Nebraska Law Review

Volume 41 | Issue 1 Article 7

1961

The Decline and Fall of *Wolf v. Colorado*

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Special Feature Article

THE DECLINE AND FALL OF *WOLF v. COLORADO*

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The purpose here is to examine critically the recent opinion of the United States Supreme Court in *Mapp v. Ohio;*[1] to place the opinion in historical perspective; to examine important questions the opinion raises but leaves unanswered; and to consider the implications of the opinion in the difficult area of federal-state relationships. *Mapp,* of course, as everyone who reads the newspapers is by now doubtless aware, holds that evidence procured by state officers in violation of the fourth amendment[2] is inadmissible in state criminal prosecutions. Building on certain dicta in *Wolf v. Colorado,*[3] while at the same time repudiating the actual holding of that case, the Court found not only that the bare command of the fourth amendment against unreasonable searches and seizures was implicit in the concept of "ordered liberty" required by due process of law—which Mr. Justice Frankfurter speaking for the Court in *Wolf* twelve years before had for the first time somewhat ambivalently conceded[4]—but that "ordered liberty" likewise required state courts to exclude evidence obtained by state officers in violation of the fourth amendment.

Mapp also contains a meaningful constitutional message for the Congress. Mr. Justice Clark, writing for the majority, unequivocally states that the existing federal rule, as enunciated in the *Weeks* and *Elkins* cases, requiring the exclusion of evi-

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1 367 U.S. 643 (1961).

2 "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."

3 338 U.S. 25 (1949).

4 "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause." *Id.* at 27.

dence illegally obtained by state and federal officers in federal criminal prosecutions is not merely a rule of evidence formulated by the Court in the exercise of its supervisory power over federal criminal prosecutions, but has itself a constitutional basis—in the case of federal prosecutions, the fourth amendment operating in conjunction with the fifth.[5] The fourth, then, was enough to compel the exclusion of such evidence in state criminal prosecutions, but the fifth amendment likewise required this in the case of federal criminal prosecutions. Thus in one broad stroke the Court not only forced more than one-half of the states to change their existing practice of admitting evidence illegally seized by government officers,[6] but made it impossible for Congress ever to grant such authority to the states, or indeed to provide for the admission of such evidence in federal criminal prosecutions. *Mapp,* then, is noteworthy not only for the blow it strikes against oppressive police investigatory activities and for its dramatic impact on the conduct of state criminal prosecutions, but because it is also one of the few times since the early thirties that the Court has seen fit to take constitutional authority away from the Congress. All of this was done, it might be noted, after only the sketchiest briefing and argument of the point by counsel who were largely pressing for decision on an entirely different ground.[7] Suffice it to say at the outset that *Mapp* is one of the most significant opinions rendered by the Court in the area of criminal procedure since the turn of the century. It is comparable in importance in this area to such landmark decisions

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[5] The fifth amendment provides in relevant part as follows: "[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

[6] In general, consult Berman & Oberst, *Admissibility of Evidence by an Unconstitutional Search and Seizure,* 55 NW. U.L. REV. 525, 532-33 (1960).

[7] Mr. Justice Harlan's dissenting opinion describes the situation as follows: "The appellant's brief did not urge the overruling of *Wolf.* Indeed it did not even cite the case. The brief of the appellee merely relied on *Wolf* in support of the State's contention that appellant's conviction was not vitiated by the admission in evidence of the fruits of the alleged unlawful search and seizure by the police. The brief of the American and Ohio Civil Liberties Unions, as *amici,* did in one short concluding paragraph of its argument, 'request' the Court to reexamine and overrule *Wolf,* without argumentation. . . . Counsel for appellant on oral argument . . . did not urge that *Wolf* be overruled. Indeed, when pressed by questioning from the bench whether he was not in fact urging us to overrule *Wolf,* counsel expressly disavowed any such purpose." Mapp v. Ohio, 367 U.S. 643, 674 nn.5 & 6 (1961).

as *Olmstead v. United States*,[8] *Powell* v. *Alabama*,[9] *Brown v. Mississippi*,[10] *McNabb v. United States*[11] and *Griffin v. Illinois*.[12] Let us now turn to the story of how *Mapp* came to be written.

I.

