Electronic Eavesdropping in Great Britain and the United States

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ELECTRONIC EAVESDROPPING IN GREAT BRITAIN AND THE UNITED STATES

I. INTRODUCTION

This paper presents a comparative analysis of the legal and legislative responses of Great Britain and the United States in the criminal area to a newly developed technology of electronic eavesdropping. Historic attitudes regarding the admissibility of illegally obtained evidence at trial are used to study the systemic reaction to a novel means of evidence gathering which at first blush does not appear susceptible to satisfactory regulation within the traditional legal norms. The degree to which legal doctrine was adjusted and the source of the impetus for such change reflect the basic cultural differences of the two countries. Attitudes as to the proper role of police in society, the functions of judge and lawmaker and finally the amount of privacy an individual should rightfully expect are all expressed in the tempering of the legal doctrine to continue serving the same social purpose. While in both systems these basic concepts remained the same throughout, the particular conception did not change in Great Britain, whereas the conception did indeed change in the United States and now more closely resembles the British.¹

The development of electronic eavesdropping techniques presented both the United States and Great Britain with a common social problem: technologically facilitated invasion of pri-

¹ For the distinction between conception and concept drawn by Ronald Dworkin, see, The Jurisprudence of Mr. Nixon, N.Y. Rev. Bks. 4 May, 1972.
privacy. Minute microphones can be contained in a coat button. Laser beams can pick sound waves off the outside of a window pane. Parabolic microphones can isolate a single conversation in a roaring crowd. How should the legal system respond to a technology which allows ever increasing intrusion into the lives of citizens?

The law would be required to balance two competing interests. The first of these concerns is the right of citizens to be free of unreasonable snooping by the state. The second is the right of the state to be able to use the best means to obtain the best evidence of a crime and to be able to use such evidence to convict. Lord Cooper recognized this tension in *Lawrie v. Muir*:

... the law must strive to reconcile two highly important interests which are liable to come into conflict—(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formed or technical ground. Neither of these objects can be insisted upon to the uttermost.

In a more recent dissenting opinion Mr. Justice Harlan saw the problem thus:

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks [of citizens] without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer ...

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3 1950 S.C. (J) 19.

II. EVIDENCE DOCTRINE

To examine comparative treatment of electronic eavesdropping it is best, as a conceptual matter, to begin with a brief study of the general criteria for the admissibility of evidence in criminal trials.

A. Great Britain: Relevance

From an early time it was established in England that the test to be applied in considering whether evidence is admissible is simply whether it is relevant to the matters in controversy before the court. The court in Reg. v. Leatham\(^5\) in 1861 admitted certain evidence observing that, “It matters not how you get it; if you steal it even, it would be admissible.” This same principle applied to evidence in civil cases.\(^6\)

B. United States: Federal/State Dichotomy

In the United States there was no single test for the admissibility of evidence as for many years a dichotomy existed between federal and state courts in this matter.

In federal forums evidence obtained in violation of federal constitutional rights was held to be inadmissible because of the violation. In 1877, the Supreme Court in *Ex Parte Jackson*\(^7\) held that a sealed mailed letter is protected by the Bill of Rights. Nine years later, in *Boyd v. United States*,\(^8\) the Court held that the Fifth Amendment forbade the use of “compelled” testimony. In 1914 the Court finally ruled in *Weeks v. United States*\(^9\) that any evidence obtained by federal officers in violation of the Fourth Amendment is inadmissible in the federal courts.

This exclusion applied only to the federal courts. In the state courts state rules governed the admissibility of illegally obtained evidence. The Supreme Court specifically rejected

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\(^5\) (1861) 8 Cox C.C. 498, 501.
\(^6\) *Lloyd v. Mostyn* (842) 10 M&W 478.
\(^7\) 96 U.S. 727, (1877).
\(^8\) 116 U.S. 616 (1886).
\(^9\) 232 U.S. 383 (1914).
the notion that the *Weeks* exclusionary rule should apply to the states as well: Fourteenth Amendment due process did not require such a result. In 1949 Mr. Justice Frankfurter wrote for the Court that as

... most of the English-speaking world does not regard as vital to ... protection [against arbitrary intrusion by the police] the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right ... As of [1949] thirty States reject the *Weeks* doctrine, seventeen States are in agreement with it ... [N]one [of the British jurisdictions] has held evidence obtained by illegal search and seizure inadmissible.

