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Prototyping Digital Law: The Cordless Telephone Cases

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Abstract

Prior to the advent of widespread interest in the intersection of digital technology and the law, American courts considered the status of cordless telephone communications. These cases, beginning in the 1980's and carrying through to the early 1990's were most often brought in the context of criminal matters. They frequently involved the adjudication of privacy expectations within the context of the search and seizure provisions of the Fourth Amendment to the United States Constitution. In the process of consideration, courts were called upon to balance such issues as societal and personal norms against the exigencies of rapidly advancing, ubiquitous media.

This paper is presented by the primary defendant's trial counsel in the matter of *Connecticut v. McVeigh*. The case was one of first impression within the jurisdiction. In its course, it precipitated legislative responses, generated national headlines and was ultimately decided by the state's highest appellate court. The final decision constituted one of the few outcomes upholding privacy rights against the exigencies of new technologies. In analysing the decisional process, this paper contrasts *McVeigh's* reasoning with that of other courts which reached opposite conclusions. It suggests that within these differences are fundamental and often incompatible choices regarding the adjudication of privacy and new technologies.

I. INTRODUCTION: REVOLUTIONS AND RETROGRADE

The literature of political, ethical and legal theory are full of attempts to reconstruct beginnings. Locke, Rousseau, Kant, and Rawls express this theme within their social contract models [1]. William Blackstone's *Commentaries* both celebrate an account of the past and employ it to sustain a particular juridical model. The success of these ventures can at least partially be attributed to their ability to imply validity as a product of simpler times and purer motives. John Rawls' construction of his admittedly hypothetical 'original position' represents a particularly radical effort toward the elimination of contingency and the establishment of a beginning point to political decision-making [2].

Even within the relatively new situation of digital communications, a consideration of its

beginnings has its attractions. Perhaps foremost among these is its potential for deciphering the rhetorical environment which permeates nearly all present dialogue concerning nearly everything electronic. Whether through the press, broadcast media, or scholarly publications, such terms as "revolutionary", "unprecedented" and "unique" are inescapable. Similarly, the vast majority of legal efforts on these issues focus upon the complete "other-ness" of digital networks, pressing the need for a total recreation of the law [3]. These frequently Utopian, usually egoistic visions are commonly yoked to the creation narratives of the cyclically-chic creed of laissez-faire capitalism, providing a pseudo-historical "beginning" from which all future courses of action may be effortlessly inferred.

Market-driven origin accounts are not limited to the law reviews and business magazines. Such efforts are currently reflected in the radically anti-regulatory positions of the American Executive Branch as well as in its Congressional output which includes bills to eliminate or severely restrict such apparently outdated sentimentalities as the doctrine of informational fair use, public control of knowledge resources and protections against consumer privacy [4].

Because this current climate is unlikely to bypass the judiciary, a rational response might include a questioning of its foundations - including those existing in history. This paper is an attempt to contribute to this task by outlining a series of American judicial and legislative confrontations with the cordless telephone. There are several reasons for choosing this subject. First, it is a topic about which I have a somewhat unique perspective, since I was a trial counsel in the matter of *Connecticut v. McVeigh* [5]. Second, *McVeigh* and the other cordless telephone cases took place at a time when the current hype given to digital technologies was non-existent. If one reason for exploring historical beginnings is the possibility of separating facts from hyperbole and rhetoric, then this scenario presents such a time. Finally, although many cases have dealt with new technologies, the cordless telephone disputes hold a special position. This is chiefly due to the fact that unlike controversies involving more conventional communications, these matters involved primarily personal uses. Legal considerations were essentially free of worries regarding large scale networks, mass communication implications, regulatory authority and the like. Instead, the questions presented related to the experiences of individuals. Finally, perhaps due to their relatively unpretentious purposes, the introduction of these devices was accompanied by no specific legislative responses with which to formulate immediately coherent precedents. Courts were largely left on their own to decide how or if cordless technology would fit into already-existing legislation.