Before examining the opinion directly, however, it is probably best to begin with a page of history. One can go far back in this area,[13] but for present purposes it is enough to start with *Weeks v. United States*,[14] decided in 1914. Following Weeks' arrest by a state police officer, several other state officers went to Weeks' house without his knowledge or consent, and being told by a neighbor where the key was kept, found it and entered the house where they made a search of defendant's room, taking possession of various papers and articles which they then turned over to a United States Marshall. Later in the same day these officers returned with the Marshall, and upon being admitted to the house by an unidentified person, the Marshall made a further search of defendant's room and seized other papers and articles belonging to the defendant. Neither the Marshall nor the state police officers had a search warrant. The papers and articles seized on the two occasions were admitted over defendant's objection at his trial on a federal charge of using the mails to transport lottery tickets. The Supreme Court, finding both searches to have been unlawful, reversed defendant's conviction and remanded, holding that it was error for the trial court to have admitted the letters and articles seized by the United States Marshall. Whether this was because the Constitution required the exclusion of such evidence was not expressly stated, but was very strongly implied. The Court found no error, however, in the admission of the letters and articles seized by the state officers acting on their own when unaccompanied by the United

[8] 277 U.S. 438 (1928) (non-trespass wiretapping not a violation of fourth amendment).

[9] 287 U.S. 45 (1932) (first case requiring states to furnish counsel for indigent defendants in capital cases).

[10] 297 U.S. 278 (1936) (first case banning use of involuntary confessions in state criminal prosecutions).

[11] 318 U.S. 332 (1943) (confession obtained during period of unlawful detention inadmissible in federal criminal prosecution).

[12] 351 U.S. 12 (1956) (states with appellate procedures must make them available to indigent defendants).

[13] See, *e.g.*, [1765] Entick v. Carrington, 19 How. St. Tri. col. 1030, 2 Wils. K.B. 275, 95 Eng. Rep. 807; Boyd v. United States, 116 U.S. 616 (1886).

[14] 232 U.S. 383 (1914).

States Marshall, "as the Fourth Amendment . . . . [was] not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies [alone]."[15] This latter facet of the Court's ruling was later to become known as the "silver platter" doctrine, *i.e.*, that evidence unlawfully seized by state officers acting entirely on their own and subsequently turned over to federal agents on a "silver platter" would be admissible in federal criminal prosecutions.

Six years later, in *Silverthorne Lumber Co. v. United States*,[16] the doctrine of *Weeks v. United States*[17] in its relation to federal officers was extended to preclude not only the admission of evidence illegally seized by federal officers, but any information which they obtained as a result of their illegal search as well—that is, not only the evidence itself, but the "fruits thereof." The Court, speaking through Mr. Justice Holmes, thought that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[18] "Of course," the Court added, "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 knowledge gained by the Government's own wrong cannot be used by it in the way proposed."[19]

Prior to *Wolf*, two further developments occurred. The first, perhaps left undisturbed by *Mapp*, came only a year after *Silverthorne*, in *Burdeau v. McDowell*, [20] decided in 1921. Acting without the knowledge or assistance of either state or federal officers, a thief, to advance his own ends, stole petitioner's private papers and turned them over to a United States Attorney. Fearing that the United States Attorney would use the papers against him to obtain an indictment, petitioner successfully moved a federal district court to compel the Attorney to return the papers. On appeal to the United States Supreme Court, the order of the district court was reversed. The fourth amendment, the Court held, gave protection against governmental action only, and here the unlawful seizure was accomplished by a private citizen acting entirely on his own. Mr. Justice Brandeis, with Mr. Justice

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15 *Id.* at 398.

16 251 U.S. 385 (1920).

17 232 U.S. 383 (1914).

18 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

19 *Ibid.*

20 256 U.S. 465 (1921).

Holmes concurring, vigorously dissented. In their view the Court's ruling sanctioned a practice "shock[ing to] the common man's sense of decency and fair play."[21]

The second development involved inroads upon the "silver platter" doctrine of *Weeks v. United States*.[22] The starting place here is *Byars v. United States*[23] which held that when participation of a federal agent in an illegal search is ". . . under color of his federal office [and is] in substance and effect . . . a joint operation of the local and federal officers," then the unlawfully seized evidence must be excluded in federal criminal prosecutions because "the effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own."[24] In other words, if a federal officer participates in the unlawful search, the evidence has to be excluded in federal criminal prosecutions notwithstanding the fact that such evidence would have been admissible had the state officers been acting entirely on their own.

The Court went even further in *Gambino v. United States*.[25] There state officers had seized liquor from the defendants' automobile after an unlawful search in which no federal officer had participated. The liquor was admitted in evidence against the defendants in a federal National Prohibition Act prosecution. The Supreme Court reversed the judgments of convictions holding that the illegally seized liquor should have been excluded. This was because there was "no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they have done so in the past; or that the [state] troopers believed that they had." Hence "[t]he wrongful arrest, search and seizure . . . [must have been] made solely on behalf of the United States."[26] The evidence was therefore inadmissible in a federal criminal prosecution.

