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Constitutional Law--Criminal Procedure--Federal Injunction Will Not Issue to Prohibit Wiretap Evidence in State Courts

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of the possessor,[17] the social value of the primary purpose of the conduct,[18] and the cost of avoiding the injury.[19]

The superiority of the reasonable use rule warrants its adoption in Kentucky. The rule protects each landowner by taking his interests into consideration and protects the interests of society in assuring that land will be developed for that activity which has the greatest utility.[20] This is in contrast with the common enemy and civil law rules, which arbitrarily protect the interests of one landowner at the expense of the other, and can conceivably work against the interests of society.[21]

The rule in Kentucky which subjects railroads to liability for obstruction of surface water, caused by negligence in the construction or maintenance of embankments and culverts, is subject to some of the same disadvantages as the civil law and common enemy rules;[22] therefore the reasonable use rule should also be adopted in respect to railroads.

Thomas H. Burnett

CONSTITUTIONAL LAW-CRIMINAL PROCEDURE-FEDERAL INJUNCTION WILL NOT ISSUE TO PROHIBIT WIRETAP EVIDENCE IN STATE COURTS—New York police armed with an ex parte court order[1] tapped petitioner's telephone. The petitioner, charged with the commission of several felonies, sought injunctive relief against Bronx County, the District Attorney and others to prevent introduction of wiretap evidence in state

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[17] Priest v. Boston & M.R.R., 71 N.H. 114, 51 Atl. 667 (1901). Under the reasonable use rule, as stated by the Restatement, Torts § 833 (1938), if defendants interference is unintentional, the rule governing negligent, reckless and ultrahazardous conduct is applied.

[18] Restatement, Torts §§ 827-28 (1938).

[19] Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

[20] *Ibid.*

[21] Kinyon & McClure, *supra* note 2, at 905-08.

[22] Once the railroad has knowledge of the interference with surface water caused by negligence in construction of the embankment, any subsequent interference is intentional and should be treated as such.

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[1] Art. 1, § 12 of the New York Constitution permits the interception of telephonic communications upon issuance of an ex parte court order. This constitutional provision is implemented by N.Y. Code Crim. P. § 813(a).

The New York statute has been criticized for making authorizations to violate federal law and denying its citizens the protection of a federal right. Even proponents of restricted wiretapping criticize the New York law since any officer above the rank of sergeant may make application to *any* judge so that all applications could be channeled through a willing judge. Note, 31 N.Y.L.J. 197, 204 (1956). See also Dash, Knowlton & Schwartz, The Eavesdroppers 35-166 (1959), for complete coverage of the wiretapping problem in New York and other so-called "permissive jurisdictions." They divide jurisdictions into three categories: (1) Permissive—those in which wiretapping is expressly allowed to some extent, (2) Prohibition—those in which wiretapping is expressly forbidden, and (3) Virgin —those which have no pertinent legislation on the subject.

criminal proceedings. Relief was denied by the district court,[2] but the Court of Appeals for the Second Circuit granted a temporary stay pending the appeal.[3] On appeal the stay was vacated, and the Second Circuit held that although introduction of wiretap evidence constituted a federal crime, the federal courts should refrain from intervention in state criminal proceedings.[4] The Supreme Court granted certiorari. *Held:* Affirmed in a per curiam decision on the basis of *Schwartz v. Texas*[5] and *Stefanelli v. Minard.*[6] Justice Douglas, with whom the Chief Justice concurred, dissenting. *Pugach v. Dollinger,* 81 Sup. Ct. 650 (1961).

Since the enactment of section 605 of the Federal Communications Act in 1934,[7] wiretap evidence and evidence obtained through wiretap leads have been excluded in the federal courts.[8] State courts have not considered themselves bound by section 605 and wiretap evidence has generally been held by them to be admissible.[9] The issue first

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[2] Pugach v. Sullivan, 180 F. Supp. 66 (S.D. N.Y. 1960). Bryan, J., ruled that although the introduction of wiretap evidence in the petitioner's criminal trial would be a criminal violation of § 605 of the Federal Communications Act, the question of whether such evidence should be admitted is left to the states to determine and the "federal courts should not exercise their equity power to disturb the delicate balance of our federal system. . . ." *Id.* at 71.

