California Law Review

VOL. 42 DECEMBER, 1954 No. 5

Surveillance by Wiretap or Dictograph: Threat or Protection?

A Police Chief's Opinion

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[EDITORIAL NOTE: The area of controversy explored by Chief Parker in the following article is one occupying a considerable amount of space in recent legal publications. Most commentators urge constitutional restraints on using precisely the law enforcement techniques which Chief Parker so stoutly defends. Examples in recent law reviews include Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings—"Ordered Liberty" or "Just Deserts,"* 41 CALIF. L. REV. 672 (1953); Editorial, 42 CALIF. L. REV. 120 (1954); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954). In view of this imbalance, the Board of Editors believes the following article to be of particular interest, representing the advocacy of a point of view rarely found in legal literature.]

Adequate intelligence of underworld activities is the police administrator's most potent weapon against organized crime. Any combination of patrol and investigation alone will not serve to suppress clever criminal operations—as the shockingly low arrest and conviction rate of known syndicate members vividly attests. Traditional police techniques are not the answer to this problem—organized crime can be reduced and stamped out by the police only when knowledge of its methods, personalities and plans produces conviction hazards so great that operation becomes unprofitable.

Whether we like it or not, we must face up to the distasteful conclusion that today's police service fulfills its task with no greater success than it did a quarter or half-century ago. Inaccurate as our statistical knowledge is, it leaves little doubt that the crime rate has been on the increase for the past several decades. It is estimated that there are six million persons in this country who exist primarily by criminal means—and this figure does not include the casual criminal or occasional offender. J. Edgar Hoover, Director of the Federal Bureau of Investigation, has testified that the annual cost of crime to our nation is greater than *twenty billion* dollars.[1] Crime pays and pays well!

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[1] In testimony before Appropriations Committee, House of Representatives, February, 1954.

This is obviously not a game in which the police play "cops and robbers" for the amusement of society. This is a case of a lawless criminal army warring against society itself, and the police comprise that part of society which has been given the task of being the first line, and sometimes the only line, of defense.

It is often a dirty business—a very dirty business—because of the warped nature of the criminals with whom the police must often deal. But history has shown and is continuing to show that it is a necessary business, and that the responsibility must be placed on someone. The men of the police service are aware of this responsibility, and in choosing their profession voluntarily assume it. They can discharge that responsibility only to the extent that society supports them. If society chooses, for reasons of its own, to handicap itself so severely that it cannot or will not deal effectively with the criminal army, it is doubtful that free society as we now enjoy it will continue; for either crime will increase until there is no internal security worthy of the name, or the police force will be so expanded that the crushing financial and moral burden of a police state will be here whether we like it or not.

I do not propose that the answer to this dilemma is to give the police a free hand. No responsible police official that I know takes such a stand. However, until society finds a more effective way of controlling criminals than by the use of a police force, society *should* control police activity by holding the police strictly accountable for the proper exercise of their power, but *should not* tie their hands to the extent that their effectiveness is critically impaired.

There are people who, well knowing that the modern criminal has availed himself of every modern technical advancement, would nevertheless restrict the police to the methods available at the time of the lantern and the "hue and cry." These people are obviously ignorant of the first rule of warfare, which is "Know Your Enemy," applying as well to domestic as to foreign enemies.

The threat that there will develop in our society an all-powerful police of potentially greater danger than the criminal army is, in my opinion, so remote as to be negligible. The police have no sources of revenue of their own; they must justify their existence and their operations each year to representatives of the people who provide the funds for police operations, fix the number of employees who can be hired, designate their salaries, and, in general, prescribe the conditions of their employment. As long as the police must come before the people and the people's representatives, and justify their past activities as a basis for asking financial support for their next year's operations, I foresee no danger that police activity will be an instrument of tyranny. The people would not stand for it; the city govern-

ment would not stand for it; the press would not stand for it; and the police themselves, since they are citizens first and policemen second, would not stand for it.

It is my opinion that if crime continues to increase for the next fifteen years at the rate it has grown in the past decade, the internal security of this country will be gravely threatened.

The solutions for these problems are not the responsibility of the police alone. Criminal activity often has its origin in unfortunate social conditions, in subnormal mental or physical health, or in society's failure, in the home, the school, the church and other agencies, to inculcate in child and adult alike a proper respect for the law and the necessary self-discipline and other desirable traits of a well-adjusted and mature personality. Again, society as a whole, through its governmental agencies, has responsibilities not primarily assigned to the police; the administration of criminal law, and the conviction, treatment and rehabilitation of criminals.

