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Wong Sun v. United States, A Study in Faith and Hope

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Leading Articles

WONG SUN v. UNITED STATES:
A STUDY IN FAITH AND HOPE

Dale W. Broeder*

I. INTRODUCTION

As a pedagogical device for a course in criminal law and procedure, few opinions of the United States Supreme Court in recent years do the trick as well as the majority opinion of Mr. Justice Brennan in Wong Sun v. United States.\footnote{83 Sup. Ct. 407 (1963).} Representing as it does the Court's first significant excursion into the search and seizure field since the historic ruling in Mapp v. Ohio,\footnote{2367 U.S. 643 (1961).} Wong Sun is bound to be of importance. But Wong Sun also deals directly with other important matters, the admissibility and relevance of "flight evidence" to show consciousness of guilt, for example, corpus delicti proof problems in "tangible" as contrasted with "intangible" crimes and substantive law and evidentiary problems in the partner-in-crime area.

But this is only the beginning. Aside from the issues Wong Sun actually decides, Mr. Justice Brennan's approach suggests that the so-called "administrative arrest and search cases" may now be dead. Furthermore, his opinion is chock full of carefully considered dicta which, among other things, can fairly be read as saying that the

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McNabb-Mallory rule, heretofore rested on the supervisory power of the Supreme Court over federal criminal prosecutions and thus subject to change by Congress, now has a federal constitutional basis and is applicable to the states through the due process clause. So, too, Rules Three and Four of the Federal Rules of Criminal Procedure and 18-3109 and its judicial extension in Miller v. United States are now a part of due process. Rabinowitz may be gone and Trupiano restored and even extended. Indeed, Wong Sun hopefully portends developments of even greater significance—not so much on account of what Wong Sun itself says—though this is so in part—but because Mr. Justice Goldberg joined the Wong Sun majority and seems now firmly committed to the civil liberties' position of the Chief Justice and Justices Brennan, Black and Douglas. This, if true, means that a state or federal criminal defendant, certainly in any serious case, now has a due process right to counsel immediately following arrest and that the votes appear there to overrule Olmstead v. United States, Goldman v. United States and perhaps even On Lee v. United States, thus making non-trespass wire-tapping and similar "eavesdropping" techniques unconstitutional on both the state and federal level. Perhaps, too, though this is somewhat more doubtful, the newly constituted Court is prepared to overrule Adamson v. California and similar cases, thus making the privilege against self-incrimination applicable to the states. Conceivably, too, Mr. Justice Goldberg would be willing, as the other Justices comprising the Wong Sun majority long have, to jettison the Court's barbarous dual sovereignty doctrines currently applicable in the privilege against self-incrimination, double jeop-

3 See text beginning at note 283 infra.
4 357 U.S. 301 (1958). See text beginning with note 80 infra.
7 277 U.S. 438 (1928).
8 316 U.S. 129 (1942).
9 343 U.S. 747 (1952).
11 See Section X infra.
ardy and res judicata fields. While extended treatment of such matters is inappropriate here, it is impossible to bring them up even in a preliminary way without observing that they make a fetish out of federalism and a mockery of the most rudimentary notions of fair play implicit in the concept of due process of law.

On the other hand, let it also be made clear that Wong Sun may at the same time portend almost nothing, indeed, that even the points Wong Sun actually decides may have relevance only for federal criminal prosecutions. Wong Sun, after all, is a federal criminal prosecution and it could scarcely be accident that Mapp v. Ohio is not once even cited, let alone discussed by the Court.

Accordingly, Wong Sun can either mean a great deal in relation to the states or almost nothing. Paradoxically, however, Mr. Justice Brennan's opinion is, internally speaking, an analytical masterpiece. The organization of the opinion could not possibly be improved; all of the problems presented by the case are thoroughly perceived and all but two or three comparatively minor points involved are disposed of with dispatch, much in the manner of Mr. Justice Holmes. Largely for this reason—but for others, too, as will presently be made clear—the burden of the undertaking here is that the dicta of Wong Sun are to be taken in deadly earnest and that the case, at least for the most part, applies to the states and portends, at a minimum, all of the constitutional developments referred to above.

One further point, also part of the burden here gladly assumed. It may safely be predicted that Wong Sun will, in a comparatively short period, join that select group of Supreme Court opinions famous for their gratuitous footnotes. Wong Sun contains several, one of which (that which puts McNabb-Mallory on a constitutional footing) potentially ranks in importance with the famous Carolene Products footnote of Mr. Justice Stone, that various constitutional rights occupy a "preferred" constitutional position.

12 Ibid.
14 In note 4 to his opinion in United States v. Carolene Products Co., 304 U.S. 144 (1938), Mr. Justice Stone said: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." While Mr. Justice Stone never succeeded in getting the entire Bill of Rights into a "preferred constitutional position," his suggestion ultimately prevailed as regards the First Amendment. See, e.g., Smith v. California, 361 U.S. 147 (1959), with which compare Lambert v. California, 355 U.S. 225, modified and rehearing denied, 355 U.S. 937 (1957).
The foregoing, of course, remains to be seen. Without more, however, *Wong Sun* joins another, and, to a law teacher, an even more select and revered set of Supreme Court opinions, those characterized by heavy reliance upon the work of "competent" legal scholars. The classic example, of course, is Mr. Justice Brandeis' opinion for the Court in *Erie Railroad Co. v. Tompkins*¹⁵ which, it will be recalled, expressly professes heavily to rest on Dean Warren's Judiciary Act research¹⁶ in order (for good or ill)¹⁷ to overturn *Swift v. Tyson*.¹⁸ Mr. Justice Brennan's *Wong Sun* opinion outdoes even *Erie* in its deference to scholars. Thus a recent article by Professor Kamisar of Minnesota¹⁹ is preferred even over an opinion of then Judge, later, of course, Mr. Chief Justice Vinson²⁰ as the primary authority for the Court's ruling that an illegal arrest compels the exclusion of voluntary contemporaneous incriminating statements, and at least one and probably several pages of Professor Maguire's book, *Evidence of Guilt*,²¹ seem to have been incorporated by reference into the United States Constitution.

Interestingly, too, Mr. Justice Stone's other footnote 4 suggestion, that any given Bill of Rights' guarantee read into the due process clause has the same meaning in relation to the states as to the federal government, was, after a hassle of many years, finally accepted by the Court just recently in *Gideon v. Wainwright*, 83 Sup. Ct. 792 (1963). See text at notes 279-81 infra.

Also in the famous footnote class is footnote 9 of Mr. Justice Clark's opinion in *Mapp v. Ohio*, 367 U.S. 643 (1961). An ambiguously worded message dealing with the questions of Mapp's retroactive effect, the courts and commentators have virtually gone mad trying to figure out what it means. See, e.g., Note, 42 NEB. L. Rev. 697 (1963) and authorities therein cited.

Though not in the constitutional law field, one cannot talk about famous footnotes without at least mentioning footnote 59 to Mr. Justice Douglas' opinion for the Court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Anti-trust professors, I am given to understand, still spend hours with it.

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¹⁵ 304 U.S. 64 (1938).
¹⁷ Prof. Crosskey, of course, mounts a vicious albeit scholarly attack not only on *Erie* but on the "competency" of Dean Warren's research. II CROSSKEY, *POLITICS AND THE CONSTITUTION* 865 (1953).
²⁰ Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940).
Similarly, citation to certain pages of an article by Professors Hogan and Snee on the importance of *McNabb-Mallory* was the basis chosen by Mr. Justice Brennan for telling us that *McNabb-Mallory* has a constitutional foundation.

Nor were the nation's law students entirely left out. The law review work of a University of Pennsylvania man seems to have been influential in the Court's ruling on the kind of proof necessary to establish the *corpus delicti* in the case of an intangible crime. And, it may be said, deservedly so.

But enough by way of introduction. What are the facts of *Wong Sun*, what does the case actually decide and how far can its logic and spirit legitimately be extended?

II. THE WONG SUN FACTS

Petitioners Wong Sun and James Wah Toy were tried without a jury in the District Court for the Northern District of California on a two-count indictment charging federal narcotics law violations. They were acquitted on the first count, charging conspiracy, but convicted on the second which charged the substantive offense of "fraudulent and knowing transportation and concealment of illegally imported heroin." The Court of Appeals for the Ninth Circuit affirmed, Judge Hamley dissenting.

The facts, necessarily somewhat detailed, were as follows. One Horn Way, who had been under surveillance for six weeks, was arrested by a federal narcotics agent in San Francisco at 2:00 a.m., June 4, 1959, and narcotics were found on his person. Horn Way, who was not shown by the record to previously have been an former, reliable or otherwise, stated shortly after his arrest (just how long is unclear) that he had purchased heroin the night before from someone known to him only as "Blackie Toy," the proprietor of a laundry on Leavenworth Street.

Acting without warrant though apparently there was ample time to have obtained one, several federal agents went at 6:00 a.m. to a laundry on Leavenworth Street, the sign above the door of which said "Oye's Laundry." While the laundry was in fact operated by petitioner James Wah Toy, there was nothing in the record iden-

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23 Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. Pa. L. Rev. 638 (1955). This note is beyond question the finest piece of work ever to be turned out on *corpus delicti* problems.

24 *Wong Sun v. United States*, 288 F.2d. 366 (9th Cir. 1961).
tifying James Wah Toy and "Blackie Toy" as the same person. While the other federal officers remained out of sight, Agent Alton Wong\textsuperscript{25} rang the bell. Petitioner Toy opened the door though he never gave his name, nor did Agent Alton Wong or any other federal officer know until after petitioner's arrest that he was in fact James Wah Toy, the proprietor of the laundry. Nor, so far as the opinions disclose, had Hom Way or anyone else given any of the agents even a general description of "Blackie Toy." Agent Alton Wong told petitioner he was calling for laundry, Toy replying that he did not open until 8:00 a.m. Petitioner started to shut the door whereupon Agent Alton Wong displayed his badge and announced, "I'm a federal narcotics agent." Toy promptly slammed the door and ran down the hallway into his bedroom. Breaking down the door, the agents followed and placed Toy under arrest, searched him and the premises, but found no narcotics.

In response to questioning in the bedroom, Toy denied having sold narcotics but admitted knowing one "Johnny" who did. Toy did not know Johnny's last name, but described the location, type and color of the house in which he lived, even describing a bedroom of the house where Toy said Johnny kept heroin and where he and Johnny had smoked some the night before. The agents went immediately to the house in question and arrested Johnny Yee. After some discussion at the scene, the nature of which none of the opinions discloses, Yee took several tubes containing heroin from a bureau drawer and surrendered them to the agents.

Within the hour, Yee and Toy were taken to the Office of the Bureau of Narcotics where Yee stated (to which federal agent or agents is unclear) that the heroin in question had been delivered to him four days before by petitioner Toy and another person known to him only as "Sea Dog." Toy was then questioned concerning "Sea Dog's" identity and stated that "Sea Dog" was petitioner Wong Sun. Toy also told the officers where Wong Sun lived, accompanied them (including Agent Alton Wong) to Wong Sun's home, and specifically pointed it out. So far as the various opinions disclose, the officers would never have located Wong Sun but for Toy. Wong Sun was arrested without warrant (though, again, as in the case of Toy, there appears to have been ample opportunity to have obtained one) and a warrantless search conducted but no narcotics were found. Unlike Toy, Wong Sun did not incriminate himself in any way at the time of his arrest.

\textsuperscript{25} The reason for the italics is that there are two Agents Wong involved in the case, Alton and William. When William first comes into the picture his name, too, will be italicized.
Petitioners and Johnny Yee were promptly and properly arraigned before a United States Commissioner and soon released on their own recognizances. Several days later the three men voluntarily appeared at the Office of the Narcotics Bureau where Agent William Wong advised each of the three of his right to withhold information which might be used against him and stated to each that he was entitled to the advice of counsel. However, no attorney was present during the questioning of any of the men. And, so far as appears, none of the men had at this time consulted counsel concerning his situation.  

Agent William Wong interrogated each man separately and each confessed both his own guilt and implicated the other two. However, neither of the petitioners would sign his statement.

Three additional circumstances also must be noted: (1) Hom Way did not testify at petitioners' trial; (2) petitioners never took the stand in their own defense and offered no exculpatory evidence; and (3) Yee's statement to Agent William Wong at the Office of the Bureau of Narcotics, while extremely incriminating to both petitioners, was not offered in evidence. While Yee was called by the government as its chief witness, he was excused after claiming the privilege against self-incrimination and completely repudiating his above-mentioned statement. Nor was any trial testimony elicited from Yee in any way tending to incriminate petitioners. However, Yee's extra-judicial statement that he got his narcotics from "Sea Dog" (made to some unidentified government agent while he was under arrest) does appear to have been admitted, though on what theory and for what purpose does not clearly appear.

But to whatever use the government may have put the last mentioned item of evidence at the trial, it attempted to sustain petitioners' convictions both in the Court of Appeals and in the Supreme Court solely on the basis of four items of evidence admitted over petitioners' timely objections at the trial based on the ground that they were inadmissible as "fruits" of "illegal arrests or of attendant searches," viz., "(1) the statements made orally by petitioner Toy in his bedroom at the time of his arrest; (2) the heroin surrendered to the agents by Johnny Yee; (3) petitioner Toy's pretrial unsigned

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26 The term "arraignment" is used throughout the article in its non-technical sense. It refers to the kind of hearing provided for in Rule 5(b) of the Federal Rules of Criminal Procedure.

27 No McNabb-Mallory question was either preserved or argued. Nor did counsel seek to obtain a reversal on the ground that petitioners were not represented by counsel when they made their statements.

28 See text accompanying note 238 infra.
statement; and (4) petitioner Wong Sun's similar statement.\textsuperscript{29} Such items, of course, if admissible, would certainly have established petitioners' guilt for the statute under which they were indicted expressly makes proof of possession sufficient for conviction on a "fraudulent and knowing transportation and concealment charge" unless such possession be satisfactorily explained by the defense,\textsuperscript{30} and because, as previously noted,\textsuperscript{31} petitioners offered no exculpatory evidence.

The Court of Appeals, while finding the arrests of both petitioners to have violated the fourth amendment, nevertheless held that the challenged items in question were not the "fruits" of such illegal arrests and affirmed petitioners' convictions. In so doing, the Court of Appeals likewise rejected two additional contentions of petitioners, namely, that there was insufficient evidence to corroborate petitioners' unsigned admissions of possession and that their statements were inadmissible because unsigned.

The Supreme Court, after twice hearing argument, reversed both convictions in a five to four decision. As previously noted, Mr. Justice Brennan, joined by the Chief Justice and Justices Black, Douglas and Goldberg, wrote for the majority. Mr. Justice Douglas also wrote a short concurring opinion. Mr. Justice Clark, with whom Justices Harlan, Stewart and White joined, dissented.

\textsuperscript{30} Petitioners were indicted under 21 U.S.C. § 174 (1959) which provides as follows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years . . . ."

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to satisfaction of the jury."

The constitutionality of the presumption is apparently well settled. See, e.g., United States v. Kapsalis, 313 F.2d 875 (7th Cir. 1963) and authorities cited therein.

\textsuperscript{31} See text accompanying note 28 supra.
III. UNLAWFUL ARREST

A. GENERALLY

Now to the majority opinion itself. While Mr. Justice Brennan disposes of the Toy and Wong Sun cases separately, dispatching all of the Toy problems before reaching Wong Sun's case, organizational convenience here is perhaps best served by first dealing with the legality of arrest problems common to both petitioners. Actually, however, as the Court viewed it, the legality or illegality of Wong Sun's arrest became in the end almost if not entirely immaterial. "Fruits doctrine" problems raised by both cases will next be considered followed by a discussion of the corpus delicti and partner-in-crime difficulties raised by the two cases. Other points of significance in the main perhaps, the "faith and hope" part of Mr. Justice Brennan's opinion, are reserved until later.

The first question faced by the Court was the legality of Toy's arrest and Mr. Justice Brennan, like the Court of Appeals, found it to be illegal. In striking contrast to the simplicity of the approach taken on the question by the Circuit Court of Appeals, however, the question was for Mr. Justice Brennan fraught with extreme difficulty, difficulty in part perhaps—though by no means in the main—engendered by the vigorous dissent of Mr. Justice Clark. Thus while the Court of Appeals shrugged the matter off in only a few lines—really just one would have done the job—the nature and perspicacity of Mr. Justice Brennan's approach necessarily required several pages.

The Court of Appeals simply held Toy's arrest illegal because the only information the arresting officers had of Toy's criminality was supplied by Hom Way and there was no evidence that Hom Way was a reliable informant, i.e., that his tips had proved accurate in the past. Indeed, it could very plausibly be contended that this approach and result was directly required by certain language in Draper v. United States, where the Court, in recently sustaining the warrantless arrest of a narcotics peddler on the detailed hearsay of an informer, relied heavily if not decisively on the fact that the informer in question was known by the arresting officers to be reliable. But Draper's negative implication was for Mr. Justice Brennan both too simple and too misleading an out.


33 "The information given to narcotic agent Marsh, [the arresting officer], by 'special employee' Hereford [the informer] may have been hearsay to Marsh, but coming from one employed for that purpose and whose
Before turning to the exact nature of his approach, let it be said at the outset that for him—and, indeed, for the minority as well—the principal if not the only question was whether the officers in arresting Toy without warrant had violated the fourth amendment. While the Federal Narcotics Act\textsuperscript{34} does allow arrests without warrant by federal agents for narcotics violations on "reasonable grounds," thus making it possible for the Court simply to have disposed of the case as a relatively inconsequential matter of statutory interpretation, none of the Justices chose to do so. On the legality of arrest point, if on no other, the Justices were without question expounding their views on the meaning of the fourth amendment.

To be sure, the majority opinion does sometimes mention the arrest provisions of the Narcotics Act, but for the most part only in passing and then chiefly to emphasize that the phrase "reasonable grounds" in such Act has "substantially" the same meaning as the fourth amendment.\textsuperscript{35} Furthermore, the vast bulk of the Court's discussion of Toy's arrest is exclusively phrased in terms of fourth amendment requirements. This point is important not only, of course, in relation to the Congress and for federal criminal prosecutions, but, in view of Mapp, for the support it lends to the view that the Court was writing for the states as well.\textsuperscript{36}

B. Toy's Arrest—Probable Cause & the Fourth Amendment

(1) Generally

Now for the Brennan approach itself. The beginning, hardly unusual, was that "due weight" must be given the Court of Appeals finding that "there was neither reasonable grounds nor probable cause for Toy's arrest." This, however, plus the comment that the above-quoted finding was "amply justified . . . on . . . [the] record" ended the Court's concern with the opinion of the Court of Appeals.

Mr. Justice Brennan's point of departure was both immediate

\textsuperscript{34} 26 U.S.C. § 7607 (1959) gives federal narcotics agents the right to "make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

\textsuperscript{35} Wong Sun v. United States, 83 Sup. Ct. 407, 412 n.6 (1963).

\textsuperscript{36} See Section VI infra.
and abrupt and can best be understood by taking a careful look at the language of the fourth amendment in toto:

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.

Almost wholly ignoring the amendment's first clause (which on its face seems rather plainly to govern the legality of arrests without warrant and makes the test one of "reasonableness" only), Mr. Justice Brennan, in a manner clearly foreshadowed by his dissenting opinion in Abel v. United States,37 proceeds promptly to turn the amendment on its ear. The question is not, the Court held, whether the officers acted reasonably in arresting Toy without warrant, but whether they had probable cause to procure an arrest warrant from a judicial officer on the basis of the information they possessed when they felt "impelled to act" against Toy. Indeed, the Court even raised the question of whether the "probable cause" requirement for arrests without warrant might ultimately prove to be "more stringent" than for arrests with warrant. In any event, "[t]hey surely . . . [could not] be less . . . [for] [o]therwise a principal incentive now existing for the procurement of arrest warrants would be destroyed."38

This approach, it should be noted, whatever else it may do, certainly rejects the notion occasionally expressed in some high judicial quarters39 and by certain commentators40 that less than


It is difficult to understand the position of these gentlemen. Mallory v. United States, 354 U.S. 449, 454 (1957) would, even if Wong Sun did not, seem to put the matter to rest once and for all. And the Vita and Goldsmith decisions referred to in the previous note are utterly indefensible.

The difficulty, I suspect, is two-fold: (1) hostility to the notion that
“probable cause” justifies a warrantless arrest and that the “probable cause” requirement pertains only to the showing required in order constitutionally to justify the filing of a formal complaint. This, of course, because the filing of a formal complaint is a condition for obtaining a constitutionally valid arrest warrant and

arrests not on probable cause but for “investigation” are unconstitutional; and (2) failure to distinguish the previous situation from the quite different one of whether a policeman can lawfully stop a car or a pedestrian on the public street not on probable cause for the limited purpose of making a good faith on-the-spot inquiry or observation, either “on suspicion” that the person stopped may have or is about to commit serious crime, or that he may know someone else who has or is about to or, in the car case, that a felon may be inside the car. All of these things, I am confident, may constitutionally be done.

What may not constitutionally be done is to detain the pedestrian or driver stopped against his will after he has refused to cooperate, and, a fortiori, to take him to the police station not on probable cause. It follows, too, that a bare, obstinate refusal to cooperate, i.e., to answer questions of a policeman after one is lawfully stopped in the above situations cannot be considered on the probable cause issue. Nobody has to talk to a policeman; and, a fortiori, not one who is himself suspected of possible criminality. See generally Broeder, Silence and Perjury Before Police Officers, 40 Neb. L. Rev. 63 (1960) and authorities cited therein.

Of course, refusal to stop at all when asked to do so in the above situations is different. That should bear on probable cause and, so far as I am concerned, could of itself be made criminal. The only tough nut is the intermediate situation where, after the person initially stops in response to the officer’s directive and the officer has made known his purpose and authority, the person in question abruptly flees or attempts to flee without explanation. But while the issue is not free from doubt, (cf. Jones v. Commonwealth, 141 Va. 471, 126 S.E. 74 (1925)), I would think that flight in this situation ought also constitutionally to have weight in determining whether there is probable cause to arrest.


The commentators, by and large, do not generally seem to draw the above-suggested distinctions either, taking instead an “all or nothing at all” approach one way or the other. See generally Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 J. Crim.L., C.&P.S. 402 (1960); Remington, The Law Relating to “On the Street” Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, 51 J. Crim.L., C.&P.S. 388
because arrest warrants issue only on a showing of "probable cause."

Of far greater constitutional significance, however, is that the Court's approach virtually compels the overruling of cases such as Abel v. United States,41 Frank v. Maryland,42 and Ohio ex rel. Eaton v. Price.43 These decisions, drawing a distinction between so-called "administrative investigations" and investigations to turn up evidence of crime, rest when all is said and done on the proposition that "probable cause" and/or recourse to a judicial officer for the purpose of obtaining a valid arrest and/or search warrant is not required by the fourth amendment in "administrative type" situations.44 The point of Wong Sun, in contrast, is that the fourth

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44 Thus Frank sustained the conviction of a man for refusing to allow a health inspector to enter his home without a search warrant. Price was the same except that in Price the officer had no ground to believe that "unhealthy" conditions existed inside the house. No emergency
amendment validity of any arrest or search must be tested by the criteria which would of necessity be employed by a judicial officer before issuing a warrant. And, if that be so, and since administrative investigations seldom require immediate action, what excuse could there possibly be for not procuring one? To ask the question is to answer it. Mr. Justice Brennan's dissenting opinion in Abel and the dissenting opinions filed in Frank and Price now almost certainly command the support of a majority of the Court's membership. And deservedly so for the reasons so eloquently and persuasively stated therein. The classic statement on the point, of course, is that of Chief Judge Prettyman: "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." 45

(2) Searches incident to lawful arrest—Rule of Rabinowitz

Accordingly, in the light of what has just been said, it should come as no surprise that Mr. Justice Brennan, before answering the question he had initially posed for himself, proceeded to drop the first of his bomb-laden footnotes, in this case footnote eight:

Our discussion implies no view whether a search warrant should be obtained where a search is conducted incident to a valid arrest, cf. United States v. Rabinowitz, 339 U.S. 56, for nothing in this case turns on the presence or absence of a search warrant. . . . 47

This, it would appear, can only mean that at least five members of the Court are now ready, indeed, probably even anxious, thor-

45 Of course, I would agree, along with the dissenters in Frank, that more liberal warrant requirements might be necessary in health inspection cases. Frank v. Maryland, 359 U.S. 360, 383 (1959). I cannot, however, agree, as the University of Chicago Law Review Board appears to think, that "the rights granted health officers [in Frank] . . . were [not] substantially greater than those possessed by a private citizen." Comment, Search and Seizure in the Supreme Court; Shadows on the Fourth Amendment, 21 U. Chi. L. Rev. 664, 664, 677 (1961). The Editors learned their tort law from my own mentor, Professor Kalven, and he, I know, never taught them that the law of "self help" was anything like what happened in Frank, let alone Price.


oughly to re-examine Rabinowitz\textsuperscript{48} which, as footnote eight adumbrates, sanctioned, under the peculiar facts there present, a search without search warrant of defendant’s office incident to defendant’s arrest in the office pursuant to a valid arrest warrant. More broadly, of course, Rabinowitz stands for the proposition that a search warrant need not be obtained to validate a search of the immediate premises\textsuperscript{40} incident to a lawful arrest with or without warrant even though there is ample opportunity to obtain a search warrant.

Rabinowitz, it will be recalled, expressly overruled on this point the case of Trupiano \textit{v. United States}\textsuperscript{50} which necessitated the procuring of a search warrant under such circumstances apart, at least, from very limited emergency situations. \textit{Chapman v. United States},\textsuperscript{51} of course, decided in the 1961 Term, made substantial inroads on Rabinowitz and, indeed, can possibly even be read as

\begin{itemize}
\item \textsuperscript{48} United States \textit{v. Rabinowitz}, 339 U.S. 56 (1950).
\item \textsuperscript{40} While Rabinowitz involved only the “immediate premises,” other Supreme Court cases prior thereto, but before Trupiano, allowed warrantless searches “incident” to a lawful arrest inside an office or home of far more than the “immediate premises.” Thus Marron \textit{v. United States}, 275 U.S. 192 (1927), while involving a search warrant, sustained a warrantless search of an entire office to discover evidence of crime then in the process of being committed. Harris \textit{v. United States}, 331 U.S. 145 (1947) went even further and held that Marron was not limited to cases of arrest for crime then being committed. Harris upheld the validity of an exhaustive warrantless search of an arrestee’s entire apartment for the purpose of turning up evidence of crime totally unrelated to that for which the arrest was made.
\item Of course, the text discussion is not concerned, nor is Rabinowitz, with “the right … always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.” Weeks \textit{v. United States}, 232 U.S. 383, 392 (1914). It should be noted, however, that such right, like every “right,” has its exceptions. In other words, the right to search the person of one validly arrested does not necessarily flow from the fact of arrest. To allow the search of the person of one validly arrested for a minor traffic violation either at the place of arrest or at the police station would be monstrous and unconstitutional, and many cases have so held. See, e.g., People \textit{v. Zeigler}, 348 Mich. 355, 100 N.W.2d 456 (1960). See generally Note, 6 \textit{WAYNE L. REV.} 413 (1960).
\end{itemize}

\begin{itemize}
\item Again the dicta of Carroll \textit{v. United States}, 267 U.S. 132, 158 (1925) to the effect that the right of warrantless search incident to a lawful arrest extends beyond the person to the area under his immediate control likewise has exceptions and for similar reasons. Certainly the right to search an entire car ought not to flow merely from the fact of a lawful arrest of the driver for running a red light. See the authorities cited in 6 \textit{WAYNE L. REV. supra}.
\item 334 U.S. 699 (1948).
\item 365 U.S. 610 (1961).
\end{itemize}
having overruled it altogether, thus re-establishing Trupiano.\(^5\) Certainly this was the view of Mr. Justice Frankfurter who, concurring in Chapman,\(^5\) objected only that the Chapman majority did not expressly do so. Significantly, also, there is strong anti-Rabinowitz and pro-Trupiano dicta in the majority opinion for the Court in Jeffers v. United States\(^5\) and, indeed, the Court granted certiorari on the question as late as 1960 in a proceeding which was ultimately dismissed on motion of the petitioner.\(^5\)

Be this as it may, there seems little doubt on principle that Rabinowitz richly deserves only a quick and definitive burial. For the impact of the case has as a practical matter been largely to swallow up the search warrant requirement of the fourth amendment and substantially to destroy the exclusionary rule. As one capable observer recently opined: "It is safe to say that the number of searches which are upheld under . . . [Rabinowitz] far exceeds the number where a search warrant has been procured."\(^6\) This is so for several reasons, not the least of which has been the expansive interpretation placed upon Rabinowitz and like cases such as Har-

\(^5\) In Chapman the officers searched petitioner's unoccupied "house," really a modern example of the "ruined tenament" referred to by Lord Camden in Entick v. Carrigton, 19 How. St. Tr. 1029 (1765), at the request of his landlord who had every reason to believe that his house was being used as an illegal distillery. Georgia law seemed rather clear that the unlawful use of leased real property worked a forfeiture. Nevertheless, the Court refused to sustain the search, in large part on the ground that the arresting officers had time to procure a search warrant. The landlord's "consent" was held to be utterly immaterial. Ibid.

The law of "consent to search," of course, is presently very much up in the air. One of the most thoughtful and penetrating opinions on the subject was authored by Judge, now Chief Justice Paul W. White of the Nebraska Supreme Court in State v. Wallin, (Doc. 15, p. 173, Jan. Term of the Dist. Ct. of Lancaster County, Neb., 1962). For convenience of students at the University of Nebraska College of Law and for Nebraska attorneys, then Judge White, at the author's request, graciously made several copies of his opinion available to the Law Library of the College of Law. The opinion, it should be noted, is not only a stimulating study on the consent to search issue but on other aspects of the law of search and seizure as well.


\(^5\) Kaplan, supra note 2, at 490.
by the lower federal courts. Illustrative as any of the cases perhaps is Williams v. United States, sustaining a warrantless search of defendant's entire home as "incident" to his lawful warrantless arrest therein.

About the only limitation on Rabinowitz—and this one appears actually to have been applied in only two cases—is that the police cannot deliberately avoid arresting a person in various obvious and safe places simply in order to pounce upon him at a spot where they think a warrantless search "incident" to his arrest will be more likely to turn up incriminating evidence. This sort of case, understandably, is virtually impossible to make out, the upshot being "that police officers making a search incident to arrest do not have to establish, in advance, probable cause to believe that the objects to be seized are at the place of arrest." A probable cause showing to a magistrate concerning the location of the items to be seized, of course, is expressly required by the fourth amendment. It might also be noted that police officers acting without search warrants are under present law better off in another respect in many cases than where they have taken the trouble to procure them. For, because of the requirement that the "things to be seized" must be "particularly described," many courts have invalidated the seizure of items not mentioned in the warrant notwithstanding they would have upheld such seizure had it been made "incident"

58 273 F.2d 781 (9th Cir. 1959).
59 This is not the blame of the lower courts alone. The very nature of the Rabinowitz-Harris type approach leads to cases such as Williams. As Mr. Justice Jackson's dissenting opinion in Harris states: "[O]nce the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the Court—and that means to me no limit at all." Harris v. United States, 331 U.S. 145, 197 (1947).
60 This is a slight overstatement. The Court itself has set at least one limit. Kremen v. United States, 353 U.S. 346 (1957) refused to sustain a warrantless search of the contents of the defendant's entire cabin and the seizure of countless items (carried away some 200 miles) not in any way related to the offense for which defendant was arrested. In fact, Kremen is virtually no limit at all.
62 Kaplan, supra note 2, at 493.
to a valid arrest. To repeat: *Rabinowitz* substantially destroys the "particularity" requirements of the fourth amendment and it is, as Judge Learned Hand once observed, "a small consolation to know that one's papers are safe only so long as one is not at home."64

Indeed, it may even be, considering that the subject of *Wong Sun* is not searches but arrests that the newly constituted Court might be disposed not only to overrule *Rabinowitz* and restore *Trupiano* but to extend the latter (apart from emergency situations) to invalidate any arrest without warrant when opportunity existed to obtain one. This possibility, furthermore, is hardly far-fetched since *Trupiano* itself contains language65 approving such extension which, it might be noted, has sometimes66 though not often been seized upon by lower federal courts to invalidate warrantless arrests. Furthermore, Mr. Justice Douglas, while joining the majority opinion in *Wong Sun*, did so only because "nothing the Court holds is inconsistent with my belief that there having been time to get a

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64 United States v. Kirshenblatt, 16 F.2d 202, 203 (2d Cir. 1926). This is really the vital point. And it ought to make no difference under *Rabinowitz* whether the valid arrest in one's home or office was, as in *Rabinowitz*, made with an arrest warrant, or whether the valid arrest is made without one. Obviously and for good reason detesting *Rabinowitz*, one of our most capable federal judges, Judge Waterman, once sought in dissent to limit *Rabinowitz* to a situation in which the warrantless search was conducted "incident" to an arrest with warrant as distinguished from an arrest without warrant. Di Bella v. United States, 284 F.2d 897, 904-08 (2d Cir. 1960). But it was an uphill battle and there is no doubt that he knew it. *But see* Mr. Justice Brennan's dissenting opinion in *Abel* v. United States, 362 U.S. 217, 248-55 (1960).

65 And not only language. This is really basic to Mr. Justice Murphy's overall approach in *Trupiano*. While he held that an arrest without warrant on the circumstances existing in *Trupiano* was valid, this was only because the arrest was made for a crime being committed in the arresting officer's presence. That this is so seems clear from the following: "Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not *at the moment committing any crime*. Those dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law at a place where he is *lawfully present." *Trupiano* v. United States, 334 U.S. 699, 705 (1948). (Emphasis added.)

