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Evidence - Legality of Wiretapping - Divulgence in Court

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prevent anyone acquited under the new rule from becoming a menace to society. In the District of Columbia, it would seem that an accused person who is acquitted by reason of insanity is presumed insane,[48] and may be commited to a hospital for the insane for an indefinite period.[49] In addition, if the new rule should prove too broad in practice, presumably the court may define more rigidly the type of mental disorder that is to be a defense.

The *Durham* rule brings the law into harmony with prevailing medical concepts. It provides the psychiatrist with the "fuller hearing by the law" which was asked for recently.[50] At last they have an opportunity to prove to the law that society may be as well, if not better protected by the "treatment" of the mentally ill offender as it is by punishing him. When the proof is made it is hoped that other courts will follow the fine example set for them by the Court of Appeals for the District of Columbia.

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EVIDENCE—LEGALITY OF WIRETAPPING—DIVULGENCE IN COURT.—Long a storm center of legal controversy, the question of wiretapping has more recently been the subject of extensive comment. A clarification of the admissibility of evidence obtained through wiretapping and a workable solution to problems stemming from the practice of wiretapping are issues of pressing importance. In medieval times when most criminals were members of a loosely knit mob without means of speedy communication, society held a great advantage over them. In the twentieth century, conspiratorial crime carried on by use of the telephone has made surveillance over the criminal more difficult. As a counter-balancing power, the authorities have resorted to wiretapping. This article will attempt

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48. *See* Barry v. White, 64 F.2d 707, 708 (D.C. Cir. 1933).

49. D. C. Code §24-301 (1951) provides: ". . . if an accused person shall be acquitted by the jury on the ground of insanity, the court may certify the fact to the Federal Security Administrator, who may order such person to be confined in the hospital for the insane, . . .".

50. Zilboorg, *op. cit. supra* note 14, at 122. The psychiatrist of today finds himself in great need of a fuller hearing by the law. He has more to say and to reveal about those who commit crimes than he is allowed to say and reveal. He is eager to convince the court and the jury that mentally sick criminals deserve an opportunity to live, if not the opportunity to get well. He wants to convince the court and the jury that our knowledge as to who is mentally ill, and as to who knows without really knowing, and as to who acts seemingly rationally but actually not reasonably, has grown to such an extent during the past fifty or seventy-five years that the law must find ways and means of admitting the psychiatrist's views into open court."

to give an historical background of the important decisions governing the practice and examine the present state of the law.

Under the common law, the admissibility of evidence was not affected by the illegality of means by which it was obtained.[1] The United States Supreme Court, however, has held the admission of evidence obtained through an unlawful search and seizure violates the Fourth Amendment.[2] In *Olmstead v. United States*,[3] the first case to reach the Supreme Court on the precise question of wiretap evidence, the court held, five to four, that wiretapping was not an unreasonable search and seizure. It further stated that since the witness was not *compelled* to testify against himself, there was no violation of the Fifth Amendment. The majority opinion delivered by Chief Justice Taft, provoked a much quoted dissent by Justices Brandeis and Holmes. Taft said the Fourth Amendment applied only to searches of material things, such as the person, his house or his effects. Wiretapped evidence is obtained only by use of the sense of hearing; the intervening wires are not part of the house; hence, there is no physical search or seizure. The dissenting opinion struck a convincing moral chord in the form of a neatly phrased query: Will the Court sustain an unethical act by government law enforcing agents in order to convict?[4] Answering the question, Holmes said, "We have to choose and for my part I think it less evil that some criminals should escape than that the government should play an ignoble part."[5] If Justice Holmes didn't have the Court on his side he apparently had correctly diagnosed the national pulse. The Baltimore Sun said editorially a few years later, "There never has been any doubt that the country agreed with Mr. Justice Holmes about wiretapping. Mr. Justice Holmes held wiretapping to be a 'dirty business'."[6] Professor Wigmore, prominent advocate of admissibility of all pertinent evidence, admits it to be 'dirty business' but justifies the use of the wiretapped evidence as a necessity.[7] He considers the view of Holmes as being an impractical limitation upon good law enforcement and as a final thrust asks, "Why all the tenderness for the lawbreaker"? This interrogatory, of course, as-

