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## A Federal Wiretap Law - Needed Weapon against Organized Crime

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quiescence in the use of the fish trap. They relied heavily on that implied promise. They may now suffer detriment due to the application of the state fish trap law applied by reason of this transition from federal to state jurisdiction. Therefore, the Court should have applied the equitable principle of estoppel to their case. Moreover, the Court should be ready to apply it liberally in the future as well.

Felix S. Cohen, one great Indian champion, after the *Alcea*<sup>181</sup> decision was rendered, expressed the hope that doubt would no longer exist as to whether the Indians would receive compensation for governmental taking of their lands. In that case, the Indians were compensated for a governmental taking of lands claimed solely on the basis of an unrecognized aboriginal title.<sup>182</sup> Mr. Cohen's hope was arguably shattered by the Court in the *Tee-Hit-Ton* case.<sup>183</sup>

Once more we see a glimmer of hope that the Court will not sit sterile and mute when the rights of Indians are placed in the judicial frying pan. Vigorous application of an expanded *Metlakatla* precedent may proscribe deprivations by state governments, whether garbed in the clothing of the police power or whatever. The present Court has shown an acute awareness and willingness to protect the individual from unreasonable and unfair state action. One would hope it would turn this same awareness and virility on the Indian problem in this period of transition from federal to state control. A change of engineers should not make the train run on a different track. The application of equitable estoppel to these problems could only serve to enhance this Nation's stature; to revitalize our national conscience as to these first Americans; and to further the principles of justice to which this country is eternally pledged.

*L. Bow Pritchett, Jr.*

<sup>181</sup> *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946).

<sup>182</sup> *Ibid.*

<sup>183</sup> *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

## A FEDERAL WIRETAP LAW—NEEDED WEAPON AGAINST ORGANIZED CRIME

### INTRODUCTION

A crime syndicate is an organization of criminals which, by the systematic utilization of violence, intimidation, bribery and political influence, controls a vast domain of illegal, quasi-legal and legitimate activities yielding enormous profits. There is a diversity of opinion as to whether organized crime holds its powerful sway by a single, nationwide system,

or by a loosely joined federation of regional syndicates. Recent sensational disclosures of the sinister machinations of organized crime are shocking a complacent public from a lethargy which has bordered upon apathy.<sup>1</sup> The existence of syndicated crime is no longer seriously doubted. Startling revelations are only now, however, dispersing the pall of secrecy that has so long veiled organized crime. For the first time, the full range, depth and ramifications of syndicated criminal activities are being presented to an amazed Congress and an astounded citizenry.

The analogy of a complex, smoothly conducted economic enterprise complete with competent personnel performing diversified but integrated functions is particularly apposite when considering organized crime. The modern archcriminal conveys an image of respectability. He dresses fashionably, eschews violence and carries on his illegal operations behind the screen of a legitimate business. He employs top-caliber counsel, tax experts and other professional help. The end result is that the enormous revenues from gambling, prostitution, narcotics and racketeering are channeled to syndicate chieftains without any traceable connection between the overlords of organized crime and their minions engaged in these nefarious activities.

Previous attacks on organized crime have been on a piecemeal basis, seriously hampered by the multiplicity of law enforcement agencies, jurisdictional limitations and disputes, and the wide dissimilarity of state and federal laws. The harsh glare of publicity on the pernicious operations of syndicated crime augurs a popular clamor for more efficient criminal justice. By its carcinomatous growth into new areas of influence, organized crime poses a peril of the first magnitude to American social, economic and political institutions. While government measures against organized crime have been accelerated by new legislation<sup>2</sup> and extended jurisdiction of federal authorities, no definite effort is being made to equip federal law enforcement agencies with the essential legal weapons crucial to the successful outcome of a decisive campaign.

<sup>1</sup> The widely publicized disclosures of Joseph Valachi, the convicted syndicate member.

<sup>2</sup> 18 U.S.C. § 1952 (a), (b) (1958). This is the so-called Travel Bill aimed especially at organized crime by its provisions: "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with the intent to (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned not more than five years, or both. (b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States. . . ."

