ValpoScholar Valparaiso University Law Review

Volume 5
Number 3 *Spring 1971*

*pp.*676-682

Spring 1971

Criminal Law–California's "Vicarious Murder Theory" Extends Felony Murder Doctrine

Follow this and additional works at: https://scholar.valpo.edu/vulr

 Part of the Law Commons

Recommended Citation

Criminal Law–California's "Vicarious Murder Theory" Extends Felony Murder Doctrine, 5 Val. U. L. Rev. 676 (1971).
Available at: https://scholar.valpo.edu/vulr/vol5/iss3/11

This Comment is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

Valparaiso University

CASE COMMENTS

CONSTITUTIONAL LAW—CRIMINAL LAW: *Warrantless Electronic Surveillance of Dissident Domestic Organizations under the National Security Exception.*

INTRODUCTION

In *United States v. Sinclair,*[1] the defendants were indicted on charges of conspiring to bomb an office of the Central Intelligence Agency located in Ann Arbor, Michigan. Following the indictment, defense counsel filed a pretrial motion for disclosure of all records, logs and memoranda obtained from any electronic surveillance directed at the defendants pursuant to *Alderman v. United States.*[2] The motion further requested an evidentiary hearing to determine whether any evidence upon which the indictment was based or which the Government intended to introduce at trial was tainted by such a surveillance.[3] The Supreme Court ruled in *Alderman* that the Government must disclose to the defendant all conversations to which he was a party or that occurred on his premises that were overheard by means of any illegal electronic surveillance.[4] Therefore, a ruling on the legality of the surveillance was necessary to determine what disposition should be made of Sinclair's motion.

The issue before the court was whether the Attorney General, as

---

1. Criminal No. 44375 (E.D. Mich., Jan. 25, 1971).
2. 394 U.S. 165 (1969).
3. *Weeks v. United States,* 232 U.S. 383 (1914), gave birth to the exclusionary rule prohibiting the admission in a federal court of any evidence gained in violation of the defendant's fourth amendment rights. *Silverthorn Lumber Co. v. United States,* 251 U.S. 285 (1920), expanded the exclusionary rule to prevent the admission of the fruits of such illegally acquired evidence. *Silverman v. United States,* 365 U.S. 505 (1961), and *Katz v. United States,* 389 U.S. 347 (1967), applied the expanded exclusionary rule to illegally overheard oral communications ruling for the first time that the interception of oral communications constitutes a "search and seizure" within the fourth amendment.

The question to be determined in an evidentiary hearing for taint is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963).

4. For a discussion of the constitutionality of the practice of wiretapping and electronic surveillance see Berger v. New York, 388 U.S. 41 (1967); Warden v. Hayden, 387 U.S. 294, 312 (1967) (Douglas, J., dissenting); Osborn v. United States, 384 U.S. 323, 349 (1966) (Douglas, J., dissenting); Clark, *Wiretapping and the Constitution,* 5 CALIF. WESTERN L. REV. 1 (1968); Spritzer, *Electronic Surveillance By Leave of the Magistrate: The Case in Opposition,* 118 U. PA. L. REV. 169 (1969); Note, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework,* 50 MINN. L. REV. 378 (1965).

Produced by The Berkeley Electronic Press, 1971

an agent of the President, may authorize the warrantless eavesdropping[5] on dissident domestic organizations[6] under the guise of protecting the "national security."[7] If the Attorney General was deemed to possess this delegated power, then the eavesdropping would have been legal and disclosure of the information to the defendant would not have been required.[8] The ensuing arguments submitted by the Government for such warrantless eavesdropping have also been employed in two other recent cases.[9]

It is asserted by the Government that the President, as Chief Executive, has the duty to "preserve, protect and defend the Constitution." In accordance with that duty, he possesses the inherent constitutional power to authorize warrantless eavesdropping in cases involving the national security and to determine unilaterally whether action in a given situation would be in the interest of national security. This power is evidenced by three presidential memorandums and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[10] The Government further contends that pursuant to the President's duty to "preserve, protect and defend the Constitution," it is "hardly unreasonable" for him to authorize eavesdropping without a warrant in situations involving groups considered to be threats to the existence of the Government.[11]

The court in *Sinclair,* unable to concur with the Government's reasoning, stated:

> An idea which seems to permeate much of the Government's argument is that dissident domestic organizations are akin

---

5. Unless otherwise indicated, "eavesdropping" will include wiretapping and bugging for the purposes of this comment.

6. The defendants in *Sinclair* are leaders of the White Panther Party having headquarters in Ann Arbor, Michigan.

7. The constitutionality of warrantless eavesdropping in national security cases has not been decided by the Supreme Court. *See* Katz v. United States, 389 U.S. 347, 358 n.23 (1967). For extended discussion of this issue see Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1968); Theoharis, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception,* 14 WAYNE L. REV. 749 (1968); Note, *Eavesdropping at the Government's Discretion—First Amendment Implications of the National Security Eavesdropping Power,* 56 CORNELL L.Q. 161 (1970); Comment, *Privacy and Political Freedom: Application of the Fourth Amendment to National Security Investigations,* 17 U.C.L.A. L. REV. 1205 (1970).

8. Giordano v. United States. 394 U.S. 310 (1968) (White, J., concurring).

9. United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971); United States v. Dillinger, Criminal No. CR 180 (N.D. Ill., Feb. 20, 1970). This case is better known as the "Chicago Conspiracy Trial."

10. Omnibus Crime Control and Safe Streets Act of 1968, § 802, 18 U.S.C.A. §§ 2510-20 (1970).

11. The fourth amendment states in part:

> to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship. It is to be remembered that in our democracy all men are to receive equal justice regardless of their political beliefs or persuasions. The executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because certain accused persons espouse views which are inconsistent with our present form of government.[12]

The court adopted the decision of *United States v. Smith*[13] which held that "in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment." The defense counsel's motion for disclosure and evidentiary hearing was granted.[14]

The purpose of this comment is to examine the legitimacy of the Government's attempt to combine dissident domestic groups with hostile foreign elements under the heading of "national security." A consideration of the ramifications of the *Sinclair* decision and of the present inability of the courts and citizenry to deter illegal eavesdropping will also be included.

THE "NATIONAL SECURITY" DISCREPANCY

The memorandums of Presidents Roosevelt, Truman and Johnson imply the existence of presidential powers to act in the interest of "national security." The confusion arises in an endeavor to characterize those situations which are to be embodied within that category.

President Roosevelt's memorandum[15] to the Attorney General was issued in response to the ominous threat to national security posed by the Axis powers and their active supporters. In consideration of the increasing number of " 'fifth columns' [being formed] in other countries . . . in preparation for sabotage," the President authorized the Attorney General to utilize "listening devices" to investigate "persons suspected

---

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

12. United States v. Sinclair, Criminal No. 44375 (E.D. Mich., Jan. 25, 1971).

13. 321 F. Supp. 424 (C.D. Cal. 1971).

14. *Appeal docketed,* No. —, 6th Cir., Feb. 15, 1971.

15. Memorandum from President Roosevelt to Attorney General Jackson, May 21, 1940, on file in the Truman Library, Stephen Speingarn Papers; United States v. Smith, 321 F. Supp. 424, 430 (C.D. Cal. 1971).

Produced by The Berkeley Electronic Press, 1971

of subversive activities against the Government of the United States, including spies."[16] Roosevelt further stated, however, that he fully concurred with the Supreme Court's prohibition of wiretap evidence in the "prosecution of citizens in criminal cases," agreeing that "under *ordinary* and *normal* circumstances, wiretapping should not be carried on by the Government for the excellent reason that it is almost bound to lead to abuse of civil rights."[17] It is clear that the utilization of "listening devices" was not to be sanctioned in any domestic matter during time of peace;[18] so far as relates to citizens, they were to be used only in emergency situations when investigating spies.[19] The Roosevelt memorandum remained in effect for the duration of World War II.

With the advent of peace to the world came paranoia and distrust among the major powers. Responding to the psychological atmosphere, Attorney General Tom C. Clark asked President Truman for a continuation of the previous administration's policy, asserting that the emergency which had precipitated the Roosevelt policy was still in existence.[20] Mr. Clark further requested, in view of the "troubled period in international affairs" and a "substantial increase in crime," an expansion of wiretapping to include "cases vitally affecting the domestic security."[21] This expansive request was in direct conflict with the policy advanced by President Roosevelt. There was, however, in Mr. Clark's reiteration of President Roosevelt's policy, no mention of Roosevelt's abhorrence to the use of wiretapping in domestic cases "under normal circumstances." Also deleted was the final sentence of the President's policy which read: "You are requested furthermore to limit these in-

16. *Id.*

17. *Id.* (emphasis added).

