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Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio

Jack G. Day and Bernard A. Berkman

{Tracing the emergence of the federal exclusionary rule from its constitutional origins, the authors document the gradual extension of the fourth amendment's reach. Focusing particular attention upon Mapp v. Ohio, in which the Supreme Court of the United States overruled Wolf v. Colorado and applied the exclusionary rule to the states through the fourteenth amendment, the authors examine in detail the significance of this decision with special regard to its effect on formerly non-exclusionary states.—Ed.}

The Facts in Mapp v. Ohio

In the late spring of 1957, the Cleveland Police broke into the home of Dollree Mapp without a search warrant. That act unwittingly thrust both the police and Miss Mapp onto the stage of constitutional history and assured for them the immortality of an historic decision of the Supreme Court of the United States.[1] In that decision the federal rule of exclusion[2] was applied to the evidence found by state police and used in a state court. For the first time, a majority of the Court held the rule to be a constitutional requirement and binding on the states.[3]

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The chain of events leading to this constitutional high point were these:

1. Mapp v. Ohio, 367 U.S. 643 (1961).

2. The substance of the exclusionary rule is that evidence resulting from an illegal search or seizure will not be admissible on trial.

3. For the purposes of the federal-state relationship problems inherent in application of the fourth and fourteenth amendments, distinctions between law enforcement officials of the state and its local subdivisions are not significant. In discussing either municipal or state officials the generic term "state officials" will be used interchangeably with "police," "policemen," or "police officials."

On May 23, 1957, the Cleveland Police came to the Dollree Mapp home on information that a witness wanted for questioning with respect to a bombing was hiding there and that policy information was also hidden in the house. Refused admittance unless they exhibited a search warrant, the police watched the house for several hours but did not seek entrance again until more police arrived.

At this point the officers forced their way in, and, although Miss Mapp's attorney was outside the premises, the police would not let him see her or enter the house.

When she demanded to see a search warrant, a paper was exhibited by one of the officers which she seized. The "warrant" was recovered after a struggle and disappeared from the case. No search warrant was produced at the trial, nor was its absence ever explained.

Because of her "belligerence" in resisting the police efforts to recover the "warrant," Miss Mapp was handcuffed, roughly used, taken upstairs by force, where the officers searched her bedroom, her child's bedroom, the rest of the second floor, rooms on the first floor and the basement. The search included a dresser, a chest of drawers, a closet, suitcases, personal papers of Miss Mapp, a photograph album, and a trunk. This broad effort ultimately uncovered obscene materials. Miss Mapp was arrested, charged, and finally convicted of knowing possession and control of lewd and lascivious books, pictures, and photographs in violation of Ohio Revised Code section 2905.34.

The Ohio Supreme Court condemned the method of the search but did not reverse on this issue because evidence illegally obtained was then admissible in a state court.[4] The conviction was affirmed and the case appealed to the United States Supreme Court.

In the highest court of the United States the judgment of the Supreme Court of Ohio was reversed, the ground for decision being that the conviction rested on the results of an unreasonable search and seizure. Four of the majority of five Justices reasoned that the fourth amendment to the United States Constitution was applicable to the states through the fourteenth amendment, and "that the exclusionary rule" is an "essential part of both the Fourth and Fourteenth Amendments,"[5] binding on the states, and not just a rule of evidence.

4. State v. Mapp, 170 Ohio St. 427, 430-31, 166 N.E.2d 387, 389 (1960). The court based its conclusion upon the holding in State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490, *cert. denied,* 299 U.S. 506 (1936). In *Mapp* a majority of the Supreme Court of Ohio voted to reverse the conviction on the ground that Ohio Rev. Code section 2905.34 was unconstitutional. However, the majority vote was not enough to reverse because the Constitution of Ohio (Article IV, Section 2) requires a majority of all but one of the supreme court to declare a statute unconstitutional where, as in *Mapp,* the court of appeals has ruled favorably on constitutionality.

5. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

Mr. Justice Black, the fifth member of the *Mapp* majority, remained unpersuaded that the exclusionary rule was a constitutional requirement of the fourth amendment "standing alone,"[6] but joined in the reversal on the ground that:

> Reflection on the problem . . . has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.[7]

THE SIGNIFICANCE AND PURPOSE OF THE EXCLUSIONARY RULE

Why such extended consideration of the conviction of one charged with possessing "dirty" pictures?

The reasons for judicial concern over convictions based on illegal searches and seizures ought not to be affected by the nature of the crime or the character of the alleged criminal. Whether the offense is mild or shocking or the defendant reprehensible or respectable is immaterial to the constitutional issue. The rights of all are of one piece, as Mr. Justice Frankfurter has pointed out:

> Petty cases are . . . calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalizations to which the case gives rise. . . .
>
> It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while . . . concerned . . . with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment.[8]

These great themes have their roots in this country's origins. The founders were all too acutely aware of the evils of the general warrant

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6. *Id.* at 661. See Wolf v. Colorado, 338 U.S. 25, 39-40 (1949) (concurring opinion): ". . . the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate."

7. Mapp v. Ohio, 367 U.S. 643, 662 (1961). Mr. Justice Black has long contended that the first provision of the fourteenth amendment was intended to make the whole Bill of Rights applicable to the states. See Adamson v. California, 332 U.S. 46, 68, 71-72 (1947) (dissenting opinion).

The notion that the fourth amendment plus the fifth equals exclusion is but an echo and implementation of the views of the Supreme Court in Boyd v. United States, 116 U.S. 616 (1886), which in turn endorsed Lord Camden's conclusions in Entick v. Carrington and Three Other King's Messengers, 19 Howell's State Trials 1029 (1765). Among the propositions in the Entick case deemed basic in Boyd was this one: "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty." *Boyd v. United States,* 116 U.S. at 629.

8. United States v. Rabinowitz, 339 U.S. 56, 68-69 (1950) (dissenting opinion).

and the writs of assistance.[9] John Adams wrote of James Otis' argument in *Paxton's Case*:[10]

> American independence was then and there born . . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance.[11]

Otis had attacked the general warrant in spirited language:

> Every householder in this province, will necessarily become *less secure* than he was before this writ had any existence among us; for by it, *a custom house officer,* or ANY OTHER PERSON *has power given him* . . . TO ENTER FORCEABLY *into a* DWELLING HOUSE, *and rifle every part of it where he shall* PLEASE *to suspect uncustomed goods are lodged!* — Will any man put so great a value on his freehold, after such power commences as he did before? — every man in this province, will be liable to be insulted, by a *petty officer,* and threatened to have his house ransack'd, unless he will comply with his unreasonable and *impudent* demands: sic . . . .[12]

No one argues that the force of history is such that the past ought to hold the present in an iron grip. If the historical considerations giving rise to the fourth amendment are no longer valid, then, of course, reason may repudiate history. But has time so altered necessity, that Justice Brandeis' evaluation of the historic reasons is no longer valid?

> Protection against . . . invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language . . . The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in *their beliefs, their thoughts, their emotions* and *their sensations.* They conferred, as against the government, *the right to be let alone* — the most comprehensive of rights and *the right most valued by civilized men.* To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusions must be deemed a violation of the Fifth.[13] (Emphasis added.)

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9. In general warrants, the name of the person to be arrested was left blank. Both general warrants and writs of assistance allowed the police to arrest and conduct searches on mere suspicion, without the prior scrutiny of a judicial officer as to the probable cause for such police actions. For an account of the attitude of the American colonists to such warrants see Henry v. United States, 361 U.S. 98, 100-101 (1959), and especially the emphatic pronouncements repeated there from early Declarations of Rights. See also the historical account written by Frankfurter in Harris v. United States, 331 U.S. 145, 157-63 (1947) (dissenting opinion).

10. Quincy (Mass.) 51-57 (1761-72). (The report of *Paxton's Case* only summarizes Otis' argument.).

11. 10 ADAMS, WORKS, 247-48 (1857).

12. The excerpt from Otis appears in an article in the *Boston Gazette* on January 4, 1762, believed to have been written by Otis faithfully reporting his argument against the writs. The article is reprinted in Quincy (Mass.), app. 488-94 (1761-72), excerpt at 489.

13. Olmstead v. United States, 277 U.S. 438, 473, 478-79 (1928) (dissenting opinion).

No one should leave the high ground marked out by Justice Brandeis for the uses of the fourth amendment. Hardly anyone would argue that history is so irrelevant, times so changed, or values so pitted that the right of privacy should be exposed to government intrusion unimpeded by the fourth amendment. And yet a prosecutor still will argue that warrants are designed only to protect policemen against a "suit for trespass or against an action in tort," and that wicked people, that is criminals, have no right of privacy.[14] The implicit premises of the opponents of the exclusionary rule are (1) that the police must have a "free hand" to combat criminal elements and (2) the police can be trusted to observe the rights of law abiding people.

The answer to the first of these propositions is that those jurisdictions holding police more strictly accountable manage a viable society.[15] The answer to the second is that experience proves the police cannot be trusted to make the perceptive judgments essential to the preservation of fourth amendment rights. This is a function of a judicial officer and it cannot be safely delegated to law enforcement men,[16] unless certain well defined and narrow circumstances are present warranting an exception.[17]

The fact patterns of the search, seizure, and arrest cases[18] demonstrate the incredible lengths to which police departments have gone to secure evidence and to make arrests. In virtually every instance in which a conviction has been reversed for fourth amendment violations, the offending action by law officers has been taken without probable cause, or not incident to a lawful arrest or beyond the permissible scope of searches. But these conclusions came only *after* judicial review. This suggests that judicial scrutiny before the commencement of the search (*i.e.,* on the issue of securing a warrant by a showing of probable cause) and the education of the police to a greater consciousness of fourth amendment rights might have resulted in legally unassailable convictions of those defendants actually guilty. More importantly, it suggests that the invasion of the privacy of those *not* guilty might never have occurred. Of course, it is of scant comfort to the innocent victim that he goes free because uncon-

14. See petition for rehearing, p. 8, Mapp v. Ohio, 367 U.S. 643 (statement of Cuyahoga County, Ohio, prosecuting attorney).

15. See discussion of the English approach to the conduct of criminal justice by Frankfurter in Harris v. United States, 331 U.S. 145, 170-71 (1947) (dissenting opinion).

The federal jurisdiction in the United States affords an admirable example of an efficiently working police system, notwithstanding the fact that its "free hand" has long been stayed by the federal rule allowing the suppression or exclusion of evidence illegally acquired.

16. Justice Jackson has noted that this is a point "not grasped by zealous officers." The protection lies in requiring the inferences of probable cause to be drawn by a "neutral and detached magistrate" rather than an officer engaged in the "often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 13-14 (1947).

17. See pp. 76-89 *infra.*

18. *Ibid.*

stitutional procedures have been used against him. The harm occurred at the moment when such procedures were used.

Beyond this, if the touchstone of propriety is guilt, the process used against "guilty" defendants will fix police methods. And no one will have fourth amendment rights because the assertion of innocence will never be made successful until *after* the illegal arrest, search, or seizure has been made and the violation completed. The violation cannot be called back. Therefore, it must be forestalled or the fourth amendment protections will be futile:

> [T]he right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court. . . .
>
> There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
>
> Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence.[19]

It is at this point that the *Mapp* case assumes its greatest significance. For it adds a constitutional dimension to the rule of exclusion requiring all law enforcement officers to give meaning in practice to the rights guaranteed all persons by the fourth amendment. "The rule is calculated to prevent, not to repair."[20]

The shaping of the law to this objective was not done on snap judgment.[21] It reflects, rather, long experience marked by searching appraisals and reappraisals. The wavering course of the development of the exclusionary rule and the many dissents strewn along the way testify to this.

The Development of the Exclusionary Rule in the United States Supreme Court

The long history of the *Mapp* doctrine began with *Boyd v. United States.*[22] In *Boyd,* the Supreme Court reversed and remanded for new trial a verdict and judgment of forfeiture to the United States. That judgment had condemned thirty-five cases of glass seized for importation into the United States in fraud of the custom laws. The importers had

19. Brinegar v. United States, 338 U.S. 160, 181 (1949) (dissenting opinion of Jackson, J.). See also Elkins v. United States, 364 U.S. 206, 217-18 (1960). By definition, a misused innocent is not going to get his case before a court unless he initiates a suit against the offending policeman. On the futility of such remedies see the analysis of Justice Murphy in Wolf v. Colorado, 338 U.S. 25, 42-44 (1949) (dissenting opinion).

20. Elkins v. United States, 364 U.S. 206, 217 (1960).

21. *But cf.* Mapp v. Ohio, 367 U.S. 643, 672 (1961) (dissenting opinion of Harlan, J.).

22. 116 U.S. 616 (1886).

entered a claim for the goods stating that the forfeiture had not occurred in the manner and form alleged.

On trial it became important to the government's case to show the quantity and value of twenty-nine cases of glass previously imported. The district attorney introduced an order of the district court directing notice to and requiring the claimants to produce the invoice of the twenty-nine cases.

The invoice was produced over claimants' objection to the validity of the notice and to the constitutionality of the law on which it was based. Failing at this juncture, the claimants opposed the introduction of the invoice into evidence on trial on the ground that:

> . . . in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against claimants is unconstitutional and void.[23]

The decision upheld the claimants' contention and the opinion, by implication, supported the view that Justice Black was to take seventy-five years later in *Mapp v. Ohio*.[24] Concluding that compulsory production "of a man's private papers"[25] in connection with the forfeiture of his property was within the fourth amendment in all cases in "which a search and seizure would be," the *Boyd* court asked:

> Is a search and seizure, or . . . a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws — is such a proceeding for such a purpose an unreasonable search and seizure within the meaning of the Fourth Amendment of the Constitution?[26]

Answering the question affirmatively, the Court concluded in a notable passage:

> The principles laid down in this {*Entick v. Carrington*} opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life . . . . [A]ny forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[27]

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23. *Id.* at 618.

24. 367 U.S. 643, 661-63 (1961). Black discusses the interrelationship of the fourth and fifth amendments.

25. Boyd v. United States, 116 U.S. 616, 622 (1886).

26. *Id.* at 622. Failure to produce would not have resulted in a search and seizure, but the allegations which the Government affirmed the papers would prove were to "be taken as confessed." *Id.* at 620.