The paucity of convictions of syndicate leaders is the most abject failure of criminal justice. The need to revamp existing laws to deal more effectively with rapidly increasing crime rates in general, and organized crime in particular, is becoming imperative. Foremost among the new weapons urged to reduce the marked disparity between efficient law enforcement and syndicated crime is legalized wiretapping. Reasons why this highly controversial technique of crime prevention and detection should be adopted to aid in the containment of organized crime will now be examined.

#### THE CASE FOR LEGALIZED WIRETAPPING

The seriousness of the threat of organized crime to American society is not yet fully realized by the general public. Unfortunately, public awareness of danger cannot, like morality, be legislated. Syndicated crime, although it shuns publicity, has shown a phenomenal ability to survive exposure by congressional committees, state legislatures, crime commissions, prosecutors, grand juries, and crusading newspapers. The popular interest in organized crime is sporadic and fluctuating. Exposés cause only temporary inconvenience to syndicated crime in the form of suspended or shifted operations. In an incredibly short time, new forms of illegal activity are developed, or the illicit operations are resumed, often in the very places where they were first uncovered.<sup>3</sup> By the ruthless employment of bribery and intimidation, its two mainstays of control, syndicated crime has built a colossal criminal empire. The experience of the past three decades has proven conclusively that huge criminal combinations cannot be crushed by isolated and uncoordinated local law enforcement agencies.<sup>4</sup> It must be conceded that local law enforcement, however efficient, must have federal assistance to combat syndicated crime, especially where criminal activities are spread over several states.

Significant current federal efforts directed against the illicit operations of organized crime are only beginning. Progress has been disappointingly slow,<sup>5</sup> and candor requires the conclusion that to date, no appreciable inroads into organized crime have been made. The prognosis for the apprehension and imprisonment of syndicate leaders in the near future remains doubtful at best. The conclusion becomes increasingly manifest that present federal laws are either grossly inadequate to cope with organized crime, or, negatively, that they unduly restrict law enforcement officers in their attempts to combat syndicate operations. Certain prominent offi-

<sup>3</sup> COOK, *A TWO-DOLLAR BET MEANS MURDER* (1960).

<sup>4</sup> *Combating Organized Crime*, 347 ANNALS 97 (1963).

<sup>5</sup> *Id.* at 103.

cials have called for new federal laws permitting wiretapping to end this material disadvantage.<sup>6</sup>

The most powerful and versatile single countermeasure readily available for a terminal struggle with syndicated crime is legalized wiretapping. Only such a law can make possible an effective three-pronged attack on organized crime with the objectives of:

- (1) Conviction of syndicate leaders at all levels of organized crime.
- (2) Curtailment of enormous syndicate profits.
- (3) Crippling of the communications of organized crime by neutralization of its most widely used facility.

It is elementary that any drive to destroy syndicated crime must first extinguish the tremendous flow of illicit revenues which makes possible the maintenance, protection and government of its huge organization. Prostitution, gambling, narcotics and racketeering, even in their more sophisticated modern variations, are all peculiarly vulnerable to exposure by wiretapping. Legal interception of telephone communications by law enforcement agencies would make possible the detection, surveillance and prosecution of these illegal activities on a scale never before possible. Secondly, the extremely formidable obstacle of linking the leaders of organized crime to actual syndicate operations would be much easier to overcome. Thirdly, bribery, corruption of police and political officials, extortion, intimidation, perjury and obstruction of justice, all of which are the necessary concomitants of daily syndicate functions, would all be susceptible to discovery and prosecution. Other legislation aimed at extending federal jurisdiction over typical operations of organized crime would be greatly implemented in that infractions would be rendered markedly easier to prove by resort to wiretap evidence.<sup>7</sup> Vigorous law

<sup>6</sup> Advocates of legalized wiretapping include Attorney General Robert F. Kennedy and Police Commissioner Michael J. Murphy of New York City, *The Chicago Tribune*, Sept. 26, 1963, p. 3, col. 2. Edward S. Silver, District Attorney of Kings County (Brooklyn), N.Y., said: "Many crimes have been solved because of information gained from wiretaps." *The Chicago Tribune*, Aug. 13, 1963, p. 4, col. 2. Frank Hogan, former District Attorney of New York County, has stated that without the availability of such evidence gathering techniques as wiretapping, the convictions of an imposing list of organization leaders, including Charles "Lucky" Luciano, Johnny "Dio" Dioguardi, and Joe "Adonis" Doto would have been impossible. *Washington Post*, May 12, 1962, p. A5.