While no era can be realistically described as free from rhetoric, the cluster of circumstances found in the cordless phone cases can be viewed as being so truly new in character that the responses engendered were the results of a true first-encounter with a discrete technology and not primarily with its hyperbole. In these relatively brief, straight-forward moments, perhaps there exist lessons to be transferred into our currently more confused scenarios.

II. Broadcasting to the World

In late February of 1990, the Cromwell, Connecticut police were approached by a citizen who informed them that he had overheard narcotics-related conversations of neighbours in his condominium complex apparently emanating from a cordless telephone and captured through a radio scanner. The police encouraged the citizen to continue his monitoring processes and provided him with additional equipment to record any intercepted audio. In the evening of one monitoring session, the police determined that the male conversant, Timothy McVeigh was about to execute a narcotics sale and relying upon that exigent circumstance [6], detained him as he drove out of the complex. A search of the vehicle

incident to the stop produced narcotics. Subsequent police activity produced further evidence of illicit activity and the arrest of McVeigh's wife.

The Defendants challenged the initial warrantless search and the subsequently obtained evidence, claiming that it had been conducted in contravention of the Connecticut Constitution's general prohibition against such searches and seizures [7]. During the related proceedings before a judge, the prosecution sought to defeat the motion by claiming that there was no privacy interest in cordless telephone conversations and therefore no Fourth Amendment interests were violated. This was chiefly accomplished through a review of cases from the federal courts and from other states which had considered wireless privacy. In addition, the prosecution produced the testimony of an expert witness who stated that the operation of a cordless telephone made it susceptible to monitoring by outside sources. In the end, the trial judge sustained the prosecution's objection to the motion, the evidence was admitted and the Defendants appealed the ruling to the Connecticut Appellate Court, an intermediate review tribunal with the state. Before the issues were briefed, the Connecticut Supreme Court accepted direct review of the matter, effectively claiming it to be an important state issue.

At the time of the proceeding, the state constitutional provision upon which the Defendants' motion to suppress evidence was based, afforded some greater protections concerning the exclusion of tainted evidence than its federal counterpart. It otherwise tracked the provisions of the Fourth Amendment to the United State's Constitution.

It is well-accepted that the Fourth Amendment protects individuals from unreasonable searches and seizures, but its application to telephonic communication is relatively recent and contested. Until 1967, the United States Supreme Court relied upon literal Fourth Amendment language to define the limits of its scope. This restricted its application to searches and seizures related to its textual menu of "persons, houses, papers or effects". Where intangible matters were involved, such as telephonic conversations, the had Court adhered to its 1927 ruling of *Olmstead v. United States* [8] which found that wiretaps involving no physical intrusions and relating only to intangible conversations, were not covered within the amendment's contemplation.

In addition to their strict reliance upon the force of the literal word, the *Olmstead* majority engaged in a detailed discussion of the telephonic hardware involved - specifically, how it related to claims of privacy: "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment" [8, p. 466].

The dissenting voice of *Olmstead* was provided by Justice Brandeis who decried a literal reading of the amendment and argued that changing circumstances must be considered, even when such situations become capable of being less physically-based than in the past. This sentiment inevitably prevailed in the 1967 matter of *Katz v. United States* [9]. The facts of this case dealt with the warrentless placement of an electronic monitoring device to exterior portions of the telephone booth. The Court rejected this attempt at avoiding *Olmstead's* physical dictates by stating that "the Fourth Amendment protects people, not places" [9, p. 351]. Instead, the opinion emphasised the individual's expectation of privacy.

Justice Harlan's concurrence in *Katz* provided the most enduring expression of the factors involved in modern Constitutional privacy jurisprudence by setting forth a two-pronged test: First, the individual must possess a subjective expectation of privacy. Second, that expectation must be viewed by society as being reasonable [9, p. 361].