1. Hitzelberger v. State, 174 Md. 152, 197 Atl. 605, 610 (1938).
2. Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886).
3. 277 U.S. 438 (1928).
4. *See id.* at 469 (dissenting opinion).
5. *See id.* at 470.
6. Baltimore Sun, March 19, 1940.
7. 8 Wigmore, Evidence §2184b (3d ed., 1940). "Kicking a man in the stomach is dirty business, normally viewed. But if a gunman assails you, and you know enough of the French art of 'savatage' to kick him in the stomach and thus save your life, is that 'dirty business' for *you*? . . . No, no.").

sumes that only the rights of wrongdoers will be violated—a debatable assumption. It also ignores the nature of private conversation, which is characterized by all sorts of exaggerations and confessions. Everyone has some aspect of his life which he does not wish exposed through indiscriminate tapping.

From the *Olmstead Case* until 1934, wiretapped evidence was admissible in federal courts. In 1934 the Federal Communications Act [8] was passed and once again the debate was re-opened. Section 605 of the Act says in part:

> "No person receiving or assisting in receiving, or transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, . . . or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and 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 communcation to any person; . . ."

This section was lifted almost verbatim from the Radio Act of 1927,[9] the apparent intent of which was to prevent pirating of messages by rival communication companies. The government thus argued that Section 605 had nothing to do with wiretapping; that the Act of 1934 was for the purpose of re-enacting the Radio Act of 1927.[10] Further, several bills specifically outlawing wiretapping had been rejected by Congress.[11] As will be noted, no mention is made in Section 605 of the word "wiretapping". However, in *Nardone v. United States*,[12] the Supreme Court interpreted Section 605 to prevent admission in federal court of evidence gained by wiretapping. The words "no person" shall divulge or publish a message to "any person" is construed to cover use of such messages in court. In the second *Nardone Case*, evidence obtained by use of information derived from wiretapping was also declared inadmissible.[13] So called "leads" gained from wiretapping cannot be utilized by the prosecution. As a practical matter, this affords little protection to the ac-

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8. 48 Stat. 1103 (1934), 47 U.S.C. §605 (1946)—hereafter referred to as Section 605.
9. 44 Stat. 1162 (1927). (Repealed by the Federal Communications Act of 1934. See note 8 *supra.*)
10. *See* Nardone v. United States, 302 U.S. 379, 381 (1937).
11. Note, 52 Mich. L. Rev. 430, 436. (Since the Nardone Case in 1937, there have been more than thirty bills dealing with wiretappng introduced into Congress.)
12. Nardone v. United States, 302 U.S. 379 (1937).
13. 308 U.S. 338 (1939).

cused because the admission of evidence for conviction obtained as a result of wiretapping does not vitiate a criminal prosecution if the government can establish that the evidence had an origin independent of wiretapping.[14] Stated another way, the burden of proof is upon the accused to show to the trial court's satisfaction that wiretapping was unlawfully employed and that a substantial part of the indictment rests upon such inadmissible evidence.[15] A moment's reflection will show that this places the accused under a great handicap. The accused is generally unaware of wiretapping or at least uncertain about what information the government has acquired. The burden of proof under these circumstances becomes gravely difficult to sustain and tends to qualify the force of the exculusionary rule.

Section 605 has been given a narrow construction so as not to unduly hamper law enforcement officers. In *Goldstein v. United States*,[16] the testimony of the accused's co-conspirators was induced by telling them contents of an intercepted telephone message to which they were parties but to which accused was not. The testimony so obtained was ruled admissible in a trial of one not a party to the message. This construction gives protection only to the parties to the intercepted conversation. The dissenting opinion claimed that Section 605 was an expression of public policy seeking to protect society at large against the evils of wiretapping, and that the majority had repudiated *Nardone v. United States* by deciding to the contrary.[17] In *United States v. Lewis*,[18] the court held that the interception is improper only if made without the consent of the sender. Where one party consents to tapping there is no violation of Section 605. It would seem immaterial whether the party consenting be the sender or receiver.[19] In 1939, the Supreme Court extended the exclusionary rule to intrastate as well as interstate communications.[20]