<sup>7</sup> For example, under the so-called Travel Bill, 18 U.S.C. § 1952 (a),(b) (1958), it appears that four major elements must be established in a prosecution under this statute: (1) That the accused travelled or used a facility (this might include telegraph, telephone, radio, railroad, bus or other form of transportation) in interstate commerce; (2) That the accused in travelling or using such facility intended to distribute the proceeds, commit a crime of violence, or perform other acts which facilitate the conduct of a business enterprise; (3) That the business enterprise facilitated by such acts involved a form of gambling (or other enumerated activity) illegal in the state where

enforcement by federal officials, whose responsibility and integrity command respect, would awaken a hitherto indifferent public to its obligations. State and local law officers, instead of having their morale destroyed by continual frustration of their efforts against organized crime, would gain fresh inspiration and renewed motivation to discharge their duties.

The controversy over legalized wiretapping is characterized by a war of clichés. Wiretapping by law enforcement officials is hailed as a boon and cursed as a bane; it is praised as a panacea, and proscribed as a poison. Realization that the true value of such a counterstroke against organized crime is somewhere between these extremes accounts for the perceptible reversal in the climate of opinion on this heatedly debated subject. The failure of past legislative measures and the acknowledged expansion of underworld power are forcing a reluctant recognition that syndicated crime poses a unique problem sufficient not only to endanger national institutions, but to challenge the very resources of the government itself.

Such a candid appraisal is the most demonstrative reminder that the balance of criminal jurisprudence is dynamic. Advocates of legalized wiretapping do not contend that it can be employed without some danger and sacrifice. Legalized wiretapping is too often dismissed as "odious," "unethical," "dirty business," or "a bad means to a good end." What is lost sight of, in the exchange of verbiage, is that the adequacies of laws and their protections must be continually interpreted in terms of the state of society and the social conditions which they are to govern. Much legal advertence is properly devoted to the protection of human rights. What is often forgotten is that an intelligent balance must be maintained between the rights of the accused, on the one hand, and the need of the society to protect itself by convicting and punishing criminals, on the other. If the scales of criminal justice get too far out of equilibrium, the result is either the impairment of individual freedom, or the weakening of the very foundations of society by allowing criminals to become too powerful. Obviously, no society can exist if crime threatens to overwhelm it. The increasing alarm of eminent law officials over the untrammelled activities of syndicated crime is grounded on the knowledge that utter contempt and disregard for the law have always been the basic creed of organized crime. If the only reasonable alternative to the supremacy of organized crime over existing political and legal institutions is the invasion of a relatively minor right such as privacy, the weighing of the interests seems clearly justifiable and prudent.

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committed or under federal law; (4) That the accused, after travelling or using a facility in interstate commerce, committed or attempted to commit one of the proscribed acts in furtherance of such business.

## THE PRESENT STATUS OF LEGALIZED WIRETAPPING

*The Federal Courts*

The *Benanti* case<sup>8</sup> remains the latest word of the United States Supreme Court on wiretapping.<sup>9</sup> It is the furthest extension and clarification of Section 605 of the Federal Communications Act.<sup>10</sup> First, it prohibits, under any circumstances,<sup>11</sup> the introduction of any evidence in a federal criminal proceeding which has been obtained by wiretapping. Secondly, *Benanti* makes wiretapping by state officers a federal offense in that it violates Section 605, notwithstanding the fact that the officials are oper-

<sup>8</sup> 355 U.S. 96 (1957).

<sup>9</sup> See Note, 12 DEPAUL L. REV. 159 (1962).

<sup>10</sup> 47 U.S.C. § 605 (1958) (hereinafter referred to as section 605).

