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The Wiretapping-Eavesdropping Problem:
A Prosecutor’s View

Edward S. Silver

As district attorney for the second largest county in the nation, I gave Samuel Dash every possible help I could in his study, for I expected him to write an objective appraisal of the wiretapping situation. I regret to say that he has written an innuendo-splattered “thriller” instead.¹

I. THE PROBLEMS OF PRIVATE WIRETAPPING

Dash states at one point that “it is safe to say that most of the private wiretapping done in the world is done in the city of New York.”² I have no way of knowing whether or not this is really so. Nor, may I add, does Dash, although I suppose he is entitled to his guess. But even if his charge were accurate, it would still be inconsequential. It is also safe to say that New York City is the financial hub of the world. And it is safe to say that New York City is the artistic and musical hub of the world. It is safe to say that many things are “most” in the city of New York.

However, one thing is patently clear. It is not even safe to say, as Dash seems to, by innuendo, that the prosecuting attorneys are indifferent to the problem of private wiretapping.³ I have said it before,⁴ and I now reiterate—no group is more anxious to wipe out private wiretapping than the prosecuting attorneys. For by prosecuting private tappers, we underscore the distinction between unauthorized tapping used for personal, nefarious profit and authorized tapping employed to enforce the laws.

Dash devotes much space to the various unsuccessful investiga-

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¹ District Attorney, Kings County, New York; President, National Association of County and Prosecuting Attorneys.
² Dash, Knowlton & Schwartz, The Eavesdroppers (1959) [hereinafter cited as Dash].
³ Id. at 79. (Emphasis added.)
⁴ See especially Id. at 82–83.
⁵ Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 86th Cong., 1st Sess., pt. 3, at 539, 563 (1959) [hereinafter cited as 1959 Hearings].
tions and prosecutions against John G. Broady, a notorious private tapper. However, he notes only incidentally that my colleague in New York County, Frank Hogan, recently convicted Broady of an extensive wiretapping operation. If Hogan and his staff are to be criticized for anything in connection with their prosecution of Broady, it should be for their overzealousness, not their laxity or indifference. In fact it was largely on the grounds of overzealous prosecution that two dissenting judges of the New York Court of Appeals voted to reverse Broady's conviction.

Furthermore, prosecutions for unlawful wiretapping have not been limited to private citizens. In February 1959, my own office obtained convictions against two policemen, Joseph Weiner and Norman Connally. We also tried a police inspector in connection with the same affair but, after a jury disagreement, reluctantly concluded that we could not successfully prosecute him. It is interesting to note that Dash himself has publicly praised New York prosecutors on another occasion for their vigorous prosecution of wiretap violators. He said:

A significant by-product of the New York law has been the prosecution of persons who engaged in unauthorized wire tapping. The district attorney appreciates that his own privilege is secure only so long as the public is satisfied that wire tapping is being properly restricted and supervised.

That we can and do attempt to eradicate an illegal tapping situation when we know about it, there is no question. But that we in fact do not know about all such situations, there is likewise no question. Just a moment's reflection will reveal why it is so difficult for even the most industrious district attorneys or police departments to detect such highly surreptitious activities.

In dealing with typical crimes, whether or not we solve them, we at least know they have been committed. For example, a mutilated body is uncovered, premises are found looted, or a ransom note is sent. However, no comparable signs are left—indeed no signs whatsoever—when an unlawful wiretap is made and subsequently removed.

5. See Dash 29–30, 33, 81–89. “It would be difficult to exaggerate the importance of this case. . . . The sentencing of Broady to serve two to four years now introduces a new factor of risk.” Eavesdropping and Wiretapping, REPORT OF THE NEW YORK JOINT LEGISLATIVE COMMITTEE TO STUDY ILLEGAL INTERCEPTION OF COMMUNICATIONS (March 1956), reprinted in Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., pt. 2, at 290 (1958) [hereinafter cited as 1958 Hearings].

6. See id. at 90.


Perhaps a law should be passed requiring telephone companies to report unlawful taps to law enforcement officials as soon as they are discovered, instead of just taking the tap off. Other legislatively imposed surveillances may be desirable, too. Today, much equipment that can be utilized in wiretapping or eavesdropping may be readily procured by private citizens. Like most district attorneys, I would not object to reasonable legislation which either required records to be kept of the sales of all such equipment or narrowly defined those groups who may purchase such equipment under any conditions. I emphasize, however, that the legislation must be reasonable, because much electronic equipment which may be misused by private tappers may also serve perfectly proper functions in business and industry. If workable, reasonable bills can be devised to curtail abusive private tapping, I am confident they will receive strong backing from the great majority of district attorneys.\(^9\)

II. THE SO-CALLED ABUSES IN LAW ENFORCEMENT TAPPING

A. The Number of Taps

At times Dash frankly admits he is pretty much “shooting from the hip.” Thus, in his discussion of wiretapping by New York plainclothesmen, he begins:

How much wiretapping is done this way by plainclothesmen is, of course, a matter of speculation. Accuracy of the figures, however, is not really essential, since what we are after is only an idea of the quantity of wire-tapping done by police.\(^{10}\)

Dash’s complete lack of candor at other times, however, is rather appalling. For instance, immediately following the last-quoted statement, he asserts somewhat categorically that New York City plainclothesmen “are responsible for making from 13,000 to 26,000 wiretaps a year.”\(^{11}\) He compiled these figures on the basis of (1)

\(^9\) Dash does not place the entire blame for “most of the private wire tapping done in the world” on the New York police and prosecutors. He also accuses the New York Telephone Company of “an almost total lack of surveillance of private tapping.” Dash 99. Not only does he refuse to accept the candor of the company’s reports concerning its checks on complaints of suspected wiretapping, but as if with predetermined conclusions, he charges, without indicating a possible reason, that the company has adopted a common practice “of quieting complaints and playing down discoveries.” Ibid. I concede that I, like Dash, have no first-hand knowledge on this subject. But I feel compelled nevertheless at least to mention that telephone company officials have made public statements which are just as credible as Dash’s accusations and which indicate that the telephone companies do provide substantial safeguards against interception of telephone communications either by their own employees or outsiders. See, e.g., the statement of Mr. John J. Hanselman, assistant vice president of American Telephone & Telegraph Co., made before the Senate Subcommittee on Constitutional Rights. 1958 Hearings pt. 1, at 2–7.

