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How Can Wiretapping Be Utilized and Controlled?

pretation is inconsistent with the legislative intent as expressed in the committee report when such report and the words of the amended section are considered in conjunction. It is apparent that the protection afforded by the amendment includes all people, including businessmen, when the loan is procured for individual or family purposes. Furthermore, the protection of the section extends to business persons even though a commercial activity may benefit indirectly because a loan obtained for individual purposes necessarily leaves more funds for use in commercial activities. The section says "for such business" indicating that the loan must be directly related to the business.

Therefore, in conclusion, when the committee report and the amended section are considered together it appears that the protection of section 14(c)(3) extends to those who are not engaged in commerce, such as wage earners, retired people, and tenant farmers; to those who are engaged in business as sole proprietors and partners, including professional men, or executives of a corporation, but who receive a loan in their individual capacity. Creditors who have relied on the false financial statements of these classes of persons, receive the protection of section 17(a)(2), and their claims are not discharged while claims of other creditors are. Discharge is completely denied *only* when a person engaged in commerce of any sort obtains a loan to enhance his commercial activity.

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HOW CAN WIRETAPPING BE UTILIZED AND CONTROLLED?

The case of *People v. Dinan*,[1] from the New York Court of Appeals, is the most recent wiretapping case to reach a state's highest appellate court. In it, New York has reaffirmed its position that wiretap evidence is admissible in evidence.[2] The question presented by

[1] 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962), cert. denied, 371 U.S. 877 (1962).

[2] New York has a system whereby law enforcement officers can obtain an ex parte order from a state court, after meeting certain requirements, which permits them to tap specific telephone lines for a certain period of time. See N.Y. Const. art. I § 12 (1938) and N.Y. Code Crim. Proc. § 813-a. The constitutional provision provides that laws permitting wiretapping may be passed. Section 813-a seeks to implement this provision. Certain judges may issue an ex parte order for eavesdropping upon oath or affirmation of law enforcement officers above a prescribed rank. There must be reasonable grounds that evidence of a crime will be obtained. The person eavesdropped upon must be particularly described and if a telephone line is involved, the number must be given. The order is not to be effective longer

the *Dinan* case was actually reviewed twice by the highest New York court, once after the trial court had dismissed the indictments because they were based on wiretap evidence,[3] and again after the defendants had been convicted.[4]

At the outset, after the defendants had been indicted, the defense moved for dismissal of the indictments[5] on the authority of *Benanti v. United States*[6] and the motion was granted.[7] In the *Benanti* case, the United States Supreme Court held that wiretapping by state officers, even when done pursuant to state authorized procedures, is a violation of section 605 of the Federal Communications Act.[8] On appeal

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than two months, but may be extended. N.Y. Code Crim. Proc. § 813-b outlines the circumstances under which an officer can commence eavesdropping without a court order. N.Y. Pen. Law §§ 738-741 define the crimes of eavesdropping, what type of eavesdropping is exempt, describe the punishment for violations, and to whom it applies.

[3]People v. Dinan, 6 N.Y.2d 715, 158 N.E.2d 501, 185 N.Y.S.2d 806 (1959), cert. denied 361 U.S. 839 (1959).

[4]People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962), cert. denied, 371 U.S. 877 (1962).

[5]Dinan's purpose was to bring the issue of the wiretap evidence before the court as quickly as possible. The trial court did inspect the minutes, although the prosecution admitted that its case was based on wiretap evidence. See People v. Wagman, 31 Misc. 2d 505, 221 N.Y.S.2d 866 (Ct. Gen. Sess. 1961), where a similar motion was made.

[6]355 U.S. 96 (1957).

[7]People v. Dinan, 15 Misc. 2d 211, 172 N.Y.S.2d 496 (Westchester County Ct. 1958).

[8]48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958). The statute reads as follows:

> No person receiving or assisting in receiving, or transmitting, or assisting in 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 to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, 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 communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled

from the trial court's ruling, the Supreme Court of New York reversed[9] and held that *Benanti* did not change the New York rule of evidence. The Supreme Court's order was affirmed by the Court of Appeals without opinion.[10]

During the trial that followed, the defendants sought to obtain a federal court injunction against the use of this evidence.[11] However, in *Poplees v. Gagliardi*[12] the application was rejected because the plaintiff had waited too long in applying for relief since the status quo before trial could no longer be maintained.[13]

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thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

[9]People v. Dinan, 7 App. Div. 2d 119, 181 N.Y.2d 122 (1958).

