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Mapp after Forty Years: Its Impact on Race in America

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MAPP AFTER FORTY YEARS: ITS IMPACT ON RACE IN AMERICA

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The facts in *Mapp v. Ohio*[1] were not unusual. White plain-clothes police officers, looking for a man suspected of bombing Don King's home, surrounded Dollree Mapp's house, an African-American woman known to the police, when the suspect's car was found parked outside the house. They knocked on the door, but Mapp denied them entrance without a search warrant. The officers radioed for a warrant, but presumably without waiting for one, detectives accompanied by six uniformed officers broke out the front glass of the door, entered, and searched the house. The lead detective told her he had a warrant and waved a piece of paper in her face, a paper which she allegedly grabbed and stuffed in her blouse. After handcuffing Mapp, the officers retrieved the paper, but no warrant was offered at trial.[2] While the suspect was not found in the house, the officers found pencil sketches of male and female nudes packed in a box and suitcase in Mapp's bedroom. Mapp was charged with possession of obscene materials, a felony. Even if there had been a warrant to search for the suspected bomber, it would not have extended to a box and suitcase in which he could not have been hiding.

The search without a warrant and without exigent circumstances that might have excused the absence of a warrant violated the defendant's Fourth Amendment right to be free from unreasonable searches and seizures. At the time of the search, 1957, Ohio courts offered

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[1] 367 U.S. 643, 643-45 (1961).

[2] *See* State v. Mapp, 166 N.E.2d 387, 389 (Ohio 1960), *rev'd* Mapp v. Ohio, 367 U.S. 643 (1961) ("No warrant was offered in evidence, there was no testimony as to who issued any warrant or as to what any warrant contained, and the absence from evidence of any such warrant is not explained or otherwise accounted for in the record."). *See also* Stanley Kent & Michael von Glahn, *Dollree Mapp v. State of Ohio*, CLEV. MAG. LANDMARK L. SUPP. 36, 38 (Mar. 1998) ("In the 1970s, Delau [one of the detectives] admitted—contradicting his trial testimony—that his lieutenant had only obtained an affidavit [not a warrant], which spelled out the reasons for wanting to secure a warrant.").

little protection to Fourth Amendment rights.[3] Nine years earlier, the United States Supreme Court had held that the Fourth Amendment protections that applied to the federal government were also binding upon the states through the Fourteenth Amendment.[4] In federal courts since 1914, the remedy for violation of Fourth Amendment rights had been exclusion of the evidence from the prosecution's case.[5] However, the Court said that the states were not bound by that rule.[6] Ohio, and about two-thirds of the other states, had not adopted at that time an exclusionary rule for constitutional violations under their own constitutions.[7] Thus, in about two-thirds of the states, police were free to violate fundamental constitutional rights without consequences. When reviewing the search in this case, the Ohio Supreme Court acknowledged the constitutional violation but stated that

> this court has held that evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution. . . . [A]nd the Supreme Court of the United States has held that the Constitution of the United States does not usually prevent a state court from so holding.
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> Hence, we conclude that . . . the due process clause of the 14th Amendment to the Constitution of the United States was not violated by defendant's conviction, although that conviction was based primarily upon the introduction in evidence of

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[3] *See, e.g.*, State v. Lindway, 2 N.E.2d 490, 493 (Ohio 1936) ("It is well settled that the Fourth and Fifth Amendments to the United States Constitution . . . are directed exclusively against the activities of the federal government and have no application to the various states and their agencies.").

[4] *See* Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), *overruled in part by* Mapp v. Ohio, 367 U.S. 643 (1961) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.").

[5] *See* Weeks v. United States, 232 U.S. 383, 398 (1914) ("We therefore reach the conclusion that the letters in question were taken from the house of the accused . . . in direct violation of the constitutional rights of the defendant; . . . there was involved . . . a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused."). *See also Wolf*, 338 U.S. at 28 ("In *Weeks v. United States*, . . . this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling was made for the first time in 1914.").

[6] *See Wolf*, 338 U.S. at 33 ("We hold, therefore, that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.").

[7] *See id.* at 38 tbl.I (summarizing the position of the states regarding the *Weeks* doctrine in 1949).

books and pictures unlawfully seized during an unlawful search of defendant's home.[8]

The illegal entry of Mapp's house by the police was nothing extraordinary; it was an everyday fact of life for blacks and other racial minorities. Police throughout America were part of the machinery of keeping blacks "in their place," ignoring constitutional guarantees against unreasonable arrests and searches and those that barred use of "third-degree" tactics when questioning suspects.[9] The Constitution played little role in the relationship between blacks and the police, and the black population had little power at the time to seek redress through the political process.