18. The Communications Act of 1934 prohibited all wiretapping: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ." 47 U.S.C. § 605 (1958). The Department of Justice, however, has interpreted the Act as prohibiting only the interception *and* divulgence and has considered interception alone to be lawful, allowing the gathering of information for "intelligence" purposes. Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L.Q. 195, 197 (1954).

19. In a letter to the House Judiciary Committee in 1941, President Roosevelt wrote:

> I have no compunction in saying that wire tapping should be used against those persons, *not* citizens of the United States, and those few citizens who are ***traitors*** to their country, who today are engaged in espionage and sabotage against the United States. . . .

Reprinted in *Hearings on H.R. 2266 and H.R. 3099 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 77th Cong., 1st Sess. 257 (1941) (emphasis added).

20. Letter from Attorney General Clark to President Truman, July 17, 1946, on file in the Truman Library, Stephen Speingarn Papers; United States v. Smith, 321 F. Supp. 424, 431 (C.D. Cal. 1971).

21. *Id.*

vestigations so conducted to a minimum and to limit them insofar as possible to aliens." Evidently unaware of these deletions, President Truman granted the Attorney General's request.[22]

Numerous bills were introduced in the 1950's in an attempt to explicitly legalize wiretapping in national security cases.[23] Debates concerning these bills centered around necessity and procedure rather than constitutional infringement. The controversy continued with the defeat of each of these bills. In an attempt to clarify the Government's position and "avoid any misunderstanding" concerning the extent to which eavesdropping was to be permitted, President Johnson issued a memorandum to all departmental and agency heads stating in part:

> No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved, (except in connection with investigations related to the national security).[24]

The mere restatement of the Roosevelt exception with no qualifications was of little assistance in resolving the controversy.

The Supreme Court in *Berger v. New York*,[25] responding to pressure exerted by the Congress and investigative agencies, indicated the necessary restrictions for a "constitutional" eavesdrop.[26] The response was issued in a negative manner, stating the reasons for holding a New York eavesdropping statute unconstitutional. Congress immediately acted upon the Court's intimation that eavesdropping may be permitted within certain restrictions by enacting Title III of the Omnibus Crime Control

---

22. The President, on July 17, 1947, wrote "I concur" at the foot of the Attorney General's letter. *Id.*

23. *See* Theoharis, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L. REV. 749, 763-65 (1968).

24. Memorandum of the President, June 30, 1965; United States v. Smith, 321 F. Supp. 424, 431 (C.D. Cal. 1971).

25. 388 U.S. 41 (1967).

26. The suggested regulations for a "constitutional" eavesdrop were: 1) the warrant must particularly describe the person and place to be searched and the conversations to be seized; 2) it must be based upon probable cause required by the fourth amendment; 3) it must authorize only one limited intrusion and not a series; 4) continuation of the eavesdrop period must be based upon a showing of present probable cause; 5) there must be an automatic termination date in the event the conversation sought is seized before the limited period of the eavesdrop ends; 6) the officer must make a return on the warrant showing the manner of execution and the materials or information seized; 7) use of evidence and leads obtained as a result of such eavesdropping should be limited solely to the investigation and prosecution of the stated crime; 8) there must be a showing of exigency in order to avoid the requirement of notice to the subject upon termination of the surveillance. *Id.*

Produced by The Berkeley Electronic Press, 1971

and Safe Streets Act of 1968.[27] In the words of one writer: "There are numerous particulars in which the Court might ultimately find that the warmth of the legislative reception exceeds the bounds of the judicial invitation."[28] Title III surely constitutes one such particular. It embraces the regulations as proposed by the Supreme Court in *Berger* and includes a national security provision similar to that embodied in the Roosevelt memorandum.[29] In addition, Title III contains the following all-inclusive provision of questionable constitutionality.[30]

> Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.[31]

The mere reference, of course, to a certain constitutional power of the President bespeaks nothing as to the actual existence of such a power. In answer to the contention that the above provision lends support to the Government's argument, the court stated in *United States v. Smith*:[32] "Regardless of these exceptions in the criminal statute, the President is, of course, still subject to the constitutional limitations imposed upon him by the Fourth Amendment."[33]

Approximately thirty years have passed since President Roosevelt's memorandum established the original limitations of the national security

---

27. 18 U.S.C.A. §§ 2510-20 (1970).

28. Spritzer, *Electronic Surveillance By Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 177 (1969).

29. The "national security" provision reads:

> Nothing contained in this chapter or in section 605 of the Communications Acts of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional powers of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.

18 U.S.C.A. § 2511(3) (1970).

30. *See* Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order."* 67 MICH. L. REV. 455 (1968); Note, *Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968*, 23 RUTGERS L. REV. 319 (1968). In reference to the Crime Control Act, Justice Goldberg said: "This law, along with much needed measures to strengthen law enforcement, contains in Titles II and III provisions which are . . . of dubious constitutionality." Goldberg, *Criminal Justice in Times of Stress*, 52 J. AM. JUD. SOC'Y 54 (1968).

31. 18 U.S.C.A. § 2511(3) (1970).

32. 321 F. Supp. 424 (C.D. Cal. 1971).

33. *Id.* at 425.

exception. During that period disturbing liberties have been taken with that exception which pose serious constitutional questions. The original exception to the then existing wiretap law was to be of limited duration, lasting for the duration of the emergency which had precipitated the policy, and was to be applied only to hostile foreign powers and their agents in the United States. Though World War II had ended, President Truman continued the policy and expanded it to include subversives of any sort. President Johnson's ambiguous restriction of eavesdropping to cases *related* to national security also permitted expansive interpretation. Employing Title III as a guideline, the alleged national security exception to the fourth amendment warrant requirement

> might be construed to embrace even a movement to alter the electoral college, or more pertinently, any black militant or radical group such as the Black Panther Party, Students for a Democratic Society, the 'Yippies,' or any other 'subversive' organization even though it has no credible links to a foreign power.[34]

The *Sinclair* decision would appear to partially resolve the incessant discrepancy by omitting "wholly domestic groups" from the national security exception. A dormant definitional problem, however, is inherent in the court's ruling. Assuming the existence of a national security exception in espionage and other foreign intelligence cases,[35] the difficulties involved in arriving at any cogent delineation are apparent. What is a "wholly" domestic organization? Is a criterion of mere citizenship of the members to be employed or shall the status of the organization be predicated upon its source of funds and/or location of power base? What degree of association must exist between a domestic organization and a foreign power to alter the status of the group in the eyes of the law? If an acceptable criterion is established, the sufficiency of evidence in support of the required link will result in perpetual controversies having no predictable solution. The decision may be used by the Government as a justification, if one be necessary, for an in-depth investigation of certain domestic organizations. In view of the ever-expanding interpretation of "national security," however, the deci-

34. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 491 (1968).

35. Implied in the *Sinclair* decision prohibiting warrantless eavesdropping only in "wholly" domestic situations is that an exception in foreign cases may be permitted. The court in *Smith* stated that it was not deciding as to the requirement of a warrant in foreign intelligence cases thus permitting the implication to be drawn. 321 F. Supp. at 426.

Produced by The Berkeley Electronic Press, 1971

sion was necessary and proper.

DOMESTIC ORGANIZATIONS AKIN TO FOREIGN POWERS?

Implicit in the arguments presented by the Government is that domestic organizations advocating a different form of government than that which we now have constitute the same threat as a hostile foreign power and should be treated in the same manner. That intimation is not in accordance with past decisions of the Supreme Court nor with the Constitution itself. Though a domestic group may "pose a threat" to the Government, the members of that group nevertheless retain their constitutional rights. "[S]pies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers . . . ."[36] In *Home Building and Loan Association v. Blaisdell*,[37] the court ruled that even in the face of an emergency constitutional powers are not increased nor are constitutional restrictions diminished. An emergency may, however, "furnish the occasion" for the exercising of powers previously granted by the Constitution.[38]

Assuming, arguendo, that an emergency of sufficient proportions presently exists, it is of no consequence if the President does not possess the necessary powers as granted by the Constitution. The arguments of the Government directed at that issue contend that the President does hold the power, not only to act in a manner he considers necessary in the interest of national security, but also the inherent Constitutional power to determine unilaterally what instances concern the national security. There is no factual evidence in our history to support such a contention. In fact, it was the exercising of a similar power which played midwife to the American Revolution.[39]

In 1761, James Otis, speaking in response to the extensive use of general warrants authorizing searches for mere evidence,[40] stated that

36. Katz v. United States, 389 U.S. 347, 360 (1967) (Douglas, J., concurring). Justice Douglas further stated:

> I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.

