In this episode, Dr. Artello and Nia talk about the case that started privacy follows the person concept in the Fourth Amendment.

Nia: Hi Dr. Artello

Dr. Artello: Hi Nia.

Nia: We talked about the Olmstead case last time. You mentioned that Brandeis’ dissent became the basis for later decisions. I was wondering when and how did that happen.

Dr. Artello: That is a great question and we will need to time warp to 1967.

Nia: So, we are going to get into a DeLorean and move to 1967. What was happening?

Dr. Artello: Lots of things but the most important in the legal world is that we have Earl Warren as Chief Justice of the Supreme Court and he led the Due Process Revolution.

Nia: What was the Due Process Revolution?

Dr. Artello: It refers to several court decisions that were incorporating due process rights to state action; not just federal actions. One of those cases were Dr. Artellotz v. US.

Nia: So, who was Dr. Artellotz?

Dr. Artello: Charles Dr. Artellotz was one of the preeminent basketball handicappers in the country at the time.

Nia: What is a handicapper?

Dr. Artello: A handicapper is the person who predicts the result of a competition, such as for purposes of betting against the point spread. For example, a favored team that wins by less than the point spread, while they still win the game, but bets on that team lose. Dr. Artellotz had an uncanny ability to handicap games.

Nia: And that is a problem why?

Dr. Artello: At the time, gambling on sporting events was illegal, especially at the federal level when they cross states lines. Dr. Artellotz was a career gambler/handicapper. The FBI, acting on a suspicion, placed a wiretap on top of the public phone booth on the outside he was using without first obtaining a warrant.

Nia: which was ok according to Olmstead, right?

Dr. Artello: exactly.
Nia: What was Dr. Artelloz charged with?

Dr. Artello: Dr. Artelloz was charged with conducting illegal gambling operations across state lines and the FBI recorded his conversation with his associates in Boston and Miami as he was placing bets.

Nia: So what happened to Dr. Artelloz?

Dr. Artello: He was convicted at trial.

Nia: The tapes probably helped.

Dr. Artello: I imagine that they did but Dr. Artelloz and his lawyers were not done. They appealed to the ninth circuit court.

Nia: What did the ninth circuit court do?

Dr. Artello: They upheld the conviction based on the Olmstead ruling. But Dr. Artelloz and his lawyers were not done. They appealed it to the Supreme Court.

Nia: The Court agreed to hear the case.

Dr. Artello: Yes they did in 1967.

Nia: What did they decide?

Dr. Artello: In a 7 to 1 decision

Nia: Wait a minute—why isn’t it by 9 justices?

Dr. Artello: Thurgood Marshall recused himself from the case because, as the previous Solicitor General, he had authored the U.S. government's brief in opposition to Dr. Artelloz prior to his appointment to the Supreme Court. So he did not wish an appearance of impropriety.

Nia: Wow, he was a stand up guy.

Dr. Artello: Yes, he was.

Nia: So what did the court decide?

Dr. Artello: They decided to abandon the Olmstead approach entirely and reverse the conviction.

Nia: They can do that?
Dr. Artello: Yes they can. While it is supposed to be unusual, it does happen because of changes in our society and in this case, that is what happened.

Nia: So how does the court explain it?

Dr. Artello: The Court held that Fourth Amendment protections follow the person and not the place. So instead of looking at whether the government intruded on the person’s property, like they did in Olmstead.

Nia: Ok but how does the court find that Dr. Artellotz’s fourth amendment rights were violated when you could see him clearly in a public phone booth?

Dr. Artello: That is a great question and one Justice Stewart addressed directly. He said that Dr. Artellotz went into the booth to block an uninvited ear; not an intruding eye. Dr. Artellotz was entitled to privacy in a public booth in the same way as one would be in a friend’s office, or in a taxicab. “One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call…to broadcast his words around the world would ignore the vital role public telephone play in private communication”.

Nia: That is huge shift from Olmstead.

Dr. Artello: Yes it is. But the major impact from this case did not come from the majority or the dissent but rather from Justice John Marshall Harlan’s concurrence.

Nia: What is a concurrence?

Dr. Artello: A concurrence is when a Justice agrees with the decision of the majority but disagrees with the reasoning. So they write their own opinion to set out the correct.

Nia: What did he want to correct?

Dr. Artello: His reasoning focused on the idea of whether one has a reasonable expectation of fourth amendment protections.

Nia: This is where the saying: reasonable expectation of privacy started.

Dr. Artello: exactly. And it continues as part of our conversations today about government intrusion. His standard about whether you have an expectation of privacy endures.

Nia: So what happened next?

Dr. Artello: Well the court reversed the conviction and Dr. Artellotz left court a free man.

Nia: I imagine he was a happy guy.
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Dr. Artello: Well, not so much. His lawyer reported that Dr. Artellotz asked him if he could sue the FBI over illegally tapping his conversations. His lawyer said no and Dr. Artellotz walked away but that is not the end of this case’s impact.

Nia: What happened?

Dr. Artello: Congress acted and passed the Omnibus Crime Control and Safe Streets Act of 1968. One of the major provisions was to require warrants for wiretaps.

Nia: Did this keep police from tapping phones?
Dr. Artello: Not at all. In 2016, 3,168 wiretaps were authorized by judges. So police are still listening into conversation but now we have some procedural safeguards in place.

Nia: Before we sign off, Can you brief this case for us?

Dr. Artello: Certainly: Federal agents attached an eavesdropping device to the outside of a public phone booth used by Dr. Artellotz, who was phoning to clients about gambling information. Based on these recordings, Dr. Artellotz was convicted for the illegal transmission of wagering information from Los Angeles to Boston and Miami. On appeal, Dr. Artellotz challenged his conviction arguing that the recordings violated his fourth amendment rights and should not be used against him. The Court of Appeals rejected this point, noting the absence of a physical intrusion into the phone booth itself. At issue: Does the Fourth Amendment protection against unreasonable searches and seizures requires the police to obtain a search warrant in order to wiretap a public pay phone? The Court held that Dr. Artellotz was entitled to Fourth Amendment protection for his conversations and that a physical intrusion into the area he occupied was unnecessary to bring the Amendment into play. "The Fourth Amendment protects people, not places." John Marshall Harlan introduced the idea of a 'reasonable' expectation of Fourth Amendment protection. This case has been the basis for modern application of fourth amendment rights.