In the same year as *Katz*, the Court, in *Berger v. New York* [10] dealt specifically with the wiretap issue. It allowed these activities when conducted pursuant to the issuance of a warrant, based upon the showing of probable cause and when executed with time constraints and particularity regarding the individuals and content monitored.

The *Berger* decision was codified and expanded in the provisions of the Omnibus Safe Streets Act of 1968 ("Title III") [11]. This statute protects both "oral" and "wire" communications, providing that when unlawfully intercepted, evidence obtained must be excluded [12]. To qualify for treatment under this law, the conversation must be (1) intercepted, and (2) either "oral" or "wire" in nature.

"Wire communication" is defined as:

any communication made in whole or in part through the use of facilities for the transmission of

communications by the aid of wire, cable, or other like connection between the point of origin and

the point of reception furnished or operated by any person engaged as a common carrier in

providing or operating such facilities for the transmission of interstate or foreign communications

[13].

"Oral communication" is defined as:

any oral communication uttered by a person exhibiting an expectation that such communication is

not subject to interception under circumstances justifying such expectation [14].

Finally, "intercept" is defined as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device" [15]. These instruments are further defined as generally, "any device or apparatus which can be used to intercept a wire or other communication" [16].

While the definition of "wired" devices was certainly a critical aspect of Title III, cordless telephones were left unmentioned. Along with cellular technology, cordless devices entered the market in the 1960's and 1970's. Between 1988 and 1991, it was estimated that approximately 43,000,000 units had been sold [17]. Unlike cellular technology, which was primarily designed for long-range communication through the transmission of voice content along pre-arranged "cells", cordless models were developed for short-range communication between a radio transmitter handset and a receiver located at the base of the unit [18]. Maximum distances between handsets and base units averaged 1,000 feet. Generally, unencrypted signals carried on commercial frequencies were easily monitored with the assistance of readily-available radio scanners. Signals could also inadvertently interfere with normal receivers, baby monitors and televisions.

The first case to involve cordless technology arose in 1984. In *State v. Howard* [19], the defendant's allegedly suspicious conversations were received by a neighbour while tuning his radio. Authorities were alerted to this fact and requested that the neighbour continue to

monitor the broadcasts. Inevitably, the warrantless collection of recordings resulting in the granting of an application to search Howard's home and the discovery of narcotics.

The Kansas Supreme Court ruled that the radio portion of the cordless unit prevented it from qualifying as a "wire-based" communication as contemplated by Title III language. Although it agreed with the defence argument that at least a *part* of all telephonic conversations were carried by wire, the court stated that including cordless telephones within the "wire" definition would work "absurd" results. Moreover, the court averred that the conversations were "oral", but found that a reasonable expectation of privacy could not be located within its function. Specifically, the court noted that the phone's user's manual described the operational limitations to any buyer who would read its contents. Similar reasoning was invoked by the Rhode Island Supreme Court in *State v. DeLaurier* [20], noting the avoidance of a further absurd result:

The act of defining defendant's broadcasts as 'wire communication' would ….be that law

enforcement authorities would find it necessary to obtain a court order to listen to the A. M.

radio [20, p. 694].

Determinations of privacy through the exposition of hardware characteristics typified the majority of decisions involving non-conventional telephonic communication. Emblematic is *United States v. Edwards* [21], which dealt with the similar issue of mobile telephone interception. Denying Title III protection, the court invoked language consistent with the preceding cordless cases, and strikingly similar to that of *Olmstead*, stating that no expectation of privacy could be justified in a conversation which is, "broadcast by radio in all directions to be overheard by countless people who have purchased and daily use receiving devices or who have another mobile radio telephone turned to the same frequency."