27. *Id.* at 630; see also note 7 *supra.*

The *Boyd* decision established the law of searches and seizures and the admissibility of their product in the federal courts. Since 1886 the Supreme Court of the United States has had repeated occasion to either reaffirm or distinguish this decision but has never overruled it. Had some prescience anticipated the gradual accretion of the specific rights of the first eight amendments into the fourteenth,[28] a process still going on as *Mapp* proves, it might have been possible long ago to predict the *Mapp* result with some assurance.

Nevertheless, because the accretion process had not even begun, much less advanced to its state of existence immediately preceding *Mapp,* the Court should have been able to distinguish the *Boyd* rule in *Adams v. New York*[29] on the ground of the inapplicability of the fourth amendment to state action. But it did not decide that issue directly. Instead, the Court went on to other considerations and said, perhaps unnecessarily to the decision:

> Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government.[30]

Thereafter, the decisional process in the Supreme Court of the United States developed refinements of the federal exclusionary rule but on terms which made the question whether its origins were constitutional or evidential of no immediate practical importance in federal cases.[31]

Twenty-eight years after *Boyd v. United States,*[32] the Court decided *Weeks v. United States*[33] which with *Boyd* became a "scripture" of search and seizure problems in the federal jurisdiction.

Defendant Weeks was convicted of unlawful use of the mails to conduct a lottery. Papers and articles secured solely by state police officers and turned over to a United States marshal, and the letters and envelopes

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28. Beginning with a dictum in Gitlow v. New York, 268 U.S. 652, 666 (1925).

29. 192 U.S. 585 (1904). According to the Court, the sole question was whether "certain private papers" found in the execution of a search warrant "which had a legal purpose in the attempt to find gambling paraphernalia," were "competent evidence against the accused." The question was answered in the affirmative, apparently on three grounds: (1) there was no unreasonable search or seizure and therefore no constitutional question; (2) even if the private papers had been illegally taken this was no impediment to their admissibility if pertinent to the issue, for the court will not inquire how the evidence was obtained; (3) it is within the power of the state to determine what evidence will be received in its own courts. 192 U.S. at 594-95, 597, 599.

30. *Id.* at 599. *But see* National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914): "The objection that the act, in directing the state officers to inspect the contents of the box, operates as an unreasonable search and seizure raises no Federal question, since the prohibition on that subject in the Fourth Amendment, does not apply to the states. Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445, 447."

31. The federal rule was applied if a basis for it existed, irrespective of whether exclusion was to be considered a constitutional or evidential requirement.

32. 116 U.S. 616 (1886).

33. 232 U.S. 383 (1914).

acquired by the independent action of the marshal, but in company with the police, were introduced at his trial.[34]

The evidence procured by state officers resulted from a search of the defendant's house in his absence and without a warrant. Entrance was accomplished by use of a key pointed out by a neighbor. The United States Marshal's actions followed admission in response to his rap on the door. Without process of any kind he searched the defendant's room, including a drawer where he found letters written to Weeks with respect to the lottery.

Defendant's conviction was reversed and remanded for a new trial on the ground that error had been committed both in not ordering the papers restored to him and in permitting their use on trial.

It was held that the state police officers had not acted under federal authority so as to make the fourth amendment applicable to the seizure by them. Nor would the Court inquire what remedies might be available against the individual state officers, the fourth amendment not being directed against individual action. But the amendment did reach the United States government and its agents, according to the Court. Its marshal having acted under color of his office in violation of the constitutional rights of the defendant, the evidence procured by him could not be used to convict. The letters seized by the marshal should have been returned to the defendant upon his seasonable application.[35]

The *Weeks* case is remarkable for its reliance on the fourth amendment alone as the basis for exclusion,[36] for its application of the exclusionary rule only to the officers of the United States government (the state officials did not claim to be acting under federal authority so as to make the fourth amendment applicable to their illegal seizures) and for its conclusion that the fourth amendment was not aimed at individual misconduct.[37]

The significance of *Weeks* in relation to *Adams v. New York*[38] lies in the fact that, under the theory of the *Weeks* doctrine, even had the *Adams* evidence been held to have been illegally acquired by the state officers, it could have been properly used on trial — in the federal jurisdiction adhering to the exclusionary rule *(Weeks)* and in a state jurisdic-

34. The defense made the necessary and seasonable moves to save their objections to the methods used in acquiring the evidence and its use on trial. In all cases discussed hereafter, it may be assumed, in the absence of a contrary indication, that the objections to the search and seizures involved have been similarly or, at least, sufficiently protected.

35. Weeks v. United States, 232 U.S. 383, 398 (1914).

36. The fifth amendment was not mentioned in the opinion as a basis for decision. It was discussed, but briefly, and then mainly in connection with defendant Weeks' claim that his fifth as well as his fourth amendment rights had been violated. Weeks v. United States, 232 U.S. 383 (1914).

37. *Accord,* Burdeau v. McDowell, 256 U.S. 465 (1921).

38. 192 U.S. 585 (1904).

tion abjuring the rule *(Adams)*. The inapplicability of the fourth amendment to the illegal state action, as the *Weeks* court viewed the scope of the amendment, would have rationalized the result.

The rule announced in *Weeks* for the exclusion of evidence from a federal trial because illegally seized by federal officers was followed and extended to the illegal seizure of corporate papers in the circumstances of *Silverthorne Lumber Co., Inc. v. United States*.[39]

In *Burdeau v. McDowell*,[40] where two thieves "blew" two safes, forced open a desk to get at the private papers of the accused, and turned them over to United States government officials who, in turn, used them in a federal trial, such conduct was held insufficient to bring the rule of exclusion into play. The initial search had been carried out by private individuals.

The theoretical justification was obvious enough. The fourth amendment simply does not apply to private individuals. And the governmental officials who used the evidence were in no way involved in its unlawful acquisition. Justice Brandeis, with whom Justice Holmes concurred, would have restored the papers to their accused owner and would not have permitted them to be used on trial. Apparently, the Brandeis-Holmes thesis was that the standards which the court has the power to establish for the administration of justice in federal courts may go beyond bare constitutional requirements because governmental officials have no exceptional position before the law:

> Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.[41]

In 1927, in *Byars v. United States*[42] a federal officer participated actively in an illegal search instigated by state officers under a warrant "clearly . . . bad if tested by the Fourth Amendment." The evidence seized, counterfeit stamps of the kind used for whiskey bottled in bond, was found partly by the federal agent and partly by the state officers. All of it was turned over to the federal official and used on the trial of the defendant in a federal court for illegal possession of counterfeit stamps with fraudulent intent. His conviction was reversed.

The Supreme Court pointed out that a search in contravention of the Constitution was not validated by what it brought to light. Nor could

39. 251 U.S. 385 (1920). *Cf.* Hale v. Henkel, 201 U.S. 43, 75-6 (1906). *But see* Essgee Co. v. United States, 262 U.S. 151 (1923).

40. 256 U.S. 465 (1921).

41. *Id.* at 477. This theme was discussed also in the dissents of Holmes and Brandeis in Olmstead v. United States, 277 U.S. 438, 469-70, 485 (1928). See also McNabb v. United States, 318 U.S. 332 (1943). Such an approach provides a theoretical basis for widened federal supervision of searches and seizures but has not been widely utilized in this connection. *But see* Rea v. United States, 350 U.S. 214 (1946).

42. 273 U.S. 28, 29 (1927).

evidence illegally obtained be used to convict in a federal prosecution. Noting that mere participation by a federal officer would not so transmute a state search as to make it a federal undertaking and bring it within the fourth amendment and the federal exclusionary rule, the Court held the facts respecting the agent's participation in this particular case did just that:

> The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as a private person might have been, but was asked to participate and did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent. . . .
>
> We cannot avoid the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the local and federal officers. In that view, . . . the effect is the same as though he had engaged in the undertaking as one exclusively his own.[43]

So the shadow of the federal exclusionary rule became a little longer.

The shadow lengthened again, however slightly, in *Lustig v. United States.*[44] Here a considerably lesser participation by a federal agent than that involved in *Byars* was enough to invoke the rule. In addition, the majority announced the famous "silver platter" dictum.

In *Lustig* although the federal agent was engaged in some keyhole peeping, he did not initiate or participate in a search of the room until local police officials conducting the search without a warrant turned up evidence of counterfeiting and sent word to him. The federal agent then became active, going to the hotel to examine the evidence. When the occupants of the room (one of whom was the defendant) appeared, they were arrested and a search of their persons by the police began with the federal agent present. That part of the yield from the search of the persons which seemed to bear on counterfeiting was turned over to the federal agent immediately. Eventually the whole product of the search was given to him and used to convict the defendant in a federal prosecution for violation of the counterfeiting statutes.

Accepting the findings of fact in the trial court, the Supreme Court nevertheless reviewed their constitutional significance.[45] Among those facts were these: the federal agent was not a moving force in the search and it was not undertaken by the state officers to help enforce federal law.

Upsetting the conviction, the Court ruled that the federal agent's selection of part of the evidence during the search for use in the prosecu-

43. *Id.* at 32-33.
44. 338 U.S. 74 (1949).
45. *Id.* at 77-78.

tion was not severable from the rest of the search. Indeed, there was no difference between participation in an illegal search from the outset and joining it during its course. To qualify for use in a federal trial after acquisition from an illegal search, the evidence had to be untainted by federal hands:

> The crux . . . is that a search is a search by a federal officer if he had a hand in it; it is not a search by a federal officer if evidence secured by state authorities is turned over to the federal authorities on a silver platter.[46]

The "silver platter" doctrine, of course, could not qualify the evidence in *Lustig.* Federal participation prevented that.[47]

A "pure" example of state action, unconstitutional by the standards imposed by the fourth amendment, occurred in *Gambino v. United States,*[48] a case decided the same year as *Byars.*[49] The issue in *Gambino* was the question of the applicability of the exclusionary rule to evidence illegally seized by state officers engaged solely in the enforcement of federal law. Convictions for conspiracy to import and transport liquor in violation of the National Prohibition Act were secured after New York state troopers, acting entirely without federal assistance, arrested Gambino and another in an automobile near the New York-Canadian border. Following the arrest, the automobile was searched and intoxicating liquor and other property found in it were seized. No warrant was ever procured.

Holding that the evidence had been wrongfully obtained, the Court took up the question whether the relation of the state troopers to the federal prosecution was such that the evidence illegally seized by them should have been excluded from the trial. Despite its judgment that the state troopers were not within the federal statutory phrase, "any officer of the law," as that term was used in defining governmental officials responsible for the enforcement of the National Prohibition Act,[50] so as to make them agents of the United States, the convictions were reversed.

The New York state prohibition act had been repealed and there was

46. *Id.* at 78-79.

47. *Cf.* Weeks v. United States, 232 U.S. 383 (1914). There the Court refused to consider the effect of the introduction of that part of the evidence secured by state police action on the ground of the inapplicability of the fourth amendment to state officers not acting under federal authority. The implications of this are in accord with the theory of the "silver platter" dictum. However, in *Weeks* too the illegal federal action tainted the conviction resulting in reversal. There was no "pure" state illegality.

48. 275 U.S. 310 (1927).

49. Byars v. United States, 273 U.S. 28 (1927).

50. Although the Court determined that the National Prohibition Act, ch. 85, tit. II, § 2, 41 Stat. 305, 308 (1919), contemplated some cooperation in enforcement between federal and state officers, it considered that only federal officers were within the phrase "any officer of the law." Had the Court been able to find the state officers also within the phrase, then the case might have been rationalized on the same terms as any other federal action case.

no state offense in which the defendants were involved, present or past, or any indication that the officers thought them so involved at the time of their arrest. It followed, according to the Court, that the officers were acting solely to enforce the National Prohibition Act. This conclusion was important to the rationale of the opinion. It was used to explain away any ostensible conflicts with prior decisions of the Court:

> The conclusion here reached is not in conflict with any of the earlier decisions of this Court in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecutions for Federal crimes. For in none of those cases did it appear that the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its law.[51]

The evidence did not survive the exclusionary rule and the fourth amendment's prohibition because the arrest and the search and seizure in question were deemed to have been done solely to enforce federal law. And the use of the evidence constituted ratification by the United States.[52]

Another "pure" example of unassisted state action yielding constitutionally "tainted" evidence for a federal prosecution occurred in 1960 in *Elkins v. United States*,[53] and resulted in the rejection of the "silver platter" doctrine.

The holding was based on the theory that *Wolf v. Colorado*[54] had transported the fourth amendment strictures on unreasonable searches and seizures into the due process clause of the fourteenth, undercutting the justification for admitting, in federal prosecutions, evidence unconstitutionally procured by state officials.[55]

Indeed, there appear to have been few, if any, "silver platter" cases decided in the Supreme Court of the United States, in "pure" form, that is, with no interposition of federal officers, in which the doctrine has been applied to sustain a federal conviction resting on tainted evidence procured solely by state officers.[56] However, inferior federal courts have sustained convictions on such evidence.[57]

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51. Gambino v. United States, 275 U.S. 310, 317 (1927).

52. The ratification thesis is set forth in Gambino v. United States, 275 U.S. at 316-17: "The prosecution . . . instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States. . . ." According to this thesis the federal exclusionary rule should apply to any use of evidence in a federal prosecution if that evidence had been illegally seized by state officials even though not in pursuit of a singular federal purpose.

53. 364 U.S. 206 (1960). See also Rios v. United States, 364 U.S. 253 (1960), decided the same day.

54. 338 U.S. 25 (1949).