The fact remains that society must deal not only with crimes which are being committed today, but those which are planned and proposed for tomorrow. It has assigned the police a grossly unbalanced share of the task of prevention *plus* the whole task of detection, apprehension, and the securing and preparing of evidence for presentation to the courts.

The task of the police does not cover the entire field of crime prevention because the police are not assigned the tasks of guardianship, child rearing, education, religious instruction, correction of mental or physical illness and social maladjustments, or otherwise dealing with the root causes of crime. The fundamental role of the police service is not crime prevention *per se*. Rather, policemen consider themselves as a "containing element,"—a thin line of blue which stands between the law-abiding members of society and the criminals who prey upon them. The function of the police insofar as prevention is concerned lies in two general fields: (1) the prevention of criminal acts by actual or potential physical intervention, and (2) performance so effective that the fear of apprehension, conviction and punishment tends to prevent criminal actions; in other words, crime repression.

The first of these is accomplished through such police procedures as uniformed and plainclothes patrol on foot and by vehicle, and by the maintenance of such organization and communications as to place men at a scene of planned disorder or other crime within the shortest possible time. Crime repression is accomplished through educating criminals to fear not only the policeman in plain view or on patrol in the area, but also the policeman who may be keeping them under surveillance without their knowledge. This involves not only observation by the police themselves, but observation by responsible citizens and informants. An important part of such crime repression *can* be accomplished through intelligent surveillance by means of

two techniques: one, the use of electronic amplifying devices—commonly called "dictographs," and the other by "wire-taps."[2]

Before proceeding further in this exposition, I feel it mandatory that I declare myself on the matter of civil rights. I believe that we cannot pass lightly over those inalienable rights of individuals which are the greatest possessions of a free people. I do not believe that the police service can afford either to ignore or to trample upon these priceless possessions, and I believe that history will indicate that every police organization which has assumed a tyrannical attitude has been doomed to oblivion. We still suffer today from the abuse of power by those who preceded us in the police profession. I believe that to avoid these fatal errors we must know and recognize the legal rights of individuals and be fully cognizant of when the law permits us to invade personal liberty.

The American people are noted for their sense of fair play. In various types of contests, rules are carefully laid out in advance and adherence required by impartial officials. In contradistinction to this noble characteristic of the American people, the police are expected to enter a contest against criminal elements in which the rules governing the actions of the police are indistinct, ill-defined, vague and uncertain, and in which their adversaries recognize no rules whatsoever.

Illustrative of this is a decision handed down on February 8, 1954, by the Supreme Court of the United States in the case of *Irvine v. California*.[3] As a lawyer, I am fully cognizant of the obedient recognition that must be given to the decision of our courts. As a police officer, I am aware of the absolute necessity for the recognition of the civil rights of individuals. But many of us in the law enforcement field are disturbed and confused by the decision in the *Irvine* case, and this confusion results more from what the court failed to state than its specific pronouncement.

This is not intended to be a criticism of the Supreme Court, and I touch upon this subject only to illustrate the plight of the police. Since the advent of appropriate electronic devices, the police of this state have utilized such devices to gather information and evidence concerning criminal activities. In 1941, the Legislature of the State of California recognized this practice by adopting Section 653(h) of the Penal Code[4] which in substance pro-

[2] Dictograph: An electronic listening device, the use of which (sometimes called "bugging") consists of placing an open microphone in a room in an inconspicuous place, thus enabling the listener to hear and record all sounds which take place in that room. Wiretapping: The use of devices enabling the operator to detect and record messages transmitted over telephone or telegraph wires.

[3] 347 U.S. 128 (1954).

[4] CAL. PEN. CODE § 653(h): Dictographs. Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, apartment, tenement, office, shop, railroad car, vehicle, mine, or any underground portion thereof, is guilty of a misdemeanor; provided, that nothing herein shall prevent the use and installation of dicto-

hibits any person *other than the police* from installing dictographs on premises without consent of the owner, lessee or occupant. It further provides that such installations are permissible when expressly authorized by the head of the peace officer agency or by a district attorney. This is not to be confused with wiretapping, as Section 640 of the Penal Code[5] of the State of California prohibits wiretapping without exception.

Three years ago the District Attorneys' and Peace Officers' Associations of California sponsored a bill in the State Legislature to permit law enforcement agencies to intercept telegraphic and telephonic communications when authorized to do so by court order based upon an affidavit setting forth probable cause.[6] The proposed legislation was similar to a law now in effect in the State of New York.[7] (Police officials in the City of New York who have the responsibility for the investigation of organized crime attribute to this statute the solving of every major racket and violence case in that state within the past decade. As examples, the Erickson and Harry Gross bookmaking scandal, the "basketball fix" and several extortion cases first came to light through wiretappings.)

