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objection can be overcome. Knowledge should be deemed to be coextensive with the will and the emotions. The *M'Naghten* rules should, therefore, consider whether the defendant had the ability to emotionally and intellectually conceive and value, as an integrated personality, the nature and consequence of his actions. Hall, *Mental Diseases and Criminal Responsibility*, 45 COLUM. L. REV. 677 (1945); Gausewitz, *A Lawyer Looks at Psychiatry and the Law*, 3 BUFFALO L. REV. 25 (1954); Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 BUFFALO L. REV. 41 (1954). This will allow a presentation of the complete mental health of the defendant to the fact finding body.

The "but for" standard, while emphasizing the proposition that something less than total incapacity of self-control will relieve a defendant of responsibility, is not precise; but it is not meant to be. Courts cannot attempt to deal with cause and effect in any absolute degree, but only in such a limited way as is practical and as is within the scope of ordinary human understanding. The "but for" standard as laid down in the *Carter* case is as effective a standard in the determination of criminal responsibility as the reasonable man and proximate cause standards are in the determination of civil liability. Therefore, while the standard laid down by the court has not accomplished any revolutionary transition in the application of the *Durham* rule, it is workable. This standard is not, however, the ultimate. The substantive and procedural law of insanity must be constantly adjusted to meet the needs of our growing society.

Richard Brocklebank

Wiretap Evidence: Excluded in Federal Court Under Federal Communications Act Although Acquired by State Officers

New York State officers in the belief that defendant was dealing in narcotics in violation of state law, tapped defendant's telephone conversation in accordance with the provisions of Article I of the New York Constitution and New York Code of Criminal Procedure, section 813-a, which permit wiretapping by police officers. Although no violation of state law was discovered, defendant was found to be transporting distilled spirits without tax stamps attached, in contravention of federal law. The accused was then turned over to federal authorities for prosecution. At the trial, defendant's counsel made a motion to suppress the wiretap evidence, in that it had been obtained in violation of section 605 of the Federal Communications Act, 48 STAT. 1103 (1934), 47 U.S.C. §605 (1952), which provides *inter alia*:

... 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 ... (emphasis supplied).

Defendant's motion was denied and the resulting conviction was affirmed by the Court of Appeals, 244 F.2d 289 (2d Cir. 1957). The Supreme Court, utilizing its supervisory power over the federal court system, reversed and unanimously held the motion to suppress should have been granted. *Benanti v. United States*, 78 Sup.Ct. 155 (1957).

Chief Justice Warren, speaking for the Court, held that the wording of section 605 was too explicit to warrant any other interpretation than that the statute was an "express absolute prohibition against the divulgence of wiretapping." The Court rejected the government's contention that the sanctions of section 605 did not apply to state officers operating under color of state law, by pointing out that the Federal Communications Act was a comprehensive scheme for the regulation of interstate as well as intrastate communication, and that conflicting state legislation would not be tolerated. The Court also dismissed the prosecution's attempted analogy between evidence garnered in contravention of section 605 and illegally obtained evidence in "search and seizure" cases. The government reasoned that since evidence obtained in contravention of the Fourth Amendment has been held admissible in cases where there has been no federal participation in the acquisition of such illegal fruits, the same principle should be applied to the instant situation, because only state officers were here involved. However, the Court determined that the clarity of the statute's admonitions precluded the necessity of discussing any such parallel.

In analyzing the scope of section 605, the Court placed heavy reliance on its prior decisions in *Nardone v. United States*, 302 U.S. 379 (1937) and 308 U.S. 338 (1939). The Court stated that the underlying principles and policies set forth in the two *Nardone* opinions governed not only the situations there presented, but were to be controlling of all subsequent controversies involving section 605. In the first *Nardone* case, it was held that the phrase "no person" as expressed in the statute is to be strictly construed and therefore is applicable to federal officers who commit an illegal wiretap. It was also decided that the statute's prohibition against divulgence to "any person" barred wiretap testimony in a federal court. In the second *Nardone* decision the Court was confronted with the problem whether evidence acquired through the indirect use of intercepted telephone conversation was admissible. It was there determined that the trial judge must give the defendant an opportunity to prove that a substantial portion of the government's case against him was the result of an illegal wiretap. If so established, the derivative use of such evidence must also be stricken. It was reasoned that a contrary interpretation of section 605 would only invite the invasions of personal liberty which Congress had intended to guard against.

