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Constitutional Law-Right to Privacy-Electronic Surveillance

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CASE COMMENTS

CONSTITUTIONAL LAW—RIGHT TO PRIVACY—ELECTRONIC SURVEILLANCE

On October 4, 1971, defendant, Jerald North, allegedly kidnapped a young school girl, dragging her into his car at knifepoint. Investigation by police led to his arrest and incarceration the following day. North's wife visited the jail on October 6 and was allowed to meet with her husband in the arresting officer's office. After the detective left the room and closed the door behind him, the couple engaged in a five minute conversation that was recorded without their knowledge or consent. The recording was presented as evidence at the preliminary hearing. Following his arraignment, the defendant moved to suppress this and other evidence which had been obtained without a warrant.¹ His motion was denied. North then brought a mandamus proceeding for review of the court's denial. Held, writ of mandamus issued. A divided California Supreme Court held that the officers' "search" of North's conversation with his wife was unlawful, since, under the circumstances, he had "a reasonable expectation his conversation was, and would remain, private."² North v. Superior Court, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).

Three months later, the California Supreme Court had a chance to reevaluate its reasoning in North. A divided court this time affirmed a juvenile court's refusal to suppress evidence of a conversation similarly monitored and recorded. This communication between an infant defendant and his uncle occurred in a police interrogation room. During the conversation, the defendant admitted having stabbed the victim. The court distinguished North by stressing that the eavesdropping there was on a special communication between a husband and wife that the police had represented

¹The car allegedly used by North in the kidnapping was parked on a public street near his home. Contemporaneously with the arrest, the police seized and examined the car without a search warrant. North argued that such an examination constituted an unreasonable search of his property. Since additional evidence connecting North with the kidnapping resulted from this search, he moved to suppress this evidence. The Supreme Court of California denied the motion, stating that "warrantless seizures of evidentiary items in plain view of arresting officers" are lawful. North v. Superior Court, 8 Cal. 3d 301, 308, 502 P.2d 1305, 1309, 104 Cal. Rptr. 833, 837 (1972).
²Id. at 312, 502 P.2d at 1312, 104 Cal. Rptr. at 840.
would be confidential. Here, however, the juvenile defendant had no “reasonable expectation” that his conversation would be private.\footnote{In re A., 30 Cal. App. 3d 880, 106 Cal. Rptr. 729 (1973).} In re A., 30 Cal. App. 3d 880, 106 Cal. Rptr. 729 (1973).

Both In re A. and North apply a reasonable expectation of privacy test. The mere existence of the test reflects the broad development of fourth amendment\footnote{U.S. Const. amend. IV. The fourth amendment protects individuals against unlawful acts by federal officials. By virtue of the fourteenth amendment, the protection extends to unreasonable searches and seizures by state officials. Mapp v. Ohio, 367 U.S. 643 (1961). In Wolf v. Colorado, 338 U.S. 25, 27 (1949), the Supreme Court stated that “the security of one’s privacy against arbitrary intrusion by the police . . . is . . . implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause” of the fourteenth amendment. For purposes of this article, the term fourth amendment will be used to include the protection afforded an individual against unlawful governmental (i.e., state or federal) intrusions.} protection against unreasonable governmental intrusions, particularly in the area of electronic eavesdropping.\footnote{Generally, the law recognizes two types of communications that can be electronically monitored. One is an oral communication which is normally tape-recorded. The other is a wire communication which is usually made over a telephone and intercepted by a method commonly referred to as wiretapping. In North and In re A., the conversations involved were oral communications. This comment will focus on oral communications and their relationship to the protection afforded by the fourth amendment.} Justice Harlan, in his concurring opinion in Katz v. United States,\footnote{A right of privacy is not expressly guaranteed by the Bill of Rights. Yet, the Supreme Court has deemed it to be a fundamental right equal in significance to the enumerated rights. Justice Douglas, in his opinion in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), explained that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” While various facets of privacy are contained in several of the first ten amendments, the fourth amendment alone has been considered to create a penumbral “right to privacy, no less important than any other right carefully and particularly reserved to the people.” Mapp v. Ohio, 367 U.S. 643, 656 (1961).} upon which the North decision strongly relied, first proposed the test. He listed two requirements for determining a right of privacy—“first that a person have exhibited an actual

