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WARRANTS UPON WARRANTS: THE PEN REGISTER AND PROBABLE CAUSE UNDER OMNIBUS CRIME CONTROL*

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Now that Congress has passed the "Omnibus Crime Control Act" of 1968, permitting limited use of electronic surveillance which previously had been prohibited by § 605 of the Federal Communications Act of 1934, what is the present legal status of law enforcement usage of the so-called "pen register"—a device which records phone numbers called and calls received without monitoring or recording conversations? This is the question the author attempts to answer in the present paper.

I

The pen register logs numbers dialed from a telephone, without monitoring any conversations. It can be installed with a fair expectation that it will not be immediately detected. For years it has been attractive to law enforcement officers investigating crimes committed in whole or in part by the use of the telephone. Now that Section 605 of the Federal Communications Act of 1934 has been amended by the Omnibus Crime Control and Safe Streets Act of 1968 to permit interception of telephone communications under proper circumstances, the device seems more attractive than ever.¹ It appears as a useful means to develop

* The views herein expressed are those of the author, and do not represent a statement of any position by the Massachusetts Department of the Attorney General.

¹ Prior to the 1968 amendment, Section 605 read 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 re-

probable cause to seek a warrant or order to make a wiretap.

This appearance may be fatal to the successful prosecution of a significant case because of three federal court decisions, handed down in 1965 and 1966, condemning the use of the pen register as *per se* violative of Section 605.

As then worded, Section 605 forbade the interception and divulgence of the existence, content

ceive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information contained therein 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 any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled 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. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103, 47 U.S.C. § 605 (1962).

By the terms of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 197, 7 U.S. CODE CONG. & AD. NEWS 1495, § 803, the following terms were added to the initial paragraph of § 605:

"Except as authorized by chapter 119, title 18, United States Code, no person receiving, assisting in receiving. . ."

18 U.S.C. § 2518 provides a probable cause procedure for obtaining a court order for the interception of communications.

² 245 F. Supp. 534 (N.D. Ill. 1965).

or effect of, telephonic communications. These decisions were *United States v. Guglielmo*,² *United States v. Caplan*,³ and *United States v. Dote*.⁴ The terms of these decisions were so slack as to invite the inference that while the dispositive words descended from Section 605, the force behind them derived from the majesty of the Fourth Amendment.

At the time, this elasticity of meaning may not have seemed to merit much consideration. The federal courts had long employed Section 605 to bar from evidence at trial the words of telephonic communications intercepted by wiretap.⁵ With similar resolve, the Supreme Court of the United States had declined to impose this handicap upon state law enforcement officers. In *Olmstead v. United States*,⁶ the Court decreed that the spoken word was not protected by the Fourth Amendment. In *Schwartz v. Texas*,⁷ the Court refused to require State courts to exclude evidence of the spoken word, notwithstanding the fact that it had been obtained in violation of Section 605. Thus no reading of the *Guglielmo*,⁸ *Caplan*⁹ and *Dote*¹⁰ decisions, could, at the time the decisions were rendered, do more than dissuade federal law enforcement officers from employing the pen register to detect the commission of crimes perpetrated in whole or in part by means of telephonic communication.¹¹

² 255 F. Supp. 805 (E.D. Mich. 1966).

³ 371 F.2d 176 (7th Cir. 1966), *affirming* *United States v. Guglielmo*, *supra* note 2.

⁴ See *Nardone v. United States*, 302 U.S. 379 (1937); *Nardone v. United States*, 308 U.S. 338 (1939).

⁵ 277 U.S. 438 (1928).

⁶ 344 U.S. 199 (1952).

⁷ *Supra* note 2.

⁸ *Supra* note 3.

⁹ *Supra* note 4.

¹⁰ *Supra* note 4.

