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## Criminal Law Comment

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## CRIMINAL LAW COMMENT

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### WIRETAPPING: THE FEDERALISM PROBLEM\*

In 1934, Congress, pursuant to an extensive re-appraisal of legislation covering interstate communications, enacted the Federal Communications Act.<sup>1</sup> Among the several sections of that statute was one numbered 605, which read in part: "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. . . ."

Federal courts have given a broad construction to §605. Thus, in the celebrated first *Nardone* case, the United States Supreme Court held §605 applicable to federal agents testifying in federal court as to the contents of a wiretapped message. Rejecting the government's contention to the contrary, the Court said: "Taken at face value the phrase 'no person' comprehends federal agents, and the ban on communication to 'any person' bars testimony to the content of an intercepted message."<sup>2</sup> Following this decision, the *Nardone* case was retried and again reached the Supreme

Court. At issue this time was the admissibility of evidence derived from the original wiretap. The Court held this derivative evidence inadmissible as "fruit of the poisonous tree."<sup>3</sup>

Again placing a broad construction on §605, the Supreme Court, in *Weiss v. United States*, found: "As Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications."<sup>4</sup> The Court went on to find that Congress must have intended to regulate intrastate communications since it is impossible for an interceptor to distinguish between calls going into interstate commerce and those limited to intrastate transactions.

Finally, in *Benanti v. United States*, the Supreme Court held wiretap evidence, secured by state officers acting under a state law permitting wiretapping when authorized by court order, inadmissible in a federal prosecution despite the absence

\* This paper is the third in a series dealing with the law of wiretapping. The first paper in the series, which was entitled *Wiretapping: The Federal Law*, appeared at 51 J. CRIM. L., C. & P. S. 441 (1960). The second paper, entitled *Wiretapping: The State Law*, may be found at 51 *id.* 534 (1961).

<sup>1</sup> 48 Stat. 1064 *et. seq.* (1934), 47 U.S.C. §151 *et seq.* (1959).

<sup>2</sup> *Nardone v. United States*, 302 U.S. 379, 381 (1937).

<sup>3</sup> *Nardone v. United States*, 308 U.S. 338 (1939). The "fruit of the poisonous tree" doctrine was first announced in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

<sup>4</sup> 308 U.S. 321, 327 (1939). After the *Weiss* decision, the feeling was that the only wires beyond the reach of §605 were those of inter-office phone systems not connecting to outside lines.

of federal participation in obtaining the excluded evidence. Furthermore, Congressional preemptive intent was found by the Court in its answer to the government's argument that §605 did not forbid state wiretapping where authorized by appropriate state legislation.

"Respondent does not urge that, constitutionally speaking, Congress is without power to forbid such wiretapping even in the face of a conflicting state law. Rather the argument is that Congress has not exercised this power and that Section 605, being general in its terms, should not be deemed to operate to prevent a State from authorizing wiretapping in the exercise of its legitimate police functions. However, we read the Federal Communications Act, and Section 605 in particular, to the contrary.

The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. . . . Section 605. . . applies both to intrastate and to interstate communications. . . . Respondent points to portions of the Act which place some limited authority in the States over the field of interstate communication. . . . The very existence of these grants of authority to the States underscores the conclusion that *had Congress intended to allow the States to make exceptions to Section 605, it would have said so.* In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, *we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.*"<sup>5</sup> (Emphasis added.)

Here, in plain language, the Court found state legislation *authorizing* wiretapping preempted by §605 of the Federal Communications Act.