Our purpose in asking for such legislation was not stimulated by idle curiosity or inquisitiveness. It was merely an attempt to restore some semblance of balance between individual freedoms and the welfare of society as a whole. I believed then, and I believe now, that it was never intended by our founding fathers that the criminal cartels of our nation should be given a privileged sanctuary within the vast telegraphic and telephonic communications network of the United States within which to plan and transact their illegal activities with impunity. Even though the police of this state are precluded from intercepting telephonic conversations that might lead to the knowledge of the whereabouts of a kidnapped child and his subsequent rescue, our petition fell upon deaf ears.

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graphs by a regularly salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney, when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.

[5] § 640. Tapping Phone or Telegraph Wires—Reading Messages. Every person who, by means of any machine, instrument, or contrivance, or in any other manner, willfully and fraudulently, or clandestinely taps, or makes any unauthorized connection with any telegraph or telephone wires, line, cable, or instrument under the control of any telegraph or telephone company; or who willfully and fraudulently, or clandestinely, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any telegraph or telephone wire, line, or cable, or is being sent from, or received at any place within the State; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained; or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things hereinabove mentioned, is punishable as provided in section 639.

[6] REPORT OF LAW AND LEGISLATION COMMITTEE, CALIFORNIA PEACE OFFICERS' ASSOCIATION, 31st Annual Convention, September 6–8 (1951).

[7] N. Y. CONST. Art. I, § 12.

In the *Irvine* case, the court specifically found that wiretapping was not involved, and limited its deliberations to the installation of a dictograph in the home of Irvine without his knowledge or consent for the purpose of obtaining evidence concerning alleged bookmaking activities.[8] As a result of the evidence obtained, Irvine was prosecuted and convicted in the California courts and sentenced to eighteen months in prison. The United States Supreme Court sustained the conviction in a five to four decision and in connection therewith, the majority opinion of the Court reads in part as follows:[9]

> The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified . . . .

It is certainly true that the chief burden of administering criminal justice rests upon state courts. If we project this principle upon local law enforcement agencies we find, with but rare exception, that the state's machinery of criminal justice is an inert and lifeless thing until put into motion by the police.

Collateral to the disposition of the appeal in *Irvine,* the clerk of the court was instructed to refer the matter to the Attorney General of the United States for investigation to determine whether or not the police officers involved were in violation of the Civil Rights Act.[10] This section makes it a crime for any person under color of any law or custom to deprive any inhabitant of any state of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

The Court pointed out that in 1949, for the first time, it ruled that the basic search and seizure prohibitions of the Fourth Amendment were applicable to the states under the Fourteenth Amendment, and thus suggested that a violation of the Civil Rights Act may be involved in the *Irvine* case. Since the Court made no reference to Section 653(h) of the Penal Code of the State of California,[11] the broad language contained in the majority opinion and the dissenting opinions is such that no clear course of procedure is spelled out for the local police to follow in searching for and seizing evidence. It is not even clear that obtaining a search warrant would alter the Court's opinion as far as the activities of the police officers were concerned.

The utilization of dictographic equipment has solved countless serious crimes and led to the apprehension of many dangerous criminals who would otherwise have gone unpunished. A reputed overlord of crime in the Los

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[8] Irvine v. California, 347 U.S. 128, 129 (1954).

[9] *Id.* at 131.

[10] 18 U.S.C. § 242 (1952).

[11] See note 4 *supra.*

Angeles area is now serving a term in a federal prison as a result of a prosecution in which information obtained through the use of dictographic equipment contributed materially. Two reputed members of the Mafia, who escaped federal prosecution for narcotic violations when a key witness against them was found murdered, were convicted of crimes in the courts of this state based upon evidence obtained through a dictograph installation. One such installation alone aided the Los Angeles Police Department in solving forty-three serious felonies.

It cannot justly be said that the police are lazy because they avail themselves of scientific devices. Rarely will be found another occupation where men labor more unstintingly far beyond the hours of normal duty with no hope of additional financial reward. The bravery of the police cannot be questioned as they daily risk their lives in the apprehension of vicious criminals. Certainly, society cannot expect the police to risk criminal prosecution when their only sin is the valid enforcement of the law as they have been led to understand the law. The rules must be more clearly defined if the police are not to be driven into inaction for fear of unanticipated consequences.

The real danger to society is in organized activity by groups, mobs and gangs of professional criminals. Effective police action supported by appropriate statutes and wise functioning of the courts and penal authorities can largely curtail the profits of crime, thus materially reducing the activities of the professional criminal. It is my considered opinion that society must take effective action if it is to protect its very existence. In so doing, society must realistically recognize certain facts concerning professional criminals. These men are extensively organized and their activities in various fields are controlled by a relative few who do not, themselves, often appear on the scene.