Title III was for twenty years, the only federal statutory safeguard against telephonic interception. The increasing prevalence of portable telephonics, electronic mail, and satellite-linked systems precipitated Congress to enact the Electronic Communications Privacy Act of 1986 (ECPA) [22]. Among other things, this legislation amended Title III by prohibiting the interception of electronic communications [23]. Significantly, the ECPA included radio communications, including cellular telephony within this definition, but explicitly excluded cordless telephones from its ambit of protection [23]. At least one commentator has suggested that this action was in direct response to heavy lobbying by the cellular phone industry [18, p. 674-75]. The results of the changes included the absence of any Congressionally-created privacy expectations for cordless users and in all non-ECPA matters, the strong inference that Congress did not view cordless communication as a private matter.

Absent ECPA-based privacy protection, there remained the possibility that cordless privacy could be found through the "oral communication" prong of Title III, which allowed for the separate consideration of privacy expectation or through a straight Fourth Amendment or state constitutional analysis. The majority of the courts however, had adopted the hardware-based view that cordless technology was inherently open in character. Illustrative is *People v. Fata* [24], where a New York court denied the possibility of a reasonable expectation by stating that the conditions of cordless operation could not possibly "assure privacy" [24, p. 686].

III Overtaken by Technology

At the time of *McVeigh*, any reliance upon federal statutory law to support a privacy right in the technology would have been unreasonable. In fact, by the time of Supreme Court review, all federal wiretap claims were not pursued. Additionally, federal Constitutional protections were generally problematic to the evidentiary issue due to the presence of a "good faith exception" to the exclusionary rule which required a showing that suppression of evidence would deter police misconduct [25]. Consequently, the approach of the *McVeigh* defence involved a direct appeal to the more stringent Connecticut Constitution and to its wiretap laws, which contained independent exclusionary requirements.

Unlike its counterparts in many American states, Connecticut's Wiretap Act [26] was not enacted to mirror federal legislation. Although the definition of a "wire communication" as a "communication made in whole or in part through the use of facilities for the transmissions of communications by the aid of the telephone…" resembles the wording of Title III, the legislative history of the statute reveals intentions which led the *McVeigh* court to reject other jurisdictions' findings of clear meaning in this phrase, to restore to it an ambiguity which had been almost universally ignored and to seek clarification from the records of the enacting legislature.

The Connecticut Wiretap Act was passed in 1971 amidst debate which can reasonably be characterised as contemplative and cautious. A co-sponsor framed the goal as providing a better model for the people of the state than was given by federal law. Another supporter stated that he found it necessary to search his conscience before he could support any wiretap bill. Significantly, an advocate questioned the constitutionality of Title III, wondering aloud whether it could even serve as a guideline. The Act's stricter provisions for a three-judge warrant issuing panel and its requirement of a unanimous vote brought about further separation from the federal statute [27].

The *McVeigh* Court departed from the decisions of prior tribunals most radically in its admission of the ambiguity surrounding the definition of "wire communication". Rather than relying upon the popular and painfully hyper-technical differentiation between radio waves and metallic connections, the majority crossed a seldom-trod threshold and considered the provisions' background.

First, it emphasised that the "whole or in part" language of the wire communication definition had to be read within the context of the Act's purposes. If telephonic communication as a whole, rather than snippets of its processes was to be protected, then a holistic presumption must be invoked [5, p.610].

Likewise, a review of the legislative rationale behind the Act was found to support the conclusion that interpretations of the Act must presume the strictest possible protections against privacy invasions. Such prevalent practises as omitting privacy protections by teasing out radio portions from copper-bound transmissions must be considered suspect [5, p. 612].

Significantly, the Court also factored in the privacy interests of third parties to the cordless conversations. It noted that persons using conventional telephones would have no way of knowing that their voices would be subject to open monitoring. Again, referring to the Act's history, the majority stated: "[w]e do not believe that the legislative intent behind the wiretap act was to leave such unknowing third parties unprotected simply because the telephonic technology in such widespread use today was not available in 1971" [5, p. 614].