Prior to *Benanti*, wiretapping was permitted under New York law in certain situations.<sup>6</sup> In order to wiretap "legally", it was necessary to obtain a court order which was to issue in somewhat the same fashion as a search warrant. Following the *Benanti* decision, Judge Samuel Hofstadter of the New York Supreme Court, in a memorandum opinion, advised New York law enforcement officers that he, for one, would no longer issue wiretap orders. "Under the decision in *Benanti*, orders authorizing interceptions are contrary to controlling Federal law. Its authority requires me,

therefore, to deny any application for such an order. For all wiretaps, whether 'authorized' or not in this State are now illegal."<sup>7</sup>

Judge Hofstadter notwithstanding, state courts, including those of New York, are not unanimous in their acceptance of preemption by §605.<sup>8</sup> Nor is total preemption the necessary effect of the *Benanti* decision. In *People v. Broady*<sup>9</sup> the New York Court of Appeals held that a New York statute *punishing* wiretapping did not impinge on federal jurisdiction. The court stated that, according to the standards of federal preemption set out by the United States Supreme Court in *Pennsylvania v. Nelson*,<sup>10</sup> the *Benanti* court did

<sup>7</sup> Matter of Interception of Telephone Communications, 9 Misc.2d 121, 170 N.Y.S.2d 84 (1958). Cf. *People v. Dinan*, 172 N.Y.S.2d 496 (1958), *rev'd*, 181 N.Y.S.2d 122 (1958), *aff'd*, 185 N.Y.S.2d 806 (1959), *cert. den.* 361 U.S. 839 (1959). In *Dinan*, the New York court acknowledged a real possibility of preemption by §605, but concluded that this could not affect the admission of wiretaps into evidence. It should be noted that New York does not exclude evidence illegally obtained. *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

<sup>8</sup> See for example, *Robert v. State*, 220 Md. 159, 151 A.2d 737, 741 (1959). The court reversed defendant's conviction because the principal evidence against defendant, a wiretap, was not obtained in conformity with a Maryland statute purporting to authorize wiretapping on the *ex parte* order of a state's attorney or judge. Md. CODE ART. 35 §§92-99. The court acknowledged that the state statute would fall if in conflict with the federal regulations but stated: "Here we find no conflict; the State Act simply excludes evidence obtained in violation of the state statute, which would otherwise be admissible notwithstanding the Federal Act." While this is not a decision on the validity of the permissive portions of the act, the implication is that evidence obtained pursuant to the state statute would be admissible *even if the act is itself contrary to controlling federal law.* And see: *In re Application for Order Permitting Interception of Telephone Communications*, 198 N.Y.S.2d 572, 574 (1960). Speaking of the New York practice of authorizing wiretapping by court order pursuant to the state's permissive statute (*supra* note 6) the court stated: "Notwithstanding the *Benanti* case, however, the practice generally of authorizing wiretaps continued in New York." Judge Davidson went on to find "authorized" wiretapping in conflict with §605, thus following the lead provided by Judge Hofstadter in *Matter of Interception of Telephone Communications*, *supra* note 7.

<sup>9</sup> 5 N.Y.2d 500, 186 N.Y.S.2d 230 (1959).

<sup>10</sup> 350 U.S. 497 (1956). The Supreme Court set out three criteria of preemptive intent: "[First, when] taken as a whole, . . . [the] congressional plan . . . makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state . . . statute is superseded regardless of whether it purports to supplement the federal law. . . . Second, [when] the federal statutes touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject. . . . Third, [when] enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program."

<sup>5</sup> 355 U.S. 96, 105 (1957).

<sup>6</sup> N.Y. CONST. art. I §12; N.Y. Pen. §§813 (a), 813 (b)

not mean to imply that "§605 was so pervasive as to preclude a State penal statute *punishing* wiretapping."<sup>11</sup>

The New York court is not alone in refusing to recognize total preemption of state law by §605. The then Attorney General of Pennsylvania, Thomas McBride, while testifying before the Subcommittee on Constitutional Rights of the Committee on the Judiciary before the United States Senate in May of 1958, stated that in his opinion, Pennsylvania (under legislation existing in that state) could prosecute federal officers violating Pennsylvania law—provided that said officers were also violating federal law.<sup>12</sup>

Congressional silence as to wiretap/eavesdrop practices not proscribed by §605 does suggest that these are areas open for state regulation, and several states have filled the void with legislation considerably stricter than §605.<sup>13</sup> Where the federal statute covers only limited situations arising in wiretapping, these states cover all wiretap activity. Where the federal enactment is silent on electronic eavesdropping, this conduct is made illegal.<sup>14</sup>