Id. at 360.

37. 290 U.S. 398 (1933). *Weeks v. United States*, 232 U.S. 383 (1914), asserted that the protection granted by the fourth amendment "reaches all alike, whether accused of a crime or not . . . ." *Id.* at 393.

38. 290 U.S. 398, 425 (1933).

39. Warden v. Hayden, 387 U.S. 294, 312 (1967) (Fortas, J., concurring).

40. General warrants were freely issued by the Secretary of State of England authorizing the search of private homes for books and papers which *might* be used to convict their owner of seditious libel. *See* Boyd v. United States, 116 U.S. 616, 626 (1886).

they were "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," since they placed "the liberty of every man in the hands of every petty officer."[41] In response to the diatribe of Otis, John Adams stated: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[42] The heated debates concerning general warrants culminated in their prohibition by Lord Camden in *Entick v. Carrington.*[43]

The omnivorous and intrusive nature of eavesdropping is such that its use, similar to that of general warrants, becomes but a search for mere evidence.[44] The intrusion resulting from eavesdropping is of a more offensive nature than that resulting from general warrants because the subject is completely unaware of the presence of the device and carries on personal activities in reliance upon his privacy. To assert that those same persons who exhibited such repugnance and disdain for general warrants intended that the executive be endowed with the power to violate the constitutional rights and privacy of the citizenry without *any* review of probable cause by the judiciary would seem patently erroneous. It would be of little consolation to the framers of our Constitution that an invasion of the most intimate areas of one's home was in the interest of national security as deemed solely by the President.

The reasons advanced for an exception to the warrant requirement in those instances involving foreign intelligence are: 1) the decision to employ electronic surveillance in foreign cases must evolve from policy considerations and an assessment of previously acquired intelligence information to which a magistrate has no access; 2) a highly judgmental decision, outside the realm of a magistrate's knowledge and experience, must be made as to comparative risk; and 3) the nation's interest stands to be prejudiced by a disclosure of the decision.

Responding to the first argument, one may be assured that the Government in all cases, domestic or foreign, will have more extensive knowledge of the factors from which the necessity for eavesdropping has arisen. The purpose of requiring judicial review of probable cause for a warrant is to interject an unbiased intermediary, one detached from the investigation, between the investigative departments of the Government and the citizenry.[45] The reason for this "buffer" is to assure the suf-

41. *Quoted in id.* at 625.
42. *Id.*
43. 19 How. St. Tr. 1029, 1066 (1765).
44. Osborn v. United States, 385 U.S. 323, 353 (1966) (Douglas, J., dissenting).
45. Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

Produced by The Berkeley Electronic Press, 1971

ficiency of the evidence and protect against the infringement of constitutional rights by over-zealous law enforcement officials. It is the unbiased and detached nature of the magistrate which allows him to perform this function, separating that which constitutes sufficient evidence from information amounting to mere speculation on the part of those conducting the investigation.

The argument in support of removing the intermediary in national security cases because of inaccessibility of information may possess a certain amount of validity when applied to foreign intelligence situations. The information involved in those instances is often extremely confidential and vital to the security of the nation. It may be convincingly argued that the world of espionage and counter-espionage is not within the realm of experience and knowledge of a magistrate. In domestic cases, however, the argument appears unacceptable. There is no classified information in these cases which cannot be presented to the magistrate for his decision. To decide otherwise would result in the removal of the magistrate from that very position prescribed by the fourth amendment, leaving no check upon the enthusiasm of the respective law enforcement agencies to perform their duties. Without this check, constitutional rights are in a precarious position.

The second argument is equally inapplicable to domestic cases. The elements of "comparative risk" in foreign intelligence eavesdropping are not indicated by the Government. One can only assume that the risks involved would amount to such things as an impairment of existing relations with a foreign country, possible repercussions of some form or the possibility of an embarassing incident. It is obvious that these considerations are not applicable to domestic cases. In fact, repercussions in domestic cases may be *more* apt to occur when the surveillance takes place without a warrant.[46]

The third argument asserts that disclosure of the warrant hearing decision would prejudice the national interest. It is undeniable that eavesdropping will be virtually ineffective when the subject of the surveillance is aware of his predicament. As to how the party will learn of the hearing decision within time to render the surveillance ineffective is unclear. Title III provides the procedure through which authorization for an eavesdrop is acquired. The pertinent sections read in part:

46. J. Edgar Hoover has written:
One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be found guilty of a violation of civil rights.
FBI Law Enforcement Bulletin, Sept., 1952.

https://scholar.valpo.edu/vulr/vol5/iss3/11

> Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction . . . .[47]
>
> Upon such application the judge may enter an *ex parte* order, as requested or as modified, authorizing or approving the interception . . . .[48]

There is no opportunity in the procedure for the subject of the surveillance to discover either the request or the decision concerning the eavesdrop. Upon termination of the authorization or extension,[49] it is provided that:

> Within a reasonable time but not later than ninety days . . . the issuing or denying judge shall cause to be served, on the persons named in the order . . . notice of the [surveillance or of the denying of authorization] . . . .[50]

Therefore, the subject first becomes aware of the surveillance sometime after it has terminated. If it is necessary to withhold notice from the subject in order to maintain the effectiveness of eavesdrops in use against related parties, Title III states that "[o]n an ex parte showing of good cause to a judge of competent jurisdiction the serving of the [notice] . . . may be postponed."[51] The above provisions are surely adequate to protect against any possible "prejudice to the national interest." The Government need only show probable cause to avail itself of these provisions.

The reasoning behind an allowance of warrantless eavesdropping in foreign intelligence cases is inapplicable to the domestic sphere, and any attempt to equate the two categories is improper. While the Government has broad discretionary powers in the foreign arena, activity in the affairs of domestic groups is limited. As stated by the court in *United States v. Smith*,[52] "limitations which are artificial in the international sphere are reasonable and proper when solely domestic subversion is involved."[53]

---

47. 18 U.S.C.A. § 2518(1) (1970).
48. *Id.* § 2518(3) (emphasis added).
49. Extension of the time limit upon authorization may be granted if proper application is made and probable cause is demonstrated. *Id.* § 2518(5).
50. *Id.* § 2518(8)(d). For a discussion of this provision see Note, *Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968*, 23 RUTGERS L. REV. 368 (1968).
51. 18 U.S.C.A. § 2518(8)(d) (1970).
52. 321 F. Supp. 424 (C.D. Cal. 1971).
53. *Id.* at 430.

Produced by The Berkeley Electronic Press, 1971

INABILITY TO PREVENT ILLEGAL EAVESDROPPING

A distressing situation evidenced by the *Sinclair* and *Smith* decisions is the inability of the courts to prevent illegal eavesdropping.[54] The general public and the courts are in somewhat the same predicament, each possessing but one deterrent to illegal surveillances.

The weapon held by the courts is the "exclusionary rule" which prohibits any use of evidence gained in violation of a defendant's fourth amendment rights in a federal court proceeding.[55] The full effectiveness of that rule, however, is hampered by the difficulties in its application. As indicated by the Government, a magistrate has no knowledge of nor access to much of the surreptitiously acquired information possessed by the Government. How then, if a motion for disclosure is granted as in the instant case, is a judge to determine when all illegally monitored conversations of the defendant have been revealed to him? An evidentiary hearing to determine what evidence has been tainted by an illegal surveillance requires an *in camera* disclosure to the court of all evidence possessed by the Government which pertains to the defendant. The question arises as to how a magistrate is to ascertain when all such evidence has been revealed to the court. The court is forced to rely upon the good faith of the Government which, in view of the past, is an unenviable position for the defendant.[56] The rule also applies only to evidence which is intended to be introduced at trial. If no such attempt is made, the court can do nothing in respect to the illegal surveliance.[57]

The only deterrent available to the citizenry is a civil action for damages resulting from an invasion of one's privacy. This device has met little success and therefore is seldom utilized. In fact, during the thirty-

54. The court in *Smith* stated:

> It is true that the court has only limited power to prevent [warrantless surveillances in domestic cases]. Due to the limitations of the exclusionary rule, at the present time courts are, for practical purposes, powerless to prevent unconstitutional searches of any type, when there is no attempt to use the information gained from that search in a subsequent court proceeding.