55. See note 67 *infra.*

56. *Cf.* United States v. Di Re, 332 U.S. 581 (1948), where Di Re was arrested and his person searched without a warrant by a state officer accompanied by a federal agent who had no power of arrest. At the trial which convicted Di Re, counterfeit gasoline ration coupons along with counterfeit fuel oil coupons found during the search were admitted in evidence over objection. Finding no federal rule justifying this search, the Court looked to state law

In *Rea v. United States*,[58] the Court approved intervention by injunction to prevent the use of evidence in a state criminal trial after it had been suppressed in a federal prosecution because of an unconstitutional acquisition. But this was done without reference to any constitutional principle. On other occasions, a restrained discretion, based largely upon considerations relevant to federal-state relations policy, had persuaded the Court to stay out of such situations.[59] Not so in *Rea*.[60]

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to determine whether the search of Di Re without a warrant was valid. Determining that state law did not supply a reason for arrest without a warrant under the circumstances, the reversal of the conviction by the appellate court below was affirmed. The Court did not rely upon either the participation of the federal officer or the state officer's enforcement of federal law only as the basis for invalidating the admission of the evidence. A decision based on either factor, coupled with an unlawful search and seizure, would have found support in prior decisions by the Court. See also Johnson v. United States, 333 U.S. 10 (1947), where state and federal officers' commingled efforts resulted in illegal gathering of evidence which was later used in a federal prosecution. The conviction was reversed. *But see* Center v. United States, 267 U.S. 575 (1925) (per curiam), where a federal conviction was affirmed, based on Burdeau v. McDowell, 256 U.S. 465 (1921) (see note 40 *supra* and accompanying text). However, the Brief for the United States (pp. 1-2) stated the issue: "The sole question involved is whether in a Federal Prosecution under the National Prohibition Act the testimony of local police to facts obtained by them while acting under State law, through an alleged unlawful search and seizure, but without collusion with or at the instance of Federal officers, is open to the objection that such testimony violates the constitutional immunity of the defendant from unreasonable search and seizure." Plaintiff in Error's Statement Of The Case supports the Government's definition of the issue. Brief for Appellant, pp. 3-4, 256 U.S. 465 (1921). *Cf.* Dodge v. United States, 272 U.S. 530 (1926). Feldman v. United States, 322 U.S. 487, 489 (1944), provides an example only by analogy because the application of the fifth amendment was involved in that case.

57. Anderson v. United States, 237 F.2d 118 (9th Cir. 1956); Parker v. United States, 183 F.2d 268 (9th Cir. 1950); Gilbert v. United States, 163 F.2d 325 (10th Cir. 1947).

58. 350 U.S. 214 (1956).

59. See Stefanelli v. Minard, 342 U.S. 117 (1951), where it was said, in response to the argument that the Civil Rights Act provided a basis for injunctive prohibition of use of evidence claimed to have been obtained by an unlawful search by state police, that the Civil Rights Act should be construed to respect the "proper balance between the States and Federal Government in law enforcement." There was no irreparable injury and: ". . . to sanction this intervention . . . would expose every state criminal prosecution to insupportable disruption. Every question of procedural due process of law . . . would invisage a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this court, to determine the issue." 342 U.S. at 123. See also a recent opinion in Pugach v. Dollinger, 364 U.S. 458 (1961) (per curiam) affirming refusal of an injunction against use of wire tap evidence in a state trial. State officials had allegedly made the taps. The affirmance was one sentence long and cited both Stefanelli v. Minard, *supra,* and Schwartz v. Texas, 344 U.S. 199 (1952) (where a state wire tap in violation of the Federal Communications Act did not upset a state conviction).

In Wilson v. Schnettler, 365 U.S. 381 (1961), the refusal of an injunction to impound seized narcotics, prevent their use on trial and enjoin the respondents (federal narcotics agents) from testifying in a state prosecution was affirmed. Justice Douglas, with whom the Chief Justice and Mr. Justice Brennan concurred, dissented. For the dissenters Rea v. United States, 350 U.S. 214 (1956) was controlling.

In Monroe v. Pape, 365 U.S. 167 (1961), the Court found a cause of action for damages sufficiently stated under the Civil Rights Act, 17 Stat. 27 (1866), 42 U.S.C. § 1983 (1957). Among other things, outrageous violations of the house and persons of the complainants by members of the Chicago police force were alleged. The deprivation of a constitutional right under color of state authority, upon which the complaint was based, was claimed to be an unreasonable search and seizure. This was a well founded claim, according to the majority, because Wolf v. Colorado, 388 U.S. 25 (1949), and Elkins v. United States, 364 U.S. 206

There the majority based its conclusions upon the supervisory power that the Supreme Court wields over "federal law enforcement agencies." A federal agent had violated the rules prescribed by the Court to govern federal criminal procedure. The power of the federal courts encompasses the policing of such rules to insure their observance.[61] And, in any event, the injunction was not sought against, and would not apply to, any state official. Only the offending federal agent would be enjoined from proffering his tainted evidence to the state prosecutor.

Although the theory of *Rea* is "supervision," there is an aura about the result which suggests a repudiation of the obverse of the "silver platter" theorem — that is, a federal officer *cannot* hand tainted evidence to state law enforcement officers on a "silver platter."

Chronologically ahead of the problems dealt with in *Rea,* the issue of federal-state relationships, as touched by the fourth amendment and the exclusionary rule, had reached a peak in *Wolf v. Colorado.*[62] At least that seems to have been the conclusion of Justice Frankfurter, who wrote the majority opinion.

The case report for *Wolf* in the Supreme Court contains a minimum of facts. But the precise question posed and stated there was this:

> Does a conviction by a State court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in *Weeks v. United States,* 232 U.S. 383?[63]

Rejecting the notion that the " 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments," and noting the Court's repeated rejections of that proposition, Mr. Justice Frankfurter concluded: "The issue is closed."[64] A remarkably unprophetic remark, even without the hindsight provided by *Mapp v. Ohio.*[65] The very decision in hand moved the right to privacy, "which

(1960), have made the guarantee against unreasonable searches and seizures in the fourth amendment applicable to the states through the fourteenth amendment. See note 67 *infra.*

60. Justice Harlan, with whom three justices joined, dissented on the grounds that this case represented a new departure in suggesting the right to supervise federal law enforcement officers (an executive function), that there may have been power to issue the injunction but discretion called for contrary action or the decision could not be reconciled with Stefanelli v. Minard, 342 U.S. 117 (1951), and that under Wolf v. Colorado, 338 U.S. 25 (1949), a state could adopt an exclusionary rule or not as it saw fit. 350 U.S. 214, 218-21 (1956).

61. Rea v. United States, 350 U.S. 214, 217 (1956).

62. 338 U.S. 25 (1949).

63. *Id.* at 25-26.

64. *Id.* at 26.

65. 367 U.S. 643 (1961). The movement of first amendment rights into the protection of the fourteenth since Gitlow v. New York, 268 U.S. 652, 666 (1925), and the instances in which specific rights equivalent to those in one or another of the first eight amendments

is at the core of the Fourth Amendment" and "implicit in the 'concept of ordered liberty,'" within the due process clause of the fourteenth amendment.[66]

To be sure, the majority opinion in *Wolf* was not in fact as broadly inclusive as it came to be interpreted,[67] and it did not vouchsafe the exclusionary rule a constitutional status (exclusion was not "an essential ingredient of the right") but left it with the intimation that it was a judicially created rule of evidence which Congress might change.[68] Accordingly, protection of the right to privacy from local police invasion was left to such remedies as the laws of the various states might devise, plus the pressure which public opinion in the local community might exert against oppressive police conduct.[69]

Between the *Wolf* decision in 1949 and *Elkins* in 1960, a significant case, full of portent for the future of the exclusionary rule, appeared. That case, *Irvine v. California*,[70] concerned an aggravated invasion of privacy by local police. The circumstances surrounding the search led the majority to comment that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the fourth amendment"; in fact, the invasion of privacy, the Court said, "would be almost incredible if it were not admitted" at the trial by the police themselves.[71]

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have been put within the protection of the fourteenth amendment were certainly known to the majority. Moreover, the tone and number of separate and concurring opinions in the *Wolf* case were a signal for caution.

Some examples of specific or equivalent rights to those in the first eight amendments being drawn under the fourteenth include: assistance of counsel [sixth amendment] to meet the fair trial requirements of the due process clause, see Powell v. Alabama, 287 U.S. 45 (1932); the privilege against self-incrimination [fifth amendment] in coerced confession cases, although not specifically applied, see Brown v. Mississippi, 297 U.S. 278 (1936), Chambers v. Florida, 309 U.S. 227 (1940) and Lisenba v. California, 314 U.S. 219, 237 (1941) (dictum); just compensation requirement [fifth amendment] in state eminent domain cases, see Davidson v. New Orleans, 96 U.S. 97, 105 (1877), *cf.* Chicago, B. & O. Ry. v. Chicago, 166 U.S. 226, 233, 236-37, 241 (1897).

66. Wolf v. Colorado, 388 U.S. 25, 27-28 (1949).

67. See, *e.g.*, the statements of Justice Douglas in Monroe v. Pape, 365 U.S. 167, 171 (1961) (actually decided on February 20, 1961 approximately four months before Mapp v. Ohio, 367 U.S. 643 (1961); "[T]he guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25; Elkins v. United States, 364 U.S. 206, 213." Justice Stewart in Elkins v. United States, 364 U.S. 206, 213 (1960), stated: "Then came Wolf v. Colorado. . . . There it was unequivocally determined by a unanimous court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers."

68. Wolf v. Colorado, 338 U.S. 25, 33 (1949).

69. After reading Mr. Justice Murphy's conclusions respecting the ineffectiveness of remedies available to victims of police lawlessness, Wolf v. Colorado, 338 U.S. at 42-44 (dissenting opinion), it is a temptation not to remind the *Wolf* majority of Mr. Justice Frankfurter's admonition in Watts v. Indiana, 338 U.S. 49, 52 (1949): "And there comes a point where this court should not be ignorant as judges of what we know as men."

70. 347 U.S. 128 (1954).

71. *Id.* at 132.

The police suspected the defendant of illegal gambling activity and had a locksmith duplicate the key to his house while he was absent from home. Using this key the officers with virtually unparalleled zeal entered the house, installed a listening device in the hallway, bored holes in the roof and strung wires to a nearby garage where police listeners were posted. From time to time over a period of weeks, additional surreptitious entries were made for the purpose of shifting the device. From the hall it was moved to the bedroom, and after that it was installed in a closet until the incriminating evidence was secured. The evidence was admitted on trial in the state prosecution and the defendant was convicted.

Justices Douglas and Black would have reversed on the ground that a gambling stamp required by federal law was introduced in evidence in the state trial in violation of the fifth amendment's privilege against self-incrimination. Justice Frankfurter would have looked to the *Rochin*[72] principle to overturn the conviction.

But the majority was unpersuaded.[73] Shocked by the police action, it affirmed the conviction nevertheless. *Rochin*[74] was distinguished from *Irvine* by the lack of violence. The police action was roundly condemned[75] but since the rule of *Wolf*[76] imported the right of privacy into the fourteenth amendment but not the subsidiary and evidentiary rule of exclusion, the state conviction could not be touched. And the defendant was left to local remedies or those provided by the Civil Rights Act.[77]

Of the efficacy of the exclusionary rule, the majority said:

> That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police.[78]

But one concurring member of the majority, Justice Clark, was not convinced. And, since he is not a Justice ordinarily identified with the strong personal rights bloc on the court, his views boded ill for the view that the fourth amendment guarantees against unreasonable searches and sei-

72. Rochin v. California, 342 U.S. 165 (1952) (see note 232 *infra* and accompanying text).

73. It will be remembered that Elkins v. United States, 364 U.S. 206 (1960) involved the use of illegally obtained evidence in a *federal* prosecution.

74. Rochin v. California, 342 U.S. 165 (1952).

75. Irvine v. California, 347 U.S. 128, 132 (1954).

76. Wolf v. Colorado, 338 U.S. 25 (1949).

77. 62 Stat. 696 (1948), 17 U.S.C. § 242 (Supp. 1948) (criminal). Justice Douglas took a dim view of the available remedies under the Civil Rights Act in the light of Screws v. United States, 325 U.S. 91 (1945) (dissenting opinion), but at that time Monroe v. Pape, 365 U.S. 167 (1961), an action for damages, had not been decided. But it is doubtful, even in the light of *Monroe,* that Justice Douglas's stout views on personal rights would allow him to embrace a remedy after the fact as an alternative to the exclusionary rule and discard the rule that he regards as a preventive measure. See Irvine v. California, 347 U.S. 128, 151-52 (1954) (dissenting opinion of Douglas, J.).

78. Irvine v. California, 347 U.S. 128, 136 (1954).

zures did not include the exclusionary rule as a matter of constitutional right. In his concurring opinion he said:

> Had I been here in 1949 when *Wolf* was decided, I would have applied the doctrine of *Weeks v. United States,* . . . to the states. But the Court refused to do so then, and it still refuses today. Thus *Wolf* remains the law and, as such, is entitled to the respect of this Court's membership. . . . In light of the "incredible" activity of the police here, it is with great reluctance that I follow *Wolf.* Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance.[79]

This premonitory language gains particular significance in the light of the *Elkins* case,[80] decided six years later, where five Justices, not including Justice Clark, joined to widen the scope of the exclusionary rule.

With *Elkins,* all evidence acquired in violation of the fourth amendment was banished except in one narrow circumstance — the ring was left open only to evidence secured in an illegal search and seizure conducted exclusively by *state* officials for use in a *state* prosecution.[81] The shocking example of *Irvine* had made the eventual elimination of the remaining exception inevitable. It became apparent with *Elkins* that at some early opportunity the Court was going to couple the substantive constitutional guarantee against unreasonable searches and seizures with an effective remedy against state action. The obvious method was to hold the exclusionary rule to be a constitutional rule — an implicit part of the fourth amendment which, in other respects, already bound the states through the fourteenth.

Mapp v. Ohio[82] supplied the occasion. The Court closed the ring.

The Impact of Mapp: Searches and Seizures Under the Exclusionary Rule

In the wake of the sweeping opinion in *Mapp v. Ohio*[83] which overruled *Wolf v. Colorado*[84] in applying the federal exclusionary rule to the states, the law enforcement authorities of those states which, until now,

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79. *Id.* at 138-39.

80. Elkins v. United States, 364 U.S. 206 (1960). Justice Clark's dissent in *Elkins* is inexplicable in the light of his position in *Irvine* unless it be that he was still of a mind to follow the rules announced in earlier cases until such time as there was a forthright adoption of the exclusionary rule as a constitutional principle.