Noting that states rely on other methods for assuring that the minimal requirements of the Due Process Clause of the Fourteenth Amendment are met, the Court found no grounds for barring illegally obtained evidence in state court proceedings. Thus, the federal exclusionary rule announced in *Weeks* is treated by the Court a matter of judicial implication—not as a rule derived either from the explicit requirement of the Fourth Amendment or from legislation expressing congressional policy. At the state level, where the great majority of criminal prosecutions were carried out, the Court felt that local public opinion was an effective check on the local constabulary. Inasmuch as federal law enforcement officers were not subject to such controls, the exclusionary rule seemed a reasonable safeguarding device.

III. ADJUSTMENTS OF DOCTRINE

In both Great Britain and the United States there developed certain doctrinal adjustments to better balance the competing interests of individual liberties and state criminal law enforcement. The conceptual starting point of the earlier cases apparently yielded results in subsequent fact situations which appeared incompatible with notions of justice. In both systems the doctrinal tempering originated in the courts and repre-

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11 *Id.* at 32.
sented a somewhat altered conception in order to meet the requirements of new events. The basic doctrinal concept in both systems, however, remained unchanged throughout.

A. Great Britain: Judicial Discretion

English courts developed the doctrine of judicial discretion to exclude evidence which is admissible in law. The courts thus responded to the apparent harshness of the common law rule that whatever is relevant is admissible regardless of the method by which it was obtained. In small measure notions of fundamental fairness to the accused tempered the interest of the state in obtaining evidence of crime. While the concept underlying the evidence rules was still the same — relevance — the particular conception of what is admissible might be altered in certain instances.

Judicial discretion to exclude illegally obtained evidence based in part on the idea of fairness to the accused first appeared in the Scottish courts. In the 1914 English case Christie the Earl of Hallsbury protested against the suggestion that a judge has the right to exclude evidence which is otherwise admissible in law.\footnote{12 Appropriately \textit{Crook v. Duncan} (1899) 1 Fraser (J) 50.}

Hallsbury’s objection was not honoured in later cases. For example, in \textit{Noor Mohamed v. The King}\footnote{13 [1914] 10 Crim. App. R. 141, 149.} in 1949 and \textit{H. M. Advocate v. Turnbull}\footnote{14 [1949] A.C. 182.} in 1951 where the defendants had been tricked into giving damaging evidence against themselves, the judicial discretion to exclude was acknowledged. The cases supporting the idea of judicial discretion are many. The factual situations wherein the issue is raised include the illegal obtaining of evidence, the breach of the Judges’ Rules by police, as well as cases where the accused was misled by authorities into providing them with evidence against himself.\footnote{15 [1951] S.C. (J) 96.}

\footnote{16 The author deliberately excludes consideration of the use of forced confessions. Their prohibition from judicial proceedings was based as much on their notorious unreliability than on other more humanistic notions.}
Nevertheless, while such discretion of the court is well established, it is a device which does not lend itself to predictability: No cases have been found wherein the appellate court finds a reversible error in the trial court’s failure to exercise its discretion and exclude certain evidence. In practice then, the discretion appears to lie completely with the trial court. It is the trial court which decides the circumstances under which discretion ought be exercised.

Thus in Kuruma v. The Queen in 1955 the appeal from a death sentence for unlawful possession of two rounds of ammunition on the grounds of unlawful search of a Kenyan was denied. Although the Board treats the search as having been unlawful and acknowledges that “... in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused,” they nevertheless find that the test of “... whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.”