[3] Pugach v. Dollinger, 275 F.2d 503 (2d Cir. 1960). Judge Medina distinguished Stefanelli v. Minard, 342 U.S. 117 (1951), and relied heavily on Benanti v. United States, 355 U.S. 96 (1957), in ruling that a federal injunction should issue since a violation of federal law in deprivation of petitioner's rights would otherwise result in irreparable injury from which the petitioner would have little recourse.

[4] Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960). The court sitting *en banc* under the authority of Stefanelli v. Minard, *supra* note 3, refused to intervene in state court criminal proceedings. Three judges favored the majority while Judge Waterman concurred on the ground that state judges would not transgress their oath to uphold the Federal Constitution and the laws of the United States by admitting wiretap evidence in violation of the federal law. Justice Clark in a strong dissent reaffirmed the views of Judge Medina.

[5] 344 U.S. 199 (1952).

[6] 342 U.S. 117 (1951).

[7] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958). It provides:

> [N]o person not being authorized by the sender shall intercept any communications and divulge . . . such intercepted communications to any person; and no person not being entitled thereto . . . shall divulge or publish the existence, contents, [or] substance. . . .

Violation of § 605 is made a criminal offense under § 501 of the Federal Communications Act. 48 Stat. 1100 (1934), as amended 68 Stat. 30 (1954), 47 U.S.C. § 501 (1958), provides for a fine of not more than $10,000 or not more than two years' imprisonment or both. Oddly enough, there have been only three convictions and none of these has been for violations by either federal or state law enforcement officers. See Massicot v. United States, 254 F.2d 58 (5th Cir. 1958); Massengale v. United States, 240 F.2d 781 (6th Cir. 1957).

[8] For a general discussion of the development of § 605 in the federal courts, see Moreland, Modern Criminal Procedure, ch. 9 (1959); Dash, Knowlton & Schwartz, The Eavesdroppers 383-442 (1959); Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 Minn. L. Rev. 391 (1960).

[9] People v. Vuriano, 5 N.Y.S.2d 391, 157 N.E.2d 857 (1959); Commonwealth v. Voci, 393 Pa. 404, 143 A.2d 652 (1958); Commonwealth v. Chaitt, 380 Pa. 532, 112 A.2d 379 (1955).

reached the Supreme Court in *Schwartz v. Texas*,[10] where, in refusing to reverse a state conviction, the Court held that "section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings."[11] The Court drew an analogy to *Wolf v. Colorado*,[12] where it had refused to impose upon the states the federal exclusionary rule announced in *Weeks v. United States*,[13] pertaining to evidence obtained by unlawful search and seizure. But much of the rationale in the *Schwartz* case was disturbed by the language of the Chief Justice in *Benanti v. United States*:[14]

> [W]e find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.[15]

Although in *Benanti* the Court merely refused to permit state officials to introduce wiretap evidence in federal court secured under a state ex parte order, the decision raised doubts as to the propriety of the *Schwartz* holding and the validity of statutes which authorized the violation of federal law.[16]

In the principal case, Pugach alleged that the introduction of wiretap evidence by the defendants would deprive him of his statutory rights,[17] that he had no adequate remedy at law, and that if relief

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[10] 344 U.S. 199 (1952).

[11] *Id.* at 203.

[12] 338 U.S. 25 (1949). The Court was specifically faced with the problem of whether due process required a reversal of a state conviction because evidence was admitted which had been obtained by an unlawful search and seizure. It held that "the fourteenth amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure." *Id.* at 33.

[13] 232 U.S. 383 (1913). A marshall searched the defendant's room without a warrant and evidence seized was introduced against him. The Court reversed the conviction holding that it was error not to return the items seized upon the defendant's seasonable request.