The primary story running through the four hundred years of American civilization is race—the ongoing story of white mistreat-

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[8] State v. Mapp, 166 N.E.2d 387, 389-90 (Ohio 1960), *rev'd*, Mapp v. Ohio, 367 U.S. 643 (1961).

[9] *See* Brown v. Mississippi, 297 U.S. 278 (1936). The Supreme Court reversed the conviction of the accused, a black man, who was found guilty and sentenced to death for murdering a white man. The summary of the facts of the case outlines the brutal methods police often used to extract confessions:

> On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. . . . A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.
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> The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. . . . [T]he same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.
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> . . . The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding.

Id. at 281-85 (citations and internal quotation marks omitted).

ment of other races—red, black, and yellow. The history of blacks and whites in America is the tale of black enslavement, murder, and rape, and later the legitimization of under-class citizenship with its lingering legacies of slavery. This includes arbitrary deprivation of the most basic human rights, including life itself, notwithstanding the commitments of the post-Civil War amendments. At every stage of the first two hundred and fifty years of the Republic, all three branches of the federal government were, at the least, accomplices to these policies. The framers legitimized human slavery and chose to reward the slave states. Even the (delayed) ban on importation of slaves enriched slave holders by increasing the value of their slaves,[10] and the three-fifths rule increased the slave states' power in the new Republic.[11] Congress, traditionally, was the power base in the national government of the southern interests, except during the short period of Reconstruction when the Radical Republicans held sway.[12] Using the strangle-hold of seniority and the filibuster in the Senate, southern representatives to the House and Senate into the mid-twentieth century made sure that legislation seeking relief from injustices for blacks rarely made it to the floor, and, if it did, they made sure it died there. Although more than 4,700 Americans, the overwhelming majority black, were lynched by mobs between the end of the 1882 and 1968,[13] Congress never passed anti-lynching legislation. Even after *Brown v. Board of Education*,[14] in 1954, almost all of the southerners in the United States Senate and House of Representatives issued a document, the Southern Manifesto, denouncing the Supreme Court decision and calling for massive resistance. This indicated that enlightenment was no closer to power in the South than it had been a century earlier.[15]

Nor could the black population look to the White House for help. In the years after the Civil War, President Hayes removed federal troops from the former Confederate states. He effectively abandoned

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[10] *See* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM 98-101 (4th ed. 1974) (discussing debates during the Constitutional Convention about the slave trade, its effect on the value of existing slaves, and the ultimate compromise reached in Article I, Section 9 of the Constitution).

[11] *See* U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . three fifths of all other Persons.").

[12] *See* FRANKLIN, *supra* note 10, at 252-67 (discussing the rise and eventual fall in political power of the Radical Republicans just after the Civil War).

[13] *See* JAMES ALLEN ET AL., WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 12 (2000).

[14] 347 U.S. 483, 500 (1954).

[15] *See* 102 CONG. REC. 4460-61, 4515-16 (1956) (showing that only Senators Albert Gore, Sr. and Estes Kefauver of Tennessee, and Lyndon Baines Johnson of Texas did not sign the Manifesto).

the African-American population in those states to reactionary forces, which recreated slavery in everything but name.[16] President Franklin D. Roosevelt was so timid when it came to race that he would not even support anti-lynching legislation in Congress for fear of alienating the powerful southern congressional leadership.[17]

In the nineteenth century, the Supreme Court added its imprimatur to white supremacy. In *Dred Scott v. Sanford*,[18] the Court held that a Negro "whose ancestors were imported into this country, and sold as slaves," even when emancipated, could not be a citizen of the United States and was not entitled to the privileges of citizenship, including access to the courts to sue to protect his freedom.[19] Forty years later, the Supreme Court in *Plessy v. Ferguson*[20] endorsed Jim Crow laws and the separation of the races, which stood as a bar to equality for half a century more.

Finally, at the mid-point of the last century, the black population found a branch of the federal government willing to consider its issues. The Supreme Court, under the stewardship of Chief Justice Earl Warren, set out to eliminate the legal structure that perpetuated apartheid in America. While at the outset the Court did not have the support of the other branches of the federal government, World War II had a remarkable effect upon the American public. The Court's initial statements on fairness and equality found support from a substantial percentage of the American public, except in the South and in the southern leadership in the Congress.