\(^{10}\) Dash 68. (Emphasis added.)

\(^{11}\) Ibid.
the impressions of "one former telephone company employee" whose identity, length of service for the telephone company, former position in the organization, etc., are all undisclosed; and (2) talks with an unknown number of completely unidentified "former and present plainclothesmen who were asked to speculate on the wiretap activity."  

Dash does note that a comprehensive poll of all the district attorneys in the state of New York disclosed that only 2,392 wiretap orders were obtained throughout the state between 1950 and 1955. However, he regards these findings—which he entitles "the response to Silver's poll"—as inconsequential. As a matter of fact, this was not my poll but one taken by the New York Joint Legislative Committee to Study Illegal Interception of Communications (the Savarese Committee), whose work Dash generally commends highly.

My only connection with the poll was as follows: I merely sent a copy of the Savarese questionnaire to my colleagues in New York State so that I might know the extent to which wiretapping is used in other counties and discern the opinions of other prosecutors concerning its value and effectiveness. True, I did read the results into the Senate Subcommittee hearings, so they would be available for public perusal and use. That is only because the Savarese Committee itself did not see fit to publish the findings. Why, I do not know. If I were to permit myself to engage in one of Dash's favorite pastimes—speculation—I might suggest that the committee was "disappointed" by the results of its poll.

12. Ibid. (Emphasis added.)  
13. Ibid. (Emphasis added.) Dash attempts to add some degree of authenticity to his speculation by suggesting mathematical processes by which one can arrive at his conclusion of 13,000 to 26,000 wiretaps per year in New York. However, one serious fallacy in his formulas is that an important "unknown," the number of taps per day, is "suggested" by his "former and present plainclothesmen." Ibid. Moreover, even assuming Dash's speculation somewhat accurately described the amount of tapping done by the New York Police Department, it certainly is far from correct with regard to tapping by the district attorneys' offices. Consider, for example, the following statement of my predecessor in Kings County, Miles F. McDonald:

"District attorneys are not evil people who are anxious to snoop on people's telephone conversations. . . . We do not use it unless it is important, and we do not do it just for the purpose of snooping.

We only do it when we want to find out, is this particular defendant guilty of this crime? It takes six men to work a wiretap. It takes one-third, almost, of my detective force to operate one tap."

Hearings on H.R. 408 Before Subcommittee No. 3 of the House Committee on the Judiciary, 83d Cong., 1st Sess., ser. 7, at 86 (1953) [hereinafter cited as 1953 Hearings]. (Emphasis added.)

14. Dash 42.  
15. Ibid.  
16. See id. at 97–104.  
B. The Safeguards Surrounding Court Order

The gravamen of Dash's charge, if one may call it that, is that virtually no safeguard against arbitrary and indiscriminate wiretapping is provided by the requirement of a court order to tap.18

This is emphatically not so. As a practical matter, we do not make applications for wiretaps unless we feel we are legally entitled to do so.19 If we sign an affidavit in which we say, under oath, that we have reason to believe that we can get evidence of crime and we set forth sufficient facts to justify that conclusion and, further, subject ourselves to examination by the court to justify the reasonableness of the order, then and only then, can we procure an order to tap a wire.20

“All that is required,” Dash tells us, “is a statement that there is reasonable ground to believe that evidence of crime may be obtained by interception of conversations over a specified telephone.”21 Curiously, however, the “example of a New York wiretap application”22 relied on by Dash to support his assertion itself refutes this very charge; the application, an elaborate one which consumes almost two full printed pages, sets forth numerous detailed facts constituting the basis for the belief that evidence of crime may be obtained by a tap.23 Not so long ago, Dash himself vigorously defended the protections of a court order. In an article which he published in conjunction with Mr. Richardson Dilworth, now mayor of Philadelphia, at a time when Dilworth was district attorney and Dash his assistant, he said:

[It is said] that any restrictions placed on wire tapping, such as requiring that a warrant be issued by a judge, will not be enforced and that judges will rubber stamp police requests. This is a shocking argument, for it applies equally well to the warrant provisions for search and seizure, for arrests and for every other type of law enforcement activity requiring

18. See Dash 44–47, 67. Assuming some law enforcement tapping is to be legal, a collateral problem concerns who should have power to authorize tapping in the particular situation. Some prominent law enforcers have advocated dispensing with the court order and vesting full power in the Attorney General. See Brownell, Public Security and Wire Tapping, 39 CORNELL L. Q. 195, 209–11 (1954); Rogers, The Case for Wire Tapping, 63 YALE L.J. 792, 797–98 (1954). However, the court order system has worked to our satisfaction in New York.
19. For example, if one squints hard enough at the fine print in the appendix to Dash's discussion of the New York situation, Dash 117, he discovers that in Brooklyn, which has a population of some three millions, from 1951 through 1954 there was an annual average of only 53% court orders, and the correlation between ultimate convictions and orders was eighty per cent. In light of this record, it is difficult to see how anyone can seriously maintain we are just a bunch of curious fellows who like to pry into other people's lives.
21. Dash 47.
22. Ibid.
23. Ibid. at 48–49.
judicial supervision. The argument in effect says that judges will not do their duty. If that is true, we have something much more serious to worry about than wire tapping. In dealing with problems of this sort, we must assume that judges and law enforcement officers will obey the law. If they will not, then any legislation outlawing wire tapping will not be effective, since it will be these same judges and the same law enforcement officers who will interpret and apply the law. The remedy for individual abuse is criminal prosecution, impeachment and action at the polls, and not strangulation of judicial and prosecution functions.  