81. Another possible "opening" is not, as the law now stands, within the province of the fourth amendment and therefore is not, strictly speaking, an exception. See Schwartz v. Texas, 344 U.S. 199 (1952).

82. Mapp v. Ohio, 367 U.S. 643 (1961).

83. 367 U.S. 343, (1961).

84. 338 U.S. 25 (1949).

have been unencumbered by the rule[85] are currently facing the consequences of *Mapp* with something less than equanimity. Their complaints are marked by frequency, if not by novelty.[86] Perhaps they have cried "Wolf"[87] once too often.

In any event, the police, the courts, the prosecutors, and defense lawyers in these states will be faced with legal problems which are new to them, questions from which they have heretofore been insulated by the expansiveness of their state rules of admissibility of illegally obtained evidence:

(1) When is a search and seizure lawful?

(2) Under what circumstances does an accused have standing to assert a constitutional violation?

(3) What is the breadth of the application of the exclusionary rule?

These questions will be considered in the pages which follow by an examination of the holdings of the United States Supreme Court and the experience of the federal courts and state jurisdictions which followed the exclusionary rule before *Mapp v. Ohio.*[88] Emphasis will be upon the decisions of the Supreme Court, because that tribunal will be the final arbiter of search and seizure questions under *Mapp,* where the conduct

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85. The states which, until Mapp v. Ohio, held without qualification that illegally seized evidence was admissible in a state criminal prosecution were: Arizona, Arkansas, Colorado, Connecticut, Georgia, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont and Virginia. Alabama admitted such evidence in all but searches and seizures of private dwellings for prohibited liquor; Maryland followed the rule of admissibility of such evidence as to felonies only. See annot., 50 A.L.R.2d 531, 543 (1956); Elkins v. United States, 364 U.S. 206, App., at 224-32 (1960).

86. The common cry of the police is that strict adherence to constitutional procedure limits or destroys their effectiveness: Their response to Mapp v. Ohio was typical. Immediately after the Mapp decision was announced, the police officer responsible for the search which was characterized by the Ohio Supreme Court as "such as to offend a sense of justice," 170 Ohio St. 427, 431 (1960), said the decision was "devastating." "If they're going to be that technical, that ties our hands in law enforcement." Cleveland Press, June 20, 1961, § A, p. 4, col. 3. See Cleveland Press, July 4, 1961, § C, p. 6, col. 5, in which the police and the county procecutor point out that "police work would be made more difficult by the decision in the . . . Dollree Mapp case." Compare this reaction with that of the local law enforcement authorities to People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955) which adopted the exclusionary rule in California. See Barrett, *Exclusion of Evidence Obtained by Illegal Searches — A Comment on People v. Cahan,* 43 CAL. L. REV. 565, 567 (1955): "The chief of police in the City of Los Angeles stated that '[the decision is] a terrible blow to law enforcement. . . . With these further restrictions being placed upon us — what are we going to do?' "

87. Wolf v. Colorado, 338 U.S. 25 (1949).

88. In addition to the federal jurisdiction, the states which followed the exclusionary rule prior to Mapp v. Ohio were: Alaska, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin and Wyoming. See Annot., 50 A.L.A.2d 531, 556 (1956).

of state officers is in issue, despite what the highest court of a state may hold.[89]

The cases in the realm of search and seizure are riotous with dissent. On similar, and sometimes indistinguishable facts, the results are frequently irreconcilable. In the words of Justice Frankfurter:

> The course of true law pertaining to search and seizures . . . has not — to put it mildly — run smooth. . . . It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases. . . . It turns crime detection into a game of "cops and robbers."[90]

The reasons for such disparate judicial opinion are not obscure. The cases reflect the need to consider several socially desirable objectives which are sometimes in conflict. As Justice Cardozo has stated them:

> On the one side is the social need that crime shall be repressed. On the other, the social need that law will not be flouted by the insolence of office.[91]

The various political philosophies of the judges, their attitudes about the relative importance of the rights guranteed by the fourth amendment[92] to a free and open society, and their concern with the problems of law enforcement explain, even if they do not clarify, the often conflicting results.

As Mr. Justice Frankfurter has put it:

> It is true . . . of journeys in the law that the place you reach depends upon the direction you are taking. And so, where one comes out on the case depends upon where one goes in . . . It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely that it was the safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the prime causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.[93]

Taking into account the various judicial attitudes toward the breadth, scope, and importance of the right against illegal search and seizure, there are certain principles which may be extracted from the decided cases. These are examined below.

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89. See Elkins v. United States, 364 U.S. 206, 224 (1960). "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, *whether or not there has been such an inquiry by a State Court,* and irrespective of how any such inquiry may have turned out." (Emphasis added.)

90. Chapman v. United States, 365 U.S. 610, 618 (1961) (concurring opinion of Frankfurter, J.).

91. People v. Defore, 242 N.Y. 13, 24, 150 N.E. 585, 589 (1926) (Cardozo, J.).

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

93. Rabinowitz v. United States, 339 U.S. 56, 60 (1950) (dissenting opinion of Frankfurter, J.).

WHEN IS A SEARCH AND SEIZURE LAWFUL?

What Is a Search and Seizure?

The courts have frequently been faced with the basic question: what is a "search and seizure" within the meaning of the fourth amendment? "A search implies some exploratory investigation or an invasion and quest, a looking for or seeking out."[94] It has been established that a search involves a prying into hidden places which requires more than the use of the ordinary senses of sight,[95] hearing,[96] or smell.[97] A trespass to person or property is ordinarily involved.[98] Thus, a policeman peeking into a transom[99] or eavesdropping at a keyhole[100] is not engaged in a "search" within the meaning of the fourth amendment, provided he has not gained his vantage point by force, trespass or fraud.[101]

The wiretapping cases[102] have turned on this consideration. Beginning with *Olmstead v. United States,*[103] the Supreme Court has consistently held that, so long as there is no technical trespass, neither the use of tapped telephone lines[104] nor wireless radio amplifiers[105] constitute a

94. People v. Bonchard, 161 Cal. App. 2d 302, 326 P.2d 646 (1958).

95. McDonald v. United States, 335 U.S. 451 (1948).

96. On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928). *Cf.* Silverman v. United States, 365 U.S. 505 (1961).

97. Johnson v. United States, 333 U.S. 10 (1947).

98. McDonald v. United States, 335 U.S. 451 (1948).

99. *Ibid.*

100. Lustig v. United States, 338 U.S. 74 (1949); United States v. Buckner, 164 F. Supp. 836 (D.C. Cir. 1958).

101. McDonald v. United States, 335 U.S. 451 (1948).

102. An extended analysis of the wiretapping cases is beyond the scope of this article. The Supreme Court decisions in this area referred to in the text are cited only to illustrate the boundaries of "search" and "seizure." For detailed study of the evolution of the wiretapping cases, see Bradley & Hogan, *Wiretapping: From Nardone to Benanti and Rathbun,* 46 GEO. L.J. 418 (1958); Rosensweig, *The Law of Wiretapping,* 32 CORNELL L. Q. 514 (1946), 33 CORNELL L. Q. 73 (1947); DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS, (1959).

103. 277 U.S. 438 (1928).

104. See the opinion of Justice Taft, speaking for the court in Olmstead v. United States, 277 U.S. 438, 464-65 (1928) over the vigorous dissents of Brandeis, Holmes, Butler and Stone: "The [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants. . . . The language of the [Fourth] Amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched. . . ." *Cf.* Rathbun v. United States, 355 U.S. 107 (1957).

105. On Lee v. United States, 343 U.S. 747 (1952) (agent with concealed microphone on his person invited onto premises of accused); Goldman v. United States, 316 U.S. 129 (1942) (amplifier held next to common wall). *But cf.* Silverman v. United States, 365 U.S. 505 (1961), in which a "spike mike" attached to a common wall actually penetrated defendant's premises and utilized the heating system as a sound conductor. The Court held this to be an illegal search, distinguishing *On Lee* and *Goldman* on the ground that in those cases there was no actual physical trespass.

"search" or "seizure" within the meaning of the fourth amendment. Consequently, evidence so obtained should not be excluded.[106]

The validity of the emphasis placed by the Supreme Court upon distinguishing minutely different fact situations on the basis of the rules of technical trespass is open to serious question. It is suggested that Mr. Justice Douglas' loss of patience with such fine distinctions in the recent case of *Silverman v. United States*[107] has both social wisdom[108] and historical accuracy[109] to commend it.

Search with a Warrant

The fourth amendment itself sets out explicitly the requirements of a warrant:

> [N]o Warrants shall issue but upon *probable cause,* supported by Oath or affirmation, and *particularly describing the place to be searched,* and the *persons or things to be seized.*[110] (Emphasis added.)

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106. It should be noted that, although Mapp v. Ohio, 367 U.S. 643, 655 (1961) applied the federal exclusionary rule to the states as to evidence "obtained by searches and seizures in violation of the Constitution" and expressly overruled Wolf v. Colorado, 338 U.S. 25 (1949), in this connection, the Court did not specifically say that evidence obtained in violation of a *federal statute,* (Federal Communications Act § 605, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958), which prohibits the interception and divulgence of wire or radio communications) was subject to the exclusionary rule. Nor did it even mention Schwartz v. Texas, 334 U.S. 199 (1952), the wiretapping counterpart of Wolf v. Colorado, *supra,* which held that evidence procured by wiretapping in violation of federal statute was admissible in a state court. The writers are of the opinion that *Schwartz* was not expressly overruled only because the facts in Mapp v. Ohio did not lend themselves to such action. But the necessary implications of the extension of the exclusionary rule to the states as to evidence obtained in violation of the Constitution will soon manifest themselves in all instances of evidence obtained by official lawlessness — whether in violation of the federal Constitution or federal statutes. The parallel and analogous development of the wiretapping decisions (which are outside the scope of the fourth amendment) and the search and seizure cases suggests that *Mapp* is the deathblow to *Schwartz.* But this clarification of the *Mapp* rule is for the Supreme Court. At least one lower court has on several occasions since Mapp v. Ohio limited its application to evidence obtained by *constitutional* lawlessness. Bolger v. Cleary, 30 U.S.L. Week 2079 (2d Cir., Aug. 4, 1961); Williams v. Ball, 30 U.S.L. Week 2109 (2d Cir., Sept. 12, 1961).

107. 365 U.S. 505 (1961).

108. *Id.* at 512-13 (concurring opinion of Douglas, J.): "My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy, . . . while an electronic device that penetrates the wall . . . is not. Yet the invasion of privacy is as great in one case as in the other. . . . Was not the wrong in both cases done when the intimacies of the home were tapped, recorded or revealed? . . . Our concern should not be with the trivialities of the local law of trespass. . . . But neither should the command of the Fourth Amendment be limited by nice distinctions to turning on the kind of electronic equipment employed. *Rather our sole concern should be with whether the privacy of the home was invaded.*" (Emphasis added.)

109. It should be noted that in Weeks v. United States, 232 U.S. 383 (1914), which originated the federal exclusionary rule in criminal cases, emphasis is placed upon the *nature of the intrusion* rather than the *technicality of the trespass.* See the following language from Boyd v. United States, 116 U.S. 616-30 (1886), quoted in *Weeks* with approval: "'It is not the breaking of his doors, and the rummaging of his drawers that constitute the essence of the offense; but it is *the invasion of his indefeasible right of personal security, personal liberty, and private property. . . .*'" (Emphasis added.) 232 U.S. at 391.

110. U.S. CONST. amend. IV. Federal rules and state statutes have implemented the con-

As a consequence, a warrant will be constitutionally defective unless the affidavit seeking the warrant contains these essential elements: (1) a statement of facts showing probable cause that a crime has been committed, (2) specification of the place to be searched, (3) a description of the articles sought with reasonable particularity.[111]

While a search warrant is not invalidated because of minor defects in it,[112] material defects in any of the essential elements will cause the warrant to be invalid *ab initio,* and any search and seizure pursuant thereto will be illegal unless it can be otherwise justified.

With respect to probable cause,[113] it is not necessary that the statements in the affidavit be in a form which would be admissible in evidence in a jury trial.[114] Statements of suspicion[115] or on information and belief[116] without disclosure of supporting facts to justify such suspicion or belief are insufficient.

The specification of the place to be searched must be sufficiently detailed to make clear the search area in which there is probable cause to believe a crime has been committed; a general or roving search warrant is invalid.[117] Thus, a warrant describing an entire building as the place to be searched is invalid where probable cause has been shown only for searching one room or apartment.[118]

Nor does the law enforcement officer have unlimited rummaging rights once the warrant has been obtained. Even though the issuance of the warrant may be proper, its wrongful execution may invalidate it. Since the validity of a warrant is determined at the time it is issued, it can-

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stitutional requirements. *E.g.,* FED. R. CRIM. P. 41 (a-g); CAL. PEN. CODE § 1523-42; ILL. REV. STAT. ch., §§ 691-99 (1957).

111. United States v. Hinton, 219 F.2d 324 (7th Cir. 1955).

112. Ledbetter v. United States, 211 F.2d 628 (D.C. Cir.), *cert. denied,* 347 U.S. 977 (1954); Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950); Palmer v. United States, 203 F.2d 66 (D.C. Cir. 1953); United States v. Daniels, 10 F.R.D. 225 (D.N.J. 1950).

113. Probable cause will be considered in greater detail in the discussion of search and seizure without a warrant. See p. 85 *infra.* Probable cause as it relates to an *arrest of the person* either with or without a warrant will not be separately surveyed in this article although generally the considerations involved are the same.

114. Giacona v. United States, 257 F.2d 450 (5th Cir.), *cert. denied,* 358 U.S. 873 (1958); Weise v. United States, 251 F.2d 867 (9th Cir.), *cert. denied,* 357 U.S. 936 (1958); Jones v. United States, 271 F.2d 494 (1959). *But cf.* Grau v. United States, 287 U.S. 124 (1932).