More recently, in the curiously captioned case of King v. The Queen, an appellant’s conviction for illegal possession of marijuana based on an illegal search was upheld. In this case, although the police deliberately violated the Jamaican constitution’s guarantee against warrantless searches, the Privy Council concluded that the discretion of the court was not taken

18 Id. at 204.
19 Id. at 203. Even reading this case against the background of the Mau-Mau uprisings the foreign student is hard put to see when a judge should exercise his discretion. This case seems precisely the sort in which a tempering effect on the doctrine is needed. Here a native Kenyan faces execution. The only evidence against him was the testimony of two low-ranking native policemen, who were not empowered to search, and the ammunition they supposedly found. A pocket knife which the defendant allegedly had also been carrying was never produced. The defendant had been a man of good character. Defendant chose to travel along a road where he knew there was a police road block where he was likely to be searched; the defendant could have gone by another route where he knew that he would not be searched. Professor Franck has criticized this case strongly in 33 Can. B. Rev. 721 (1955).
away by the constitution and that furthermore, "This is not . . . a case in which evidence had been obtained by conduct of which the Crown ought not to take advantage." 21

In Great Britain, then, the trial judge has broad discretion to exclude otherwise admissible evidence, where the introduction of such evidence would be somehow fundamentally unfair to the accused. Although in theory the trial court might be reversed on appeal for failing to exclude evidence, no cases in which this was done have been forthcoming. The strict test for admissibility of evidence is not whether the method by which it was obtained was tortious but excusable, but rather whether what was obtained is relevant to the issue being tried. 22

B. United States: Dissolving the Dichotomy

Courts in the United States tempered the harsh results in individual cases arising from the federal-state dichotomy as well. Judicial adjustment of the Weeks doctrine was gradually effected until the principles of the exclusionary rule also applied to state proceedings.

In the 1952 case of Rochin v. California 23 the Supreme Court held that the Fourteenth Amendment did indeed require exclusion from state court of illegally obtained evidence where police activities so outrageously abused individual privacy as "to shock . . . the conscience" of a "civilized society". Thus, there was created a narrow exception to Wolfe and a foreshadowing of subsequent decisions.

Mr. Justice Frankfurter had noted in Wolfe that the exclusionary rule of Weeks was one of judicial implication and that states had other means of deterring unreasonable searches. In 1961 in Mapp v. Ohio 24 Mr. Justice Clarke, noting that the

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21 Id. at 319.
22 Karuma at 204.
24 367 U.S. 165 (1952). The Court later in Linkletter v. Walker 381 U.S. 618 (1965) said its decision in Mapp was not based on the notion that the petitioner
state remedies had proven ineffective against Fourth Amendment violations, reversed Wolfe. The Court held that the Fourteenth Amendment fully incorporated the Fourth and that the exclusionary rule was an essential element of the guarantee. Although by then over half the states had adopted the exclusionary rule, the Court said its action was the only effective means available to compel respect for the constitution. Apparently, the states could no longer be trusted as the guardians of the federal guarantee. The Court closed the only remaining courtroom doors which were open to receive evidence obtained through official lawlessness.

Thus, beginning with the concepts of due process and privacy found in the national constitution, the cases move from a federal-state dichotomy in the criteria for the admissibility of evidence, to the gradual broadening of the rule and, finally, to a dissolution of the dichotomy. It should be noted that the change occurs largely because the Court's perception of the underlying facts has changed: In Wolfe Justice Frankfurter acknowledges that the Fourth Amendment applies to the states by operation of the Fourteenth. He assumes, however, that the methods on which states rely to insure enforcement of the guarantees do not fall below the minimal standards assured by the Due Process Clause. Mr. Justice Clark in Mapp, noting that the factual grounds upon which Wolfe was based are invalid,

had any right that the evidence not be used, rather Mapp was adopted as a deterrent to police activity of a given sort.

See, Dworkin, Hard Cases, 88 HARV. L. REV. 1057, 1077-078 (1975), pointing to a distinction between civil cases, where it is assumed one of the parties has a right to win and criminal cases, where the accused has a right to vindication if innocent but where there is no parallel right of the state if the accused is guilty. In a hard criminal case, such as Mapp, the Court might properly find for the accused purely on the basis of policy. Wellington, supra note 23 at 260, suggests that where the Court's decision is based on policy, inasmuch as the concern is with the subsequent behaviour of a class of persons, law enforcement officials, there is no reason why the ruling might not have been wholly prospective.