¹¹ Altogether too little attention has been paid to this innovation in the problems of criminal law. In his *Conflict of Laws In Time: The Sweep of New Rules in Criminal Law*, 1967 DUKE L.J. 713, Chief Justice Roger J. Traynor of the Supreme Court of California reviewed some of the dislocations resulting from simultaneous modification of the criminal laws by the courts and legislatures, generally accomplished without adequate reference to the issues raised in consequence. Pivoting on the question of whether decisions, modifying the criminal process, ought to be prospective or retrospective, the Traynor article was unusual in that it focussed upon the effects achieved upon police work, by decisions aimed at influencing police work. Perhaps the failure to make this connection lay at the root of the *Guglielmo-Caplan-Dote* series of decisions, and the difficulties which they now portend: in theory the cases merely served to reassert a long-standing limitation imposed upon law enforcement officers, but in fact their reasoning went a good deal beyond such reassertion. This reflects the occasionally frustrating disparity between

The decisions survived upon the books, but the times changed. Late in 1966, *Olmstead* underwent significant erosion. In *Osborn v. United States*,¹² the Court attributed to the Fourth Amendment what the *Olmstead* Court had decreed as "an enlarged and unusual meaning"¹³: the inclusion of spoken words within the definition of "things" protected in possession against unreasonable search and seizure. In *Osborn*, the Court carefully evaluated the constitutional propriety of the use of a recording device (installed upon the person of a consenting undercover operative) and deliberated extensively upon the adequacy of the precedent "detailed factual affidavit" supplied to provide the antecedent justification, noting its assertion of "the commission of a specific criminal offense" and stressing that the device was employed for a "narrow and particularized purpose."¹⁴

On June 12, 1967, six months after *Osborn*, the Court decided *Berger v. New York*.¹⁵ There "'conversation' was within the Fourth Amendment's protections, and . . . the use of electronic devices to capture it was a 'search' within the meaning of the Amendment. . . ." ¹⁶ The decision in *Olmstead* was dismissed as having been "negated by our subsequent cases . . .," ¹⁷ none of which was named.

Berger left a vacuum. It finished off the position that the Fourth Amendment did not apply to the spoken word, without indicating how the Fourth Amendment was to apply to the protection of the spoken word. That deficiency the Court sought to remedy in *Katz v. United States*,¹⁸ decided six months after *Berger*.

In *Katz* the Court, reviewing acts committed by federal agents who had installed an eavesdropping

the realities controlling appellate decisions—delivered on the basis of resolution of contending *ideas*—and pre-trial, police investigation, which is conducted, ideally, with some considerable reference to the views of appellate courts, but administered in a *factual* context. Law enforcement officers are compelled to assert a "right to rely" upon the ideological representations of the condition of the law made by appellate courts of record, notwithstanding the fact that this reliance may be rather rudely disappointed by a new appellate representation, contradictory of the old, and handed down when curative pre-trial investigation of a given case, developed conformably to the new position, is no longer possible.

¹² 385 U.S. 323 (1966).

¹³ 277 U.S. 438, 466 (1928).

¹⁴ 385 U.S. 323, 330 (1966).

¹⁵ 388 U.S. 41 (1967).

¹⁶ *Id.* at 51.

¹⁷ *Ibid.*

¹⁸ 389 U.S. 347 (1967).

device on an outdoor public telephone booth, found it "clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place."¹⁹ Convinced that a "judicial order could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance,"²⁰ the Court concluded:

"The government agents here ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment.' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed."²¹

Notwithstanding its distastefulness to the federal investigators directly involved, the *Katz* decision constituted a substantial contribution to the resolution of a perplexing conflict among dissonant concepts theretofore randomly developed in the law of telecommunications.

Prior to *Katz* there remained among law enforcement officers (and their legal advisors) some lingering doubt whether electronic surveillance would ever be conclusively adjudicated as a constitutional method of search and seizure. This uncertainty was nourished by *Berger v. New York*: "It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If this be true then the 'fruits' of eavesdropping devices are barred under the Amendment."²² The effect of this uncertainty almost certainly was to discourage law enforcement officers from employing electronic surveillance in cases of any importance lest they ruin a case against a defendant of more than usual significance. (In the usual course of events, the use of such comparatively complicated measures is likely to be considered only in "important" cases.) And this discouragement, of course,

tended to diminish the prospect of developing tactics of electronic surveillance likely to pass constitutional muster. *Katz*, firmly establishing the potential constitutional use of electronic surveillance, eliminated that conceptual uncertainty.