66 Carter v. United States, 314 F.2d 386 (5th Cir. 1963). Clay v. United States, 239 F.2d 196 (5th Cir. 1956). And see Hopper v. United States, 267 F.2d 904 (9th Cir. 1959).
warrant, probable cause alone could not have justified the arrest of petitioner Toy without a warrant."

That it is imperative to extend Trupiano to cover arrests as well as searches seems apparent from the fact that today about the only advantage of an arrest with warrant as compared with an arrest without one is that the officer armed with the warrant need not himself possess information constituting "probable cause." And that, in the light of cases such as Draper and Jones is not much of a difference. Nor, absent a directive from the Court, have the lower federal or the state courts taken steps to induce officers to procure arrest warrants. About the only significant experiment in this direction was undertaken by the Court of Appeals for the District of Columbia in Accarino v. United States, laying down the rule that, emergency situations apart, the police may never arrest without warrant in a dwelling house whether they enter forcibly or peacefully. This experiment, however, was short-lived and the District of Columbia rule now seems to be that the police may forcibly or otherwise enter a dwelling to arrest without warrant whenever they have "reason to believe" that the party lawfully to be arrested is inside. Such a rule, of course, makes a mockery of the fourth amendment which only a Trupiano rule as applied to arrest as well as searches can effectively counteract.

(3) The Reliability Rule & Draper v. United States

So much then for the Court’s diversionary footnote message on the continued viability of Rabinowitz. Lest the reader (understandably) may have forgotten, the basic issue left dangling was the precise nature of the Court’s answer to “[t]he threshold question in ... [Toy’s] case ... , [i.e.], whether the [arresting] officers could, on the information which impelled them to act, have procured a warrant for the arrest of Toy.” Although noting that “the narcotics agents had no basis in experience for confidence in the reliability of Hom Way’s information,” a circumstance, it will

69 Jones v. United States, 357 U.S. 493 (1958). Draper and Jones sustained arrests without and with warrant respectively on the basis of hearsay supplied by a “reliable informer.”
70 179 F.2d 456 (D.C. Cir. 1949).
71 Washington v. United States, 263 F.2d 742 (D.C. Cir. 1959). The entire development in the District is traced by Kaplan, supra note 2, at 498.
73 Ibid.
be recalled, which was of itself enough to invalidate Toy's arrest in the Court of Appeals, the Court paid no further attention to the issue of Hom Way's reliability, but instead spent almost two lengthy paragraphs discussing whether the information possessed by the officers sufficiently "narrowed the scope of their search to this particular Toy."\textsuperscript{74}

The importance of this, of course, as previously noted,\textsuperscript{75} is that it amounts to a rejection of certain passages in \textit{Draper} strongly implying that an arrest without warrant based solely on information supplied by an informer not known to be reliable—reliability in \textit{Draper} meaning that the informant's tips had accurately checked out in the past—is as a matter of law constitutionally invalid notwithstanding how detailed the information supplied. The Court does indeed discuss \textit{Draper} but only for the purpose of emphasizing that there the informant's tip was detailed and specific and led the arresting officers directly to the suspect.

In the case of Toy by contrast, "Hom Way's accusation merely invited the officers to roam the length of Leavenworth Street (some 30 blocks) in search of one 'Blackie Toy's' laundry . . . [until] they came upon petitioner Toy's laundry, which bore not his name over the door but the . . . label 'Oyes.'"\textsuperscript{76} Nor, the Court emphasized, had the agents any information leading them to equate "Blackie Toy" with petitioner James Wah Toy, "e.g., that they had the criminal record of a Toy, or that they had consulted some other kind of official record or list."\textsuperscript{77}

Confining himself then to the situation \emph{prior to Toy's flight down the hall}, Mr. Justice Brennan concluded that "no arrest warrant could have issued consistently with Rules 3 and 4 of the Federal Rules of Criminal Procedure." These rules, furthermore, via another footnote which is destined to become famous, this time footnote nine, were then expressly said to be part of the fourth

\textsuperscript{74}Id. at 414.

\textsuperscript{75}See text accompanying note 32 \textit{supra}.

\textsuperscript{76}Mr. Justice Brennan was really fudging at this point. While Leavenworth Street is, to be sure, "some 30 blocks" long, the length of Chinatown, as I recall, is some six blocks. Furthermore, Mr. Justice Brennan does not discuss how many laundries there were in this six block area. It is a safe bet that there are not many. In any event, the record did show that the agents arrived at the laundry within an hour after having heard Toy's bedroom statements. See the dissenting opinion of Mr. Justice Clark, \textit{Wong Sun v. United States}, 83 Sup. Ct. 407, 423 (1963).

amendment. Accordingly, in terms of the Court's threshold premise, Toy's arrest without warrant prior to his flight down the hall would a fortiori have violated the fourth amendment.

(4) Toy's flight—Miller v. United States

The Court next focused on the events at the laundry itself, the government having urged that "Toy's flight down the hall when the supposed customer at the door revealed that he was a narcotics agent adequately corroborated the suspicion generated by Hom Way's accusation and thereby validated Toy's warrantless arrest." Apparently conceding that this would have been so had the rule of Miller v. United States been complied with, the Court held that it had not been.

Miller, a pre-Mapp opinion likewise authored by Mr. Justice Brennan, holds that the lawfulness of an officer's entry into a

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78 On account of this and because, as will later be argued, Wong Sun applies to the states, it is well to quote these rules insofar as they would apply to the states:

Rule 3 provides as follows and is quoted in its entirety: "The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Rule 4, in relevant part, provides as follows:

"Rule 4. Warrant or Summons upon Complaint

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it . . . .

(b) Form.

(1) Warrant. The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner . . . .

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued . . . .

(4) Return. The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5." (Emphasis added.)


80 357 U.S. 301 (1958).
dwellings house\textsuperscript{81} to make an arrest without warrant "must be tested by criteria identical with those embodied in 18 U.S.C. § 3109."\textsuperscript{82} That statute, dealing only with the execution of search warrants, provides that an officer must state his authority and purpose and be refused admittance before he may break open the door.\textsuperscript{83} Miller's judicial gloss among other things renders the entry unlawful whenever the officer fails "insufficiently or unclearly" to identify either his office or his mission, notwithstanding that the occupant promptly flees from the door. Miller holds that flight under such circumstances "must be regarded as ambiguous conduct."

While agent Alton Wong finally did disclose his supposed authority (though not his purpose) before breaking the door, Mr. Justice Brennan concluded that §18-3109 still had not been obeyed. Not, however, because Agent Wong neglected to state his purpose, but because the Agent's initial ruse that he had come for laundry was "never adequately dispelled." Accordingly, the Court found that "Toy's flight from the door afforded no surer an inference of guilty knowledge than did the suspect's conduct in ... Miller..."\textsuperscript{84} Thus, notwithstanding the evidence of Toy's flight, his arrest was unlawful.

In the process of finally so holding, however, Mr. Justice Brennan saw fit to write another significant footnote. Footnote ten gratuitously observes that "[a]lthough the question presented here is only whether the petitioner's flight justified an inference of guilt sufficient to generate probable cause for his arrest, and not whether his flight would serve to corroborate proof of his guilt ... the two questions are inescapably related."\textsuperscript{85} The remainder of the footnote discusses and cites federal court opinions looking strongly with disapproval upon the admission of flight evidence to show consciousness of guilt, the purpose of which can only be to cast grave

\begin{footnotes}
\item[81] Miller involved an apartment. Wong Sun involved a combination laundromat and apartment.
\item[83] 18 U.S.C. §3109 (1951) provides as follows: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."
\item[85] Id. at 415. (Emphasis added.)
\end{footnotes}
doubt on the continued admissibility of such evidence in federal criminal prosecutions.\footnote{86}

Before making certain additional general comments on the Court's overall approach to the question of Toy's arrest, various points are of interest concerning the Court's injection of \textit{Miller} into the discussion. The first is whether \textit{Miller} has constitutional status. While Mr. Justice Brennan says nothing one way or another on the question in \textit{Wong Sun},\footnote{87} his \textit{Miller} opinion has strong constitutional overtones and, indeed, petitioner's counsel in \textit{Miller} argued that the "notice of purpose and authority" requirement was part of the fourth amendment's constitutional package. Thus \textit{Miller} observes that "from earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the \textit{precious interest of privacy} summed up in the ancient adage that a man's house is his castle."\footnote{88} Again, \textit{Miller} notes that the "authority and purpose" requirement came into the common law as early as \textit{Semayne's Case},\footnote{89} decided in 1603, and "still obtains."\footnote{90} Most significant of all, however, is \textit{Miller's} reference to the requirement as "deeply rooted in our heritage" and as declaring the reverence of our "law for the individual's right of privacy in his house." Finally, the Court added, "[e]very householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house."\footnote{91}

Even considering the consequences to law enforcement when the police fail to obey \textit{Miller}—invalidation of an otherwise perfectly lawful arrest and/or search\footnote{92} and, in the light of \textit{Wong Sun}, presumably the loss of the fruits thereof, it is submitted that \textit{Miller} is part of the fourth amendment and, under \textit{Mapp}, beyond the reach

\footnote{86}{The Court's point that "flight evidence" is unreliable raises the question of whether flight evidence would ever be relevant on the probable cause issue. See note 39 \textit{supra}.}

\footnote{87}{However, it may be significant that the Court's opinion often speaks, not just in terms of lack of probable cause to enter Toy's apartment but of the officers' "unlawful entry" therein.}

\footnote{88}{357 U.S. 301, 306-07 (1958). (Emphasis added.)}

\footnote{89}{5 Coke 91, 11 ERC 629, 77 Eng. Rep. 194 (1603).}

\footnote{90}{357 U.S. 301, 308 (1958). Though Mr. Justice Brennan does not make the point, it is perhaps worthy of note that \textit{Miller} is canonized in \textit{Restatement, Torts} §206 (1934).}

\footnote{91}{\textit{Miller v. United States}, 357 U.S. 301, 313 (1958).}

\footnote{92}{In addition to \textit{Miller}, see cases cited in Broeder, \textit{supra} note 2, at 206. And see \textit{United States v. Barrow}, 212 F. Supp. 837 (E.D. Pa. 1962) and cases there cited.}
of Congress and the states. This not only for the reasons assigned by Mr. Justice Brennan in *Miller* but because the rule is flexible and admits of readily defined exceptions for emergency situations, is easy for the police to understand and takes only a moment to comply with. The protection it affords the right of privacy, furthermore, is considerable. In the first place, most persons sought to be arrested in their homes do not live alone. We are not, after all, a nation of celibates. Marriage and the propagation and raising of children in the privacy of one's home is the most basic value of our civilization. For most, probably, the right freely to speak, to vote or to worship as they see fit are nothing in comparison. More directly, however, the point is that the average dwelling house arrest involves only one suspect, presumptively innocent anyway, and a houseful of actually innocent persons who are not suspected of anything. And, when the constable crashes in without warning armed with a valid warrant, let us say for Junior's arrest on a stealing a hub cap charge, such persons may well be in various stages of undress or conceivably even engaged in the most intimate of relations between husband and wife. To sustain Junior's arrest under these or similar circumstances would be unthinkable.

Furthermore, *Miller* covers searches as well as arrests, and search warrants often issue for dwellings where no occupant is suspected of illegal activity. Again, putting *Miller* on a constitutional footing will save the often innocent householder's property, his doors and windows particularly—hardly a minor point since if the loss is small it will cost too much to collect it and if large the officer would probably be unable to pay the judgment. Finally, as Mr. Justice Brennan himself points out, *Miller* is "also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder."94

While two capable authors make a technical historical argument that *Miller* has no rightful place in the fourth amendment,95 it is the very type of argument that the Court has repeatedly rejected,96 most recently, perhaps, in *Gideon v. Wainwright*.97 And in the end one of these authors concedes that his is very much of an

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93 See *e.g.*, the various civil liberties public opinion studies cited and discussed in Broeder & Barrett, *Impact of Religious Factors in Nebraska Adoptions*, 38 Neb. L. Rev. 641, 672–81 (1959).


96 See *e.g.*, Beaney, *Right to Counsel* 32 (1955).

uphill battle and that Miller goes right along with Mapp as an integral fourth amendment part. Unfortunately, however, state courts passing on the question have thus far uniformly held otherwise.

(5) Unlawful Collateral Purpose Rule

A more difficult question raised by the Court's discussion of Miller is whether the Court thereby impliedly intended to reject all or at least a portion of the so-called "unlawful collateral purpose" rule. This rule, which has widespread support in lower federal and state court decisions, is to the effect that an arrest or search or even an observation is unconstitutional if the officer acts for an unlawful reason notwithstanding that he also has a valid one. Collins v. United States, a recent decision of the Fifth Circuit Court of Appeals, affords as typical an illustration as any. There defendant's arrest and booking on a non-existent charge of "investigation of loitering" was held unconstitutional and compelled the exclusion of evidence seized incident thereto notwithstanding that the officers had probable cause to arrest defendant for two serious felonies. A better illustration, from the standpoint of Toy's case, is afforded by United States v. Evans, holding that police officers could not validly seize stolen property because they had gone to defendant's apartment not for the legitimate purpose of questioning him, but to search for stolen property.

The problem with regard to Toy is this. The Court squarely held that Agent Alton Wong could not constitutionally have arrested Toy at the time he came to the door. When at the door, therefore, he was there for the unlawful purpose of making an arrest. He was, in legal contemplation, a trespasser. How, then, consistently with the unlawful collateral purpose rule, could Agent Wong constitutionally arrest Toy merely because the latter slammed the door and ran when Agent Wong said that he was a narcotics officer? Yet the Court's discussion of Miller strongly implies that

98 Kaplan, supra note 2, at 503. This fact may assume special significance in view of the fact that Mr. Justice Brennan, at least, read the Kaplan article and cited it in Wong Sun, though in a different connection. Wong Sun v. United States, 83 Sup. Ct. 407, 414, n.9 (1963).


100 See Broeder, supra note 2, at 217.

101 289 F.2d 129 (5th Cir. 1960).

the arrest would have been valid provided that Miller had been complied with. The Court's concession of the validity of Toy's arrest under such circumstances seems especially evident from Mr. Justice Brennan's emphasis on the circumstance that Agent Wong "made no effort at . . . any time . . . to ascertain whether the man at the door was the 'Blackie Toy' named by Hom Way" so that Toy's case would fall into one of Miller's hypothesized exceptions, namely, a case where "‘without announcement of purpose, the facts known to the officers would justify them in being virtually certain’ that the person at the door knows their purpose." But, Agent Wong's purpose being unlawful, Toy's arrest, despite the identification of himself as "Blackie Toy," could not be sustained consistently with the unlawful collateral purpose rule as it has thus far generally been applied.

One way of saving "unlawful collateral purpose," of course, would be to conclude that Agent Wong's presence at the laundry door would have been lawful had he only come to ask petitioner whether he was "Blackie Toy" and, indeed, this may be only what Mr. Justice Brennan had in mind. This explanation, furthermore, gains some strength from the fact that the Court—after having under our first hypothesis rejected unlawful collateral purpose outright—later appeared to say (without identifying the rule as such) that it was in full force and effect. Indeed, the Court's language and citation of authorities can even be read as giving the rule constitutional status; and, if so, this would be another Wong Sun first. The language follows and the reader may judge for himself:

A contrary holding here [that Toy's flight from Agent Wong's unlawful presence could alone have justified Toy's arrest] would mean that a vague suspicion could be transformed into probable cause for arrest by reason of ambiguous conduct which officers themselves have provoked. Cf. Henry v. United States . . . [a Fourth Amendment case] That result would have the same essential vice as a proposition we have consistently rejected—that a search unlawful at its inception may be validated by what it turns up. (citing fourth amendment cases)

(6) Fungibility of Probable Cause—Court Restrictions—Factors

Certain general comments on the Court's approach to the legality of Toy's arrest likewise appear to be in order. The Court's obviously deliberate rejection of the Draper language concerning informer reliability has already been noted. But in the end Mr. Justice Brennan appears to do far more damage to the reliability requirement than this. Indeed, his discussion as a whole appears to

destroy it altogether, or, if not, to make it little more than an insig-
nificant makeweight in the probable cause balance.

Two points, previously noted, bear repeating again. The first
is the Court's remark that the agents had no information giving
them reason to equate "Blackie Toy" with petitioner Toy. Pre-
sumably if they had such information a valid arrest warrant could
have issued even prior to the time Agent Alton Wong reached Toy's
laundry. Again, if Hom Way had given the agents a definite physical
description of "Blackie Toy," the only possible reading of the Court's
Miller discussion is that Agent Wong could, after complying with
Miller, have broken the door and arrested petitioner so long as
petitioner's physical appearance approximated the one given by
Hom Way. And very possibly the same result would have followed
if Agent Wong had no physical description of "Blackie Toy" so long
as Toy identified himself as "Blackie Toy" or had on a bowling shirt
bearing the words "Blackie Toy" or even if the laundry sign above
the door said "Blackie Toy" rather than "Oye's."

This, it is submitted, destroys the reliability requirement al-
together since in every one of the hypothesized cases all the agents
have is a man reasonably or almost certainly identified as a felon
on the unsworn accusation of a person of unknown reliability found
to be illegally in possession of narcotics.

Such an approach might be justified in some cases, but not here.
Narcotics peddlers, generally addicts, do not readily disappear. They
must necessarily stay close to the source of supply. The agents
would almost certainly have soon caught Toy even if Hom Way had
refused to swear out a complaint, and it need hardly be mentioned
that the prosecution has an arsenal of legal weapons with which
to induce a confederate to cooperate.\footnote{See Section XI infra.} Furthermore, the Court's
rule as applied to cases such as fornication, adultery, non-violent
drunkenness in one's house, possession of obscene material, false
pretenses and a host of other non-violent crimes—whether felonies
or not—would be utterly intolerable. A man's home could be
crashed into by a constable after compliance with Miller merely
on the basis of a crank midnight phone call to the police station
from someone completely unknown to anyone in the department
accusing one of smoking in bed. A line, of course, would be drawn
somewhere. One always is. That is the judicial process. But the
Court's generalized approach in throwing out reliability in a case
like Toy's seems unnecessary, unwise and fraught with grave dif-
ficulties for the future.
This naturally leads to a second basic point. The Court deals with "probable cause" as though it was a fungible, that probable cause for dope peddling, gambling or fornication is the same as the probable cause necessary in order constitutionally to arrest for violent crimes such as murder, forcible rape or robbery and the Court fails even to mention, let alone to illustrate, a possible distinction between completed crimes, serious or not, and those in the process of commission or which are alleged to be so. This, as earlier pointed out, results at least in part from the Court's determination to turn the fourth amendment on its ear and to reject the "reasonableness" test of the fourth amendment's first clause, which seems to contemplate arrest without warrant situations, in favor of the "probable cause" test of the second which plainly deals with the showing required to obtain an arrest warrant from a judicial officer. And the latter test, with the exception just discussed that the reliability requirement is left out, is then made to do the job for all arrest without warrant situations regardless of the nature of the offense involved, and apparently whether or not it is completed or still in the process of being committed.

The reason for this, of course, and Mr. Justice Brennan is explicit on the point, is the Court's concern lest policemen will otherwise have little or no incentive to procure arrest warrants. Indeed, as previously stressed, the Court at one point suggests that the requirements for warrantless arrests may be "more stringent" than for cases in which warrants are actually obtained.

Why, then, it may be wondered, does Mr. Justice Brennan entirely (or almost entirely) reject the informer reliability requirement for arrests? The answer, it seems to me, is that he perceived, in the light of his generalized and fungible "probable cause in order to obtain a warrant approach," that his opinion might well be regarded as dealing a crippling blow to necessary and desirable police investigative techniques. To be specific: Unless he discarded the informer reliability requirement, the very nature of his fungible "probable cause" approach would or at least could be taken to mean that the police would be helpless to arrest one specifically accused of murder by an anonymous telephone call informant claiming to have just witnessed a murder previously unknown to the police, notwithstanding that the informant gave specific details of what he saw which, when checked out, showed that a murder had just been committed by someone at the spot and roughly in the manner described by the anonymous informant. This, of course, because the police would have no way of judging whether the in-

105 See text accompanying note 37 supra.
former was reliable. The caller might himself have committed the murder. Yet it seems obvious, in view of the homicidal character of the crime found to have been committed and the immediate and extremely serious dangers to society if the suspect is allowed to roam free, that the police be allowed immediately to arrest him.

Other cases could be put which would cause the police even greater difficulty unless the informer reliability requirement be dropped, an anonymous phone call, for example, to the effect that an adult male of a certain description has just dragged a young lady allegedly heard to have screamed "Please don't rape me" into a particularly described wooded lot. The police, on their way to the lot but a quarter mile from it, find an obviously exhausted man answering the informer's description. No molested girl is immediately apparent. This is a much weaker case for an arrest than the one just put for here the police have no independent evidence that any crime, let alone the crime of rape has been committed. In the homicide hypothetical, they did, as, indeed, they did in the Toy case itself—a point, incidentally, heavily stressed in the dissenting opinion of Mr. Justice Clark.\textsuperscript{106} Hom Way, it will be recalled, was found with narcotics on his person. This, together with Hom Way's admission that he had purchased them from a peddler, amply established that someone was guilty of illegal sale. The difficulty in Toy's case was with the agents' sparse information concerning the seller's identity. In our hypothetical rape case it is the other way around. The police almost certainly have the suspect, but no independent evidence of crime. Mr. Justice Brennan's rejection of the informer reliability requirement, however, would validate the rape suspect's arrest. And, in view of the seriousness of the crime involved, an immediate arrest would obviously seem to be required. These and similar cases,\textsuperscript{107} it is submitted, had to be and were taken


\textsuperscript{107} Wayne v. United States, 31 L. Week 2497 (D.C. Cir. Apr. 4, 1963), decided just as this article goes to press, comes very close to the hypotheticals referred to in the text. There the police received a phone call from a person claiming to be the friend of a girl who had just contacted such person and reported having been present at her sister's illegal abortion and that she "believed" but did not know her sister to be dead as a result of such abortion at a specific address. The police, acting without warrant, went immediately to the address, announced their authority and purpose and, no one answering, forcibly entered the dwelling. The defendant, his lawyer and a body were found. On defendant's trial for homicide, objection was made to the coroner's testimony on the ground that the entry without warrant was unconstitutional and that the coroner's testimony—based on his examination of the body—was the illegal fruit thereof. Unfortunately, the majority did not reach
into account by the Court once the decision was made to adopt a fungible "probable cause" approach. This, in turn, or so the Court felt, necessitated the rejection of the informer reliability concept, at least as an absolute.

The difficulty, of course, lies in the Court's basic approach. Informer reliability should not have been dropped in a narcotics case any more than for false pretense or obscenity cases. While the Court's desire to provide an incentive for police officers to obtain arrest warrants whenever practicable merits only applause, this could much better have been accomplished by an outright re-adoption of Trupiano and its extension to arrest cases.

Indeed, it may be that this is the approach Mr. Justice Brennan would himself have preferred. Certainly his Rabinowitz footnote lends credence to such a view, as does his dissenting opinion in Abel. The fact remains, however, that he wrote as though the reliable informer concept was to be dropped from the fourth amendment for all criminal cases, not just for some and this, unless the right of privacy is grievously to suffer, must eventually necessitate considerable opinion swallowing.

At the same time, let it immediately be said that the Court's approach is readily understandable in terms of the precedent with which it had to work. For not one of the Court's fourth amendment majority opinions deals with the probable cause concept as other than fungible. Indeed, of all the Supreme Court Justices ever to sit on an arrest or search case, and there have been many, only Mr. Justice Jackson has written opinions noting that significant fourth amendment differences should be drawn according to the

the issue of whether the entry was constitutional—which it certainly was if the text analysis be correct—but instead held that the "fruits doctrine" did not apply since the police learned of the body from an "independent source." It was on this point that Judge Edgerton dissented and, in my opinion, correctly so. See note 217 and accompanying text infra. Of course, the court should simply have held the entry constitutional on the basis suggested in the text. See also note 116 and accompanying text infra.

108 And perhaps also in terms of the Warrant Clause of the fourth amendment which does, in fact, seem to require "a uniform quantum of pre-search [or arrest] information for every [arrest], search and seizure." Comment, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, supra note 2, at 680. See Dumbra v. United States, 268 U.S. 435 (1925); Steele v. United States (No. 1), 267 U.S. 498 (1925); United States v. Clancy, 276 F.2d 617 (7th Cir. 1960).

109 In large part, of course, this is because of the generally "fungible nature" of the sort of cases with which federal courts typically deal, narcotics, gambling, prostitution, etc.
seriousness and violent or non-violent character of the offense involved. And then only twice, and the opinions in question involved searches rather than arrests.\footnote{110} The \textit{Restatement of Torts},\footnote{111} to be sure, lists "seriousness" as a factor to be considered in determining the lawfulness of a warrantless arrest, but, as has recently been observed, "such express recognition by the commentators or the courts is unusual."\footnote{112} There is, however, considerable sub rosa internal evidence that the courts, while ostensibly employing a fungible approach, often attach great

\footnote{110}{Thus in Brinegar v. United States, 338 U.S. 160, 183 (1949), Mr. Justice Jackson wrote as follows:  
"If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." (dissenting opinion)  
And, concurring in McDonald v. United States, 335 U.S. 451, 459-60 (1948), Mr. Justice Jackson had this to say:  
"It is to me a shocking proposition that private homes, even quarters in a tenament, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime. Almost without exception, the overzeal was in suppressing acts not \textit{malum in se} but only \textit{malum prohibitum}."}

\footnote{111}{"The nature of the crime committed or feared, the chance of the escape of the one suspected, the harm to others to be anticipated if he escapes and the harm to him if he is arrested, are important factors to be considered in determining whether the actor's suspicion is sufficiently reasonable to confer upon him the privilege to make the arrest." \textit{Restatement, Torts} §119, comment j (1934).}

\footnote{112}{LaFave, \textit{supra} note 40, at 348. As LaFave notes, one exception is in a comment in \textit{Problems of the Protection of Human Rights in Criminal Law and Procedure, U.N. Seminar on the Protection of Human Rights in Criminal Law and Procedure, Working Paper H (TE 326/1 (40-2) LA) (1958)}; and another in United States v. Kancso, 252 F.2d 220, 222 (2d Cir. 1958): "The word 'reasonable' is not to be construed in the abstract or in a vacuum unrelated to the field to which it applies. Standards which might be reasonable for the apprehension of bank robbers might not be reasonable for the arrest of narcotics peddlers."}
importance to the seriousness factor. And well they should; the more serious and violent the offense the greater the community's need of protection. And, conversely, the showing should be strong indeed to permit a warrantless arrest on a charge of petty theft or penny-ante poker. Probable cause can no more be made an absolute than freedom of speech or of the press or, for that matter, any other constitutional concept. To erect a legal absolute is in the long run often one of the best ways substantially to impair or even to destroy the value sought to be protected.

Stress has been laid on the seriousness and violence factors. Others deserve consideration, too, certainly all of those mentioned in the footnote quotation from the Restatement of Torts along, of course, with the reliable informant factor. Another circumstance often entitled to great weight is whether the offense is alleged by an informant still to be in the process of commission. An arrest to prevent crime, particularly serious and violent crime, should be tested by criteria less stringent than where the felony is alleged to be over and done with. And here, at least, the courts and commentators have worked out something of value. The reference of course, is to authority, most of it in the torts field, dealing with the circumstances under which a dwelling house may be entered in order to prevent crime.

And perhaps certain crimes, those where defense is difficult and where experience has shown accusation often to be motivated

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114 In homicide cases, the precedent is almost non-existent. It should not, however, be thought that the seriousness factor, even if taken account of, guts the probable cause requirement altogether, even in a homicide case. Thus the Restatement, which expressly takes account of such factor, gives the following as an illustration of a proper case for a warrantless arrest in a homicide case: "A sees B and C bending over a dead man D. B and C each accuse the other of murdering D. A is not sure that either B or C did the killing, but he has a reasonable suspicion that either B or C killed D. A is privileged to arrest either or both." Restatement, Torts §119, comment j, illustration 2 (1934).

115 See note 111 supra.

by spite and based on falsehoods and half-truths, need specialized arrest rules devised for them alone. In rape and statutory rape, for example, apart from emergency situations, a strong case can be made for requiring a sworn complaint from the victim herself and an almost total prohibition of warrantless arrests. The freshness of a given accusation\footnote{This factor was expressly taken account of in determining the probable cause issue in Payne v. United States, 294 F.2d 723, 725 n.1 (D.C. Cir.) cert. denied, 368 U.S. 883 (1961).} might sometimes be a vital factor in a great variety of offenses as well as the number of suspects.\footnote{See LaFave, supra note 40, at 348 and authorities there cited.} Certainly the constable ought not constitutionally be allowed to arrest fifty people on a murder charge simply because all of them had the motive, opportunity and means to have murdered a man and were together at the scene when the murder took place.

One cannot possibly catalogue all of the factors which in various cases will be relevant. This much, however, should be made crystal clear: Even under a probable cause to obtain a warrant test, the lawfulness of any given warrantless arrest should depend on the totality of circumstances, and it is a mistake ever to hold that the fourth amendment has no room for such obviously relevant factors as an informant's reliability and/or the seriousness or violent or non-violent nature of the offense for which the arrest is made.

One final point concerning the nature of the Court's "probable cause to obtain a warrant" approach. Whatever its limitations, the test appears by necessary implication to incorporate within itself the point that it is the same for all crimes. In other words, Mr. Justice Brennan appears to be saying that the common law and statutory arrest distinctions between felonies and misdemeanors and between misdemeanors of various kinds are, as such\footnote{As such}, irrelevant for fourth amendment purposes. And, on principle, it could not be otherwise. When the common law arrest rules were formulated, much anti-social behavior now elevated to felony status was then in the misdemeanor category or not criminal at all. Furthermore, to make the legality of an arrest for fourth amendment purposes turn on a state law crime classification makes the constitutional right of privacy mean more or less according to the nature of a given state's fortuitous classification, thus making for lack of uniformity among the states and affording them a convenient means for watering down the scope of the fourth amendment. To put it another way: Notwithstanding his failure to mention Mapp, Mr. Justice Brennan's over-all approach to the legality of arrest question...
lends considerable support to the view that he was writing for state as well as for federal criminal prosecutions.\textsuperscript{119}

Only a few words need be said concerning the Court's approach to the legality of the arrest of Wong Sun. Noting only that "no evidentiary consequences turn[ed] upon . . . [the] question," the Court found "no occasion to disagree with the finding of the Court of Appeals that . . . [Wong Sun's] arrest, also, was without probable cause or reasonable grounds."\textsuperscript{120} While the Court of Appeals invalidated Wong Sun's arrest solely because Toy was not shown to be a reliable informer, it is impossible to believe, in the light of the Court's rejection of the reliability factor in the case of Toy, that the Court meant without further explanation to take it all back in an uninformative remark upon which nothing in the case turned. Also perhaps significant is the majority's failure even to mention, let alone discuss the ground upon which the Court of Appeals invalidated Wong Sun's arrest.

IV. FRUITS DOCTRINE

What, then, followed from the circumstance that Toy and Wong Sun were found by the Court to have been unconstitutionally arrested? Certainly not immunity from prosecution;\textsuperscript{121} this possibility

\textsuperscript{119} See Section VI infra.

\textsuperscript{120} Wong Sun v. United States, 83 Sup. Ct. 407, 419 (1963).

\textsuperscript{121} While it is, to say the least, extremely improbable that the Court would ever impose such a drastic sanction, the more I reflect upon the idea, the less radical it seems. There are many instances in the law where absolute immunity or something closely approximating it is given where a defendant's constitutional rights have been violated. Those most obvious, of course, are in the speedy trial area. See, e.g., People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955); Note, The Right to a Speedy Criminal Trial, 57 COLUM. L. REV. 846 (1957); Note, Dismissal of the Indictment as a Remedy for Denial of the Right to Speedy Trial, 64 YALE L. J. 1208 (1955).

Absolute immunity is also, of course, the rule in any case where a mistrial has been declared on account of prosecutor misconduct (Gori v. United States, 367 U.S. 364 (1961) is a freakish exception and even Gori was a five to four decision), where the prosecutor has entered a \textit{nolle} after jeopardy has attached or where the trial judge has erroneously directed a verdict of not guilty. See, e.g., Fong Foo v. United States, 389 U.S. 141 (1962); People ex rel. Meyer v. Warden, 269 N.Y. 426, 199 N.E. 647 (1936); Groban v. State, 44 Ala. 9 (1870). Absolute immunity likewise follows in a compromise verdict case such as Green v. United States, 355 U.S. 184 (1957) and in many situations where the government has intentionally or even negligently or non-negligently destroyed or lost defense evidence. See, e.g., In re Newbern, 168 Cal. App. 2d 472, 335 P.2d 948 (2d Dist. 1959), \textit{aff'd on other grounds}, 53 Cal. 2d 786,
Immunity is also virtually assured where the government illegally and/or unconstitutionally overhears a conversation between defendant and his counsel concerning trial strategy. Cf. United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), cert. denied, 342 U.S. 920, 926 (1952). And, while the rule has often been criticized, "immunity bath" statutes are unconstitutional unless they give "absolute immunity against future prosecution for the offense to which the question relates." Counselman v. Hitchcock, 142 U.S. 547, 586 (1892). In the fifth amendment area, the "fruit of the poisonous tree" doctrine is held not to give sufficient protection. See generally McNaughton, The Privilege Against Self-Incrimination, 51 J. Crim. L., C. & P.S. 138, 153 (1961). The entrapment cases should perhaps also be mentioned. See, e.g., Sherman v. United States, 356 U.S. 369 (1958); Note, Entrapment, 73 Harv. L. Rev. 1335 (1960).