Then came *Wolf v. Colorado*,[27] in 1949. A state deputy sheriff and others went to a doctor's office without a warrant and seized his appointment book, searched through it to learn the names of his patients, locked up and interrogated some of them, and

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[21] *Id.* at 477.

[22] 232 U.S. 383 (1914).

[23] 273 U.S. 28 (1927).

[24] *Id.* at 33.

[25] 275 U.S. 310 (1927).

[26] *Id.* at 314, 316.

[27] 338 U.S. 25 (1949).

filed a state information against the doctor on the basis of information the district attorney had obtained from the books. The books were also introduced in evidence against the doctor in his state trial, a conviction resulting.[28] The Supreme Court granted certiorari to determine whether the evidence so obtained by state officials was admissible against the defendant in a state criminal prosecution. Mr. Justice Frankfurter, writing for the majority, held that it was. But in what for its author has certainly since *Mapp* turned out to be one of his sorriest bits of dicta, *Wolf* nevertheless conceded that at least "the core" of the fourth amendment's prohibition against unreasonable searches and seizures was applicable to the states through the due process clause of the fourteenth amendment, and that petitioner's federal constitutional rights had in fact been violated by Colorado. At the same time, the opinion held that the states are free to admit evidence obtained in violation of the fourth amendment or not as they see fit so long as they do not by statute or judicial decision "affirmatively sanction" unreasonable searches and seizures, and so long as they provide some remedy—even a generally worthless tort action against the offending officers would be enough—to redress the fourth amendment violation. Of course, as previously noted,[29] *Mapp* overturns this ruling and holds such evidence inadmissible in state criminal prosecutions.

Between *Wolf* and *Mapp,* however, it developed that there were both "unreasonable" seizures by state officers, and "*very* unreasonable" ones. This interesting distinction was first drawn in *Rochin v. California,*[30] an opinion which fittingly enough was likewise authored by Mr. Justice Frankfurter. California police officers unlawfully broke into Rochin's house and into his bedroom where they found him sitting partially clad on a bed upon which his wife was lying. Noticing two capsules on the night stand beside the bed, the officers inquired who owned them, whereupon Rochin seized and swallowed the capsules. A struggle ensued in which the officers jumped on Rochin but were unable to extract the capsules. Rochin was then taken to a hospital where a doctor, acting under the officers' direction, forced an emetic solution through a tube into Rochin's stomach against

[28] As *Wolf* was decided in the abstract, these facts do not appear in the *Wolf* opinion itself. Rather they are taken from the Court's opinion in Irvine v. California, 347 U.S. 128 (1954), where an effort was made to overrule *Wolf,* and the Court felt it necessary to set forth the facts involved in *Wolf.*

[29] See text at note 1 *supra.*

[30] 342 U.S. 165 (1952).

his will. The vomited matter proved to contain two morphine capsules. Rochin was convicted by a California court of unlawfully possessing morphine, the principal evidence against him consisting of the two capsules. The Supreme Court reversed. The officers' course of conduct was of a character found to be "shocking to the conscience" of the Court and accordingly violated due process of law. *Wolf v. Colorado*[31] notwithstanding, evidence so obtained was held to be inadmissible in a state criminal prosecution.

The problem, then, was what would shock the Court's conscience. The answer, it soon become apparent, was not very much. *Irvine v. California*[32] made this clear beyond all possible doubt. California police officers several times burglarized defendant's home, placing microphones in various places in the home, which allowed them to listen to what defendant and others in the home said. One microphone was even placed under defendant's bed where he and his wife slept, and was kept there constantly monitored by the officers for a twenty day period. Eventually the officers heard the defendant make incriminating statements on the basis of which California convicted him of bookmaking. The Supreme Court affirmed. Only four members of the Court were sufficiently shocked. Significantly, however, Mr. Justice Clark, the author of *Mapp,* while concurring with the majority, did so with great reluctance. In a separate opinion,[33] he announced himself as being fed up with the vagaries of "shock the conscience," and as being prepared to jettison *Wolf* as soon as a majority of the Court's membership would allow. In retrospect at least, *Wolf* now hung by only a thread. Even one of the Court's most conservative spokesmen had had enough.

The battle next shifted back to federal criminal prosecutions. In *Elkins v. United States,*[34] decided in 1960, the Court re-examined the "silver platter" doctrine of *Weeks v. United States*[35] and found it wanting.[36] The situation was the by now familiar one

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[31] 338 U.S. 25 (1949).

[32] 347 U.S. 128 (1954).

[33] *Id.* at 138.

[34] 364 U.S. 206 (1960).

[35] 232 U.S. 383 (1914).