<sup>11</sup> However, this exclusion is only relatively absolute. There are two important exceptions. The first is rather obvious. Evidence of wiretapping is admissible in a prosecution of one who is alleged to have violated the Federal Communications Act by engaging in the wiretapping in question. Second, that facts have been improperly learned by wiretapping does not render them automatically inadmissible in a federal criminal prosecution if knowledge of them has been gained from an independent source. *Nardone v. United States*, 308 U.S. 338 (1939). In *Costello v. United States*, 365 U.S. 265 (1960), although a wiretap by state officers on the defendant's telephone prompted information which led to the calling of the defendant before a grand jury (county), admissions made by the defendant in the course of state investigations were allowed to be used in his subsequent denaturalization proceeding, where those admissions were not made because the defendant's telephone was tapped, but because he realized that state officials had for some time been in possession of the facts regarding which they questioned him.

The fact that co-conspirators accused of a federal offense are induced to turn state's evidence by confronting them with the incriminating contents of telephone messages unlawfully intercepted (under section 605) by federal officers does not make their testimony inadmissible as evidence against other co-conspirators not parties to the intercepted messages where the testimony is not confined to facts within the knowledge of the witnesses and does not refer in any way either to the existence or contents of the intercepted messages. *Goldstein v. United States*, 316 U.S. 114 (1943).

A defendant in a criminal case who asserts that evidence against him was improperly obtained by wiretapping has the burden of proving to the trial court's satisfaction the truth of the assertion. *Nardone v. United States*, *supra*. In interpreting this rule as to the burden, no "fishing expeditions" are allowed, and the defense, with a mere averment that wiretapping has taken place, is not entitled to examine evidence which has not yet been introduced by the prosecution to determine whether or not such was the case. This is true especially where the prosecution denies use of such an unlawful means. Nevertheless, federal courts have still ruled where the defense in the first instance shows that wiretapping has been used, the burden then passes to the prosecution to show that such wiretapping has not furnished the clues which led to the prosecution. *United States v. Coplon*, 185 F.2d 629 (1950), *cert. denied* 342 U.S. 920 (1952). Once it is established that wiretapping has taken place, in meeting the burden shifted to it, the prosecution must show that such wiretapping did not lead to evidence introduced. In sustaining this burden, the prosecution must disclose the nature of such wiretap evidence not only to the trial judge, but also to the accused, since the accused must be given the opportunity to meet and dispel the prima facie case which otherwise would be made against him.

ating under the authority of a state law and pursuant to an order of a state court. Thirdly, the very divulgence of wiretap information before a jury (petit or grand) constitutes a separate offense under Section 605 as interpreted by the Court. Finally, in its sternest admonition to states allowing legalized wiretapping, the Supreme Court warns that "Congress, in setting out a prohibition in plain terms, did not mean to allow legislation which would contradict that section and that policy."<sup>12</sup> State officers using legalized wiretapping are thus put in the extremely awkward position of overtly breaking federal law both when making interceptions and when disclosing the data obtained. There are strong indications that the traditional reluctance of the federal courts to intervene in state criminal proceedings may not be relied on by state courts where an important interest is involved.<sup>13</sup>

The famous case of *Mapp v. Ohio*<sup>14</sup> holds that all evidence obtained by searches and seizures in violation of the fourth amendment of the federal constitution is, by that same authority, inadmissible in a state court.<sup>15</sup> Coming only four months after the Supreme Court refused to enjoin the use of wiretap evidence in a New York state criminal trial, the impact of *Mapp* on legalized wiretapping is the subject of sharp judicial disagreement.<sup>16</sup>

In states having legislation allowing wiretapping by police officers, *Mapp* aggravates the ominous warning contained in *Benanti v. United States*<sup>17</sup> by specifically overruling the two important wiretap precedent cases of *Wolf v. Colorado*<sup>18</sup> and *People v. Defore*.<sup>19</sup> The full significance

<sup>12</sup> *Benanti v. United States*, 355 U.S. 96, 105, 106 (1957).

<sup>13</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949), and *Stefanelli v. Minard*, 343 U.S. 117 (1951), are precedents for the traditional reluctance of federal courts to interfere collaterally in state criminal proceedings.

<sup>14</sup> 367 U.S. 643 (1961).

<sup>15</sup> *Id.* at 655.

<sup>16</sup> In *Pugach v. Dollinger*, 365 U.S. 458 (1961), a federal court refused to enjoin the use of evidence obtained by wiretapping pursuant to a court order in a New York state criminal trial. While conceding that section 605 would be violated by the reception of such evidence, the federal court affirmed denial of the injunction sought citing *Schwartz v. Texas*, 344 U.S. 199 (1952), and *Stefanelli v. Minard*, 342 U.S. 117 (1951), as authority. In a *per curiam* opinion, the United States Supreme Court reaffirmed denial of the injunction citing the same cases as controlling.