While on this matter of absolute immunity, I may just as well make a point which has long bothered me and upon the recognition of which much may someday depend. Currently, of course, the Court and all state courts, so far as I know, apply a waiver doctrine where a criminal defendant is successful in upsetting his conviction on appeal or by some sort of post-verdict motion in the trial court. Because of his appeal and/or motion, he is said to have "waived" his rights under the double jeopardy clause and a new trial is allowed. To me this is extraordinarily unfair to the defendant and is unsound constitutional policy as well.

For one thing it sets up a variance between the mistrial and appeal situations, makes trial judges reluctant to grant mistrials for prosecutor misconduct, encourages prosecutors to engage in unfair or marginally unfair trial tactics and encourages trial judges to make favorable prosecution rulings—all of this, of course, because, if there is a reversal on appeal, a new trial can almost always be had. The unfairness of this to the defendant is obvious. Even the expense of one trial exhausts the financial resources of many men. Why should the defendant have to pay for the expense of another and perhaps yet another trial because the trial judge or the prosecutor committed error? And, financial considerations apart, the psychological damage involved in just one trial is in a great many cases severe. How is it when there are two, three or four trials?

There is one further point, perhaps the most important of all. Trial court decorum is seriously undermined and the law and the legal profession suffer a tremendous loss of prestige in the eyes of society as a whole. All of these things could be avoided if the Court would only bar new trials after successful defense appeals. That, I think, was one of the intended purposes of the second clause of the seventh amendment: "[N]o fact tried by a jury shall be otherwise re-examined . . . than according to the rules of the common law." The rules of the English common law in 1791, as today, bar new trials after a conviction is upset. A successful defendant appellant in England, convicted murderer, rapist or what have you, goes scot free. And
was not even mentioned. Nor are Frisbie\textsuperscript{122} or Kerr\textsuperscript{123} anywhere to be found. The question was instead whether and to what extent petitioners’ various incriminating statements and the narcotics seized from Yee were thereby rendered inadmissible against petitioners under the “fruits doctrine” of \textit{Silverthorne Lumber Co. v. United States.}\textsuperscript{124}

A necessary and inevitable corollary to the rule first enunciated and applied in \textit{Weeks v. United States},\textsuperscript{125} that evidence seized during an unconstitutional search is inadmissible in a criminal prosecution of the victim, the essence of \textit{Silverthorne} is simply that the “exclusionary prohibition extends as well to the indirect as the direct products of such invasions.” \textit{Silverthorne} itself, of course, authored by Mr. Justice Holmes, holds that information obtained during an unconstitutional search cannot be used to subpoena the very documents unconstitutionally seized. Referring to the policy of what Mr. Justice Brennan called “the broad exclusionary rule” (which, at the outset of his “fruits doctrine” discussion, was said to be required “[i]n order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person”), the Court found such policy to be succinctly expressed in \textit{Silverthorne} itself: \textsuperscript{128}

“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 \textit{not be used at all}. 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, but the

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\textsuperscript{122} Frisbie v. Collins, 342 U.S. 519 (1952).

\textsuperscript{123} Kerr v. Illinois, 119 U.S. 438 (1886). Frisbie and Kerr, of course, hold that one unconstitutionally abducted from one state and taken to another may nevertheless validly be tried in the second state.

\textsuperscript{124} 251 U.S. 385 (1920).

\textsuperscript{125} 232 U.S. 383 (1914).

\textsuperscript{126} Wong Sun v. United States, 83 Sup. Ct. 407, 416 (1963). (Emphasis added.)
knowledge gained by the Government's own wrongs cannot be used by it in the way proposed.'

A. APPLICABILITY OF THE FRUITS DOCTRINE TO INTANGIBLE EVIDENCE

Traditionally, as the Court points out, the exclusionary rule has barred only the admission of physical, tangible materials obtained through an unlawful invasion. Noting that the Court's recent decision in Silverman v. United States extended fourth amendment protection to the unconstitutional overhearing of verbal statements as well as to "the more traditional seizure of 'papers and effects,' "precedent amply supported and indeed required Silverthorne's extension to cover any "verbal evidence which derives . . . immediately from an unlawful entry and [or] an authorized arrest." Such evidence, the Court held, "is not less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." Nor could the majority (or the dissenting Justices either, for that matter) discern "any logical distinction between physical and verbal evidence." Accordingly, Toy's incriminating conversation with the officers in his bedroom, the first of the various challenged "fruit" items to be considered, was held to have been erroneously admitted against Toy.

The Court's extension of Silverthorne to verbal statements rejected a virtual multitude of lower federal and state court decisions to the-effect that Silverthorne did not cover such evidence but was confined solely to tangible items. The basis for so confining the doctrine was said to be that tangible items were always seized against the victim's will whereas a victim's oral statements made during an unlawful search or seizure were voluntary. In other words, to use a typical arrest case as an illustration, the unlawfully arrested suspect could keep his mouth shut but could do nothing about the seizure of items on his person or in his immediate presence. And if he chose voluntarily to blab it was his fault, not that of the arresting officers.

129 Ibid. This is the point at which the Court paid recognition to Prof. Kamisar, citing in support of its conclusion his article, Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure, supra note 19. On this point Prof. Maguire's views were expressly rejected by the Court. (Maguire, Evidence of Guilt 187-90 (1959)); Wong Sun v. United States, 83 Sup. Ct. 407, 416 n.11 (1963). Professor Maguire was to have his day later. See text accompanying note 215 infra.
130 See Kamisar, supra note 19.
The result of the distinction, of course, was positively to encourage constables unlawfully to arrest and/or search in many cases where they otherwise would not have. For, in many cases, they had nothing to lose and everything to gain. It is simply a fact of life that many people under arrest (or who happen to be present when a successful but unlawful search of their premises is conducted) become frightened and talk their heads off in order to curry favor with the officers and perhaps to procure lenient treatment from the prosecutor and/or the court. And if the unlawful arrest/or search produces no such "voluntary" blabbing, the person whose rights are violated is simply released and the officers go on their way confident that they run absolutely no risk of criminal prosecution or of disciplinary action from their superiors and almost none of a successful trespass and/or false imprisonment action by the victim. Thus the fundamental right of privacy was substantially watered down for everyone—the innocent as well as the guilty—and the policy underlying the exclusionary rule, to protect such right and to bring disciplinary pressures upon constables guilty of violating it—was not only blunted but turned on end. No wonder that the majority extended Silverthorne to verbal statements and that, on this point, not a single Justice disagreed. In the process of so extending Silverthorne, the Court also at long last expressly wrote finis to a group of ludicrous (no other word fits) lower federal court decisions holding that, while tangible items unconstitutionally seized must themselves be excluded, the officers guilty of the seizing could nonetheless validly testify to and describe what they had seized.\textsuperscript{131}

In extending Silverthorne to verbal statements, however, the Court unfortunately did not see fit unequivocally to state that all oral statements made by an accused while unlawfully under arrest or during the course of an unlawful search of his person or premises must be excluded. This is apparent first of all from the nature of Mr. Justice Brennan's answer to the government's argument "that Toy's statements to the officers in his bedroom, although closely consequent upon the [unlawful] invasion . . . were nevertheless admissible because they resulted from 'an intervening independent act of a free will'."\textsuperscript{132} The response was as follows:\textsuperscript{133}

\textsuperscript{131}E.g., Williams v. United States, 263 F.2d 487 (D.C. Cir. 1959); see United States v. Evans, 194 F. Supp. 90 (D.D.C. 1961). The Court disposed of these monstrosities by expressly approving McGinnins v. United States, 227 F.2d 598 (1st Cir. 1958) which goes the other way.


\textsuperscript{133}Ibid. (Emphasis added.) The government also argued that Toy's declarations were admissible because they were exculpatory rather than
This contention . . . takes insufficient account of the circumstances. Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested. Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion.

The negative inference, of course, is that Toy's bedroom statements might have been admissible if what Mr. Justice Brennan referred to in a footnote as "such oppressive circumstances" had not been present.

Then, as though to emphasize this negative inference, the Justice immediately proceeded to quote from a distinguished work of Lord Devlin's to the effect, "[i]t is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be worse for you if you do not." In one respect, at least, this makes matters still worse since it implies that the Court might have sustained the admission of Toy's bedroom statements had the proof shown that Toy was advised by the officers of his right not to talk or if it were otherwise shown that Toy knew of his right to remain silent.

On the other hand, the Court's reference to Devlin seems likewise to create at least a rebuttable presumption that one unlawfully arrested or whose person or premises are unlawfully searched does not know of his right to keep still. But rebuttable presumption or no, the notion that constables should ever be able to save an otherwise inadmissible statement of the accused merely by telling him that he need not say anything is untenable for several reasons. In the first place, to admit the statement under such circumstances rewards the police for having unlawfully arrested and/or searched and substantially undercuts much of the policy upon which the Court's extension of Silverthorne to verbal statements rests. Again, whether or not the accused is advised of his rights or otherwise incriminating. The Court disposed of this very quickly: "There are two answers to this argument. First, the statements soon turned out to be incriminating, for they led directly to the evidence which implicated Toy. Second, when circumstances are shown such as those which induced these declarations, it is immaterial whether the declarations be termed 'exculpatory.'" Id. at 455.


135 There is nothing in Wong Sun on burden of proof problems either as regards arrest, search or derivative use. For a discussion of such problems, see Traynor, supra note 2, at 337.
knows them, he will still often be scared to death and may well talk because he is upset, and also to ingratiate himself with the officers and/or the prosecution in order to obtain favorable treatment.

Also, being upset and often ignorant and sometimes retarded as well, he will often not in fact understand a warning that he need not talk. Finally, to allow an exception to Silverthorne’s extension merely on the basis of police testimony that a warning was given will create inevitable conflicts in the evidence which will almost always be resolved against the accused. In part, of course, this is because the accused will sometimes have a criminal record of substantial proportions and, even if he does not, will always have reason to lie. More than this, however, trial judges, particularly state trial judges, are often ex-prosecutors and, even if not, tend by reason of their constant business and often close social associations with prosecuting attorneys unconsciously to identify with them and the testimony they proffer.

Relevant here also is the overwhelming evidence that police officers who are guilty of unconstitutional or other improper behavior often if not usually commit perjury when asked about it on the stand, or, indeed, anywhere else. Again, assuming, as will later be argued, that Silverthorne’s extension to verbal statements is part of the fourth amendment and under Mapp extends to the states, this will mean, unless the Court orders that state trial judges rather than juries must decide all unlawful arrest and search questions (and this outside the jury’s presence), that juries will use the statements even if they find them to be inadmissible on the ground that no warning was given and/or that the accused knew of his right to remain silent.

It is noteworthy here, too, that if the police testify that a warning was given when in fact it was not, the accused will, if the truth is to be shown, be forced to take the stand thus allowing the government to impeach him with his criminal record if one he has and perhaps also to cross-examine him on the merits. In many

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136 Doubtless this is what Mr. Justice Douglas had in mind when he wrote in Haley v. Ohio, 332 U.S. 596, 601 (1948) that “we cannot give any weight to recitals which merely formalize constitutional requirements.” Compare Fikes v. Alabama, 352 U.S. 191, 193 (1957).

137 I detest making points like this and will refrain from citation of authorities. The gore, or some of it, can be found in Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 MINN. L. REV. 1083, particularly at 1177 et seq. (1959).

138 See Section VI infra.
cases, therefore, the accused must necessarily forego even the opportunity of trying to convince the jury that he talked without warning.

That Mr. Justice Brennan was not merely careless in implying that not all statements made by an accused while unlawfully under arrest or during the course of an unlawful search of his person or premises go out under Silverthorne, furthermore, is to some extent supported by the Court's handling of Wong Sun's statement incriminating Toy. While the statement was ultimately held to be inadmissible against him, the Court did not exclude it on Silverthorne grounds. Indeed, so far as Toy was concerned, the "fruits doctrine" was not once mentioned by the Court in connection with Wong Sun's statement. Yet, as earlier stressed, Wong Sun would presumably never have been located but for Toy. Wong Sun was found only because Toy's inadmissible bedroom statements sent the officers to Yee (who, the government conceded, would not otherwise have been found either) and because Yee told certain unidentified officers at the Bureau of Narcotics that he got his narcotics from a person known to him only as "Sea Dog." The next step was that the unidentified agents interrogated Toy (who was presumably no longer handcuffed but still unconstitutionally under arrest) at the Bureau of Narcotics concerning "Sea Dog's" identity and Toy not only supplied it but, still under unlawful arrest, personally led the officers to Wong Sun's home where Wong Sun was promptly arrested.

Why, then, was Wong Sun's statement to Agent William Wong several days later not simply disposed of against Toy as a "fruit of the poisonous tree"? Very arguably it could have been, but the Court's handling of the statement impliedly suggests otherwise. If the suggested implication was in fact intended, this could be so for only two reasons. First, the Court regarded the connection between Toy's bedroom reference to Yee who first mentioned Wong Sun (though referring to him as "Sea Dog") and Wong Sun's ultimate statement incriminating Toy (made several days later) as "so attenuated as to dissipate the taint" of the bedroom statements made while Toy was not only unlawfully under arrest but, as the Court noted, held under "oppressive circumstances" as well. And, second, because Toy's statements to the unidentified federal agents identifying "Sea Dog" as Wong Sun and his action in personally directing the agents (including Agent Alton Wong) to Wong Sun occurred at a time when no "oppressive circumstance" other than that of unconstitutional arrest itself was present.

If this analysis be correct, an unconstitutional arrest or search alone will not vitiate a resultant voluntary oral incriminatory
statement. Additional "oppressive circumstances" must also be shown. It can only be hoped that this does not turn out ultimately to be so. If it does, the Court might just as well have never extended Silverthorne to oral statements in the first place. For the trier of fact will almost never find such additional "oppressive circumstances" to have been present.

Be this as it may, however, two developments in this connection are practically inevitable. The first is that the negative implication from the Court's handling of Wong Sun's statement incriminating Toy together with the Court's reference to "oppressive circumstances" in discussing Toy's bedroom statements will eagerly be seized upon by many lower federal and state courts as a means of limiting the Court's Silverthorne extension to oral statements as narrowly as possible. An exact parallel is to be found in the history of the exclusionary rule first enunciated in the McNabb opinion which likewise unfortunately contained "oppressive circumstances" language. The lower federal courts bled that language almost to the breaking point and, until Mallory, decided many years later, the "McNabb rule," at least in most circuits, had virtually no substance whatever. And, indeed, because of certain limiting language in Mallory, the litigation is still going on. It may also turn out that the various negative implications which can be drawn from Mr. Justice Brennan's quotation of Lord Devlin will similarly be grabbed at to limit Silverthorne's extension. Hopefully, however, the courts will find the considerations here-tofore advanced sufficiently persuasive to occasion the rejection of such implications.

The second practically inevitable development is this: Whatever the lower federal and state courts may ultimately do with the limiting language and implications of the Court's opinion, prosecutors and police will certainly act upon them until finally ordered to do otherwise. As Mr. Justice Jackson once sagely remarked in a related connection: "[The Court] must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." Accordingly, an attempt will here be made to show that the negative language and implications referred to, while illustrative

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139 See Hogan & Snee, supra note 22.
140 E.g., United States v. Vita, 294 F.2d 524 (2d Cir. 1961); Trilling v. United States, 260 F.2d 777 (D.C. Cir. 1958).
of Mr. Justice Brennan's perspicacity in spotting situational differences which to minds less capable would prove elusive, and of his obvious capacity to confine himself to the bare facts of the situations actually before him, should not be taken seriously. As regards the Devlin reference, such a showing has already been attempted. It only remains to dispose of the Court's reference to "oppressive circumstances" in connection with Toy's bedroom statements and of the possible negative implications flowing from the means chosen to dispose of Wong Sun's statement incriminating Toy.

In the first place, the extraordinary breadth of the Court's opinion as a whole makes any notion that the Court meant to limit Silverthorne's extension merely to oral statements resulting from unconstitutional arrests and/or searches when accompanied by "oppressive circumstances" almost inconceivable. For the opinion, among other things, says (as will later be shown) that McNabb-Mallory is now part of due process, that consideration should be given not just to Trupiano's restoration but to its extension into the arrest field as well, that Rules Three and Four of the Federal Rules of Criminal Procedure are part of the fourth amendment and that "flight evidence" may no longer be admissible on the question of guilt. Arguably, too, the opinion puts Miller v. United States into the fourth amendment. A Court so obviously concerned about effectively protecting the right of privacy and willing in the space of a short opinion to do all this and even more, much of it gratuitously, would hardly wish to be understood as confining Silverthorne's extension to unlawful arrest and search cases involving "oppressive circumstances." And, indeed, the Court pointedly refers to the "broad exclusionary rule" at the very outset of its discussion of Silverthorne. The "oppressive circumstances" language is explicable simply as an understandable effort by the Court to bolster its argument for extending Silverthorne in terms of the factual situation actually presented. There is certainly nothing unusual about this. Ours is, after all, a case by case system.

The Court's failure to deal with Wong Sun's statement in terms of Silverthorne can likewise readily be explained without limiting Silverthorne's extension to "oppressive circumstance" cases. First of all, this was simply not necessary and the "fruits problem" presented by such statement in relation to Toy is comparatively difficult. Why borrow trouble in the form of a biting dissent? Or

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142 See Section VII infra.
143 357 U.S. 301 (1958).
Mr. Justice Brennan may simply have chosen to make new law in the partner-in-crime field in terms of which Wong Sun's statement was in fact held inadmissible against Toy. That he made new law in the area, furthermore, is beyond question.\textsuperscript{144} The reader can doubtless think of other possibilities.

That Mr. Justice Brennan never meant to confine \textit{Silverthorne}'s extension to "oppressive circumstance" cases, however, is perhaps best shown by the fact that the very footnote employing the "oppressive circumstance" language is also the one chosen as the vehicle for saying that \textit{McNabb-Mallory} supports the Court's extension of \textit{Silverthorne} to cover voluntary oral incrimination. This, of course, because \textit{McNabb-Mallory} deals almost exclusively with voluntary statements and automatically requires their exclusion if made during a period of unlawful detention. Exclusion is required, furthermore, whether or not "oppressive circumstances" (other than the fact of unlawful detention) are present. While a \textit{McNabb-Mallory} case is distinguishable from voluntary incrimination spontaneously made during the course of an unlawful arrest and/or search both from the standpoint of reliability and because of the danger of police brutality in the police station, the Court expressly assumed in relying on the \textit{McNabb} cases to support the exclusion of Toy's bedroom statements that such factorial possibilities were not of themselves to be regarded as "oppressive." Accordingly, at least in terms of the Court's assumption, Mr. Justice Brennan's reliance on \textit{McNabb-Mallory} not only negates the "oppressive circumstances" inference but, indeed, strongly implies that the minimal ultimate reach of the Court's extension of \textit{Silverthorne} precludes the admission of any and all voluntary incrimination made by the victim: (1) during the course of an attempt (successful or not) unlawfully to arrest him; (2) while he is unlawfully under arrest; or (3) which accompanies and/or results in whole or in part from an illegal search of which he has standing to complain.\textsuperscript{144a} And this, it must be emphasized, apart from any "oppressive circumstance" other than that involved in the illegal arrest or attempted illegal arrest or illegal search.

That the above-suggested interpretation of \textit{Wong Sun} is correct furthermore—certainly as to the inadmissibility of any voluntary oral statement by the victim of an illegal but successful search—gains strong support from Mr. Justice Brennan's opinion in \textit{Costello v. United States}.\textsuperscript{145} Though a wiretap case decided in the govern-

\textsuperscript{144} See Section V infra.

\textsuperscript{144a} Compare \textit{State v. Keating}, 378 P.2d 703 (Wash. 1963).

\textsuperscript{145} 365 U.S. 265 (1961).
WONG SUN—A STUDY IN FAITH AND HOPE

sent's favor, Mr. Justice Brennan's opinion leaves no doubt that the case would have gone for petitioner on a "fruits doctrine" basis had the government failed to show that various voluntary incriminating statements of petitioner made in response to questioning by a New York prosecutor and introduced against petitioner in a denaturalization proceeding were in no degree prompted by the fact that the prosecutor told petitioner at the questioning that his telephone had been tapped. Reversal would similarly have been required absent a showing that none of the questions eliciting petitioner's incriminating statements were in any degree based on information gleaned by the prosecutor from the illegal taps. This, of course, at least insofar as the illegal search point is concerned, goes far beyond the rule suggested above. For Costello, as applied to an illegal search case, would require the exclusion of any voluntary incrimination induced by questions asked by an officer because of a successful illegal search even though the suspect was totally unaware of the fact of the illegal search.

Also noteworthy in this connection is the concurring opinion of Mr. Justice Goldberg in Cleary v. Bolger.\textsuperscript{146} People v. Rodriguez\textsuperscript{147} is therein not only cited with obvious approval but, indeed, assigned as one of Mr. Justice Goldberg's principal reasons for joining the Court's judgment in Cleary. Mr. Justice Goldberg, of course, as previously stressed, joined Mr. Justice Brennan's Wong Sun opinion. Rodriguez, a New York Court of Appeals case decided before Wong Sun, relies squarely on Mapp, Silverthorne and Costello to invalidate a voluntary confession obtained from one lawfully under arrest for murder by displaying to him the weapon with which he dispatched his victim. The weapon having been discovered by New York officers during an unconstitutional search of defendant's premises, the cases in question, but particularly, it would seem, Mr. Justice Brennan's opinion in Costello, were held by the Court of Appeals constitutionally to require the exclusion of the confession as a matter of law. The record was devoid of any "oppressive circumstance" other than the fact of the unconstitutional search itself. Indeed, defendant was not even present when the search was conducted.

Nor is Rodriguez a judicial freak. The Fourth Circuit Court of Appeals,\textsuperscript{148} relying on Mapp and Silverthorne and thereby up-

\textsuperscript{146} 93 Sup. Ct. 365, 390 (1963).
\textsuperscript{147} 11 N.Y.2d 279, 229 N.Y.S.2d 353 (1962).
\textsuperscript{148} Hall v. Warden, 313 F.2d 483 (4th Cir. 1963). Hall, holding Mapp to be retroactive and reversing the District Court on this point, also contains an enlightening discussion of the retroactivity problem.
setting a state murder conviction, seems recently to have taken the same view on almost identical facts as has the Supreme Court of Hawaii.\(^{149}\) Commonwealth v. Spofford,\(^{150}\) a recent Massachusetts case, is of even greater significance. State police unconstitutionally searched defendant's apartment in his absence and found certain obscene pictures. Defendant arrived at the apartment just as the police found the pictures and, when confronted with them, voluntarily acknowledged ownership. Defendant then voluntarily accompanied the officers to the police station where he was questioned by other officers on the basis of the unconstitutionally seized pictures and, still not under arrest, voluntarily admitted possessing additional obscene material and freely consented to a further search of his apartment. The search produced a second set of obscene materials. Relying on Mapp and Silverthorne and holding all of the above-mentioned items to be inadmissible, the Court concerned itself principally with defendant's police station admissions and his consent to search which produced the second group of obscene materials. So far as the first set of pictures and defendant's admission of ownership at his apartment, there was simply nothing to discuss. Out they went. The police statement admissions and the consent to search were held to be constitutionally invalid on two separate grounds either one of which would apparently alone have sufficed for exclusion. The first was that defendant, though not technically under arrest (lawful or unlawful) at the station, "was in no environment to make a free choice, even [though] . . . the record . . . [was] barren of evidence of threats, duress, coercion, or promises by the police officers."\(^{151}\) The Court also observed that defendant, "[a]lthough not denied counsel . . . nevertheless had none." The second ground was Costello and Rodriguez put together:

The police questioning, including that as to the existence of other photographs and similar material, received impetus from the improperly acquired material.\(^{152}\) The defendant's purported consent and the second lot [of obscene materials] were an offshoot of the original unreasonable search and seizure. Its acquisition was branded with the initial taint.\(^{153}\)

Before proceeding further the above-discussed cases need first of all to be distinguished for analysis purposes. From the stand-

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\(^{151}\) Id. at 676.

\(^{152}\) Id. at 676. (Emphasis added.). This, of course, is Costello.

\(^{153}\) This was Rodriguez. The quoted language is from Commonwealth v. Spofford, 180 N.E.2d 673, 676 (Mass. 1962).
point of excluding oral incriminating statements not of themselves involuntary but nevertheless the products of official illegality, (together, of course, with evidence derivatively acquired therefrom) a wiretap case such as Costello presents a different problem from an illegal but successful search case. Still different is an attempted unlawful arrest case and an unsuccessful unlawful search case not involving an arrest. And illegal arrest cases such as those of Toy and Wong Sun are different yet. All of these cases—so far as we are concerned here—are the same only in the sense that they each involve incriminating statements which are not in and of themselves coerced.

However, a wiretap case initially always involves an involuntary taking of a person's conversation of which he is almost never even aware. The conversation is then used in some way to induce the suspect voluntarily to incriminate himself and will often be extremely effective in so doing. An illegal search case, when successful, initially involves an involuntary seizure or examination of evidence which is again extremely likely to produce voluntary incrimination from the suspect. Unlike the wiretap case, however, the police will normally have to tell the suspect of the successful search before he will voluntarily confess. An illegal arrest case involves an involuntary seizure of the person, but, assuming no incriminating evidence is unlawfully discovered, the illegal arrest is not nearly so effective in producing voluntary incrimination. An unsuccessful unlawful search case not accompanied by an unlawful arrest is, at least normally, less likely still to produce such statements and will almost never do so, of course, unless the suspect is present at the time of the search. Perhaps an unsuccessful unlawful attempt to arrest case is from this standpoint one step further removed. While unsuccessful arrests always involve flight evidence, such evidence is not in any real sense “voluntary.” Truly voluntary incrimination is extremely unlikely to result from an attempt unlawfully to arrest.

That Mr. Justice Brennan well perceived these and still further distinctions admits of no doubt. It could scarcely be accident, for example, that Wong Sun fails once even to mention Mr. Justice Brennan’s opinion for the Court in Costello decided only two years before, and that Nardone154 (another wiretap case) is cited solely in relation to questions not presently relevant.

Mention has been made of other instances of voluntary oral incrimination resulting from official illegality which the Court

probably had in mind. Certainly the McNabb-Mallory cases were considered; indeed, as previously stressed, they were expressly relied upon to support the exclusion of Toy's bedroom statements, and, though differing from the standpoint of their probable reliability, are on the Court's assumption an a fortiori line of cases for excluding such statements.

In any event, in view of the painstaking care with which Mr. Justice Brennan wrote and of his obvious analytical capacities, it is impossible to believe that he failed to perceive what, in the light of the Court's exclusion of the bedroom statements, would eventually but no less certainly have to be decided by the Court. A complete catalogue of the possibilities is here impossible. Among the more obvious, however, may be mentioned a suspect's subsequent voluntary incrimination resulting from previous confessions held to be inadmissible for involuntariness or on account of a McNabb-Mallory violation (the so-called "consecutive confession cases" so brilliantly dealt with by Professor Kamisar), from illegal entrapment, from unlawful eavesdropping techniques other than wiretapping, or from unlawful abuses of the privilege against self-incrimination or of other important privileges such as lawyer-client, husband-wife, doctor-patient and priest-penitent. In the light of the exclusion of Toy's bedroom statements, for example, it would be surprising indeed if the present Court declined to hear a case such as United States v. Remington. There, the reader may remember, Judge Learned Hand in dissent wrote many years ago that Silverthorne and Sorrells (then the Court's leading entrapment case) compelled the reversal of a perjury conviction based on false testimony voluntarily given by Remington on his previous trial on a charge of having falsely told a federal grand jury that he had never been a communist. Finding the first indictment to be invalid on account of prosecutor abuse of Remington's privilege

155 Kamisar, supra note 19, at 98. Consecutive confession cases aside, of course, the Court has not yet even decided whether "tangible" fruits of an involuntary confession are inadmissible.

While Professor Kamisar deals to some degree with consecutive confession cases in the McNabb area and with fruits problems in the McNabb area generally, much has happened since he wrote. Those developments are considered in the text circa note 279.

156 See, e.g., Fletcher v. United States, 295 F.2d 179 (D.C. Cir. 1961), noted in 50 Geo. L.J. 610 (1962). The court, with Judge Edgerton dissenting, held that Silverthorne did not apply in the entrapment field. The case is also useful for its discussion of burden of proof problems.


confidentially to communicate with his wife, Judge Hand felt that Remington had of necessity "voluntarily" to take the stand at such previous trial and repeat as truth what he had originally told the grand jury. Accordingly, he had been entrapped under Sorrells, and Silverthorne made a new and valid indictment based on such allegedly perjured testimony at the first trial equally bad. Having once held Toy's bedroom statements to be inadmissible, the range of possibilities becomes virtually limitless. Additional ones will briefly be considered later.

Presently, however, we are solely concerned with voluntary oral incrimination in arrest and search cases and in establishing the proposition that the Court's exclusion of Toy's bedroom statements likewise requires (without a showing of "oppressive circumstances") the exclusion of any and all oral incrimination accompanying an illegal arrest or attempted illegal arrest or an illegal search, and of all voluntary statements made or acts done while the suspect is unlawfully under arrest. While, as just discussed, these and many other instances of official lawlessness markedly differ in terms of their relative probable effectiveness in producing voluntary incrimination, that, it is submitted, is not and should not be the test for excluding such evidence insofar as fourth amendment violations are concerned.

Aside from the point that the exclusion of Toy's bedroom statements is at least on the Court's assumption a fortiori from McNabb and that the Court expressly relies on McNabb in excluding such statements, the matter really boils down to this: Unless such evidence (and evidence derivatively acquired therefrom) be excluded, the police will still have a strong incentive to violate the fourth amendment in many cases where they would otherwise respect it. The right of privacy will not effectively be protected for anyone, and an effective judicial sanction for its violation is what Mr. Justice Clark held in Mapp was constitutionally required. There is also, of course, the argument from precedent, particularly Rodriguez and Spofford, and the point that the admission of such evidence would put the Court in the awkward posture of sanctioning and indeed encouraging fourth amendment violations. Unfortunately, the Court will have to do enough of this as it is. Frisbie is not likely soon to be overruled and grants of outright immunity from prosecution extended to persons unlawfully ar-

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rested. There will be such sanctioning, too, under the *Hester* or "open fields" doctrine and under the rule of *Walder v. United States* to the effect that a person whose premises are unconstitutionally searched and who commits too much perjury on his trial can be impeached through use of evidence obtained by such search. And, as will later be discussed, the Court's comparatively narrow rules on standing to object in fourth amendment cases will result in a virtual flood of convictions lawfully based wholly or in part on evidence obtained in reckless disregard of the constitutionally protected right of privacy. Indeed, *Wong Sun* itself is an example of such a case.

B. COLLATERAL CONSIDERATIONS

The discussion thus far has focused on voluntary oral incrimination (or other voluntary acts) resulting from and/or made during the course of a fourth amendment violation. If the statements or acts in question are involuntary in the due process sense, of course,

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162 *Hester v. United States*, 265 U.S. 57 (1924). This case, which has received an extraordinarily broad construction by the lower federal courts, upheld the seizure of evidence without warrant in an "open field," that is, at a place without the curtilage on the ground that there was no "search." Needless to say, the officers were trespassers. But the Court thought this to be beside the mark.

163 347 U.S. 62 (1954). *Walder* held that the government could impeach defendant, on trial for illegally possessing narcotics, with evidence unconstitutionally seized from him two years earlier in connection with an entirely different charge, when he took the stand and testified on direct examination that he had "never" possessed narcotics. *Walder's* holding is narrow, however, not just because of the lapse of time between the unconstitutional seizure and the lack of relationship between such seizure and the present charge, but also because there was an independent showing of perjury in *Walder*, i.e., the unconstitutionally seized evidence had been formally suppressed shortly after it was seized. Furthermore, the Court expressly says that the defendant could commit perjury with respect to all "elements of the case against him."

The difficulty, of course, lies in determining the meaning of the phrase "all elements of the case against him." Is it confined to statements which are "per se inculpatory" or does it allow perjury on anything directly bearing on the case before the court? I am inclined to think the latter. However, at least one court has taken the former view. *Tate v. United States*, 283 F.2d 377 (D.C. Cir. 1960), noted in 45 Minn. L. Rev. 669 (1961), held, in a *McNabb-Mallory* context, that the government could impeach defendant, on trial for theft of hospital equipment, with a statement obtained during a period of illegal detention that he had gone to the hospital with a companion after he had testified on direct that he went to the hospital alone to see a friend. And see *Lockley v. United States*, 270 F.2d 915 (D.C. Cir. 1959).

164 See textual discussion beginning at note 181 infra.
they must be excluded whether or not a fourth amendment violation is involved. Suppose, however, following a defendant's unconstitutional arrest, that he is routinely booked and fingerprinted and such fingerprints are introduced in evidence over appropriate and timely objection at his robbery trial and become an important part of the proof that certain other fingerprints, found at the scene of the crime, are defendant's fingerprints. The fingerprint evidence does not appear involuntary in the due process sense, but neither does it fit the voluntary incrimination category or the case of physical or tangible items unconstitutionally seized or observed. Nevertheless, the case supposed is clearly a fortiori from voluntary incrimination.

The supposed case is, in fact, _Bynum v. United States_, holding that the fingerprints in question were unconstitutionally admitted, and rejecting as wholly immaterial the government's "harmless error" point that it would clearly have been proper to have taken defendant's fingerprints in court during trial in order to compare them with the prints found at the scene of the crime. As _Bynum_ was cited with obvious approval by Mr. Justice Brennan in a footnote to his discussion of Toy's bedroom statements, the language of _Bynum_ rejecting the government's "harmless error" argument and going instead on an automatic reversal basis bears quoting:166

"[T]his argument [harmless error], like the argument of trustworthiness already . . . [rejected], simply does not meet the point. It bears repeating that the matter of primary judicial concern in all cases of this type is the imposition of effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention. Neither the fact that the evidence obtained through such detention is itself trustworthy or the fact that equivalent evidence can conveniently be obtained in a wholly proper way militates against this overriding consideration. It is entirely irrelevant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way."