Whom should we believe—Dash, the prosecutor, or Dash, the ex-prosecutor? Probably we would be safest in relying on somebody else altogether. The genuineness of the safeguard of the court order has been vouched for by a respected lawmaker who has long been a close student of the wiretapping problem—Senator Kenneth B. Keating. While testifying before a subcommittee of the House Committee on the Judiciary and recommending federal legislation including a court order requirement similar to New York’s, he said:

[The requirement of a court order] has worked very well . . . [in New York]. Before any of our law-enforcement officers can put a tap on a telephone, they have to apply to one of our judges and show him why the tap is necessary and what they hope to discover by it. In this way, the public is protected against mere spying and "fishing expeditions."  

In a moment of rare concession, Dash does note District Attorney Frank Hogan’s denial that he has ever engaged in "political wiretapping" and the joint denial of Hogan and myself that applications for wiretap orders are perfunctorily heard by judges of the court of general sessions. But Dash devotes much more time and attention to the assertions of former Assistant District Attorney William Keating. The latter charges that there is widespread misuse of court orders. For example, he claims that by means of a "fraudulent" application Hogan installed a tap on the premises of Carmine De Sapio under the authorization of a court order "solely for political purposes."  

Another alleged wiretapping abuse proclaimed by Dash is that of "exploratory tapping," that is, taking a sample of the conversations which can be picked up on a particular phone prior to getting a court order to tap it. As I told the Senate Subcommittee on Constitutional Rights, I can only say that this practice does not occur
in my office. I am not going to say what the police do because I have not checked into that, but in my office we do not know in advance whether a wiretap is going to be profitable or not. We seek a court order only when we have sufficient independent evidence on which we can say that we have reasonable grounds to believe that we will get evidence of crime.\(^3\)

I guess that if one looks long enough and hard enough for "sensational stuff" one can always find some. Here, as in many places throughout the book, Dash is much stronger on innuendo than he is on the facts. To pit William Keating—a disgruntled former assistant in Hogan's office who was recently convicted of contempt of court—against his old boss, an outstanding tested prosecutor—is hardly worthy of comment.

C. Police Corruption

Exemplary of the confidential sources of "factual" information expounded in The Eavesdroppers is the "former plainclothesman" who is Dash's "authority" on wiretapping activities in New York between 1947 and 1951. Among his revelations was the following:

A. I'm being very candid with you—if I'm a plainclothesman and I'm making $80 a week, and I go in on a pair and I come up on a hot pair—... and I went in on it on my own—well, that could be worth anywhere from $500 to $1000 to me personally.
Q. You mean to keep them in business?
A. No, just leave them in business. Just walk away from it.
Q. Would that be the going rate on that?
A. Oh yes, oh, definitely, $500 up.\(^3\)

A. \(\text{[I]f you grab a bookie's worksheet and he wants to} \) and you're going to court that afternoon with it—which is also standard practice—and he wants his worksheet back, you charge him for his worksheet according to the amount of play he has on his worksheet. If he doesn't come across, as the saying goes, you just pass the word in the neighborhood or just let everybody see him get pinched, and then everybody puts in a winner. \(\ldots\) \(^3\)

Q. How extensive is that practice?
A. Oh, let me say that any man who is susceptible and needs an extra dollar will do it.
Q. And would that be true of most plainclothesmen?
A. I don't like to say this because I like being a policeman, but I think it's true of almost every cop. I don't say all.\(^3\)

\(^{32}\) Because we never know when we will get "quack" complaints, in my office we have a strict policy—and I am sure it applies to other district attorneys, too—that we will not apply for a court order to tap merely on the basis of an anonymous letter. We always investigate the matter ourselves first to obtain substantial evidence upon which to base a request for a court order.

\(^{33}\) Dash 59.

\(^{34}\) Id. at 59–60.

\(^{35}\) Id. at 60.
A. The average policeman doesn't look on bookie or policy money as dirty money.\textsuperscript{36}

Well, I suppose this is the kind of sensationalism that makes a book "sell." There seems to be no other explanation for Dash's devoting almost six full pages of his book to extracts from an interview with this fellow.

Of course, there are some crooked cops in every police department. But even some judges have been known to take a bribe. I can assure you that every New York policeman knows that if this office learns of an unlawful tap, he will be prosecuted to the fullest. If the "former plainclothesman," whoever he is, really asserted that practically every other plainclothesman would do the same, he is just a crook hoping he has plenty of company.

D. The Myths about Gambling

When Dash reveals that much wiretapping is done merely to combat gambling he acts as if he has made an expose of major proportions. For example he says:

It was also learned at this period [1948] that New York police used wiretapping principally to make gambling arrests. They did not hesitate to employ this means of investigation for very minor offenses.\textsuperscript{37}

There is a constant effort on the part of law enforcement officers to play down gambling wiretapping and to emphasize that wiretapping is principally used in investigations of major crimes. But the wiretapping done by plainclothesmen is still in large part aimed at bookmakers' operations and prostitution. As a matter of fact, more wiretapping by police is done in gambling cases than in any other kind of case.\textsuperscript{38}

But I am not the least defensive about the comparatively widespread use of law enforcement tapping to combat gambling. Rather, I am surprised that Dash adheres to the popular line that treats gambling so lightly.\textsuperscript{39} As a former district attorney, he should know better—much better.