<sup>17</sup> 355 U.S. 96, 105, 106 (1957).

<sup>18</sup> 338 U.S. 25 (1949). The *Wolf* case holds that evidence obtained by a state officer by means which constitute an unlawful search and seizure under the fourth amendment to the Constitution is nevertheless admissible in a state court.

<sup>19</sup> 242 N.Y. 13, 150 N.E. 585 (1926). The *Defore* case ruled that decisions of the Supreme Court of the United States construing the fourth and fifth amendments of the Constitution are not binding on state courts, and that a state may make its own rules as to the admissibility of illegally obtained evidence.



of the rejection of *Wolf* is that it had served as the key precedent for the even more eminent wiretap precedent case of *Schwartz v. Texas*.<sup>20</sup> In the *Schwartz* case, the Supreme Court said that wiretap data could be introduced into evidence in a state criminal trial even though it violated Section 605 pursuant to the rule of *Wolf v. Colorado*, holding that evidence, although obtained by a state officer through an unlawful search and seizure, is nevertheless admissible in a state court.<sup>21</sup> Thus, the signal importance of *Mapp v. Ohio* in connection with wiretapping is that, by its rejection of the *Wolf* and *Defore* cases, it compromises the authority of *Schwartz* (practically the sole remaining principal precedent for wiretapping). It is little wonder that even in the few states allowing wiretapping, there are some judges who refuse to issue orders granting permission to intercept telephone messages, holding that *Benanti* and *Mapp* bar wiretap evidence from state courts as a matter of law.<sup>22</sup> Only the consideration of another case by the United States Supreme Court distinguishing the *Schwartz*, *Benanti* and *Mapp* decisions, can solve the intricate puzzle posed by the holdings of these three cases.

Several recent cases prominently featuring the use of electronic devices serve to spark the wiretap controversy. Although decided on the rationale of the *Rathbun* case,<sup>23</sup> these decisions highlight the increased use of electronic aids by federal authorities in obtaining essential evidence. In *Carbo v. United States*,<sup>24</sup> three different types of electronic equipment were used in securing the evidence leading to the conviction of the defendants for extortion affecting interstate commerce, and for the interstate transmission of threats.<sup>25</sup> A recording of a threatening telephone conversation was made by police with the consent of the receiver by placing an induction coil beside the receiver's home telephone. The federal court held that this recording was not in violation of Section 605 relating to the unauthorized publication or use of a telephone conversation.<sup>26</sup> Threats made by one of the co-defendants to the complaining witness were recorded on a miniature wire-recording device known as a "Minifon." On another occasion, a

<sup>20</sup> 344 U.S. 199 (1952).

<sup>21</sup> *Id.* at 201.

<sup>22</sup> See the dissents in *People v. Dinan*, 11 N.Y. 2d 350, 183 N.E.2d 689 (1962).

<sup>23</sup> 355 U.S. 107 (1957). The *Rathbun* case holds that listening in on a regular extension line is not wiretapping.

<sup>24</sup> 314 F.2d 718 (9th Cir. 1963).

<sup>25</sup> 18 U.S.C. § 875 (b) (1958) which reads as follows: "Whoever, with the intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to injure the person of another, shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both."

<sup>26</sup> *Carbo v. United States*, 314 F.2d 718, 739 (9th Cir. 1963).

small transmitter was concealed on the person of the prosecuting witness, which was connected to a receiver in an adjoining room, where police recorded additional threats. Recordings from all three devices were admitted into evidence over the objections of the defense that they constituted a violation of Section 605.

In *United States v. Williams*,<sup>27</sup> a tape recording of telephone conversations between the defendant and an informer did not constitute interception within the meaning of Section 605, and there was no violation of the fourth amendment or due process where the informer permitted the recording and the use of a memorandum from it to refresh the recollection of a Narcotics agent who took the recording.