When it comes to cases that stamp the Warren Court era, all deal directly or indirectly with race. *Brown v. Board of Education*[21] imposed the racial equality principle upon our society and, once and for all, eliminated the legal basis for racial segregation. *Baker v. Carr*[22] furthered equality in our representative democracy. *Mapp v. Ohio*[23] stands out as the third hallmark case, beginning the transformation of the constitutional ideal of due process into a living reality and leading the way for the transformation of due process that followed. Justice Walter V. Schaefer of the Illinois Supreme Court described *Brown*,

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[16] *See* FRANKLIN, *supra* note 10, at 267 (discussing the presidential campaign of 1876 and the compromise reached between the Republicans and Democrats regarding federal troops in the South).

[17] *See* T.H. WATKINS, THE HUNGRY YEARS 498-99 (1999) (discussing the attempts by some members of Congress to pass an anti-lynching bill and its ultimate failure due to a filibuster by southern senators).

[18] 60 U.S. (19 How.) 393 (1856).

[19] *Id.* at 403.

[20] 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[21] 347 U.S. 483 (1954).

[22] 369 U.S. 186, 237 (1962).

[23] 367 U.S. 643 (1961).

Baker, and the due process revolution initiated by *Mapp* as a process of putting flesh and blood on our ideals.[24]

The Supreme Court procedure in *Mapp*, as well as the outcome, provoked consternation and disagreement. Although the defendant in the state court had moved to suppress the evidence illegally seized as a result of a warrantless entry of her home, the Ohio Supreme Court reiterated its prior holding that "evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution."[25] United States Supreme Court precedent supported that holding. In *Wolf v. Colorado*,[26] the Supreme Court held that an illegal search and seizure violated a defendant's Fourth Amendment rights, but the federal rule requiring exclusion of such evidence was inapplicable to the states.[27] In just twelve years, state support for the proposition of law advanced in *Wolf* had eroded. The national trend, evidenced by state court decisions, was toward rejection of *Wolf* and adoption of the exclusionary rule as a matter of state law.[28] A dissenting justice of the Ohio Supreme Court indicated that state courts were "now about evenly divided," which evidenced a sea change in the twelve years since the *Wolf* decision.[29]

How the United States Supreme Court came to decide the Fourth Amendment issue has long been an issue of contention and lore in Cleveland legal circles. Judge Jack Day, in this Symposium, tells us how the issue made it to the Supreme Court as a side issue in the ACLU's amicus brief.[30] The Justices themselves disagreed as to whether the issue had been properly raised.

The majority conceded that the appellant "chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled," and that it was the amicus

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[24] *See* Walter V. Schaefer, *Panelists' Comments*, 54 KY. L.J. 521 (1966). Responding during a symposium on poverty, equality, and the administration of criminal justice, Justice Schaefer commented that:

> Flesh and blood are being put on our ideals. This is true, for example, with respect to *Brown v. Board of Education*. This is true with respect to *Baker v. Carr*, and is true in all areas of criminal procedure. And putting flesh and blood—coming face-to-face with our ideals and looking them in the teeth—is not always a comfortable process, nor is it always an easy one.

Id.

[25] State v. Mapp, 166 N.E.2d 387, 389 (Ohio 1960), *rev'd*, Mapp v. Ohio, 367 U.S. 643 (1961).

[26] 338 U.S. 25 (1949).

[27] *See id.* at 33.

[28] *See* Mapp v. Ohio, 367 U.S. 643, 651 (1961) ("While in 1949, . . . almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule.").

[29] *Mapp*, 166 N.E.2d at 394 (Herbert, J., dissenting).

[30] *See* Jack Day, *Words That Counted—A Vignette*, 51 CASE W. RES. L. REV. 373 (2001).

curiae who urged the Court to overrule *Wolf*.[31] That "surer" argument was a request that the Court declare the Ohio obscenity statute, under which Dollree Mapp had been charged and convicted, unconstitutional.[32] The majority said the issue was initially raised in the Supreme Court by the ACLU's amicus brief. While that is true, dissenting Justice Harlan pointed out that the issue was raised in the ACLU's brief "in one short concluding paragraph of its argument 'request[ing]' the Court to re-examine and overrule *Wolf*, but without argumentation."[33] He further pointed out that Mapp's attorney raised the question as a subordinate issue, not even citing to *Wolf*, and in oral argument "expressly disavowed" any purpose to have *Wolf* overruled.[34] Justice Harlan's purpose was to demonstrate how the Court had violated its own long-held principles in reaching out to decide an issue that the parties had not focused upon.[35]