115. Baysden v. United States, 271 F.2d 325 (1959); United States v. Castle, 138 F. Supp. 436 (D.D.C. 1955).

116. United States v. Office No. 508, 119 F. Supp. 24 (W.D. La. 1954).

117. Marcus v. Search Warrant, 367 U.S. 717 (1961); United States v. Hinton, 219 F.2d 324 (7th Cir. 1955); United States v. Barkouskas, 38 F.2d 837 (D.C. Cir. 1930); United States v. Brown, 151 F. Supp. 441 (E.D. Va. 1957). See also Justice Butler's strong language in Marron v. United States, 275 U.S. 192, 195-96 (1927): "General searches have long been deemed to violate fundamental rights. It is plain that the [Fourth] Amendment forbids them. . . . The requirement that warrants shall particularly describe the thing to be seized makes general searches under them impossible."

118. *Ibid.*

not be justified on the basis of what is found thereafter.[119] Ordinarily, unless there is an overriding necessity which would validate a search even without a warrant,[120] only the place specified in the warrant may be searched and the article named taken.[121] But it has been held permissible to seize things other than those described in the search warrant if they bear a reasonable relation to the purpose of the search.[122] Thus, where a search warrant described the items to be seized as intoxicating liquors and articles for their manufacture, the Supreme Court permitted a seizure of ledgers and bills in a closet on the premises which demonstrated defendants' connection with the liquor business,[123] although probably this holding was based upon rights which the officers would have had even in the absence of a warrant.[124] Furthermore, it has been held that an article which is properly subject to search and seizure and which comes into the possession of an arresting officer in the course of a lawful search need not be returned merely because the arresting officer was not particularly looking for it.[125] And, of course, weapons may be seized even though not described in the warrant on the theory that such seizure is necessary to safeguard the arrest or the officer.[126]

But, even an officer in possession of a valid warrant may not break into a private dwelling without stating in advance and in loud tones his purpose.[127] A knock on the door is not enough.[128] But if he identifies

119. Byars v. United States, 273 U.S. 28 (1927).

120. See discussion p. 80 *infra.*

121. United States v. One Buick 1949 Sedanette, 112 F. Supp. 218 (D. Mass. 1953). See Justice Butler's unequivocal statement in Marron v. United States, 275 U.S. 192, 195-96 (1927): "The requirement that warrants shall particularly describe the thing to be seized . . . prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." These are strong and clear words. *But cf.* result in Harris v. United States, 331 U.S. 145 (1947).

122. Marron v. United States, 275 U.S. 192 (1927); United States v. Joseph, 174 F. Supp. 539 (E.D. Pa. 1959). *But cf.* Harris v. United States, 331 U.S. 145 (1947), in which police entered with arrest warrant charging accused with mail fraud and transportation of forged checks. The search turned up forged draft cards, although the police were only looking for stolen checks. The search was held to be valid.

123. Marron v. United States, 275 U.S. 192 (1927).

124. *Id.* at 195. The court found that the accused was committing a felony (selling liquor) in the presence of the arresting officers. This is a favorite technique of courts that wish to justify a search where the yield is far different from what was contemplated by the police upon entry. *E.g.,* Harris v. United States, 331 U.S. 145 (1947).

125. Abel v. United States, 362 U.S. 217 (1960); Harris v. United States, 331 U.S. 145 (1947).

126. Palmer v. United States, 203 F.2d 66 (D.C. Cir. 1953).

127. Miller v. United States, 357 U.S. 301 (1958). The officers said "police" softly and failed to announce their intention to arrest the accused before breaking in. It was held that the entry was illegal even though accused tried to slam the door in the policemen's faces. See Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953). Police said they were from "Western Union" and were admitted by subterfuge. The entry was held to be illegal. See also McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950); Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949).

128. Curtis v. United States, 354 U.S. 926 (1957); Woods v. United States, 240 F.2d 37 (D.C. Cir.), *cert. denied,* 353 U.S. 941 (1957).

himself as a law enforcement officer, knocks and receives no response, he may break in without invalidating the warrant or the search.[129] The same rules apply to an arrest without a warrant.[130] However, these rules do not apply under emergency circumstances, such as occur when the accused is fleeing or otherwise attempting to avoid arrest or destroy evidence[131] or when officers are justified in believing that they or someone else is in physical peril.[132]

Search Without a Warrant

It cannot be over-emphasized that the fourth amendment has been interpreted to mean that the government may not, except upon urgent necessity, invade the privacy of its citizens without a warrant.[133]

As the cases have developed, certain exceptions to the rule (that searches shall be by warrant) have emerged. Thus, a search without a warrant may not violate the fourth amendment if: (1) it is made with the *consent* of one who is qualified to give consent, or (2) it is *incidental to a lawful arrest,* or (3) there is *probable cause* to believe that a felony has been committed, or (4) it is necessary *to safeguard a law enforcement officer or his arrest,* or to protect evidence likely to be destroyed.

These exceptions derive, in some instances, from the just requirements of law enforcement but in others, regrettably, from a misreading of the fourth amendment in the context of its historical origin and its contemporary significance.

Consent

There can be no doubt that where a person freely gives his consent to a search, such consent will validate the search without a warrant.[134]

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129. United States v. Purgitt, 176 F. Supp. 557 (D.D.C. 1959); United States v. Price, 149 F. Supp. 707 (D.D.C. 1957).

130. Miller v. United States, 357 U.S. 301 (1958).

131. People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956).

132. Read v. Case, 4 Conn. 166 (1822).

133. See McDonald v. United States, 335 U.S. 451, 455 (1948), for a general statement of the rule and its rationale: "[The fourth amendment] guarantee of protection against unreasonable searches and seizures . . . , *with few exceptions,* stays the hands of the police *unless they have a search warrant* issued by a magistrate on probable cause supported by oath or affirmation. . . . We are not dealing with formalities. The presence of a search warrant serves a high function. *Absent some grave emergency,* the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." (Emphasis added.)

134. United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied,* 347 U.S. 935 (1954).

The justification is that consent operates as a waiver of constitutional objections.[135] But mere submission to authority is not consent.[136] Nor may a person under the compulsion of a subpoena be deemed to have given his free consent to a search without a warrant.[137] And consent will not be inferred where there has been an arrest or other official pressure.[138]

Who may give consent to a search? It has been held that the consent of any third party legitimately in charge of the searched premises is sufficient to validate a warrantless search.[139] Thus, the consent of the hotel manager to a search of a room recently vacated by the suspect was sufficient.[140] Consent to search given by the wife of the accused[141] or a building superintendent[142] has been upheld. And it has been suggested that one who rents a room in a rooming house cannot complain if the police enter the general premises with the consent of the landlady, another tenant, or the guest of such tenant.[143] But a boarder cannot give consent to search premises of an accused in his absence.[144] A right to possession of the premises to be searched is apparently the common element necessary before one may waive a fourth amendment violation of premises searched following consent.

Search Incident to Lawful Arrest

While the Supreme Court has held upon a number of occasions that a warrantless general search of the premises of an accused contemporaneous with and incident to a lawful arrest on such premises, does not

135. People v. Soretsky, 343 Ill. 583, 175 N.E. 844 (1931).

136. Johnson v. United States, 333 U.S. 10 (1947); Amos v. United States, 255 U.S. 313 (1921).

137. Nelson v. United States, 208 F.2d 505 (D.C. Cir.), *cert. denied,* 346 U.S. 827 (1953); *In re* Wallace & Tierman Co., 76 F. Supp. 215 (D.R.I. 1948).

138. Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955); United States v. Broadway Arrington, 215 F.2d 630 (7th Cir. 1954); Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954); Catalonotte v. United States, 208 F.2d 264 (6th Cir. 1953); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951). *But cf.* Brainard v. United States, 220 F.2d 384 (D.C. Cir. 1955).

139. United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied,* 347 U.S. 935 (1954); United States v. Walker, 190 F.2d 481 (2d Cir.), *cert denied,* 342 U.S. 868 (1951); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Stein v. United States, 166 F.2d 851 (9th Cir.), *cert. denied,* 334 U.S. 844 (1948). *Cf.* Abel v. United States, 362 U.S. 217, 241 (1960).

140. Abel v. United States, 362 U.S. 217, 241 (1960).

141. United States v. Walker, 190 F.2d 481 (2d Cir.), *cert. denied,* 342 U.S. 868 (1951) (reputed wife); Stein v. United States, 166 F.2d 851 (9th Cir.), *cert. denied,* 334 U.S. 844 (1948) (common law wife). *Cf.* Amos v. United States, 255 U.S. 313 (1921).

142. Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); *cf.* McDonald v. United States, 335 U.S. 451, 458 (1948) (concurring opinion).

143. McDonald v. United States, 335 U.S. 451, 458 (1948) (concurring opinion of Jackson, J.). Presumably illegal entry into the room itself would require the consent of the tenant, but peeking into his transom or listening at his keyhole, since neither is technically a "search" or "seizure," would not require his consent. See discussion p. 76 *supra.*

144. Weeks v. United States, 232 U.S. 383 (1914).

violate the fourth amendment,[145] the scope of the rule is very much in doubt.[146] The Supreme Court cases in this area "cannot be satisfactorily reconciled,"[147] and the wisdom of the rule has been subject to powerful, not to say overpowering, attack.[148]

Clearly an exception to the general requirement that the government shall not invade the privacy of the home, unless authorized to do so by a search warrant, the rule which permits a warrantless search of the accused's premises where the search is incident to a lawful arrest on the premises is not at this late date in dispute in its narrowest application. It is well settled that, upon lawful arrest, the person of the accused may be searched and articles in his immediate physical control may be

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145. Abel v. United States, 362 U.S. 217 (1960); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927); Agnello v. United States, 269 U.S. 20 (1925).

146. See Trupiano v. United States, 334 U.S. 699 (1948). *But see* United States v. Rabinowitz, 339 U.S. 56 (1950). However, McDonald v. United States, 335 U.S. 451 (1948), United States v. Di Re, 332 U.S. 581 (1948), Johnson v. United States, 333 U.S. 10 (1947), and Taylor v. United States, 286 U.S. 1 (1932), closely related in principle to *Trupiano*, still stand. See also Chapman v. United States, 365 U.S. 610 (1961) in which *Taylor* and *Johnson* were expressly relied upon by the Supreme Court although "underlying the decision [was] the approach of *Trupiano*." 365 U.S. at 618-19 (concurring opinion of Frankfurter, J.)

147. Abel v. United States, 362 U.S. 217, 235 (1960).

148. See the strong language of Justice Frankfurter in United States v. Rabinowitz, 339 U.S. 56, 70-80 (1950) (dissenting opinion): ". . . I suggest that it makes a mockery of the Fourth Amendment to sanction search without a search warrant merely because of the legality of an arrest. I have yet to hear the answer to Judge Learned Hand's reasoning below that to make the validity of a search depend upon the presence of the party in the premises searched at the time of the arrest . . . would make crucial a circumstance that has no rational relevance to the purpose of the privilege. The feelings which lie behind it have their basis in the resentment, inevitable in a free society, against the invasion of a man's privacy without some judicial sanction. It is true that where one has been arrested . . . his privacy has already been invaded; but that interest, though lost, is altogether separate from the interest in protecting his papers from indiscriminate rummage . . . The short of it is that the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it. . . . To tear 'unreasonable' from the context and history and purpose of the Fourth Amendment in applying the narrow exception of search as an incident to an arrest is to disregard *the* reason to which reference must be made when a question arises under the Fourth Amendment. *It is to make the arrest an incident to an unwarranted search instead of a warrantless search an incident to an arrest.* . . . The main aim of the Fourth Amendment is against invasion of the right of privacy as to one's effects and papers without regard to the result of such invasion. . . . The justification for intrusion into a man's privacy was to be determined by a magistrate uninfluenced by what may turn out to be a successful search. . . . The framers did not regard judicial authorization as a formal requirement for a piece of paper. They deemed a man's belongings part of his personality and his life . . . ." (Emphasis added.)

See also the cogent remarks of Judge Learned Hand in United States v, Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926): "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; *but it is small consolation to know that one's papers are safe only so long as one is not at home.*" (Emphasis added.)

seized.[149] Arresting officers may seize plainly visible instruments or fruits of crime at the scene of the arrest.[150] But where the scope of the search incident to arrest goes beyond the physical person of the accused and the items in his immediate control, there is no such unanimity of opinion. The Supreme Court has allowed a contemporaneous search of a closet in a saloon in which an arrest took place,[151] the bathroom adjoining a hotel room in which an arrest was made,[152] and an entire four-room apartment, in the living room of which the accused was arrested.[153] But search of a home several blocks away from the place where the arrest was made was held too remote.[154]

On the other hand, the Supreme Court has also held that a warrantless search of a single room in which the accused was arrested was too broad in scope,[155] and that the removal of all of the contents of a cabin to an FBI office 200 miles away for examination was beyond the scope of permissible search.[156]

It should be noted that the search must actually accompany and be incident to a lawful arrest.[157] Thus a search by an officer who was not of the group which eventually made the arrest,[158] a search of a garage prior to a future arrest on the premises,[159] and police entry for the admitted purpose of searching, rather than arresting, although an arrest on the premises actually took place about an hour later,[160] all failed to fall within the coverage of the "search incident to arrest" exception, and were, hence,

149. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Agnello v. United States, 269 U.S. 20 (1925); Carroll v. United States, 267 U.S. 132, 158 (1925); Weeks v. United States, 232 U.S. 383 (1914).

150. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). *Compare* Trupiano v. United States, 334 U.S. 699 (1948) *with* United States v. Rabinowitz, 339 U.S. 56 (1950). See also Marron v. United States, 275 U.S. 192 (1927).

151. Marron v. United States, 275 U.S. 192 (1927). This case was limited to its facts by Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) and United States v. Lefkowitz, 285 U.S. 452 (1932). The Court pointed out in the two later cases that in *Marron* a crime was being openly committed in the presence of the police officers and the articles seized were in plain view of the officers. The Court concluded that the broad rule in *Marron* was unnecessary to the result and limited the case accordingly.

152. Abel v. United States, 362 U.S. 217 (1960).

153. Harris v. United States, 331 U.S. 145 (1947).

154. Agnello v. United States, 269 U.S. 20 1925).

155. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (police used force to compel accused to open safe and unlock desk); United States v. Lefkowitz, 285 U.S. 452 (1932) (no force used as desks and cabinet were not locked). *Contra,* United States v. Rabinowitz, 339 U.S. 56 (1950).