In *Wilson v. United States*,<sup>28</sup> an agent of the Narcotics Bureau used a device available to the public known as a "Twinfone." This electronic aid, when attached to the receiver of a telephone, automatically creates an extension. A recording of a conversation leading to the sale of narcotics was made, and later admitted into evidence. On the basis of the reasoning in the *Rathbun* case,<sup>29</sup> testimony as to a telephone conversation overheard with the consent of only one of the parties does not constitute an interception within the prohibitions of Section 605, and such testimony does not become inadmissible merely because it is recorded by or overheard by an electronic or mechanical device attached to an extension telephone or to telephone wiring at the locality of the consenting party.

*Rathbun* continues to be prominent in the area of electronic evidence for three major principles.<sup>30</sup> First, Section 605 is interpreted as safeguarding the means of communication rather than rendering the communication itself privileged. Thus, one party cannot bind the other to secrecy merely by using the telephone. Second, the consent of each party to a conversation does not have to be obtained for divulgence, but it may be disclosed with only the consent of one of the parties. Third, such testimony does not become inadmissible simply because it was recorded by using an extension telephone or by utilization of an electrical device attached to the receiver, so long as the receiving party's consent has been obtained. Where eavesdropping has been approved in these cases, the significant fact is that a third person is listening to a conversation directly, or indirectly through use of an electrical device, with the consent, and often, the assistance, of one of the parties, and that the other party does not know that his conversation is being overheard. Both the consenting party

<sup>27</sup> 311 F.2d 721 (7th Cir. 1963).

<sup>28</sup> 316 F.2d 212 (1963).

<sup>29</sup> 355 U.S. 107 (1957).

<sup>30</sup> *Rathbun v. United States*, 355 U.S. 107 (1957); *Carnes v. United States*, 295 F.2d 602 (5th Cir. 1961); *Hall v. United States*, 308 F.2d 266 (5th Cir. 1963).

and the third party are free to divulge the contents of the conversation in a courtroom or elsewhere. The only function being served by recording is to preserve a permanent and accurate record of the conversation and thus furnish more trustworthy evidence.<sup>31</sup>

### *The State Courts*

The majority of states have legislation which prohibits wiretapping entirely<sup>32</sup> or, with certain exceptions, such as that which is accidental and incidental to the normal operation of the public utility.<sup>33</sup> A few states will allow wiretapping when there is consent of one or both parties.<sup>34</sup> However, since many of the states have passed the applicable statutes for the protection of their public utilities, the criminal character of the legislation is at least questionable.<sup>35</sup> Maine, Minnesota, Mississippi, New Hampshire, Texas, Vermont and Washington have no discernible legislation covering wiretapping. The District of Columbia is governed by Section 605.

Five states have considered the many problems involved in legalizing wiretapping and have passed laws allowing interception of telephone communications under certain conditions.<sup>36</sup> The legislative intent, in these jurisdictions, has been to permit law enforcement authorities to employ wiretapping in fighting crime, and, at the same time, insure that the right of privacy of the individual receives the maximum protection possible.<sup>37</sup> Under a typical statute, permission to intercept telephone conversations by wiretap can only be obtained by application for an ex parte order from a judge after a good cause for wiretapping is shown. The person who is to be the subject of telephone eavesdropping must be particularly described, and the number of the telephone given. The order is generally effective for two months, but it may be extended upon proper application.

<sup>31</sup> *Carnes v. United States*, 295 F.2d 598, 602 (5th Cir. 1961).

<sup>32</sup> See, e.g., ARIZ. REV. STAT. ch. 3, § 13-886 (1956); CAL. PEN. CODE ch. 15, § 591, ch. 2, § 640 (1959); DEL. CODE ch. 3, § 757 (1953); IOWA CODE ch. 716, § 8 (1950); MICH. STAT. ch. 286a, § 28.808 (1954); N. J. STAT. ch. 170, § 63 (1953); OKLA. STAT. ch. 69, § 1757 (1951); WIS. STAT. ch. 134, § 39 (1957) (telegraph only).

<sup>33</sup> N. C. GEN. STAT. ch. 14, § 155 (1953); ORE. REV. STAT. tit. 16, ch. 165 §§ 510, 540 (1955); MD. CODE art. 35, § 93 (1957); PA. STAT. ch. 43, § 2443 (1958).