321 F. Supp. at 430.

55. See cases cited note 3 *supra*; *but cf.* United States v. Schipani, 435 F.2d 26 (2d Cir. 1970). *Schipani* ruled that where illegally seized evidence is reliable and clear and has not been gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence. 435 F.2d at 28.

56. Numerous instances involving the interception of privileged communications, the submission of "either phony or patently inadequate affidavits" and the conscious violation of the law by the Government have been compiled in Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1968).

57. *See* note 54 *supra* and accompanying text.

eight years in which the Communications Act of 1934[58] was in effect, there was not one successful suit brought under the criminal sanctions of section 605 of that act.[59] It is apparent that a party who has not suffered any monetary loss by an invasion of his privacy might be unwilling to proceed with the inconvenience of litigation. One convicted of a crime will have little chance of convincing a jury that he has suffered remediable damages during the search which revealed his criminal activities. Criminal prosecution of a police officer in these cases will also be unlikely because a prosecutor would be unwise to impair his relations with the police with whom he must work so closely.

Title III embraces a provision for civil damages which concludes with the following sentence:

> A good faith reliance on a court order or on [the belief that a proper emergency exists that requires interception before the authority can be granted] shall constitute a complete defense to any civil or criminal action brought under this chapter.[60]

In the face of that disclaimer, few persons would consider their chances of success in a suit against an officer to be sufficient to make the time and money expended worthwhile.

It has been asserted that the reality and content of constitutional rights are determined by the available remedies and enforcement devices.[61] If that is true, the right of privacy is reduced to a mere platonic abstraction. The possible ramifications of the present situation were well stated by Federal Bureau of Investigation Director J. Edgar Hoover in a speech in 1952.

> Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights, those responsible have committed no ordinary offense. A crime of this nature, subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.[62]

CONCLUSION

The controversy concerning eavesdropping under the heading of

58. 47 U.S.C. § 605. *See* note 18 *supra.*

59. R. CIPES, CRIMINAL DEFENSE TECHNIQUES § 5.02(3) (1969).

60. 18 U.S.C.A. § 2520 (1970).

61. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1, 12 (1950).

62. FBI Law Enforcement Bulletin, Sept., 1952.

Produced by The Berkeley Electronic Press, 1971

"national security" has continued since the inception of the provision in 1940. The application of the fourth amendment to eavesdropping[63] has but shifted the debates from eavesdropping in general under the national security exception to *warrantless* eavesdropping under the same heading. While the Supreme Court has been restricting eavesdropping, the legislature and investigative agencies have expanded its legal usage. From an investigative technique to be used against spies and saboteurs, eavesdropping under national security seems to have been expanded to a repressive measure utilized against those who may bring displeasure to the Government.[64] The *Sinclair* decision may be viewed as an indication that the courts will no longer acquiesce in such an expansion.

There is no valid reason why the Government cannot comply with the warrant requirement of the fourth amendment. At the time President Roosevelt issued his celebrated memorandum, all wiretapping by any person was held to be illegal.[65] The President's only recourse was to authorize an exception to the existing law. With the passage of Title III, permitting eavesdropping with a warrant in numerous instances,[66] there no longer exists a valid reason for the continuance of illegal investigations. The Government need only establish probable cause and authorization or approval will be granted.[67] If the exigency of the situation is such that acquiring a warrant would delay the surveillance until it was ineffective, the surveillance may be carried out without a warrant, provided an application for authorization is filed "within 48 hours after the interception has occurred, or begins to occur."[68] If an extension of the time limit placed on a surveillance is necessary, the Government need only show probable cause for such an extension.[69]

The recurring assertion that the activities of the Government serve to protect the Constitution seems ironical. Indeed, the argument that a government can protect constitutional rights by infringing upon those rights is, at best, illogical. In *United States v. Robel*,[70] the

63. Katz v. United States, 389 U.S. 347 (1967).

64. *See, e.g.*, United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971) (surveillance of members of the Black Panther Party); United States v. Dillinger, Criminal No. CR 180 (N.D. Ill., Feb. 20, 1970) (surveillance of the leaders of the Students for a Democratic Society and the Yippies); N.Y. Times, June 5, 1969, at 27, col. 1 (surveillance of the late Dr. Martin Luther King).

65. *See* note 18 *supra.*

66. 18 U.S.C.A. § 2516 (1970).

67. "It is practically unheard of for a judge to fail to grant a wiretap order for the district attorney." S. DASH, R. KNOWLTON & R. SCHWARTZ, THE EAVESDROPPERS 45 (1959).

68. 18 U.S.C.A. § 2518(7) (1970).

69. *Id.* § 2518(5).

70. 389 U.S. 258 (1967).

Supreme Court considered this precise situation:

> It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.[71]

The ideals of *Robel* have been sustained by *Sinclair*. The suppression of the civil liberties of dissident domestic groups in the name of national security will not be tolerated.

ADDENDUM

On April 8, 1971, the United States Court of Appeals for the Sixth Circuit, in a 2-1 decision, affirmed the holding of the district court granting the defendant's motion for disclosure and ordering an evidentiary hearing at the conclusion of the trial.

The majority stated:

> The government has not pointed to, and we do not find, one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General, or federal law enforcement from the restrictions of the Fourth Amendment in the case at hand. It is clear to us that Congress in the Omnibus Crime Control and Safe Streets Act . . . refrained from attempting to convey to the President any power which he did not already possess.
>
> Essentially, the government rests its case upon the inherent powers of the President as Chief of State to defend the existence of the State. We have already shown that this very claim was rejected by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952) . . . .[72]

The court explicitly refrained from deciding the extent of the President's lawful powers under the Constitution as Commander-in-Chief of the Army and Navy, and whether the case presented facts which might have constituted probable cause for issuance of a prior or subsequent warrant for eavesdropping.

Judge Weick, the lone dissenter, was of the opinion that *Alderman* did not require an adversary proceeding and full disclosure in all cases, examination by a magistrate *in camera* being sufficient in cases of a non-

71. *Id.* at 262.

72. United States v. Sinclair, No. 71-1105 (6th Cir., April 8, 1971) (citation omitted).

Produced by The Berkeley Electronic Press, 1971

complex nature. Since the sealed exhibits in the instant case contained but a few pages, it was asserted that an *in camera* hearing was the proper procedure to be employed. Judge Weick saw no danger in allowing the President and the Attorney General to act without judicial review of probable cause, stating:

> I see no reason why the powers of the President should be any different in dealing with either foreign or domestic subversives; both or either could result in the destruction of the government.[73]

CONSTITUTIONAL LAW—FREEDOM OF RELIGION: *Amish Exempted from Wisconsin Compulsory Education Statute.*

INTRODUCTION

The Wisconsin Supreme Court, in *State v. Yoder*,[1] reversed the convictions of three Amish fathers who refused to comply with the Wisconsin Compulsory School Attendance Law.[2] This statute requires a child's attendance at either a public or private school until the age of sixteen. The fathers refused to send their children to school claiming that to do so would violate basic tenets of their religion. In reversing the 1969 convictions, the Wisconsin Supreme Court has become the first major court to declare that a compulsory school attendance law is an unconstitutional infringement upon the first amendment rights of the Amish in the free exercise of their religion.[3]

THE APPLICATION OF THE SHERBERT DOCTRINE

In arriving at their decision in the *Yoder* case, the majority relied

---

73. *Id.*

1. 49 Wis. 2d 430, 182 N.W.2d 539, *petition for cert. filed*, 39 U.S.L.W. 3446 (U.S. April 1, 1971) (No. 1536).