Pennsylvania also rejected the suggestion that Benanti may have changed the doctrine set out in Schwartz v. Texas, 344 U.S. 199 (1952), namely that states may form their own rules of evidence on wiretapping evidence. One Voci was convicted by use of wiretap evidence and the Pennsylvania Superior Court affiirmed. Commonwealth v. Voci, 185 Pa. Super. 563, 138 A.2d 232 (1958). Benanti was handed down just before this decision. Then the Supreme Court of Pennsylvania affirmed. Commonwealth v. Voci, 393 Pa. 404, 143 A.2d 652 (1958), cert. denied, 358 U.S. 885 (1958). Actually the Pennsylvania legislature had changed their rule of evidence by statute, but it was passed too late to help Voci, said the court. See Pa. Stat. tit. 15 § 2443 (1958).

[10]People v. Dinan, 6 N.Y.S.2d 715, 158 N.E.2d 501, 185 N.Y.S.2d 806 (1959), cert. denied, 361 U.S. 839 (1959).

[11]Why the defense waited so long to take such action is difficult to understand. One possible explanation is that the defense believed that the wiretap evidence would not be linked with the defendants. However, the prosecution produced a surprise witness at the trial, a former member of the conspiracy, who identified the voices of the defendants. Thus, the damaging evidence, the recorded telephone conversations, could be traced to the defendants, and hence the application for a federal injunction.

[12]182 F. Supp. 784 (S.D.N.Y. 1960).

[13]Resort to the federal courts for injunctive relief in such cases has been tried other times with varied success. Stefanelli v. Minard, 342 U.S. 117 (1951), is the leading case and held that federal courts should refuse to intervene in state criminal proceedings to suppress evidence. In that case the objectionable evidence was obtained through an unlawful search and seizure by state policemen. The Supreme Court would not enjoin the use of such evidence in the state court. In Voci v. Storb, 235 F.2d 48 (3d Cir. 1956), Voci sought to enjoin policemen from testifying in any pending or future action, to enjoin the prosecutor from using any wiretap evidence, and to suppress all evidence based on wiretaps. In denying relief the court relied on Stefanelli. Then Voci again tried to enjoin the policemen from testifying and also to have the tape recording of the tapped telephone conversations turned over to the court to be destroyed. The district court dismissed the complaint and held that Voci could not relitigate his right in light of Voci v. Storb. See Voci v. Farkas, 144 F. Supp. 103 (E.D. Pa. 1956).

A preliminary injunction was granted in Burack v. State Liquor Authority, 160 F. Supp. 161 (E.D.N.Y. 1958). But here the wiretap evidence was being used

in an administrative proceeding for suspension of a license rather than in a criminal court.

Another series of cases involved one Pugach. He first sued to enjoin the divulgence by witnesses of information gained through wiretapping and also the use of evidence secured through leads obtained by wiretaps. The district court denied relief. Pugach v. Sullivan, 180 F. Supp. 66 (S.D.N.Y. 1960). Then a three judge court granted a stay pending an appeal of the district court's ruling. Pugach v. Dollinger, 275 F.2d 503 (2d Cir. 1960). This court tried to distinguish Stefanelli. However, on appeal, the district court's ruling was affirmed and the stay order vacated. Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960). In this case the court stated that it was "guided" by Stefanelli. The Supreme Court affirmed the decision in a memorandum opinion on authority of Stefanelli and Schwartz v. Texas, 344 U.S. 199 (1952). Pugach v. Dollinger, 365 U.S. 458 (1961).

The most recent litigation on this question still is pending before the Supreme Court as of this writing. In Bolger v. United States, 189 F. Supp. 237 (S.D.N.Y. 1960), the applicant sought to enjoin a detective from testifying at a state criminal trial. Here the evidence was obtained through an unlawful search and seizure in which the detective and federal officers had cooperated. The district court granted the injunction, and the second circuit affirmed. Bolger v. Cleary, 293 F.2d 368 (2d Cir. 1961). cert granted, 368 U.S. 984 (1962).