This thematic sentiment was given further support by reference to the *Katz* conclusion that cognisance must be taken of the role which a technology has assumed within the society. In this instance, the cordless telephone was judged to have achieved such a status. Most

significantly, the panel strongly rejected the prosecution's invocation of the still-common assertion that current law had been displaced by technology. In what can be viewed as subtle criticism of other jurisdictions' superficial consideration of federal precedent, the *McVeigh* panel noted that Congress itself had recognised that technology was advancing rapidly and had incorporated adequate elasticity into its own Title III definitions [5, p. 619].

A particularly noteworthy feature of the decision was the role of an almost contemporaneous legislative attempt to resolve the issue of cordless telephone incorporation into the Act. In 1991, several members of the Connecticut House of Representatives attempted to explicitly include cordless communication within the statutory definition [28]. The motion was defeated. The *McVeigh* Court noted that the rejection could not be read to persuasively indicate a legislative exclusion of cordless technology from the Act: "[O]rdinarily, we have viewed [bill] failures as indicative of legislative approval of an existing interpretation of substantive law" [5, p. 621].

Noted its minority status among national precedents, the Connecticut Supreme Court remanded the matter to the trial court with instructions to exclude the evidence obtained as a result of the monitoring activity [5, p. 623].

IV. Conclusion: Found Difficult and Not Tried

The problem of cordless telephone privacy has at least in part been alleviated by the addition of the technology to the protections granted under the ECPA [23], although at least one commentator remains sceptical that this will completely resolve all ambiguities attached to this medium [29]. Beyond this single issue, there remains the recurring question of how to evaluate new technologies within the context of traditional legal protections.

The history of the cordless telephone cases suggest that a majority of state and federal courts will invoke presumptions which effectively disconnect new technologies from the conventional law. The operations of these presumptions are most poignantly revealed when contrasted with the dynamics of the *McVeigh* decision. Where the Connecticut Court refused to engage in hyper-technical lecturing, the majority of the cordless phone cases were abruptly decided by the splitting of radio-based or wire-based hairs. As with the massively hardware-based exegesis of the *Olmstead* majority, by far, the cordless telephone tribunals accepted the credo that privacy is wholly defined by what is designed into circuitry.

Perhaps not surprisingly, this extremely popular techno-centric view is also remarkably compatible with the equally celebrated laissez-faire world view discussed previously. According to this philosophy, privacy, if it exists at all, can be commodifed, exchanged and even discarded under market-favourable terms. The ideal is articulated more directly by Sun Microsystems' Scott McNealy, "You already have zero privacy – get over it" [28].

The predominant juridical approach considered in this paper neatly fits into the requisites of a totalising market system. Intentional or otherwise, few courts engaging in cordless adjudication have been unable to find a laissez-faire mandate which could be refused. Here is a brief sample:

Markets require mobility. The popular model of cordless phone adjudication services this goal by neatly severing links between a technology-based issue and years - perhaps hundreds of years - of legal thought. Thus, where the *McVeigh* court willingly admitted to the definitional ambiguity of the "wire communication", its counterparts have mostly refused to venture into such difficult and time-consuming waters. Considerations of legislative intent are all but absent in most decisions regarding the purposes and histories of federal or state

wiretap acts.

Markets require certainty. Rather than endeavouring to probe the real experiences of normal cordless telephone users, the majority of the courts considered herein chose to allow the "reasonable" limits of privacy to be defined by the contents of owner's manuals. Avoiding the risks of difficult decisions - of which the recurring phrase, "absurd outcome" is apparently a synonym - most courts were willing to accept that such worries had been determined by the manufacturing process.

Markets require identifiable parties. The *McVeigh* decision is unique in its serious consideration of third-party users. Declining to focus only upon the expectations of the immediate parties, it undertook the challenge of examining factors pertaining to a wider society. Consideration of social implications can slow advancement by creating webs of intricacies which, if left ignored, often cause even worse sets of problems, but do not impede immediate progress.