The exclusionary rule seems to have that effect upon the United States Supreme Court. Twenty years after *Mapp*, when the Rehnquist Court was looking to emasculate the exclusionary rule, the Court reached out in *Illinois v. Gates*.[36] After oral argument in *Illinois v. Gates*, the Court restored the case to its docket for the following term and ordered the parties to brief and argue whether the exclusionary rule should be modified, an issue that had never been raised by either party in the life of the case. It was only after both parties returned and argued the following year that any modification to the exclusionary rule would be irrelevant to their case that the Court, "with apologies to all," relented and reserved the issue for another day.[37] That

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[31] *Mapp*, 367 U.S. at 646 n.3.

[32] *See id.* at 672-73.

[33] *Id.* at 674 n.5 (Harlan, J., dissenting).

[34] *See id.* at n.6.

[35] *See id.* at 674-75 ("In this posture of things, I think it fair to say that five members of this Court have simply 'reached out' to overrule *Wolf*. With all respect for the views of the majority . . . I can perceive no justification for regarding this case as an appropriate occasion for re-examining *Wolf*.").

[36] 462 U.S. 213 (1983).

[37] *See id.* at 217. In the beginning paragraphs of the opinion, Justice Rehnquist outlined the procedural history of the case.

> We granted certiorari to consider the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip. After receiving briefs and hearing oral argument on this question, however, we requested the parties to address an additional question:
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> > "[W]hether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."
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> We decide today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it. Rather, we consider the question originally presented in the petition for certiorari,

day came one week later, when the Court docketed three cases for its 1983-84 Term in which the proposed modification had been urged at trial and argued on appeal. Two of those cases were decided a year later, inaugurating the so-called "good faith" exception to the exclusionary rule.[38]

With the decision in *Mapp* and the application of the exclusionary rule to the states, the due process revolution and its reshaping of American criminal justice was off to the races. *Mapp* led the way when it held that the Fourth Amendment right "is enforceable against [the states] . . . by the same sanction . . . as is used against the [f]ederal [g]overnment."[39] Justice Clark's rationale for enforcing the core right against the states the same way it was enforced against the federal government became the rule as other core rights contained in the Bill of Rights were made applicable to the states through the Due Process Clause of the Fourteenth Amendment:

> Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."[40]

> and conclude that the Illinois Supreme Court read the requirements of our Fourth Amendment decisions too restrictively.

Id. (alteration in original) (citations omitted).

[38] *See* United States v. Leon, 468 U.S. 897, 922 (1984) ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."); Massachusetts v. Sheppard, 468 U.S. 981 (1984) (applying the good-faith exception created in *Leon* and reversing the exclusion of the evidence). The *Sheppard* Court concluded:

> In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. . . . Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve. Accordingly, federal law does not require the exclusion of the disputed evidence in this case.

Sheppard, 468 U.S. at 990-91. A third case, Colorado v. Quintero, 463 U.S. 1206 (1983), raised the issue of whether a good faith exception to the exclusionary rule should be applied to searches conducted without warrants. Quintero died before the case was argued, mooting the case, and the specific issue has never been addressed by the Supreme Court.

[39] *Mapp*, 367 U.S. at 655.

[40] *Id.*

This universal rule was restated in another Clark majority opinion two years later.[41] It was stated that the right, once applied to the states, would be interpreted by "the same constitutional standard" as used in interpreting the federal right.[42]

This became the standard as *Mapp* led the way when making other rights of the Bill of Rights binding on the states. By the end of the Warren Court, almost all of the protections of the Bill of Rights applying to criminal cases had been made binding on the states, the only exception being the Fifth Amendment protection guaranteeing the initiation of criminal proceedings by grand jury indictment. Following closely on *Mapp*, the Court made the Fifth Amendment privilege against self-incrimination,[43] the Sixth Amendment rights to counsel,[44] to a speedy and public trial,[45] to confrontation of hostile witnesses,[46] and to compulsory process to obtain witness testimony,[47] and the Eighth Amendment right to be free from excessive bail[48] applicable to the states. Finally, the Warren Court incorporated the double jeopardy prohibition into the Fourteenth Amendment Due Process Clause,[49] overruling *Palko v. Connecticut*,[50] where the incorporation debate had begun. These rights came over to state criminal proceedings through the Fourteenth Amendment to be enforced the same as they would in federal criminal cases.