<sup>11</sup> *People v. Broady*, *supra* note 9 at 240. Further credence may be lent to the New York court's opinion by the decision in *Uphaus v. Wyman*, 360 U.S. 72 (1959), which limited Pennsylvania v. Nelson, *supra* note 10, to cases of *direct overlapping* of state and federal statutes so as to prevent "a race between federal and state prosecutors to the courthouse door." *Uphaus v. Wyman*, *supra* this note at 76. The states were thus left free to protect themselves with appropriate legislation. *Ibid.* *But query* whether a distinction should not be drawn between sedition, which might in a particular instance be directed solely against a local governmental unit (and therefore not a proper subject for federal regulation) and wiretapping, which *always* involves interference with a channel of interstate commerce (and, perhaps, is therefore *never* a proper subject for state regulation, even when in aid of that of the federal government).

<sup>12</sup> *Hearing on Wiretapping, Eavesdropping, and the Bill of Rights Before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. pt. 1, pp. 20-25 (May 20, 1958).

<sup>13</sup> See for example: ILL. REV. STAT. ch. 38 §206 (1960); PA. STAT. ANN. tit. 15 §§2443, 4688. The cited statutes make the mere listening to, or intercepting of, messages unlawful. The federal act has been interpreted (by the Justice Department) to require both interception *and* divulgence for a violation. Whether both elements are really necessary before a violation of §605 occurs may be doubted. See *Massicot v. United States*, 254 F.2d 58 (5th Cir. 1958). The Treasury Department has interpreted §605 as proscribing interception without more. The essentiality of both elements to a violation of §605 has never been decided by the Supreme Court. *Benanti v. United States*, *supra* note 5, n. 5 at p. 100 of the opinion.

<sup>14</sup> Electronic eavesdropping may be distinguished from wiretapping in that the former involves *amplifica-*

Coverage in excess of §605 does not necessarily save such state enactments from preemption. In the face of federal preemptive intent, state legislation in aid of, as well as in derogation of, that of the federal government must fall.<sup>15</sup> However, restrictive state statutes may be saved from unconstitutionality by severability clauses which must be given effect by courts interpreting them.<sup>16</sup> It is therefore possible that at least part of the state legislation, e.g., that pertaining to electronic eavesdropping, could stand.<sup>17</sup>

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*tion of sound waves* emitted from a sound producing source, thus enabling the listener to hear what would otherwise be beyond earshot, whereas the latter involves the *interception of electrical impulses* (usually from wires, but conceivably from micro-wave relays) and the translation of those impulses into audible sound waves. Thus, "bugging" a room with microphones would be electronic eavesdropping, while attaching a listening device to a telephone wire would constitute wiretapping. An induction coil system of interception would constitute wiretapping. Although the distinction may seem both technical and artificial, it is important, for it is only *interception* and divulgence of the electrical impulses which is made a criminal offense by §605. Compare *On Lee v. United States*, 343 U.S. 747 (1952) with *Nardone v. United States*, *supra* note 2.

<sup>15</sup> *Charleston & Western Car. RR. v. Varnville & Co.*, 237 U.S. 597, 604 (1915).

<sup>16</sup> *Watson v. Buck*, 313 U.S. 387 (1941). The rationale for total preemption is the necessity of avoiding any chance of burdening interstate commerce. While this burden is clear in the case of permissive state wiretap legislation, the burden cast upon interstate activity by restrictive state legislation is of questionable existence. Implementation of severability clauses would serve to remove burdensome portions of a state's legislation while preserving the privacy protection secured by the restrictive sections. *Cf. Atlantic C.L. RR. Co. v. Georgia*, 234 U.S. 280 (1914).