It is important to note that Section 605 does not make interception, per se, a criminal offense.[21] The bare interception must be

14. *See* Coplon v. United States, 191 F.2d 749, 756 (D.C. Cir. 1951); United States v. Reed, 96 F.2d. 785, 786 (2d Cir. 1938).
15. Nardone v. United States, 308 U.S. 338 (1939); United States v. Frankfield, 100 F. Supp. 934 (Md. 1951); United States v. Fillion, 36 F. Supp. 567 (E.D.N.Y. 1941).
16. 316 U.S. 114 (1941).
17. *See id.* at 122 (dissenting opinion).
18. 87 F. Supp. 970 (D.D.C. 1950).
19. See discussion of word "sender" in United States v. Pollakoff, 112 F. 2d. 888, 889 (2d Cir. 1940).
20. Weiss v. United States, 308 U.S. 321 (1939).
21. See Note, 6 Hastings L. J. 71, 73 (1954).

coupled with a divulging of the information gained to complete the offense.[22] There are two elements to the offense: "interception" and "divulging". The effect of this interpretaton is best seen by looking at the operations of the Justice Department. On an average day, the Federal Bureau of Investigation has 150 to 200 taps working,[23] yet the Bureau does not consider itself engaging in illegal acts. The resulting accumulation of evidence is probably one of the big reasons why the Justice Department wants legislation making all prior wiretapped evidence admissible.[24]

Thus far we have been dealing exclusvely with wiretapping as related to federal courts. It is well established that Section 605 does not apply as a compulsory rule of evidence in state courts.[25] The fact that that wiretapped evidence is inadmissible in federal courts is simply a factor to be considered by the states in formulating a rule of evidence relating to its use in state courts.[26] Most state courts will not inquire into the source of competent evidence and in this respect they follow closely the common law rule. The Federal Communications Act is presumed to be limited in effect to federal jurisdictions and does not supersede a state's exercise of its police power in the absence of a clear manifestation to the contrary.[27] One possible reason that state courts have refused to follow the federal rule is that there has always remained some doubt as to just what Congress intended to do about the problem of wiretapping. Every time Congress has been directly confronted with the problem it has refused to act.[28] In a recent Pennsylvania case, the defendent conceded that Section 605 did not promulgate a rule of evidence binding upon state courts.[29] However, the defendent advanced the theory that the common law rule that the admissibility of evidence is not affected by its source had no relevancy because it was propriety of divulging of the information in court and not the prior unlawful obtaining of it that was involved. As a

22. Nardone v. United States, 308 U.S. 338 (1939); *See* Coplon v. United States, 191 F. 2d 749, 759. (Section 605 does not make wiretapping an offense but does condemn as criminal the interception and disclosure of the contents of the message, both acts being essential to complete the offense.)
23. *Time Magazine*, Jan. 4, 1954, p. 23, col. 1.
24. See *Hearings before Subcommittee of the Committee on the Judiciary on S. 832 and H.R. 8649, 83d Cong., 2d Sess. 114 (1954)*. (At page 228, the Attorney General expresses an opinion that legalizing admissibility of evidence intercepted prior to enactment of pending bills would not result in an ex post facto law.)
25. People v. Channell, 107 Cal.2d 192, 236 P. 2d 554 (1951); Hubin v. State, 180 Md. 279, 23 A.2d. 706 (1942).
26. *See* Schwartz v. Texas, 344 U.S. 199, 201 (1952).
27. *See* McGuire v. State, 200 Md. 601, 92 A.2d 582, 584 (1952).
28. See Note, 52 Mich. L. Rev. 430, 436 *et seq.* (1954).
29. *See* Commonwealth v. Chaitt, 176 Pa. 318, 107 A.2d 214, 220 (1954).

result, it was argued, the state court, by permitting wiretapped testimony, actually participates in an act which is made a crime by federal statute. This theory required the assumption that it was a crime to testify in a state court concerning conversation overheard on a tapped wire. There are apparently no cases upholding this view. There is, however, among writers, some isolated support for applying the principle of Section 605 to the state courts.[30] A mere reading of the section would appear to reveal no logical distinction made between federal and state courts in the language of the statute; nevertheless, state courts have made this distinction and have been upheld by the Supreme Court.[31]