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In re A., 30 Cal. App. 3d 880, 886, 106 Cal. Rptr. 729, 733 (1973). The reasons for the distinction are more fully explained later in this comment. As will be shown, the California court looked to the surrounding facts in each case to determine the reasonableness of expecting privacy.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

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(subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' 7

Originally, the fourth amendment was applied strictly to protect individuals only against unreasonable physical trespass to their person or property. The Supreme Court, in *Olmstead v. United States*, determined that wiretapping did not violate the fourth amendment because it did not constitute a physical entry upon another's premises. 9 For the same reason, the Court, in *Goldman v. United States*, decided that the use of a detectaphone to eavesdrop upon an oral communication was not unlawful. 10 After *Silverman v. United States*, 11 it became apparent that the requirement of physical trespass was neither legitimate nor practical. In *Silverman*, the electronic device used was forced through the defendants' wall until it touched the heating ducts. The Court deemed this technical invasion a trespass and, thus, a violation of the fourth amendment. In *Goldman*, the detectaphone was placed on the wall of an adjoining room not belonging to the defendants. Since there was no physical trespass, the evidence obtained was held admissible. Yet, as Justice Douglas pointed out in his concurring opinion, the application of the law rested on irrelevant facts. Since the invasion of privacy was the same in each case, the rulings should have been the same.

The Supreme Court, in *Katz v. United States*, 12 finally overruled the *Olmstead* decision. The officers involved placed a device inside a public telephone booth to record the defendant's end of a conversation. In holding the tape-recording inadmissible, the Court declared that "the Fourth Amendment protects people, not places." 13 Thus, protection depends neither upon whether a physi-

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7 104 U.S. at 361.
8 277 U.S. 438 (1927). Government officials obtained evidence by means of a wiretap against defendants who were conspiring to violate the Prohibition Act. Since the tapping connections occurred in an office building on a public street and not upon the defendants' property, the Court found no fourth amendment violation. Justice Brandeis, in his dissenting opinion, gave support to a broadening of the protection guaranteed by the fourth amendment. He described the right of privacy as "the most comprehensive of rights and the right most valued by civilized man." He added that "every unjustifiable intrusion by the Government" upon a man's privacy "must be deemed a violation of the Fourth Amendment." *Id.* at 478.
9 316 U.S. 129 (1942). Although the Court refused to overrule *Olmstead*, there was a strong minority in favor of doing so.
12 Id. at 351.
cal trespass has occurred nor upon where a person is located at the
time of the intrusion. Rather it turns on what an individual seeks
to preserve as private.\textsuperscript{14} Justice Harlan concurred that the protec-
tion afforded by the fourth amendment concerned people, al-
though he described it in terms of place. He explained that the
primary issue is not whether, at other times, the telephone booth
"is accessible to the public." The question is whether the place is
"temporarily private," such that its periodic occupants can rea-
sonably expect to be alone and free from an intruding ear.\textsuperscript{15}

In a strong dissent in \textit{Katz}, Justice Black objected to an overly
broad interpretation of the scope of the fourth amendment. Such
an interpretation, he believed, results in a judicial fabrication of a
constitutional right of privacy.\textsuperscript{16} Even the dissenting opinion in
\textit{North} accepted without question the premise of an individual's
right of privacy. Justice Sullivan queried, however, how any defend-
ant confined in jail could reasonably expect to be alone.\textsuperscript{17} Cer-
tainly, if one favors a strict application of the fourth amendment,
as did Justice Black, then the protection extended in \textit{North} is
grossly beyond its legitimate scope. Given a broader view and Jus-
tice Harlan's reasonable expectation of privacy test, however, the
protection afforded does not appear as nearly out of focus.