Another similar case is Rea v. United States, 350 U.S. 214 (1956), reversing 218 F.2d 237 (10th Cir. 1954). Here a federal agent obtained evidence through an illegal search. The evidence was suppressed in federal prosecution, but then the state prosecuted. The prosecution wanted to have this agent testify and use the evidence he had seized. But the Supreme Court put the constitutional issues aside and held that the agent should be enjoined under the supervisory powers of the court over the federal law enforcement agencies. However, today both the Rea and Bolger cases might be decided on the basis of Mapp v. Ohio, 367 U.S. 643 (1961). Since such evidence is not inadmissible in any court, the injunction applicant has an adequate law remedy and the application ought to be denied. Moreover, such a holding in the Bolger case would be in harmony with Stefanelli, a case which the court has relied upon in almost every other case in this area of the law.

In addition to the injunction, other remedies have been sought but have proved unsuccessful. An application for habeas corpus was denied in United States ex rel. Gragiano v. McMann, 275 F.2d 284 (2d Cir. 1960), cert. denied, 365 U.S. 854 (1961). Gragiano's conviction in a state court had been based on wiretap evidence. In Pugach v. Klein, 193 F. Supp. 630 (S.D.N.Y. 1961), Pugach applied for a writ of habeas corpus, a writ of mandamus to force the United States Attorney to prosecute a New York City police office, a county judge, and an assistant district attorney, a warrant for their arrest and a search warrant. All the applications were denied.

In Williams v. Ball, 294 F.2d 94 (2d Cir. 1961,) cert denied, 368 U.S. 990 (1962), the plaintiff's action was for a declaratory judgment that N.Y. Const. art. I § 12 (1938) and and N.Y. Code Crim. Proc. § 813-a were invalid. (See note 2 supra for the substance of these provisions). The district court refused to grant a stay of the state trial or convene a special court to adjudicate the action for lack of a substantial constitutional issue. Williams v. Ball, 194 F. Supp. 393 (W.D.N.Y. 1961). In affirming, the second circuit said that even if these provisions were invalid, that fact would not help the the plaintiff because of Schwartz v. Texas.

A more recent case is Lebowich v. O'Connor, 309 F.2d 111 (2d Cir. 1962), in which the second circuit affirmed a decision to dismiss a declaratory judgment action for failure to state a claim upon which relief could be granted. The appellant, on trial in New York, sought a declaratory judgment that the district attorney had violated his oath of office by tapping the appellant's telephone line. The action originally was brought to enjoin the use of wiretap evidence at the criminal trial, but after the Pugach decision was handed down, the prayer for relief was changed to one for declaratory judgment.

On appeal from the convictions that followed, the Court of Appeals reiterated its position with respect to the *Benanti* case, and rejected an argument that *Mapp v. Ohio*[14] required a change in the New York rule regarding the admissibility of wiretap evidence. Three dissenting judges took the view that the evidence should be excluded for policy reasons.[15]

The United States Supreme Court has held that evidence obtained by wiretapping is inadmissible in federal courts[16] although wiretapping

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[14]367 U.S. 643 (1961). This case held that the fourth amendment to the United States Constitution was applicable to the states through the fourteenth amendment and so evidence obtained in violation of the search and seizure protections of the fourth amendment is inadmissible in state as well as federal courts because it is a violation of the due process clause of the fourteenth amendment.