Aside from any consideration of the Federal Communication Act of 1934, a similar problem of interpretation arises regarding state statutes. Among the states there are many types of laws regarding the use of communication facilities. It is a complex picture and follows no pattern. Some forbid wiretapping only in the most general terms while others have wiretap statutes dealing solely with telegraph companies.[32] A majority of states, although limiting to some extent the tapping of wires, do not prohibit the admission in evidence of information obtained in violation of their laws.[33] A minority of states prohibit both the tapping of wires and the admission of illegally obtained evidence.[34] All of these statutes are subject to varying interpretations and since cases construing them have been infrequent, the status of wiretapped evidence in a majority of states remains uncertain.

North Dakota has a statute prohibiting only unlawful interception of messages.[35] Nothing is said as to use of such messages in court. While there apparently have been no reported cases decid-

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30. Bernstein, "Civil Liberties and Wire Taps", 37 Ill. L. Rev. 99, 108 (1942).

31. People v. Kelley, 22 Cal.2d 169, 137 P. 2d 1 (1943), *cert denied*, 320 U.S. 715 (1943). (Attorney General of California took the position that the Federal Communications Act is a rule of evidence concerning federal officers and federal courts and does not prohibit the admission in a state court of evidence obtained by state officers. The court held that wiretapped evidence is admissible in California courts.)

32. See *Hearings before Subcommittee of the Committee on the Judiciary on S. 332 and H.R. 8649*, 83d Cong., 2d Sess. 230 (1954).

33. *Hearings, supra* note 32, at 230. (Alabama, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Maine, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, and Virginia.)

34. *Ibid.* (Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, Rhode Island, South Dakota, Washington, West Virginia, Wisconsin and Wyoming.)

35. N. D. Rev. Code §8-1007 (1943): "Every person who, willfully or fraudulently . . . makes any connection with or cuts, breaks, or taps in any unauthorized manner any telegraph or telephone line, wire or cable . . . reads or copies by the use of telegraph or telephone instruments . . . aids, employs, agrees or conspires with any other person to do any of such acts . . . is guilty of a felony . . . ").

ing the point, the assumption is that wiretapped evidence would be admissible in our state courts.[36] A careful reading of the statute together with the prevailing attitude of other states, would indicate North Dakota does not follow the federal rule.

CONCLUSION

The right of privacy has always been high on the list of civil liberties to be protected. It is the very essence of the Fourth Amendment. Free exchange of conversation without fear of reprisal is an important adjunct to the right of privacy. This right of privacy, an oft-repeated yet vague term, is, of course, not absolute. Under present international conditions it is imperative that criminals threatening national security be detected and prosecuted. It is no less important that constitutional rights be protected. Somewhere between these two conflicting views a balance must be struck. The Justice Department has long sought to force a change in the law. Attorney General Brownell touched off a new controversy in 1954 when he said, "[it is] . . . absurd to let spies go unwhipped of justice behind that shield . . . [of non-admissibility]".[37] Mr. Brownell views the federal rule as defined in Section 605 as a glaring loophole that should be closed by appropriate legislation so that those guilty of espionage and related offenses will no longer be able to escape punishment.

Despite Section 605, it is a recognized fact that wiretapping is extensively used by the Justice Department. The view of the Department presently is this: 1) the Federal Communication Act of 1934 prohibits interception *only* when coupled with divulgence, and 2) communication of the contents of a tap by one government agent to another agent is not divulgence within the meaning of Section 605.[38] This rather strained interpretation has the practical effect of making wiretapping legal for federal agents since no conduct deemed legal by the Department is going to be prosecuted. However, the Department realizes that the contents of their intercepted messages will never be admittd in federal courts under present rulings; thus the urgency for a change. Congress has been considering several proposals.[39] The objectives hoped to be achieved would seem to be:

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36. See Note, 33 Cornell L. Q. 73 (1948).
37. See note 23 *supra*.
38. *Hearings, supra* note 32, at 239.
39. *Id.* at 245.