And, earlier, the _Bynum_ opinion notes that if "one . . . product of illegal detention is [constitutionally] proscribed, by the same token all should be proscribed."167

In connection with Mr. Justice Brennan's approval of _Bynum_, it may be significant (in the light of his subject rulings on "deriva-

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165 262 F.2d 465 (D.C. Cir. 1958).
166 Id. at 468-69. (Emphasis added.)
167 Id. at 467. (Emphasis added.) In making this statement, the court expressly relied upon the United States v. Klapholz, 230 F.2d 494 (2d Cir. 1956), cert. denied, 351 U.S. 924 (1956).
tive use" questions) that he fails to note the subsequent history of that case. Bynum was convicted once again and the Court of Appeals affirmed notwithstanding the proof showed that while the fingerprints taken during unlawful arrest were not themselves used on the re-trial, they were the only means by which the prosecutor was able outside court to secure a copy of defendant's fingerprints from the Federal Bureau of Investigation. The Federal Bureau prints were then used at trial and compared with the prints found at the scene of the crime. The second Bynum ruling, which seems clearly erroneous under various Wong Sun rulings yet to be discussed, in practical effect destroys Bynum number one and allows unconstitutional dragnet arrests for the purpose of obtaining people's fingerprints.

A situation analogus to Bynum, but sometimes more difficult to decide, is presented by cases such as United States v. Meachum and Payne v. United States. Meachum, decided by Judge Youngdahl shortly after Mapp, involved a motion to suppress defendant's voluntary oral confession to one Malinoff. Defendant had originally been arrested on probable cause on a charge of robbing one Turner. Following his lawful arrest, defendant was then placed in a lineup viewed by Turner. Though others were identified by Turner as his assailants, defendant was not identified as having been involved in the Turner robbery. Though the police no longer had probable cause to hold defendant on any charge whatever, he was nevertheless not released but was instead placed in another lineup an hour later where he was identified by citizen Malinoff as the person who had robbed him. A few minutes afterwards defendant gave an unsolicited voluntary confession to Malinoff. Defendant's motion to suppress such confession was granted on the basis of Mapp. Observing that "the import of the Fourth Amendment is that an individual may not be arrested and retained in custody without probable cause," Judge Youngdahl read Mapp as requiring that "any evidence procured through such violation is to be suppressed . . . [for] without this 'deterent [exclusionary rule] safeguard . . . the Fourth Amendment would [be] reduced to 'a form of words.'" While Meachum does not touch the question of whether Malinoff could under Mapp lawfully identify defendant at his trial (so long

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as he did not refer to his police station lineup identification), the language just quoted strongly implies that he could not.

That Mapp would forbid this, furthermore is, on careful reading, implied in an opinion of the Court of Appeals for the District of Columbia in Payne v. United States. While allowing a witness who initially identified defendant in a lineup held while defendant was detained in violation of Rule 5(a) of the Federal Rules of Criminal Procedure (not deemed by the court to have a constitutional basis) to testify against defendant on the trial without referring to his previous lineup identification, the court strongly relied on the circumstance that defendant was constitutionally under arrest at the time of the lineup identification by the witness. The clear implication was that Mapp's exclusionary rule would have disallowed such testimony had defendant been unconstitutionally under arrest at such time. Any other result, it seems apparent, would be unsupportable. For it would permit unconstitutional dragnet arrests by the police of Everyman simply for the purpose of holding a lineup which, it should be added, is generally far more humiliating and uncomfortable than an unconstitutional arrest itself. Having observed numerous lineups in Chicago, Illinois, the writer can testify of his own knowledge that the police on each and every such occasion behaved as though they were dealing with animals rather than human beings. Some of these "animals," furthermore, were respectable middle-class individuals wholly innocent of any wrongdoing who were ultimately turned loose because the police had nothing upon which to hold them in the first place. While Chicago type lineups may perhaps not be typical, the Court, it should be remembered, does not write in the fourth amendment area merely for communities where the police behave responsibly. Oxford, Greenwood, Chicago and New York are likewise in the United States.

So much, then, and it very well may have been too much, for the Court's disposition of Toy's incriminating bedroom statements and the many questions raised thereby. The next question was whether the narcotics surrendered by Yee as a result of such statements were likewise inadmissible against Toy. The answer was again affirmative but this time quick and wholly unequivocal. Noting that "[t]he prosecutor candidly told the trial court that 'we

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173 Implicit in the court's ruling is the proposition that the Silverthorne doctrine is inapplicable in the McNabb area. This seems erroneous. See text discussion circa note 296 infra. Dicta in United States v. Vita, 294 F.2d 524 (2d Cir. 1961), however, supports the court's position.
couldn't have found those drugs except that Mr. Toy helped us to.'” Mr. Justice Brennan promptly rejected any thought that the case was the one envisioned in Silverthorne “where the exclusionary rule has no application because the Government learned of the evidence ‘from an independent source.’” Nor was it like the case hypothesized in Nardone “in which the connection between the lawless conduct of the police and the discovery of the challenged evidence . . . [had] ‘become so attenuated as to dissipate the taint.’”

Then came the bomb. For it was at this point that Mr. Justice Brennan chose to enunciate the Court's rule on the extent to which Silverthorne required the exclusion of evidence derivatively acquired from illegal police activity. The Court's language was as follows:175

> We need not hold that all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is “whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Maguire, Evidence of Guilt, 221 (1959). We think it clear that the narcotics were “come at by the exploitation of that illegality” and hence that they may not be used against Toy.

Accordingly, a law professor's rule (and perhaps also his illustrations of how it should be applied) was read into the United States Constitution and Professor Maguire joined select company with Dean Warren and Professor Kamisar as “competent scholars” (the phrase, of course, belongs to Mr. Justice Brandeis) whose legal research has expressly been recognized by the Court as extremely influential on a question of momentous constitutional importance.

Whether Professor Maguire's rule should have been adopted is another matter, as is the question of what it means and how it is applied. Such questions are best reserved until later.

After holding the narcotics of Yee to have been inadmissible against Toy, the Court noted that the only remaining question concerning Toy was his unsigned incriminating statement given to Agent William Wong. While the statement was disposed of on other grounds, the Court nevertheless expressly recognized that there was a “fruit of the poisonous tree” problem with respect to it. Citing

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175 Ibid.
United States v. Bayer, the Court observed that the existence of such other grounds made it unnecessary to consider "whether, in light of the fact that Toy was free on his own recognizance when he made the statement, that statement was a fruit of the illegal arrest." The reason it might have been, of course, is that Toy had previously incriminated himself (in the bedroom and by producing Wong Sun) and, though having received 5(b) information from a United States commissioner before making the statement, had presumably not talked with a lawyer and so could not possibly have known that his bedroom statements, the narcotics of Yee and the statement of Wong Sun might possibly be inadmissible against him. Nor did Toy have a lawyer present when he made the statement.

But even in declining to speak, Mr. Justice Brennan strived to convey some sort of message. The reference, of course, is to his citation of Bayer. A strange sort of McNabb case in a military context, Bayer holds that defendant's voluntary confession assumed by the Court to be inadmissible under McNabb did not require the exclusion of a second voluntary confession made six months later when the defendant, an army officer, at the time of the second statement, was restricted to "base limits" unless given special permission to leave. In other words, Bayer was neither in jail, threatened with jail or even under house arrest. He had the freedom of the entire base just as Toy had the considerably larger freedom of San Francisco. Whether Bayer knew at the time of his second statement that his first was inadmissible is not discussed by the Court. Presumably, however, he did not.

Down through the years, of course, Bayer has chiefly not been remembered for its facts or holding but rather for the following much celebrated dicta: Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantage of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. The

176 331 U.S. 532 (1947), noted in 33 Iowa L. Rev. 136 (1947); and 26 Tex. L. Rev. 536 (1948).
Silverthorne and Nardone cases . . . did not deal with confessions but with evidence of a quite different category and do not control this question.

That Mr. Justice Brennan meant to convey something by citing Bayer is very possible, indeed, probable. What it was, however, is a mystery. Speculation on the matter here would be utterly profitless.

C. Silverthorne Problems in Connection With Wong Sun's Arrest

This ends the extent of the Court's concern with Silverthorne problems in relation to Toy. The possible Silverthorne implications of the Court's approach to Wong Sun's statement implicating Toy have already been considered.¹⁷⁹

But Silverthorne problems aplenty existed in relation to Wong Sun whose arrest, it will be recalled, was, at least for the sake of discussion, assumed by the Court to be unconstitutional. Accordingly, the first question became the admissibility of his unsigned statement to Agent William Wong. Unlike Toy, Wong Sun had not incriminated himself in any way prior to the giving of such statement. And this, it would seem, made all the difference in the world. For some reason, however, though obviously cognizant of the distinction, Mr. Justice Brennan saw fit to ignore it. Wong Sun's statement, he wrote simply:¹⁸⁰

was not the fruit of . . . [his unconstitutional] arrest, and was therefore properly admitted at trial. On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint."

This, then, was the case hypothesized in Nardone. The fact that the statement was unsigned was held merely to affect its weight and credibility.

The narcotics surrendered by Yee were likewise held to be admissible against Wong Sun. The Court was explicit:¹⁸¹

Our holding . . . that this ounce of heroin was inadmissible against Toy does not compel a like result with respect to Wong Sun. The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by an official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to

¹⁷⁹ See text discussion circa note 138 supra.
¹⁸¹ Id. at 419.
object to its use at his trial. Cf. Goldstein v. United States, 316 U.S. 114.

In other words, Wong Sun had no standing. Though the narcotics were assumed to have been obtained by two separate and independent fourth amendment violations and their introduction in evidence, under the Court's ruling in Mapp, constituted still a third, redress was refused. The result, while not surprising in view of Mr. Justice Black's insistence in Mapp that the exclusionary rule rests both on the fourth and on the privilege against self-incrimination clause of the fifth (and because of the practical necessity of garnering his vote), is nevertheless unfortunate and marks a significant step back from Mapp's forceful stress on the necessity of providing effective judicial policing of policemen. The ruling likewise inescapably carries with it a notion to which when baldly put no Justice ever to sit on the Court, let alone Mr. Justice Black or Mr. Justice Brennan, would for a moment subscribe, namely, that the fourth amendment is primarily designed to protect criminals. As the distinguished Judge Traynor recently put it:182

Such a focus to ferret out some violated right of the defendant suggests, though perhaps unintentionally, that the objective of the exclusionary rule is to make amends to the defendant. What should be of primary concern is not the grievousness of selected guilty defendants such as landowners or the gentry of invitees, but the grievousness of official lawlessness.

It should be added, too, that many (if not most) fourth amendment violations are committed upon persons wholly innocent, and that the Court's approach in Wong Sun leaves them with no assurance that their privacy will be respected in the future. Indeed, the suggestion is that it will not be. For if, as the California Court has stated:183

law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation [personal interest] virtually invites law enforcement officers to violate the rights of [both innocent and guilty] third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of evidence illegally obtained against them.

Certainly the lesson that petitioner Wong Sun will doubtless soon be jailed—if, indeed, he has not already been—because the fourth amendment was three times violated will hardly be lost on the police.

182 Traynor, supra note 2, at 335.

Finally, and perhaps most important of all, the Court, in allowing a conviction based on a fourth amendment violation to stand, sullies its own distinguished image and casts an ominous, brooding shadow over the administration of criminal justice throughout the land. Much to be preferred is the view of the California court in *People v. Martin*, that the defendant need only show that the government obtained the challenged evidence in violation of the fourth amendment rights of somebody. If experience is any teacher, however, it may safely be ventured that few state courts will take it upon themselves to do more than due process was in *Wong Sun* held minimally to demand.

Further to exacerbate matters, the Court's holding that *Wong Sun* lacked standing to object to the heroin's admission was not required by precedent. *Wong Sun* is the first illegal search case in the United States Supreme Court ever to hold that a defendant lacked standing to raise the question of illegal search. Moreover, *Wong Sun*'s "personal interest" or "aggrieved party" limitation, while supported by an almost unanimous body of lower federal court decisions, is based on an historical misunderstanding. Since the exclusionary rule was early premised on both the fourth and fifth amendments, its protection was thought by most courts and commentators to be limited to the "aggrieved party." But there is absolutely no reason (other, of course, than the practical one of obtaining the vote of Mr. Justice Black) why a rule designed to protect fourth amendment rights should depend on more than the fourth amendment and/or why the self-incrimination clause of the fifth amendment, which by definition can only be personal, should be employed to water down the scope of the fourth by engrafting upon it a "personal interest" or "aggrieved party" limitation.

That the privilege clause of the fifth is not needed to support the exclusionary rule is, of course, shown by *Mapp* and by the corporation and union cases among others. Corporations and unions are protected against illegal searches by the exclusionary rule of the fourth, yet have not been accorded the benefits of the privi-

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184 Ibid.
185 It may be, however, that the tide on the state level is changing. Thus, the New York court, on facts closely approximating *Wong Sun*, allowed standing to a codefendant. *People v. Loria*, 10 N.Y.2d 368, 179 N.E.2d 478 (1961). However, the court did not adopt the rule of the *Martin* case, *i.e.*, that any criminal defendant has standing.
lege against self-incrimination. Thus as to corporations and unions the exclusionary rule necessarily rests solely on the fourth. 187 Why, then, should a different doctrine control as to individuals, and particularly as regards persons jointly engaged in some criminal enterprise?

The illogicality involved in limiting fourth amendment protection to the "aggrieved party" is perhaps best illustrated by the conspiracy cases where the owner, often the prime mover in the criminal undertaking, goes free while his underlings are promptly sent to the penitentiary. 188 Also in point are cases where corporate papers have unconstitutionally been seized. While the corporation itself can demand their return, the corporate officers who run the risk cannot. 189 Again, the unconscionable spectacle required at least by the logic of the Court's approach in Wong Sun, of denying standing to one spouse where evidence has been unconstitutionally seized from the other, and like rulings as between parents and children, brothers and sisters and other close relatives, are additionally illustrative of the unsoundness of the Court's approach.

The Court's "aggrieved party" test is also a litigation breeder. Close questions will constantly arise and, indeed, they already have.190 While this is ordinarily a consideration entitled to little weight, the multitude of still unanswered fourth amendment questions plaguing the courts would, even if the policy question was close, argue strongly for adoption of a test easy of practical administration.191

The weakness of the Court's ruling on Wong Sun's lack of standing is also demonstrated by the only case replied upon to

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187 See the exhaustive citations, Note, supra note 186, at 156-57.
188 E.g., Kelley v. United States, 61 F.2d 843 (8th Cir. 1932); Remus v. United States, 291 Fed. 501 (6th Cir. 1923).
189 E.g., United States v. DeVasto, 52 F.2d 26 (2d Cir. 1931); Bilodeau v. United States, 14 F.2d 582 (9th Cir.), cert. denied, 273 U.S. 737 (1926).

Some cases have gone to the extreme length of denying standing to a defendant who is the sole owner of the corporation. E.g., Lagow v. United States, 159 F.2d 245 (2d Cir. 1946); State v. Easter, 174 Neb. 412, 118 N.W.2d 515 (1962).

190 E.g., United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962).
191 Apparently the Court's standing test is, at least for the present, to remain the one set forth in Jones v. United States, 362 U.S. 257 (1960), that anyone "legitimately" on the premises has standing along, of course, with anyone with a proprietary interest in the evidence unconstitutionally seized. On the latter point, however, Jones is unclear, but this has long been the rule in the federal courts. See, e.g., United States v. McDaniel, 154 F. Supp. 1 (D.D.C. 1957); United States v. Lester, 21 F.R.D. 376 (W.D. Pa. 1957), and authorities therein cited.
support it, Goldstein v. United States. First of all, Goldstein is an illegal wiretap rather than an unlawful search case. But ignoring this and treating the two cases as presenting basically the same issue of standing to object, Goldstein falls far short of the mark and, indeed, when the entire history of the litigation is considered, tends to support a contrary ruling.

The Goldstein litigation first reached the Court in Weiss v. United States. Weiss, Goldstein and others had been convicted of conspiracy in part on the testimony of various co-conspirators who had pleaded guilty and/or turned government evidence when confronted with incriminating information obtained by unlawful tapping of their telephones. Speaking for a unanimous Court, Mr. Justice Roberts reversed the convictions of all the petitioners including Goldstein who had not been a party to any of the illegally monitored calls. Reversal was required, the Court held, because the government, in order to refresh the recollections of the co-conspirators, used transcripts of the illegally monitored calls which were attested to as accurate by the conspirators testifying for the government and which were later admitted into evidence. The government's argument that the consent of the co-conspirators to the divulgence of their conversations authorized their use at the trial was flatly rejected. For their consent was given solely in order to obtain lenience and after they had been informed of the taps.

On remand Weiss pleaded guilty, but Goldstein stood trial and was again convicted. However, because of a district court ruling on

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192 316 U.S. 114 (1942).

193 This is a very substantial concession in view of Mr. Chief Justice Warren's opinion for the Court in Benanti v. United States, 355 U.S. 96 (1957). For in footnote 12 of his opinion, the Chief Justice expressly draws a distinction between the wiretap and fourth amendment cases, the obvious purpose of which is to say that persons who would not have standing in a wiretap case would nevertheless have such standing in a fourth amendment case. The reader may judge for himself: "Goldstein v. United States, 316 U.S. 114, is not to the contrary. The holding of that decision is that one not party to an intercepted conversation may not bar the testimony of one who has been induced to testify by exposure of the fact that his own conversations have been wiretapped." Id. at 122. "The broad language of the decision that the policy of the Fourth Amendment applies to § 605 is placed in the context of a discussion of the right of one not a party to the conversation to complain." Id. at 120, 121. "This right was rejected on the ground that since the statute allows the 'sender' of a message to consent to its divulgence, it meant to protect only him." Id. at 103. (Emphasis added.) Furthermore, it is worthy of note that the Chief Justice wrote for a unanimous Court in Benanti.

194 308 U.S. 321 (1939).
a suppression motion, the government was precluded from using the information obtained by illegal tapping even as against Goldstein. Accordingly, the co-conspirators based their testimony against Goldstein on matters other than those referred to in the illegally tapped phone calls. In addition, government witnesses testified that the taps furnished no help to them in their investigation of Goldstein’s activities. The most that could be said of the use of the phone calls is that they might have been used in a sub rosa manner by the government in order to “persuade” the co-conspirators to testify against Goldstein. The Supreme Court affirmed in a four to three decision holding that Goldstein, not having been a party to the illegally tapped calls, had no standing to complain of the leverage use to which the government might have put them.

The Court’s ruling in Wong Sun, of course, goes far beyond Goldstein. For in Wong Sun the illegally obtained evidence, the narcotics themselves, was introduced, whereas in Goldstein the illegal taps, if used at all, were used only to induce various co-conspirators to testify against Goldstein. The contents of the illegally monitored calls were never made known to the jury and, as we have seen, the district court expressly ruled on the basis of the Court’s unanimous Weiss opinion that the co-conspirators could base their testimony against Goldstein only on matters other than those referred to in the illegally tapped calls. Far from supporting the Court’s position in Wong Sun, the Goldstein cases appear to require that the narcotics be excluded not only against Toy but as against Wong Sun as well, and that no testimony concerning them could be advanced on the trial. Parenthetically, it might also be observed that several of the Court’s opinions, at least one involving an illegal search question, afforded ample precedent for excluding the heroin against Wong Sun.

The Court’s ruling that Wong Sun lacked standing with respect to the heroin, it should be observed, does not necessarily mean that he would lack standing to object to the admission of his unsigned statement to Agent William Wong provided such statement was in whole or in part the product of the unconstitutionally seized heroin. For getting a defendant to convict himself out of his own mouth through the use of evidence unconstitutionally seized from

186 See United States v. Goldstein, 120 F.2d 485 (2d Cir. 1941).
a third party arguably gives the defendant a "personal interest" in the confession which he would not have in the unconstitutionally seized evidence. Goldstein, of course, does not touch the matter since Goldstein never confessed as a result of the taps. However, the Court failed to discuss the question notwithstanding that it seems almost certain that Wong Sun was aware when he confessed that heroin had been found on Yee. And certainly Agent Wong knew of the heroin and must have questioned Wong Sun in terms of such knowledge. The Court's failure to discuss the question, coupled with Mr. Justice Brennan's pointed avoidance of his own opinion for the Court in Costello, which, though a wiretap case, is an authority otherwise directly in point, virtually compels an inference that the Court felt the standing question with regard to the confession was the same as or perhaps even a fortiori from the standing question with regard to the heroin. At the same time, as a technical stare decisis matter, the issue is still open.

One final point. The Court's position that Wong Sun was not "aggrieved" and therefore lacked standing to object to the admission of the heroin and, impliedly, to his statement as well, raises ominous implications for the ultimate resolution of related constitutional issues, most notably perhaps in the involuntary confession area. Suppose, for example, that a witness makes a confession which would be inadmissible against him for "involuntariness" but which is credible and incriminates the defendant. Must the statement be excluded against defendant because involuntary against the witness or will defendant lack standing because only the due process rights of the witness have been violated? Mr. Justice Frankfurter raised the question or a closely related one in Turner v. Pennsylvania, but declined to decide it, and the issue has likewise arisen in other cases, notably Hysler v. Florida. Wong Sun, of course, suggests that our hypothetical defendant would lack standing, a suggestion, furthermore, which is buttressed by Mapp's heavy reliance on the involuntary confession cases to put the ex-


\[200\] 338 U.S. 62 (1949). With reference to footnote 11, it is of interest that Turner underwent five trials, each time, of course, in which his life was at stake.


\[202\] 315 U.S. 411 (1942).
clusionary rule on a constitutional basis. Furthermore, as Judge Traynor has observed,

[T]here are strong parallels between the unconstitutionally obtained evidence of involuntary confessions and the unconstitutionally obtained evidence of unreasonable searches and seizures. The more one reflects on how serious a turn either sort of unconstitutional invasion can take, the more superficial it seems to view the first as the more heinous. There is no scale of decorum according to setting in the rampages of the lawless.

Of course, the confession cases could for standing purposes be distinguished from Wong Sun. No case is ever the same. The question is one principle, the point that if an involuntary but credible statement of a witness must be excluded in order to deter official lawlessness, a like result is required in the case of evidence obtained by unconstitutional searches and seizures.

So much then for the Court's actual disposition of "derivative use" and "standing" questions in Wong Sun itself. Consideration is now required of the Court's adoption of Professor Maguire's test for determining when evidence derivatively acquired from a fourth amendment violation must be excluded and what such test in practice will mean. In the course of adopting the test, it will be remembered, the Court took pains to reject any notion that "[a]ll evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." This is another Wong Sun first; the Court had never previously so stated. Moreover, the Court's pronouncement in this regard goes far beyond Silverthorne's "independent source" exception and likewise removes from exclusionary rule protection many cases not covered by Nardone's hypothetical (actually applied in Wong Sun) where the connection between the unlawful conduct and the challenged evidence has "become so attenuated as to dissipate the taint." In other words, the Court flatly rejected a "cause in fact" test.

The wisdom of this is beyond question. For making factual cause a test—even with the "independent evidence" and "attenua-

203 See Broeder, supra note 2, at 198.
204 Traynor, supra note 2, at 326.
205 It is not meant by this, however, to suggest that a witness unconstitutionally arrested not on the defendant's premises should be precluded from testifying against defendant, assuming, of course, that the witness was not discovered through unconstitutional police officer behavior directed against the defendant.
tion" exceptions—would mean, to take some extreme cases, that a criminal could with impunity intentionally kill or seriously maim a police officer seeking unconstitutionally to arrest him or deliberately to take advantage of an unconstitutional search in order to murder a confederate or to commit some other serious crime.

However, this is not to suggest that all crimes committed as a result of unconstitutional invasions of a defendant's right of privacy are beyond exclusionary rule protection. Indeed, the Court itself, in *Walder v. United States*, indicated that the victim of an unconstitutional search had the right to commit at least some perjury in order to protect his privacy and, not just incidentally, to save the exclusionary rule from extinction in some cases. Other examples readily suggest themselves in the fourth amendment area and outside it, among them, of course, the previously discussed situation presented by *United States v. Remington*. And the proper result in cases where a defendant, during an unconstitutional but successful search of his home, offers to bribe the officers to remain silent, or draws a weapon for the purpose of avoiding unconstitutional arrest, is anything but clear.

Likewise unclear, once cause in fact is rejected, are cases (not involving independent and directly resultant criminality) such as *Acklen v. State*, where defendant, unlawfully under arrest, inadvertently handed over lottery tickets instead of his driver's license. Countless other illustrations could be put. But whatever distinctions may ultimately prove necessary, it is abundantly clear that cause in fact ought not to be the sole test and that the Court was clearly right in so holding.

Now for the Maguire test itself which, for convenience, will here be repeated: "... whether, granting establishment of the

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208 In a few states, including Nebraska, this may in any event be done. E.g., People v. Burt, 51 Mich. 199, 16 N.W. 378 (1883); Simmerman v. State, 14 Neb. 568, 17 N.W. 115 (1883); State v. Bethune, 112 S.C. 100, 99 S.E. 753 (1919). Fortunately for police officers, this is very much of a minority view. See, e.g., Elk v. United States, 177 U.S. 529 (1900).


212 E.g., Billingsley v. State, 156 Tenn. 116, 299 S.W. 797 (1927).

213 The crime of "escape" is also relevant. While in most states, "escape" from unlawful arrest is not criminal, this is by no means true in all.

214 196 Tenn. 314, 267 S.W.2d 101 (1954).
primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 215

What does it all mean? The best one can do, of course, is to quote directly from Evidence of Guilt. 216 The test there put forward, after all, was expressly adopted by the Court and Professor Maguire's illustrations of how it should be applied were presumably, at least in the main, also endorsed and thereby read into the United States Constitution. The most significant paragraph begins on page 222:

Turn now to a few specific instances. If an unreasonably seized document reveals the location of a weapon used in a murder, and the defendant in the murder case had standing to protest the seizure, it can be safely assumed that a . . . trial judge would feel bound on due objection to suppress or exclude the weapon. At the other extreme, if unreasonable search or seizure does no more than spur the authorities 'to press an investigation which they might otherwise have dropped,' it has been forcefully asserted that evidential fruits of such investigation are not barred from admission, [citing United States v. Nardone, 127 F.2d 521, 523 (2d Cir. 1942)]. In between these extremes lie innumerable possible variants. Unnecessary and excessive search connected with an arrest indicated numerous other crimes of the man apprehended, and suggested sources of proof; it was held, but with dissent, that evidence discovered by the help of these leads might not be used in prosecution for the other crimes [citing People v. Mills, 148 Cal. App. 2d 392, 398, 402-404, 306 P. 2d 1005, 1009-1010, 1012-1013 (1957), cert. denied, 355 U.S. 841, 886 (1957)]. If such search leads the police to witnesses who can aid the prosecution, distinctions are sometimes sought to be drawn between the consequences of thus discovering identity and nothing more, and of thus discovering both identity and more or less the likely tenor of testimony [citing People v. Martin, 382 Ill. 192, 195, 201-203, 46 N.E.2d 997, 999, 1001-1002 (1943); People v. Albea, 2 Ill. 2d 317, 118 N.E.2d 277, 41 A.L.R.2d 895 (1954); and People v. Schumloffel, 170 Cal. App. 2d 339 P.2d 558 (1959)].

Again, at page 224, Professor Maguire observes that "[w]here officers who have lawlessly invaded a man's house hear him, ignorant of their presence, make incriminating statements, testimony from them as to those statements is very likely subject to exclusion." (citing Irvine v. California, 347 U.S. 128 (1954)).


216 MAGUIRE, EVIDENCE OF GUILT (1959). Professor Maguire has graciously consented to the reproduction of the various quotations set forth in the text.
Necessity requires one final quotation, this one from page 225:

A kindred attenuation of the consequences of unreasonable search and seizure is presented when officers improperly enter the dwelling of a married couple, finding the wife at home and the husband absent. Incidentally to their search the officers question the wife about her husband's coming and goings, extracting information that he is returning soon. They go down into the street, wait and watch, intercept the husband arriving in an automobile, and promptly and fruitfully search this vehicle. Summary search of the car is more likely to be permissible than summary search of the apartment. [citing, of course, Carroll v. United States, 267 U.S. 132 (1925)]. But, in a situation substantially conforming to that above stated, the court felt bound to remand the case for determination as to whether the officers, entirely aside from information given by the wife, would have taken effective steps to intercept defendant and his automobile. [citing Somer v. United States, 138 F.2d 790 (2d Cir. 1943)].

Whether Professor Maguire approves of Somer is unclear. Be that as it may, the opinion is extremely persuasive and its author, Judge Learned Hand, one of the most brilliant judges to sit on a federal bench in this or any other century.217

Now let me add a few words of my own. Whether, in any given case, evidence derivatively acquired from a fourth amendment violation should be excluded ought in principle to depend on the extent to which its admission would thwart the laudable policies underlying the exclusionary rule. Of course, the exclusionary rule—adopted to protect the privacy of Everyman—is basically at odds with society's interest in crime prevention and detection and sometimes results in guilty people going free, but Mapp squarely holds that the privacy interest is superior. Accordingly, if the exclusionary rule is effectively to function, neither a high probability or even the certainty of a man's guilt or the seriousness of his supposed crime are relevant. Once a fourth amendment violation is shown, "[e]ven the police engaged in an illegal search who find Cardozo's hypothetical murdered man should not be allowed to testify, or

217 Wayne v. United States, 31 U.S. L. WEEK 2497 (D.C. Cir. Apr. 4, 1963), discussed supra note 107, appears contra to Somer. Assuming the entry in Wayne to have been unconstitutional, it ought to be no excuse that the police could have found the body in a legal and proper way, i.e., by securing a search warrant. Indeed—on the assumption that the entry was unconstitutional—the case would seem on all fours with Cardozo's famous hypothetical murdered man case. See note 203, infra, and accompanying text.

However, as observed in note 107, Wayne seems to have been correctly decided on its facts. The case is likewise of importance for its express recognition of the point, many times made herein, that the Court in Wong Sun did in fact read certain pages of Prof. Maguire's book into the fourth amendment.
the expectation of discovery of a serious crime will overcome the deterrent effect of the rule.218 On the other hand, cases involving unconstitutional searches for one purpose which incidentally happen to put the police in a position to observe on-going criminality of an entirely different sort—an unconstitutional search for dope, for example, in which the police find defendant beating his wife or committing murder would be, or at least should be in a different constitutional category. On-going criminality in the vice area, however, should ordinarily be protected whatever the purpose of the unconstitutional search.219 An unconstitutional crashing into a house of prostitution in order to arrest the prostitutes, for example, should preclude the police from testifying that they observed a customer gambling or using dope.220 Likewise, to analogize from an actual case, an unconstitutional police raid on a nudist camp should prevent the police not only from testifying on such issues as “indecent exposure” but also as to non-puritanical nudist activities such as adultery, fornication, sodomy and the like.221

Apart from the basic question of whether and to what extent Wong Sun rests on constitutional grounds and applies to the states, only one question remains so far as the Court’s discussion of “derivative use” problems is concerned. Why, after concluding that Toy’s bedroom statements were inadmissible, did Mr. Justice Brennan go on to consider a host of other problems in relation to

218 Note, 8 U.C.L.A. Rev. 454, 455 (1961). “In refusing to adopt the exclusionary rule when on the New York Court of Appeals, Judge Cardozo put the following case: ‘A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free.’ People v. Defore, 242 N.Y. 13, 23-24, 150 N.E. 585, 588 (1926).” Defore in general, though not necessarily the above-quoted specific language, was repudiated by Mr. Justice Clark speaking for the Court in Mapp v. Ohio, 367 U.S. 643, 653 (1961).


220 See cases cited note 240 infra. See generally DASH, THE EAVESDROPPERS 439–41 (1959) and cases and other authorities therein cited. To say the least, the proper distinctions do not seem often to be taken.

Toy? If the doctrine of automatic reversal applied, Toy's conviction should have been reversed merely on the basis of the bedroom statements and nothing further need have been said. Ordinarily, of course, the Court avoids deciding unnecessary questions, particularly unnecessary constitutional questions.

Did the Court, by going further, mean to imply that automatic reversal doctrine was inapplicable in the illegal arrest and search field? The answer, it seems clear, is no. First of all, the Court says nothing whatever about prejudice, and a consideration of the other questions referred to was necessary if Toy was to be discharged. Secondly, because of Mapp, the Court must of necessity take every available opportunity to develop the scope of the constitutionally based exclusionary rule. Again, the Court clearly regards the question as open, for certiorari has just been granted in a state case raising it. Finally, Mapp's exclusionary rule rests heavily on the involuntary confession cases where automatic reversal doctrine is firmly established. Failure to apply the doctrine would not only be inconsistent with Mapp, but would substantially destroy the effectiveness of the exclusionary rule and, in addition, give further currency to the notion that the fourth amendment only protects criminals. As pointed out above, Wong Sun does too much of that already.

223 See Broeder, supra note 2, at 198.
224 Prof. Allen, however, is on record as thinking that the entire automatic reversal problem in the fourth amendment area is nothing but a "tempest in a teapot." But Prof. Allen likewise clearly failed to anticipate the extension of Mapp in Wong Sun. See Allen, supra note 2, at 45, n.222.

For recent cases applying the automatic doctrine on facts quite similar to Wong Sun, see Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958), discussed in text at notes 165-67 supra. See also Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962) (McNabb-Mallory); Griffith v. Rhay, 282 F.2d 711 (9th Cir. 1960), cert. denied, 364 U.S. 941 (1961) discussed in text at note 439 infra (voluntary confession excluded because defendant was not represented by counsel; other evidence of guilt said to be overwhelming).