I know of no more convincing way to dispel the popular notions about gambling and to reveal some of its many close links with the "hard core" underworld than to quote at length from the recent

\textsuperscript{36} Id. at 62.
\textsuperscript{37} Id. at 38.
\textsuperscript{38} Id. at 65–66.
\textsuperscript{39} At one time Dash's position was apparently exactly contrary, for he said: "The . . . proposal . . . [to make inadmissible in evidence conversation obtained by wiretapping] is an unreasonable interference with law enforcement, especially in the area of major crimes and rackets." Dash, Wire-Tapping: A Realistic Appraisal, 18 The SHINGLE 37, 41 (1955). (Emphasis added.)
findings of a rackets grand jury from my county which studied the subject exhaustively:

Gambling is the very heartbeat of organized crime both on a local and national scale.

The crimes encompassed by the term “gambling” in this presentment are sinister. The public has been misled as to the true nature of gambling and its serious impact on our body politic, because it is confused with practices which are indulged in at one time or another by a large proportion of the respectable citizens of the community. Almost everyone, at one time or another has gambled, whether in a private game of cards, at a church bingo, at the pari-mutuel machines at a racetrack or in some other form. The result has been a public acceptance of gambling as if it were a part of human nature and, therefore, an unimportant offense. This attitude is, in large measure, responsible for the public apathy towards the enforcement of the laws relating to gambling. The public must begin to understand the crucial difference between criminals engaged in gambling and the indulgence of decent citizens in various types of betting.

From the evidence presented to us, we state categorically that gambling crimes are linked on innumerable occasions with the most obnoxious criminal enterprises known to man. The public may think of the bookmaker in the corner candy store as an innocent betting commissioner operating a legitimate business. We have heard the evidence. We know otherwise. Actually, if you scratch the professional operator of gambling ventures you find the narcotics peddler, the loan shark, the dice game operator, the white slaver, the murderer.

These observations were underscored by the grand jury’s plea that they should be proclaimed throughout the breadth and length of our . . . nation. All of our other findings and recommendations flow from a proper understanding of this axiom of modern racketeer-

40. Presentment of the Second Additional March 1958 Grand Jury of the County of Kings on Effective Means of Combatting Violations of Laws Relating to Gambling and Police Corruption 2-3 [hereinafter cited as Presentment]. The grand jury went on to state concrete examples, including the following:

Brooklyn has been the scene of a number of unsolved gangland homicides over the past few years. Almost every one of those killings is involved with gambling ventures in one form or another. In one case where seven leading narcotics dealers were convicted . . . , six were actively engaged in gambling activities, including bookmaking and policy, which they used as the source of funds for their deadly trade in narcotics. . . . Many of these gambling figures have gone into labor rackets and coin operated machine rackets as well. The very case which was the initial subject of our investigation . . . is an excellent example of the interrelationship of gambling and other criminal ventures. Closely allied with the bookmakers and operating out of the same tavern was a group of loan sharks who financed the bookmakers. These loan sharks also operated dice games. Literally thousands of sets of crooked dice were confiscated in raids upon their homes. Guns were found in or about the dwellings of these loan sharks. Legally intercepted telephone conversations at the same tavern during the same period showed references to a holdup of a payroll truck . . . and to a burglary of many thousands of dollars worth of transistor radios. . . . Evidence showed that those same bookmakers, through the loan sharks, were dealing with the notorious Robillatto, also known as “Johnny Roberts”. . . .

Id. at 3–4. The Presentment is reprinted in 1959 Hearings pt. 3, at 551–57.
Moreover, this same grand jury, composed not of policemen and prosecuting attorneys but of ordinary citizens whose espousal of the right to privacy and other freedoms will not be doubted, found that even "the courts . . . do not comprehend the seriousness of the crimes involved and their implications with regard to the public welfare." 42

Based on these findings, the grand jury proceeded to make some very far-reaching and significant recommendations to Kings County Judge Hyman Barshay apposite to eradicating gambling and related crimes. 43 The final caveat of the presentment is especially meaningful in the context of this Article:

Relentless war must be carried on against organized crime. This war is a continuing war. We can turn the tide only by eternal vigilance and relentless prosecution of our laws. Only by such measures can we strike a truly devastating blow against gambling— the heartblood of organized crime. 44

I speak out of duty to the citizens I serve when I say that we cannot effectively carry out their request—indeed, their ultimatum—to wage a "relentless war" against crime without the use of wiretapping.

III. THE NEED FOR LAW ENFORCEMENT TAPPING

Ascertaining why district attorneys and police officials favor even a limited right to tap wires gets to the crux of the wiretapping problem. The answer is a simple one—we need this tool in order to fight modern crime effectively. Even Dash admits the usefulness of wiretapping:

A review of the cases in which convictions were obtained through the use of wiretapping in New York reveals almost incredible conversations carried on over the telephone by persons engaged in criminal activity. It appears to be untrue, though it is widely believed, that criminals who are aware of police wiretapping stop using the telephone. New York police wiretapping transcripts prove that sophisticated criminals, like all other human beings, "talk" on the telephone. Publication of police wiretapping practices, therefore, has not seriously interfered with the effectiveness of wiretapping as a police weapon. 45

41. Presentment 2.
42. Id. at 7.
43. Id. at 13–15.
44. Id. at 16.
45. DASH 87. Admittedly, there are opinions to the contrary—one anyway. The same William Keating referred to with regard to the Broady prosecution has said that it is a "national habit" to be cautious about what one says on the telephone. Transcript of The Big Ear, Presented on "NBC Kaleidoscope," March 22, 1959, p. 9, copy on file in University of Minnesota Law School Library [hereinafter cited as The Big Ear].
Our experience shows that the use of the phone has become so essential an activity that, even when persons suspect they are being tapped, we still manage to obtain information which, when cumulated, is of great value. For example, one person on the phone may say, "Are we meeting as usual on Broadway?"; a second, "Are we meeting at two o'clock?"; and a third, "Is it at Number 482?" With patience and care, much valuable information is pieced together.