<sup>17</sup> It must be noted, however, that the states are powerless to inhibit the activities of federal officers validly exercising an investment of federal authority. *Ohio v. Thomas*, 173 U.S. 276 (1899); *Boske v. Comingore*, 177 U.S. 459 (1900); U.S. CONST. art. VI cl. 2. (supremacy clause.) The immunity from state regulation is not total, but is limited to action reasonably necessary and proper to the attainment of the assigned mission. Compare *In re Neagle*, 135 U.S. 1, 75 (1890), with *Oklahoma v. Willingham*, 143 F. Supp. 445 (Okla. 1956). In the former case a murder prosecution was set aside on the ground that the defendant's act was reasonably necessary to the accomplishment of the federal policy (protection of a federal judge while on the circuit). In the latter case, a federal court remanded to the state a traffic violation prosecution which had been removed to the federal court by the defendant mail truck driver. Violation of local traffic regulations was not considered reasonably necessary to the efficient delivery of mail. When the particular action proscribed by the state is *specifically* demanded of the federal officer, the state can do nothing. But the investment of federal authority may be implied. *Tennessee v. Davis*, 100 U.S. 257 (10 Otto. 1879); *In re Neagle*, *supra* this note. When this is the case, the question is how far to go in finding, in congressional silence, an im-

While it may be conceded that *restrictive* state wiretap legislation is consistent with federal policy and should not be overturned, the same cannot be said of *permissive* state wiretap legislation. The *Benanti* holding of federal preemption in this area was clear and unequivocal. Still, the overall impact of the *Benanti* decision on state wiretap activity remains uncertain; this is in no small measure due to the Court's decision to preserve the earlier case of *Schwartz v. Texas*.<sup>18</sup>

In the *Schwartz* case the Supreme Court held state procured wiretap evidence admissible in a state prosecution. Analogizing to the fourth amendment cases,<sup>19</sup> the Court suggested that:

"The problem under §605 is somewhat different because the *introduction of the intercepted communication would itself be a violation of the statute*, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts."<sup>20</sup> (Emphasis added.)

The Court went on to say that §605 could be enforced by the penal provisions of §501<sup>21</sup> without exclusion of the evidence; that apparently Texas had carefully legislated to provide for the admissibility of wiretap evidence; that if Congress had intended to preempt the field it should have said

plication of authority to indulge in activity specifically outlawed by an exercise of the state's police power, an exercise valid but for its affect on federal agents. The problem is avoidable by excision of the provision making the statute applicable to federal officers. But a federal court may be incompetent to place this construction upon a state statute, and, without a prior interpretation from a court of the state, may be bound by the legislation as enacted. *Beal v. Missouri Pac. Ry. Corp.* 312 U.S. 45 (1941). For further discussion of the validity and problems of state regulation of federal wiretap/eavesdrop practices not proscribed by §605, see Note, 67 YALE L. J. 932 (1957).

<sup>18</sup> 344 U.S. 199 (1952).

<sup>19</sup> In *Weeks v. United States*, 232 U.S. 383 (1914) the Supreme Court adopted the exclusionary rule for federal courts as a means of enforcing the provisions of the fourth amendment relating to unreasonable searches and seizures. In *Wolf v. Colorado*, 338 U.S. 25 (1949) the Court held the states bound by the "core" provisions of the fourth amendment under the due process clause of the fourteenth amendment, but otherwise free to enforce those provisions by means other than exclusion of the unconstitutionally seized evidence. By analogy to these decisions, the Court in *Schwartz* reasoned that the federal decision to exclude from its courts wiretap evidence should not be binding on state courts, since §605 could be enforced through §501.

<sup>20</sup> *Supra* note 18.

<sup>21</sup> 48 Stat. 1064, 1098 (1934), 47 U.S.C. §§151, 501 (1959). The penalty for violation of §605 is set by §501 at a fine not to exceed \$10,000. and/or imprisonment for a term not to exceed one year.

so in clear and unequivocal terms; and finally, that Congress had not so expressed its intent and therefore it would not be applied.