[14] 355 U.S. 96 (1957).

[15] *Id.* at 105.

[16] In *In re* Interception of Tel. Communications, 9 Misc.2d 121, 170 N.Y.S.2d 84 (1958), Hofstadter, J., refused to issue an exparte order on the ground that the New York statute was invalid and that he would become an accessory before the fact to the perpetration of a federal crime. See also Application for Interception of Tel. Communication, 198 N.Y.S.2d 572 (1960), where Judge Davidson refused to issue further orders since the federal decisions had held the use of wiretap evidence unlawful, even though obtained pursuant to the New York statute.

[17] The District Court ruled that jurisdiction lay under the Civil Rights Act, 68 Stat. 1241 (1957), 28 U.S.C. § 1343 (1958), amending 66 Stat. 932 (1948), which provides for federal relief against denial of equal rights under federal law by state officials, and under 17 Stat. 13 (1871), 42 U.S.C. § 1983 (1958), which provides a federal remedy where citizens have been deprived of federal rights pursuant to state action. Pugach v. Sullivan, 180 F. Supp. 66 (S.D. N.Y. 1960).

In McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951), petitioner's claim for injunctive relief against the use of wiretap evidence in state criminal proceedings was dismissed for lack of jurisdiction. 62 Stat. 930 (1948), 28 U.S.C.

(Footnote continued on next page)

were denied, he would suffer irreparable injury.[18] Conceeding that the divulgence of wiretap evidence, even in a state court, would constitute a federal crime, the lower courts nevertheless refused to intervene in the state criminal proceeding on the ground that the present facts called for the exercise of the court's equitable discretion in denying the requested relief.[19] The Second Circuit relied primarily on the authority of *Stefanelli v. Minard*,[20] where the Supreme Court had refused injunctive relief against the use of evidence secured by means of an unlawful search and seizure in a state criminal proceeding. There Justice Frankfurter had warned against tampering with the balance between the federal and state courts. Intervention into the state criminal proceedings, he said, would "expose every state criminal proceeding to insupportable disruption . . . [and] would invite a flanking movement against the system of State courts by resort to the federal forum. . . ."[21]

Chief Justice Warren, Justice Douglas, and Judges Clark and Medina have strongly supported the petitioner's views. Their disagreement with the majority's affirmance may be summarized in three arguments. First, it was contended that the *Schwartz* case was severely restricted, if not overruled, by the *Benanti* decision,[22] and that the statute under which the evidence had been obtained was invalid since it affirmatively authorized the interception of communications, a field which Congress had pre-empted.[23] Secondly, it was argued that the *Stefanelli* decision should not be controlling since in that case the violation of federal law had occurred before the trial, no federal crime

(Footnote continued from preceding page)
§ 1331 (1958), was held inapplicable because the claim was less than $3,000. Even though the court concluded that the petitioner had shown a state custom or usage in violation of his federal rights, the court denied jurisdiction under the Civil Rights Act on the ground that § 605 of the Federal Communications Act did not provide a constitutional right, nor for the protection of equal rights of citizens. See also Voci v. Farkas, 144 F. Supp. 103 (E.D. Pa. 1956), where the court granted injunctive relief against the use of wiretap evidence in the state proceeding for the suspension of petitioner's license. Upon finding that irreparable injury would follow if relief were denied, jurisdiction was not put into issue.

[18] See Pugach v. Sullivan, *supra* note 17, at 68 n.1, where the court notes the irreparable injury which Pugach would suffer, such as the loss of his license to practice law, the loss of a liquor license plus the loss of several personal rights.

[19] An additional reason for the court's holding was the traditional reluctance of equity to enjoin the commission of a crime based on the policy of preserving the right to a trial by jury. Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960). The validity of this reason in the principal case is questionable. See 8 U.C.L.A.L. Rev. 198, 200 (1961).

[20] 342 U.S. 117 (1951).