Aside from the deterrence factor, and solely on the question of prejudice, is not defendant always prejudiced by the introduction of "tainted evidence." If he were not, why did the prosecution, knowing there is an admissibility problem—ordinarily, of course, one must object to save one's rights—take a chance on introducing it? The best statement of this point will be found in Coggins v. O'Brien, 188 F.2d 130, 139 (1st Cir. 1951): "I take it that such a constitutional claim is not to be defeated merely because there may have been other evidence, untainted, sufficient to warrant a conviction; that the burden is not on the petitioner to show a probability that in the jury's deliberations the perjured evi-
V. WONG SUN, CORPUS DELICTI AND EVIDENCE QUESTIONS

Aside from arrest and search questions which are now momentarily laid aside, it will be recalled that Mr. Justice Brennan likewise grappled with corpus delicti and partner-in-crime declaration problems. After excluding Toy's bedroom statements and the narcotics derived therefrom, the only proofs remaining against Toy were his and Wong Sun's unsigned statements. And these, the Court held, were not enough. This conclusion was said to flow from "two clear lines of decisions which converge to require it. One line ... establishes that criminal confessions and admissions of guilt require extrinsic corroboration; the other line of precedent holds that an out-of-court declaration made after arrest may not be used at trial against one of the declarant's partners in crime."226 As a matter of fact, only one line of precedent "required" this as to Toy; the other did not, let alone "clearly." By reason of his approach, however, Mr. Justice Brennan appears to have made new law in both areas and, indeed, inferentially raised a serious question concerning the present virility of a related line of decisions, which, however indefensible, have long been regarded as almost untouchable by courts and commentators alike.

It is, of course, true, as Mr. Justice Brennan preliminarily observes, that "[i]t is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission of the accused"227 and that Toy's statement alone accordingly would not suffice to convict him.

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226 See text at note 161 supra.


228 Wong Sun v. United States, 83 Sup. Ct. 407, 418 (1963). Many state courts, furthermore, are far more strict in this regard than the United
It is somewhat misleading, however, for him to hold, as he does, that the Court's decision in *Smith v. United States* that "corroboration is necessary for all elements of the offense established by admissions alone," necessarily controls in narcotics cases such as those of Toy and Wong Sun where proof of possession is by statute sufficient to convict unless such possession be satisfactorily explained. *Smith*, *Opper* and the other cases upon which Mr. Justice Brennan relies are tax fraud cases in which the corpus delicti is always "intangible" (defendant's corrupt state of mind) rather than "tangible" (homicide, for example) and where, if the extrinsic corroboration rule is to mean anything at all, must necessarily include the identity of the defendant as the perpetrator. There is, however, nothing "intangible" about possessing dope. One either does or does not and that ends it, at least normally. The statute takes care of the "intangible" state of mind issue. Where, however, as in the Toy and Wong Sun cases, the government seeks to convict on a theory of "constructive" possession, the guts of the government's case against both lies in showing that they at least knew that somebody with whom they were criminally connected in a narcotics transaction had the actual possession. Accordingly,

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228 *348 U.S. 147 (1954).*


230 *Opper v. United States, 348 U.S. 84 (1954).*

231 *E.g., United States v. Calderon, 348 U.S. 160 (1954).*

232 In murder and voluntary manslaughter cases, for example, the vast majority of the courts have held that the corpus delicti consists only of two elements: (1) the loss (in these cases, of course, the body); and (2) the criminal agency of another, but not necessarily the defendant, as the means. *E.g., Gallegos v. State, 152 Neb. 831, 43 N.W.2d 1 (1950); with which compare Hoffmam v. State, 160 Neb. 375, 70 N.W.2d 314 (1955); Downey v. People, 121 Colo. 307, 215 P.2d 892 (1950); Warmke v. Commonwealth, 297 Ky. 649, 180 S.W.2d 872 (1944). Compare State v. Bennett, 6 S.W.2d 881, 883 (Mo. 1928) with State v. Joy, 315 Mo. 7, 285 S.W. 489 (1926). And see State v. Jones, 150 Me. 242, 108 A.2d 261 (1954).*

233 The statute in question is set out in note 30 supra.

234 United States v. Kapsalis, 313 F.2d 875, 878 (7th Cir. 1963) clearly recognizes the difference between a case where the government seeks to show present or past possession in the defendant himself, and where the government seeks to prove past possession on basis of an inference to be drawn from defendant's illicit connection with someone else who is shown to have had the actual possession. See also Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962); Robinson v. United States,
while Smith, Opper and the other tax fraud cases do not, as Mr. Justice Brennan would have us believe, necessarily require extrinsic evidence of such "knowledge" sufficient to induce reliance on the truth of petitioners' confessions, the policy underlying such cases is undeniably involved. This, of course, because, if the extrinsic corroboration rule is to have any bite at all in such cases, it must cover the vital question of "knowledge," or, to put it as many have, the corpus delicti in such cases includes the identity of the defendant as the perpetrator. The defendant in question must be shown to have had the required knowledge by extrinsic evidence which is at least sufficient to induce belief in the reliability of his extra-judicial confession of knowledge. For if it were otherwise the government would in effect be convicting the defendant on the basis of his uncorroborated confession alone in violation of the "fundamental principle" to which Mr. Justice Brennan makes reference at the outset of his discussion.

Perhaps the point can be clarified by an illustration drawn from other than a tax or narcotics case. Suppose, for example, a defendant charged with aiding and abetting the interstate transportation of a stolen auto knowing it to be stolen. There is extrinsic proof both that defendant drove the car interstate and that the car was stolen, but the only proof that defendant knew it at the time consists of an extra-judicial confession. Here the core of the government's entire case is to show that defendant "knew" the car was stolen. To allow a conviction merely on the basis of an extra-judicial confession of such knowledge would in effect be to junk the extrinsic evidence requirement altogether and to permit a conviction merely on the basis of an uncorroborated out-of-court confession. The case supposed is extremely close to the cases of Toy and Wong Sun. For the core of the cases against them, just as against our hypothetical Dyer Act defendant, is what they "knew." And unless they are shown by extrinsic evidence to have had such knowledge they will be put in jail merely on the basis of their extra-judicial confessions. While Mr. Justice Brennan unquestionably perceives this, his opinion on the point is for some reason intentionally made ambiguous.

To return now directly to Toy. The only possible source of corroboration of his confession was Wong Sun's confession implicating him. And that statement, the Court held, was inadmissible against

263 F.2d 911 (10th Cir. 1959); United States v. Calhoun, 257 F.2d 673 (7th Cir. 1958).

235 But see the heated discussion of the point in Smyly v. United States, 287 F.2d 760 (5th Cir. 1961).
Toy. This was because of the "second governing principle," said to be "likewise well settled in . . . [the Court's] decisions . . . that an out-of-court declaration made after arrest may not be used at trial against one of the declarant's partners in crime." While the Court's ruling itself is unexceptionable, the statement just quoted is one of the best examples of unadulterated and obviously intentional judicial license to come from the Court in years. For, far from being "well settled," the principle in question is not supported by a single Supreme Court ruling.

The best Mr. Justice Brennan could do was a quotation from *Fiswick v. United States*, a conspiracy case containing dicta concerning the inadmissibility of post-arrest co-conspirator declarations. This particular dicta, however, was not quoted. Mr. Justice Brennan instead chose to quote *Fiswick's* actual holding that a confession or admission of a co-conspirator is "'admissible against the others [only] where it is in furtherance of the criminal undertaking . . . [and] all such responsibility is at an end when the conspiracy ends.'" Toy and Wong Sun, of course, while indicted for conspiracy, were acquitted on that charge. Accordingly, the quotation from *Fiswick* is made do for a non-conspiracy case and then extended further to what appears to be the Court's ruling that any post-arrest declaration by one's non-conspiratorial (and, a fortiori, one's conspiratorial) associates is, as a matter of law, not made in furtherance of the criminal association and is hence inadmissible against anyone but the declarant himself. Authority for this later ruling is entirely absent and recent lower federal court decisions hold squarely to the contrary.

Furthermore, the Supreme Court decision most closely in point likewise goes the other way. The case in question, *Pinkerton v. United States* holds that a defendant can be convicted both of

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238 The Court did, however, cite the page. The dicta follows: "Moreover, a confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it." Id. at 217.


240 United States v. Agueci, 310 F.2d 817 (2d Cir. 1962); Poliafico v. United States, 237 F.2d 97 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957).

241 323 U.S. 640 (1946). The close relationship between *Pinkerton* and the problem under discussion is expressly recognized in United States v. Agueci, 310 F.2d 817, 839 (2d Cir. 1962).
conspiracy and of substantive offenses committed pursuant thereto merely on proof that he at one time agreed with his brother to engage in moonshine operations notwithstanding that he was in jail when the substantive offenses were committed by his brother, and though he had no knowledge of his brother's substantive offenses and in no way profited from them. The Court's ruling in Wong Sun seems a fortiori to require Pinkerton's overruling. For Wong Sun deals only with a post-arrest incriminatory declaration by one's criminal associate which may or may not lead to one's conviction. If that declaration is, as Wong Sun appears to hold, inadmissible as a matter of law because the criminal association ends with one's arrest, how can one possibly be convicted of substantive crimes committed pursuant to a conspiracy when there are only two parties to the conspiracy and one is in jail when the substantive offenses are committed, and he likewise has no knowledge of them? The answer is that he cannot, and that Pinkerton accordingly must go. 242 The case is vicarious criminal liability gone wild and, aside from Wong Sun, seems in any event previously to have been doomed by such cases as Lambert, 243 Smith 244 and Robinson. 245

The corroboration problem in relation to Wong Sun, of course, is different than for Toy as the heroin was held lawfully admitted against Wong Sun. However, since Toy's statement incriminating Wong Sun was made after his arrest, it was inadmissible under the ruling above discussed 246 and, as it might have tipped the scales

242 The Pinkerton case is discussed in an excellent Comment, Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920, 993 (1959).

243 Unfortunately, some courts have even carried Pinkerton beyond Pinkerton. See, e.g., Adverson v. Superior Court, 78 Cal. App. 2d 22, 177 P.2d 315 (1st Dist. 1947); People v. Cohen, 68 N.Y.S.2d 140 (Co. Ct. 1947).


246 Robinson v. California, 370 U.S. 660 (1962). In addition to Robinson and the cases cited in the two preceding notes, it should be noted that tort law "proximate cause" cases are coming more and more expressly to be rejected by the courts in deciding criminal cases. See, e.g., Commonwealth v. Root, 403 Pa. 571, 170 A.2d 310 (1961). And tort law concepts, of course, are at the basis of Pinkerton.

247 It should be noted that the Court did, at least in one respect, concede that it was making new law in the partner-in-crime post-arrest declaration area: "We have never ruled squarely on the question presented here, whether a codefendant's statement might serve to corroborate even where it will not suffice to convict. We see no warrant for a different
in favor of conviction, Wong Sun was awarded a new trial. Unfortunately, the Court was unwilling to hold that the narcotics were insufficient as a matter of law to corroborate Wong Sun's confession. While admittedly the case is a close one, the crucial issue is still what Wong Sung "knew" of Yee's possession of narcotics. Mere proof that Yee was found to have heroin in his possession which, so far as Wong Sun's statement and the Court's opinion disclose, was not in any way shown to be connected with Wong Sun, seems insufficient extrinsic evidence of that knowledge. The Court, however, was clearly of a different mind. The trial court would be allowed to go either way.

One final point. The Court fails to mention Yee's statement to certain agents at the Bureau of Narcotics that he had purchased the heroin from Toy and Wong Sun four days previously. As to Toy, of course, this is easily explained since Yee was found only because of Toy's inadmissible bedroom statements. Why the statement was not considered as to Wong Sun, however, is unclear. Two possibilities immediately suggest themselves. The first is that such statement was admitted under the co-conspirator declaration exception to the hearsay rule and, since Wong Sun was acquitted of conspiracy, the statement fell with the acquittal. The second is that Mr. Justice Brennan simply did not want to throw mud on his newly created rule concerning post-arrest declarations of partners in crime. The case as to Yee's statement is far more difficult than the Wong Sun and Toy statements since Wong Sun had not yet been arrested when Yee talked and the non-conspiratorial criminal association was, so far as Wong Sun knew, still in business. The various pedagogical uses to which all of this can be put are both numerous and varied. A few of the possibilities are suggested by the case cited below.\textsuperscript{248}

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\textsuperscript{248} See, e.g., People v. Bongiorno, 358 Ill. 171, 192 N.E. 856 (1934) (arrest as terminating responsibility for post-arrest felony murder of arrestee's non-arrested confederate); People v. Walsh, 262 N.Y. 140, 186 N.E. 422 (1933) (same); see generally Note, 47 Iowa L. Rev. 1116 (1962); Platt v. State, 143 Neb. 131, 8 N.W.2d 849 (1943) (acquittal of one member of two man conspiracy in separate trial does not bar subsequent conviction of other); Nigro v. United States, 117 F.2d 624 (8th Cir. 1941) (same but contra to Platt); Sherman v. State, 113 Neb. 173, 202 N.W. 413 (1925) (acquittal of one member of two man conspiracy in same trial requires...
VI. WONG SUN'S APPLICATION TO THE STATES: SOME GENERAL CONSIDERATIONS

The principal question raised by Wong Sun—whether and to what extent it rests on constitutional grounds and is applicable to the states—has, in the main, been reserved for consideration until now. Some of it, of course, obviously does not, those portions of the opinion dealing with post-arrest declarations, for example, and with the quantum and nature of the extrinsic proof necessary in order to establish the corpus delicti in "tangible" as compared with "intangible" crimes. Also clearly in the non-constitutional category, even for federal criminal prosecutions, is the Court's suggestion that "flight evidence" may no longer be admissible to show defendant's consciousness of guilt.

Beyond this, so far as the states are concerned, there is some doubt, but it is the position here that the remainder of the opinion, dicta as well as actual rulings, is based entirely on the fourth amendment and applies both to the federal government and to the states. So far as legality of arrest questions are concerned, of course, the Court expressly says that Wong Sun rests on the fourth amendment. There can be no question either that Rules Three and Four of the Federal Rules of Criminal Procedure are fourth amendment requirements for, again, Mr. Justice Brennan expressly says so. Indeed, so far as federal criminal prosecutions are concerned, the only really doubtful question is whether § 18-3109 together with its Miller and Wong Sun extensions, is part of the fourth. This question, of course, has already been considered and, on balance, the answer seems to be affirmative.

However, the careful reader of Wong Sun may object that the Court's extension of Silverthorne to cover voluntary oral incrimination rests solely on the Court's supervisory power over federal criminal prosecutions. And, indeed, superficial support for such a view can be drawn from Mr. Justice Brennan's choice of language in making the extension:

Either in terms of deterring lawless conduct by federal officers, Rea v. United States, 350 U.S. 214; or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, Elkins v. United States, 364 U.S. 206, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction.

See generally Developments in the Law: Criminal Conspiracy, supra note 242, at 972.

249 See text at note 80 supra.

The cases cited in the above quotation, of course, do rest on a supervisory power rationale and the Court speaks in the quotation only of "federal officers" and "federal courts."

Nevertheless, policy considerations aside, there is an abundance of internal evidence in Wong Sun itself ample to overcome any "supervisory power" inference which might otherwise be drawn from the quotation. First of all, just preceding the quotation, the Court speaks of Silverman, a fourth amendment case, and just before Silverman, of Boyd, a fourth amendment case, and just before Boyd, of Weeks and Silverthorne itself, all of which cases were in Mapp found to contain language placing the exclusionary rule on a constitutional basis. And, if this were not enough, the Court, in discussing Silverman, expressly refers to "the Fourth Amendment" saying that it protects against seizure of "verbal statements" as well as against "the more traditional seizure of 'papers and effects.'" Moreover, the Court characterizes any distinction between the two types of evidence as "[i]llogical." Finally, and perhaps most important from the standpoint of internal proof, is footnote twelve, where, in the very process of extending Silverthorne to verbal voluntary incrimination, Mr. Justice Brennan observes that "[e]ven . . . where an exclusionary rule rests . . . on non-constitutional grounds . . . we have sometimes refused to differentiate between voluntary and involuntary declarations." As is apparent from the Court's citation to an article dealing with McNabb-Mallory, that is the rule referred to and it is, of course, one which has traditionally been rested on a supervisory power theory. But the necessary negative implication from the footnote is that the Court, in extending Silverthorne to voluntary oral incrimination, was doing so on constitutional grounds. A careful re-reading of the language in question will make this clear. Any thought that Silverthorne and its extension to voluntary verbal incrimination were intended by the Wong Sun majority to rest on other than fourth amendment grounds seems almost completely baseless.

254 Silverthorne v. United States, 251 U.S. 385 (1920).
255 See Broeder, supra note 2, at 196.
257 Id. at 417. (Emphasis added.)
258 This is not perhaps altogether accurate. The Court may also have been intending to go on fifth amendment grounds. Certainly this is the implication from the Court's limited standing rule. See text at note 181 supra. And see Section X infra.
Excluding those rulings and dicta referred to at the outset of this section and with the possible exception of Miller, there is not the slightest suggestion in Wong Sun that the Court was writing other than in fourth amendment terms. And this is true not only of the Court's discussion of illegal arrest, search and standing problems and of evidence derivatively acquired from illegal arrests and searches but of everything else, including the footnote mud Mr. Justice Brennan rightly chose to throw on Rabinowitz.\textsuperscript{239}

Accordingly, since Wong Sun fails even once to cite Mapp,\textsuperscript{260} the only remaining question in this regard is whether the fourth amendment means one thing for the states and another for the federal government. While attempts have been made by several capable commentators to show that it does and/or that it \textit{ought to}\textsuperscript{261} and while several state courts\textsuperscript{262} have taken this view, most courts\textsuperscript{263}


\textsuperscript{261}E.g., Collings, \textit{supra} note 2, at 42; Traynor, \textit{supra} note 2, at 327; Weinstein, \textit{supra} note 2, at 164-65. The argument, in sum, goes something like this: Local problems are different than those encountered by the F.B.I. and the District of Columbia police and are therefore better handled by local judges. How they are different than those encountered by the District of Columbia police, I do not understand, but, to the extent that they are different from those dealt with by the F.B.I., I think the answer has best been put by the distinguished Justice Schaefer of Illinois: "The more remote the court, the easier it is to consider the case in terms of a hypothetical defendant accused of crime, instead of a particular man whose guilt has been established." Schaefer, \textit{Federalism and State Criminal Procedure}, 70 Harv. L. Rev. 1, 7 (1956). It is, of course, also argued that some of the Court's decisions are wrong. Maybe so, but I would rather debate this case by case.


\textsuperscript{263}Commonwealth v. Spofford, 180 N.E.2d 673 (Mass. 1962); Belton v. State, 228 Md. 17, 178 A.2d 409 (1962); People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478 (1961) (this may be stretching \textit{Loria}). The Nebraska Supreme Court does not seem to have yet squarely taken a position. Chief Justice White, however, while a District Judge, took the view that federal decisional case law controlled. A careful and well-reasoned opinion, there is no question of where he stood though he did pull a pun in deciding the issue. In response to the State's argument that state law rather than federal law controlled, he had this to say: "The confusion of holdings cited by the State in this respect [that state law applied] only makes more forceful one of the prime reasons for the Mapp
and commentators264 have not and, indeed, with all respect, it is submitted that any such position is untenable.265 For, in the first place, as Wolf long ago held, the fourth amendment is implicit in the "concept of ordered liberty" and thus applicable to the states through the due process clause of the fourteenth amendment. It is, in sum, a federal right designed to protect against official lawlessness on the state as well as the federal level. But while Wolf granted the right and withheld the remedy, Mapp held the remedy to be inseparable from the right and, indeed, that the scope of the right is only as broad as that of the remedy. Accordingly, to permit the states individually to adopt exclusionary rules narrower than the one constitutionally deemed necessary by the United States Supreme Court for federal criminal prosecutions is to grant the states power to amend the fourth amendment itself. Such a proposition is absurd on its face.

It would also prove completely unworkable in practice. For, once adopted, the Court would continually be faced with the problem of how much amending would be allowed and we would, in almost no time, be back to the impossible vagaries of the Rochin—Irvin—Breithaupt era. It must likewise be remembered that the Court can take only so many fourth amendment cases each term and much remains to be done in the area. Accordingly, if we are ever to get a coherent body of arrest and search law, the Court's fourth amendment precedents in federal cases must necessarily control state cases as well.

Moreover, the notion that one's federally protected constitutional right of privacy means one thing when he is in State A, an-

holding, namely, to destroy variability and to establish equality and uniformity. If the exclusionary rule has constitutional origins, then its mandate must equally apply to every citizen in the United States, irrespective of the variation in State holdings. When Mapp snapped the jaws of Wolf shut, they closed not on the tail of the State dog but on its throat as well." State v. Wallin, Memorandum Opinion on Motion to Dismiss, pp. 9-10 (Doc. 15, p. 173, Jan. Term of the Dist. Ct. of Lancaster County, Neb. 1962). See note 52 supra.

264 See e.g., Allen, supra note 2, at 46; Broeder, supra note 2, at 203; Kaplan, supra note 2, at 503.

265 Probably by the time this article is printed the issue will finally have been laid to rest. The Supreme Court granted certiorari on the question in Kerr v. California, 368 U.S. 974 (1962) and oral argument was had on December 11, 1962. See 31 U.S.L. Week 3202 (1962).


other while he is vacationing in State B and yet another depending on who happens to arrest him and/or search his person or premises—a State A officer, a State B officer or a federal officer—is nothing short of ridiculous. Either one has a right of privacy constitutionally protected from federal and state interference or he does not. *Mapp* holds that one does. How, then, can fortuities such as those just mentioned possibly affect its measure and scope? To ask the question is virtually to answer it.

However, should the states within limits be allowed to water down the fourth amendment, federal policy will often be frustrated for evidence unconstitutionally turned up by a federal officer and subject to exclusion under the federal exclusionary rule could many times be used in criminal prosecutions in states not choosing to follow federal precedent. Generally unprovable "working arrangements" would spring up and the Court would not be able effectively to control even federal officers. Similarly, evidence seized by a state officer in a state following federal exclusionary precedent and there subject to exclusion could be used in another state following less stringent admissibility standards. If so, the policy of the first state would be frustrated by that of the second, unprovable working arrangements would here also come into being and a host of unnecessary conflict of laws questions would arise. Recognizing the force of such considerations, the Michigan Court, reversing its pre-*Mapp* position, recently held in *People v. Winterheld*209 that federal exclusionary rule precedent controlled in Michigan even where the arrest and seizure of evidence were made outside Michigan by the police of another state. Previous to *Mapp*, Michigan, though following an exclusionary rule, refused to apply it where the unconstitutional official conduct occurred in another state by officers of such other state. The theory underlying that view was that Michigan's exclusionary rule was merely court-created and designed to effectuate the guarantees of the Constitution of...[Michigan]. With respect to acts...[outside Michigan], by officers of another State, such guarantees do not

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209 *People v. Winterheld*, 359 Mich. 467, 102 N.W.2d 201 (1960); accord, *State v. Olsen*, 212 Ore. 191, 317 P.2d 938 (1957) (evidence illegally seized by police of another state admissible in Oregon even though inadmissible if seized by Oregon policeman). These, and similar cases, go largely on the theory that the officers of another state are like private persons, or something in the nature of a dual sovereignty doctrine is applied. *Compare* *Hanna v. United States*, 260 F.2d 723 (D.C. Cir. 1958).

extend to them and, hence, the reason for the rule in that regard disappears, and, with it, the rule. 271

Aside from the point Winterheld actually decides, of course, obvious questions are raised concerning the continued vitality of Bur- deau v. McDowel 272 and of the present status of the Court's large body of precedent concerning "dual sovereignty" in the involuntary confession 273 double jeopardy 274 and privilege against self-incrimination 275 areas.

The point is not, as at least one writer has assumed, 276 that absolute uniformity is required; states can always demand more of their police than the fourth amendment requires. The point is rather that they cannot demand less. There is a uniform federal constitutional minimum. And its measure is to be found in Supreme Court decisions defining both branches of the fourth amendment, its scope and its accompanying exclusionary rule remedy, in cases involving federal as well as state criminal prosecutions.

Policy considerations aside, however, Wong Sun itself virtually compels the conclusion that Mr. Justice Brennan was writing for state as well as for federal criminal prosecutions. It is, for example, difficult to believe that the Court would, in the light of existing precedent, have ruled as it did on the question of Wong Sun's standing if the only concern was federal criminal cases. More important, however, is the point that one of Mr. Justice Brennan's gratuitous footnotes almost certainly puts McNabb-Mallory on a constitutional footing and applies the rule to the states through the due process clause. 277 Surely an opinion doing this cannot fairly be read, so far as fourth amendment questions are concerned, as applying merely to federal criminal prosecutions.

One final point and this one, I think, a clincher. There had, particularly since Wolf, been a sharp division of opinion among the Court's membership on the broad question of whether, when a

274 See Section X infra.
275 Ibid.
276 Collings, supra note 2, at 427.
277 See Section VII infra.
given Bill of Rights' guarantee is applied to the states through the due process clause, such guarantee necessarily has the same content in relation to the states as in relation to the federal government. In recent years the affirmative position has most often been argued by Mr. Justice Brennan, the negative by Mr. Justice Harlan. The contest, while perhaps still in doubt when Wong Sun was written, seems definitely now to be over. *Gideon v. Wainwright*,278 overruling *Betts v. Brady*279 (a classic example of the Harlan approach and a pointed illustration of its hazards) and applying the sixth amendment's right of counsel guarantee in its full extent280 to the states through the due process clause leaves no doubt that Mr. Justice Brennan's position has at long last finally prevailed. Mr. Justice Black, long an adherent to such position, wrote for the *Gideon* majority and was joined by six other Justices. Mr. Justice Harlan concurred only in the result saying that he did not understand the majority to hold "that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such."281 With all deference, however, Mr. Justice Harlan's "understanding" is patently erroneous. For if Mr. Justice Black's opinion in *Gideon* decided anything, it is exactly that.

Concurring in *Gideon*, Mr. Justice Douglas summed up the result of the long debate as follows:282

My Brother Harlan is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government. Mr. Justice Jackson shared that view. But that view has not prevailed and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

Accordingly, the fourth amendment together with the exclu-


279 316 U.S. 455 (1942).

280 This "to its full extent" approach pervades the majority opinion by Mr. Justice Black. The following language is perhaps the most explicit on the point: "We think the Court in Betts had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." *Gideon v. Wainwright*, 83 Sup. Ct. 792, 794 (1963). (Emphasis added.) And then the Court went on to hold that *Betts* was wrong in holding that the right to counsel guarantee was not one of those rights.

281 Id. at 799, 801.

282 Id. at 797, 798.
sionary rule which *Mapp* found to be at its heart and applicable to the states through the due process clause means for the states exactly what it means in relation to the federal government. The conclusion that *Wong Sun*'s fourth amendment rulings and dicta were intended both for the states and for the federal government seems inescapable.

VII. THE SCOPE AND EXTENT OF THE McNABB-MALLORY RULE

The proposition that *Wong Sun* was the vehicle chosen by the Court to indicate that the *McNabb-Mallory* rule now rests on constitutional grounds and applies to the states through the due process clause has, of course, herein repeatedly been advanced. Traditionally based on the Court's "supervisory power" over federal criminal prosecutions, *McNabb-Mallory* requires the exclusion of any and all voluntary incriminating statements and/or acts of the accused while detained in violation of Rule 5 (a) of the Federal Rules of Criminal Procedure. Presumably, also, any consent

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284 Mallory v. United States, 354 U.S. 449 (1957). The purpose of the rule, of course, is to force police compliance with 5(a) and to assure the arrestee the hearing provided for by 5(b) as well as a prompt preliminary examination.
286 Rule 5 provides as follows:

"(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

"(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall
to search given during such period is likewise invalid and requires the exclusion of evidence obtained pursuant thereto.\textsuperscript{287} Fingerprint evidence, chalk line walking, "mug" shots and line-up identifications made of the suspect while so detained would be a fortiori excludible.\textsuperscript{288} Evidence of this sort is not in any meaningful sense even "voluntary." Whether, in the case of an illegal line-up identification, the person making such identification is thereby also barred from identifying defendant at the trial, however, has not, as before noted,\textsuperscript{289} yet authoritatively been determined. Likewise in doubt is the extent to which, if at all, fingerprint evidence obtained during illegal detention may be used outside court to obtain a valid set of prints.\textsuperscript{290}

Again, McNabb-Mallory was held in at least one case to preclude the admission of any evidence seized or observations made by federal officers subsequent to the time defendant was required to be taken before a magistrate. The officers in question, after lawfully arresting defendant in his apartment, remained there past the permissible period and thereby obtained incriminating evidence. The Court's language excluding such evidence was extremely broad: "[W]e think that [McNabb-Mallory] extends to all evidence obtained by federal agents through access to persons while detained in violation of Rule 5 (a)."\textsuperscript{291}

Whether Silverthorne applies in the McNabb area to bar evidence derivatively acquired from a 5(a) violation is the subject of conflicting federal court decisions,\textsuperscript{292} a circumstance in large part hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. . . ."


\textsuperscript{288} See text and notes 165-170 supra.

\textsuperscript{289} Ibid.

\textsuperscript{290} Ibid.


\textsuperscript{292} That it does not apply, see Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960); United States v. Morin, 265 F.2d 241, 245-46 (3d Cir. 1959). That it does, see Armprister v. United States, 256 F.2d 294, 296-97 (4th Cir. 1958); United States v. Klapholz, 230 F.2d 494 (2d Cir. 1956).
doubtless attributable to Mr. Justice Jackson's unfortunate dicta in *Bayer* that *Silverthorne* does not apply. Not to apply *Silverthorne*, of course, is substantially to destroy *McNabb-Mallory* altogether and, recognizing this, a few courts have had the fortitude to anticipate the Supreme Court's eventual disapproval of *Bayer*'s dicta and to apply *Silverthorne* in spite of it.

The allied problem raised by the so-called "consecutive confession cases" is as unsettled in the *McNabb* area as in the involuntary confession field. However, once a confession or admission is shown to have been obtained during a period of illegal detention under 5(a), recent precedent tends to exclude all subsequent reaffirmations and/or confessions or admissions relating to the same offense notwithstanding that the suspect has been taken before a magistrate and advised of his rights in the meantime. The post-arraignment statements now appear admissible only on proof that the suspect was aware at the time of making them that his initial confession or admission was possibly or probably inadmissible because obtained during an illegal detention. It is difficult to quarrel with this. Indeed, were it not for the dicta in *Bayer*, a lower federal court decision to the contrary would be utterly indefensible.

And see Jackson v. United States, 313 F.2d 572 (D.C. Cir. 1962); Watson v. United States, 249 F.2d 106, 109 (D.C. Cir. 1957).

Actually, *Mallory*, at least when the record itself is read along with the opinion of the Court of Appeals, involved not only the exclusion of a voluntary statement made during a period of illegal detention but also certain physical evidence seized as a consequence thereof. There is a full discussion of the point in Kamisar, * supra* note 19, at 97, n.87.


293 See cases cited note 292 * supra*.

294 As to the consecutive confession cases in the involuntariness area, see Kamisar, * supra* note 19, at 98.

295 The progressive liberalization of the precedent can be seen from the following cases: Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960); Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960), cert. denied, 366 U.S. 941 (1961); Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962); and, finally, Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962), reversing United States v. Killough, 193 F. Supp. 905 (D.D.C. 1961). Indeed, the *Killough* case indicates a willingness to re-examine the entire "fruits doctrine" and perhaps to apply it in the *McNabb* area as fully as it is applied in the fourth amendment area. Indeed, several of the judges wanted to do so in *Killough* itself. See generally Note, 51 Geo. L.J. 394 (1963).

Actually, as will be shown later, even the most liberal McNabb-Mallory decisions, particularly those relating to post-arraignment interrogation, fall far short of the mark.

What, then, does Rule 5 (a) mean? Only the basic interpretative configurations will be noted. And Mallory, the Court's latest pronouncement on the question, necessarily provides the starting place. Writing for a unanimous Court, Mr. Justice Frankfurter clearly outlawed any delay solely for the purpose of interrogation and stated that 5 (a) allowed "little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." Furthermore, the words "without unnecessary delay" in Rule 5 (a) were said to mean "as quickly as possible." Thus, a majority of federal lower court opinions to the contrary notwithstanding, it would be no excuse for delay that the arrest occurred at 2:00 a.m. when the nearest available magistrate was asleep or on a Saturday afternoon or on a Sunday or at any other time when it might prove inconvenient or embarrassing to contact him.

How could it be otherwise? Jail is always uncomfortable and one, whether innocent or not, is typically dealt with by police as a hardened criminal. Once arrested, he is searched, "mugged" and fingerprinted and most jailors automatically assume guilt, and that serious. Punishment in their minds is required and likewise the necessity for blind, instant obedience to their commands. The food in local jails is rotten—one is permitted no other—and coffee and soft drinks are hardly available on demand. Lavatory conditions are disgusting and prisoners are typically deprived of the right even to smoke and to make purchases to accommodate their special needs. One may lose his job if not immediately released, and he is in any event without family or friends to comfort him. Often they will not even be notified of his arrest. Small wonder then that serious psychological damage occurs to some persons after only a few hours behind bars.

To make the arrestee's length of permissible legal detention turn on the often fortuitous circumstance of the time of day or night he happens to be arrested or on the type of day it is (Sunday, holiday or otherwise) makes for utterly unnecessary inequality among arrestees. Furthermore, for harassment purposes, police will, if

298 See text at note 401 infra.

allowed to, sometimes arrest on a day or in the middle of the night when they know a magistrate will not conveniently be available.

It is to be remembered, too, that we are speaking of persons presumably innocent; indeed, they may be and often are unlawfully under arrest and it is one of 5(a)'s most important purposes to get a judicial determination of that issue "as quickly as possible." As Mallory expressly states:

The police may not arrest upon mere suspicion but only upon 'probable cause.' The next step in the proceeding is to arraign the arrested person as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined.