156. Kremen v. United States, 353 U.S. 346 (1957).

157. Jones v. United States, 357 U.S. 493 (1958); Lustig v. United States, 338 U.S. 74 (1949).

158. Lustig v. United States, 338 U.S. 74 (1949).

159. Taylor v. United States, 286 U.S. 1 (1932).

160. Jones v. United States, 357 U.S. 493 (1958).

illegal searches. It will be observed that the Supreme Court and the federal courts have placed great stress upon the requirement that the arrest precede the search.[161] This emphasis is probably based upon the oft-stated principle that an illegal search is never justified by its success,[162] and the rejection of the "boot-strap" argument that a search is justified by an arrest which, in turn, is based upon the fruit of the search.[163]

Under the rule which permits a warrantless search incident to a lawful arrest, the arrest may be lawful either when there is a valid arrest warrant,[164] when probable cause exists to believe that a felony has been committed by the accused,[165] or when a felony is committed in the presence of arresting officers who gained access to the premises by lawful means.[166]

While it is not the intention of the writers to deal exhaustively here with the law of arrest,[167] it may be noted in passing that either a criminal warrant obtained from a magistrate[168] or an administrative warrant[169] will be sufficient, if properly drawn and obtained, to validate an arrest.

The warrantless search incident to arrest is an ever-widening exception to the command of the fourth amendment that searches shall be by authority of judicial warrant. It is a constantly growing aperture in

161. United States v. Lefkowitz, 285 U.S. 452 (1932); Taylor v. United States, 286 U.S. 1 (1932). See Raniele v. United States, 34 F.2d 877 (8th Cir. 1929); United States v. Waller, 108 F. Supp 450 (N.D. Ill. 1952). But some states hold otherwise. *E.g.*, People v. Duroncelay, 48 Cal. 2d 776, 312 P.2d 690 (1957).

162. McDonald v. United States, 335 U.S. 451 (1948); United States v. Di Re, 332 U.S. 581 (1948); Johnson v. United States, 333 U.S. 10 (1947); Byars v. United States, 273 U.S. 28 (1927).

163. McDonald v. United States, 335 U.S. 451 (1948). See also Johnson v. United States, 333 U.S. 10, 16-17 (1947): "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters . . . . must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects', and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law and the police-state where they are the law."

164. Abel v. United States, 362 U.S. 217 (1960); United States v. Rabinowitz, 339 U.S. 56 (1950); Marron v. United States, 275 U.S. 192 (1927).

165. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925). It will be noted that in the *Carroll* case, the Court spoke of "probable cause in justifying seizures" and "probable cause . . . in making arrests without warrant" and probable cause in malicious prosecution and false arrest cases synonymously. Note also that the probable cause necessary to obtain a warrant is indistinguishable in definition from probable cause which will justify an arrest or search without a warrant. Jones v. United States, 362 U.S. 257 (1960). The writers in discussing probable cause throughout this article will deal with these concepts similarly.

166. Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927).

167. For a consideration of the law of arrest in detail, see *Police Detention and Arrest Privileges: An International Symposium*, 51 J. CRIM. L. 385 (1960); Coakley, *Restrictions in the Law of Arrest*, 52 NW. U. L. REV. 2 (1957).

168. United States v. Rabinowitz, 339 U.S. 56 (1950); Marron v. United States, 275 U.S. 192 (1927).

169. Abel v. United States, 362 U.S. 217 (1960).

the wall of privacy which the fourth amendment has erected between the private citizen and his government.

Many resourceful law enforcement officers find it totally unnecessary ever to use a search warrant as long as the exception of warrantless search incident to arrest is available to them. Why should they apply for a warrant in which they must describe the place to be searched and the articles to be seized with particularity when they can arrest the suspect in his home, conduct a general and roving search which a magistrate would never permit them by warrant and perhaps turn up some incriminating evidence which would justify the arrest *ab initio?* How much simpler from the law enforcement standpoint "to justify the arrest by the search and at the same time to justify the search by the arrest."[170] But such an approach, while efficient from the law officer's viewpoint, cannot be constitutionally justified on such grounds.[171] Cutting "red tape" has never been the test of the constitutionality of police behavior, and Justice Frankfurter's warning in this regard explains why it is particularly to be discouraged in application here:

> Arrest under a warrant for a minor or trumped up charge has been familiar practice in the past, is [a] commonplace in the police state of today, and too well known in this country.[172]

Under such circumstances the search warrant becomes an obsolete piece of paper, the right of privacy becomes subject to the whim of the policeman, and our free society takes a long step toward its own annihilation.

Probable Cause

The probable cause which is necessary to validate an arrest and/or search without a warrant has been described as "a belief, reasonably arising out of circumstances known to the . . . officer" that a crime has been committed[173] or, more simply stated, "a reasonable ground for belief of guilt."[174] "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."[175] But simple belief[176]

170. Johnson v. United States, 333 U.S. 10, 16-17 (1947).

171. See McDonald v. United States, 335 U.S. 451, 454-55 (1948), in which Justice Douglas speaking for the court, said: "[T]here must be compelling reasons to justify the absence of a search warrant. . . . No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement. . . ."

172. United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (dissenting opinion).

173. Carroll v. United States, 267 U.S. 132, 149 (1925).

174. Brinegar v. United States, 338 U.S. 160, 175 (1949).

175. Stacey v. Emery, 97 U.S. 642, 645 (1878).

176. Nathanson v. United States, 290 U.S. 41 (1933).

and good faith of the arresting officer[177] are not enough. "That faith must be grounded on facts within [his] knowledge . . . which in the judgment of the court would make his faith reasonable."[178] Probable cause need not be proved beyond a reasonable doubt[179] but it must be something more than mere suspicion,[180] common rumor, or even "strong reason to suspect."[181]

There has been considerable litigation over whether, as distinguished from the personal observations of the officer, hearsay evidence of an informer is sufficient to constitute probable cause.[182] Standing alone it is probably not enough.[183] But if "the informant's statement is reasonably corroborated by other matters within the officer's knowledge" such hearsay may be the basis of probable cause, either in obtaining a warrant[184] or to support an arrest and search without a warrant.[185] Thus, the "reliable" nature of the informant, coupled with a police finding that the informant's tip describing the accused and his whereabouts checked out exactly, constitutes probable cause to support an arrest.[186] Such a result has, however, been vigorously attacked.[187]

But it is clear that where the identity of the informant is concealed from the court, such informant's hearsay "tip" is insufficient to constitute probable cause.[188]

The question whether probable cause is a sufficient constitutional substitute for a search warrant has been considered by the Supreme Court,

177. Henry v. United States, 361 U.S. 98 (1959).

178. Director General v. Kastenbaum, 263 U.S. 25 (1923).

179. Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949).

180. *Ibid.* See also Shurman v. United States, 219 F.2d 282 (5th Cir.), *cert. denied,* 349 U.S. 921 (1955); Rent v. United States, 209 F.2d 893 (5th Cir. 1954); United States v. Plymouth Coupe, 182 F.2d 180 (3rd Cir. 1950).

181. Henry v. United States, 361 U.S. 98 (1959).

182. Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959); Scher v. United States, 305 U.S. 251 (1938); Worthington v. United States, 166 F.2d 557 (6th Cir. 1948); United States v. Bianco, 94 F. Supp. 239 (W.D. Pa. 1950), *rev'd. on other grounds,* 189 F.2d 716 (3rd Cir. 1951); United States v. Nichols, 78 F. Supp. 483 (W.D. Ark. 1948), *aff'd,* 176 F.2d 431 (8th Cir. 1949).

183. Scher v. United States, 305 U.S. 251 (1938); Worthington v. United States, 166 F.2d 557 (6th Cir. 1948); United States v. Bianco, 94 F. Supp. 239 (W.D. Pa. 1950), *rev'd on other grounds,* 189 F.2d 716 (3d Cir. 1951).

184. Jones v. United States, 362 U.S. 257 (1960).

185. Draper v. United States, 358 U.S. 307 (1959).

186. *Ibid.*

187. See statement of Justice Douglas in Jones v. United States, 362 U.S. 257, 273 (1960) (concurring opinion): "This is an age where faceless informers have been reintroduced into our society in alarming ways . . . Unless the magistrate makes his independent judgment on *all the known facts,* then he tends to become merely the tool of police interests." (Emphasis added.) See also Draper v. United States, 358 U.S. 307 (1959) (dissenting opinion of Douglas, J.).

188. Scher v. United States, 305 U.S. 251 (1938). *But cf.* United States v. Nichols, 78 F. Supp. 483 (W.D. Ark. 1948), *aff'd.,* 176 F.2d 431 (8th Cir. 1949).

with varying results.[189] In cases involving search of open fields,[190] moving vehicles,[191] and business offices[192] the courts have held that probable cause to believe that a crime has been committed is enough. But this rule has been specifically rejected in its application to private dwellings[193] where it has been held that a search warrant is required.

Note that probable cause is an indispensable element to justify a search in both instances,[194] but where invasion of a private dwelling is contemplated, the initial determination of whether probable cause to search exists is left to a magistrate rather than to the policeman. This is a distinction with a constitutional difference.[195]

With respect to all stationary buildings, the Supreme Court formulated a rule in *Trupiano v. United States*[196] that whether or not there was a valid arrest, an incidental search and seizure will be constitutionally invalid if there was time and opportunity to procure a search warrant but

189. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925). *But cf.* Chapman v. United States, 365 U.S. 610 (1961); Johnson v. United States, 333 U.S. 10 (1947); Agnello v. United States, 269 U.S. 20 (1925).

190. Hester v. United States, 265 U.S. 57 (1924); Edwards v. United States, 206 F.2d 855 (10th Cir. 1953).

191. Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 261 U.S. 132 (1925).

192. United States v. Rabinowitz, 339 U.S. 56 (1950). *But cf.* United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

193. McDonald v. United States, 335 U.S. 451 (1948) (room in rooming house); Johnson v. United States, 333 U.S. 10 (1948) (hotel room); Weeks v. United States, 232 U.S. 383 (1914) (private dwelling). *Cf.* Taylor v. United States, 286 U.S. 1 (1932) (garage adjoining private dwelling). See also Agnello v. United States, 269 U.S. 20, 33 (1925) quoted with approval in Chapman v. United States, 365 U.S. 610, 613 (1961): "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. *And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.*" (Emphasis added.) In Brinegar v. United States, 338 U.S. 160, 176 (1949), the Court carefully distinguished its facts from those involving private dwellings: "No problem of searching the home or any other place of privacy was presented either in *Carroll* or here. Both cases involve freedom to use public highways in swiftly moving vehicles. . . ."

194. Henry v. United States, 361 U.S. 98, 104 (1959).

195. See Johnson v. United States, 333 U.S. 10, 13-14 (1948) in which Mr. Justice Jackson, speaking for the Court, said: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

See also Trupiano v. United States, 334 U.S. 699, 710 (1948), in which Mr. Justice Murphy, speaking for the Court, said: "It is a mistake to assume that a search warrant . . . would contribute nothing to the preservation of the rights protected by the Fourth Amendment. A search warrant must describe with particularity the place to be searched and the things to be seized. Without such a warrant, however, officers are free to determine for themselves the extent of their search and the precise objects to be seized. This is no small difference. It is a difference upon which depends much of the potency of the right of privacy. . . ."

196. 334 U.S. 699 (1948).

the police failed to do so. Scarcely two years later this rule was abandoned in *United States v. Rabinowitz.*[197] The Court substituted the test of "reasonableness" of the search for the practicability of procuring a search warrant[198] over the biting dissent of Justice Frankfurter.[199]

It is apparent that the Supreme Court has in the past[200] regarded the approach later taken in *Rabinowitz* as a backward step in constitutional history and the development of human freedom and there are clear indications that it seems to think so at the present time.[201] An examination of the opinions in *McDonald v. United States,*[202] *Johnson v. United States,*[203] and *Taylor v. United States*[204] demonstrates clearly that these cases turned upon the availability of, and opportunity to procure, a search warrant. They are still good law today. The very recent case of *Chapman v. United States*[205] is clear evidence of the present Court's intention to revert to the spirit of the *Trupiano* rule, if not to its exact letter. It is suggested that a rule which at its origin was based neither upon logic nor experience but which resulted from changes of personnel on a bitterly divided court and which has seen the very court which established it turn its back upon it has been drained of whatever vitality it may have possessed at its inception and is now awaiting the oblivion of explicit rejection. At very least, *Rabinowitz* must be confined to its facts.[206]

Search Necessary to Safeguard Arrest

Another exception to the constitutional command that a search must be by warrant is that an officer may search the person of the accused and the premises within his reach for weapons, both to safeguard the arrest

197. 339 U.S. 56 (1950). This dramatic reversal of position is traceable directly to the personnel changes on the court rather than to a considered rejection of the rule. Justices Murphy and Rutledge of the *Trupiano* court, staunch friends of the fourth amendment, had been replaced on the *Rabinowitz* Court by Justices Minton and Burton. See Justice Black's dry observation in *Rabinowitz:* "In my judgment it would be wiser judicial policy to adhere to the *Trupiano* rule . . . at least long enough to see how it works." 339 U.S. at 67 (dissenting opinion).

198. *Id.* at 65.

199. *Id.* at 83, 84: "There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant. . . . It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable. . . . [T]he presence or absence of an ample opportunity for getting a search warrant [is] very important. It is not a rule of thumb. It is a rule of the Fourth Amendment. . . ."

200. McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1947); Taylor v. United States, 286 U.S. 1 (1932).

201. Chapman v. United States, 365 U.S. 610 (1961).

202. 335 U.S. 451 (1948).

203. 333 U.S. 10 (1948).

204. 286 U.S. 1 (1932).

205. 365 U.S. 610 (1961).

206. Faint hearts convinced that an unjust rule must be perpetuated because it is well-entrenched are referred to Mapp v. Ohio, 367 U.S. 643 (1961) for proof that sometimes justice triumphs even at the expense of stare decisis.

and the life of the arresting officer.[207] There is no dispute about this exception because it is based upon clear necessity. Nor would there be argument if the principle were extended to include search for tools or implements, such as skeleton keys or hacksaw blades, by which the prisoner might effect an escape, or drugs or poison, by which the prisoner might injure himself.