<sup>34</sup> MD. CODE art. 35, § 93 (1957); PA. STAT. ch. 43, § 2443 (1958).

<sup>35</sup> See, e.g., IDAHO CODE ch. 67, § 18-6705 (1947); NEBR. REV. STAT. ch. 86, § 328 (1943); TENN. CODE ch. 45, §§ 39-4533, 65-2117 (1956); WYO. STAT. tit. 37, ch. 9, § 259 (1957).

<sup>36</sup> MD. CODE art. 35, § 94 (1957); MASS. GEN. LAWS ch. 272, § 99 (Supp. 1962); NEV. REV. STAT. tit. 16, ch. 200, § 660 (1957); N. Y. CODE OF CR. PROC. § 813-a (Supp. 1962); ORE. REV. STAT. tit. 14, ch. 141, § 720 (1959).

<sup>37</sup> It must be admitted that there are few convictions under these statutes. One such instance was that of a private detective. *People v. Broady*, 5 N.Y.2d 500, 158 N.E. 2d 817 (1959).

All the acts describe the particular circumstances under which telephone messages may be intercepted. The officer seeking the authority for wiretapping must make a showing that a crime has been, or is about to be committed, and that evidence will be obtained that will probably result in either the solution or prevention of such crime. The statute of Maryland has superior features in that it contains the most safeguards against abuse. It rules out "fishing expeditions" by requiring an affirmation that the interception affords the only available means of obtaining essential information, and that all other alternatives have failed. In addition, the Maryland statute provides that evidence obtained other than by the procedures described under the act shall not be admissible in a state criminal proceeding, including, of course, evidence obtained without a court order. The other permissive jurisdictions are less stringent.

### *Federal Law v. State Law*

The *Benanti* case<sup>38</sup> makes wiretap evidence inadmissible in a federal court and makes wiretapping a federal crime both by the interception of the conversation and by its divulgence after the illegal interception. In stating that Congressional intent was not meant to be frustrated by state legislation authorizing wiretapping, the United States Supreme Court has strongly indicated that a future decision by it may impose a similar exclusionary rule on state criminal proceedings. The *Mapp* case<sup>39</sup> reinforces such conjecture by demolishing state laws holding that the states are free to make their own laws regarding the admissibility of evidence procured in violation of the federal constitution. Efforts to extend *Mapp* by analogy account for the present confusion regarding the status of state laws allowing wiretapping. In *Williams v. Ball*,<sup>40</sup> one federal court has rejected the application of the *Mapp* verdict to state rules permitting wiretap evidence to be used in state courts.<sup>41</sup> In the *Williams* case, the conduct sought to be enjoined by exclusion was not expressly forbidden by the federal constitution, but merely by federal statutory law. However, in the *Mapp* case, the conduct found reprehensible was clearly in violation of the fourth amendment of the United States Constitution, and was, therefore, within the control of the Supreme Court by virtue of the fact that compliance by federal officers and federal courts can be compelled. While the Supreme Court has impliedly disapproved of the admission of wiretap evidence in a state criminal trial, there has not been, as yet, an express rejection in the form of a decision. Consequently, the federal courts have hesitated to extend *Mapp* by implication to exclude such evidence. Another decision which will either extend the *Benanti* case or soften it by

<sup>38</sup> 355 U.S. 96 (1957).

<sup>39</sup> 367 U.S. 643 (1961).

<sup>40</sup> 294 F.2d 94 (2nd Cir. 1961).

<sup>41</sup> *Id.* at 96.

limitation seems to be required to resolve the embarrassing situation of prohibiting violations of the federal constitution, but allowing statutory abridgments with impunity.

Meanwhile, states allowing legal wiretapping cling tenaciously to their laws. A few cases have specifically held that the *Benanti* and *Schwartz* cases allow the use of wiretap evidence in a state court, and that while Section 605 may technically be violated, it does not act as a bar where state rules of evidence allow such data to be admitted.<sup>42</sup> Such conflicting positions reduce to extreme uncertainty the present status of cases featuring wiretap evidence which has been obtained under a state law.