By denying certiorari in Dinan, the Supreme Court, in effect, has declined, for the present at least, to reconsider Olmstead v. United States, 277 U.S. 438 (1928) and Schwartz v. Texas, 344 U.S. 199 (1952) in light of Mapp. The argument in favor of extending Mapp into this field seems to be that both the fourth amendment to the United States Constitution and section 605 of the Federal Communications Act are intended to protect the right of privacy of the individual. Since Mapp requires the states to recognize the protections afforded to individuals by the fourth amendment and since it establishes the rule of inadmissibility of evidence obtained in violation of the fourth amendment, the same sanctions should be imposed when section 605 is violated. However, this argument has never prevailed. See Williams v. Ball, 294 F.2d 94 (2d Cir. 1961), cert. denied, 368 U.S. 990 (1962); People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962), cert, denied, 371 U.S. 877 (1962); People v. Wagman, 31 Misc. 2d 505, 221 N.Y.S.2d 866 (Ct. Gen. Sess. 1961); State v. Carbone, 38 N.J. 19, 183 A.2d 1 (1962) (dictum). The courts faced with this argument have distinguished between search and seizure and wiretapping—a distinction established in Olmstead. The former violates a constitutional provision whereas the latter violates a statute only. Moreover, the exclusionary rule with respect to wire tapping rests upon the supervisory power of the judiciary. Compare Nardone v. United States, 302 U.S. 379 (1937) with 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958). Under Schwartz the states may form their own rules of evidence with regard to wiretapping, whereas Mapp is explicitly limited to excluding evidence obtained by searches and seizures in violation of the fourth amendment. "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." 367 U.S. 643, 655 (1961).

[15]The dissenter's argument is that in admitting the evidence a crime is committed at the trial. These three dissenters are not alone among the New York judiciary. In at least three instances applications for an ex parte order to tap lines have been denied. See Matter of Interception of Telephone Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958); Application for an Order Permitting the Interception of Telephone Communications of Anonymous, 208 Misc. 69, 136 N.Y.S.2d 612 (Sup. Ct. 1955); In the Matter of an Application for an Order Permitting the Interception of Telephone Communications, 23 Misc. 2d 643, 198 N.Y.S.2d 572 (Ct. Gen. Sess. 1960).

[16]Nardone v. United States, 302 U.S. 379 (1937). See also Nardone v. United States, 308 U.S. 338 (1939), which held tht such evidence was inadmissible and cannot be used for any purposes, and Weiss v. United States, 308 U.S. 321 (1939), which held that intrastate as well as interstate communications are so protected.

is not a violation of the fourth and fifth amendments to the United States Constitution.[17] However, the Court has also held that the states may form their own rules of evidence on this matter.[18]

There is some merit in the policy considerations behind both the New York and federal positions. The New York view allows law enforcement officers to use wiretapping to prevent and detect crime.[19] Even though the provisions of the applicable New York statutes are not complied with, the evidence obtained illegally is still admissible.[20] Thus, while there is an attempt to protect the New York citizen against any unreasonable intrusion into his privacy, the more important consideration under this view is the apprehension and conviction of criminals. On the other side, the United States Supreme Court takes an opposite stand—no wiretapping and wiretap evidence is inadmissible.[21] This view takes from federal law enforcement

[17]Olmstead v. United States, 277 U.S. 438 (1928).

See Griffith v. State, 111 So. 2d 282 (Fla. Dist. Ct. App. 1959), in which the court stated, in dictum however, that wiretapping violated sections 12 and 22 of the Declarations of Rights of the Florida Constitution, and so wiretapping evidence would be inadmissible. The holding of the case was that listening over a party line, which the policeman had hooked up himself, was a wire attachment, not a wiretap, and the evidence was admissible. Accord: Williams v. State, 109 So. 2d 379 (Fla. Dist. Ct. App. 1959). The Florida wiretapping statute is Fla. Stat. Ann. § 822.10 (Supp. 1962).

New Jersey has also held that listening over an extension or party line is not a violation of its statute. See State v. Giardina, 27 N.J. 313, 142 A.2d 609 (1958) and N.J. Rev. Stat. § 2A:146-1 (1953). Where a policeman picked up a telephone during a raid on a bookmaking establishment and listened to the conversation, the statute was not violated. See State v. Carbone, 38 N.J. 19, 183 A.2d 1 (1962). Contra: Tollin v. State 78 A.2d 810 (Del. Ct. Gen. Sess. 1951).

Maryland requires an ex parte order from a court permitting wiretapping, or consent of both parties to the telephone call to listen over an extension line. See Md. Ann. Code Art. 35, § 93 (1957). Where the consent of only one party to the call was obtained, convictions of statutory rape and attempted abortion based on the evidence so obtained were reversed. See Robert v. State, 220 Md. 159, 151 A.2d 737 (1959).