Accordingly, it is difficult to escape the conclusion that it is the duty of the police to call the magistrate no matter what the hour or the nature of the day and the duty of the magistrate, it may be, to get out of bed and promptly to arraign. And this much (notwithstanding much lower court precedent to the contrary) was conceded by government counsel in oral argument in Mallory before the Court of Appeals. Indeed, if the call or calls not be made and/or the available magistrate or magistrates arbitrarily refuse promptly to appear, it is arguable that Mallory would require the exclusion of even an unsolicited voluntary statement not in any way the product of official interrogation.

While Mallory states that the arrestee may be taken to the police station and "booked" before being arraigned, the opinion at no point even remotely suggests, even by implication, that the police may lawfully interrogate him after his arrest either on the way to the station and/or while he is being booked and arrangements made in order to get him before a magistrate "as quickly as possible." Indeed, the Court, on any fair reading of the opinion, strongly implies just the opposite. The Court's only reference to a legally permissible delay for investigative purposes and even that, the Court stressed, could be but a "brief" one, was "where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession."

Again, at another point, the Court stresses that "[i]t is not the function of the police to arrest, as it were, at large and to use an interrogating process ... in order to determine whom they should charge before a commit-

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ting magistrate on 'probable cause.'”303 Finally, Mallory notes that the accused “is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately the guilt.”304

Mallory, it is submitted, bars all post-arrest questioning by the police, at least prior to arraignment. Of course, lower federal court decisions do not support this reading but the lower courts detested McNabb also, and, indeed, had virtually extinguished it until the Court wrote Mallory. But if one reads the opinion as above suggested, he has at least some judicial company and that very distinguished.305 It is always comforting to know that one's views are shared by judges such as Bazel on and Edgerton, not only because of their richly deserved high judicial stature but also because they have, in the end, so often proved to be right.306

One final point, seemingly heretofore overlooked by commentators on Mallory. The decision was written not just for the District of Columbia, but for federal officers everywhere, from New York to California and for the sandhills of Western Nebraska. If Mallory is to be read as allowing interrogation of the arrested party from the time of his arrest until he gets before the magistrate, his federal protection will be less in rural areas than in urban. Farmers are certainly entitled to as much protection as apartment dwellers in a large metropolis.

So much, then, for this necessarily abbreviated preliminary tour of McNabb-Mallory's internal interpretative terrain. Now for the basic proposition itself: McNabb-Mallory rests on constitutional grounds, is applicable to the states and this is shown by Wong Sun itself.

Indeed, even had the Court failed to mention the rule by name, the proposition could, at least in the light of Mapp, be established

303 Id. at 456.
304 Id. at 454. (Emphasis added.)
306 See, as to Judge Edgerton, the collection and discussion of his opinions in BONTECOU, FREEDOM IN THE BALANCE: OPINIONS RELATING TO CIVIL LIBERTIES (1960). I am certain Judge Bazel on has been similarly honored, but I am unable at this writing to find the reference I have in mind.
by Wong Sun's fourth amendment rulings alone. For, when it is all over, the basic point is going to be this. Mapp held that tangible evidence seized by state or federal officers during the course of a search unconstitutional under the fourth amendment was by the authority of that same amendment inadmissible in both state and federal criminal prosecutions. Wong Sun extends Mapp considerably, first to cover unconstitutional arrests as well as searches, then to exclude not only tangible evidence seized or observations made incident to such arrests (and/or searches), but to voluntary oral incrimination resulting therefrom as well as evidence derivatively acquired from such voluntary oral incrimination. The point of both cases, but particularly of Wong Sun, is that there must be an effective judicially imposed and administered constitutional sanction—short at least of an outright grant of immunity—for one whose fourth amendment rights have been trampled upon either by state or federal officers.

Accordingly, the placing of McNabb-Mallory on fourth amendment grounds and extending it to the states becomes an a fortiori case. For the degree of interference with one's right of privacy—which has long been held to be at the core of the fourth amendment—is much greater in a typical illegal detention case under Rule 5(a) than in a typical unconstitutional search case—which, unlike Mapp, will probably involve an automobile or public office rather than a private home—and is far less still than that involved in an unconstitutional arrest case which may last for only a moment though usually, of course, for a greater period.

Unconstitutional arrests, however, do not always (perhaps not even usually) involve jailing and the same may be said of unconstitutional searches. Again, the injury to reputation in many unconstitutional arrest and search cases may be minimal or even non-existent. In contrast a 5(a) violation almost inevitably means irreparable damage to reputation and confinement behind bars in a local jail under revolting conditions without the benefit of family, friends or counsel. Indeed, as all available studies show, counsel for

307 While Mapp did not actually hold that evidence unconstitutionally seized by federal officers is inadmissible in a state criminal proceeding, that it is seems obvious not only as a matter of common sense but because of the Court's ruling in Rea v. United States, 350 U.S. 214 (1956), however battered some aspects of that ruling may be after Wilson v. Schnettler, 395 U.S. 381 (1961). See Broeder, supra note 2, at 193.

308 See generally on this point, Comment, 28 U. Chi. L. Rev., supra note 2, at 701.

indigent felony defendants are not likely to show up for weeks. One is subject to police discipline, denied the ordinary comforts of life and also by definition the opportunity even of having the legality of his arrest impartially determined by a judicial officer.

The length of pre-arraignment detention, whether or not legal as a matter of state law, furthermore, is generally considerable, often extending for days and sometimes for more than a week. At least this was the finding of the American Bar Foundation inquiry based on a study of actual police practices in Michigan and Wisconsin and predominately in Detroit and Milwaukee. While the final report has yet to appear, certain of the data have preliminarily been revealed in an illuminating article by Professor LaFave. Lengthy pre-arraignment detentions were likewise often found by Professor Barrett in his recent empirical study of police practices in various California communities. Lengthy pre-arraignment detentions seem likewise often to occur in Nebraska, and it is at least worth mentioning that Gallegos v. Nebraska, one of the Court's leading decisions refusing to apply McNabb-Mallory to the states, involved a fourteen day pre-arraignment detention in Nebraska and a total pre-arraignment detention of twenty-five days. And the purpose of secret pre-arraignment detention, it need hardly be mentioned, is to get the suspect to convict himself out of his own mouth.

For all the above reasons, it is submitted that pre-arraignment detention not only violates the fourth amendment as an unconstitutional seizure of the person and invasion of his right of privacy but is clearly a fortiori from the fourth amendment violations found by the Court in Mapp and more particularly in Wong Sun.

Having established that failure promptly to arraign an arrestee constitutes a fourth amendment violation, Mapp and Wong Sun require the creation of a constitutionally based and judicially administered remedy applicable to state as well as to federal criminal prosecutions. The obvious choice, virtually if not necessarily com-

310 Not all states have statutes requiring that an arrestee be taken before a magistrate as "quickly as possible" or "without unnecessary delay." Indeed, some states have no statutes whatsoever on the question. Again, the statutes greatly differ as regards their wording. Nebraska's analogue to Rule 5(a) is Neb. Rev. Stat. § 29-401 (Reissue 1956). See generally LaFave, supra note 309, at 332-35.

311 LaFave, supra note 309, at 335-43.


pelled by Wong Sun's extension of Silverthorne to cover voluntary oral incrimination, is the McNabb-Mallory rule. For, in a typical McNabb-Mallory case, the only evidence at issue is voluntary oral incrimination. In the light of Wong Sun's reliance on Professor Maguire's Evidence of Guilt, it may also be worthy of note that the author expressly comments in such book on the "obviously close" relationship between McNabb-Mallory and voluntary oral incrimination resulting from unconstitutional searches and seizures and this at a point only two pages removed from the passage of the book actually quoted by the Court.314

Again, Wong Sun's ruling that evidence derivatively acquired from voluntary oral incrimination following a fourth amendment violation is inadmissible also seemingly writes finis to Bayer's dicta that Silverthorne is inapplicable in the McNabb-Mallory field.

Be this as it may, there is no doubt that Wong Sun contains language which does everything but expressly state that Rule 5 (a) is now part of the United States Constitution and that McNabb-Mallory, designed to enforce it, is likewise constitutionally based and applies to the states as well as to the federal government.315 The language in question is to be found in footnote twelve, appended to the Court's text discussion of the "oppressive circumstances" present when Toy made his incriminating bedroom statements:

Even in the absence of such oppressive circumstances [referring to the bedroom situation], and where an exclusionary rule rests principally on non-constitutional grounds, we have sometimes refused to differentiate between voluntary and involuntary declarations. See Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L.J. 1, 26-27 (1958).

In the light of the Court's citation of the Hogan-Snee article, there can be no doubt that the exclusionary rule said "principally" to rest on "nonconstitutional grounds" is McNabb-Mallory. Accordingly, the Court's use of the word "principally" necessarily means that such rule likewise has a constitutional basis.

That this is so, of course, does not establish that the rule necessarily applies to the states; conceivably it could constitutionally be

315 In addition to the much better argument relied upon in the text, one can also say this on the basis that Wong Sun expressly states that Rules 3 and 4 of the Federal Rules of Criminal Procedure are now part of the fourth amendment. And Rule 4(b) (1) and (4) expressly provide that the arrested party be brought before a magistrate pursuant to Rule 5. See note 4 supra and accompanying text discussion.
based and yet only apply in federal criminal prosecutions. This possibility, however, becomes extremely remote, indeed, almost far-fetched, when one reads the entire Hogan-Snee article and particularly pages 26 and 27, the only two pages of the article to which the Court explicitly makes reference. For, in the first place, those pages say absolutely nothing about any distinction between voluntary and involuntary statements in the McNabb-Mallory field or, indeed, in any other. Rather they exclusively consist of an eloquent summation of the various considerations advanced by the authors in support of their central thesis which is that "Rule 5(a) [of the Federal Rules of Criminal Procedure is] a sine qua non in any scheme of civil liberties" and that it, along with the exclusionary rule devised by the Court to enforce it, deserves constitutional status in relation to both the states and the federal government. That the Court would have cited two pages of an article taking this position (which pages in no way support the statement immediately preceding the citation) without intending to endorse such position is inconceivable.

Lest the reader still have doubts, however, and because the considerations supporting the application of Rule 5(a) and McNabb-Mallory to the states likewise have relevance for predicting the Court's ultimate position on other constitutionally re-required pre-trial safeguards, it is necessary here at least briefly to examine them. Some are premised on the Constitution itself, others simply on the facts of life. The discussion of each consideration will be brief and a numbering technique is employed. The constitutional points are considered first.

A. CONSTITUTIONAL POINTS

Aside from violating the fourth amendment, as previously discussed, denial of prompt arraignment following arrest violates several other provisions of the United States Constitution intended to protect federal and state prisoners alike, as well as certain relatively clear-cut federal constitutional rights not specifically mentioned in the United States Constitution but which have evolved out of the Court's procedural due process and equal protection rulings.

(1) Denial of prompt arraignment following arrest involves an unconstitutional deprivation of the right to bail as guaranteed by the eighth amendment and due process of law.

The eighth amendment, which guarantees bail in all but capital cases where the "proof is evident and the presumption great," is designed to give content and meaning to the presumption of innocence basic to Anglo-American legal tradition, to allow the defendant an
opportunity to prepare his defense and, above all, to get him out of jail and out of the grasp of the police.\textsuperscript{317}

Judicial tolerance of police failure promptly to arraign not only guts the presumption of innocence but likewise authorizes punishment of a man before trial, indeed, usually even before a formal charge has been filed against him. While it is true that from one-third to one-half of all persons arraigned are financially unable to make bail,\textsuperscript{318} this scarcely justifies, on some kind of perverse equal protection rationale, the deprivation of bail to those who can afford it. Equal protection is involved, all right, but mainly in the sense that under present practice the decision of whether and/or when one is to have the opportunity of receiving bail is left in the hands of constables who make their decisions in terms of God knows what sort of subjective and judicially unknowable and hence uncontrollable criteria.\textsuperscript{319}

Equal protection is involved in another sense, too, as \textit{Griffin v. Illinois}\textsuperscript{320} and similar decisions\textsuperscript{321} make plain. While the bail concept to some extent does violence to the concept of equal protection, this hardly means that the eighth amendment is unconstitutional because of the fifth and fourteenth. Rather, in a society where wealth

\textsuperscript{317} Professor Warner shows how important the right to bail really was in the old days. While less important today, it is still one of our most precious rights. See Warner, \textit{In Investigating the Law of Arrest}, 26 A.B.A.J. 151 (1940); 31 J. Crim. L., C& P.S. 111 (1949).


\textsuperscript{320} 351 U.S. 12 (1956).

\textsuperscript{321} See, e.g., \textit{Lane v. Brown}, 83 Sup. Ct. 768 (1963); \textit{Draper v. State}, 83 Sup. Ct. 774 (1963) and cases cited therein. Judge Van Pelt's opinion in \textit{Geaminea v. State}, 206 F. Supp. 308 (D. Neb. 1962) is also of interest in this as in many other connections, particularly if one believes, as I do, that the principal responsibility for the enforcement of the criminal law, including the federal constitutional safeguards accorded to all criminal defendants, ought to rest with the states. But, as Judge Van Pelt notes in \textit{Geaminea}, Nebraska has not yet acted, at least as regards making clear the appropriate collateral attack channels for the assertion of federal constitutional claims. In the light of \textit{Fay v. Noia}, 83 Sup. Ct. 822 (1963), Judge Van Pelt's \textit{Geaminea} opinion deserves particular attention.
confers advantages even in criminal cases, the task is how to protect the men without it while according to the economically successful their undeniable constitutional right to employ their resources as they see fit. The teaching of Griffin is that the magistrate on arraignment should, whenever possible, release both rich and poor on their recognizances, but, where this is not feasible, to at least ensure that the poor man who cannot make bail will be put on a par with the man who can to the extent that the former may no longer be questioned without the consent and presence of counsel. This can readily be accomplished by an appropriate order in the commitment papers, the violation of which would then be punishable as a contempt of court. Certainly Griffin demands no less. For an intelligent man out on bail would scarcely—unless otherwise advised by counsel—for a moment consent to such questioning.

United States v. Carignan\textsuperscript{322} a McNabb-Mallory case, it must be conceded, impliedly teaches otherwise,\textsuperscript{323} but Carignan came along before Griffin and "equal protection", like "due process", is also an "evolving concept." Furthermore, Carignan is clearly wrong for still other reasons.

One final point as regards prompt arraignment, bail and equal protection. Currently, reliable empirical studies indicate that marginally indigent defendants able to post bond but financially unable to hire counsel will, in public defender communities, often be deprived of public defender representation and will instead be given the services of appointed counsel with little or no criminal law experience.\textsuperscript{324} Furthermore, such studies indicate that magistrates often set bond at a figure out of a marginally indigent defendant's reach as a sort of punitive quid pro quo for having to provide him with free legal services.\textsuperscript{325} Further to compound such inequities by allowing police questioning of indigents in the absence of counsel following formal commitment for trial is to make of equal protection a cynical legal belly-laugh.

(2) Denial of prompt arraignment is cruel and unusual punishment proscribed by the eighth amendment and due process of law.

\textsuperscript{322} 342 U.S. 36 (1951).
\textsuperscript{323} See text at note 403 infra.
\textsuperscript{325} Ibid.
To see this, one has only to read *Robinson v. California*, the first Supreme Court decision actually applying the cruel and unusual punishment clause to the states. While police failure promptly to arraign is hardly unusual, that is not the test under *Robinson*. The question is whether the challenged government practice is rationally adapted to a socially permissible end. Incommunicado jail detention without judicial authorization cannot meet that test. And surely no one could justifiably contend that jailing to interrogate fails to qualify as "punishment." Nor that it is not "cruel."

(3) *Failure promptly to arraign violates Article I, Sections 9 and 10 of the United States Constitution providing against Bills of Attainder.*

The essence of the Bills of Attainder clauses, as early explained by Mr. Justice Field, is that a man may not be punished without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.

While the clause is, as Mr. Justice Field indicates, primarily directed against legislative acts, the case of a policeman acting under color of government authority would appear to be a fortiori.

(4) *Failure promptly to arraign involves an unconstitutional suspension of the Writ of Habeas Corpus in violation of Article I, Section 9 of the United States Constitution.*

The clause in question provides simply that the "Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." The language makes no distinction between federal and state prisoners and, while it seems to be party line gospel among federal jurisdiction professors that

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328 Or so I am told by Prof. Lake and by every other federal jurisdiction man I know or whose work I have read. See, e.g., Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).
the Writ referred to in Section 9 reaches only federal prisoners, no court, and certainly not the Supreme Court of the United States, has ever so held. Accordingly, one may with propriety reject the professorial line in favor of common sense and the words of the Constitution itself.

Certainly the commission of an ordinary crime is neither an "Invasion" or a "Rebellion" and, even if it were, it is a serious question whether even the President of the United States could constitutionally suspend the Writ. Mr. Chief Justice Taney, in *Ex parte Merryman*,\(^2\) wrote that only Congress has such power. And if the President has not the power, it would seem odd that the framers should vest it with the village constable.

That jailing a man incommunicado suspends the Great Writ for all practical purposes admits of no doubt.

(5) Failure promptly to arraign violates an arrestee's due process right adequately to prepare for his defense.

This might not be so if the arrestee were given counsel immediately upon arrest who could then confidentially talk with the accused and investigate on his behalf. But this is not the life that police and prosecutors today practice. The usual case is deprivation of any assistance whatever during detention and, even in the exceptional case where the police allow an arrestee to call counsel, a conference is typically denied until the police are through with their interrogation. In the meantime valuable defense evidence may be lost and possible defense witnesses, often themselves criminals involved in the crime for which the arrestee stands accused, have disappeared.

Obviously relevant here are cases involving intentional or negligent government suppression or loss of evidence favorable to the defense which, under many cases, in the Supreme Court and otherwise, have been held to deny due process and to require automatic or almost automatic reversal.\(^3\) One federal court even dismissed an indictment on due process grounds where the government had

\(^2\)Taney 246, Fed. Case. No. 9,487 (1861).

negligently lost evidence which might possibly have been of use to the defense.331

While one might also argue that failure promptly to arraign denies one the assistance of counsel in violation of the sixth amendment (held in Gideon332 to apply in its full extent to the states), this would beg the as yet unresolved issue of when such constitutional right attaches. This issue is further explored below.333

(6) Failure promptly to arraign in order secretly to interrogate an accused behind bars for the purpose of getting him to confess violates the due process right of an accused not to be convicted out of his own mouth.

Paradoxically, the reason for this has most eloquently been put by Mr. Justice Frankfurter in Watts v. Indiana,334 a case in which the Court declined the opportunity to put McNabb on a due process footing:335

Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. "The law will not suffer a prisoner to be made the deluded instrument of his own conviction." . . . The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards. For while under that system the accused is subjected to judicial interrogation, he is protected by the disinterestedness of the judge in the presence of counsel.

How the Court could say all of this and at the same time reject

333 See text circa note 461 infra.
334 338 U.S. 49 (1949).
335 Id. at 54-55.
McNabb in relation to the states has never satisfactorily been explained. As Hogan and Snee have observed:336

The American people like to boast that they are willing to pay the price the accusatorial system exacts in the terms of handicaps to the police in return for the insurance it provides against the unjust punishment of innocent citizens. Unfortunately, present day police techniques force one to label such a boast as hypocritical. The system of administering criminal law in this country has degenerated into an incredible hybrid of the accusatorial and inquisitorial. Those who generations from now set out to write the history of our legal institutions will puzzle over a framework of criminal justice, which, during a public trial before an impartial judge with defense counsel present to give aid, will not suffer the defendant to be asked a single question without his consent. And yet that same legal system will condone the relentless questioning in secret at all hours of the day and night of that same defendant with only those whose duty it is to ensnare him to determine where the line between fair and foul is to be drawn. This is a tragic indictment of contemporary society. The preaching of one thing and the practicing of another is often one of the first warnings of social decay.

VII. WONG SUN, McNABB-MALLORY AND DUE PROCESS OF LAW

The fourth amendment argument for granting due process status to McNabb-Mallory, of course, as well as the constitutional considerations just advanced, by definition embody policy judgments of the most fundamental character. That, after all, is what a Constitution is for. To some extent, however, the discussion went beyond the policy judgments inherent in the constitutional provisions discussed and, to the extent that this was so, such ground is not here again covered.

The burden now assumed is simply that Rule 5(a) and the accompanying McNabb-Mallory exclusionary rule designed to enforce it, deserve due process status even apart from specific constitutional provisions and such policy considerations as underlie them.

Of course, the evidence is overwhelming and conclusive that the police almost never promptly arraign, that illegal detention—for interrogation and other purposes is their official policy.337


337 See, e.g., Hearings on Admission of Evidence (Mallory Rule) Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958); Hearings on Mallory v. United States Before the Special Subcommittee to Study Decisions of the Supreme Court of the United States of the House Committee on the
Indeed, the police themselves are the first to admit this,338 even in states such as Nebraska possessing statutes closely paralleling Rule 5(a).339 Michigan is the only state thus far to have adopted McNabb-Mallory as a matter of local policy. Outside Michigan, the various state statutes similar to 5(a) are nothing but meaningless paper.

Now for the non-constitutional considerations themselves. A numbering technique is again employed.

(1) McNabb-Mallory provides still another desirable hedge against unconstitutional arrests.

While Wong Sun provides considerable protection in this regard, there is, of course, some degree of doubt as to how far its various rulings extend. But even assuming the opinion's ultimate reach to be as broad as heretofore suggested, neither Wong Sun nor any other decision is ever going to preclude warrantless arrests altogether. And the question of probable cause in many such cases is going to be a close one and, policemen, being only human, will resolve such doubts in favor of an arrest. Accordingly, it is imperative that the arrestee be promptly arraigned so that the constable's spur of the moment judgment may be calmly reviewed by an impartial judicial officer whose job is not to ferret out crime but to enforce the United States Constitution. To the extent that Wong Sun may not prove to reach as far as herein suggested, of course, the case for giving McNabb-Mallory constitutional status under the above-stated proposition becomes even better.

(2) Prompt arraignment is an effective deterrent to police brutality in the police station.

The implicit assumption, of course, is that police brutality in the period between arrest and delayed arraignment is wide-spread. The nature of the beast, of course, defies much more than random empirical study, but that the assumption is correct seems to be the almost unanimous consensus of opinion among impartial (i.e., non-


338 See authorities cited in previous note.

police connected) commentators on the subject.\textsuperscript{340} Again, such reliable empirical studies as there are support the assumption\textsuperscript{341} and one cannot regularly read involuntary confession cases for very long without becoming convinced that, at least in many sections of the country, such brutality in the police station before arraignment is not just occasional but a regularly established pattern of police policy. Not many of the cases, to be sure, involve the barbarities of a \textit{Brown v. Mississippi}\textsuperscript{342} but some come all too close, and this is true even of decisions reaching the United States Supreme Court,\textsuperscript{343} the most recent example, of course, being \textit{Fay v. Noia}.\textsuperscript{344} Nor is it accident that every involuntary confession case ever to reach the Supreme Court involved a confession obtained before the accused was arraigned.

Certainly one of the most enlightening studies on the relation between illegal detention and police brutality is that of William Westley,\textsuperscript{345} a competent sociologist who closely observed the operations of a "more or less typical" midwest police department. Westley reported that the use of violence was not only widespread, but was justified by the police not simply as a means of obtaining confessions but also to coerce arrested persons to respect them. Normally, of course, the coercing would be done in the privacy of the police station during the course of an illegal detention.

Westley's findings were recently summarized by Weisberg as follows:\textsuperscript{346}

73 officers, approximately 50\% of all patrolmen in the city studied, were asked, 'When do you think a policeman is justified

\footnotesize{\begin{itemize}
\item \textsuperscript{340} See, \textit{e.g.}, Weisberg, \textit{supra} note 337 and authorities therein cited.
\item \textsuperscript{341} The classic study, of course, is, \textit{Report on Lawlessness in Law Enforcement, National Commission on Law Observance and Enforcement} (1931). We shall doubtless know more and have more reliable data upon publication of the study of the police in actual operation being conducted by the American Bar Foundation. The plan for the study is set out in \textit{Sherry & Pettis, The Administration of Criminal Justice in the United States} (1955).
\item \textsuperscript{342} 297 U.S. 270 (1936).
\item \textsuperscript{343} The classic example, of course, is \textit{Stein v. New York}, 346 U.S. 156 (1953), a case thoroughly discussed in a penetrating article by Professor Meltzer, \textit{Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury}, 21 U. Chi. L. Rev. 317 (1954).
\item \textsuperscript{344} 83 Sup. Ct. 822 (1963).
\item \textsuperscript{345} Westley, \textit{Violence and the Police}, 59 Am. J. Sociology 34 (1953).
\item \textsuperscript{346} Weisberg, \textit{supra} note 319, at 36.
\end{itemize}}
in roughing a man up? The following table summarizes the answers:

<table>
<thead>
<tr>
<th>TYPE OF RESPONSE</th>
<th>FREQUENCY</th>
<th>PERCENTAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disrespect for Police</td>
<td>27</td>
<td>37</td>
</tr>
<tr>
<td>When impossible to avoid</td>
<td>17</td>
<td>23</td>
</tr>
<tr>
<td>To obtain information</td>
<td>14</td>
<td>19</td>
</tr>
<tr>
<td>To make an arrest</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>For the hardened criminal</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>When you know the man is guilty</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>For sex criminals</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>73</td>
<td>100</td>
</tr>
</tbody>
</table>

Professor Westley explains these responses in terms of the emotional needs of the policeman who, by and large, appeared strongly to dislike the community as a whole and who felt that the community strongly disliked him. Westley asked eighty-five policemen from all ranks how they thought the public viewed them. Seventy-three percent felt that the public hated policemen, only thirteen percent that they were generally liked. If these attitudes prevail generally, and in view of Westley's findings on police attitudes towards the use of violence, getting arrested persons out of police hands as quickly as possible obviously rises to the level of a constitutional imperative. For apart from the use of illegal detention in order to extract coerced confessions, constables must often physically abuse arrestees simply in order to satisfy their own deep-seated psychological needs.

A second basic point is that the involuntary confession rules are wholly inadequate to protect against police brutality, physical, psychological or otherwise. For in the first place, they do not put an end to coercion itself; they merely bar the use of confessions obtained thereby and, as the Westley study shows, police brutality is sometimes wholly unrelated to confession producing.

Much of it, of course, is and so more to the point is that the fact that "involuntariness" (whether on account of physical violence or threat thereof, psychological coercion, promises of immunity or reward or fraud) is extremely difficult and often impossible to establish.

This is so for many reasons. In the first place, the defendant is generally the only person who can testify to circumstances which, if believed, would render the confession involuntary and, as a practical matter, he is often not in a position to do so. For in most states the issue of involuntariness is tried by jury and in some of these states the defendant, by taking the stand on the involun-

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347 Ibid.
tariness issue, thereby subjects himself to cross-examination on the merits. While such a procedure is of doubtful due process constitutionality, the states in question have tenaciously hung onto it. Accordingly, a defendant who cannot risk cross-examination on the merits must in these states allow the confession to come in unchallenged. Again, all states entrusting the jury with the involuntariness issue allow the defendant to be impeached, and so a defendant with a serious police record must also generally remain silent. Moreover, even if the defendant elects to take the stand and has no criminal record, he is unlikely to be believed as he stands only to gain by lying. Further compounding his problem is the circumstance that the coercion claim is so often put forward in bad faith that it is difficult for the trier of fact to recognize the genuine article when it does appear.

But the defendant's main problem is with the police. Police guilty of coercive tactics in obtaining confessions simply perjure themselves not only out of self-protection but also to protect their brother officers. The evidence of police perjury in confession cases (as well as in most other areas of official lawlessness) is simply overwhelming and, just prima facie, it stands to reason that a constable willing to beat a suspect in order to obtain a confession will have no scruples about lying under oath that he had not done so. Jurors, perhaps, do not sufficiently realize this. But whether they do or not there is still the confession before them. And, should they by some miracle find it to be involuntary, no one doubts that, as Hogan and Snee have stated, "[e]ven the most avid defender of the jury system would hesitate to claim that a juror will or can shut out from his consideration of a defendant's guilt or innocence a confession he believes is involuntary but true." Of course, the entire business of submitting involuntariness questions to the jury

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348 See the exhaustive discussion of the problem in Meltzer, supra note 343.
349 The Supreme Court granted certiorari on the issue in Fikes v. Alabama, 352 U.S. 191 (1957) but the decision went off on other grounds.
350 See note 137 supra and authorities cited therein.
ought to be held unconstitutional. Stein v. New York, sustaining the practice, ought to be excised from the United States Reports.

One final point concerning the inadequacy of the rules on involuntariness. Like the Rochin "shock the conscience" cases, now gone since Mapp, they often work to the advantage of the hardened criminal who can withstand pressure. The man who is easily frightened and intimidated, often a first offender, gets no protection from them whatsoever since he usually confesses under the slightest pressure. McNabb-Mallory in contrast puts the two groups of suspects on an equal footing.

(3) McNabb-Mallory protects the innocent as well as the guilty.

This proposition, perhaps, is to some degree implicit in the previous one but deserves separate emphasis. There is no doubt that some—we cannot know how many—persons have been and are each year convicted on the basis of wholly false confessions obtained from them during periods of illegal and secret detention in the police station and which would not otherwise have been obtained. Actual police violence and coercion plays a part, as does the inherently coercive police station atmosphere and the widespread use of what can only be described as incredibly unfair

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352 The case for so doing is persuasively stated by Meltzer, supra note 343.
353 346 U.S. 156 (1953).
354 The Court's decision in Townsend v. Sain, 346 U.S. 156 (1963), may have done just this. See particularly id. at 758, n.10.
356 E.g., Fay v. Noia, 342 U.S. 165 (1952); Stein v. New York, 346 U.S. 156 (1953) (I have taught Stein for years and have never yet found a student who felt that the police did not inflict great physical abuse upon all the defendants). See generally the large collection of cases in an excellent Note, Voluntary False Confessions: A Neglected Area in Criminal Administration, 28 Ind. L.J. 225 (1953). See generally Borchard, Convicting the Innocent (1932).
357 For the most widely publicized recent example, see Sat. Eve. Post, Innocent's Grim Ordeal, p. 63 (Feb. 2, 1963).
358 See, e.g., Mr. Chief Justice Warren's statement in his opinion for the Court in Blackburn v. Alabama, 361 U.S. 199, 206 (1960): "A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror." The same point is made, though more politely and from a police standpoint, in Mulbah, Interrogation 35 (1961): "With a person behind bars, police have a certain leverage that is valuable. The fellow in handcuffs, without the immediate prospect of freedom, is likely to be quite voluble — if he believes it is the key to the jail door."
(though non-violent) interrogation tactics the nature of which can be found in all standard police manuals,\textsuperscript{358} some of them, regrettably, authored by criminal law professors.\textsuperscript{359} And the notion that the use of these tactics will never induce an innocent man to confess simply cannot stand the test either of analysis or experience.\textsuperscript{360}

Moreover, once a confession is obtained, the police—or at least some police—tend to sit back and not to check out other possibilities. The confession convinces them and they unconsciously tend to discount evidence pointing to innocence and to another’s guilt and which, absent the confession, would be taken quite seriously.\textsuperscript{361}

In any event, the point is that prompt arraignment will sometimes prevent an innocent man from conviction and perhaps even death. Of course, \textit{McNabb-Mallory} will result in some guilty men going free—that is the result of any procedural safeguard—but we cannot really know which way the pendulum more often swings. One thing, however, is clear. \textit{McNabb-Mallory} will save some innocent men from conviction whereas, in the case of unconstitu-

\textsuperscript{358} \textit{E.g.}, ARTHUR \& CAPUTO, \textit{INTERROGATION FOR INVESTIGATORS} (1959); O’HARA, \textit{FUNDAMENTALS OF CRIMINAL INVESTIGATION} (1956); MULBAR, \textit{INTERROGATION} (1951); KIDD, \textit{POLICE INTERROGATION} (1940).

\textsuperscript{359} \textit{E.g.}, INBAU \& REID, \textit{LIE DETECTION AND CRIMINAL INTERROGATION} (3d ed. 1953). And see Inbau, \textit{“Fair Play” in Criminal Investigations and Prosecutions}, 3 NW. UNIV. TRI-QUARTERLY No. 2 (1961); INBAU, \textit{RESTRICTIONS IN THE LAW OF INTERROGATION AND CONFESSION} 77 (1957); Inbau, \textit{THE CONFESSION DILEMMA IN THE UNITED STATES SUPREME COURT} 442 (1948); Inbau \& SOWLE, \textit{CASES AND COMMENTS ON CRIMINAL JUSTICE} 658 (1960).


\textsuperscript{360} See Weisberg, \textit{supra} note 337 and authorities there cited.

\textsuperscript{361} See, \textit{e.g.}, the statement of one police officer: “Officers who have formed definite opinions as to guilt or circumstances may innocently exert a strong influence on the statements of witnesses whom they interrogate. Furthermore, when investigators allow theories of situations to form before there are sufficient facts disclosed to support them, they are likely to find their subsequent investigation restricted to a search for facts to lend support to the ill-conceived theory.” KOOKEN, \textit{ETHICS IN POLICE SERVICE} 54 (1957).
tional lawlessness of the sort involved in *Wong Sun*, one deals with persons who are beyond doubt guilty of crime. If we are sometimes to turn obviously guilty people loose because their rights have been invaded and to protect Everyman, we surely can do no less for persons who might be and sometimes are in fact wholly innocent. Finally, societal interests simply do not demand that everyone guilty even of serious crime be convicted. It is enough merely that some are, enough so that the threat of punishment remains meaningful. And it should not be forgotten that the right of privacy is more important than that an occasional guilty man goes free.