The actual effect of the exclusionary rule has been the subject of much dispute. See e.g., Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," J. CRIM. L. CRIM'Y & POL. SCI. 171 (1962); LaFave, Improving Police Performance through the Exclusionary Rule, MICH. L. REV. 391, 566 (1965); Wright, Must the Criminal Go Free If the Constable Blunders? 50 TEX. L. REV. 736 (1972).
uses the change in the facts to extend the exclusionary rule to the states.

Most recently, in *Stone v. Powell*, the Supreme Court has indicated that it is once again entrusting judicial enforcement of Fourth Amendment guarantees to state forums. The Court denied a state prisoner federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced because the state had provided an opportunity for full and fair litigation of the federal claim.

The Court commented on the exclusionary rule:

> Application of the rule . . . deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

Apparently the Court is moving back toward Justice Frankfurter’s conception of the requirements of the concepts of due process and freedom from unreasonable search and seizure.

Thus, although the basic concept of a constitutional guarantee remains the same, after *Mapp* the Court’s conception of it is clearly different and after *Stone* it is different yet again. Likewise, in the English cases the basic notion of admissibility has remained the same whereas in any given case the conception of admissibility lies within the court’s discretion. Finally,

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25 96 S. Ct. 3037 (1976). The Court noted that the “primary justification” of the exclusionary rule is deterrence of police conduct in violation of Fourth Amendment guarantees. *Id.* at 3048. The rule being one of judicial implication, just as it was adopted in response to a perceived need, so too when the judicial perception changes, the rule itself might be altered or abandoned altogether. But see, Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L. Rev. 223 (1977), suggesting a constitutional grounding for a substantive right of privacy.

26 96 S. Ct. at 3050. Mr. Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), suggests that the trend of recent Court civil liberties decisions should prompt litigants to base their claims and judges their decisions on state rather than federal constitutional grounds. He notes that “. . . the centuries-old remedy of habeas corpus was so circumscribed last Term as to weaken drastically its ability to safeguard individuals from invalid imprisonment.” *Id.* at 498 (footnote omitted).
it appears that the American courts are moving closer to the British conception.

IV. ELECTRONIC EAVESDROPPING AND EVIDENTIARY NORMS

The conceptual framework of each legal system contains inherent problems. In the United States there appears an almost inevitable willingness to let the criminal go free because the constable had blundered. In Britain one can discern no guidelines as to when judicial discretion to exclude evidence should be exercised. Furthermore, given the willingness of courts to admit illegally obtained evidence, there even appears to be an incentive for police to resort to improper means.

How were these problems resolved in light of the development of wiretapping (telephone-tapping in British parlance) and other electronic eavesdropping devices? By whom were they resolved, the judiciary or the legislature? Could traditional evidence rules be applied successfully to a novel technology?

A. United States: Courts and Congress

In Olmstead v. United States the Supreme Court in 1928 found that evidence obtained by the use of a police tap of a telephone was neither a search nor a seizure. Over the vigorous dissent of Holmes and Brandeis the Court found no “trespass” by the police in attaching the tap and no seizure of a “thing” as conversation was not considered a “thing”. For Fourth Amendment purposes there was neither a “place” searched nor were “things” seized.

Congress departed from the common law of evidence in the Federal Communications Act of 1934. Section 605 of the Act forbade any

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

27 277 U.S. 438 (1928).
This section was held to apply to wiretapping by both state and federal officers, in cases involving both intrastate and interstate communications. 29

*Schwartz v. Texas* 30 provided the wiretapping counterpart to *Wolfe* by ruling that wiretap evidence gathered by state officials was admissible in state prosecutions.

The notions of trespass as in *Olmstead* were central to the Court’s interpretation of Fourth Amendment rights in other bugging cases: In *Goldman v. United States* 31 placing a microphone against the outer wall of a private office by federal agents was not deemed a trespass and, hence, not a violation of Fourth Amendment rights. Likewise in *On Lee v. United States* 32 there was no trespass by fraud and hence no constitutional violation where a wired-for-sound informant was used to transmit incriminating statements to a federal agent who related these at defendant’s trial.