In \textit{Lanza v. United States},\textsuperscript{18} the Supreme Court had no need
to decide whether a recording of a conversation between two broth-
ers, one of whom was confined in jail, constituted an unreasonable
search and seizure. Yet, the dicta used in discussing the issue is
partly responsible for the opposite decisions in \textit{North} and \textit{In re A}.
On the one hand, the court asserted that "it may be assumed that
even in a jail, or perhaps especially there, the relationships which
the law has endowed with particularized confidentiality must con-
tinue to receive unceasing protection."\textsuperscript{19} In \textit{North}, the California

\textsuperscript{14}Id.
\textsuperscript{15}Id. at 361 (concurring opinion).
\textsuperscript{16}Id. at 371 (dissenting opinion).
\textsuperscript{17}370 U.S. 139 (1962). The petitioner, who had been given immunity from
prosecution, was convicted for refusing to answer questions presented by a fully
authorized legislative committee. A conversation between the petitioner and his
brother, who was confined in jail, had been intercepted. Petitioner argued that this
constituted an illegal search and seizure which violated the fourteenth amendment.
Consequently, he contended that he could not be compelled to answer any ques-
tions concerning the conversation. The Supreme Court held that it did not have to
decide the issue, since some of the questions which the petitioner was convicted for
refusing to answer were unrelated to the intercepted conversation.
\textsuperscript{19}Id. at 143.
court recognized a marital communication privilege, quoting the above language. On the other hand, the Lanza court stated that it was "at best a novel argument" to claim that one in jail was protected by the fourth amendment, since "official surveillance has traditionally been the order of the day." The In re A. court adopted this reasoning to reach its conclusion.

While the presence or absence of a confidential relationship in the two California cases was important to their opposite holdings, the reasonable expectation of privacy test was crucial. If the privacy of the defendants' conversations rested solely upon with whom they had conversed, the test would be arbitrary and unfair. The significance and merit of the reasonable expectation test is that, in its application, it is not a test or formula at all. Reasonableness can be determined only by reviewing fairly all the facts in a given case and not by applying some arbitrary rule. In North, the detective surrendered his own office, shut the door behind him, and left North and his wife entirely alone. These facts led the couple to expect, with justification, that their conversation would be private.

In In re A., the police made no such implied representation that the conversation would be private. The defendant and his uncle conversed in an interrogation room rather than a detective's private office. Furthermore, the defendant's uncle was aware of a special mirror in the room through which the police could observe them. In view of these particular facts, the California court held that the defendant could not have reasonably expected his conversation to be private.

As the court pointed out in In re A., the reasonable expectation test is consistent with recent federal legislation. In 1968, Congress enacted a statute making the interception of any oral communication illegal and forbidding the introduction of such

\[\text{[A] spouse . . . has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.}\]  


\[\text{8 Cal. 3d at 310, 502 P.2d at 1310, 104 Cal. Rptr. at 838 (1972).}\]

\[\text{2370 U.S. at 143.}\]

\[\text{30 Cal. App. 3d at 884, 106 Cal. Rptr. at 732.}\]

\[\text{4Ud. at 883.}\]

unlawfully obtained evidence in any trial. Title III of the Act defines oral communication as that "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." Thus, the requirement for a citizen's protection against the use of warrantless recordings of oral conversations is the same under Title III as under Justice Harlan's application of the fourth amendment—a reasonable or justifiable expectation of privacy.

In addition to California, this test has also been used in the federal courts. It is likely to be applied in other state courts, particularly in those states which, like West Virginia, have no previously developed standard of conduct by way of legislation or decision with regard to the interception of communications. The West Virginia constitution prohibits unreasonable searches and seizures. The provision is virtually identical to the fourth amendment of the Federal Constitution and, according to the West Virginia Supreme Court of Appeals, should be construed in harmony with it. West Virginia also recognizes the exclusionary rule. In State v. Wills, the West Virginia court declared that any evidence

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26Id. § 2515.
27Id. § 2510 (emphasis added).
28Although several federal courts have held Title III constitutional, the Supreme Court has not yet ruled on the question. One federal court recently held the statute violative of the fourth amendment in certain circumstances. United States v. Whitaker, 343 F. Supp. 358 (E.D. Pa. 1972). Some commentators have raised serious doubts about its constitutionality, e.g., Schwartz, The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich. L. Rev. 455 (1969). The most significant criticism of Title III came from Justice Douglas, who deemed it unconstitutional in his dissenting opinion in United States v. Cox, 406 U.S. 934 (1973). Nevertheless, the constitutionality of 18 U.S.C. § 2510 (1971), which defines oral communication, is not under attack. In fact, the criticism has not been directed at a possible allowance of excessive protection of personal rights. Rather, the fear is that Title III is likely to permit abusive eavesdropping upon private conversations.
29United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972). A search of a prison cell produced documentary evidence sufficient to prove the defendant guilty of tax offenses. The court applied Justice Harlan's test and determined that the prisoner had no reasonable expectation of privacy in his prison cell.
30W. Va. Const. art. III, § 6, provides:
  The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.
3291 W. Va. 659, 114 S.E. 261 (1922).
obtained by a search that violates the fourth amendment is inadmissible in a trial against the accused. Moreover, the West Virginia Legislature enacted a law, in 1965, permitting a defendant to suppress the use of illegally secured evidence.\textsuperscript{33} Generally speaking then, West Virginia law on searches and seizures is compatible with federal law, and, as pointed out in \textit{State v. Abdella},\textsuperscript{34} great weight will be given to United States Supreme Court decisions in interpreting the West Virginia constitution.

