); United States v. Frankfield, 100 F. Supp. 934 (D. Md. 1951). Once a hearing has been granted, the prosecution has the burden of showing that a substantial part of its case was not obtained through the use of wire tapping.

53. See United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945) for an example of this privilege.

54. It has at least eliminated the use of wire tapping directly as evidence in federal courts.

55. Mo. Senate Bill No. 198, 67th Gen. Assembly (Feb. 11, 1953).

56. N.Y. CODE CRIM. PROC. § 813-a.

57. Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Problem*, 52 COL. L. REV. 165, 196 (1952) (condemning the New York system); Rosenzweig, *The Law of Wire Tapping*, 33 CORNELL L.Q. 73 (1947) (presenting a clear analysis of the New York situation).

58. Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Problem*, 52 COL. L. REV. 165 (1952).

59. *Ibid.*

ments.[60] Assuming that wire tapping has been helpful to the police, it is questionable whether the advantages have outweighed the abuses.

Thus it appears from a practical standpoint that neither the federal nor New York type of statute has been entirely satisfactory in its application. It has been argued that an absolute prohibition is unenforceable, while a limited restriction can be enforced. It has been argued that a limited restriction will be abused and, therefore, an absolute prohibition is necessary.[61] These argumeents, like others, ignore the basic problems which apply to both statutes: the difficulty of discovering wire taps and the difficulty of enforcement against the police.

On final analysis it would seem that an absolute prohibition of wire tapping is the more practical method of eliminating the abuses which permeate the field. First, there would be less opportunity for the police abuse which developed in New York, unless the police would tap extensively in violation of the law. If they did, it would be easier for the public to discover such an open abuse than it would be to discover abuses in the operation of a legalized system. Public pressure does have an effect on police action. Second, since the police themselves would be prohibited from tapping, they might be more prone to enforce sanctions on private individuals who attempted to do for their own benefit what the police could not do. Third, it is highly improbable that the disadvantages to crime detection would outweigh the advantages to be gained from the decreased opportunity for abuses to develop in the law enforcement departments.[62]

The final problem for consideration is the advantage or disadvantage of the exclusionary evidence rule. The pending Missouri statute expressly declares that evidence obtained by wire tapping is to be inadmissible in court.[63] The common law rule is that illegality in obtaining evidence has no effect on its admissibility in court.[64] Wigmore, in support of the

60. Rosenzweig, *The Law of Wire Tapping*, 33 CORNELL L.Q. 73, 90 (1947), footnote 234, illustrates the conflict in opinion citing Thomas E. Dewey and J. Edgar Hoover on opposite sides of the question.

61. Both of these arguments are set out in Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Problem*, 52 COL. L. REV. 165 (1952).

62. See text supported by note 59 *supra*.

63. Mo. Senate Bill No. 393, 67th Gen. Assembly (1953) as amended by House Amendment No. 1.

64. 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

common law rule, expresses the idea that it is ridiculous to hold that just because one person commits a crime in discovering another's crime, the second should not be punished.[65] Wire tap evidence, especially when recorded by tape recorder, is extremely accurate, and it is argued that all possible evidence should be used to assure conviction of one who is in fact guilty of crime. The proponents of the common law rule maintain that direct enforcement of restrictions on wire tapping is sufficient to prevent it.[66]

The exclusionary evidence rule is based on the theory that to eliminate wire tapping, the incentive must be removed.[67] As has been previously asserted, the exclusion of wire tap evidence in the federal courts has not been entirely effective in eliminating the incentive.[68] The reason for this is the extreme practical difficulty of showing that a tap occurred.[69] The application, however, of the exclusionary evidence rule has had some effect.[70] In light of the difficulty of direct enforcement of prohibitive provisions, it is submitted that the value of the exclusionary evidence rule as an enforcement method overbalances the disadvantage which might accrue from the acquittal of a few guilty criminals.

In conclusion it is submitted that the absolute prohibition of wire tapping is the better solution to the wire tap problem in conformity with sound policy and with due regard for practical applicability. The pending Missouri statute forbidding tapping completely would further resolve any possible conflict between state and federal law. It is more in harmony with the ideas here expressed than was the original Senate bill. In light of all factors and in consideration of probable consequences, it is submitted that in this writer's opinion the Missouri Legislature acted in the better interests of the state by the passage of this bill.

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65. *Id.* § 2184.
66. *Ibid.*
67. Nardone v. United States, 308 U.S. 338 (1939).
68. See note 52 *supra.*
69. Since the one attempting to exclude evidence must sustain the burden of showing that a wire tap occurred, and since this is a difficult burden to sustain, much evidence is obtained through the indirect use of wire tapping. Since, as a practical matter, much of this evidence will be admitted in court, the law enforcement agencies still have a very real reason for wire tapping. See note 53 *supra.*
70. See note 54 *supra.*