*Silverman v. United States* 33 adumbrates the new conception of the constitutional rights as announced in *Mapp*. Regardless of whether there was a technical trespass under local property law, listening to conversations by inserting a “spike mike” into a party wall and contacting a duct serving defendant’s house was deemed an illegal search and seizure. For the first time the Court recognized the electronic seizure of conversation as within constitutional protection.

Finally, in *Katz v. United States* 34 the Court specifically rejected the *Olmstead* and *Goldman* notions of trespass. Instead, the Court found the Fourth Amendment protection extends to persons — not simply areas — and as such the reach of the protection cannot be determined by the presence or absence of physical intrusion into some enclosure.

31 316 U.S. 129 (1942).
Likewise, in *Lee v. Florida*, Schwartz went the way of *Wolfe*: Spurred by the federal policy protecting intercepted communications of the Federal Communications Act of 1934 and outraged at the lack of even a single prosecution of a law enforcement officer under § 605, the Court held, as in *Mapp*, that nothing will compel respect for the Act except removing the incentive to disregard it by mandatory exclusion of the illegally intercepted communication.

The Omnibus Crime Control Act of 1968 represents to a large extent legislative dissatisfaction with the judicial balancing of the competing interests noted above. Title III of the Act specifically amends the Federal Communications Act of 1934 and serves to remove the judicially created means of protecting constitutional guarantees. It appears to authorize warrantless police searches and seizures in certain situations.

Congress observes a necessity

"... to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communication may be authorized, to prohibit unauthorized interception ... and the use of the contents thereof in evidence ...")

The Congress seeks to provide an indispensable aid to law enforcement agents in fighting "organized" crime, while safeguarding the privacy of innocent persons. The Act provides procedures for obtaining wiretap warrants from judges, as well as criminal and civil sanctions for unauthorized taps. Clearly the intent of Congress was to give law enforcement officials greater freedom in using electronic eavesdropping devices than recent Court decisions had indicated was within constitutional bounds.

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37 *Id.*, Title III § 801(b).
38 *Id.*, (c) (d).
Thus, interception of communication without prior judicial authorization is permitted for a period up to forty-eight hours in "emergency situations" involving conspiratorial activities characteristic of organized crime. In short, Congress has authorized warrantless wiretaps for two-days. It shall be interesting to see how this section will reconcile with the *Katz* decision.

B. **Great Britain: Courts and Parliament**

In Britain, as one might expect, evidence obtained by means of electronic eavesdropping is treated no differently than other evidence: The chief concern of the court in evaluating its admissibility is relevance.

In *Hopes v. H. M. Advocate* the Scottish court allowed into evidence a tape recording of a transmission from a wired-forsound blackmail victim.

In *R. v. Magsud Ali*, involving the incriminating conversation of an accused murderer in a room bugged by police, the tape recording was held admissible provided the accuracy of the recording could be proved, the voices identified and that it is otherwise relevant. That court noted that defense counsel did not seem eager to argue the matter of whether such evidence ought to be admitted.

The court analogized electronically obtained evidence to photographs:

> . . . it does appear . . . wrong to deny to the law of evidence advantages to be gained by new techniques and new devices . . . The criminal does not act according to Queensberry Rules. The method of the informer and the eavesdropper is commonly used in the detection of crime. The only difference here was that the mechanical device was the eavesdropper . . . *The method of taking the recording cannot affect admissibility as a matter of law although it must remain very much a matter for the discretion of the judge.*

(Emphasis added.)

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42 Id. at 469.
This particular formulation of the issue and the treatment of the legal problem has been followed in subsequent cases.

Thus, in the most recent cases, the issue before the courts has been confined to a discussion of the originality of the tape recordings offered into evidence in *R v. Robson, R. v. Harris*,\(^4^8\) involving a charge of corruption, and *R v. Stevenson, R v. Hulse* and *R v. Whitney*,\(^4^4\) all charged with conspiring to obstruct the course of justice.