Dash's discussion of the Harry Gross investigation is a case in point:

On September 14, 1950, the day before Gross’s bookmaking headquarters were raided and Gross was arrested, the district attorney's wiretappers intercepted a telephone call between Murray Michaelson, the manager of Gross's headquarters, and one of Gross's runners, Arthur Karp. Just as this call was being completed, Harry Gross called in to Murray Michaelson and this conversation also was intercepted. Both conversations indicated to the district attorney that not only was Gross operating a gigantic bookmaking business, but he was also enjoying complete police protection for which he was paying handsome sums in bribes.

This incident illustrates well the need for and efficacy of law enforcement wiretapping. Unfortunately, however, Dash lost this point in the shuffle, because he wrote a "thriller" instead of an objective report or even a well-reasoned critique of tapping. He would do well to adhere to his own staunch position of just five years ago, when he said in response to a proposal to make evidence procured by wiretapping inadmissible:

The outlaw proposal . . . is a serious and unreasonable interference with law enforcement, especially in the area of major crimes and rackets. No one questions the fact that wire tapping is tremendously effective as a weapon for combatting crime. However, those in favor of the outlaw proposal say: "Sure wire tapping is effective—but so were the rack and screw." But wire tapping is not the rack and screw. It is not an unfair or coercive procedure. It does not tend to produce the conviction of innocent people. Rather, it tends to insure the conviction of guilty people. It is an "ear witness" of crime—almost, if not as good as, an eye witness. That wire tapping may result in the overhearing of innocent conversation appears to be a basic trouble. The restrictions proposed above [court order, application by only district attorney or head of police department, limited period of effectiveness of warrant, and judicial power to destroy wiretap evidence] substantially solve this problem. Where they do not, then it is again a case of balancing interests. Reasonable searches of homes have often revealed innocent but embarrassing information. No one has suggested abolishing the right to search for this reason. Organized and vicious rackets and criminal activities are on the 'phone every day. Their conspiracies and their criminal conduct reach into the very chambers of judges, legislators, and government executives. To relax in any way the fight against such activities is to endanger the very existence of democratic government. . . . Without wiretapping these ter-
rible connections between crime and government would remain unknown, and certainly unprovable. . . . Such a weapon should be regulated and supervised, of course. But it indeed seems silly if not ridiculous, to prevent the district attorney or the head of the police department under proper supervision, to listen in on those who are in the act of destroying honest government, endangering human life, or jeopardizing the safety of the nation. 47

During the last five years, many widely publicized Senate hearings have revealed the existence of organized crime. The press, radio and television have demanded that the law enforcing agencies do something about it. 48 It has been shown that the crime syndicates and organized rackets have virtually no limitations upon them as to what instrumentalities they can use to further their nefarious activities. But in spite of this, Congress has done nothing to erase or even modify the effect of the recent case of Benanti v. United States. 49 The Supreme Court's holding in that case makes it a crime for anyone to intercept and divulge a telephone conversation, even though it is done under very restricted but permissive wiretapping statutory law such as that existing in New York.

Let me reiterate a little colloquy I wrote regarding the effect of the Benanti decision on law enforcement. This is an imaginary piece, but I think it accurately epitomizes the practical problems currently confronting law enforcers. It is a telephone conversation between a big-time racketeer and one of his henchmen.

Peanuts: Lo, Boss, thisez Peanuts.
The Boss: Yeah, hello, did the shipment come in OK?
Peanuts: Sure thing, Boss, 50 horse.
The Boss: What do you mean '50 horse'? I was expecting 50 kilos of heroin. Give it to me straight.
Peanuts: Cee Boss, dats no way to talk on the phone, you warned me y'self. I . . .
The Boss: Listen, dope, that's old stuff. My mouthpiece told me the bulls aren't allowed to stick their snoops in our private business. It's against the law, y'hear? It's dirty business to do such a thing.
Peanuts: Are you all right, Boss? You ain't cockeyed or something? Are you hitting the stuff y'self?
The Boss: Look, dope, I'm telling ya. Let 'em listen. The lip tells me and he gets paid to know. The more they listen, the better, it's better's you think. There's some stuff known like the fruit of the poisoned bush, or something. If they grab the stuff after listen, it's out. They ain' allowed to do such naughty things no more.
Peanuts: Look, Boss, should I come over? I think ya needs me.
The Boss: Forget it, Peanuts. I'm fine, great—the boys is all with me

48. This whole problem was dramatized as a result of the Apalachin meeting on Nov. 14, 1957.
49. 355 U.S. 98 (1957).
I may have been jesting a bit when I wrote this, but actually I am extremely dismayed by the effect of the Benanti decision. It may proscribe law enforcers from listening to conversations of people dealing with narcotics, murder, or any other crime, even though the state law expressly authorizes such wiretapping, as in New York. Moreover, the case may preclude law enforcers from using not only the testimony obtained via the taps but "the fruits of the poisonous vine" as well, that is, any evidence which is subsequently uncovered as a result of the lead procured by tapping. At the least, the Benanti decision renders the Communications Act of 1934 subject to the interpretation that even tapping by state authorities under court order is prohibited. In April of this year, Senator Keating and Representative Emanuel Celler introduced identical bills to obviate the confusion and to preserve the right to limited law enforcement tapping in states such as New York.51

Senate committees have graciously acknowledged information given to them by District Attorney Hogan, myself, and other district attorneys 52 which they knew had been acquired in large measure

---forget it---and say---you get another grand for the job you did yesterday. The D.A. will know his canaries can't eat lead—it's bad for their diet—that's pretty good, what?