The road since *Mapp* has been strewn with obstacles and roadblocks. The subsequent forty years is filled with the Court's development of limitations on *Mapp*. The exclusionary rule is inapplicable to grand jury proceedings,[51] most sentencings as well as parole and probation revocation proceedings,[52] collateral IRS proceedings following upon state criminal cases,[53] and deportation hearings.[54] Two crippling limitations followed. In *Stone v. Powell*,[55] the Supreme

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[41] *See* Ker v. California, 374 U.S. 23 (1963).

[42] *Id.* at 30. *See also id.* at 33 ("This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment.").

[43] *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[44] *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

[45] *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

[46] *See* Pointer v. Texas, 380 U.S. 400, 403 (1965).

[47] *See* Washington v. Texas, 388 U.S. 14 (1967).

[48] *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

[49] *See* Benton v. Maryland, 395 U.S. 784, 794 (1969).

[50] 302 U.S. 319, 328 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

[51] *See* United States v. Calandra, 414 U.S. 338, 354 (1974).

[52] *See* Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 364 (1998).

[53] *See* United States v. Janis, 428 U.S. 433, 454 (1976).

[54] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

[55] 428 U.S. 465 (1976).

Court held that Fourth Amendment issues may not be raised in federal habeas corpus actions if the defendant had a "full and fair opportunity" to litigate the Fourth Amendment issue in the state criminal proceeding, even if the state courts incorrectly decided the Fourth Amendment issue.[56] That decision eliminated federal oversight of state court decisions on Fourth Amendment issues, except for certiorari petitions to the Supreme Court, which in the early years after *Mapp* was so useful in persuading recalcitrant state courts to enforce Fourth Amendment rights. Finally, in 1984, the Supreme Court adopted the so-called "good faith" exception, holding that the exclusionary rule is inapplicable to searches where police in good faith reasonably rely upon an invalid search warrant.[57] All of these decisions are based upon the premise that the exclusionary rule is not a constitutional right, and that the singular reason for the exclusionary rule is to deter illegal police behavior. This premise, however, rejects the underlying rationale of both *Weeks v. United States* and *Mapp v. Ohio*, namely that the exclusionary rule is part and parcel of the Fourth Amendment right to be free from unreasonable searches and seizures.[58]

I. *MAPP* AND THE MESSAGE

Notwithstanding the limitations imposed upon the exclusionary rule in the ensuing years, the spirit of the *Mapp* decision continues to come through loud and clear. *Mapp*'s message is that the government must obey the law while enforcing it. If the government fails to do so, and in so doing violates the rights of citizens to be free from unreasonable searches and seizures, this violation will result in denying the government the use of the fruits of its illegality to prove that the citizen has committed a crime. This commitment involves making unavailable, at least in the prosecution's case in chief, reliable evidence of guilt. It results in a collateral issue—the conduct of the government in obtaining the evidence of guilt—taking precedence over

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[56] *Id.* at 494-95.

[57] *See* United States v. Leon, 468 U.S. 897, 926 (1984); Massachusetts v. Sheppard, 468 U.S. 981, 990-91 (1984).

[58] *Compare* Mapp v. Ohio, 367 U.S. 643, 657 (1961) (holding "that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments"), *and* Weeks v. United States, 232 U.S. 383, 394 (1914) (noting that to sanction the unlawful invasion by officers of the law of a person's home "would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action"), *with Stone*, 428 U.S. at 486 ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. Post-*Mapp* decisions have established that the rule is not a personal constitutional right."), *and* United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

the guilt or innocence of the defendant.[59] In so doing, it sends an important message: We place greater value on ensuring that the government does not violate the fundamental rights of its citizens than we do on convicting the guilty defendant in those cases where the evidence is the result of a Fourth Amendment violation.

Every time a motion to suppress based upon a Fourth Amendment violation is filed in a criminal case, the stage is set for retesting that commitment to protecting individual rights and the social value of holding the government to a high standard even if a guilty defendant goes free. That is often the case when evidence is suppressed. There is a tremendous cost when a guilty defendant goes free, and society's willingness to absorb that cost constantly waivers. It is this cost that has rallied opponents to the exclusionary rule for decades.

There are limits to the effects of the message. The exclusionary rule only works in those cases where police are concerned that evidence discovered during an intrusion will be available at a subsequent trial. If there is no concern about the use of evidence, then the exclusionary rule will have no deterrent effect upon police. For example, if a police stop is designed to harass an individual or a member of a group, the officer will not be concerned about a subsequent determination that the stop or arrest was illegal. Worse are those situations where a police officer is willing to commit perjury at a suppression hearing about the circumstances surrounding a stop, arrest, or search. The existence of an exclusionary rule is meaningless to the perjuring officer because she will manufacture facts to bring herself within the law's requirements. Further, the message is lost when trial judges deny motions to suppress pro forma regardless of the facts.