2. WIS. STAT. ANN. § 118.15 (1968).

3. The Amish were also victorious in the Pennsylvania case of *Commonwealth v. Petersheim*, 70 Pa. D. & C. 432 (Somerset County Ct. 1949), *appeal dismissed*, 166 Pa. Super. 90, 70 A.2d 395 (1950), which was decided on similar facts. The Pennsylvania court discussed the flag salute case, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), and concluded that "the trend of the recent and modern decisions is in favor of the religious liberty of the individual when it comes in conflict with a State law, ordinance or regulation." 70 Pa. D. & C. at 442. This case has stood alone and has never been expressly overruled.

https://scholar.valpo.edu/vulr/vol5/iss3/11

substantially on the doctrine espoused by the Supreme Court in *Sherbert v. Verner*.[4] The *Sherbert* decision held that the denial of unemployment compensation benefits to a Seventh Day Adventist who refused to work on Saturdays interfered with the free exercise of her religion. The Supreme Court based its decision on a broad interpretation of the free exercise clause, ruling that the first amendment protected not only the religious beliefs of the individual but also guaranteed the right to engage in ritualistic worship.[5]

The *Sherbert* doctrine consists of a two-step procedure to be employed when confronted with an issue involving the free exercise clause. The first inquiry is whether the challenged statute interferes with the constitutional freedom to act in accordance with one's sincere religious beliefs;[6] the second inquiry is, if there is such interference, whether there is a compelling state interest which would warrant such infringement.[7]

In applying the first segment of the *Sherbert* doctrine to the *Yoder* case,[8] the majority resorted to an extensive examination of evidence presented concerning the Amish religious beliefs. The evidence tended to show that the Amish allowed their children to obtain an eighth grade education since they felt that the basic subjects taught in the public grade schools were of some value to their children. However, the Amish objected to the "worldliness" of the public high schools and refused to allow their children to attend them. The Amish maintained that the public high schools were concerned with preparing children to achieve success in a society from which they wished to withdraw. They preferred to have their children spend their post eighth grade years at home where the children would be able to engage in a more intensive study of the Bible and the Amish religious beliefs. Tradition required this intensive study to help prepare the child to decide whether or not he wished to accept adult baptism at the age of eighteen.[9] Based on this evidence, the court decided that the Amish refusal to comply with compulsory education was grounded on their religious beliefs and that to coerce the Amish into

4. 374 U.S. 398 (1963).

5. This concept seems to have its contemporary genesis in the case of *Cantwell v. Connecticut*, 310 U.S. 296 (1940), where it was stated that the free exercise clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation. . . ." *Id.* at 303-04.

6. 374 U.S. at 403.

7. *Id.* at 406.

8. 182 N.W.2d at 540-42.

9. *See generally* N.Y. Times, Feb. 16, 1971, at 29, col. 8.

Produced by The Berkeley Electronic Press, 1971

sending their children to a public high school would infringe upon the free exercise of their religion.[10]

The majority then applied the second segment of the *Sherbert* doctrine: the infringement may be justified only if it is needed to protect a "compelling state interest." Although the majority concluded that compulsory education was of "supreme importance,"[11] they reasoned that "compulsory education . . . in itself is *not* a compelling state interest although it is within the state power to regulate."[12] This decision, that education is not a compelling state interest, is unique for the bulk of authority has historically held to the contrary.[13]

Weaknesses of the Majority Opinion

It is submitted that the majority opinion is premised on two possible misconceptions: 1) the belief that there was substantial infringement upon free exercise of the Amish religion[14] (*i.e.,* the first test of the *Sherbert* doctrine);[15] 2) the conclusion that compulsory education was not a compelling state interest[16] (*i.e.,* the second test of the *Sherbert doctrine*).[17]

Infringement of Free Exercise

In examining the extent of the infringement upon the Amish religious beliefs, Chief Justice Hallows articulated the reasons for the Amish aversion to the public high schools:

> To the Amish, secondary schools not only teach an unacceptable value system but they also seek to integrate ethnic groups into a homogenized society, resulting in a psychological alienation of Amish children from their parents and great harm to the child. . . .
>
> . . . There is another impact on the Amish children themselves if they are required to go to high school. They would experience a useless anguish of living in two worlds.

10. 182 N.W.2d at 542.
11. *Id.* at 543.
12. *Id.* at 542 (emphasis added).
13. Brown v. Board of Educ., 347 U.S. 483, 493 (1954); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 400 (1923); State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951). For additional supportive authority see Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 Wis. L. Rev. 217, 229 n.70.
14. 182 N.W.2d at 542.
15. 374 U.S. at 403.
16. 182 N.W.2d at 542.
17. 374 U.S. at 406.

https://scholar.valpo.edu/vulr/vol5/iss3/11

> Either the education they receive in the public school is irrelevant to their lives as members of the Old Order Amish or these secondary school values will make life as Amish impossible.[18]

The Compulsory School Attendance Law requires attendance at either a public or private high school until the age of sixteen.[19] Although the majority noted that the Amish are opposed to private as well as public high schools,[20] they discussed only the reasons why compelling the Amish to attend public schools would be undesirable. The opinion failed to analyze, however, how serious an infringement the alternative of a private high school would be on the Amish religious beliefs. The arguments directed against the public high schools would lose much, if not all, of their relevance if applied to a private Amish high school. Such a private high school would be able to shun the "worldliness" of its public counterparts; it could teach an acceptable value system as opposed to the "unacceptable value system" which confronts the Amish children attending public high schools; these children would no longer be forced to experience "a useless anguish of living in two worlds."[21] In addition to avoiding the major Amish objections to the public high schools, such a private high school would also further the intent of the Act by educating the children in all of the required courses. By only analyzing the adverse effects of compulsory attendance at a public high school, the majority, therefore, discounted what perhaps would have been a desirable alternative—the private high school.[22]

In support of the majority, however, it may be stated that even granting the Amish the alternative of attending private schools would still infringe on the free exercise of their religion. The Amish feel that any education past the eighth grade is unnecessary and unsuitable in relation to their chosen station in life—that of farmers and homemakers.[23] They shun the progressive ways of modern American society and maintain that post eighth grade education, public or private, is not only inappropriate but would actually undermine the tenets of their religion.[24]

---

18. 182 N.W.2d at 542.
19. WIS. STAT. ANN. § 118.15(1) (1968).
20. 182 N.W.2d at 541.
21. *Id.* at 542.
22. The dissenting opinion, however, did consider a private school. *Id.* at 547.
23. *See generally* Note, *The Right Not to be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925, 940-41 (1967).
24. The case of *Commonwealth v. Beiler*, 168 Pa. Super. 462, 79 A.2d 134 (1951), was decided in favor of compulsory education on similar facts. In support of their

Produced by The Berkeley Electronic Press, 1971

If the Amish did choose to attend private schools, such schools might still have to satisfy the basic standards as set forth by the state.[25] These requirements usually involve the offering of "basic" substantive courses. The Amish, however, regard the subject matter of many required high school courses as actually sinful. "The Amish shun such things as art and literature, because they are conducive to individual pride and tend to conflict with the simple and humble life which the Amish believe God demands. The study of science tends to conflict with their literalistic interpretation of scripture."[26] Despite the fact that this alternative might not have been a viable solution, the failure of the majority to discuss it was detrimental to the logic of their opinion.

Justice Heffernan, in his dissenting opinion, advocated "an Amish vocational school which will teach reading, agriculture, and husbandry, and whatever religious precepts the Amish community desires"[27] as a means of reconciling the conflict between the Amish and the compulsory education law. The state legislatures of Kansas and Pennsylvania have modified the compulsory attendance laws of their respective states to allow for the implementation of a plan similar to that advocated by Justice Heffernan.[28] These modifications were prompted by decisions

---

objections to compulsory education in general and past eighth grade education in particular, the Amish "bishops" submitted to the court the following "Statement of Position of Old Order Amish Church Regarding Attendance In Public Schools" which states in part:

> We believe that our children have attained sufficient schooling when they have passed the eighth grade of the elementary school. . . . We believe than [*sic*] our children have passed the eighth grade that in our circumstances, way of of life and religious belief, we are safeguarding their home and church training in secular and religious belief and faith by keeping them at home under the influence of their parents.

Id. at 136. *See generally* Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217.

25. 182 N.W.2d at 550. Accommodation in formulating such basic requirements to various religious beliefs have been made in other states. KAN. STAT. ANN. § 72-111 (Supp. 1970); PA. STAT. ANN. tit. 24, § 13-1330 (Supp. 1970).

26. Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423, 426-27 (1968).

27. 182 N.W.2d at 550.

28. The Kansas statute presently reads:

> A child attending secondary schools in this state shall not be required to participate in any activity which is contrary to the religious teachings of such child, if a written statement signed by one of the parents or the guardian of such child is filed with the proper authorities of the school attended, requesting that the child not be required to participate in such activties and stating the reason for such request.
>
> When a recognized church or religious denomination that objects to a regular public high school education provides, either individually or in cooperation with another recognized church or religious denomination, offers and teaches a regularly supervised program of instruction, approved by the state board of education for children of compulsory school attendance age

handed down by the Kansas Supreme Court[29] and the Pennsylvania Superior Court.[30] Each of these courts, however, held that the state compulsory school attendance laws as applied to the Amish were constitutional.