[18]Schwartz v. Texas, 344 U.S. 199 (1952).

[19]See N.Y. Const. art I, § 12 (1938) and N.Y. Code Crim. Proc. § 813-a.

[20]People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962), cert. denied, 371 U.S. 877 (1962); People v. Variano, 5 N.Y.2d 391, 157 N.E.2d 857, 185 N.Y.S.2d 1 (1959).

[21]See Benanti v. United States, 355 U.S. 96 (1957); Weiss v. United States, 308 U.S. 321 (1939); Nardone v. United States, 308 U.S. 338 (1939); Nardone v. United States, 302 U.S. 379 (1937). There are also numerous Supreme Court cases defining what evidence is admissible and what is prohibited by section 605 of the Federal Communications Act. See Rathbun v. United States, 355 U.S. 107 (1957); On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942). These cases deal with listening devices such as dictaphones and microphones. Eavesdropping with such electrical devices is not a violation of the federal statute because in such a situation there is no communication which comes under the aegis of the statute.

agencies a valuable weapon in combating crime. The facts are, however, that neither the Federal Bureau of Investigation nor the several branches of the armed services feel bound by the prohibition of section 605 and have in the past carried on extensive wiretapping operations.[22] It seems that some method should be worked out whereby law enforcement officers can use wiretapping and yet provide safeguards for privacy of individuals.

Congress has had before it in the past several bills which would have permitted wiretapping under certain circumstances.[23] Unfortunately, the various attempts made in Congress in the past to modify the prohibition of section 605 have failed to gain the necessary support.[24] Many of these proposals would provide for a procedure similar to that found in a few states, namely the requirement of an ex parte order from a judge, after good cause has been shown, authorizing the wiretapping.[25]

A survey of the efforts of the state legislatures shows that few of them have appreciated the problem, and only three have enacted legislation whereby the advantages of wiretapping may be utilized by law enforcement agencies and the rights of individual privacy are, at the same time, properly protected.[26]

A majority of the states have some legislation dealing with the subject of wiretapping,[27] prohibiting it in all but a few instances.[28]

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[22]See Hearings Before the Subcommittee on the Study of Wiretapping of the House Committee on the Judiciary, 84th Cong., 1st Sess., ser. 2, at 37 (1955). The then Assistant Attorney General, Mr. Warren Olney, testified that at no time has the number of wiretaps by the F.B.I. ever exceeded 200 at any one time. He had no idea what the total for a year might be.

[23]See H.R. 762, 84th Cong., 1st Sess. (1955); H.R. 867, 84th Cong., 1st Sess. (1955); H.R. 4513, 84th Cong., 1st Sess. (1955); H.R. 4728, 84th Cong., 1st Sess. (1955); H.R. 5096, 84th Cong., 1st Sess. (1955).

[24]With the adjournment of the 87th Congress, all the legislative proposals before it died. The hearings being conducted on wiretapping by a subcommittee of the House Committee on the Judiciary were adjourned and were not printed for public distribution.

[25]See H.R. 762, 84th Cong., 1st Sess. (1955); H.R. 867, 84th Cong., 1st Sess. (1955); H.R. 4513, 84th Cong., 1st Sess. (1955); H.R. 5096, 84th Cong., 1st Sess. (1955).

[26]These three states are Maryland, Nevada, and Oregon. Their statutes are discussed in footnotes 33 through 40 infra and the accompanying text.