Again, before the decision in *Katz*, those law enforcement officers who were sincerely convinced that electronic surveillance could be fitted into a constitutional scheme of search and seizure were as paralyzed operationally as those doubting its primary constitutionality. Persuaded that electronic surveillance could be constitutionally conducted, they were still unable to say, with any realistic assurance, what methods should be employed. From a variety of procedures, it was all but impossible to choose with any confidence precisely those alternatives which a court would later approve as satisfying constitutional standards. Once more it must be noted that the peculiar characteristics of electronic surveillance—the delicacy of its application, the need for specialized personnel to perform it effectively, and the relative expense of its employment—which practically limit it to use in significant cases, also functioned in this setting to check any inclination to experiment. Thus the pre-*Katz* uncertainty on the operational level also served to decrease the probability that constitutionally adequate procedures would be fashioned empirically by trial and error. *Katz* obviated this uncertainty.²³

The importance of this definitional function was immense. Taken together with *Osborn*²⁴ and *Berger*,²⁵ *Katz* completed the chore set by the Court for itself, the bringing of spoken words within the protection of the Fourth Amendment. It then proceeded to insure that the protection conferred

²³ It is significant that clarification of the conceptual conflicts, and those arising from procedural uncertainties, was left to the Supreme Court of the United States. As was the case with problems of arrest, interrogation, and the extensiveness of the right to be represented by counsel, there appears to be adequate justification for the persuasion that judicial intervention in law enforcement problems is in large part the product of legislative refusal to act, where action is plainly required. As suggested in note 11 *supra*, the most damaging condition of the law, from a law enforcement point of view, is uncertainty. Notwithstanding copious grumbling, public and private, to the contrary, the fact is that capable law enforcement officials are reasonably amenable to the need to adapt to new, or merely different, procedural rules. But they feel themselves entitled to demand that the reliance manifested by such adaptation not be capriciously rebuked by a retrospective declaration of new procedures, functioning to set free offenders caught under the previous rationale.

²⁴ *Supra* note 12.

²⁵ *Supra* note 15.

¹⁹ *Id.* at 354.

²⁰ *Id.* at 356.

²¹ *Id.* at 359.

²² *Supra* note 15, at 63.

upon the possession of spoken words should be no greater than the protection given to tangible possessions. Thus the privacy accorded to persons communicating orally is no closer to absolute than the privacy vouchsafed to persons communicating in writing: it may be constitutionally invaded by a law enforcement officer, pursuant to a warrant, issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."²⁶

There nowhere appears, in this eminently rational solution to the problems engendered by the contending claims of personal privacy and community security in the field of communications, any legitimate reason to discriminate among methods of oral communication, nor to pronounce on the basis of such discrimination any more extensive protection for one than for another. Once the presumption is made, that spoken words are properly included among "things" protected in possession by the Fourth Amendment, and the procedures set down forestalling that protection from becoming absolute, the social adjustment required for comparatively frictionless coexistence of the interests of privacy and law enforcement would, in the abstract, seem to be complete. But such adjustments, of course, are never made in the abstract, and this one was accomplished in the area partially occupied by Section 605 of the Federal Communications Act of 1934.

Section 605—enacted as a regulation of the communications industry, elevated judicially to a rule of evidence, and long since unsuccessfully, albeit most energetically, challenged in that guise—was not discernibly affected by the *Osborn-Berger-Katz* sequence of decisions. While those cases attacked and demolished a great source of confusion in the law of telecommunications, they did not explain what renders absolutely sacred all which is *mechanically* communicated. Briefly, it will be remembered that when *Olmstead v. United States*²⁷ endured as good law denying Fourth Amendment protection to the spoken word in possession, spoken words said face-to-face were *per se* vulnerable to seizure without warrant, but by virtue of Section 605, words spoken over the telephone were rendered different from those addressed to a person within earshot. That difference, championed in a number of high and lower decisions over a period of some

thirty years, was sufficient in all of its majestic unreasonableness to preclude its own correction by the *Osborn-Berger-Katz* rationale. Thus between December of 1967, when *Katz* became the law of the land, and June of 1968, when a new decision and a new statute again altered the law, all spoken words except those communicated with mechanical assistance were open to constitutional search and seizure, but none of those communicated by telephone, radio, or other protected means could ever *legally* be seized. To this was added a further complication: if words spoken into a protected system were *illegally* seized by a State law enforcement officer, they could be *legally* admitted into evidence in a State court under *Schwartz*.