After noting these legislative enactments, the majority concluded their opinion: "These legislative exemptions evince the fact the important goals of education can be attained by alternative forms of regulation without infringing first amendment rights."[31] After making the reference to "alternative forms of regulation" which do not infringe upon religious beliefs, the majority failed to pursue the possibility of private education to any logical conclusion. Instead of attempting to analyze the merits of such education, the majority concluded the opinion without further discussion.

The Compelling State Interest

The majority states that compulsory education is not a compelling state interest.[32] The phrase "compelling state interest" originated in the case of *Sherbert v. Verner*.[33] However, the guidelines which the court established were insufficient for any adequate determination of what constitutes a "compelling state interest."

The only insight offered to resolve this definitional problem was

---

who have successfully completed the eighth grade, participation in such a program of instruction by children who have successfully completed the eighth grade and whose parents or guardians are members of the sponsoring church or religious denomination shall be regarded as acceptable school attendance within the meaning of this act.

KAN. STAT. ANN. § 72-1111 (Supp. 1970).

The Pennsylvania statute presently reads:

The provisions of this act requiring regular attendance shall not apply to a child who—

. . . .

(4) Has attained the age of fourteen (14) years and is engaged in farm work or domestic service in a private home on a permit issued as provided in clause (3) of this section, and who has satisfactorily completed, either in public or private schools, the equivalent of the highest grade of the elementary school organization prevailing in the public schools of the district in which he resides, if the issuance of such a permit has first been recommended by the district superintendent of schools having supervision of the schools of the district where such child resides, or by the principal of the private school where such child is enrolled, and the reason therefor has been approved by the Superintendent of Public Instruction.

PA. STAT. ANN. tit. 24, § 13-1330(4) (Supp. 1970).

29. State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966).
30. Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951).
31. 182 N.W.2d at 547.
32. *Id.* at 542.
33. 374 U.S. 398 (1963).

Produced by The Berkeley Electronic Press, 1971

> [i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[34]

The majority in *Yoder* simply stated that no "compelling state interest" existed and offered no supportive authority to sustain their ruling. They defined a "compelling state interest" to be "not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation."[35]

This definition as offered by the *Yoder* court is arguably more restrictive than the definition proposed in *Sherbert*. It is more restrictive in that should a compelling state interest be found, no exception would be allowed.[36] There are two views as to the interpretation of *Sherbert* concerning such exception. The first view states that once the presence of a compelling state interest is established, it is then determined whether the granting of an exception will seriously impair the interests of the state.[37] This would imply that a compelling state interest can exist yet an exception to it can be carved out.

The second view maintains that if an exception can be made without subverting the purpose of the statute, no compelling state interest exists, *i.e.*, there can be no exception to a compelling state interest.[38] It is this latter view which the *Yoder* court adopts.[39] However, it is arguable that the *Yoder* definition is more expansive than the one offered in *Sherbert* in that it seems to require less demanding criteria to establish a compelling state interest. The *Sherbert* doctrine requires something more than a "colorable state interest;" it seems to require "paramount interests" of the state. In contrast, *Yoder* speaks only of an interest which is more than a general interest which would allow no exception. It is

34. *Id.* at 406, *quoting* Thomas v. Collins, 323 U.S. 516, 530 (1945).

35. 182 N.W.2d at 542.

36. *Id.*

37. There evolves from this decision a two-fold test which must be met in order to sustain any law which imposes a burden on the free exercise of religion. Such burden must be removed unless (1) there is a compelling state interest to the contrary and (2) the state interest will, in fact, be seriously impaired by granting the exemption.
10 VILL. L. REV. 337, 339 (1965). *See also* Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 280.

38. Casad, *Compulsory High School Attendance and The Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423, 429-31 (1968). *See also* Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 280.

39. 182 N.W.2d at 542.

possible to envision an interest which is more than a general state interest, but less than a paramount interest, yet which would allow no exception.[40] Such an interest could qualify for protection under *Yoder* but fail to satisfy the *Sherbert* criteria.

The case law and literature evidence the confusion surrounding the illusive concept of compelling state interest.[41] The phrase defies mechanical application. It has therefore been incumbent upon the individual judge to make a subjective determination as to what is a "compelling state interest." As a result, it is difficult to support or refute such a determination. To illustrate, consider the arguments of the majority and dissent in *Yoder*. The majority supported their contention with quotations from two cases which could have been cited in support of a belief to the contrary.[42] "The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted."[43] After ruling that compulsory education was not a "compelling state interest" but was a "matter of supreme importance," the majority declined to differentiate between the two concepts.

In his dissenting opinion, Justice Heffernan quoted the following statement from *Brown v. Board of Education*:[44]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recogniton of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it

40. Exemptions will generally be denied if any substantial harm may result to either the persons involved or any third parties. 182 N.W.2d at 544.

41. Casad, *Compulsory High School Attendance and The Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423 (1968); Galanter, *Religious Freedoms in the United States: A Turning Point?*, 1966 WIS. L. REV. 217; Note, *The Right Not be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925 (1967); 32 GEO. WASH. L. REV. 307 (1963); 49 IOWA L. REV. 952 (1964); 43 ORE. L. REV. 177 (1964); 11 U.C.L.A. L. REV. 426 (1964); 16 VAND. L. REV. 1235 (1963); 10 VILL. L. REV. 337 (1965).

42. 182 N.W.2d at 543.

43. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

44. 347 U.S. 483 (1954).

Produced by The Berkeley Electronic Press, 1971

> is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[45]

The majority cited their own edited version of this quotation in support of the conviction that compulsory education was important but not a compelling state interest.[46] They also observed that when Chief Justice Warren made that statement he was supporting the value of education in modern American society. Since the Amish regard this modern American society as evil and desire to withdraw from it, the majority determined that this quotation lost much of its forcefulness.[47]

Application of the "Yoder Doctrine"

The *Yoder* doctrine dictates that once it is determined that no compelling state interest exists, it must then be decided whether an exemption to the statute can be granted to the petitioners.[48] Assuming, arguendo, that the *Yoder* approach is correct, the question then becomes: if an exemption is granted to the Amish, will the purpose of the Compulsory School Attendance Law be subverted? In arriving at an answer to this question, we must consider what effect such an exemption would have upon society as a whole and the Amish child as an individual. It is submitted that an exemption extended to the Amish would not defeat the purpose of compulsory education. The educational system would continue to function, and it would continue to develop the "responsible and productive citizens" which are the basis of good government and a healthy society. However, if the number of poorly educated people should substantially increase, there would be a corresponding increase in the burden placed on society to provide for such people. Since this ruling may affect 50,000 Amish in nineteen states and undoubtedly will be cited in cases brought by other religious groups seeking similar exemptions,[49] it is possible that a significant number of children may be denied a good education and become potentially burdensome on society.

The effect of compulsory education upon the individual child must be studied from two viewpoints: that of the child who eventually leaves the Amish community and that of the child who remains a member of the community.

For the child who chooses to remain in the Amish community, the lack of a formal education is less of a problem. He is absorbed into a

45. *Id.* at 493.
46. 182 N.W.2d at 543.
47. *Id.*
48. *Id.* at 544.
49. *See generally* N.Y. Times, Feb. 16, 1971, at 29, col. 7.

https://scholar.valpo.edu/vulr/vol5/iss3/11

community of his peers and arguably suffers no detriment.[50] However, it is a fact that large numbers of young Amish leave their community every year.[51] If they are not compelled to attend school after the eighth grade, these young people will be faced with the alternative of living in a society of which they no longer desire to be a part or joining a society for which they are not intellectually prepared. The court did not acknowledge the persuasiveness of this argument and determined that granting an exception to the Amish would not subvert the purposes of the Compulsory Education Statute.[52]

If the state could have established a "compelling state interest" in maintaining compulsory education, the "least means" language of *Sherbert*[53] and *Braunfeld v. Brown*[54] would seem to mandate that the method chosen to implement such interest must be the least imposing of all feasible alternatives. Perhaps a viable alternative would be to allow the creation of Amish vocational schools at the expense of the Amish. Not only will the creation of such schools be a less imposing alternative on the Amish beliefs, but the granting of such an option has been constitutionally required.[55] This would also be an acceptable solution under the Wisconsin statute.[56] In addition to benefiting those young Amish who do decide to leave the community, an Amish vocational high school could teach subjects which would benefit the individual directly and the Amish community indirectly. Since such schools would be controlled by the Amish, they could more readily avoid the subjects and the distasteful "worldliness" which are offensive to their religious beliefs.[57] It would benefit both those who leave the community and those who remain.