#### SUMMARY AND CONCLUSION

Syndicated crime presents a very real and imminent danger to American social, economic, and political institutions, and even to government itself. The unchecked growth of organized crime attests the general enfeeblement of law enforcement at all levels, and the urgent need for new legal weapons to fight criminals and methods which have clearly outpaced existing techniques of crime containment. Available procedures against criminals must be modified and strengthened to cope much more effectively with the peculiar problems inherent in syndicated crime. Certainly a threat comparable to the Communist menace calls for a hard and realistic scrutiny of existing rules of criminal procedure and evidence. The growth of organized crime to its present proportions would have been impossible without the jurisdictional limitations and disputes that have vitiated past attempts to deal with it. The federal government has taken token steps to curtail syndicated criminal activity, but no real damage has been sustained by organized crime. Despite apparent Congressional concern, no legal weapons capable of inflicting mortal blows to syndicated crime have been placed in the hands of federal law enforcement agencies.

Because of the reputation for honesty and integrity enjoyed by federal law enforcement officers, the public has high expectations for the success of the struggle against syndicated crime. A legalized wiretapping law is the easiest and quickest weapon available to federal agencies capable of producing the desired results. Such a law is urgently needed to restore the

<sup>42</sup> In *Lebowich v. O'Connor*, 309 F.2d 111 (2nd Cir. 1962), appellant, on trial in New York for a criminal charge, sought a declaratory judgment that the district attorney of New York had violated his oath of office by tapping the appellant's telephone line. In dismissing, the Court cited *Pugach v. Dollinger*, 365 U.S. 458 (1961), and *People v. Dinan*, 11 N.Y.2d 350, 183 N.E.2d 689 (1962). See also *People v. Wagman*, 31 Misc. 2d 505, 221 N.Y.S.2d 866 (Ct. of Gen. Sess. 1961). Defendant was prosecuted on charges of conspiracy and bribery of basketball players. On his motion for inspection of grand jury minutes, suppression of evidence and other relief, the Court said in denying the motion that wiretap evidence is not inadmissible on the ground that it violates the fourth amendment to the United States Constitution. The court specifically held that *Mapp v. Ohio* does not overrule *People v. Dinan*.

balance of criminal justice, and to stop the erosion of the very foundations of the American legal system by organized crime. Such legislation would not be a wonderworker in itself. It would not serve to shortcut or eliminate the need for dedicated law officers and good police methods.

Legislation permitting wiretapping by police officers must be drafted carefully so as to afford the maximum protection of the right of privacy of individuals and yet achieve the goal of the exposure of syndicated crime. Such draftsmanship is a formidable, but not insuperable task.

Vigorous law enforcement and a marked increase in the number of convictions of syndicate leaders at all levels will do much to dissipate public laxity toward law and to recapture respect for authority. The long reign of corrupt police officers and public officials will come to an end; they will be replaced by competent, honest men who have been frustrated far too long by the entrenched regime of bribery and intimidation.

The argument that a federal wiretap law will mark the beginning of a police state and open the floodgates of abuse is essentially fallacious because it is a *non sequitur*. It is typical of the morally deadlocked school of thinking that has imbued syndicated crime with an aura of unchallenged power bordering upon invincibility. It would discard as unworkable the first promise of a weapon capable of inflicting genuine and lasting damage to organized crime because it would render the relation between law enforcement authorities and criminals less sporting. It ignores without consideration the absurd situation of increasing pressure on authorities for convictions, yet withholding from these officials one of the few instrumentalities versatile enough to achieve the desired results.

Increasing national crime rates and the expansion of organized crime into new fields call for an end to the procrastination and indecision of Congress. Compared to the herculean tasks of passing uniform anti-syndicated crime laws in all of the states, or to the need for nationwide reorganization of law enforcement agencies to overcome fragmentation, duplication, disputes and competition, legalized wiretapping is much easier and practical, and above all, it can be done quickly. Congress should express its alarm and solicitude over the dangerous power of organized crime by striking a decisive blow against it rather than by passing more piecemeal legislation which merely postpones coming to grips with the real problem. A federal law authorizing wiretapping is needed now. Such legislation can always be amended or repealed if abuses become genuine problems instead of mere doctrinaire objections. A federal act allowing wiretapping by federal law enforcement officers pursuant to an *ex parte* application to a federal court and providing that evidence obtained as a result shall be admissible in federal courts should be given a trial.

*Frank Kilzer*