[27]Ala. Code tit. 14, § 84; tit. 48, § 414 (1958); Alaska Comp. Laws Ann. §§ 49-5-12, 49-5-19 (1949); Ariz. Rev. Stat. Ann. § 13-886 (1956); Ark. Stat. Ann. § 73-1810 (repl. vol. 1957); Cal. Pen. Code §§ 591, 640; C.Z. Code tit. 5, § 853 (1934) (telegrams only); Colo. Rev. Stat. Ann. § 40-4-17 (1953); Con. Gen. Stat. Rev. § 53-140 (1958); Del. Code Ann. tit. 11, § 757 (1953); Fla. Stat. Ann. § 822.10 (Supp. 1962); Ga. Code Ann. § 26-3805 (Supp. 1961); § 26-8114 (1953); Hawaii Rev. Laws § 296-14 (1955), § 309A-1 (Supp. 1960); Idaho Code Ann. § 18-6705 (1947); Ill. Ann. Stat. ch. 134, § 15a (Smith-Hurd 1936); Iowa Code § 716.8 (1962); Kan. Gen. Stat. Ann. § 17-1908 (1949); Ky. Rev. Stat. Ann. § 433.430 (1955); La. Rev. Stat. § 14.322 (1950); Md. Ann.

Yet many of these statutes are aimed at protecting the facilities of the public utilities rather than the privacy of the individual.[29] In any event, few convictions are based upon them.[30] Some of these statutes

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Code art. 35, § 93, art. 27, § 585 (1957); Mass. Ann. Laws ch. 272, § 99 (Supp. 1961); Mich. Stat. Ann. § 28.808 (1954); Mont. Rev. Codes Ann. § 94-35-220 (1947) (telegrams only); Neb. Rev. Stat. § 86-328 (1943); Nev. Rev. Stat. §§ 200.620, 200.640, 707.100, 707.320 (1957); N.J. Rev. Stat. § 2A:146-1 (1953); N.M. Stat. Ann. § 40-37-5 (1953); N.Y. Pen. Laws § 738; N.C. Gen. Stat. § 14-158 (1953); N.D. Cent. Code Ann. § 8-10-07 (1961); Ohio Rev. Code Ann. § 4931.28 (Baldwin 1958); Okla. Stat. tit. 21, § 1757 (1951); Ore. Rev. Stat. §§ 164.620, 165.510 (telegrams only), 165.540 (1953); Pa. Stat. Ann. tit 15, § 2443 (1958); R.I. Gen. Laws Ann. §§ 11-35-11 (telegrams only), 11-35-12 (1956); S.C. Code 16-554, 58-316 (1952); S.D. Code § 13-4519 (1939); Tenn. Code Ann. §§ 39-4533, 65-2117 (1956); Utah Code Ann. § 76-48-11 (1953); Va. Code Ann. § 18.1-156 (repl. vol. 1960); W. Va. Code Ann. § 5970 (1961); Wis. Stat. § 134.29 (1961); Wyo. Stat. § 37-259 (1957). See also P.R. Const. art. II, § 10, for a unique constitutional provision specifically prohibiting wiretapping. See also N.H. Rev. Stat. Ann. § 572.3 (1955) and State v. Tracy, 100 N.H. 267, 125 A.2d 774 (1956), which held that the statute was not construable as regulating or prohibiting wiretapping. In addition to New Hampshire, the following states have no apparent legislation dealing with wiretapping: Indiana, Maine, Minnesota, Mississippi, Missouri, Texas, Vermont, and Washington. The District of Columbia is covered by section 605 of the Federal Communications Act. See United States v. Plisco, 22 F. Supp. 242 (D.D.C. 1938).

[28]The most common exception to the prohibition is the normal operation of the public utility. See Alaska Comp. Laws Ann. § 49-5-12 (1949); Hawaii Rev. Laws § 309A-1 (Supp. 1960); Md. Ann. Code art. 35, § 93 (1957); Mass. Ann. Laws ch. 272, § 102 (Supp. 1961); Nev. Rev. Stat. §§ 200.620, 707.100 (1957); N.Y. Pen. Law § 739; N.C. Gen. Stat. § 14-155 (1953); Ore. Rev. Stat. §§ 165.510, 165.540 (1953);R.I. Gen. Laws Ann. § 11-35-12 (1956). The consent of one or both of the parties of the conversation is another exception. See Hawaii Rev. Laws § 309A-1 (Supp. 1960); Md. Ann. Code art. 35, § 93 (1957); Mass. Ann. Laws ch. 272, § 99 (Supp. 1961); N.Y. Pen. Law § 738; N.C. Gen. Stat. § 14-155 (1953); Ore. Rev. Stat. § 165.540 (1953); Pa. Stat. Ann. tit. 15, § 2443 (1958). Two states have exempted their law enforcement officers from the prohibitions of their statutes. See La. Rev. Stat. § 14.322 (1950) and S.C. Code § 16-554 (1952). The most significant exception is where a court has issued an ex parte order permitting wiretapping. See Md. Ann. Code art. 35, § 93 (1957); Mass. Ann. Laws ch. 272, § 99 (Supp. 1961); Nev. Rev. Stat. § 200.630 (1957); N.Y. Pen. Law § 739; Ore. Rev. Stat. § 165.540 (1953).