The conclusion that the fourth amendment analogy is inapplicable to the wiretap situation seems inescapable. Federal courts have adopted the exclusionary rule to implement the fourth amendment provisions relating to unreasonable searches and seizures.<sup>22</sup> The states, while bound by the core provisions of the fourth amendment under the due process clause of the fourteenth amendment, are free to enforce the basic right against arbitrary police invasion by whatever means seem reasonable.<sup>23</sup>

States not following the exclusionary rule generally choose that course for two reasons. The evidence is no less reliable for the illegality connected with its seizure, and, in any case, the constitutional violation is complete long before the evidence secured thereby is to be admitted. Exclusion of the evidence thus serves neither to punish the offender, nor to prevent his offense.<sup>24</sup>

This is not the situation in wiretap cases. As was recognized by the Court in both the *Benanti* and *Schwartz* decisions, the mere giving of testimony to the existence or contents of a wiretap is *in itself* the commission of the very act made criminal by §605. If wiretap evidence is to be admitted, a court must, in effect, consent to the commission of a federal crime. This is the error. It cannot be overcome by the existence of penal sanctions under §501.<sup>25</sup> Allowing the wiretap to come in, the court, in a stroke, sanctions a crime and inflicts irreparable injury on the defendant. By way of compensation he is allowed a civil suit for damages and, perhaps, a chance to prosecute the prosecutor.<sup>26</sup>

One explanation of *Schwartz* is that, by pointing out the criminality of admitting wiretap evidence, the Court hoped to guide state tribunals to the exclusion of such evidence. Thus, there would be no imposition on state sovereignty and the delicate balance of federalism would be preserved. That the road suggested by the *Schwartz* decision has not been unerringly followed by state courts is

<sup>22</sup> *Weeks v. United States*, *supra* note 19.

<sup>23</sup> *Wolf v. Colorado*, *supra* note 19.

<sup>24</sup> 8 WIGMORE, EVIDENCE §2184 (3d ed. 1940); *People v. Defore*, *supra* note 7; *cf.* opinion of Traynor, J. in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955).

<sup>25</sup> See *supra* note 21.

<sup>26</sup> *In re Application for Order Permitting Interception of Telephone Communications*, *supra* note 8.

clear. In fact, time after time wiretap evidence has been admitted in state prosecutions.<sup>27</sup>

Nor may a state court suggest that federal law is law of a foreign sovereign; and therefore, the federal government and not the state is charged with its enforcement. "The Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, anything in the Constitution or Laws of any State to the contrary notwithstanding."<sup>28</sup>

Another rationalization of *Schwartz* is that the federal government is incompetent to make a rule of evidence for the states. Although it is arguable that Congress or the Supreme Court does have this power,<sup>29</sup> the easy answer is that it has not done so. Instead, Congress has seen fit to make a particular act a crime, regardless of where, or under what circumstances, committed. In this posture, any court permitting testimony to a wiretap is refusing to comply with the clear mandate of the supremacy clause and at the same time being, for practical purposes, an accessory before the fact.

The decision to preserve *Schwartz* forced the *Benanti* Court to a strained interpretation of

<sup>27</sup> For example see: *People v. Maranian*, 359 Mich. 361, 102 N.W.2d 568 (1960); *State v. Giardina*, 27 N.J. 313, 142 A.2d 609 (1958); *People v. Variano*, 5 N.Y.2d 391, 185 N.Y.S.2d 1 (1958); *People v. Saperstein*, 2 N.Y.2d 210, 159 N.Y.S.2d 160 (1958); *Commonwealth v. Voci*, 393 Pa. 404, 143 A.2d 652 (1958); *State v. Tracey*, 100 N.H. 267, 125 A.2d 774 (1956); *Commonwealth v. Chaitt*, 380 Pa. 532, 112 A.2d 379 (1955); *White v. State*, 204 Md. 442, 104 A.2d 810 (1954).

<sup>28</sup> *Testa v. Katt*, 330 U.S. 386, 391 (1947); *Robb v. Connolly*, 111 U.S. 624, 637 (1884).