Peanuts: OK, if ya says so, ya had me worried there for a bit . . . .

The Boss: And listen, I want you should give a couple of yards to the Criminal Liberties Union. Deys the main outfit dat made tappin' a dirty business. Now we got a right to talk "bout our private business, like good Americans should what the Constitution says they should.

Peanuts: Boss, dats what I call a good union—is it one of Dio's outfits?

The Boss: I don't care what outfit it is—they earn our t'anks. Take care of it. Ain't you got no 'preciation? Bye Peanuts, Keep your nose clean.

Peanuts: Bye, Boss.60
through wiretapping. However, even though they have used that information to publicize the dangers of organized crime, to date they have done nothing but investigate and expose—they have taken no measures to overrule Benanti or otherwise revitalize the now seriously crippled law enforcement. It is difficult to see why law enforcement agencies should simply have to forego employing this valuable instrument of crime detection and prosecution. And yet although there are those who, with vivid imagination, conjure up dire consequences that supposedly will result from the power to tap even with a court order, over twenty years of experience in New York State show that facts are more reliable than fiction. The New York Joint Legislative Committee to Study Illegal Interception of Communications has admitted that the district attorneys have never abused the privilege to tap: “We know of no instance in which illegal wiretap evidence has been offered by any prosecutors since law enforcement wiretapping was regularized in 1938.”

Yet some skeptics would taunt: “Why after 275 years do law enforcers in a democratic country suddenly need even a limited right to tap wires?” But the answer is in the question—simply that in those 275 years and especially in the last fifty, crime, like many other things, has “grown up.” Let me quote to you the words of a federal judge and former Secretary of War, Robert P. Patterson, spoken before the American Bar Association on September 19, 1951, on the subject of organized crime:

The underworld of today would rate Jesse James as a small-fry amateur. Crime has become big business, with campaigns planned and organized like operations in legitimate big business, with a structure of chief executives, fiscal departments, legal departments, public relations and the rest. Advantage has been taken of the most modern methods in business organization, swift communications, swift transportation. Advantage has also been taken of lagging organization of government. Law enforcement systems operating along lines good enough for 1851 or 1901 are too slow for the swifter pace of the time we are living in.

Further, in the same address, he said:

If we are in dead earnest in insisting that organized crime be defeated, we should lose no time in putting this powerful weapon, i.e., wiretapping, into the hands of the officers we depend on to do the necessary work. Experience in the states where interception of telephone talks by law officers is allowed proves that the liberties of decent citizens have been in no way interfered with or injured.

As was pointed out earlier, criminals still tend to use the telephone. Where is the logic in allowing law-breakers to do so with impunity in furtherance of their wrongful operations? Former Attorney General Herbert Brownell, Jr. has rather ingeniously ob-

served with respect to detection of suspected Communists and other security risks by wiretapping, "the mere fact that they have cleverly resorted to the telephone and telegraph to carry out their treachery should no longer serve as a shield to punishment." As Brownell went on to point out:

"Prior to the invention of the telephone and telegraph, you could track a criminal down by shadowing him and checking his contacts. These days, most spies, traitors, and espionage agents are usually far too clever and devious in their operations to allow themselves to be caught walking down the street with their accomplices. Trailing them or trapping them is difficult unless you can tap their messages. Convicting them is practically impossible unless you can use these wiretaps in court. . . .

It is therefore neither reasonable nor realistic that Communists should be allowed to have the free use of every modern communication device to carry out their unlawful conspiracies, but that law enforcement agencies should be barred from confronting these persons with what they have said over them."

In my opinion, these very cogent observations of Mr. Brownell are equally applicable to other types of organized crime as well. Like Senator Frank E. Moss of Utah,

I do not wish to belabor the point and I do not wish to appear as an alarmist, but it is important to recognize the threat posed by the modern criminal—he is a modern man, with modern tools at his disposal and the know-how to use them. He is represented by modern attorneys. He deals in and with the modern corporate institutions. He circles the globe in modern airplanes and he has readily available to him modern means of communications that can put him, within minutes, in touch with almost any place in the world.

We cannot cope with a jet-age criminal with a horse and buggy prosecutor. We need a modern district attorney, with modern tools and the legal right to use them. The right to wiretap, with proper safeguards, is essential.

55. Id. at 205-06.
56. My predecessor as District Attorney of Kings County, Miles F. McDonald, testified before a House subcommittee: "If you do not give the people the right to tap a wire, you are just giving the enemies of our country the right to a secret dispatch case that you cannot possibly find out about. . . . You are giving to the enemy every bit of technological progress." 1953 Hearings ser. 7, at 86.
57. 106 CONG. REC. A1440 (daily ed. Feb. 23, 1960) (speech entitled "The Modern District Attorney" delivered by Senator Moss, former President of the National Association of County and Prosecuting Attorneys, in New Orleans on Feb. 19, 1960). In the same speech, he quoted the following dramatic statement made by J. Edgar Hoover in an article in the February 1960 issue of the FBI Law Enforcement Bulletin:

"America today is threatened by a sinister, unholy alliance which saps the strength of our Nation and besmirches our country's dignity.