This condition was twice attacked in June of 1968. The development first in logic, the decision in *Lee v. Florida*,²⁸ was chronologically second, coming down on June 17. The statute, the Omnibus Crime Control and Safe Streets Act of 1968,²⁹ was enacted on June 6, but in a universe controlled by pure logic would have followed the decision in *Lee*.

Lee overruled *Schwartz v. Texas*,³⁰ In *Lee*, the Court held that the exclusionary rule fashioned in *Nardone v. United States*,³¹ to limit the zeal of federal officers eager to tap wires must now be extended to apply to State officers and State courts.

This decision failed to reach the obvious problem created by decisions interpreting Section 605 and exacerbated by the developments in *Osborn, Berger* and *Katz*: the difficulty of understanding why words spoken into a telephone, or other protected communications system, should be absolutely protected against all searches, when words spoken without such mechanical assistance were now protected only against unreasonable searches. But it did have the merit of preparing the way for the correction of that difficulty, inasmuch as it placed federal and State officers on the same footing, and evenhandedly obliged them to bow to the same illogic.

That correction had in fact been made—or at least attempted—some twelve days before the decision in *Lee*, when Congress passed the Omnibus Crime Control and Safe Streets Act of 1968. In Title II, Section 803, Congress amended Section 605 of the Communications Act of 1934 to permit the interception and divulgence of telephonic and

²⁸ 392 U.S. 378 (1968).

²⁹ See note 1, *supra*.

³⁰ *Supra* note 7.

³¹ *Supra* note 5.

²⁶ U.S. CONST. amend. IV.

²⁷ *Supra* note 6.

broadcast communications, provided that the interception is accomplished conformably to criteria of constitutional searches strikingly resembling those established in the *Osborn-Berger-Katz* rationale.

This legislation, long overdue, appears to complete the corrective process urgently required by American law of telecommunications ever since the first *Nardone* case, decided in 1937.³² At long last it appears that the law of telecommunications has been satisfactorily adjusted to achieve a balance between claims of equal importance, and that the terms of that adjustment are the same for federal officers working toward federal trials and State officers preparing cases for trial in State courts.

Unfortunately, that word "appears" must be stressed. In an area long characterized by uncertainty, some uncertainty yet endures. In part, at least, it is the product of the decisions in *United States v. Guglielmo*,³³ *United States v. Caplan*,³⁴ and *United States v. Dote*.³⁵ Primarily, it suggests that telephonic communications may still lie beyond the pale of "things" that can be seized in conformity with the Constitution of the United States.

II

In 1965, Orlando W. Wilson, then Superintendent of the Chicago Police Department, testified before the Illinois Crime Commission on the subject of wiretapping.³⁶ His remarks deserve some review:

"Under our present law, the higher-ups in organized crime are given complete immunity in their oral and telephonic communications. Whatever they say over the telephone or to their fellow criminals, face to face, is completely protected and immune from interception by law enforcement officers. This shouldn't be. The very fact that the telephone exists has made law enforcement more difficult. It permits the higher-ups in organized rackets to conspire and carry out their illegal

activities by telephone and to issue directions to their underlings without committing any overt acts themselves that might result in apprehension by the police or other law enforcement officers. Thus they remain immune from punishment and the only persons who are charged with crimes are the minor figures in the rackets—the lowly policy runner, the prostitute, or the narcotics pusher, all of whom are at the bottom of the ladder. They are the only ones who do something that the police can see and testify about and therefore they are the only ones who are arrested and charged with a crime.