Furthermore, it is clear that where relevant evidence is likely to be concealed or destroyed unless the officer acts with speed, a search or seizure without a warrant is justified, again on grounds of emergency and necessity.[208] But these exceptions should apply only if the officer is rightly on the premises. He should have no right to protect an arrest which is invalid or to preserve evidence for which he is not entitled to search.

Administrative Search and Seizure

Until this point, consideration has been given to search and seizure as it relates to criminal process, judicial warrants, and the police. In recent years, fourth amendment problems relating to administrative warrants, civil administrative search procedure, and administrative officials have received increasing attention from the courts.[209] The importance of these problems cannot be overestimated. As the executive branch of government has expanded, as administrative functions have increased and governmental regulation of private affairs for the general welfare has become entrenched, these effects have been felt in the area of individual privacy; one may anticipate that they will be in evidence even more frequently in the future.

While it has been held that an administrative warrant is equivalent and subject to the same rules of search and seizure as a judicial warrant,[210] recently the Supreme Court, in *Frank v. Maryland*,[211] has expanded the area of permissible administrative search without a warrant

207. Abel v. United States, 362 U.S. 217 (1960) (rule applies to administrative as well as criminal arrests); Harris v. United States, 331 U.S. 145 (1947); Agnello v. United States, 269 U.S. 20 (1925).

208. Abel v. United States, 362 U.S. 217 (1960).

209. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960); Abel v. United States, 362 U.S. 217 (1960); Frank v. Maryland, 359 U.S. 360 (1959); District of Columbia v. Little, 178 F.2d 13, *aff'd on other grounds*, 339 U.S. 1 (1950).

210. Abel v. United States, 362 U.S. 217 (1960). But see the vigorous dissent of Justice Douglas in which Justice Black joined: "[A]dministrative officers — as distinguished from police . . . need not go to magistrates, the Court says, for warrants of arrest. Their warrants are issued within the hierarchy of the agency itself. Yet . . . the Fourth Amendment in origin had to do as much with ferreting out heretics and collecting taxes as with enforcement of the criminal laws. . . . Moreover the administrative officer who invades the privacy of the home may be only a front for the police who are thus saved the nuisance of getting a warrant. . . . The administrative official with an administrative warrant, over which no judicial official exercises any supervision . . . performs a new role. The police wear his mask to do police work. That, in my view, may not be done." 362 U.S. at 242.

211. 359 U.S. 360 (1959).

beyond its police counterpart.[212] In *Frank,* by a five to four decision, the Supreme Court upheld the constitutionality of a Baltimore ordinance which provided criminal penalties for a homeowner who refused to permit a health inspector to enter his home during the daylight hours whenever he had cause to suspect the existence of a nuisance. Justice Frankfurter, writing for the Court, sustained the ordinance on the ground that the necessities of health inspection override the peripheral infringement of the right of privacy, by the application of his famous test of "balancing"[213] the needs of the public. That the four dissenting Justices[214] were unconvinced of the soundness of the majority opinion is evident from the stinging language of Justice Douglas's dissent[215] and the positions taken by the same Justices in the standoff four to four decision[216] in *Ohio ex rel. Eaton v. Price.*[217]

In *Price,* the four Justices in favor of affirming a conviction under a similar Dayton ordinance,[218] went even further than the majority did in *Frank.* In *Frank,* the health inspector at least had reasonable grounds to believe that there was a health nuisance on the premises because he had observed filth and rat excrement in the backyard. While a warrant on such a showing would have been easy to procure from a magistrate and should have been required by the ordinance in order to satisfy the fourth amendment,[219] in *Price,* there was even less justification for upholding the search. In the latter case although there was no evidence of

212. Even giving the broadest scope to the exceptions to the exclusionary rule, a police officer must have probable cause to believe that a *crime* has been committed before he may enter a home to search without a warrant. But since health inspectors and other administrative officers rarely are searching for evidence of *crimes* when they enter a home, to permit them to search without a warrant sets a decidedly lower standard of fourth amendent protections for them than for policemen; in fact, it reduces such protections "to the vanishing point." See the opinion of Justice Brennan in Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 268 (1960).

213. "[T]here are no constitutional rights that cannot be 'balanced' away." Wilkinson v. United States, 365 U.S. 399, 423 (1961) (dissenting opinion of Black, J.).

214. The justices were Warren, Black, Douglas, and Brennan.

215. Frank v. Maryland, 359 U.S. 360, 374 (1959) (dissenting opinion): "The question in this case is whether a search warrant is needed to investigate sanitary conditions. . . .

"[The fourth amendment] was designed to protect the citizen against uncontrolled invasion of his privacy. It does not make his home a place of refuge from the law. It only requires the sanction of the judiciary rather than the executive before that privacy may be invaded. History shows that all officers tend to be officious; and health inspectors, making out a case for criminal prosecution of the citizen, are no exception. . . . .

"Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers and other criminal elements. . . . It would seem that the public interest in protecting privacy is equally as great in one case as in another."

216. Justice Stewart, with the majority in *Frank,* did not participate.

217. 364 U.S. 263, 269 (1960). Justice Brennan, speaking for Chief Justice Warren and Justices Black and Douglas said: "[M]uch reliance at the bar has been put on Frank v. Maryland. . . . We would not be candid to say that on its own facts we have become reconciled to that judgment."

218. They were Justices Frankfurter, Clark, Harlan and Whittaker.

219. This was in the opinion of the four dissenters.

any health violation at all on the part of the homeowner,[220] he was convicted for failure to permit entry of the health inspector. The relaxation of the standards of the fourth amendment in the administrative area as opposed to the comparative progress in criminal law enforcement is totally unwarranted.[221] The decision in *Frank v. Maryland* thus remains "the dubious pronouncement of a gravely divided court."[222]

Conduct of the Law Enforcement Officer

Even though the search and seizure might otherwise be proper, either pursuant to a warrant or otherwise, where the methods used by the law enforcement officers amount to "conduct that shocks the conscience,"[223] a conviction based upon evidence so obtained will be reversed.[224]

This result is derived from the interrelationship between the protection against illegal search and seizure provided by the fourth amendment[225] and the privilege against self-incrimination guaranteed by the fifth amendment.[226] Thus, where police burst into the defendant's bed-

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220. Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 271 (1960): "For all that appears here, the . . . [inspector's] action could have been based on caprice or on personal or political spite."

221. No valid answer has yet been provided to Judge Prettyman's statement in District of Columbia v. Little, 178 F.2d 13, 17 (1949), *aff'd., on other grounds,* 339 U.S. 1 (1950): "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

222. Cooper v. Aaron, 358 U.S. 1, 24 (1958).

223. Rochin v. California, 342 U.S. 165, 172, (1952). It is not clear whether the application of the federal exclusionary rule to the states by *Mapp v. Ohio* will eliminate the need for the approach in *Rochin.* Manifestly since fruits of an *illegal* search or seizure will be inadmissible in any court as a result of *Mapp,* this broad rule may encompass the fact situations contemplated by *Rochin,* since all that need be shown under *Mapp* is that the search was *unreasonable,* not necessarily "shocking to the conscience." But where entry is lawful, particularly by warrant, the *Rochin* doctrine may yet be a valuable adjunct in preventing police excesses. And, until Schwartz v. Texas, 344 U.S. 199 (1952), is overruled, the principles of *Rochin* may be applied in the wiretapping cases through the due process clause, even though wiretapping is not a "search" or "seizure" within the protection of the fourth amendment. See note 106 *supra.*

224. Rochin v. California, 342 U.S. 165 (1952); United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949). *But cf.* Irvine v. Irvine, 347 U.S. 128, 136 (1954).

Many shocking instances of police lawlessness and brutality have emanated from California. *E.g.,* Irvine v. California, 347 U.S. 128 (1954). It is apparent that California felt compelled to adopt the federal exclusionary rule in People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955), because the private remedies of criminal prosecution and civil actions for trespass against errant police officers, so heavily relied upon as alternatives in Wolf v. Colorado, 338 U.S. 25 (1949), were no deterrent at all to such conduct. See People v. Cahan, *supra* at 437-38, 282 P.2d 905, 907 (1955): "Without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties. . . ."

225. United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949).

226. Rochin v. California, 342 U.S. 165 (1952).

room, saw him swallow several morphine capsules, struggled unsuccessfully to open his mouth and extract them, then recovered the pellets by pumping his stomach against his will and with the use of force, the Supreme Court, speaking through Mr. Justice Frankfurter, reversed the conviction based upon such evidence, holding that such conduct "is bound to offend even hardened sensibilities."[227] Such methods, he continued, are "too close to the rack and the screw to permit of constitutional differentiation."[228] And the conviction was reversed even though the evidence taken from the defendant's stomach was completely trustworthy and reliable.[229]

While stomach-pumping has been frowned upon as a method of obtaining evidence,[230] the search of the rectum for narcotics cached there has been judicially approved.[231] It is difficult to reconcile the results except to observe that "Rochin was at one end of the alimentary canal and Blackford was at the other . . . ."[232] In both instances, force was employed and pain was inflicted[233] to extract evidence from a body cavity; in both instances the integrity of the body was violated and the privacy of the person disturbed, and in each case the defendant resisted physically until he was overpowered.

In *Breithaupt v. Abram*[234] the Supreme Court sapped the vigor of the *Rochin* doctrine by holding that a blood sample drawn by police from an unconscious man lying in a public highway to determine its alcohol content in order to convict him of involuntary manslaughter was not unconscionable conduct which would require reversal of the conviction. The opinion turned upon the fact that the blood sample was "taken by a skilled technician"[235] and that the "procedure has become

227. *Id.* at 172.

228. *Ibid.*

229. While it has been urged as a rationale for excluding coerced confessions that the evidence thus obtained is unreliable, "it would take a rash man indeed to try to disassociate himself from the contents of his stomach." Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts,* 43 MINN. L. REV. 1083, 1120 (1959). The basis then, of such exclusion is the *brutality* of the method used rather than the *unreliability* of the testimony so secured.

230. Rochin v. California, 342 U.S. 165 (1952); United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949).

231. Blackford v. United States, 247 F.2d 754 (9th Cir.), *cert. denied,* 356 U.S. 914 (1958); Application of Woods, 154 F. Supp. 932 (N.D. Cal. 1957), *application denied,* 249 F.2d 614 (9th Cir. 1957).

232. Blackford v. United States, 247 F.2d at 754, *cert. denied,* 356 U.S. 914 (1958) (dissenting opinion).

233. The Court in the *Blackford* case attempted to explain away the pain involved in the rectal probe on the ground that it was "self-inflicted" because defendant failed to cooperate with the police in the search of his anal cavity. The argument is not at all persuasive. If the use of force by law enforcement officers may be justified by the failure of the criminal to "cooperate," our defenses against police brutality have been very much diluted.

234. 352 U.S. 432 (1957).

235. *Id.* at 437.

routine in our everyday life."[236] Chief Justice Warren and Justices Black and Douglas dissented vigorously.[237]

But it is clear that where an accused consents to the violation of his body, no constitutional question is presented.[238]

The scattered decisions in this area suggest that the courts will not admit evidence obtained by methods which are personally repulsive to the jurists. They do not provide a more objective yardstick.

It is of perhaps more than passing interest to observe, however, that since *Rochin* the Supreme Court has not found a single fact situation which merited similar judicial treatment. Whether or not this is an indication of the absorption of the *Rochin* doctrine into the broad exclusionary rule of *Mapp v. Ohio* will depend upon whether the Court includes in its definition of an "unreasonable" search *all* instances of shocking methods and whether the *Rochin* doctrine will be applied to wiretapping.[239]

Who May Protest A Fourth Amendment Violation?

In order to move to suppress the fruits of an illegal search and seizure, an accused must have "standing" to object.[240] This is based upon the undisputed rule that only the one whose privacy has been invaded may protest.[241] To establish such "standing," the accused must claim either ownership or possession of the seized property or a substantial possessory interest in the premises searched.[242]

Until *Jones v. United States*,[243] it had been held by the inferior federal courts that one who claimed no interest in the property which was seized could not move to suppress such evidence on the ground that it was obtained unconstitutionally.[244] Thus, the accused was placed squarely

236. *Id.* at 436.

237. "[I]f the decencies of a civilized state are the test, it is repulsive to me for the police to insert needles into an unconscious person in order to get the evidence necessary to convict him, whether they find the person unconscious, give him a pill which puts him to sleep, or use force to subdue him. The indignity to the individual is the same in one case as in the other." 352 U.S. at 444 (dissenting opinion of Douglas, J.) *Cf.* United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957), in which the Court refused to permit into evidence chemical tests for blood stains performed on the penis of the accused over vigorous protest and physical resistance.

238. *In re* Guzzardi, 84 F. Supp. 294 (N.D. Tex. 1949) (evidence secured by stomach pump is admissible where defendant consents).

239. See note 223 *supra.*

240. Elkins v. United States, 364 U.S. 206 (1960); Rios v. United States, 364 U.S. 253 (1960).

241. Jones v. United States, 362 U.S. 257 (1960).

242. *Ibid.*

243. 362 U.S. 257 (1960).

244. United States v. Pepe, 247 F.2d 838 (2d Cir. 1957); Lovette v. United States, 230 F.2d 263 (5th Cir. 1956); United States v. Eversole, 209 F.2d 766 (7th Cir. 1954); Steeber v. United States, 198 F.2d 615 (10th Cir. 1952); United States v. Reckis, 119 F. Supp. (D. Mass. 1954).

between the horns of a procedural dilemma. If, at the preliminary motion to suppress, he claimed an interest in the seized property, such allegations might well be used against him in a trial on a charge of possession of such illicit material; if he failed to claim an interest in the property, he had no standing to suppress the evidence.

But in *Jones,* the dilemma was resolved. The Supreme Court held that where possession of the seized evidence both convicts and shows "standing" to object to the seizure, there is no necessity to show an interest in the premises searched or the property seized.[245]

However, in a prosecution which does not turn on illicit possession, the ordinary rules regarding a showing of interest will be applied; such rules are consequently considered here.