[21] *Id.* at 123. In the *Stefanelli* decision the Court relied on Douglas v. City of Jeanette, 319 U.S. 157 (1943), for the discretionary refusal by the Court to exercise equitable power to interfere in state criminal proceedings.

[22] Pugach v. Dollinger, 81 Sup. Ct. 650 (1961) (dissenting opinion).

[23] Pugach v. Dollinger, 277 F.2d 739, 747 (2d. Cir. 1960) (dissenting opinion).

was involved, no irreparable injury had been shown and the case was an isolated instance of a fourth amendment violation. While in *Pugach*, the petitioner sought to prevent a crime *in futuro*, irreparable injury was clearly proven, and the acts sought to be enjoined constituted a common violation of federal rights by law enforcement officials.[24] Thirdly, it was insisted that the federal courts should exercise their equitable powers in preventing a federal crime,[25] in protecting the petitioner's statutory rights and in implementing the congressional mandate against unlawful telephonic interception.[26]

Instead of the flood of litigants to the federal forums as predicted by Justice Frankfurter, Judge Clark, to the contrary, concluded that his state brethren, along with state law enforcement officials, would welcome federal intervention which would give a definitive solution to the wiretapping problem.[27] The situation facing the Court was not uncommon to many of the struggles between conflicting state and federal policies.[28] It is certainly questionable whether state judges would rule inadmissible wiretap evidence which was expressly permitted under a local statute. In the usual case the defendant is unaware that wiretap evidence is being used against him; after it has been introduced, federal relief would be precluded under *Schwartz v. Texas*. If the state judges refused to follow the lead of the federal courts, then the prediction of Justice Frankfurter might well come true.[29]

Conspicuously absent from Justice Douglas' dissent is the argument based on the "supremacy clause"[30] of the Constitution. Here the New York statute expressly authorized the divulgence of wiretap evidence in spite of the express congressional prohibition against such divulgence. This argument was strongly hinted by Judge Waterman in his concurring opinion in the Second Circuit decision.[31] He believed

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[24] Pugach v. Dollinger, 81 Sup. Ct. 650 (1960) (dissenting opinion); Pugach v. Dollinger, 277 F.2d 739, 747 (2d Cir. 1960) (dissenting opinion); Pugach v. Dollinger, 275 F.2d 503 (2d Cir. 1960).

[25] See cases cited note 24 *supra*.

[26] Pugach v. Dollinger, 277 F.2d 739, 747 (2d Cir. 1960) (dissenting opinion).

[27] *Ibid.*

[28] *Ibid.*

[29] See 8 U.C.L.A.L. Rev. 198 (1961).

[30] U.S. Const. art. VI provides in part as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[31] Pugach v. Dollinger, 277 F.2d 739, 744 (2d Cir. 1960) (concurring opinion). Judge Waterman also admonished the United States district attorneys that failure to prosecute admitted violations was an affront to the court.

that state judges would not admit evidence into the record, the divulgence of which would violate federal law. To admit such evidence the judge would have to disregard his sacred oath to uphold the United States Constitution and the laws made pursuant thereto as the supreme law of the land.[32] In *Pugach* there was the clearest conflict between federal law prohibiting the interception of telephonic communications on the one hand, and on the other, a state constitutional provision and statute authorizing such interceptions. It would seem from *Pugach* that the Supreme Court was willing to turn a deaf ear to the state's infringement of federal statutory rights and to disregard its staunch enforcement of the concept of federal supremacy.