The professional criminal is clever and resourceful, quick to take advantage of every invention or technique that can be adapted to criminal purposes; he knows the law, and he knows the ways in which it can be distorted to provide loopholes for his escape from detection and conviction. Some are highly skillful in disgnising their operations as legitimate business enterprises, and are extremely resourceful in concealing their operations from ordinary observation by law-abiding citizens and neighborhood patrolmen.

I wish again to emphasize that the most dangerous criminals are professionals—people who refuse to work productively or legitimately, people who sneer at those who do and refer to them as "suckers" and "chumps." These people are most often organized according to their particular rackets or types of activity. Thieves and burglars are organized with one another and with "fences"—people who make a business of buying and selling

stolen property. Robbers, safecrackers and other strong-arm men are organized with each other, and, in turn, often with fences. People who are in one or another of the vice rackets—prostitution, gambling, narcotics and the like—are organized among themselves, and thus it is with almost every type of crime against person or property. Above the "little men" in each of these rackets are the "big men," who often do not physically participate, but who control the activities of the men below them, arrange for their bail and for their representation in court, and who see to it that a substantial part of the proceeds is delivered to them.

Crime by its very nature is largely a thing which is carried on in the dark, behind closed doors or out of sight or hearing. Society has determined, for example, that it will not tolerate prostitution, not only for its deleterious effect on the morals of the community and its threat to the public health through the spread of venereal disease, but also because experience has shown that prostitution engenders pandering, procuring, thefts, strong-arm robberies, assaults and many other such crimes. Consequently, the laws of the state and the ordinances of the city are directed toward the suppression not only of organized, but of occasional prostitution.

It is impossible, however, to detect prostitution and to obtain evidence which will support prosecutions and convictions by ordinary patrol work. The crime goes on behind locked doors. Watches are kept. Only patrons are admitted. Sometimes even they are required to have introductions or be identified. A prostitute does not solicit uniformed policemen nor admit them to her chamber. Patrons do not complain, nor are they willing to testify. The prostitute is an outlaw; arrests or police records mean nothing to her as such. She will not testify against her confederates nor against her employers. She is part of one branch of organized professional criminality. There are other types equally as organized, equally as insidious, equally as secretive.

When these organized mobs are operating with their accustomed secrecy, there is no technique known to police science by which their criminal activities can with certainty be detected and the criminals brought to account. One of the most effective techniques ever devised for such work—wire tapping—is barred under federal and state law.

When wire tapping cannot be carried on, the most effective method of suppressing crime and ferreting out criminal activities is to keep the men known to be engaged in these activities under constant and close surveillance. This is not only more costly than any police department can afford, but in the vast majority of cases it is impossible. The most effective substitutes for constant and close surveillance are to have an undercover agent inside the organization, which is extremely difficult to achieve and very hazardous, or to have some means of overhearing what is said, whether by

listening at the transoms, outside windows, down a ventilator shaft or by dictograph.

It is my opinion that if the police were deprived of the power to use dictographs, or if the police were restricted in the use of dictographs to such an extent that the element of secrecy would be destroyed, the ability of the police to detect crimes of the sort referred to as "organized crime" would be greatly destroyed, and the power of the police to cope with many of the crimes which are committed only in secret would be substantially eliminated.

The use of dictographic equipment should not in any way be interpreted as a laborsaving device to free policemen from more arduous tasks. The monitoring of an installation requires endless hours of the most tedious concentration and confining toil, sometimes under conditions of great discomfort. But experience has shown that it is work that must be done if crime is to be controlled. There is no available substitute for it. Elimination of the use of dictographs would doubtless be a welcome respite to the men who are assigned to that kind of work; but any elimination would provide organized crime a sanctuary in the very midst of society which the forces of law and order could not penetrate. Wittingly or unwittingly, those who would deprive society of this means of containing the criminal element are, in effect, giving aid and comfort to their enemy. The question has been raised: is the installation of a dictograph an illegal act?

It would seem that common sense, reasoned thought and impartial evaluation yields but one answer to the question. The common good and public interest posits the subordination of the individual to the community. Thus, rights to life, liberty, or the pursuit of happiness are not *absolute* rights; if they were so construed, the electric chair, the state prison, and the Office of Price Administration would be of necessity precluded as instruments of government.