More specifically, with respect to confidential communications between spouses, West Virginia, by statute,\textsuperscript{35} forbids the admission of testimony in a court of law by one spouse without the consent of the other. This statute is narrower in scope than the California law, which gives a spouse the "privilege . . . to prevent another [person] from disclosing" a marital conversation made in confidence.\textsuperscript{36} In fact, the West Virginia court ruled on this very issue in \textit{Nash v. Insurance Co.}\textsuperscript{37} The court held that, despite the couple's intention that their conversation be private, "a third person who overheard it, whether his presence was known or not, may testify as to what was said."\textsuperscript{38} The West Virginia court would be unlikely to admit such evidence today if the "third person" is actually a concealed tape recorder, intentionally placed near the couple in order to eavesdrop.\textsuperscript{39} Upon this background of law in

\textsuperscript{33}W. VA. CODE ANN. § 62-1A-6 (1966), provides: "A person aggrieved by an unlawful search and seizure may move for the return of property and to suppress from use as evidence anything so seized on the ground that (1) the property was illegally seized without a warrant . . . ."
\textsuperscript{34}139 W. Va. 428, 82 S.E.2d 913 (1954).
\textsuperscript{35}W. VA. CODE ANN. § 57-3-4 (1966), provides:
Neither husband nor wife shall, without the consent of the other, be examined in any case as to any confidential communication made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage existed.

West Virginia also recognizes an attorney-client privilege. State v. Fisher, 126 W. Va. 117, 27 S.E.2d 581 (1943). Furthermore, in justice of the peace courts, West Virginia renders not only a spouse or an attorney incompetent to testify, but also a clergyman concerning any confession and a physician concerning any communication made by his patient. W. VA. CODE ANN. § 50-6-10 (1966).
\textsuperscript{36}CAL. EVID. CODE § 980 (Deering 1965).
\textsuperscript{37}106 W. Va. 672, 146 S.E. 726 (1929).
\textsuperscript{38}Id. at 676, 146 S.E. at 727.
\textsuperscript{39}Since \textit{Nash}, the West Virginia court has recognized a right of privacy. In \textit{Roach v. Harper}, 143 W. Va. 869, 876, 105 S.E.2d 564, 568 (1958), it was described as "an individual right that should be held inviolate. To hold otherwise, under modern means of communication, hearing devices, photography, and other technol-
West Virginia, cases similar to *North* and *In re A.* will be decided. Should West Virginia embrace the reasonable expectation standard? Does the test exaggerate the rights of an individual and neglect the legitimate interests of society? Although an individual's right to privacy is considered fundamental, the interest of the state in convicting those guilty of serious felonies is certainly substantial.

Ideally, a law or a test which applies the law should balance the interests of an individual with those of society. In *Katz*, the Supreme Court rejected the rigid *Olmstead* rule and sought to create a standard which would achieve this balance. Assuming a broad view of the fourth amendment, the Supreme Court appears to have been successful. With its focus on protecting people rather than particular places, the Harlan test weighs both interests: It considers the individual's intention that his conversation be private and requires that his expectation be one which society recognizes as reasonable.

Finally, it becomes apparent that the test is also logical. When it is reasonable according to society's standard for a person to expect his communications to be private, it is unreasonable for society without due authorization to search or eavesdrop upon such private communications. The converse is true as well.

*J. Timothy DiPiero*

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logical advancements, would effectively deny valuable rights and freedoms to the individual."