By affirming in *Pugach* on the authority of *Schwartz,* the Court dispelled all hope that *Schwartz* might be overruled on the strength of the Benanti decision. As of *Pugach,* wiretapping and the divulgence of wiretap evidence while constituting a federal crime is nevertheless admissible in state criminal proceedings at the state's discretion. For all practical purposes, section 605 of the Federal Communications Act has been reduced to a federal rule of evidence.[33]

The law, however, is not as well settled as it might seem. Two months after *Pugach,* the Court handed down *Mapp v. Ohio.*[34] In overruling *Wolf v. Colorado,*[35] the Court held that the right of privacy guaranteed under the fourth amendment is enforceable through the due process clause of the fourteenth amendment and that evidence obtained by an unconstitutional search and seizure is inadmissible in state criminal proceedings. The effect *Mapp* will have on the wiretapping law is speculative. Since *Wolf* represented the foundation for both *Schwartz* and *Stefanelli,* these decisions stand on shaky ground. While it is arguable that *Mapp* need not have any particular bearing on the wiretapping decisions because state infringement merely is in violation of a federal statute and not a constitutional right, one should

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[32] *Ibid.*

[33] See Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View,* 44 Minn. L. Rev. 891 (1960). Professor Kamisar takes the position that an individual has more protection under § 605 from unlawful wiretapping than he would if wiretapping came under the fourth amendment. In addition to the criminal offense for violating § 605, civil damages are also available. Little, if any, advantage could be gained by reversal of Olmstead v. United States, 277 U.S. 438 (1928).

[34] 81 Sup. Ct. 1684 (1961). Police officials without permission and without a warrant made a search of defendant's premises and found pornographic literature, the possession of which constituted a crime. The conviction was affirmed by the Ohio Supreme Court. The Court by-passed the first amendment question and reversed on the ground that the search by the police without a warrant constituted a denial of due process under the fourteenth amendment. Justice Clark, speaking for the court, noted the obvious futility of relegating the fourth amendment to the protection of other remedies.

[35] 338 U.S. 25 (1949).

not forget the closeness of the *Olmstead*[36] decision where the Court ruled that wiretapping fell outside the protection of the fourth amendment. But is not wiretapping as great an intrusion on the right of privacy as an unconstitutional search and seizure? Would the Court's decision be the same as in *Olmstead* if it were to reappraise the issue? One might anticipate that the Court will provide the answer to these questions in the very near future.

The victory of *Pugach* may be short-lived. Law enforcement officials may once again be compelled to fight twentieth century crime with nineteenth century methods.[37] Undoubtedly the battle over wiretapping is just beginning. Many advocates urge as a solution to the problem what may be considered a middle-of-the-road position. While urging on the one hand that the Supreme Court take the initiative in enforcing the federal statute by ruling inadmissible such evidence unlawfully obtained by state officials and violative of the due process clause of the fourteenth amendment, they also seek legislation by Congress which would permit restricted and controlled wiretapping by authorized officials in a limited number of situations such as espionage, narcotics and kidnappings. Warrants should be required, and such warrants should be issued only by a federal judge or a designated member of the Federal Communications Commission. Such a statute would enable law enforcement officials to use wiretapping, while at the same time providing adequate safeguards to insure the protection of constitutional and statutory rights.[38]

K. Sidney Neuman

LOSS OF CONSORTIUM TO WIFE CAUSED BY NEGLIGENCE OF THIRD PARTY —Plaintiff's husband, a fireman, was severely injured while attempting to extinguish a fire caused by the defendant's negligence. Plaintiff brought suit for loss of consortium. From a summary judgment dismissing her action, the plaintiff appealed. *Held:* Reversed. Where a wife's conjugal interest is invaded by the negligent act of a third party,

[36] Olmstead v. United States, 277 U.S. 438 (1928). The historic dissents by Justices Holmes and Brandeis may well serve as a basis for overruling *Olmstead* in a future decision. Justice Douglas, in particular, has continued to strive to bring wiretapping within the protection of the fourth amendment. He states that this would be an effective solution to the wiretapping problem only if *Wolf v. Colorado* were reversed. Douglas, The Right of the People 150 (1952).

[37] See Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 Minn. L. Rev. 835 (1960); Rogers, *The Case for Wiretapping*, 63 Yale L.J. 792 (1953).

[38] See 100 Cong. Rec. 4156 (1954), where Senator McCarren discusses a bill he introduced in the 83rd Congress. While the bill proposed a system similar to that of New York, it did not restrict grants of warrants by federal officers and was defeated.