"The telephone is not only a means of *facilitating* crime but it may be the very *instrumentality* for committing certain types of crime. It is almost invariably used in such crimes as extortion and kidnapping, and is, of course, the very *sine qua non* of bookmaking, call girl operations and lewd, obscene or threatening telephone calls. How absurd it is to grant complete immunity to criminals to use the telephone for such purposes without fear of detection!"³⁷

The Congress, in 1968, indicated its endorsement of the Wilson position. "Organized criminals," the Congress asserted in findings appended to Title III of the Omnibus Crime Control Act, Section 801 (c), "make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice."³⁸

Agreeably to this finding, Congress established a "[p]rocedure for interception of wire or oral communications."³⁹ The procedure is set down as follows:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each ap-

³² *Ibid.*

³³ *Supra* note 2.

³⁴ *Supra* note 3.

³⁵ *Supra* note 4.

³⁶ It should be noted that the Wilson position is cited only as exemplary. Atty. Gen. Robert F. Kennedy, Atty. Gen. Nicholas deB. Katzenbach, and the President's Commission on Law Enforcement and Administration of Justice, among sundry other spokesmen for law enforcement, stressed the importance of electronic surveillance in the effort against organized crime.

³⁷ Statement of Orlando W. Wilson, mimeographed for distribution at Illinois Crime Commission Hearings of February 5, 6, 1965. (Emphasis in original.)

³⁸ P.L. 90-351, 82 Stat. 197, 7 U.S. CODE CONG. & AD. NEWS 1495, 1511 (1968).

³⁹ Omnibus Crime Control and Safe Streets Act of 1968, § 802, *amending* 18 U.S.C. § 2518.

plication shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. . . ." ⁴⁰

Accommodating Section 605 of the Federal Communications Act of 1934, to the employment of this authority to intercept telephonic communications under judicial orders issued upon probable cause,⁴¹ Congress plainly manifested its intent to lay open to reasonable searches and seizures the previously sacrosanct, clandestine criminal acts committed in whole or in part by means of the telephone.

This amendment of Section 605, in order to be

⁴⁰ Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 197, 18 U.S.C. § 2518 (1968).

⁴¹ The extent of the change accomplished by this accommodation is open to some doubt. To balance the absolute view adopted by such cases as the *Guglielmo-Caplan-Dote* series, that all telephonic communication has ever been completely protected against interception, by anyone, a number of cases took the position that this protection did not apply if the communication was itself unlawful. See *United States v. Beckley*, 259 F. Supp. 567 (N.D. Ga. 1965), where the court held that the protections of Section 605 "were never intended for, nor do they cover, such communications which are themselves illegal." *Id.* at 573, citing *Casey v. United States*, 191 F.2d 1, 4 (9th Cir. 1951). To the same effect, see *United States v. Hanna*, 260 F. Supp. 430 (S.D. Fla. 1966); *United States v. Sugden*, 226 F.2d 281 (9th Cir. 1955).

fully effective, must also affect the accretions of time and decisional law which have accumulated upon the statute. Among those accretions are the decisions in *United States v. Guglielmo*,⁴² *United States v. Caplan*,⁴³ and *United States v. Dote*.⁴⁴ The implications of those decisions, of fair singularity prior to the amendment of Section 605, assume remarkable peculiarity in the post-amendment context.

United States v. Guglielmo was a prosecution for violation of federal gambling laws. Defendants moved to suppress evidence consisting of "[p]en register tapes which recorded the calls from defendants' lines" as a result of "the request of agents of the Internal Revenue Service."⁴⁵ "Neither the defendants nor the parties called knew of or acquiesced in this Internal Revenue request,"⁴⁶ which was honored by the Illinois Bell Telephone Company.

The defendants supported their motion to suppress with the argument that the use of records made by the pen register and employed "to further develop leads and to conduct gambling investigations resulting in the obtaining of search warrants which produced the instant indictments," amounted to a "violation of the Federal Communications Act (Title 47, U.S.C.)."⁴⁷

The court first supplied this description of the pen register:

"The pen register is a mechanical device attached on occasion to a given telephone line, usually at central telephone offices. A pulsation of the dial on a line to which the pen register is attached records on a paper tape dashes equal to the number dialed. The paper tape then becomes a permanent record of outgoing calls as well as numbers called on a particular line. Immediately after the number is dialed and before the line called has had an opportunity to answer (actually the pen register had no way of determining or recording whether or not the calls are answered) the pen register mechanically and automatically is disconnected. There is neither recording nor monitoring of the conversation."⁴⁸

Upon this description, and in consideration of

⁴² *Supra* note 2.