In short, a comparison with *McVeigh* renders the reasoning employed by most courts in these matters subject to behaviours approaching not-so-benevolent neglect. If the simplistic rationales found in the majority of cordless telephone cases are indeed indications of how courts will decide our digital futures, the reasons for these choices may best be summed up by paraphrasing Chesterton: Comprehensive decision-making, as found in *McVeigh*, "has not been tried and found wanting; it has been found difficult and left untried" [28].

Notes

[1] J. Locke, *Second Treatise of Government*; J. Rousseau, *The Social Contract;* I. Kant, *The Foundation of the Metaphysics of Morals;* J. Rawls, *A Theory of Justice* exemplify the contract tradition.

[2] J. Rawls, *A Theory of Justice.* Cambridge, MA: Harvard University Press, 1980.

[3] See, e.g., See, e.g., D. Post, "Anarchy and state on the internet: an essay on law-making in cyberspace," J. Online Law available at http://www.wm.edu/law/publications/jol/; I. Hardy, "The proper legal regime for cyberspace," U. Pitt. Law Rev., vol. 55 (1994); D. Burk, "Federalism in cyberspace," *Conn. Law Rev.*, vol. 28, 1996.

[4] See, M. Chon, "Radical plural democracy and the internet," *Cal. Western Law Rev.*, vol. 33, 1997.

[5] *Connecticut v. William McVeigh, et. al.*, 224 Conn. 593, 620 A.2d 133 (1993).

[6] See *Connecticut v. Guertin*, 190 Conn. 440, 453 (1983): "The test of exigent circumstances … is whether under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee… endanger the safety or property of others."

[7] Article I, Section 7 of the Constitution of the State of Connecticut.

[8] 227 U.S. 438 (1928).

[9] 389 U.S. 347 (1967).

[10] 388 U.S. 41 (1967).

[11] 1968 U.S.C.C.A.N. 2112, 2163, now at 18 U.S.C.A. 2510-2522 (1994).

[12] 18 U.S.C. 2515

[13] 18 U.S.C. Section 2510(1) (1994).

[14] 18 U.S.C. Section 2510 (2) (1994).

[15] 18 U.S.C. Section 2510 (4) (1994).

[16] 18 U.S.C. Section 2510 (5) (1994).

[17] Electronic Industries Association, Consumer Electronics U.S. Sales 19 (1992).

[18] T. Rabel, Comment, The Electronic Communications Privacy Act: Discriminatory Treatment for Similar Technology, Cutting the Cord of Privacy, 23 J. Marshall L. Rev. 661 (1990).

[19] 679 P.2d 197 (Kan. 1984).

[20] 488 A.2d 688 (R.I. 1985).

[21] 632 F. Supp. 584 (M.D. La. 1986).

[22] Pub. L. No. 99-508, 100 Stat. 1848 (1986).

[23] This exclusion was rescinded by the Communications Assistance For Law Enforcement Act of 1994, Pub. L. No. 103-414, 108 Stat. 4279, 4290 (1994).

[24] 529 N.Y.S. 2d at 683 (1988).

[25] See, e.g., *United States v. Maxwell*, 42, M.J. 568, 578 (C.M. A. 1995).

[26] Connecticut General Statutes, Section 54-41a et seq.

[27] Legislative debate of the House of Representatives and Senate of the State of Connecticut, 1971.

[28] K. Markoff, A Growing Compatibility Issue in the Digital Age: Computers and Their Users' Privacy, New York Times (Online Ed. at www.nyt.com), March 3, 1999.

[29] House Bill No. 5718 (1991).

[30] See, B. Mangano, Note: The Communications Assistance For Law Enforcements Act and Protection of Cordless Telephone Communications: The Use of Technology as a Guide to Privacy, 23 Clev. St. L. Rev. 99 (1996).

[31] G. K. Chesterton, *What's Wrong with the World.* Peru, IL: Sherwood Sugden & Co., 1990, p.29.