"To the profession of law enforcement, this dark force is known as organized crime—a lawless legion of extortionists, strong-arm hoodlums, and professional racketeers whose greed reaches into every community of our land. Their lust for power and profit costs American citizens an astounding $22 billion a year. No longer are their victims necessarily rich individuals of position who were the
I would agree with the satire of Dash the prosecutor when he defended search and seizure and wiretapping against the assertion of some starry-eyed proponents of the right to privacy. He described their view as one which "appears to be a complete distortion of our whole scheme of things, and manifests an abhorrence of criminal law enforcement, as well as a belief in the game theory of prosecution." He posed the practical problem for law enforcers as follows: "[T]he baddies and goodies are playing a game and the goodies may obtain the evidence necessary to get the baddies only by some mishap or negligence on the part of the baddies; but the goodies may not step over certain lines provided by the rules of the game, or they lose the game." 58

One of the most disheartening facets of the wiretapping situation today is the lack of public understanding of the practice itself. For some reason, the word "wiretapping" has fallen heir to evil connotations. If there were a commonly used word that meant merely the "scientific devices to combat crime," the very existence and use of that term would make most people understand much more clearly the law enforcers' point of view. As it is, when we talk of wiretapping and eavesdropping, the terms themselves create difficulties that are not truly part of the problem.

There are organizations and there are people who feel compelled to oppose wiretapping because they think that doing so makes them {\textit{ipso facto}} "liberals," whatever that word means in this context. I do not know precisely what the word "liberal" means, but if it connotes a love, a devotion, and a constant watchfulness for the liberties which we as Americans enjoy in 1960 and want our children to enjoy, then I am sure all prosecutors will take that label too. And yet, all the district attorneys of New York State, and all district attorneys with whom I have come into contact in the national association, feel most strongly that wiretapping is absolutely necessary if they are to be able to cope with the modern criminal.

IV. Concluding Observations

One of the shortcomings of The Eavesdroppers is that it does not clearly distinguish wiretapping by law enforcing agencies in their fight against crime from tapping by private investigators and other mere "snoopers." Undoubtedly, the latter variety of tapping serves no socially useful purpose and should be banned. But let us not fail to see the forest for the trees. Let us not unduly hinder the legitimate uses of wiretapping by blind efforts to eliminate its abuses.

We know that acetylene torches, for example, are sometimes used by safecrackers for illegal purposes. And yet nobody would suggest proscribing their proper and utilitarian use in industry simply because they may also be used to perpetrate a crime. Nor surely would anybody advocate that peace officers should be stripped of firearms just because pistols are also commonly possessed by thugs and stick-up men.

Wiretapping by law enforcing agencies with New York-type safeguards does not mean we prosecutors are not concerned about civil liberties. Quite the contrary. For example, the district attorneys of New York have introduced a number of bills aimed at protecting the rights of defendants.\footnote{A few examples for the year 1959 alone should suffice:}

Under existing law, N.Y. Code Crim. Proc. § 308, indigent criminals may be furnished daily minutes of the testimony at county expense only in capital cases and other narrowly limited situations. We have introduced and sponsored a bill, Senate Bill No. 184, providing for the furnishing of such daily minutes "in any case where the defendant is represented by counsel assigned by the court, . . . the defendant, is not financially able to purchase a daily copy of the testimony and . . . such daily copy is needed for an adequate defense of the charge." (Emphasis added.)

There are occasions, unfortunately, where the fact that a multiple offender has been sentenced improperly does not come to light until he has already served more time than he should have for that particular offense. We district attorneys are advocating in Senate Bill No. 1299 that in such an event "any time spent by a person under such original sentence over and above the sentence subsequently imposed . . . shall be deducted from and credited to the term of any other sentence which he may be then currently serving with respect to any other conviction of crime."

In New York, some misdemeanors are treated as a felony when committed for
the district attorneys, not the American Civil Liberties Union or the bar associations, introduced those bills.60

Allow me to use a recent decision to illustrate what I mean when I say that we district attorneys are law enforcing agents, not law violating agents. In two recent state criminal prosecutions in New York, the defendants, Pugach and O'Rourke, sought injunctions in federal district courts to prevent the introduction of wiretap evidence in state court proceedings. In both cases the injunctions were refused.61 However, on motion of Pugach to the Court of Appeals for the Second Circuit, Judge Medina voted to stay introduction of the evidence, pending determination on appeal.62 Finally, the Second Circuit, sitting en banc, vacated the stay granted in the Pugach case and affirmed the denials of an injunction in both cases.63

Theoretically, this decision does not preclude district attorneys from using evidence obtained by wiretapping. However, in his concurring opinion, Judge Waterman stated clearly that he did not believe any state judge would admit such evidence in violation of his oath,64 and further, he made the following admonition to United States District Attorneys:

the second time by the same defendant. In such an event the fact of the prior conviction of the same misdemeanor is put in the indictment. We believe it is unfair to the defendant for the jury to learn of his prior conviction. There is too great a likelihood that jurors will think: "This fellow was guilty of drunken driving once; I suppose he is guilty this time, too." Thus, the New York State District Attorneys' Association introduced and sponsored a bill, Assembly Bill No. 157, which would prohibit the district attorney from alluding to the previous conviction if the defendant would admit the same on the court record outside of the hearing of the jury.