Similarly, in *Keeton v. R*\(^4^5\) the court allowed evidence of a telephone conversation incriminating the appellant. That court noted with approval that, "It must often happen that the police very properly use some form of subterfuge or deception in the detection and prevention of crime."\(^4^6\)

Unlike the case of the United States Congress, the response by Parliament to both the notion of judicial discretion and to the specific application of the discretion generally as well as to the area of electronic eavesdropping has been quite favourable.

Thus in the *Younger Committee Report on the Right to Privacy*,\(^4^7\) detailed recommendations are made to prohibit the private use and manufacture of electronic surveillance equipment. However, the Committee sees no reason to exclude from evidence in civil proceedings any such illegally obtained evidence. They approve the judge’s discretion in both civil and criminal proceedings. "... it is necessary to take into account the desirability, for the sake of enabling the court to arrive at the right decision, that as much relevant evidence as possible should be admissible."\(^4^8\)

Writing that same year the Criminal Law Revision Committee on Evidence,\(^4^9\) having deliberated since 1964, specifically rejected the notion that illegally obtained evidence should be

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\(^4^3\) [1972] 2 All E.R. 699.
\(^4^4\) [1971] 1 All E.R. 678.
\(^4^6\) Id. at 271.
\(^4^7\) YOUNGER COMMITTEE REPORT ON THE RIGHT TO PRIVACY, CMD. NO. 5012 (1972).
\(^4^8\) Id. at 175.
\(^4^9\) CRIMINAL LAW REVISION COMMITTEE ON EVIDENCE, CMD. NO. 4991 (1972).
inadmissible. The Committee also refused to define for the
sake of uniformity the criteria on which judicial discretion
should be exercised because "... it is best to leave it to the
courts to lay down any general principles on which discretion
should be exercised."

The Committee's Draft Bill provided simply that nothing in the proposed act shall prejudice the power of any court to exclude evidence at its discretion. Parliament, apparently, is not only satisfied with the manner in which the courts are balancing the competing interests of individual liberties and state criminal law enforcement, but they deliberately will not inject themselves into the process except to lend support to the courts.

V. CONCLUSION

In summary, distinct attitudes toward personal rights and police practice have resulted in dissimilar doctrinal and institutional responses to the development of electronic spying techniques. Evidence will seldom be excluded by a British court because of the manner in which it was obtained. While Parliament is concerned with the abuses made possible by private use of electronic spying devices, it has left the courts free to exercise their discretion where official conduct is involved. The United States Congress has provided procedures for official use of such devices, as well as criminal and civil penalties for unauthorized use. To the extent that under given circumstances Congress has allowed interception of communication without prior judicial authorization, the Congress has given law enforcement officers greater freedom in the use of such devices than the Supreme Court has found proper.

Despite the two systems' oft-mentioned common cultural heritage, diversity in national wealth and power, social, ethnic and racial integration, and sheer size indicate the need for varied solutions. The context in which the problem is framed is itself unique and thus mandates a unique solution. But even

\[50\text{Id. at 162.}\]
\[51\text{Id. at 205, Part IV § 45(8).}\]
as the response has differed in both systems, it appears that the common social problem has compelled from each solutions which are markedly similar, perhaps reflecting—as one British lawyer put it—the risks of living toward the end of the twentieth century.  

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82 Supra note 47 at 161. The social effects of these risks remain to be seen. See, Weinreb, Generalities of the Fourth Amendment, 42 U. CHI. L. REV. 47 (1974): "Technological surveillance that transcends the limits of the human body is not merely more efficient than 'human' investigation. The aspects of privacy that are part of the pattern of our lives depend on our knowledge of human limitations. There is no necessity that observation be limited by the capacities of the human eye and ear. Those limitations are contingent and can be extended by man's technical virtuosity. But if we do so, our attitudes and finally our behavior will be affected. It is a risky business to speculate how human beings will adapt to a changed environment . . . experience suggests that if we were to lose the cloak of anonymity in public places, we should be less open, more crafty, more secretive, and more isolated than we are now. There is no way to establish that our behavior is now better . . . than it would be if we expected and had less privacy. In the end, we must rely on an unproved vision of men in society."