⁴³ *Supra* note 3.

⁴⁴ *Supra* note 4.

⁴⁵ *Supra* note 2, at 534.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Id.* at 535.

defendants' arguments, the court in *Guglielmo* concluded that "the instant unconsented use of a pen register violated the integrity of telephone communications and the clear prohibition of § 605."⁴⁹ It dismissed the indictments: "The fruits of such a violation are, of course, inadmissible in evidence, much as proper investigation and alert detection of crime should be encouraged. (*Nardone v. United States*, 308 U.S. 338)."⁵⁰

The Government appealed this decision. Before the opinion in this appeal was issued *sub nom. United States v. Dote*,⁵¹ the *Guglielmo* decision was considered in *United States v. Caplan*.⁵²

In *Caplan*, also a gambling case, the court considered "motions filed on behalf of all twenty-five defendants indicted herein to quash search warrants issued by another judge of this court,"⁵³ because of an alleged violation of Section 605.⁵⁴

The foundation of these assertions was the contention that "the use of a pen register, under the circumstances, constituted the 'interception' of a communication, an act forbidden by the second clause of § 605 and prohibited from communication to others regardless of any authorization from anyone other than the sender or the receiver."⁵⁵

The *Caplan* court, adopting a description of the pen register which strikingly resembled that set down in *Guglielmo*,⁵⁶ cited *Guglielmo* for the prop-

osition that "the furnishing by the telephone company to I.R.S. agents of pen register data constituted divulgence of the *existence* of communications in violation of the statute."⁵⁷ In this reflection the *Caplan* court was clearly correct, inasmuch as the *Guglielmo* court had held that, as a product of the use of a pen register, "[t]he *existence* of a communication was divulged. . . ." ⁵⁸ It was this divulgence, of the existence of a communication, which the *Guglielmo* court, in view of the Section 605 decree that ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the *existence*, contents . . . or meaning of such intercepted communication to any person . . .," ⁵⁹ had found to be in "clear and unequivocal" contravention of the "language of the statute."⁶⁰ But the *Caplan* court was not content merely to adopt this position.

Instead, the *Caplan* court found that the use of the pen register ". . . constituted the 'interception' of a *communication*."⁶¹ Further, it held, in opposition to the Government's contention that there was no " 'interception' of a communication since the pen register only records the fact that a number was dialed . . .," ⁶² that the fact of dialing the telephone is *per se* communication.

This holding was offered together with the *Guglielmo* rationale "as an alternate basis for holding that the government made forbidden use of the pen register data. . . ." ⁶³ It was reached by reasoning which left something to be desired:

"To the government's argument that no 'communication' was intercepted, defendants, in

the pen register is of very limited territorial significance. It is practically significant only when the telephone company, or law enforcement, wishes to determine what local, or non-toll, numbers are being called from a given telephone. The telephone company's automatic billing equipment, in the ordinary course of business, makes similar records of every toll call. So, as an interesting sidelight, *Caplan* and *Dote*, and perhaps *Guglielmo*, stand also for the proposition that telephonic communications made within the toll zone are entitled to a higher level of privacy than telephonic communications made between toll zones, a very elevated level indeed, considering that toll calls are—or were—deemed entitled to a higher level of privacy than mere face to face conversation.

⁴⁹ *Supra* note 3, at 807. (Emphasis added.)

⁵⁰ *Supra* note 2, at 536.

⁵¹ 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1962), quoted in *id.* at 535-36.

⁵² *Id.* at 536.

⁵³ *Supra* note 3, at 806.

⁵⁴ *Id.* at 806-07.

⁵⁵ *Id.* at 808.

⁴⁹ *Id.* at 536.

⁵⁰ *Ibid.*

⁵¹ *Supra* note 4.

⁵² *Supra* note 3.

⁵³ *Id.* at 806.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Note 48 *supra* and accompanying text.