So, too, with the guaranties offered under the Fourth Amendment, guaranties against unwarranted searches and seizures. Wise men, indeed, placed the word "unreasonable" in that provision.[12] Those who would deprive law enforcement of its vitality seem to regard the guaranties of the Fourth Amendment as *absolute* guaranties against any and all searches and seizures. How could the police service operate under that construction of the law? Could police enter on private property without first obtaining the consent of owners? Could prowler complaints be investigated? Complaints about strange activity? Complaints that a house is suspiciously quiet? Reports that someone has not been seen for a suspicious length of time? Reports concerning neglected children who have been left alone? Searches,

[12] U. S. CONST. AMEND. IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .

where a fugitive is known to be in the area? Searches, where a car resembling a reportedly stolen car is seen from the street? Rescue from burning buildings? From gas-filled bedrooms? Major disturbances on private property? Obviously, many operations of the police service require *reasonable* searches or seizures which otherwise would be trespasses.

Objection is made that the above cited cases are all discriminate, but that dictographic techniques eavesdrop on the innocent as well as the suspect, and that such techniques smack of the general warrant, and cannot be selective in nature. Also, it is contended that the use of the dictograph implies unbridled arbitrary discretion on the part of police officers, their use of expedient principles to justify their actions and their indiscriminate application of law. Yet, the one who makes that objection sees no unreasonable action when he is a passenger in a vehicle and the driver of that vehicle is stopped by a traffic officer. His liberty is curtailed; he is surely discommoded—and yet he is an innocent party who does not question the action. Does not the analogy hold? Can we ask our traffic officers to overlook all vehicles which carry passengers lest some passenger's constitutional guarantees be violated? Obviously, in the general interest, the actions of the traffic officers are deemed *reasonable,* in respect to both driver and passenger. Is modern traffic enforcement deemed a police state method? Does the passenger regard police traffic activity as an insidious kind of intrusion upon his personal liberty? Do we brand that traffic officer with the stigma of *unbridled arbitrary discretion?* With use of *expedient* principles? *Indiscriminate application of law?*

We might find objectors who say, "But this ignores the sanctity of the home." I believe, as do my colleagues in the law enforcement profession, that the privacy and the sanctity of the home ought to be constitutionally protected; that the protection of individual rights is paramount to governmental expediency; and that secret search by way of general warrants is an unjustifiable infringement upon the rights of a free people.

American citizens *may* have their privacy violated by impatient, overzealous and opportunistic officials just as millions of people are faced with arguments of "state necessity" in other parts of the world which have a totalitarian regime. We do not argue a "fight fire with fire" philosophy—because such a premise *could* reduce the Bill of Rights to a heap of ashes! History shows that bad police methods breed disrespect for law, shake the confidence of law-abiding citizens in the administration of justice and weaken the national morale. Police tyranny is no substitute for police protection—nor is an exaggerated conception of individual rights!

In a consideration of the morality of wiretap and dictograph, we may apply the principle of ethics entitled "The Law of Double Effect."[13] This

[13] FAGOTHEY, RIGHT AND REASON 85 (1953).

law posits that when an action produces two effects, one good, and one bad, as long as the good effect is intended, and as long as the means are either morally good or morally neutral, *the act may be morally justified.* Thus, when this nation was faced with the ethics of warfare in the use of the atom bomb, it was obviously morally justified according to this principle.

So, too, when the traffic officer arrests the driver: the good effect *only* is intended; the bad effect (deprivation of the personal liberty of the passengers) is not intended. Hence, this activity is morally justifiable. In the case of the wiretap or dictograph the identical rationale *may* be applicable.

We would not attempt to justify a wiretap or dictograph if the ends sought were extortion, blackmail or like evil. If these techniques are used they must, of necessity, be rigidly controlled. But if the end is the protection of the commonweal, then the evil effect (eavesdropping upon the conversations of the innocent) is not intended, and the action *may* be morally justified.

It is up to the legislatures and judiciary of this nation carefully to spell out the authority and powers and procedures to be followed by the investigatory agencies in their enforcement of the laws of this land, if there is doubt as to the constitutionality or morality of a particular process or technique. Until this is done, it would seem that the *test of reasonableness* would be adequate as a criterion to guide the law enforcement administrator. We are not arguing that the end justifies the means; on the contrary, we argue that the means are neutral—as is any mechanical technique, and that the use of these means is justified by moral as well as by statute law. Behind all statute law stands moral law. If an action is morally defensible, then, too, it is legally defensible. It is my opinion that the use of the wiretap and dictograph do *not* violate a moral precept, and that, therefore, the statute law should echo this viewpoint.

Far from being a *threat* to our freedoms, the use of modern technological devices by the police service may well be its most powerful weapon in combatting our internal enemies, and a vital necessity in the *protection* of our nation's security, harmony and internal well-being.