<sup>29</sup> See for example, *Rochin v. California*, 342 U.S. 165 (1952), where the Court overturned the state's decision to admit tangible evidence secured by a forced "stomach pumping." Although the evidence (which consisted of heroin capsules swallowed by defendant upon his arrest) was surely no less reliable for the obnoxious method by which it was obtained, the Court held that this was "conduct that shocks the conscience," violative of due process, and that the evidence was improperly admitted. From this it may be concluded that any *unusually* offensive conduct would "shock the conscience" and therefore lead to inadmissibility of the evidence obtained thereby, regardless of the reliability factor. *And see: Wolf v. Colorado*, *supra* note 19 at 33, and *Schwartz v. Texas*, *supra* note 18 at 202. In both instances the Court expressly reserved comment on the power of Congress to impose a rule of evidence on the states. *And as to the limitations on the Rochin doctrine, see: Irvine v. California*, 347 U.S. 128 (1954). (*Rochin* apparently limited to invasions of the body of the defendant.) *See also: People v. Grant*, 179 N.Y.S.2d 384 (1958); *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Rutledge, J. dissenting in Wolf v. Colorado*, *supra* note 19 at 48.

§605. That "no person . . . shall intercept" was too clear a statement to permit a construction excluding state authorized wiretapping from its mandate. Thus the Supreme Court found the ban on *interception* specifically applicable to state law enforcement agents, notwithstanding the existence of directly conflicting state legislation.<sup>30</sup> Yet to have found an equally broad mandate in the phrase "no person . . . shall . . . divulge" would have compelled the Court to forbid testimony in violation of §605 and so overturn the *Schwartz* decision.

Unwilling to impose so far on state-federal relations, and perhaps apprehensive of coming to a decision which might be interpreted as federal nullification of a state rule of evidence and thus inviting congressional action attempting further invalidation of state practices inconsistent with those of the federal courts, the Supreme Court chose to limit the *divulgence* provision of §605 to prohibiting wiretap testimony in federal courts.<sup>31</sup> Thus the Court found in the *divulgence* provisions of §605 a standard far more stringent in its application to federal tribunals than that applicable to state courts acting under the same statute. At the same time the *interception* provisions of §605 were given a scope so broad as to preempt the clear expression of state policy embodied in state legislation providing for "authorized" wiretapping.

While "mere logical symmetry and abstract reasoning are perhaps not enough"<sup>32</sup> to justify what would admittedly be an intrusion by federal authority into state affairs, the failure to import equal emphasis to both the *divulgence* and *interception* provisions of §605 results in more than a lapse of neat logic. With the admissibility of wiretap evidence inhibited at the state level only by the threat of federal prosecution for the resulting violation of §605,<sup>33</sup> and that eventuality being remote in the extreme,<sup>34</sup> it is plain that there is

<sup>30</sup> *Benanti v. United States*, *supra* note 5 and accompanying text.

<sup>31</sup> *Id.* at 101, heading I of the opinion.

<sup>32</sup> The phrase is from *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 1443 (1960), where the Supreme Court held evidence obtained in violation of the fourth amendment by state officers acting without federal assistance inadmissible in a federal prosecution, thus overturning the "silver platter" doctrine.

<sup>33</sup> *Schwartz v. Texas*, *supra* note 18 at 202. The Court stated that the fact that the admission of wiretap evidence would violate §605 was but another factor for states to consider in formulating evidentiary rules for use in their courts.

<sup>34</sup> DASH, SCHWARTZ, & KNOWLTON, *THE EAVES-*

little, if any, motivation for a cessation of state wiretap practices. Thus the states are allowed to attribute to §605 an interpretation which might well be described as imputing to that statute a "self-defeating, if not disingenuous purpose."<sup>35</sup>

The confusion pervading the wiretap area leaves the defendant seeking to exclude wiretap evidence from use in a state court, the state court witness seeking to avoid the commission of a federal crime, and the state legislature seeking a firm answer as to the legality of its enactments, grasping at straws in support of their embattled positions.

If the defendant is to make full use of the aids available to him, he must act before the trial is under way. When the wiretap to be introduced against him was obtained by federal agents, and the state is relying upon that testimony, the defendant may be able to obtain a federal order enjoining the federal agent from testifying at the state's prosecution. While this tack apparently has never been attempted in a wiretap case on the ground of the imminent violation of §605, it has been successfully employed to prevent a federal agent from testifying in a state prosecution to evidence obtained in violation of the Federal Rules of Criminal Procedure relating to illegal searches and seizures.<sup>36</sup> The basis for the injunction was to force federal agents to abide by the standards propounded by the Federal Rules. It would seem that if an injunction would issue to prevent a violation of the Federal Rules of Criminal Procedure, then one would issue to prevent a violation of the Federal Communications Act.