The description of the pen register furnished in *United States v. Caplan*, *supra* note 3, read as follows:

"The pen register is a device attached to a given telephone line usually at a central telephone office. A pulsation of the dial on the line to which the pen register is attached records on a paper tape dashes equal in number to the number dialed. The paper tape then becomes a permanent and complete record of outgoing numbers called on a particular line. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. The pen register cuts off after the number is dialed on outgoing calls and after the ringing is concluded on incoming calls without determining whether the call is completed or the receiver is answered. There is neither recording nor monitoring of the conversation." 255 F. Supp. at 807.

Oddly enough, none of the courts in the *Guglielmo-Caplan-Dote* series of cases adverted to the fact that

open court, demonstrated that it was possible to dial a number and to permit the phone to ring a specified number of times and then to hang up. When this was done, the pen register dutifully recorded the fact that the number was called. History affords us the illustration of a prearranged signal. Paul Revere's associate, who hung a lantern in the Old North Church, would hardly have been exculpated at a trial for treason if he had argued that he was not sending a communication, but only illuminating the belfrey."⁶⁴

This reasoning was deficient in at least two respects. The first of these deficiencies lay in the choice of example. In a generation which has perfected the artful use of the person-to-person call (placed to a person who does not exist, or is in fact making the call, in order to convey information to the answering party without incurring toll charges), the call to be made at a specified time (but not to be answered), and the use of an agreed-upon number of rings at a specified time (again, without the call being answered), as commonplace methods of fraud upon telephone companies, it is hardly necessary to exhume the revolutionary communications methods of Paul Revere to demonstrate that actual conversation is not always required for the transmission of information over a distance.

The second deficiency was the product, in part, of the first. By hearkening back to Paul Revere, the court was able to avoid the implications of defendants' persuasive demonstration in open court. Evading those implications in turn permitted the court to duck the genuine issue thus raised.

That issue is not whether it is possible to contrive to convey information by use of the telephone without actually talking, or incurring the tariffs imposed upon such telephonic communication. Rather it is whether "the Congress" by indicating "a policy of protecting the privacy of telephone subscribers from invasion by law enforcement officers as well as others who may be less well motivated,"⁶⁵ consciously intended also to protect those who undertake to use the protected system without paying for it (a species of theft), together with those who set out to employ it as an easy, convenient, and secure means to the commission of more serious offenses.

The failure of the *Caplan* court to perceive these deficiencies created a precedent for the notion that the mechanical preliminaries to telephonic communication—dialing the telephone—are themselves communication, and protected as such.

That suggestion was speedily taken up by the Court of Appeals for the Seventh Circuit in decision of the appeal of *Guglielmo*,⁶⁶ *sub nom. United States v. Dote*.⁶⁷ In an opinion more notable for its dogged eclecticism than for its selectivity among available rationales, the *Dote* court blithely grounded its decision not only upon the "well-reasoned memorandum opinion reported as *United States v. Guglielmo . . .*,"⁶⁸ but also upon the presumably equally—"well-reasoned opinion . . . reported as *United States v. Caplan . . .*,"⁶⁹ thereafter contriving to intensify the misfortune created by the *Caplan* decision.

Caplan reflected a belief that the mechanical preliminaries to telephonic communication are themselves communication, and protected as such. *Dote*, uncritically synthesizing *Caplan* and *Guglielmo*, produced the outright declaration that the "ringing of the telephone . . . may of itself be a communication . . ." ⁷⁰ Rejecting the Government's argument, "that § 605 applies only to substantive communications, that is, to interchanges of thought,"⁷¹ the *Dote* court passed perilously close to adjudication of the question along the more restricted lines of the *Guglielmo* decision—"Our concern in the instant case is whether the existence of an intercepted communication was divulged or published,"⁷²—before concluding:

"The ringing of a telephone may be more than merely a signal indicating a call. Even if a call is not answered, a call at a certain time, or a certain number of rings, or repeated calls may well be a prearranged message or signal. *The ringing of the telephone, therefore, may of itself be a communication*, and a device, attached to the telephone line, which indicates to a third party that such a communication is taking place or is about to take place, inter-

⁶⁶ *Supra* note 2.

⁶⁷ *Supra* note 4.