There is one further point as regards *McNabb-Mallory* and its protection of the innocent. A suspect arrested not on probable cause will, on account of the rule, secure a prompt judicial determination of the lack of evidence against him and thus, at no expense, procure a meaningful official determination sufficient to redress his damaged reputation. This is far better than an expensive, time-consuming lawsuit against a police officer who in the normal case will be judgment-proof anyway. Of course, with the consent of the arrested party, the arresting officer should be allowed to forego the arraignment should he decide that he acted unconstitutionally in making his arrest.

(4) *McNabb-Mallory* is necessary in order to protect the financial interests of arrestees.

If a lawfully arrested party is promptly arraigned, he will, in many cases at least, be immediately released on bond and so be able to meet his ordinary employment responsibilities, an important point since the grist of the typical arrest mill consists of many persons with previous criminal records who, in order to retain their jobs, must promptly report to work each day. Failing to do so, they will almost automatically be discharged, find it difficult to get other employment and, notwithstanding their good intentions, inevitably drift back into criminal activity. But, criminal record or no, prompt arraignment saves any arrestee money provided he can make bail. If he cannot, of course, assuming the arrest to be lawful, he will gain nothing from a financial standpoint.

However, many arrests are unlawful and in such cases a prompt arraignment will mean immediate discharge, a point which, again, is particularly important from the standpoint of an ex-felon trying his best to reform.

But, assuming that the arrest is constitutional and the state, acting through either its legislative or judicial branch, determines that a subsequent detention is likewise lawful (which is, in effect, the situation now prevailing in forty-nine states), does the arrestee
so detained (presumably for "lawful" investigative interrogation) have a constitutional right to compensation for his losses from the state? His livelihood, his property, have been taken for the public benefit and the case seems squarely to fall within the "just compensation" clause of the fifth amendment long ago held to be applicable to the states through the due process clause. The conventional answer, however, has been "no" since the suspect is apparently a "menace" to society and a state may, under the police power, remove even an "apparent menace" without having to pay "just compensation." The "just compensation" clause protects him no more than a man who has expended his entire resources in order to gain an acquittal. Assuming this to be the law—though by no means conceding that it should be and/or that the question is settled—this is all the more reason to require prompt arraignment following arrest. The lawfulness of the arrest may there be determined. If found to be unlawful, the arrestee will be discharged. If found lawful, release on bail can be had.

(5) Adoption of McNabb-Mallory will increase public respect for law enforcement officers and result in an increased degree of cooperation with them in their investigative activities.

There is nothing that makes the ordinary citizen more resentful of the police than being tossed into jail overnight. Indeed, he may carry this grudge the rest of his life and generalize so as to become resentful of all policemen and unwilling to cooperate with them and/or to support them in any way. This has obvious consequences for society's interest in crime prevention and detection, not to mention the impact it has, salary-wise and status-wise on policemen. It also, I am convinced, affects the arrest-conviction

362 E.g., Truax v. Raich, 239 U.S. 33 (1915).
365 Attorneys' fees have been held not recoverable in connection with suits to recover "just compensation." Dohany v. Rogers, 281 U.S. 362 (1930).
366 See generally NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) (THE WICKERSHAM COMMISSION).
367 See the study reported of public attitudes towards police officers in Los Angeles in GOURLEY, PUBLIC RELATIONS AND THE POLICE (1953). To say the least, the police did not come off well and, in general, the more educated the individual, the less he thought of policemen and their behavior. With a few exceptions, lawyers thought them guilty of widespread unconstitutional conduct.
ratio. After personally interviewing some 225 jurors in depth, many assigned as one of their reasons for disbelieving police testimony some experience, often in their youth, where some policeman had held them in jail incommunicado, even if only for a few hours.

If it be true that our prosecutors have a tough time with our juries—and my experience teaches otherwise, and I would not for a moment concede this to be so—one of the reasons is the lawless activities of the police themselves.

It might also be noted that, since Mallory, the arrest-conviction ratio in the District of Columbia has improved and the United States Attorney for the District, where the Rule, of course, has its principal bite, seems on balance to think it a good development all around. Instead of interrogating, the District of Columbia police are now investigating and the government's cases are stronger than formerly.

Parenthetically, too, while on the question of whether McNabb-Mallory works, it should be added that, in contrast to the difficult probable cause determination the police must now make under Wong Sun, Rule 5(a) is simple and easy of application.

(6) Application of McNabb-Mallory to the states is required in order effectively to prevent federal officers from taking advantage of illegal state jail detentions for federal interrogation purposes and to prevent them from illegally detaining persons in their own custody to interrogate on state charges and sometimes even federal charges.

This is the McNabb-Mallory analogue to the Byars, Gambino, Lustig and Elkins problems existing in the illegal arrest and search area prior to Mapp and Wong Sun. It is, in sum, the "illicit working arrangement" and "general understanding" cases, "silver platter" and "reverse silver platter."


375 Of course, these problems exist not only in the arrest and search and McNabb-Mallory fields, but in many others, e.g., double jeopardy, privi-
So far as *McNabb-Mallory* is concerned, several basic situations have arisen and continue to arise: (1) federal and state officers, acting together—or state officers acting at the behest of federal officers—arrest a person on a state charge, illegally detain him in a state jail and federal officers thereby obtain a confession to a federal crime; (2) state officers, acting without the knowledge of federal authorities, arrest on a federal charge and obtain a confession to a federal crime during a period of illegal detention in a state jail; (3) state officers, acting without knowledge of federal officers, interrogate a suspect on a state charge during a period of illegal detention and obtain a confession to a federal crime; (4) state officers arrest a person on a state charge, happen to learn that he may have committed a federal crime and, pursuant to a general understanding with federal officers, notify them in order that they may take advantage of the illegal state detention to obtain a confession to a federal crime; and (5) federal officers illegally detain a federal prisoner and obtain a confession to some state offense.

There are, of course, innumerable possible variants to the above situations, but the ones mentioned should suffice to illustrate the general range of problems involved. The Court has grappled with such issues in but three cases and the results, to say the least, have hardly been encouraging.

The first such case was *Anderson v. United States*,\(^376\) decided on the same day as *McNabb* itself. The *Anderson* petitioners were arrested by state officers in connection with a dynamiting investigation and held by such officials in a state jail for six days before they were arrested by federal officers and arraigned before a federal judicial officer. During the six day period petitioners saw only policemen, most of them federal policemen, and the latter at long last obtained confessions. The confessions were admitted over petitioners' objections in their federal criminal prosecutions. This was held error. While the Court could have gone on the ground that the federal officers were exploiting the illegal state jail detentions and thus "participating therein" it did not, reversing instead because the record showed "a working arrangement between the federal officers and the [state officers] . . . which made possible the

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\(^{376}\) 318 U.S. 350 (1943).
abuses revealed by this record." The narrowness of the Court's ruling was not lost on the lower federal courts which proceeded to read Anderson as allowing almost unbarred federal interrogation of illegally-detained state arrestees. And this, furthermore, regardless or almost regardless of what the evidence showed with regard to the nature of the federal-state "working arrangement." While it may be, as Professor Kamisar has remarked, that some of these cases make "delightful comic opera," they also unmistakably reveal a sordid picture of calculated perjury by both state and federal officers.

Thus the practical effect of Anderson was, if anything, to make things worse than they had been before. Federal officers took the decision as giving them unbridled license to interrogate persons illegally detained in state custody concerning federal crimes. Rule 5(a) and McNabb-Mallory meant nothing, even in the federal courts, insofar as illegal interrogation of persons in state custody was concerned. And one need hardly worry about Anderson's "working arrangement" language; the testimony would never show one, or, if it did, would be discounted anyway.

The Court had an opportunity to rectify this regrettable state of affairs and to make federal officers behave themselves in Coppola v. United States. Petitioner, convicted of robbing two different federally insured banks, was arrested by Buffalo, New York, police officers on an unrelated state charge called to their attention by the FBI at about 9:30 in the morning. He was jailed and interrogated by the state police incommunicado, but never arraigned. The FBI was informed of petitioner's arrest about noon of the day of his arrest. "At nine in the evening of that day they received permission to interrogate petitioner as to his involvement in the two

377 Id. at 356.
378 See Kamisar, supra note 356, at 1185.
379 Id. at 1184.
380 Id. at 1183.
WONG SUN—A STUDY IN FAITH AND HOPE

robberies"382 of which the FBI suspected him all along. The federal officers interrogated him behind bars from nine o'clock until one, until petitioner confessed to the robberies. "[A]s a matter of courtesy," state officers left the federal officers alone during this entire period. Petitioner was not arraigned on the state charge until two o'clock in the afternoon and was not given into federal custody until shortly before four o'clock when he was finally arraigned on the federal charges before a United States Commissioner. This, it will be noted, was nineteen hours after the federal agents had begun their interrogation.

The Court affirmed petitioner's conviction based in part on the above-mentioned confession in a per curiam opinion stating only that the facts just related did not amount to a "working arrangement" under the Anderson ruling. Only Mr. Justice Douglas dissented. So far as prisoners in state custody were concerned, federal officers could with impunity still flout McNabb-Mallory and introduce their illegally obtained confessions in federal court.

Cleary v. Bolger,383 decided on the same day as Wong Sun, involved, at least in part, a "reverse silver platter" McNabb-Mallory problem in an injunction context. Relying on the Court's ruling in Rea v. United States384 holding on the peculiar facts there present that federal officers guilty of an unconstitutional search and seizure could be federally enjoined from testifying in a state criminal proceeding and from turning over their unconstitutionally seized evidence to state authorities, the district court385 issued an injunction against federal officers guilty of both an unconstitutional seizure of Bolger's property and of obtaining incriminating statements from Bolger in violation of Rule 5(a) from testifying as to such statements or concerning their unconstitutional seizure of Bolger's property in Bolger's state criminal trial, and also before a state administrative commission having power to revoke Bolger's longshoreman's license. Since petitioner Cleary, a Waterfront Commission investigator, was invited to be present when Bolger incriminated himself during a period of illegal detention, Cleary was likewise enjoined in order to make the injunction effective against the federal officers. Only Cleary appealed and the injunction as to him was upheld by a divided Court of Appeals.386

382 Id. at 763.
386 Bolger v. Cleary, 293 F.2d 368 (2d Cir. 1961).
Expressly reserving judgment on the propriety of the district court injunction against the federal officers, (based as it was, the Court noted, on a "broad reading of Rea"), the Court held the injunction against Cleary to be clearly improper under Rea. Rea did not apply since that case involved a federal officer who acted in disobedience of a federal court order. Cleary in contrast was a state officer and no federal court orders had been violated by him or anyone else.

Nor . . . [could] the injunctive relief against . . . [Cleary] find justification in the rationale that it was required in order to make the injunction [assumed arguendo to have correctly issued under Rea] against the federal officers effective. Such relief as to him must stand on its own bottom. We need not decide whether petitioner's status as a state official might be ignored had it been shown that he had misconducted himself in this affair, that he had been utilized by the federal officials as a means of shielding their own illegal conduct, or that he had received the evidence in direct violation of a federal court order. Here the District Court found that petitioner was not a factor in the federal investigation and that his presence there was simply 'the result of the commendable cooperation between the Customs Service and the Commission who were both concerned with law enforcement on the waterfront.'

Mr. Justice Goldberg concurred in the judgment of the Court but only because of his "belief that New York will, under Mapp, likely exclude all the evidence in question here." The Chief Justice and Justices Douglas and Brennan dissented.

Briefly, then, to sum up, the present federal-state McNabb-McNabbery situation seems to be this. Absent a showing of a virtually impossible to establish "working arrangement" between federal and state officers, incriminating statements obtained by federal officers from persons in state custody during a period of illegal detention are clearly admissible in federal criminal prosecutions of such persons. "General understandings" do not qualify as "working arrangements." This is Coppola. A fortiori from Coppola is the "pure silver platter" situation never squarely presented to the Court, where state officers, during the course of an illegal detention of a state suspect, extract a confession to a state crime which is also a

388 Ibid.
389 Id. at 389.
390 Id. at 391. (Emphasis added.)
391 And also, presumably, where the state officers, without the knowledge of federal officers, act as federal officers for the purpose of enforcing federal law. Cf. Gambino v. United States, 275 U.S. 310 (1927). But not even this is certain.
federal crime. "Reverse silver platter" situations are completely up in the air. It may be that state courts can freely admit confessions to state crimes obtained by federal officers from persons illegally detained by such officers under any and all circumstances. Certainly the Court has never held otherwise. On the other hand, it may be that Rea would allow an injunction against a federal officer from testifying concerning such statements in a state criminal proceeding. If so, this would make the state court outcome the result of a footrace between the state trial and the federal injunctive proceeding and/or perhaps, though this has not been decided either, on whether the incriminating evidence had been turned over to state officers at the time application is made for the federal injunction. 392

Furthermore, the Court in Cleary expressly reserved judgment on the basic question of whether Rea had been seriously undermined even in the search and seizure field by Wilson v. Schnettler. 393 Finally, as a practical matter, Cleary allows federal officers illegally to detain a federal suspect and, merely by inviting a state officer or some private person to be present, to allow such person to testify concerning incriminating statements of the suspect in state criminal and administrative proceedings. Indeed, it may even be—Cleary certainly does not hold otherwise—that such third person could testify concerning the statements in a federal criminal proceeding.

The situation, then, is even worse than the one existing in the illegal search area prior to Mapp and Wong Sun. Illicit working arrangements are encouraged and federal policy is utterly frustrated. One reason Mapp 394 applied the exclusionary rule to the states was to obviate all of these difficulties. As these difficulties are even greater in the McNab-Mallory field, the case for applying such rule to the states would appear a fortiori from Mapp and Wong Sun.

(7) For courts—state or federal—to sanction the admissibility under any circumstances of incriminating statements obtained during a period of illegal detention gives tacit approval to such police investigating techniques and breeds disrespect for law and legal institutions in general.

The point has never been more forcefully and eloquently stated

392 See generally Broeder, supra note 2, at 193-94.
Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

VIII. WONG SUN AND THE RIGHT TO COUNSEL

Enough is enough. Evidence obtained in violation of Rule 5(a) by either state or federal officers is and ought to be constitutionally inadmissible in both state and federal criminal prosecutions. In connection with the matters now to be considered, two points previously made in connection with the scope of 5(a) and McNabb-Mallory must again be stressed.

The first is that though Mallory seems almost certainly to bar all post-arrest interrogation of a suspect, it has not been so interpreted by the lower federal courts. The lower courts (Judges Bazelon and Edgerton dissenting) have continued their pre-Mallory practice of sustaining the admission of all voluntary incrimination by the suspect produced as a result of post-arrest interrogation (on the way to the station, while at the station during the “booking” process plus “a little more” and in any event so long as a magistrate is not readily accessible).

In part, at least, this may be explained by the Court’s failure in Mallory expressly to disapprove of United States v. Mitchell. While Mitchell is chiefly renowned for its holding that a voluntary confession made by an arrestee a “few minutes” after arrival at the police station is not retroactively invalidated by a subsequent illegal detention of eight days, the Court’s opinion in Mitchell is ambiguous concerning the exact circumstances under which the confession therein was obtained. While it is clear from the Court of

395 277 U.S. 438, 471 (1928).
396 Id. at 485.
397 See text and notes beginning with note 299 supra.
398 322 U.S. 65 (1944).
Appeals' opinion that the confession came as a consequence of police interrogation, Mr. Justice Frankfurter's plurality opinion for the Court does not mention this circumstance but instead assumes a case in which the defendant “spontaneously” blabbled not in response to police questioning. This is clear not only from Mr. Justice Frankfurter's use of the word “spontaneous” (seemingly based on an intentionally erroneous reading of the record) and from his failure to mention that the police interrogated the accused, but also from his reliance on a statement in McNabb that “'[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible.'” Neither does it, of course, under a Bazelon-Edgerton reading of Mallory. Nothing in Mallory requires policemen to put on ear muffs while taking the accused to the police station and/or a magistrate.

Be this as it may, Mitchell has not generally been so understood, and one must accordingly deal with McNabb-Mallory as a Rule allowing some post-arrest interrogation of an accused notwithstanding his counsel is absent and whether or not he is advised of his right to remain silent. So interpreted, McNabb-Mallory falls short of the mark and fails adequately to protect the accused. Brutality, unfairness and fraud—generally impossible for the accused to establish—may produce a confession in but a few minutes. Furthermore, McNabb-Mallory, by not requiring a warning of defendant’s right to remain silent, does not adequately pay heed to the privilege against self-incrimination which certainly applies in federal criminal cases and, as will later be argued, is likewise probably now applicable in its full extent to the states.

United States v. Carignan illustrates additional deficiencies in the scope of McNabb-Mallory's protection. Carignan was “detained for investigation” on an assault charge at 10:00 a.m. Shortly thereafter defendant was at least tentatively identified in a police lineup by an eye-witness as the man who had committed a murder approximately six months before. At 4:00 p.m. on the same day defendant was “arrested” and duly arraigned on an assault charge, but could not post bond or hire a lawyer and so was remanded to jail where federal officers, after many hours of incommunicado

401 Judges Bazelon and Edgerton, of course, read Mallory as barring all post-arrest interrogation of the arrested party. See note 305 supra and accompanying text.
402 See Section X infra.
403 342 U.S. 36 (1951).
questioning, induced defendant to confess to the murder. While
the Court sustained the Court of Appeals' reversal of defendant's
conviction for trial judge failure to exclude the jury while hearing
evidence on the circumstances surrounding the taking of the con-
fession, the Court went on to hold that defendant's 5(b) warning
on the assault charge gave him all the protection he needed, and
that since he was validly committed on the assault charge the police
could interrogate him at will concerning the murder.

This, the Court held, was because the police had only a "strong
suspicion" of defendant's guilt when they began questioning him on
the murder charge, and because neither 5(a) nor 5(b) precluded
post-arraignment jail interrogation of a validly committed de-
fendant notwithstanding that he had no counsel and was in jail
only because of his inability to post bond. The Court's opinion was
authored by Mr. Justice Reed, an arch foe of McNabb, and joined
in by three other Justices.

Mr. Justice Douglas, joined by Justices Black and Frank-
furter, wrote a concurring opinion finding the confession to be in-
admissible under McNabb. This was because a

time-honored police method for obtaining confessions is to arrest a
man on one charge (often a minor one) and use his detention for
investigating a wholly different crime. This is an easy short cut for
the police. How convenient it is to make detention the vehicle of
investigation! Then the police can have access to the prisoner day
and night. . . . [T]he fact that the charge on which this respondent
was arraigned was not a minor one nor one easily conceived by the
police is immaterial. The rule of evidence we announce today gives
sanction to a police practice which makes detention the means of
investigation. Therein lies its vice. . . . [W]e do not reach the
question whether a confession so obtained violates the Fifth
Amendment.

That the Court's plurality opinion did, indeed, give sanction
to the vice referred to is borne out by numerous lower federal
court decisions and by a host of state cases. Such decisions, of

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404 Id. at 45.
405 Id. at 46-47.
406 E.g., Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960), cert. denied,
366 U.S. 941 (1961); Goldsmith v. United States, 277 F.2d 335 (D.C. Cir.
1960).
407 See discussion and citation of authorities in LaFave, supra note 40, at
367-83. Of course, most cases simply do not reach the courts; those that
do generally involve arrests which would clearly not otherwise have
been made, arrests for "vagrancy," "loitering," etc. Ibid.
See also Mr. Justice Frankfurter's opinion, in which Mr. Justice
course, do violence to the "collateral unlawful purpose" doctrine arguably given constitutional status in Wong Sun408 and in effect thwart one of McNabb's basic purposes—to stop police brutality in the police station and to prevent convictions on the basis of unreliable confessions. Likewise ignored is the fifth amendment.409 And, as previously explained, 410 Carignan and its ilk also fly squarely in the face of the rationale of Griffin v. Illinois411 and similar decisions. Persons unable to post bond should no more be subject to government questioning under jail conditions in the absence of counsel than persons out on bond who, if sensible, will not utter a single word without their lawyers being present.412

"Instead of bringing him before a magistrate with reasonable promptness, as Connecticut law requires, to be duly presented for the grave crimes of which he was in fact suspected (and for which he had been arrested under the felony-arrest statute), he was taken before the New Britain Police Court on the palpable ruse of a breach-of-the-peace charge concocted to give the police time to pursue their investigation. This device is admitted.... [I]t kept Culombe in police hands without any of the protections that a proper magistrate's hearing would have assured him. Certainly, had he been brought before it charged with murder instead of an insignificant misdemeanor, no court would have failed to warn Culombe of his rights and arrange for appointment of counsel."

The conviction was upset on involuntariness grounds.

408 See text following note 221 supra.
409 Whether the privilege against self-incrimination applies to police station interrogation and/or to interrogation and/or observations outside it is the subject of conflicting decisions in the lower federal courts notwithstanding the Court's decision in Bram v. United States, 168 U.S. 532 (1897) which appears on fifth amendment grounds to invalidate a voluntary pre-arraignment confession in the police station in the absence of counsel. Bram could, of course, take care of most of the right to counsel problem, McNabb-Mallory, wire tapping and many other matters, but it has been sparingly used by the lower federal courts and for no significant purpose by the Court itself.

Much, of course, may turn upon Bram should the fifth amendment be applied to the states. See Section X infra. The Bram problem and the various conflicting federal and state cases on whether the privilege applies to police investigation and interrogation is succinctly discussed by McNaughton, The Privilege Against Self-Incrimination, 51 J. CRIM. L., C. & P.S. 138, 151-52 (1960). And see Comment, The Privilege Against Self-Incrimination: Does It Exist in the Police Station?, 5 STAN. L. REV. 459 (1953).

410 See notes 320-23 supra and accompanying text.
412 Thus far only one judge, Judge Fahy, has recognized this in a McNabb-Mallory context. Carignan notwithstanding, Judge Fahy thought it a perversion of McNabb-Mallory to allow post-arraignment police questioning of the accused, and that the order of the arraigning magistrate committing defendant to the local jail for the obvious purpose of being
This brings us, then, to what one may expect for the future. Giving McNabb-Mallory constitutional status both in relation to state and federal criminal prosecutions is simply not enough. Once having "located their man," due process should bar future questioning of such person unless his lawyer is present and regardless of whether he has been previously advised of his right to counsel and of his right to remain silent, and/or even if he has had an opportunity privately to confer with counsel. Of course, provided the police or prosecutor warn the defendant of his right to remain silent and that anything he says may be used against him, they should not have to plug their ears. The Indian rule, barring all confessions as to a policeman, goes too far.\footnote{413}

The policy arguments for the rule herein suggested appear unanswerable, especially under existing practice in the states when lawyers for indigent defendants generally do not show up for weeks.\footnote{414} By this time, of course, the accused has often if not generally confessed himself into the penitentiary, sometimes, doubtless, on the basis of an involuntary confession where involuntariness cannot be established. Evidence is often lost—\footnote{415} a particularly important point under our system of trial which, when once started, goes straight through to the end without adjournment for the purpose of discovering new evidence,\footnote{416} and where new trials on the

questioned on a robbery charge in the absence of counsel not only violated Rule 5(b) and McNabb-Mallory but perhaps due process as well. Goldsmith v. United States, 277 F.2d 335, 345 (D.C. Cir. 1960) (dissenting opinion). However, Judge Fahy did not refer to Griffin.

\footnote{413} This rule is discussed in Culombe v. Connecticut, 367 U.S. 568, 588 (1961).

\footnote{414} Thus a 1955 New Jersey study indicated that in 16 out of 21 counties counsel were appointed for indigent criminal defendants at or after arraignment. In 13 of these counties the minimum interval between arrest and appointment (while the accused was jailed) ran from one day to 25 days, the maximum between seven and 180 days, the average being around 70 days. \textit{Report on the Assigned Counsel System, N.J. Administrative Office of the Courts} 6 (1955). A New York study indicated that a delay of three months between arrest and appointment of counsel to jailed indigents was not unusual. \textit{Equal Justice For the Accused, Special Committee of the New York City Bar Ass'n} 67 (1959). Also see Dist. of Columbia Report, op. cit. supra, note 337.

\footnote{415} What would the reaction of the public be if some misguided policeman, trying to apply the same rule to himself as that applied to indigent defendants, decided to wait for 70 days or three months before investigating a given crime? See Beaney, \textit{Right to Counsel Before Arraignment}, 45 Minn. L. Rev. 771, 780 (1961).

ground of newly discovered evidence are extremely difficult to come by.\footnote{E.g., United States v. Hiss, 107 F. Supp. 128 (S.D.N.Y. 1952); United States v. Kaplan, 101 F. Supp. 7 (S.D.N.Y. 1951) (this one inevitably makes students gag). See more generally Jeffries v. United States, 215 F.2d 225 (9th Cir. 1954); United States v. Troche, 213 F.2d 401 (2d Cir. 1954).}

And, even where possible defense witnesses have not been lost, the prosecution has often, in one way or another, convinced them not to talk to defense counsel. Furthermore, under the law of many states,\footnote{See generally Falknor, Evidence, 32 N.T.U.L. Rev. 512, 517 (1957); Note, Silence as Incrimination in Federal Courts, 40 Minn. L. Rev. 593 (1958). Raffel v. United States, 271 U.S. 494 (1926), holding that silence under arrest may sometimes be admissible on the question of guilt, is probably dead. See the discussion and citation of authorities in Jones v. United States, 296 F.2d 398 (D.C. Cir. 1962) (here defendant possibly went to his death simply because he refused to talk to the police until he got a lawyer).} evidence of a defendant's silence while under arrest when accused of crime is admissible. And so on. The various policy arguments have been eloquently and forcefully stated elsewhere and it would be a work of supererogation here to again cover the ground.\footnote{See generally Falknor, Evidence, 32 N.T.U.L. Rev. 512, 517 (1957); Note, Silence as Incrimination in Federal Courts, 40 Minn. L. Rev. 593 (1958).} Professor Chafee has summed up the basic point in one simple but forceful sentence: "A person accused of crime needs a lawyer right after his arrest probably more than any other time."\footnote{Allison, He Needs a Lawyer Now, 42 J. Am. Jud. Soc'y 113 (1958); Beaney, supra note 415; Douglas, The Right to Counsel, 45 Minn. L. Rev. 693 (1961); Mueller, The Law Relating to Police Interrogation Privileges and Limitations, 52 J. Crim. L., C. & P. S. 2 (1961); Weisberg, supra note 337. Also consult Celler, Federal Legislative Proposals to Supply Paid Counsel to Indigent Persons Accused of Crime, 45 Minn. L. Rev. 697 (1961); Pollock, Equal Justice in Practice, 45 Minn. L. Rev. 737 (1961); Kamisar, Betts v. Brady Twenty Years Later; The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219 (1962); Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pers- vasive Right" of an Accused, 30 U. Chi. L. Rev. 1 (1962).}

On the policy side, at least insofar as research here could discover, the commentators appear to have overlooked only one important point. The consideration has likewise escaped judicial notice, having thus far been raised and discussed in only one of literally thousands of decisions actually involving it.

The point in question is simply Canon 9 of the Canons of Professional Ethics of the American Bar Association and the various policy judgments and considerations embodied therein. The Amer-
ican Bar Association Canons, of course, are by all judges and lawyers regarded as appropriate and necessary guidelines for lawyer behavior, and their violation is in some states by Court Rule expressly made ground for disciplinary action, including disbarment. The Canons control lawyer behavior in criminal as well as in civil cases and, so far as criminal cases are concerned, apply equally to prosecuting attorneys and defense counsel.

Canon 9, a modern version of Hoffman's Resolution XLIII, that "I will never enter any conversation with my opponent's client relative to his claim or defense, except with the consent and in the presence of his counsel," provides as follows:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

The leading opinion interpreting the above Canon is Opinion 108421 of the Committee on Ethics of the American Bar Association. The Committee was asked whether "[p]laintiff's attorney [in a torts case had] . . . an ethical right in the absence of defendant's counsel to interview the defendant and question him as to the facts of the case if said defendant is willing to discuss the facts with him?" The Committee unanimously agreed that the answer was "no." Canon 9 was the only Canon involved and controlled the question completely. The Canon's first sentence was held to be "clear and convincing" and

[the] reasons for . . . [the] prohibition [contained therein] . . . equally clear. They arise out of the nature of the relation between attorney and client and are equally imperative in the right and interest of the adverse party and of his attorney. To preserve the proper functioning of the legal profession as well as to shield the adverse party from improper approaches the Canon is wise and beneficial and should be obeyed.

It is impossible to see how the Committee could have concluded otherwise. Thus, when perhaps $50 and a dented fender are at stake, it is undeniably unethical and, in some states at least, including Nebraska, an express basis for disciplinary action for any attorney to talk with his adversary's client concerning a claim

421 AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS, OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 230 (1957).
422 Ibid.
423 Id. at 231.
without first securing the consent of the client's attorney and having him present at the conversation and this, furthermore, whether or not the client is willing or even anxious to discuss the claim outside his lawyer's presence. The principal reason for this, of course, as the Committee points out, is to protect the client from throwing away a possible claim and/or defense. So far as civil cases are concerned the matter admits of no doubt.

How is it then on the criminal side? The Ethics Committee has likewise expressly held Canon 9 to control in criminal cases. Indeed, its only reported opinion dealing with Canon 9 in a criminal case presented an a fortiori situation from the civil case situation just discussed. The opinion, unfortunately not reported in full, reads as follows: "Where three persons are accused of related thefts, the prosecutor may not, in the proceedings against one of them, interview another of them represented by counsel, except with the latter's lawyer."

And, if the prosecutor cannot interview a co-defendant outside the presence of the defendant's lawyer, it is a fortiori unethical for the prosecutor to question the defendant himself unless the defendant's lawyer consents and is present. And if this be so in a dented fender case involving $50 and in a theft case where liberty is at stake, how is it where the very life of the client may become forfeit by prosecutor questioning in the absence of defendant's attorney? Again, the answer is clear. The capital case is a fortiori.

But capital case or no, one has only to read the daily newspapers to be aware that the prosecuting attorney or one of his lawyer assistants almost invariably controls both the pre and post arraignment interrogation of all persons suspected of serious crimes. Often prosecuting attorneys do the questioning themselves, or if not, direct it from behind the scenes and are in any event ultimately and finally in control of such interrogation. Typically, too, the case is that of an accused lodged in jail under the complete control of the prosecution and police with the interrogation conducted incommunicado.

Furthermore, the accused is typically denied all access to counsel and, whether or not aware of his right to remain silent—Wong Sun indicates that he is presumed not to be so aware—almost surely does not know of his right to representation by an attorney. And should he be allowed to obtain such representation and/or have had the foresight to secure counsel before his arrest, Canon 9 specifically forbids his interrogation by prosecuting attorneys.

424 Id. at 640, Opinion 249. See generally Drinker, Legal Ethics 201 (1953).
Surely no lawyer could in good conscience contend that a distinction under Canon 9 ought to be drawn between cases where the accused has in advance of his arrest secured representation and/or is allowed to procure it after his arrest, and cases where the arrested party is denied access to counsel and fortuitously happens not then to be represented by counsel. To do so, of course, would place the prosecutor who at least allowed the arrested party access to counsel in a worse position than one who did not, and protect the man with foresight (often a professional criminal) as against the man (probably much more in need of counsel) without it.

Nor can any line justifiably be drawn under Canon 9 between cases where prosecuting attorneys themselves question suspects in the absence of their counsel and cases where, though in a position of control, they do nothing to prevent such questioning by the police. To do so, of course, would put a premium on ignorance and intentional eye-shutting, and place the eye-shutting prosecutor in a better position than one who has taken the trouble to learn what is going on. All of these cases are the same; Canon 9 is violated in every instance supposed and the prosecutor subject to disciplinary action and, arguably, to disbarment should he long continue to engage in or countenance the above-described practices.

The matter would be plain enough to any lawyer in a car dent case where $50 was at stake and an attorney directly or indirectly questioned a person with a claim against his client while at the same time forcibly preventing such claimant—through action or inaction—from consulting counsel. And, this being so, how can it possibly be otherwise where long-time loss of liberty and sometimes life itself may hang in the balance. The conclusion is inescapable that most every prosecutor in the nation is under Canon 9 subject to disciplinary action.

For an ethics committee to write that a client’s interest in a car dent is more important than his interest in staying alive, and that the Bar is more interested in car dents than in persons accused of serious crimes, would be shocking and incredible. And it is no answer to say that historical prosecutor abuse of Canon 9 justifies its suspension.

The request here is not, let it be made clear, for wholesale disciplinary action against prosecutors. The point is simply that their conduct in the above-mentioned respects puts the legal profession in the indefensible and intolerable position of having one rule for money matters—where the conduct of the Bar under Canon 9 is beyond reproach—and another rule for serious criminal cases where prosecutors can trample on the Canon with impunity.
Finally, let it be said that the fault lies not principally with the prosecutors but with the courts who have repeatedly countenanced prosecutor abuse of Canon 9 by affirming convictions in which such abuses were present while at the same time failing even to mention that a Canon 9 violation had occurred and/or suggesting that such conduct ought not in the future take place.

The only criminal case found in which a possible Canon 9 violation was considered is the recent decision of the Second Circuit Court of Appeals in *United States v. Massiah*.425 Massiah had been indicted on federal narcotics charges, had retained counsel for his defense on such charges and was out on bond awaiting trial when a government investigative agent, acting without the knowledge of federal prosecuting attorneys, installed a hidden transmitter under the front seat of a car owned by Massiah's co-defendant Colson. This was done with Colson's consent. Colson was also induced to permit the government agent to hide in the trunk of Colson's car while Colson induced Massiah to incriminate himself during a ride, the conversation being overheard by the agent through the use of the portable transmitter. The agent was allowed over objection to testify to what Massiah had said. A conviction followed.