The results of the *Benanti* case have created much discussion and speculation as to its impact on the officers and courts of a state which permits legal wire-

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tapping. In respect to state officers, it appears inescapable that they are amenable to federal prosecution under section 501 of the Communications Act, which imposes two years' imprisonment, a fine of \$10,000, or both, for violation of section 605. The Supreme Court's previous determination in *Weiss v. United States*, 308 U.S. 321 (1939) that section 605 applies to intrastate as well as to interstate communications, along with the Court's assertion in the instant case that section 605 presents a federal pre-emption of the field negating conflicting state wiretap statutes, plus the Court's unconditional acceptance of the express prohibitions laid down in the *Nardone* cases, leaves little room for doubting the status of state officers indulging in wiretap activities. In view of these reasons, state officers find themselves in the unusual and undesirable quandary of violating federal law while complying with the letter of state law.

It is interesting to note in the instant case that the Court refused to decide whether *both* an "interception" and a "divulgence" were necessary for a violation of section 605 to ensue. Therefore, until this question is definitely resolved, it is possible that federal and state officers will continue to "intercept" messages stopping short of "divulging" same as trial evidence.

While it is apparent that state officers can be prosecuted for violations of section 605, it appears equally clear that state obtained wiretap evidence is not ipso facto inadmissible in state criminal proceedings. In *Schwartz v. Texas*, 344 U.S. 199 (1952) the defendant's conviction was based upon wiretap evidence secured by state officers complying with state law. On appeal to the Supreme Court, the conviction was affirmed on the ground that, notwithstanding a violation of the federal wiretap statute, federal courts will not interfere with state rules of evidence unless an express manifestation to the contrary is present within the statute. This rationale is in accordance with the doctrine of *Wolf v. Colorado*, 338 U.S. 25 (1949), later reiterated in *Steffanelli v. Minardi*, 342 U.S. 117 (1951), that federal courts are reluctant to interfere with state rules of evidence. The Court in the instant case alluded to *Schwartz v. Texas*, *supra*, and although it denied its applicability to the case at hand, on the basis that the cited case was decisive of a state matter only, it did not indicate any dissatisfaction with its rationale. Hence it must be assumed that *Schwartz v. Texas* represents the law as it now stands. Prior to the *Benanti* case, the New York Court of Appeals in considering the applicability of section 605 in state court proceedings had reached an identical conclusion. *People v. Saperstein*, 2 N.Y.2d 210, 159 N.Y.S.2d 160 (1957); *People v. Stemmer*, 298 N.Y. 728, 83 N.E.2d 141 (1948); *Harlem Check Cashing Corp. v. Bell*, 296 N.Y. 15, 68 N.E.2d 854 (1946); *accord*, *People v. Channell*, 107 Cal. App.2d 192, 236 P.2d 654 (1951).

Even though federal courts are reluctant to interfere with state proceedings,

it does not necessarily follow that federal agents may freely tender wiretap evidence in a state court to secure a state conviction. In the recent case, *Rea v. United States*, 350 U.S. 214 (1956), a federal agent prevented from offering illegally obtained evidence in a federal court, sought to introduce the same in a state court. A motion to restrain the federal agent from utilizing the evidence was granted (5-4) by the Supreme Court, on the basis of the federal courts' supervisory power over federal law enforcement agencies. This was an extension of the rule set forth in *McNabb v. United States*, 318 U.S. 332 (1943), that federal courts can prevent federal agents from presenting illegally obtained evidence in a federal court. On the strength of the *Rea* case, it would indicate that federal agents could be stopped from offering wiretap evidence in a state court.