[29]Many of the statutes are placed in the public utilities sections of the codes rather than the criminal law section. Moreover, many of them cover a great deal more than tapping wires. These are protection of property statutes, not protection of privacy statutes. See Alaska Comp. Laws Ann. § 49-5-12 (1949); Cal. Pen. Code § 591; Colo. Rev. Stat. Ann. § 40-4-17 (1953); Fla. Stat. Ann. § 822.10 (Supp. 1962); Hawaii Rev. Laws § 296-14 (1955); Idaho Code Ann. § 18-6705 (1947); Ill. Ann. Stat. ch. 134, § 15a (Smith-Hurd 1936); Ky. Rev. Stat. Ann. § 433.430 (1955); Mich. Stat. Ann. § 28-808 (1954); Neb. Rev. Stat. § 86-328 (1943); N.M. Stat. Ann. § 40-37-5 (1953); N.D. Cent Code § 8-10-07 (1961); Ohio Rev. Code Ann. § 4931.28 (Baldwin 1958); Okla. Stat. tit. 21, § 1757 (1951); S.D. Code § 13-4519 (1939); Tenn. Code Ann. §§ 39-4533, 65-2117 (1956); Va. Code Ann. § 18.1-156 (repl. vol. 1960); Wyo. Stat. § 37-259 (1957).

[30]People v. Broady, 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230 (1959). The defendant in that case was a private detective. See also Hearings Before the Subcommittee on the Study of Wiretapping of the House Committee on the Judiciary,

give a civil remedy, but the criminal liability is the only deterrent relied upon in a majority of the states.[31] As yet, only Pennsylvania, Rhode Island, and Wisconsin have enacted legislation which makes all wiretap evidence inadmissible.

Five states—Maryland, Massachusetts, Nevada, New York, and Oregon, have legislation enabling a law enforcement officer to obtain an ex parte order from a court to permit wiretapping.[33] It is submitted that the best of these five acts is that of Maryland.[34] It would appear to be superior to the statutes of New York and Massachusetts in that it makes evidence obtained in any manner other than that prescribed inadmissible.[35] Neither New York nor Massachusetts has this protection for an individual's privacy. The reason for preferring the Maryland legislation over the similar acts of Oregon and Nevada is that it clearly sets forth the public policy of the state,[36] which the others fail to do. All the acts of the five states listed above describe under what circumstances communications may be intercepted. There

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84th Cong., 1st Sess., ser. 2 at 36-37 (1955). The Justice Department could supply the Subcommittee with records of only three convictions of section 605 of the Federal Communications Act. See also United States v. Gris, 247 F.2d 860 (2d Cir. 1957) in which the defendant was convicted of violating section 605. For the criminal penalties imposed for conviction of a violation of section 605, see 48 Stat. 1100 (1934), as amended 68 Stat. 30 (1954), 47 U.S.C. § 501 (1958).

[31]For statutes giving a civil remedy see: Alaska Comp. Laws Ann. § 49-5-19 (1949) (liability to the company or persons injured); Nev. Rev. Stat. § 707.140 (1957) (liability to person damaged); Ore. Rev. Stat. §§ 30.780, 165.510 (1953) (liability for damages, probably to the person injured and not the company); Pa. Stat. Ann. tit. 15, § 2443 (1958) (liability to person whose communication is intercepted). Civil relief is also available to some extent in the federal courts, although no federal legislation expressly creates civil liability for wiretapping. See Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947). But the doctrine of that case was not extended to cover a quasi-judicial officer. See Simons v. O'Connor, 187 F. Supp. 702 (S.D.N.Y. 1960), in which an action for damages, brought against a district attorney for wiretapping, was dismissed for failure to state a claim upon which relief could be granted.