60. As I have said before, 1959 Hearings pt. 3, at 534–35, a prosecutor has a clear duty to a defendant to see that the defendant has a fair trial. In a true sense, I never win or lose a case in the sense that one wins or loses a ball game. We are careful to see that the evidence uncovered by our investigation is correct. Then we present the evidence we have. If the jury finds for the defendant, I certainly do not feel we have "lost" the case. If I were trying to establish a "batting average" based on the percentage of successful prosecutions, I would tell my grand jury department to refrain from indicting anyone but those whom we are almost certain to convict in the trial court; but if we did this, many more bums, crooks, and racketeers would go free. As the esteemed Senator Thomas C. Hennings, Jr. remarked to me when I testified before his Subcommittee on Constitutional Rights, "we hear some claptrap about fellows who never lose cases. I have often said that the ones who never lose cases are those who have tried practically none, or liars." Id. at 534.

In my annual report for 1955 and quite apart from the context of wiretapping, I said:

While I welcome comparison of the work of my staff with that of any other district attorney's office throughout the state, I have abstained from quoting percentage of successful prosecutions because of my sincere belief that it is not a true measure of the work of the district attorney's office. Justice, and only justice, must be our goal and a desire for results that will insure statistical excellence may frequently interfere with the attainment of this end.


64. Id. at 2528.
Normally it is not the province of a member of the federal judiciary to suggest to a United States District Attorney how he should perform his duties.

[However,] I point out that in oral argument . . . [prosecuting] counsel . . . did not deny that it planned to offer wiretap evidence at . . . [the] trial, and thereby did not deny to five federal judges in open court an intent to commit a federal crime. If such a crime is committed and remains unpunished after it has been stated by the U.S. Supreme Court in Schwartt v. Texas . . . and by us here that the interests of the United States may be adequately protected through enforcement of the penal provisions of Section 501, there will have been a most extraordinary affront to this court.

As a result of this decision, Judge Widlitz, in Nassau County, refused to admit the wiretap testimony. Consequently, the indictment of O'Rourke and five or six other defendants in a juke box racket case was dismissed. It is my opinion that most judges will take the same view as Judge Widlitz, in spite of the long-standing case of People v. Defore, in which it was held that evidence, even though illegally procured, is admissible. The decision will give district attorneys, too, much pause before offering such testimony.

Many well-meaning people who do not understand law enforcement problems are, to say the least, very careless about what they say with reference to the problem of wiretapping. Everybody seemingly likes to wrap himself around with the robes of Mr. Justice Holmes and refer to wiretapping as "dirty business"; however, they use the phrase much more flippantly than did the Justice. I doubt whether even one per cent of those people has read the opinion in Olmstee v. United States where the words "dirty business" were used. And probably not many more even realize that the Olmstee case dealt with a situation where federal officers wiretapped in a bootlegging case in violation of a Washington statute and, on the basis of those unlawful taps, obtained convictions.

I agree with the great dissenters in Olmstee that officers of the law should not violate the law in fighting crime. Nobody can dispute this. But the principle announced in Olmstee has no bearing on a situation—such as we have in New York—where the state constitution authorizes district attorneys and high-ranking police officials to tap wires only under specified conditions and with meaningful safeguards. To those who like to empathize with Mr. Justice Holmes, may I suggest the following quotation: "At the present

65. Not included in U.S.L. Week excerpt, but on pp. 5-6 of concurring opinion in Docket Nos. 26116 & 26147, 2d Cir., April 14, 1960.
66. N.Y. Times, April 20, 1960, p. 34.
68. 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).
time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny.\textsuperscript{70}

There may be those who think wiretapping is a "dirty business," but who will deny the fact that murderers, narcotics peddlers, labor racketeers, and extortionists are engaged in far dirtier businesses? Such crime must be eradicated not only for the sake of preserving democracy itself but also because of its corollary effects. For example, it breeds "disrespect for law and order [which] poisons the minds of many of our young people. It produces a contempt on their part for the law and those charged with enforcing it. It leads them to deride decency and good conduct and thus promotes juvenile delinquency."\textsuperscript{71} All we seek are adequate weapons with which to fight such dirty business!

And when I say "we," I mean all of us. I cannot stress too much that the right to tap is a right given not to the district attorneys or police as such but to them as agents of the public, as agents sworn to fulfill their obligations to the public

As Senator Keating has said:

\begin{quote}
A lot of people have raised a fuss about the dangers of a police state, and invasions of rights, which tend to cloud our thinking and obscure the issues. I believe it was Judge Learned Hand who once pointed out something we tend to lose sight of: Law enforcement agencies, and the Nation itself, have important rights which must be protected, too, if our laws are to be properly enforced and our Nation is to be fairly safeguarded against the designs of its avowed enemies.

We do not want to trifle with the great principle that every man's home is his castle. But we cannot apply it blindly. It is one thing to restrain interferences with what a man may do within his own four walls; it is quite another to let him use our modern network of communications media to plot the commission of crimes all over the country, or even all over the world, from behind the same protection.

\ldots

Invasion of privacy is repugnant to all Americans. And it should be. Nevertheless, the safety of our Nation and its people must be paramount.\textsuperscript{72}
\end{quote}

Does the public wish to take away this weapon from its servants in the fight against crime? I do not think so. I think they will agree with Mr. Anthony P. Savarese, Jr., New York assemblyman and chairman of the Joint Legislative Committee that investigated wiretapping, who said:

\begin{quote}
There are certain circumstances where you've got to permit the invasion [of privacy] in the public interest. Certainly, nobody can deny that the investigation of crime is a fundamental problem. \ldots And if you don't give the police every reasonable chance to do the job, you're only cutting off your nose to spite your face.\textsuperscript{73}
\end{quote}

\textsuperscript{70} Kepner v. United States, 195 U.S. 100, 134 (1904) (dissenting opinion).
\textsuperscript{71} Presentment 6.
\textsuperscript{72} 1953 Hearings ser. 7, at 5-6.
\textsuperscript{73} The Big Ear 11. (Emphasis added.)