While the cases which had dealt with the type of interest in the searched premises necessary to raise an objection prior to *Jones* distinguished such interests on the basis of technical real property concepts,[246] that landmark decision has obliterated such technical distinctions, even where the prosecution is not based upon illicit possession.[247] The broad rule of *Jones,* then, is that "anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him."[248] Property of an accused illegally seized in a search of the premises of another may be suppressed even though the accused was not on the premises at the time of the search.[249]

The rule that an accused may not object to the introduction in evidence of property in which he has no right, title, or interest[250] has been expanded by a number of courts to deny standing to object to anyone

245. Jones v. United States, 362 U.S. 257, 263 (1960).

246. *E.g.,* "Guests" and "invitees" had no standing. Gaskins v. United States, 218 F.2d 47, 48 (D.C. Cir. 1955); Gibson v. United States, 149 F.2d 381, 384 (D.C. Cir. 1945); *In re* Nasetta, 125 F.2d 924(2d Cir. 1942). Nor did employees have standing, even though in "control" or "occupancy" of premises if not in "possession." United States v. Conoscente, 63 F.2d 811 (2d Cir. 1933); Connolly v. Medalie, 58 F.2d 629, 630 (2d Cir. 1932). Generally, the necessary interest has been described as "ownership in or right to possesion of the premises." Jeffers v. United States, 342 U.S. 48 (1951).

247. In Jones v. United States, 362 U.S. 357, 366 (1960) Justice Frankfurter said: "We are persuaded . . . that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by common law in evolving the body of private property which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." Note, however, that private property concepts are still important in determining who may give consent to a warrantless search. See discussion, p. 81, *supra.*

248. *Id.* at 267.

249. United States v. McDaniel, 154 F. Supp. 1 (D.D.C. 1957); United States v. Lester, 21 F.R.D. 376 (D. Pa. 1957).

250. *Annot.,* 50 A.L.R. 2d 577 (1956). *Cf.* Jones v. United States, 362 U.S. 257 (1960); United States v. Ong Goon Sing, 149 F. Supp. 267 (S.D. N.Y. 1957).

claiming an interest in contraband on the ground that nobody can acquire a legitimate property interest in such goods.[251]

However, the Supreme Court has made it clear that an accused who claims an interest in contraband has standing to move to suppress such evidence if illegally seized,[252] "it being his property for purposes of the exclusionary rule."[253] But the property, being contraband, will not be returned to the accused even though the motion to suppress is successful.[254]

Some lower federal courts, however, have distinguished between contraband, the possession of which, by its very nature, is illegal (*i.e.,* narcotics, burglary tools) and embezzled or stolen property, in which, but for the manner in which it was obtained, one might have a legitimate property interest.[255]

The cases considering embezzled[256] or stolen[257] property have distinguished their facts from contraband on the ground that a thief acquires no title to stolen property and consequently does not have sufficient standing to object. Whether or not the *Jones* rule will affect this distinction remains to be seen.[258]

One who claims an interest in public documents, however, has been treated with far less constitutional consideration than one who possesses contraband.[259] "Records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation" cannot be the subject of illegal search and seizure.[260] Thus, a possessor of gasoline ration coupons,[261]

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251. State v. Goldstein, 111 Ore. 221, 224 Pac. 1087 (1924); State v. Sabo, 108 Ohio St. 200, 140 N.E. 499 (1923); Rosansky v. State, 106 Ohio St. 442, 140 N.E. 370 (1922). *But cf.* Work v. United States, 243 F.2d 660 (D.C. Cir. 1957) (phial of narcotics illegally seized held inadmissible); People v. Mayo, 19 Ill. 2d 136, 166 N.E.2d 440 (1960) (policy slips held inadmissible even though contraband).

252. United States v. Jeffers, 342 U.S. 48 (1951); Trupiano v. United States, 334 U.S. 699 (1948).

253. United States v. Jeffers, 342 U.S. 48, 54 (1951).

254. *Ibid.* See also Trupiano v. United States, 334 U.S. 699 (1948), *overruled on other grounds,* United States v. Rabinowitz, 339 U.S. 56 (1950).

255. United States v. Pete, 111 F. Supp. 292 (D.D.C. 1953); United States v. Friedman, 166 F. Supp. 786 (D.N.J. 1958).

256. United States v. Pete, 111 F. Supp. 292 (D.D.C. 1953).

257. United States v. Friedman, 166 F. Supp. 786 (D.N.J. 1958).

258. Certainly in cases in which the stolen or embezzled property is the essence of the charge, the *Jones* rule would apply to permit the accused standing to move to suppress the evidence if illegally obtained. In other cases, it would seem that the spirit of the *Jones* rule, which decries the application of the law of private property to fourth amendment considerations, would require the elimination of the different results in dealing with stolen property and contraband.

259. Davis v. United States, 328 U.S. 582 (1946); Wilson v. United States, 221 U.S. 361 (1910).

260. Harris v. United States, 331 U.S. 145, 154 (1947); Wilson v. United States, 221 U.S. 361, 380 (1910).

261. Davis v. United States, 328 U.S. 582 (1946).

forged government "draft" cards,[262] or even record books of a corporation licensed to do business by the state[263] has been held to have no standing to object to what might otherwise be an illegal search or seizure. The distinction between *public* and *private* papers, originally made in *Wilson v. United States*[264] in a case involving a subpoena of corporate books, was extended to the warrantless search[265] apparently on the basis that when government officers demand such public documents, "the demand is one of right,"[266] since the property belongs to the government and not the accused.[267]

As our lives become more and more subject to governmental regulation, as our business becomes more complex and record keeping more intricate and widespread, the greater will be the opportunity for government to violate with impunity the privacy of its citizens through the "public documents" exception. Why should not this area be treated as contraband, where the possessor has even less legitimate property interest? Why should the possessor of public documents illegally seized not have an opportunity to have them suppressed but not returned to him, as in the case of contraband?

The conduct of the accused on the witness stand may also have bearing on whether or not he has standing to object to the introduction of illegally seized evidence. It has been held that one who voluntarily testifies to, and admits ownership of, the illegally seized evidence can no longer object to its introduction.[268]

WHAT IS THE SCOPE AND APPLICATION OF THE EXCLUSIONARY RULE?

Having examined illegal search and seizure under the exclusionary rule and the persons who may assert it, it is important to consider some of the ramifications of the rule and its use in court proceedings.

It may be stated generally that where illegally obtained evidence may not be *directly* introduced in evidence under the exclusionary rule, it may not be used *indirectly* against the accused either.[269] This principle was

262. Harris v. United States, 331 U.S. 145, 154 (1947).

263. Wilson v. United States, 221 U.S. 361 (1910).

264. 221 U.S. 361, 380 (1910).

265. Davis v. United States, 328 U.S. 582 (1946).

266. *Id.* at 593.

267. The Court did "not suggest that officers seeking to reclaim government property may proceed lawlessly and subject to no restraints," but it did not indicate under what circumstances it might find a search for government documents to be lawless. *Id.* at 591.

268. Rao v. Texas, 160 Tex. Crim. 416, 271 S.W.2d 426 (1954); Burks v. State, 194 Tenn. 675, 254 S.W.2d 970 (1953); State v. Smith, 357 Mo. 467, 209 S.W.2d 138 (1948).

269. Goldstein v. United States, 316 U.S. 114 (1942); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

clearly established in the landmark decision of *Silverthorne Lumber Co. v. United States.*[270] Defendants were arrested and taken into custody. While they were detained, government agents, without a search warrant, went to defendants' business office and confiscated all the books, papers, and documents there. Upon defendants' motion to suppress and for return of the papers, the trial court found that they had been unconstitutionally seized. Whereupon the government agents returned the papers to the defendants, but only after they had made copies of all the material documents. A new indictment was framed based upon the knowledge thus obtained and subpoenae were served upon the defendants specifying with great detail the documents sought. (All of this detailed information was obtained in the illegal search.) Defendants were convicted of contempt for failure to respond to the subpoenae. The Supreme Court reversed the conviction. Mr. Justice Holmes, speaking for the Court, macerated the government's position[271] and laid down the proposition which has been followed since:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*[272] (Emphasis added.)

But, softening the rule somewhat, the Court continued:

> Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .[273]

Thus evidence is inadmissible under the exclusionary rule not only when obtained as the *yield* of an illegal search, but also if it results from *information derived* from an illegal search.[274] Evidence resulting from leads obtained through illegal wiretapping will be excluded as well.[275] And where evidence is excluded because it was illegally obtained, neither

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270. 251 U.S. 385 (1920).

271. "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. . . . In our opinion such is not the law." 251 U.S. at 391-92.

272. *Ibid.*

273. *Id.* at 392.

274. Woo Lai Chun v. United States, 274 F.2d 708 (9th Cir. 1960); United States v. Krulewitch, 167 F.2d 943 (2d Cir.), *rev'd on other grounds,* 336 U.S. 440 (1948); People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1942); Simmons v. State, 277 P.2d 196 (Okla. 1954).

275. Nardone v. United States, 308 U.S. 338 (1939).

the oral testimony of the officers[276] nor photographs of the excluded evidence[277] will be admissible.

It has been held that even though evidence is excluded when offered *affirmatively,* because it was illegally obtained, if the accused testifies affirmatively, broadly and beyond the bare denial of the elements of the charge against him as to such evidence on direct examination, the evidence may be introduced by the prosecution in rebuttal.[278] But if the accused does not testify as to such evidence on direct examination, the prosecution may not introduce such evidence to impeach him, even though it may have attempted to lay a foundation on cross-examination of the accused.[279] The rationale for this distinction apparently is that the accused has waived his right to assert the protections of the fourth amendment in the former case by voluntarily testifying in reliance upon the inadmissibility of the illegally obtained evidence. He cannot "turn the illegal method by which evidence was obtained to his own advantage and provide himself with a shield against contradiction of his untruths."[280] But it has been indicated in dictum that if the denials of the accused on direct examination are not so broad, but are limited to a bare denial of the elements of the charge against him, the illegally obtained evidence may not be used to impeach him.[281]

CONCLUSION

The law of search and seizure and the historical development of the exclusionary rule have been considered in some detail in this survey of the field in the light of the expanded use of the exclusionary rule required by the holding in *Mapp v. Ohio.*[282] This was done primarily in an attempt to collate the experience of the federal and other jurisdictions which have followed the exclusionary rule prior to *Mapp* as an aid to practitioners in the criminal law in dealing with the exclusionary rule for the first time.

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276. McGinnis v. United States, 227 F.2d 598 (1st Cir. 1955); Houston v. State, 113 So.2d 582 (Fla. App. 1959); Todd v. State, 233 Ind. 594, 122 N.E.2d 343 (1954); Smith v. State, 182 Tenn. 158, 184 S.W.2d 390 (1945).

277. Joyce v. State, 227 Miss. 854, 87 So. 2d 92 (1956).

278. Walder v. United States, 347 U.S. 62 (1954).

279. Agnello v. United States, 269 U.S. 20 (1925).

280. Walder v. United States, 347 U.S. 62, 65 (1954).

281. "Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it and therefore not available for its case in chief. Beyond that, however, there is hardly a justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U.S. at 65.

282. 367 U.S. 643, 655 (1961): "We hold that all evidence obtained by searches and seizures in violation of the Constitution, is, by that same authority, inadmissible in a state court."

Furthermore, the experience in the federal and state jurisdictions which have operated under the exclusionary rule should demonstrate clearly to law enforcement agencies and to all who are disturbed by the extension of the exclusionary rule that their alarm is needless. As Mr. Justice Stewart has said in *Elkins v. United States*:[283]

> The federal courts themselves have operated under the exclusionary rule . . . for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.

It is particularly heartening to note the reaction of the California Attorney General to the effects of the exclusionary rule upon law enforcement there several years after California adopted the rule in *People v. Cahan*:[284]

> The over-all effects of the *Cahan* decision . . . have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice.[285]

This attitude is in accord with the general position taken by no less an authority than J. Edgar Hoover,[286] as to the necessity of coordinating police action and constitutional rights.[287]

The cases have hammered out the necessary exceptions to the constitutional requirement of a search warrant in order to provide police officers with realistic remedies in times of emergency and clear necessity. At times we think the Court has gone too far in limiting the right of privacy, for the benefit of police procedure.[288]

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283. 364 U.S. 206, 218 (1960).

284. 44 Cal. 2d 434, 282 P.2d 905 (1955).

285. Excerpt from letter of Governor Edmund G. Brown, then Attorney General of California, to the Stanford Law Review, quoted in Note, 9 STAN. L. REV. 515, 538 (1957). *Cf.* Barrett, *Exclusion of Evidence Obtained by Illegal Searches — A Comment on People v. Cahan,* 43 CAL. L. REV. 565, 586-88 (1955).

286. Director of Federal Bureau of Investigation.

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

"Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement provide for fighting crime with intelligence rather than force. . . ." F.B.I. Law Enforcement Bulletin, Sept. 1952, pp. 1-2.

288. Where the shoe has pinched, we have cried out throughout this article. And we are not alone. See Stewart's opinion in Elkins v. United States, 364 U.S. 206, 222 (1960): "[T]here are those who think that some of the Court's decisions have tipped the balance too heavily against the protection of that individual privacy which it was the purpose of the Fourth Amendment to guarantee."

But there is a more positive and compelling reason, apart from the negative argument that law enforcement will not disintegrate under the *Mapp* rule, to urge the strengthening of the exclusionary rule even as its use is geographically expanded. The requirements of freedom and the right of privacy should weigh heavily in the balance where close fact situations are involved. As the above decisions demonstrate, the fourth amendment protections are "still a sizeable hunk of liberty"[289] which we must exert every effort to preserve.

Mapp v. Ohio "gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and to the courts that judicial integrity so necessary in the true administration of justice."[290] But the decision in *Mapp v. Ohio* is the beginning, not the end, of the struggle to protect the constitutional right of each citizen to be let alone.

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289. In United States v. On Lee, 193 F.2d 306 (2d Cir. 1951), Judge Frank said in his dissent: "A man can still control a small part of his environment, his house; he can retreat hence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. *That is still a sizeable hunk of liberty — worth protecting from encroachment.* A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." (Emphasis added). 193 F.2d at 315-16.

290. Mapp v. Ohio, 367 U.S. 643, 660 (1961).