Despite the limitations on the message imposed by the limits on the exclusionary rule set by the Supreme Court, the perjurious testimony of certain police officers, and the failure of some trial judges to enforce the Constitution as they have sworn to do, the exclusionary rule survives and has helped to strengthen the American people's view of themselves as free citizens in a free society. The self-confidence that comes with the knowledge that there are limitations on how government may behave strengthens individual security and invigorates individual willingness to take risks. The absence of self-confidence causes individuals to withdraw from society and to wrap themselves in a cocoon to maintain security and privacy, leading to a very limited life. The greatest threats to privacy and self-confidence today come from government and industry use of technology, which

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[59] *Cf.* People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) ("The criminal is to go free because the constable has blundered.").

invades privacy and provides information on the most private aspects of one's life. Somehow, the message of *Mapp* will have to be reinvigorated to limit government acquisition and use of such data; protection from private invasion of informational privacy will require legislative action.[60]

II. *MAPP* AND RACE

The impact of *Mapp* was naturally greatest in the African-American community where Fourth Amendment violations were the most common. Whatever limited effect *Mapp* would have, it would be felt most where police conduct was the least restrained. It was this community which the Warren Court intended to benefit by the due process revolution, because wherever injustice existed in America, its worst impact was felt in the black community.

The *Mapp* decision went hand-in-hand with *Brown v. Board of Education* and other decisions of the Warren Court seeking to eliminate legal barriers to racial justice. In *Brown* it was the laws that mandated racial segregation; in *Mapp* it was the underlying law enforcement culture in the country that tolerated and encouraged police to treat African-Americans and other racial minorities differently from the majority population. And different meant worse. The police were not unique in this regard; they were part of the racist culture that permeated American life and that has not yet disappeared. The impact of the racist culture on relations between police and African-Americans is readily apparent throughout American history. The white police officers who invaded Dollree Mapp's home did so with confidence that they would not be called to task for violating her fundamental rights by entering her home without a warrant. How the police behaved in Dollree Mapp's house was consistent with historical practice in the United States.

Since before the founding of the Republic, law enforcement officers were used primarily to track the movements of African-Americans and to ensure their subservience. Prior to the Civil War, it mattered little whether the African-American was a slave or a freeman. Sheriffs and other law enforcement officers treated them the same, thereby reducing the Negro freeman to slave status in the eyes of the law. The Civil War changed little in that regard. In the South, after Reconstruction precipitously ended, sheriffs and their deputies, as well as police in the cities, were the instrument of repression,

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[60] The Fourth Amendment only protects against governmental intrusions of privacy, not private intrusions of privacy. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) ("The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action.").

working hand-in-hand with nightriders who would keep the African-American population terrorized and subservient. Police failed to prevent lynchings or apprehend the perpetrators.

Even in the North, the African-American population received very different justice on the street than whites. While relations between police and all citizens on the street during the first six decades of the twentieth century were rough and characterized by arbitrary overreaching by police, the full brunt of police lawlessness and brutality fell on the African-American community. Arbitrarily stopping and detaining African-Americans,[61] engaging in dragnet arrests of African-Americans,[62] and, as in the *Mapp* case, entering homes without warrants, police ensured that African-Americans were second-class citizens, receiving rougher justice than that accorded the rest of the population. Police brutality towards African-Americans was as common in the North as in the South. And the criminal justice system, then as now, meted out disproportionately harsher penalties to African-American defendants than it did to white defendants.[63]

The Warren Court's due process revolution sought to achieve a more level playing field in state criminal proceedings by applying the procedural guarantees of the Bill of Rights to state criminal cases. *Mapp* also sought to achieve justice on the streets by imposing the exclusionary rule on state criminal proceedings to discourage police from violating Fourth Amendment rights.

Whatever effect *Mapp* may have had on the streets immediately after 1961, that effect was, at the very least, diminished after 1968. In 1968, the same Warren Court, in *Terry v. Ohio*,[64] reacting to growing national concern about increases in crime, sanctioned seizures of the person on less than probable cause required for arrest. The *Terry* investigative stop requires a lesser standard than probable cause,

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[61] *See* David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 266 (1999) (discussing the police practice of arbitrarily stopping and detaining African-American motorists simply because of their race).