On appeal, Massiah argued that the agent's conduct was a violation of Canon 9 and that allowing him to testify to information obtained in violation of such Canon denied his right to counsel under the sixth amendment and due process of law. The Court's response was as follows: 426

Assuming without deciding that it would be improper [under Canon 9] for a prosecutor to interview a criminal defendant under indictment in the absence of his retained counsel, see Drinker, Professional Ethics 202 (1953), such a prohibition would not require that government investigatory agencies also refrain from any contact with a criminal defendant not in custody simply because he had retained counsel. To be sure, such a rule would prohibit an investigator's acting as the prosecuting attorney's alter ego, but there is no suggestion that Agent Murphy was so acting here. Moreover, the contact here was at still one further removed—with a co-defendant whose instructions from the investigator were apparently no more than to induce Massiah to talk. This was not a case where a defendant was in danger of being tricked by a lawyer's artfully contrived questions into giving his case away.

Two points are of significance. The first is the Court's obvious reluctance to hold that a government attorney or someone acting on his behalf would violate Canon 9 by interrogating a criminal

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defendant in the absence of his counsel even after indictment! While this is indefensible and extremely unfortunate for the reasons above stated and still others later to be discussed, it is, in the light of history, at least understandable.

Of more importance, however, is the Court's apparent assumption that a Canon 9 violation, if established, would of itself violate the sixth amendment and due process and preclude the admission of any statement obtained as a consequence of such violation. It is likewise of interest to note that Judge Hays dissented on the ground that the admission of the agent's testimony violated Massiah's sixth amendment and due process rights. Unfortunately, however, Judge Hays did not discuss Canon 9. The situation, of course, was one in which McNabb-Mallory afforded the defendant no protection whatever.

So much, then, for the one policy point neglected by the commentators. Remaining discussion is confined to cases actually involving the issue of a defendant's due process right to counsel prior to or following arrest, and to the question of how the cases dealing with such issue would today be decided in the light of Mr. Justice Goldberg's obvious identification with the civil liberties' position of the Chief Justice and Justices Black, Douglas and Brennan, and in the light of Wong Sun's dicta applying McNabb-Mallory to the states.

Two lines of Supreme Court precedent are directly relevant involving a total of three cases. The first line consists of Crooker v. California and Cicenia v. Lagay.

Crooker involved an intelligent 31 year old college graduate, with one year of law school, who confessed to murder after being interrogated in three periods from 8:30 p.m. to 2:00 p.m. When the interrogation began, Crooker several times specifically requested an opportunity to call a particular lawyer, but was told that he could not do so until the "investigation" was completed. Seeking to upset his conviction, petitioner argued that the admission of his confession obtained following the denial of his right to consult counsel and to have counsel present while he was being questioned denied due process. The Court, in a five to four decision, rejected the contention. Mr. Justice Clark, writing for the majority, while conceding that due process would under some circumstances

427 Id. at 69.
require the appointment of counsel before arraignment, held that
Crooker was not such a case. Relying expressly on the “fair trial”
test of Betts v. Brady431 (now overruled, of course, by Gideon v. 
Wainwright432), the majority concluded that Crooker had not been
denied a fair trial. He was, after all, an intelligent, educated man
and, on account of an unfortunate law school curriculum, had taken
a freshman criminal law course thereby learning of his constitu-
tional right of silence. Accordingly, it followed that a little knowl-
edge was indeed a very dangerous thing and Crooker went to his
death in part at least on account of a year in law school.

Mr. Justice Douglas, joined by the Chief Justice and Justices
Black and Brennan, vigorously dissented. Various policy considera-
tions, of course, were advanced, including the point that Crooker
was a capital case, but in the end the dissenters went squarely on
the broad ground that “[t]he demands of our civilization expressed
in the Due Process Clause require that the accused who wants a
counsel [regardless of the offense] should have one [presumably
whether or not he can afford it] at any time after the moment of
his arrest.”433 The dissenters also made clear that they did not
mean merely an opportunity to confer with counsel. Their point
instead was that due process required the exclusion of any confes-
sion obtained from an accused who had asked for counsel unless
counsel was actually present at the time of the questioning. This,
of course, goes far beyond the protection afforded by McNabb-
Mallory.

Cicenia434 was similar. New Jersey authorities had refused to
permit a lawyer previously retained by the defendant to talk with
him until the police had obtained a confession. More than seven
hours elapsed from the time the lawyer first asked to see his
client until permission was granted. Cicenia many times requested
the presence of counsel during the period. Ultimately, of course,
defendant confessed and, having done so, pleaded non-vult (thus
getting a life sentence) to a murder charge rather than risk a
trial on the merits and thus death. New Jersey had no pre-trial
procedure for challenging the admissibility of a confession. It
had to be done at a trial on the merits or not at all.

Mr. Justice Harlan, joined by four other Justices, applied
a “fair trial” test and found that no fundamental unfairness had

431 316 U.S. 455 (1942).
resulted. Mr. Justice Douglas, with whom the Chief Justice and Mr. Justice Black joined, again dissented, this time briefly, citing the *Crooker* dissent. The case having come from New Jersey, Mr. Justice Brennan understandably did not participate.

Aside from the fact that *Cicenia*, like *Crooker*, rests on the now discarded "fair trial" test of *Betts v. Brady*, the chief point of interest concerning *Cicenia* is the "strong distaste" Mr. Justice Harlan expressed for the behavior of the New Jersey authorities and his statement that "were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice in the federal courts. See *McNabb v. United States*, 318 U.S. 332." The point, in other words, is that while Mr. Justice Harlan was unwilling to hold that the sixth amendment (even in a federal case) guaranteed the right to the presence of counsel upon arrest, he did, as Professor Beaney has pointed out, see that it would be difficult to argue that the failure to take an arrested person before a commissioner . . . [as quickly as possible] should be given greater significance than refusal to afford the defendant access to counsel. . . . [T]his is obviously what Mr. Justice Harlan had in mind.

Accordingly, since *Wong Sun* gives *McNabb-Mallory* constitutional status in relation to both the states and the federal government in an opinion in which Mr. Justice Goldberg joined, it would be equally difficult for Mr. Justice Goldberg to draw the distinction in constitutional terms assuming, which is difficult to believe, that he might wish to. This point, plus the overruling of *Betts* by *Gideon*, virtually compels the conclusion that the dissenting opinions in *Crooker* and *Cicenia* represent the view of a majority of the Court's present membership and that, at the least, due process now requires the exclusion of any confession obtained in the absence of counsel when a defendant has requested that one be present during the questioning.

Nor is it clear that any such request need be made by the defendant, or that the present Court would require one. Certainly

435 Id. at 511-12.
436 Id. at 508-09.
437 Beaney, supra note 415, at 775-76.
438 It probably also spells the death of *In re Groban*, 352 U.S. 330 (1956), upholding the compulsory in camera firewarden interviewing of a criminal suspect in the absence of counsel notwithstanding that the suspect requested counsel and had the money to pay for one. And if *Groban* falls, so will Anonymous v. Baker, 360 U.S. 287 (1959) which rests on *Groban* and in some respects is not as distasteful.
none should be since this would remove due process protection from those most in need of counsel, i.e., those unaware of their right to have counsel present, and would, in addition, set up insuperable proof problems for the defendant since the police would, if their witness-stand behavior in other areas is any criterion, almost invariably testify that no such request was made.

*Griffith v. Rhay,* a decision of the Ninth Circuit Court of Appeals, expressly recognizes the force of the first point in upsetting a state first degree murder conviction because of an unconstitutionally obtained confession. Griffith, while under arrest in a hospital on a first degree murder charge, confessed to such crime as a consequence of interrogation by the prosecuting attorney. The court described the circumstances as follows:

At the outset of the questioning the prosecuting attorney identified himself to Griffith, told Griffith that he was charged with murder in the first degree, and warned him that anything he said could be used against him. Griffith, however, was not told that he did not have to answer. Nor was he asked if he had an attorney or wished to consult an attorney, or advised that one would be provided without expense to himself if desired. Griffith did not request the services of an attorney.

Distinguishing *Crooker* on the ground that defendant there had attended law school and knew of his right to keep silent, and *Cicenia* because the defendant there had previously employed counsel and so presumably was also aware of such right, this could not be said of Griffith who had never previously consulted counsel and was not expressly told by the prosecutor that he need not talk. The fact that *Crooker* and *Cicenia* involved defendants who had requested counsel was simply brushed aside. "In our opinion . . . Griffith is to be regarded as in the same position as one who had made and been denied such a request." Furthermore, the court held,

>[S]ince Griffith had a [due process] right to the assistance of counsel on the afternoon of the interrogation [since he was then under arrest] his failure to request such assistance has significance only if it amounted to a waiver of that right. . . . [C]ourts indulge every reasonable presumption against the waiver of fundamental constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458.

Accordingly, the conviction could not stand notwithstanding "[t]hat the record contained other evidence of guilt which may be

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440 Id. at 715.
441 Id. at 717.
442 Ibid.
considered overwhelming. That circumstance was expressly held to be "immaterial."

The only unfortunate aspect of Griffith is the suggestion implicit in the court's approach that the result might have been different had defendant known of his right not to blab. The case does, however, point up the vagaries involved in the now discarded "fair trial" approach. For it is clear on any fair reading of Griffith that he was far less "prejudiced" than either Crooker or Cicenia, both of whom were interrogated incommunicado behind bars. Griffith, in contrast, while under guard, was allowed guests and would doubtless have been permitted to have friends present at the interrogation had he requested this.

It is also of interest that Griffith, unlike Crooker and Cicenia, would not have been protected by the McNabb-Mallory rule as it is presently being applied by the lower federal courts, (Judges Edgerton and Bazelon dissenting). This, of course, because Griffith was physically unable to be arraigned.

The second line of precedent stems from a pair of concurring opinions in Spano v. New York. Defendant was arrested upon a bench warrant issued pursuant to a murder indictment. While he had been cautioned by his lawyer to say nothing to the authorities, defendant was intensively questioned incommunicado by a prosecuting attorney and various policemen. Bruno, defendant's long time friend, who at the time was a New York City police officer, helped persuade defendant to confess by falsely telling defendant that he (Bruno) might lose his job unless he confessed. Defendant's requests to have his lawyer present during the questioning were denied. The New York Court of Appeals, with three judges dissenting, upheld the conviction and also the admissibility of the confession.

The Court unanimously reversed, but the Justices disagreed as to the grounds. Mr. Chief Justice Warren, joined by four other Justices, applied a "totality of the circumstances" test—the usual "involuntariness" approach. Mr. Justice Douglas, however, joined by Justices Black and Brennan, wrote a concurring opinion saying that reversal was required because defendant was under indictment at the time of the interrogation. The criminal proceeding against him had formally commenced, and to allow interrogation in the absence of counsel after formal commencement of the proceedings denied due process of law. It was also suggested, albeit impliedly,

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443 Id. at 718.
that the fifth amendment barred the admission of a confession obtained under such circumstances.

Mr. Justice Stewart, joined by Justices Douglas and Brennan, also separately concurred. The Stewart opinion was, in general, the same as the Douglas opinion, laying heavy stress on the fact that an indictment had been returned. It differed, however, in its failure even impliedly to bring in the fifth amendment, which doubtless accounts for the fact that Mr. Justice Stewart failed to join in the Douglas opinion and Mr. Justice Black in the Stewart opinion. The Chief Justice, it can be safely assumed, recognized the insuperable difficulty involved in making the admissibility of a confession obtained in the absence of counsel turn on a circumstance as fortuitous as whether or not an indictment had been handed down at the time of the interrogation. Such a test, of course, as will soon be shown, is completely unworkable since the obtaining of an indictment can always purposefully be delayed. The same may be said of making the issue of permissible interrogation in the absence of counsel turn on any other formal step which can purposefully be delayed, e.g., the filing of an information or a complaint, an arraignment or even the making of an arrest. The Chief Justice was apparently holding out for something far more practical and in the meantime intended to remain silent. Retrospectively, it seems doubtful that he would have joined in the dissenting opinions in *Crooker* and *Cicenia*. He would have dissented, to be sure, but on quite a different ground.

However this may be, the Spano concurring opinions had an immediate impact on the New York Court of Appeals and set off a chain reaction the impact of which is presently being felt by trial and appellate judges throughout the land. It all began with *People v. Di Biasi*, decided in 1960. *Di Biasi*, a capital case, involved a post-indictment confession obtained from defendant in the police station. Though defendant had retained counsel who had in fact surrendered him to the police, defendant, when questioned, neither objected to such questioning, nor asked to call his attorney, nor requested that his attorney be present during the questioning. Regarding such factors as completely immaterial, the court held that any post-indictment confession obtained in response to official interrogation in the absence of defense counsel is inadmissible on

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federal and state due process grounds, and on the additional ground that such interrogation constitutes "testimonial compulsion," i.e., violates defendant's privilege against self-incrimination.

People v. Waterman, another New York Court of Appeals case, went two steps further, extending Di Biasi to all post-indictment interrogation in the absence of counsel regardless of the nature of the offense (capital felony, non-capital felony, misdemeanor or otherwise), and whether or not defendant had actually retained counsel at the time of the interrogation. People v. Meyer went further still, but the stress was still on the necessity of showing that a formal procedural step other than arrest had been taken against the accused. Meyer held that "any statement made by an accused after arraignment not in the presence of counsel ... is [constitutionally] inadmissible." Taken literally, this language would preclude a turnkey from testifying concerning a totally unsolicited confession or admission of an accused legally committed to jail for inability to post bond or because the offense was non-bailable. It is extremely doubtful whether the court meant to be so understood. The dissent so construed the majority opinion, however, and it must be conceded that the actual facts of Meyer indicate that the initiative giving rise to the interrogation came from the accused.

People v. Rodriguez, however, while extending Meyer to prohibit the admission of any statement of the accused made in the absence of counsel during the adjournment of an arraignment, but before its completion, stressed the point that the statement was produced as a result of police questioning and that this was likewise the constitutional vice involved in Di Biasi, Waterman and Meyer.

Thus far the New York cases have been pressed upon numerous courts, both state and federal, and in a variety of situations. Perhaps the most unusual of these is United States v. LaVallee, where a state prisoner sought release in a federal habeas corpus proceeding contending that the above-discussed cases compelled the reversal of his state conviction in part based on the testimony of post-indictment incriminating statements made by him to an informer planted by the police in his jail cell for the purpose of inducing such state-

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449 Id. at 104.
ments. While conceding that the claim was "not completely devoid of plausibility," the court nevertheless rejected it, as did the majority in a closely related context in the previously discussed case of United States v. Massiah. There, however, at least one judge found the reasoning of the New York cases persuasive and accordingly dissented.

But while the New York cases mentioned—and still others not mentioned—were sounding high civil liberties notes, it soon developed that they were so high as to be beyond effective New York judicial hearing. The cases, in practice, apart from their retroactive impact, actually mean little and, when operative at all, operate in an extremely fortuitous fashion. For, with their insistence on some "formal step" in addition to the fact of arrest, such "formal step" could be and is purposefully delayed and incommunicado pre-arraignment interrogation following arrests go along unchecked. The Court of Appeals, furthermore, Judge Fuld alone dissenting, refused even to adopt McNabb-Mallory. Without that rule, it cannot too much be stressed, the seeming protection afforded by the Spano-Di Biasi line of decisions becomes almost totally illusory. And, finally, albeit reluctantly, Judge Fuld himself gave up. Accordingly, New York prosecutors and police simply delay any "formal step" until their incommunicado interrogation of the accused results in a confession. Then, sooner or later—generally later, often weeks later—an attorney is finally called in.

Thus far at least, no court outside New York has followed the DiBiasi-Spano line of cases. And the Oregon and California courts have expressly refused to do so. But of all the commentators and courts to deal with such cases, and there have been many, only one Judge, the distinguished Judge Traynor of California, appears to have understood what they were really all about and particularly the point that, absent McNabb-Mallory and the right to counsel in the police station, such cases (because of their insistence on a "formal step") in practice offer little or no protection to persons accused of crime.

452 307 F.2d 62 (2d Cir. 1962). See text at note 425 supra.
455 See note 414 supra.
Concurring in *People v. Garner*, Judge Traynor put his refusal to adopt the New York cases chiefly upon the above-mentioned grounds. At the same time, however, he conceded that there was much to be said for the views expressed in the *Crooker* and *Cicenia* dissents making the permissibility of official interrogation in the absence of counsel turn on the question of whether defendant had been arrested. But, recognizing that arrests as well as arraignments, indictments and informations could also purposefully be delayed to ensnare a suspect, he perceived that the *Crooker* and *Cicenia* dissents were not the complete answer either.

In other words, Judge Traynor clearly expressed what no commentator thus far appears to have understood, and (whether understood or not) what no member of the United States Supreme Court has yet seen fit to point out in an opinion, namely, that once a court, and Judge Traynor was speaking principally of the United States Supreme Court, takes even one step down the path opened by the *Spano* concurring opinions and the *DiBiasi* cases, there is no logical course but to adopt what, at least until recently, was the "English rule" with regard to permissible interrogation of suspects. This rule, as explained by Lord Devlin, is that "whenever the evidence in the possession of the police has become sufficiently weighty to justify a charge, the charge is for this purpose treated as having been made" and further official questioning of the suspect must come to an abrupt halt whether or not a warning be given. In other words, the test is not whether the suspect has been arrested, formally or informally, but whether the police have grounds to believe that he is "their man." Furthermore, an objective standard is employed in determining this issue. Interrogation after such point is barred, and incriminating statements produced thereby in the absence of counsel are inadmissible.

And this, it is submitted, will ultimately turn out to be what due process as defined by the United States Supreme Court will require on both the state and federal level. Indeed, while Judge Traynor was not at all sure he liked this, he foresaw it coming. Noting that *Betts v. Brady* was still law at the time he wrote, he observed that such case was really the only barrier logically precluding adoption of the English rule. *Betts*, of course, is now gone and the sixth amendment applies in its full extent to the states—for indi-

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458 Id. at 693.

459 DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 35 (1958). The operation of the rule is well explained throughout Devlin.

460 316 U.S. 455 (1942).
gents and non-indigents alike. It seems very likely that Judge
Traynor, in the light of *Gideon*, would today feel constitutionally
bound to dissent in *Gardner*.

Having said this, the answer to what has heretofore been re-
garded as a knotty technical problem of when, for *government ques-
tioning purposes*, the right to counsel attaches, is answered. The
question has been thought technical, of course, not only because
the Court has failed specifically to speak on the matter, but because
of the inconsistency between Rule 44 of the Federal Rules of Crimi-
nal Procedure requiring appointment of counsel whenever a defend-
ant appears in court without one, and Rule 5(a) which merely re-
quires the Commissioner on arraignment to advise the arrestee of his
right "to retain" counsel. The word "retain" in such Rule, unfortun-
ately, is not there by accident. It was added by the Court itself
when Rule 5(a) was submitted by the Advisory Committee for
approval and possible change. The best discussion of the problem
will be found in *United States v. Killough*. The question of when
the right to counsel attaches for investigative purposes, of course,
and whether there is room in this field for possible distinctions
according to the seriousness of the charge, is outside the scope of
this article.

IX. *WONG SUN, WIRE TAPPING AND RELATED
INVESTIGATIVE TECHNIQUES*

As *Wong Sun*'s dicta put *McNabb-Mallory* on a constitutional
footing, and because of the interrelationship between that rule and
the entire matter of police questioning of criminal suspects, the
discussion necessarily had to go far beyond the facts of *Wong Sun*

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461a In this connection the holding in *State v. Krozel*, 24 Conn. Sup. 266,
190 A.2d 61 (1963) appears noteworthy. The court held that failure of
the police to allow a defendant they "thought" was intoxicated to con-
tact his counsel after arrest—notwithstanding he did not have money
for the phone call—*automatically* required the upsetting of his convic-
tion. And this even though defendant did not confess during the in-
terim, or otherwise incriminate himself.

462 Compare the present wording of 5(a) with the Federal Rules of Crimi-


464 As to these matters, see the authorities cited in note 419 *supra* and the
host of authorities cited by those authorities. The classic work on right
to counsel, of course, is *Beane, Right to Counsel* (1955).
itself. But all of the matters considered, it is submitted, are inex- 

tricably bound up with Wong Sun and constitute part of its promise and hope.

There is yet another such promise in Wong Sun—the over-

ruling of Olmstead v. United States and related cases. Olmstead, of course, holds, over vigorous dissents by Justices Brandeis and Holmes, that non-trespass wiretapping does not violate the fourth amendment. The reason Wong Sun probably overrules Olmstead is because the basic premise on which Olmstead rests is that conversa-

tion is not an “effect” within the meaning of the fourth amendment, whereas Wong Sun clearly holds that it is, (i.e., Toy’s bedroom statements). The notion that it cannot be, furthermore, is probably erroneous even as a technical historical matter.466

Of course, the ultimate downfall of Olmstead was earlier fore-

shadowed by Silverman on which Wong Sun expressly rests. Silverman held that the fourth amendment barred government agents from testifying to incriminating statements of the defendant overheard by means of a spike protruding one-fifth of an inch into defendant’s party wall. Wong Sun, it should be noted, goes beyond Silverman in that Toy obviously intended that his statements be overheard. To be sure, both Silverman and Wong Sun differ from Olmstead in that they involve trespasses. But the main premise of Olmstead is not trespass, but that conversation is not an “effect.” Silverman and Wong Sun destroyed that premise and Olmstead along with it.

Necessarily also gone, then, is Goldman v. United States, holding that the fourth amendment was not violated where federal agents overheard defendant incriminate himself in his private office by use of a detectaphone applied to the wall of a room adjoining the office. This, of course, because Goldman expressly rests on Olmstead.

On Lee v. United States is probably also destined to be over-

ruled on account of Wong Sun, but for somewhat different reasons.

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465 277 U.S. 438 (1928).
466 The amendment as originally drafted read: “The right of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches . . . .” On the motion of Mr. Gerry, the much broader word “effects” was substituted for the phrase “their other property.” Olmstead v. United States, 277 U.S. 438, 450 (1928), and authorities there cited.
468 316 U.S. 129 (1942).
The facts were as follows. While petitioner was at large on bail pending his trial in a federal court, an old friend of petitioner's who, unknown to petitioner, was a federal agent and had a radio transmitter concealed on his person, entered the customers' room of petitioner's laundry and engaged petitioner in conversation for the purpose of getting petitioner to incriminate himself. Incriminating statements made by petitioner during this conversation were listened to on a radio receiver outside the laundry by another federal agent who testified concerning them at the trial resulting in petitioner's conviction.

Relying on *Olmstead* and *Goldman* and finding that no trespass had been committed by the "old friend," the Court held the fourth amendment not to have been violated. To the extent that *On Lee* rests on *Olmstead* and *Goldman* it can no longer be sustained in the light of *Wong Sun* and *Silverman*. But *Wong Sun* arguably compels its overruling for still other reasons. The "old friend's" presence in the customer's room was for an unlawful purpose and *Wong Sun* arguably puts "unlawful collateral purpose" into the fourth amendment.\(^470\) Also relevant, of course, is *Miller v. United States*\(^471\) and its *Wong Sun* extension. If an officer must in order constitutionally to arrest in/or search a laundry first announce his authority and purpose, this should likewise hold true in the case of a fraudulent entry for the purpose of obtaining oral incrimination. Again, of course, the concurring opinions in *Spano*\(^472\) are relevant along with the *Di Biasi*\(^473\) case and its extensions, and the previously discussed dissenting opinion of Judge Hays in *United States v. Massiah*.\(^474\) Petitioner in *On Lee*, after all, was under indictment at the time he was surreptitiously induced to incriminate himself. Finally, *On Lee* was a five to four decision and Mr. Justice Burton, certainly no civil liberties' softie, was one of the four.

As a policy matter, all of these cases (*Olmstead*, *Goldman* and *On Lee*) should go. For they not only involve what Mr. Justice Holmes once called "dirty [police] business" but constitute wholly unjustified invasions of a man's privacy which it is the central purpose of the fourth amendment to prevent. And technical distinctions according to whether there is a trespass, while sometimes

\(^460\) 343 U.S. 747 (1952).
\(^470\) See text beginning at note 100 supra.
\(^471\) 357 U.S. 301 (1958). See text accompanying note 80 supra.
\(^472\) See text beginning at note 444 supra.
\(^473\) See text accompanying note 446 supra.
\(^474\) 307 F.2d 62 (2d Cir. 1962). See text at notes 425 and 453 supra.
perhaps helpful, cannot possibly be determinative. Certainly not in an electronics age. Science has already produced a series of frightening devices by which a man's whispered words in the privacy of his home or office can electronically be overheard from a location many yards distant. Only God knows what the future will bring.

For somewhat similar reasons, the Court should outlaw the admission of testimony concerning observations of criminality obtained through surreptitious keyhole or window peeking and incriminating statements overheard by officers standing on a man's porch solely for the purpose of overhearing what is being said inside.

Nor, with regard to wire tapping and similar techniques, should one concern himself with the probability that a search warrant could not constitutionally be obtained to overhear one's private conversations. For to allow search warrants for such a purpose would, sooner or later, destroy the fourth amendment altogether. In practice, all the judicial safeguards in the world would not help. This is not "metaphysics" either, as one writer has suggested. It is life. The policy considerations are adequately discussed elsewhere and will not here be pursued further.

It must, however, be said that the overruling of Olmstead and similar cases is not of itself going to stop the government from wire tapping and/or from using 1984 scientific investigative techniques as they develop. Certainly Nardone, outlawing the admission of wire tap evidence in the federal courts, has not put a stop to wire tapping so far as federal agents are concerned, and there seems little doubt that many convictions have been unlawfully obtained through the indirect use of evidence obtained from leads furnished by illegal taps. This is because the defendant ordinarily cannot prove that wire tapping has occurred.

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474 The law in this area is well and fully discussed in Dash, The Eavesdroppers 423 (1959), as is, indeed, the entire law of wire tapping and related eavesdropping and eaves-spotting techniques. Id. at 385-476. Policy arguments are therein also advanced. Other extremely useful articles in the wire tap field are found in a symposium on the subject in 44 Minn. L. Rev. 818-940 (1960).

475 See Kaplan, supra note 2, at 478.

476 See authorities cited in note 476 supra.

Reviewing the situation as of 1952, a Yale man found that there were only four wire tap hearings conducted since Nardone was decided in 1937, and that the defendant’s discovery of the tap was in each such case both freakish and fortuitous. Nor has the situation improved since, as United States v. Casanova, handed down only recently, makes plain. Of course the police will continue to employ unlawful techniques, whatever the Court says, unless and until the public becomes sufficiently outraged. But the Court can educate. It can kindle fires and mold public opinion. And, above all, it cannot, unless liberty under law is itself to perish, hand down decisions countenancing the use of wire tapping and related techniques.

X. WONG SUN, THE FIFTH AMENDMENT AND DUAL SOVEREIGNTY DOCTRINE.

Wong Sun likewise raises hope in several other constitutional sectors. First of all, the Court’s “personal interest” or “aggrieved party” standing test strongly suggests a fifth amendment approach. Why, unless the fifth applies to the states, limit standing under the fourth merely to the “aggrieved party”? Second, Wong Sun applies McNabb-Mallory to the states and one of the obvious reasons for doing this, as previously discussed, is effectively to implement federal constitutional policy and to obviate illicit working arrangements and silver platter and reverse silver platter situations. Elkins made a similar point in the fourth amendment field, as did Mapp.

What reason is there, then, for applying a different doctrine in the privilege against self-incrimination and double jeopardy areas? Under existing Supreme Court precedent, of course, a person can constitutionally be forced in a federal proceeding to confess himself into a state penitentiary and vice versa, and this though both the federal and the state constitutions guarantee freedom from self-incrimination.

The pernicious effects of this dual sovereignty doctrine and the frustration of federal constitutional policy it entails in the

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481 213 F. Supp. 654 (S.D.N.Y. 1963). The decision, holding that defendant did not sufficiently show a wire tap, cites a host of similar rulings.
482 The most recent note, covering all of the Court’s decisions through 1962, appears in 57 Nw. U.L. Rev. 561 (1962). See also Kroner, Self-Incrimination: The External Reach of the Privilege, 60 Colum. L. Rev. 816 (1960). These works cite all of the leading cases, articles and books on the subject.
privilege field were perhaps never more forcefully demonstrated than by the Court's recent decision in *Hutcheson v. United States*,\(^4^8^3\) sending petitioner to jail for refusing on due process grounds to answer certain questions put to him by a Congressional investigating committee. Petitioner, already indicted and awaiting trial in a state court, was faced with a real dilemma when the questioning turned to matters with which the state criminal prosecution was concerned. While petitioner could have asserted his federal privilege against self-incrimination, the fact of his refusal would, under the Court's decisions in *Twining*\(^4^8^4\) and *Adamson*\(^4^8^5\) be admissible against him in the state criminal proceeding and he was thus, as a practical matter, barred even from asserting his federal privilege against self-incrimination in a federal proceeding notwithstanding that the Indiana Constitution likewise contained a privilege against self-incrimination. He accordingly refused to answer on due process grounds and was sent to jail with the Court's blessing.

As *Hutcheson* amply demonstrates, the dual sovereignty doctrine in the privilege area is, as a practical matter, inseparable from the question of whether the federal privilege against self-incrimination applies to the states. Dual sovereignty doctrine and cases like *Adamson* and *Twining* refusing to apply the federal privilege to the states must stand or fall together. And they certainly ought not stand. If *Hutcheson* does not make this clear, then *Cohen v. Hurley*\(^4^8^6\) should, at least for a lawyer concerned about the independence of the Bar. *Cohen* sustained the disbarment of an attorney merely for asserting his state constitutional privilege against self-incrimination when asked by a state judge in an *in camera* proceeding where he was denied the privilege of representation by counsel concerning his possible involvement in "ambulance chasing" activities. There was not the slightest evidence that petitioner had engaged in any illegal or unethical activity. Yet he was required, on penalty of disbarment, to answer and to supply out of his own mouth, evidence which might convict him of crime notwithstanding that he was presumably wholly innocent. *Cohen*, while allowed to remain on the books, in effect denies to lawyers the constitutional rights afforded to other people, is a definite threat to the independence of the Bar and hence a blow at the constitutional rights of Everyman.

\(^4^8^3\) 369 U.S. 599 (1962).

\(^4^8^4\) Twining v. New Jersey, 211 U.S. 78 (1908).

\(^4^8^5\) Adamson v. California, 332 U.S. 46 (1947).

Similarly, though the federal and most state constitutions contain provisions against twice being placed in jeopardy, an acquittal on a state charge under the Court's precedents is no bar to a conviction on a federal charge based on the same facts and vice versa. Likewise, a conviction on a state charge will not bar a federal conviction on the same facts and the same holds true the other way around.

None of the decisions above referred to, nor any of their doctrines, have the approval of any member of the Wong Sun majority. The only question mark is Mr. Justice Goldberg who has not thus far had an opportunity to pass on any of these questions. It is submitted, however, that his Wong Sun vote, along with his concurring opinion in Cleary and his vote in Gideon show that he would join the other Justices comprising the Wong Sun majority in voting to jettison dual sovereignty and to apply the fifth amendment in its full extent to the States.
XI. CONCLUSION

It only remains to add a few words by way of conclusion and to emphasize the point that the various positions taken herein—while on the whole civil libertarian—are, if anything, too moderate. Much more could and perhaps should have been said of the deficiencies in our nation's procedural criminal law, but one cannot do and say everything one wants when reviewing the holdings and potential of just one opinion, no matter how brilliant its author or great the opinion's potential.

In assessing whether or not the positions herein assumed are correct, the reader might with profit note a justly renowned comment of the late Professor Dession: 488

[T]he criminal law...[has] acquired a rather bad name. It is not only that punishment is inherently repellent; the prevailing impression is that the whole system is ridden with inefficiency. Too few of the really serious offenders are caught, and of those caught far too few are convicted and appropriately sentenced, or so our not infrequent crime surveys would have one believe. This is popularly ascribed to criminal procedure, the thought being that the safeguards of the accused operate as unreasonably technical obstacles to conviction of the guilty. The notion is, of course, balderdash, as all who had any experience in the trial of criminal cases well know. To prosecute is far easier than to defend. The prosecutor is normally assumed to represent right and justice, and on top of that he almost invariably enjoys more investigative assistance and resources generally. But the notion persists.488

The point, in other words, is that the balance of advantage in a criminal prosecution rests heavily on the side of the prosecution. Only a few points need be mentioned. The traditional test for refusing to direct a verdict of acquittal in a criminal case has now been watered down to the point where it is the same as for a civil case.489 A grand jury indictment can never, or almost never, be attacked for lack of competent evidence to support it,490 and defendants arrested on bench warrants issued pursuant to grand jury indictments are not entitled to preliminary hearings.491 Again, while

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the "technical rules" of common law criminal pleading have for the most part been abolished, there has been no commensurate increase in a defendant's right to obtain discovery of the government's case in advance of trial. Instead the movement on the state level is the other way around and statutes have been passed requiring the defendant to give notice of what his defense is to be—alibi, insanity or what not.

Indeed, in some states, it is a matter of grave doubt whether defense counsel even has a right to subpoena his client's confession prior to trial, and discovery of the government's other evidence is almost universally prohibited.493

Then there is the matter of comparative resources mentioned by Professor Dession. Even a wealthy defendant does not have access to FBI fingerprint files and the facilities often necessary in order to conduct vital and reliable scientific tests. Furthermore, the prosecutor has the power to detain "material witnesses." The defense does not. The prosecutor can offer immunity from prosecution in return for favorable testimony. The defense cannot. One could go on and on. But it would be pointless. The ground has been well and thoroughly covered by Professor Goldstein.493

The concluding point is simply this: Given life and law as it presently exists, the modest procedural protections herein suggested, even if they were all to be adopted, would still leave the scale of justice in criminal cases tilting very heavily on the side of the prosecution.

492 See Broeder, supra note 2, at 218, n.169.