If the state's case does not depend upon the availability of a federal agent as a witness, the defendant may still be able to procure an injunction from a federal court to prevent the state from

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DROPPERS (1959). The authors suggest that prosecutions for violation of §605 are on the increase. *Id.* at 402. Nevertheless, their numbers seem infinitesimal in comparison to the number of taps allegedly in operation. *Id.* at 38-44. *But cf.* Brown, *The Great Wiretapping Debate and the Crisis in Law Enforcement*, 6 N.Y.L.F. 265, 270-272 (1960).

<sup>35</sup> The phrase is from *Nardone v. United States*, *supra* note 3, and was quoted by the Court in *Benanti*, *supra* note 5, in describing the effect of *not* excluding wiretap evidence in federal prosecutions. Presumably the effect would be the same if wiretap evidence were not excluded from state prosecutions.

<sup>36</sup> *Rea v. United States*, 350 U.S. 214 (1956). (Federal agent enjoined from testifying in New Mexico narcotics prosecution after failure of federal prosecution on ground that the federal officer improperly obtained warrant.)

using wiretap evidence against him, if the use of such evidence would result in the violation of §605. The most recent instances of such an attack are to be found in the New York cases of *Pugach v. Dollinger* and *O'Rourke v. Levine*.<sup>37</sup> In *Pugach* a stay of the use of wiretap evidence was granted<sup>38</sup> pending defendant's appeal from an order refusing to grant a preliminary injunction.<sup>39</sup> In *O'Rourke*, a similar stay was denied,<sup>40</sup> *Pugach* being distinguished in that there the trial had not yet begun, while in *O'Rourke*, it was in progress.

Subsequently, both cases were heard by the full Court of Appeals for the Second Circuit. The decision was that "a Federal Court should not intervene in criminal prosecutions by a state for violation of its criminal laws." Judge Waterman concurring, said: "I am not willing to assume that a New York State trial judge will permit such evidence to be admitted over the objection of defense counsel. After all, New York State judges, as we, were bound when they took office, to support the Constitution. . . . It is therefore presumptuous to assume that a New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath."<sup>41</sup>

<sup>37</sup> Earlier attempts of defendants to federally enjoin an imminent violation of §605 in the course of a state prosecution have proved inconclusive, none having been carried past the district court level. See: *Voci v. Farkas*, 144 F. Supp. 103 (E.D. Pa. 1956) and *Burack v. State Liquor Authority*, 160 F. Supp. 161 (E.D. N.Y. 1958).

<sup>38</sup> *Pugach v. Dollinger*, 275 F.2d 503 (2d Cir. 1960).

<sup>39</sup> *Pugach v. Sullivan*, 180 F. Supp. 66 (S.D. N.Y. 1960).

<sup>40</sup> *O'Rourke v. Levine*, 363 U.S. 836 (1960).

<sup>41</sup> *Pugach v. Dollinger*, 277 F.2d 739, 742, 745 (2d Cir. 1960). It was recognized by the majority, concurring, and dissenting opinions that the particular wiretaps in issue comprised but isolated instances of a general practice in New York of "authorizing" wiretaps. The conclusions as to what should be done about this ranged from the majority outlook that it is the state's concern; through the concurring opinion's refusal to concede that the evidence would be admitted without prosecution by United States district attorneys; to the dissenter's view that only by federal injunctive action would this flagrant flaunting of federal law be ended. The majority also seemed to take some refuge in the doctrine that equity will not enjoin the commission of a crime. This doctrine appears to be based first on the fear of denying the prospective defendant a trial by jury and second, hesitancy to substitute the contempt penalty for that provided by the legislature. *State v. Red Owl Stores*, 244 N.W.2d 103 (Minn. 1958). In the wiretap situation the first ground seems inapplicable since ordinarily there is no question as to the fact of the statutory violation. The merit of the second ground is doubtful when weighed against the peril to the person against whom the crime is to be committed.