[62] *See* Davis v. Mississippi, 394 U.S. 721, 722 (1969) (noting that in investigating a rape where the victim could only describe her assailant as a "Negro youth," the police, without warrants, rounded up at least twenty-four African-American youths and took them to police headquarters for questioning and fingerprinting before releasing them without filing charges).

[63] *See* Harris, *supra* note 61, at 297-304 (discussing the disproportionate effect of the criminal justice system on blacks); Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781, 802-07 (1993) (detailing a statistical analysis of sentencing disparities based upon race and recommending changes in mandatory sentencing schemes); Laura A. Wytsma, Comment, *Punishment for "Just Us"—A Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, 3 GEO. MASON INDEPENDENT L. REV. 473, 496 (1995) (discussing the disparate treatment of mandatory crack and powder cocaine sentences).

[64] 392 U.S. 1 (1968).

namely reasonable suspicion, to justify an investigative detention.[65] Moreover, in the hands of a Supreme Court less sensitive to minority concerns during the subsequent thirty years, the *Terry* stop, which the Warren Court acknowledged is a Fourth Amendment seizure,[66] grew in its impact on the African-American community. The area in which a stop takes place, such as a "high-crime area," became a factor in determining the reasonableness of a stop, thereby making inner-city residents far more subject to these stops than other citizens.[67] While race is not a constitutionally acceptable factor in determining reasonableness, and thus the legitimacy of the investigative stop, "high crime area" often is a euphemism for race, legitimizing race as a consideration.

No one knows, for certain, whether the decision in *Terry* represented a loss of courage and commitment by the Warren Court to equal justice on the streets. These stops, though illegal, were common prior to the Court's decision in *Terry*.[68] The Court may have legitimized them in order to get control by putting them within the framework of the Fourth Amendment. However, the cost of providing this tool to help law enforcement prevent crime has grown over the years. The momentary detention allowed and envisaged by Chief Justice Warren in *Terry* has grown under the Burger and Rehnquist

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[65] After reviewing the underlying justifications of the Fourth Amendment and the needs of the police, the Supreme Court held that:

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 27 (citations omitted).

[66] *See id.* at 16 ("There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion.").

[67] *See* State v. Bobo, 524 N.E.2d 489, 493-94 (Ohio 1988) (Wright, J., dissenting) ("In every metropolitan area in this nation, there are neighborhoods where illegal drug sales run rampant and many of the residents are armed and ready for trouble. . . . I cannot see how we can create what amounts to a 'high crime area' exception to the protections extended by the Fourth and Fourteenth Amendments.").

[68] *See Terry*, 392 U.S. at 15 n.11 (noting that the practice of stopping and frisking, while varying from locale to locale, exacerbates police-community tensions).

Courts to allow for longer detentions and the use of substantial force absent probable cause to justify a full-fledged arrest.[69]

Worse, the later Courts narrowed the category of *Terry*-stop by expanding another category, "consensual encounters" between police and citizens, which implicate no Fourth Amendment rights and, thus, provide for no Fourth Amendment oversight of the reasonableness of the police conduct.[70] The "consensual encounter" is predicated upon the Supreme Court's conclusion that no reasonable innocent person would believe that he is not free to leave rather than comply with a police officer's request that the person stop and provide information, even though it is patently obvious that no reasonable innocent person, not schooled in the fine points of Fourth Amendment jurisprudence, would feel free to disregard a police officer under most of these circumstances.[71] It is little wonder, then, that issues such as racial profiling have reached the political radar. Racial profiling by police[72] is an issue that actually predates the founding of the Republic,[73] but it has become such a wide-spread negation of basic Fourth Amendment rights that its existence imperils not only the people who are subject to such interference because of race or ethnicity but the liberty of all Americans. If the nation continues to disregard, and thus ratify, this injustice, it raises questions about the security of all Americans from unreasonable searches and seizures.

By controlling movement, you control behavior. *Mapp* essentially protects freedom of movement from unreasonable interference by police. By making unreasonable interference with the movement

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[69] *See* LEWIS R. KATZ, OHIO ARREST, SEARCH AND SEIZURE § 15.6 (2000) (discussing the length and duration of a *Terry* detention).

[70] *See* Florida v. Rodriquez, 469 U.S. 1, 5-6 (1984) ("The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."); United States v. Mendenhall, 446 U.S. 544, 544 (1980) ("As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.").