CONCLUSION

The controlling authority and focal point of all confusion appears to be *Sherbert v. Verner*. It superficially requires a two-step test: 1) does the statute infringe upon first amendment rights, and 2) is there

50. *See generally* J. HOSTETLER, AMISH SOCIETY (1963).

51. Casad, *Compulsory High School Attendance and The Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423, 434 n.51 (1968).

52. 182 N.W.2d at 544.

53. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

54. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

55. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

56. WIS. STAT. ANN. § 118.15(1) (1968).

57. They would still have to meet, however, the basic requirements for accreditation as set forth by the state. Perhaps further accommodation could be made as proposed by statutes promulgated in Kansas and Pennsylvania. *See* note 28 *supra* and accompanying text.

Produced by The Berkeley Electronic Press, 1971

a compelling state interest to warrant such infringements? However, also hidden within the *Sherbert* rhetoric is language relating to the "least means" test[58] and to the granting of "exemptions" from the compelling state interest rule.[59] The problem posed in *Yoder* in light of the ambiguous standards of *Sherbert* may admit no easy solution. It is hoped that the Supreme Court will grant certiorari to the petitioners and through the *Yoder* case attempt to more carefully crystalize the elements and application of the "*Sherbert doctrine.*"

CRIMINAL LAW: *California's "Vicarious Murder Theory" Extends Felony-Murder Doctrine.*

INTRODUCTION

The past few years have produced many well-reasoned decisions which have limited a felon's responsibility for a killing committed by his intended victim.[1] The antiquated felony-murder rule, which has been under fire since its inception in this country, has recently been held inapplicable to situations where either the victim or an independent third party committed the killing during the perpetration of a felony.[2]

Despite this very definite trend, the Supreme Court of California in *Taylor v. Superior Court*[3] held the defendant responsible for the death of his co-felon, even though the deceased was killed by the wife of the intended victim. In the *Taylor* case, the defendant and his co-felons attempted to rob a liquor store. While the defendant sat in the getaway car, his armed accomplices, Daniels and Smith, entered the premises and pointed their guns at the owner of the liquor store who was standing behind the counter. Daniels "chattered insanely" and threatened to execute the owner on the spot if the money was not delivered immediately. Smith, according to the testimony, looked "intent" and "apprehensive" as if "waiting for something big to happen." While Daniels was forcing the owner to the floor behind the counter, the

58. *See* notes 53-54 *supra* and accompanying text.
59. 374 U.S. at 408-09.

1. *See* Comment, 24 RUTGERS L. REV. 591, 598-602 (1970); 21 SYRACUSE L. REV. 1321 (1970).

2. *See* People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

3. 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).

owner's wife, who was standing on a ladder and apparently hidden from the robbers' view, drew a pistol from beneath her clothing and shot and killed Smith while wounding Daniels. Refusing to reverse the decision of the superior court, the supreme court held Taylor guilty of the murder of his co-felon.

COUNTERVAILING FELONY-MURDER CONSIDERATIONS

By attributing the death of the felon to the acts of his co-felons when the actual killing was done by one directly opposed to the felony, the Supreme Court of California side-stepped one of its previous decisions and ignored two landmark cases decided by the Supreme Court of Pennsylvania, which have been heralded for providing a logical limitation to the felony-murder rule and are being followed by other jurisdictions.[4] In *People v. Washington*,[5] the defendant attempted to rob a gasoline station. While he was ransacking the deposit vault, his accomplice entered an adjacent office and pointed a revolver at the owner. Without hesitation the owner shot and killed the felon and subsequently wounded the defendant. Upon appeal from the superior court, the Supreme Court of California, recognizing that the basic issue was "whether a robber can be convicted of murder for the killing of any person by another who is resisting the robbery,"[6] reversed a conviction of murder against the defendant.

In refusing to apply the felony-murder rule in such a situation, the *Washington* court explained that malice aforethought is not attributed to the robber when a killing is committed by his victim since the killing is not committed by the robber in the perpetration of the robbery. Indeed, in such a case the killing is committed to thwart a felony. If this aspect were included within the California felony-murder rule, it would expand the meaning of such a rule beyond common understanding.[7]

The Supreme Court of Pennsylvania refused to hold felons responsible for the death of their co-felon in *Commonwealth v. Redline*.[8] The

4. *See* 65 COLUM. L. REV. 1496 (1965); 9 DUQUESNE L. REV. 122 (1970); 71 HARV. L. REV. 1565 (1958); 25 MD. L. REV. 356 (1965); 56 MICH. L. REV. 1197 (1958); 24 MO. L. REV. 266 (1959); 5 SANTA CLARA LAW. 172 (1965); 18 STAN. L. REV. 690 (1966); 21 SYRACUSE L. REV. 1321 (1970). *Contra,* State v. Kress, 105 N.J. Super. 514, 253 A.2d 481 (1970), *discussed and criticized in* Comment, 24 RUTGERS L. REV. 591 (1970).

5. 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

6. *Id.* at 780, 402 P.2d at 132-33, 44 Cal. Rptr. at 444-45.

7. *Id.*, 402 P.2d at 133, 44 Cal. Rptr. at 445. Section 189 of the California Penal Code deals with the degrees of murder: "All murder . . . which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem . . . is murder of the first degree." CAL. PENAL CODE § 189 (West 1970).

8. 391 Pa. 486, 137 A.2d 472 (1958).

Produced by The Berkeley Electronic Press, 1971

felon was shot and killed by a police officer while attempting to escape from the scene of the robbery. The court reasoned that the homicide was justifiable and could not support a charge of murder on any rational legal theory. In essence, it could not understand how anyone could have a criminal charge lodged against him for the consequences of the lawful conduct of another person.[9]

The Supreme Court of Pennsylvania reaffirmed the *Redline* decision in *Commonwealth ex rel. Smith v. Myers,*[10] holding that robbers were not guilty of a homicide when their victim, in self-defense, shot at his assailants and accidentally killed an innocent bystander. The court vehemently refused to hold felons responsible for a killing committed by anyone opposed to the felony and denied the applicability of the felony-murder rule in such situations: "[We] want to make clear how shaky are the basic premises on which [the felony-murder rule] rests. With so weak a foundation, it behooves us not to extend it further and indeed, to restrain it within the bounds it has always known."[11]

The rationale of the California and Pennsylvania courts in these decisions reflects the policy that it would be unjust, according to criminal law methods of measuring culpability, to impose upon robbers the penalty of murder not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber's conduct happened to induce.[12] While the courts recognized that there would always be a possibility that the victim of a robbery would resist and kill, they refused to discriminate among robbers by punishing some for largely fortuitous circumstances. As one commentator has said:

> It seems preferable . . . to impose liability only for homicides resulting from acts done in furtherance of the felony. A closer causal connection between the felony and the killing than the proximate cause theory normally applicable to tort cases should be required because of the extreme penalty attaching to the conviction for felony murder and the difference between the underlying rationales of criminal and tort law.[13]

The *Redline, Myers* and *Washington* decisions clearly signify a

9. *Id.* at 507, 137 A.2d at 483.
10. 438 Pa. 218, 261 A.2d 550 (1970).
11. *Id.* at 228, 261 A.2d at 555.
12. People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).
13. 71 HARV. L. REV. 1565 (1958), *quoted in* Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 232, 261 A.2d 550, 557 (1970).

https://scholar.valpo.edu/vulr/vol5/iss3/11

rejection of the proximate cause theory[14] that would hold felons responsible for all deaths occurring during the felony. The present criticism of the proximate cause theory was initiated in the *Redline* opinion. The court pointed out that the assumed analogy between criminal causation and the tort liability requirement of proximate cause was not conclusive; if it were, then the doctrine of supervening cause, which had been entirely disregarded, would have to be considered by the jury.[15]

The *Myers* decision went even further in disputing the applicability of the proximate cause theory of liability in criminal cases. Although the court recognized that precedent could be found for application of the tort law concept of proximate cause in fixing responsibility for criminal homicide, it could find no rational basis for its use in determining criminal liability, especially after the marked expansion of civil liability of defendants in tort actions for negligence. The court felt that persistence in applying the tort liability concept of proximate cause to prosecutions for criminal homicide under such circumstances would be to extend possible criminal liability to persons chargeable with unlawful or reckless conduct in situations not generally considered to present the likelihood of a resultant death.[16]

Similarly, the Supreme Court of California seemed to reject the proximate cause theory in the *Washington* decision when it held that: "it is not enough that the killing was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing."[17] It is evident, therefore, that the courts have become increasingly reluctant to use the proximate cause theory in establishing the necessary causal relation between the robber's conduct and a death ensuing from the robbery.