[32]Pa. Stat. Ann. tit. 15, § 2443 (1958); R.I. Gen. Laws Ann. § 11-35-13 (1956); Wis. Stat. § 325.36 (1961). These are the only states which have established a rule through legislation, which is substantially the same as the Supreme Court's, as first enunciated in the Nardone cases.

[33]See Md. Ann. Code art. 35, § 94 (Supp. 1962); Mass. Ann. Laws ch. 272, § 99 (Supp. 1961); Nev. Rev. Stat. § 200.660 (1957); N.Y. Code Crim. Proc. § 813-a; Ore. Rev. Stat. § 141.720 (1953)

[34]Actually there is little to choose from among the acts of Maryland, Nevada, and Oregon

[35]See Md. Ann. Code art. 35, § 97 (1957); Nev. Rev. Stat. § 200.680 (1957); and Ore. Rev. Stat. § 41.910 (1953). These statutes specifically state that evidence obtained by wiretapping without a court order is inadmissible. The Massachusetts and New York statutes do not formulate any rule on this matter, and no case has come to light which covers the situation.

[36]See Md. Ann. Code art. 35, § 92 (1957).

must be a showing that a crime has been committed or is about to be committed, and that evidence will be obtained that will probably result in the solution or prevention of the crime.[37] In Maryland, Nevada, and Oregon, the applicant must demonstrate further that no other means are available to obtain the information.[38] Thus in those states, wiretapping cannot be used simply because it is an effective way to gain otherwise difficult to obtain information, but only as a last resort when all else fails. All five of the above mentioned states require an ex parte order for use of other electrical devices for eavesdropping on conversations.[39] Again the requirements in New York and Massachusetts for obtaining such an order are somewhat less stringent.[40]

This scheme of legislation, enacted in Maryland, Nevada, and Oregon, is superior to any other thus far enacted or proposed. It combines the destruction to property, wiretapping, and eavesdropping features of the other types of statutes, and is thus broader in scope than the federal legislation now in force. There are no apparent loopholes for over-zealous law enforcement officers, as many of the proposed Congressional bills have had. Nor does this legislation permit shortcuts in crime detection and prevention—the applicant must show that no other means of obtaining the information is available. The right of privacy is protected against any unreasonable interception of communications, and yet the law enforcement agencies are not prohibited nor unduly hindered from employing this very useful and effective means of crime prevention and detection. It is hoped that other states and Congress, following the lead of Maryland, Nevada, and Oregon, will

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[37]See Md. Ann. Code art. 35, § 94 (Supp. 1962); Mass. Ann. Laws ch. 272, § 99 (Supp. 1961); Nev. Rev. Stat. § 200.660 (1957); N.Y.Code Crim. Proc. §§ 813-a; 813-b; Ore Rev. Stat. § 141.720 (1953).

[38]Md. Ann. Code art. 35, § 94 (Supp. 1962); Nev. Rev. Stat. § 200,660 (1957); Ore. Rev. Stat. § 141.720 (1953).

[39]Md. Ann. Code art. 27, §§ 125A, 125B, 125C, (Supp. 1962); Mass. Ann. Laws ch. 272, § 99 (Supp. 1961); Nev. Rev. Stat. § 200.650 (1957); N.Y. Pen. Law § 738; Ore. Rev. Stat. § 165.540 (1953). There is no federal legislation covering this situation. See Rathbun v. United States, 355 U.S. 107 (1957); On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942). The holding of these cases was to limit the scope of section 605 of the Federal Communications Act so that it does not prohibit the use of these electrical devices.

[40]The requirements in all of these five states are the same as for an order to permit wiretapping. Therefore New York and Massachusetts do not require a showing that no other means is readily available. See Md. Ann. Code art. 27, § 125A (Supp. 1962); Mass. Ann. Laws ch. 272, § 99 (Supp. 1961); Nev. Rev. Stat. § 200.660 (1957); N.Y. Code Crim. Proc. §§ 813-a, 813-b; Ore. Rev. Stat. § 141.720 (1953).