1) To permit the government in cases involving national security to use wiretapped evidence in court.
2) To criminally punish all other unauthorized usage;
3) To place authority in the court system to authorize taps; and
4) To make wiretapped evidence presently on file admissible.

Of these four objectives, only the first meets with the unqualified approval of both Congress and the Justice Department. These objectives would clarify the status of wiretapping, ending all executive and judicial speculation over the rather mysterious Section 605.

While law enforcement agencies would be the chief benefactors under proposed changes in the law, oddly enough such changes do not meet with complete approval within their ranks.[40] Everyone at least pays lip service to the disirability of limitations that should accompany any wiretap authorization under proposed legislation. The limitations range from those permitting almost indiscriminate tapping (once a court order is obtained) to more stringent restrictions as to time, place, and persons. The purpose which wiretapping is to serve is the pivotal question to be considered. A recent case in New York, where wiretapping can be authorized at the court's discretion, contained some profound words on this subject.[41] Noting that permission to tap had been given in the past as a matter of course, the court said, "A telephone interception is a far more devastating measure than any search warrant . . . it is a direct assault on liberty and differs in no substantial sense from stationing a police officer at the elbow of the person using the telephone . . ." .[42]

As yet we need not live under the assumption that every sound is overheard and every move scrutinized. Support of unlimited wiretapping and its more or less free admissibility is a step in that direction. To be sure, those advocating a relaxing of the law can make a certain case for their side. But, in essence the same case can be made for giving law enforcement officers the right to intercept private correspondence or even to dispense with search warrants. When the matter is put in these terms, the case for unlimited wiretapping falls apart. It seems apparent that a legislative change is needed in the present law as it has been interpreted, but only to this extent—that wiretapped evidence of activities directly harmful

40. See Note, 53 Harv. L. R. 863, 870. (Thomas Dewey, then District Attorney of New York said ". . . one of the best methods available for uprooting certain types of crime." On the other hand, J. Edgar Hoover, F. B. I. chief, said in a letter of Feb. 9, 1940, ". . . archaic and inefficient practice which has proved a definite handicap . . . in the development of sound investigative technique".)
41. In re Anonymous, 23 U. S. L. Week 2338, N. Y. Sup. Ct., Jan 10, 1955.
42. *Ibid.*

to national security should be readily admissible in federal courts. The importance of national survival needs no elaboration. With this exception, the *Nardone Case* represents not only good law but good policy. The evils which free admissibility would correct (i.e. the escape of criminals) would be overbalanced by new evils resulting from encroachment upon individual privacy. As observed in the dissenting opinion of the *Goldstein Case,* every reasonable prohibition calculated to destroy the menace of wiretappng should be adopted, even though some criminals escape.

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TORTS—INTERFERENCE WITH CONTRACTUAL RELATIONS—INCLUDING BREACH OF CONTRACT.—In the year 1853 one Lumley entered into a contract with one Johanna Wagner who agreed to perform for a certain term at Lumley's theatre and not to sing or use her talents elsewhere without Lumley's consent. Before the time of performance one Gye induced Miss Wagner to breach her contract of which he had knowledge. Lumley brought an action in tort against Gye alleging these facts and praying for the special damages which he had suffered. The defendant Gye demurred to the complaint but the English court overruled the plea and entered judgment for the plaintiff saying: "He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract."[1] Thus was born the "doctrine of *Lumley v. Gye*", setting forth in definitive form the tort of inducing breach of contract,[2] which has since been accepted in England[3] and in the vast majority of jurisdictions in the United States.[4]

Originally the action appeared as a remedy available to the Roman *pater-familias* for damages sustained by him due to violence committed on his family or slaves. England eventually adopted this type of action as a part of the common law, and in 1350 when the Black Death left a great shortage of labor, created an additional remedy by instituting the Statute of Labourers. Under that act a penalty was provided to prevent a laborer from running away, and

1. 2 El. & Bl. 216 (Q.B. 1853).
2. See Prosser, Torts 977 (1941).
3. See, *e.g.*, Bowen v. Hall, 6 Q.B.D. 333, 50 L.J.Q.B. 305 (1881).
4. See Prosser, *supra* note 2, at 979.