[71] *See* United States v. Notorianni, 729 F.2d 520, 523 (7th Cir. 1984) (Cudahy, J., dissenting) ("It is perfectly appropriate to indulge what may be a modest fiction that a person being casually questioned by a policeman about possible criminal activity feels entirely free to say nothing and move on.").

[72] *See* Harris, *supra* note 61, at 270-73 (presenting three individual accounts and their impact on the participants, the results of statistical analyses establishing the existence of racial profiling, and the consequences of such a policy); Adero S. Jernigan, Student Article, *Driving While Black: Racial Profiling in America*, 24 LAW & PSYCHOL. REV. 127 (2000) (discussing racial profiling and the Supreme Court's decision in *Whren v. United States*, 517 U.S. 806 (1996)).

[73] *See* HERBERT S. KLEIN, SLAVERY IN THE AMERICAS 40-57 (1967) (chronicling the history and the gradual shift to complete enslavement of the African-American population in Virginia prior to the Revolutionary War); Jernigan, *supra* note 72, at 128-29 (reviewing the history of police targeting of minorities in the United States since the 1600s).

of African-Americans, like all Americans, costly to the government by denying it the use of evidence found during such interference, *Mapp* helped to promote the freedom of movement for all Americans. However, *Mapp* especially promoted the freedom of movement for African-Americans who were subject to harassment and other unreasonable interference more than most Americans. *Terry* and its progeny expanded the opportunities for police interference with African-Americans' freedom of movement. It further expanded police interference by allowing the area where a stop takes place to be a positive factor in determining the reasonableness of a stop. This increases the opportunities for stops in the inner cities, where most people stopped will be African-Americans or other minorities. While the courts say "area" alone is not enough, area "alone" is often coupled with other, innocuous factors.[74] The net result is subjecting people in the inner cities, most of whom are not and have never been involved in criminal activity, to constant police interference in their movements in ways, degrees, and frequency unknown by the rest of America. The *Terry* stop, and its expansion, as well as the expansion of unregulated consensual encounters, has muted *Mapp*'s message, especially on the streets of inner-city communities where African-Americans continue to be stopped and hassled by police much more so than in other communities. It is not surprising that the message has been muted. The Warren Court saw the need to ensure the quality of justice for those in this country who were denied it. The successor Courts have not been attuned to this need but, instead, have used their powers to accommodate law enforcement convenience by expanding police authority to intervene without prior judicial authorization and without exigent circumstances, which traditionally provided the justification for warrantless intrusions.[75]

CONCLUSION

It would be wrong for the reader to conclude that I think that *Mapp* after forty years has made little difference in the due process equation. The rule in *Mapp* continues to be enforced most fully when the police intrusion takes place in a home, which is precisely the fact situation presented in *Mapp v. Ohio*. The Supreme Court, even the

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[74] *See* State v. Bobo, 524 N.E.2d 489, 491 (Ohio 1988) (finding that the high-crime location, coupled with such factors as the time of day, the experience of the officers, furtive gestures by the individual, and the fact that the officers were out of their vehicle, justified the investigative stop).

[75] *See* Lewis R. Katz, United States v. Ross: *Evolving Standards for Warrantless Searches*, 74 J. CRIM. L. & CRIMINOLOGY 172, 189 (1983) (discussing the change in the Supreme Court's Fourth Amendment jurisprudence holding that police inconvenience did not justify bypassing the constitutional requirements for searches and seizures).

post-Warren Court, zealously protects the Fourth Amendment rights of Americans in their homes, except when it comes to allowing the prosecution to use evidence secured with an illegal search warrant that was "reasonably relied upon" by the police.

It is on the streets of America where the message of *Mapp* has been muted. Nonetheless, despite the continued lack of equal justice on the streets and the weakening of the protections of the exclusionary rule, and consequently the weakening of Fourth Amendment rights outside of the home, *Mapp* continues to have symbolic effect. Every time a court rules that reliable and relevant evidence of guilt must be suppressed, resulting sometimes in the dismissal of charges against a likely guilty defendant, we are reminded that the cost of maintaining individual liberties is substantial. *Mapp* made us confront those costs on a regular basis in every court in the land. It makes us reaffirm our commitment to liberty in a tough, tangible way.

Someday a future Supreme Court—now farther than ever in the future—must confront the costs to liberty of the dilution of *Mapp* and the resulting expansion of police power, especially as a result of the "war on drugs." Until that day, when our society finally chooses to admit to and deal with the reality of unequal justice on the streets of America, the impact of *Mapp* will remain largely symbolic.