The Court in the instant case failed not only to see any connection between section 605 and the "search and seizure" cases, but in addition, noted that it remained an open question before the Court whether evidence secured in contravention of the Fourth Amendment by state officers acting alone, could be used to secure a conviction in a federal court. What makes this notation particularly significant is that for many years it has been generally assumed that "search and seizure" evidence illegally obtained by state officers and turned over to federal authorities would be admissible in a federal court, so long as there was no federal participation in the wrongful acquisition of such evidence. This practice has become widely known as the "silver platter" doctrine. See Mr. Justice Frankfurter's opinion in *Lustig v. United States*, 338 U.S. 74, 78-79 (1949).

On the basis of the validity of this doctrine the Court of Appeals affirmed Benanti's conviction. 244 F.2d 389 (2d Cir. 1957). Judge Medina, while recognizing that a violation of section 605 did not involve any constitutional question, *Olmstead v. United States*, 277 U.S. 438 (1927), nevertheless believed that a parallel could be drawn between section 605 and "search and seizure" cases in so far as the admissibility of evidence was concerned. See *Goldstein v. United States*, 316 U.S. 114 at 120 (1942). Since the "silver platter" doctrine seemingly permitted the admissibility of state obtained evidence in a federal court minus any federal participation in the acquisition, Judge Medina reasoned that the same principle should be applied in the instant case, since only state officers committed the illegal wiretap.

Notwithstanding that the legality of the "silver platter" doctrine has never been specifically adjudicated by the Supreme Court, there are cases replete with strong inferences and dicta suggesting its validity. See *Burdeau v. McDowell*, 256 U.S. 465 (1921); *Byars v. United States*, 275 U.S. 28 (1927); *Lustig v. United States*, 338 U.S. 74 (1949); *Irvine v. California*, 347 U.S. 128 (1954). Cf. *Gambino v. United States*, 275 U.S. 311 (1927). Furthermore, there are many

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lower federal court decisions upholding the "silver platter" doctrine. E.g., *United States v. Moses*, 234 F.2d 124 (7th Cir. 1956); *United States v. White*, 228 F.2d 832 (7th Cir. 1956); *Jones v. United States*, 217 F.2d 381 (8th Cir. 1954); *Fredericks v. United States*, 208 F.2d 712 (5th Cir. 1953), *cert. denied* 347 U.S. 1019 (1954).

Perhaps the leading case advocating the "silver platter" doctrine is *Burdeau v. McDowell*, *supra*. In that case a private individual committed the illegal search and seizure. The Court held the evidence admissible, regarding the Fourth Amendment and the prophylactic rule of evidence set forth in *Weeks v. United States*, 232 U.S. 383 (1914) as applicable only where there is federal participation in the illegal acquisition of such evidence. Thereafter, federal courts found little reason to differentiate between "state officers" and "private individuals" concerning illegally obtained evidence.

Nevertheless, it should be noted that while Mr. Justice Frankfurter coined the phrase "silver platter" in *Lustig v. United States*, *supra*, he reserved comment on its validity. However, Mr. Justice Murphy, joined by Justices Douglas and Rutledge, wrote a brief concurring majority opinion stating: "In my opinion the important consideration is the illegal search. Whether state or federal officials did the searching is of no consequence to the defendant and it should make no difference to us." 338 U.S. 74, 80. This expression of views by three Supreme Court Justices seemed to somewhat tarnish the "silver platter," but its lustre was again brightened in *Irvine v. California*, *supra*, when Mr. Justice Jackson, speaking for the majority said, "Even this court has not seen fit to exclude illegally seized evidence in federal cases unless a federal officer perpetrated the wrong." 347 U.S. 128, 136. In the light of these contrary viewpoints, the extemporary comment in the instant case must be regarded as casting no small doubt on the doctrine's heretofore generally assumed authenticity.

While popular opinion may question the wisdom of excluding relevant wiretap evidence, such criticism should be directed to Congress, for a plain reading of section 605 fully vindicates the Supreme Court's decision.

Richard G. Vogt

Use of an Arrest as a Pretext for a Search Without a Warrant

Narcotic officers, acting solely on the basis of information obtained from a paid informant, arrested defendant without a warrant of arrest and seized several ounces of heroin from his person. Upon consideration of a motion to suppress the evidence on the ground that it was illegally obtained, *held* (2-1): that the narcotic officers in relying on an informant's tip had reasonable grounds to believe