⁶⁸ *Id.* at 178.

⁶⁹ *Id.* at 179.

⁷⁰ *Id.* at 181.

⁷¹ *Id.* at 180.

⁷² *Id.* at 181.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

cepts it. *United States v. Caplan*, supra, 255 F. Supp. at 808.⁷³

The principal, initial difficulty with this equation of mechanical preliminaries to conversation to (protected) communication is its necessary effect upon the definition of the word: communication. The equation, if enforced, cuts the word loose from its moorings, and effectively deprives it of any determinable meaning. If dialing a telephone is to be treated as *communication* simply because it is a step in the process of positioning the prospective communicator to deliver his communication, then it becomes virtually impossible to exclude from the definition of *communication* any physical activity ultimately contributing to an exchange of thought. Unless the distinction between *communication* and *noncommunication* is to vary arbitrarily, depositing coins in a pay telephone would appear to be a form of *communication*, together with entering the phone booth, securing change for currency, and so on. It is not too much to say that if dialing in order to signal without incurring tariffs amounts to protected *communication*, then the use of a device to bewilder the toll-calculating equipment in order to converse without paying tariffs, ought also to be protected *communication*.⁷⁴ Put simply, the *Dote* decision suggests that the premium of protection is, or may be, payable in the coinage of criminal ingenuity: no matter what is done, it is protected so long as it bears some faint connection with telephonic communication.

The implications of this position cannot be escaped by mere reference to the 1968 amendment of Section 605,⁷⁵ to permit judicially-ordered

⁷³ *Ibid.* (Emphasis added.)

⁷⁴ The decision in *United States v. Hanna supra* dealt with precisely this question. Defendants employed what was known as a "blue box" to emit tones which activated long-distance circuits without activating the telephone company's billing equipment, thus defrauding the company and incidentally enabling defendants to conduct a rather ambitious, inter-toll-zone, interstate, gaming operation. The court rejected defendants' contention that this use of the "blue box" was congressionally intended for protection under Section 605. More recently, the newspapers carried reports of a blind college student, born with perfect pitch, who had learned to confuse the long-distance circuitry by whistling into the handset, thus accomplishing the same ends as the "blue box," and perhaps furnishing some hope for the ultimate replacement of the machine by human beings, as an incident of his deplorable behavior.

⁷⁵ *Supra* note 40.

interception of telephonic communications, upon a demonstration of probable cause. Under the *Osborn-Berger-Katz* decisions, *conversation* is a thing protected in possession by the Fourth Amendment. To seize it, a warrant or order is required. It is not very far from the concept of conversation-as-thing to communication-as-thing, and, if that distance is travelled, some serious practical problems for law enforcement are pre-aged.

Those problems, proceeding from the random development of decisional and statutory law on the subject of telecommunications as most strikingly exemplified in the *Guglielmo-Caplan-Dote* series of decisions, consist principally of the possibility that it may prove almost impossible, in cases involving crimes committed by means of the telephone, to secure the probable cause needed for interception, without violating the law in the process. To secure the warrant or order needed for such interception, it is necessary to demonstrate some present knowledge concerning the nature and purpose of the communication activity believed to be criminal, in order to show probable cause to the reviewing magistrate. But, if preliminary, mechanical activity, such as dialing the telephone, is communication, and if communication is protected by the Fourth Amendment, then evidence showing the numbers called, and the frequency with which they are called may not be secured and divulged without an order or warrant. Thus the paradox: an order for interception may be had, but only upon a showing of facts constitutionally obtainable only with a warrant. In other words, the officer must secure a warrant in order to secure the facts he needs to get the warrant.

Presumably, or at least hopefully, some court of fair impressiveness will discern a way to eliminate such problems, perhaps by restoring to such words as *communication* the definitions they enjoyed prior to the time when the process of expanding Section 605 commenced, rendering them meaningless. As it is, law enforcement officers (and their legal advisors) might well limit themselves to a very measured confidence in the permanency of the revolution wrought in the law of telecommunications by the Omnibus Crime Control and Safe Streets Act of 1968. And one prudent manifestation of such caution might take the form of disciplined restraint in the use of the pen register.