RATIONALE OF THE TAYLOR COURT MAJORITY

In an apparent attempt to overcome the trend away from application of the felony-murder rule, the California Supreme Court, in the *Taylor* case, based a murder conviction on the vicarious responsibility of the co-felons. While tacitly agreeing with the *Washington* holding that to impose upon a robber an additional penalty for a fortuitous killing might be

14. A common expression of the proximate cause theory of criminal liability is: If one or more persons set in motion a chain of circumstances out of which death ensues, those persons must be held responsible for any death which by direct, by almost inevitable sequence, results from such unusual criminal act. Commonwealth v. Redline, 391 Pa. 486, 516, 137 A.2d 472, 489 (1958).

15. *Id.* at 505, 137 A.2d at 481.

16. 438 Pa. at 232, 261 A.2d at 557.

17. 62 Cal. 2d at 781, 402 P.2d at 133, 44 Cal. Rptr. at 445.

Produced by The Berkeley Electronic Press, 1971

unjust when not based on any difference in the conduct of the robber, the court, looking to dictum in *Washington,*[18] ruled that where there was a difference in conduct, criminal liability for a killing committed by a resisting victim or police officer would be determined by an inquiry into whether the conduct of the defendant or his accomplice was sufficiently provocative of lethal resistance to support a finding of implied malice.[19] Prior to the *Taylor* decision, the California "vicarious murder theory" seemed to hold that robbers would not be responsible for killings performed by their victim unless the robbers had committed malicious acts, in addition to the acts constituting the underlying robbery, which demonstrated culpability beyond that of other robbers.[20]

Until the *Taylor* decision, such "additional malicious acts" were limited to situations in which the defendant had either initiated a gun battle,[21] used an innocent party as a shield[22] or attempted to disarm a police officer.[23] Although the defendant and his accomplices did not perform any of these acts, the California Supreme Court held that Daniels' repeated threats and Smith's nervous apprehension were sufficiently provocative of lethal resistance to lead a reasonable man to conclude that Daniels and Smith "initiated" the gun battle, or that such conduct was done with "conscious disregard for human life and with natural consequences dangerous to human life."[24]

The Dissent

The minority faction in the *Taylor* case, a 4-3 decision, filed a lengthy and vigorous dissenting opinion. Without taking exception to a "vicarious murder theory" itself, the dissenters adamantly maintained that such a theory was not applicable to the *Taylor* case since they believed that the robbers had not committed any malicious acts in addition to the acts which constituted the underlying felony. As Justice Mosk pointed out:

> Indeed, the crime cannot be committed without making or carrying out a threat of violence: it is code law that "Robbery

18. *Id.* at 782, 402 P.2d at 133-34, 44 Cal. Rptr. at 445-46.
19. 3 Cal. 3d at 584, 477 P.2d at 134, 91 Cal. Rptr. at 278.
20. *Id.* at 586, 477 P.2d at 135, 91 Cal. Rptr. at 279. Under such circumstances, the court explained, it would be unnecessary to imply malice by invoking the felony-murder rule since the defendant for a base, anti-social motive, with wanton disregard for human life, performed an act involving a high degree of probability that it would result in death. *Id.* at 584, 477 P.2d at 134, 91 Cal. Rptr. at 278.
21. People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1966).
22. People v. Reed, 270 Cal. App.2d 37, 75 Cal. Rptr. 430 (1969).
23. Brooks v. Superior Court, 239 Cal. App. 2d 538, 48 Cal. Rptr. 762 (1966).
24. 3 Cal. 3d at 586, 477 P.2d at 135, 91 Cal. Rptr. at 279.

https://scholar.valpo.edu/vulr/vol5/iss3/11

> is the felonious taking of personal property in the possession of another, . . . *accomplished by means of force or fear.*" . . . The threat thus has no independent significance, no purpose other than to facilitate the commission of the robbery. It is, in short, a necessary incident of the crime.[25]

Justice Peters went so far as to label the majority opinion as a desire to overrule the *Washington* decision *sub silentio,*[26] pointing out the absurdity of the distinction made between the *Washington* and *Taylor* cases:

> [I]t is too obvious to dispute that inherent in the brandishing of a gun in a robbery is the conditional threat of the robber that he will use the gun if his demands are not complied with. The fact that the robber makes his threat express does not serve to distinguish *Washington.* It is unreasonable to assume that, just because the robber in *Washington* did not articulate his threat, the victim in that case had less reason to fear for his safety or, as the majority assert, less "provocation" for shooting the robber than did the victims in the instant case.[27]

Very simply, then, the dissent concluded that a robber who merely articulates his conditional threats does not engage in a greater degree of anti-social conduct than robbers who are less bold and vociferous. Since the conduct of Taylor and his accomplices did not substantially increase the risk of harm to the victims, the dissenters believed it was unjust to impose a murder conviction upon Taylor.

THE IMPACT OF THE TAYLOR CASE

In its refusal to reverse the defendant's conviction, the Supreme Court of California has sacrificed logic and ignored recent developments in the criminal law in order to reach a desired result.[28] The court clearly re-established the proximate cause theory that was rejected in the *Redline, Myers* and *Washington* decisions and has applied it vicariously. The majority opinion openly states that the petitioner may be convicted of first degree murder "[i]f the trier of fact concludes that under the particular circumstances of the instant case Smith's death *proximately*

25. *Id.* at 598, 477 P.2d at 141, 91 Cal. Rptr. at 285.
26. *Id.* at 594, 477 P.2d at 139, 91 Cal. Rptr. at 283.
27. *Id.* at 592, 477 P.2d at 138, 91 Cal. Rptr. at 282.
28. *See* notes 2-4 *supra* and accompanying text.

Produced by The Berkeley Electronic Press, 1971

resulted from the acts of petitioner's accomplices done with conscious disregard for human life."[29]

Rather than limiting the scope of the felony-murder rule, the *Taylor* decision and its "vicarious murder theory" manage to reach extraordinary results without having to invoke the shaky rule itself. According to such a theory of criminal liability, the act of killing as well as the malice essential for murder can be implied from a robber's acts and can be applied vicariously from one robber to another. Under the guise of requiring a closer causal connection between the defendant's acts and the resulting death, the California Supreme Court has taken a "very relaxed view of [that] necessary causal connection," contrary to the explicit cautions it laid out in *Washington.*[30] While Taylor would have been absolved of all guilt for the killing according to the reasoning of the *Washington* decision, he is now held guilty of murder under the "vicarious liability theory" as extended in the *Taylor* case. It seems that an accomplice to a robbery in California will now be liable for the malicious mannerisms of his co-felons and will be held responsible for the over-reaction of the robbery victim.

The *Taylor* decision is equally harsh and faulty when viewed from a sociological point of view. Punishing the defendant for largely fortuitous circumstances is a concept repugnant to criminal law principles and cannot benefit society in any meaningful way. To hold felons responsible for circumstances beyond their control would only deter robbery haphazardly at best. According to Holmes, "the wise policy is not to punish the fortuity, but rather to impose severe penalties on those types of criminal activity which experience has demonstrated carry a high degree of risk to human life."[31] Thus it seems logical that robbery would be more effectively deterred by increasing the penalties for armed crimes or the taking of hostages as in the "shield" cases than by punishing robbers for the possible response of their victims. By imposing upon the defendant a punishment grossly disproportionate to the extent of his culpability, the California Supreme Court has served no useful social purpose and has regressed in its interpretation of criminal justice.

29. 3 Cal. 3d at 584, 477 P.2d at 134, 91 Cal. Rptr. at 278 (emphasis added).

30. *See* People v. Washington, 62 Cal. 2d 777, 782, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 n.2 (1965).

31. Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 226, 261 A.2d 550, 554 (1970), *quoting* O. HOLMES, THE COMMON LAW 59 (1881).