[36] As the Court observed in *Elkins,* the "silver platter" phrase was first coined in the Court's opinion in Lustig v. United States, 338 U.S. 74 (1949). Over the years "silver platter" occasioned much law review comment. See, *e.g.,* Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice,* 8 DE PAUL L. REV. 213 (1959); Kamisar,

of a state officer's search in violation of defendant's fourth amendment rights, the search not having been participated in by federal officers, and the unlawfully seized evidence being admitted at defendant's trial on a federal charge. In reversing defendant's federal conviction, Mr. Justice Stewart, speaking for the Court, reasoned simply that since the Frankfurter majority opinion in *Wolf* had found the fourth amendment applicable to the states through the due process clause, federal policy in federal criminal prosecutions would be as much affronted by admitting the results of illegal seizures by state as well as by federal officers. The "silver platter" aspect of *Weeks v. United States*[37] accordingly had to go. Subsidiary reasons assigned were the difficulties involved in administering "silver platter;"[38] the fact that the doctrine frustrated the policy of those states following the federal exclusionary rule as a matter of local policy;[39] the salutary effect of the exclusionary rule in the federal area and in those states which had adopted it; the circumstances that states adhering to the rule had generally set their faces against allowing evidence unlawfully seized by federal officers to be admitted into evidence,[40] and the fact that a contrary ruling would put the Court's imprimatur on unconstitutional action by state police officers.

Three cases remain to be noted, all having been efforts to flank *Wolf* by way of federal court injunctions. The first such effort, *Stefanelli v. Minard*,[41] was unsuccessful. *Stefanelli* held it to be impermissible for a federal court to enjoin state officers from presenting evidence obtained in the course of an unreasonable search of defendant's effects in defendant's state criminal

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Wolf and Lustig Ten Years Later: Illegal Evidence in State and Federal Courts, 43 MINN. L. REV. 1083 (1959); Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 3 WASH. U.L.Q. 229 (1959).

37 232 U.S. 383 (1914).

38 Among them were the problems involved in determining whether the state officers were in fact investigating state rather than federal criminality, and whether there was sufficient federal participation to taint the illegally seized evidence. See text at notes 23-25 *supra*.

39 That is, state officers were encouraged by "silver platter" to turn over their illegally seized evidence to federal authority, thus frustrating local policy which sought to deter unreasonable state officer searches by excluding evidence obtained thereby in state criminal prosecutions.

40 See, *e.g.*, State v. Arregui, 44 Idaho 43, 254 Pac. 788 (1927); Walters v. Commonwealth, 199 Ky. 182, 250 S.W. 839 (1923); Little v. State, 171 Miss. 818, 159 So. 103 (1935).

41 342 U.S. 117 (1951).

prosecution. *Rea v. United States*[42] and *Wilson v. Schnettler*,[43] on the other hand, involved federal officers. *Rea* held that a federal district court should, on proper application, enjoin a federal officer guilty of an unlawful search and seizure from turning over his illegally acquired evidence to state officials for use in a state criminal prosecution, or, indeed, from testifying in such prosecution as to matters learned in the course of the illegal search and seizure. This, of course, was because the federal courts had a duty to see that federal officers behaved themselves. *Rea* involved an unlawfully issued federal search warrant, and prior to the application for the injunction a federal indictment had been returned against defendant, and he had successfully moved the federal district court to suppress evidence obtained pursuant to the illegal warrant.

Wilson, decided only this term, was exactly the same as *Rea,* except that the federal officer guilty of the unreasonable search had no search warrant whatever. No federal indictment had been brought against defendant at the time application was made for the injunction, and the defendant had naturally never moved the federal district court to suppress the unlawfully seized evidence. In what must be characterized as one of the most unconvincing and hairsplitting opinions to come from the Court in decades, these minor differences were held to be enough to tip the scale and to make it improper for a federal district court to enjoin the federal officer. The Court did not—indeed, it could not—really explain why, and so, on the eve of *Mapp,* the injunction situation as to federal officers seems roughly to have been this: A federal officer guilty of violating a defendant's fourth amendment rights through the use of an unlawfully issued federal search warrant could be enjoined from testifying in the defendant's state criminal prosecution, whereas an injunction against such an officer would be improper in the case of an unreasonable search *made with no warrant at all.* Furthermore, even assuming a proper case for a federal injunction, *Wolf,* still in force, meant that a state court defendant not able for some reason to secure an injunction against the illegally acting federal officers would be without a remedy—thus making the admissibility of the unlawfully seized evidence turn on the outcome of a foot race between the state and federal courts, and also, perhaps, though this was never expressly decided, on whether the federal officers had turned over the unlawfully seized evidence to state authorities at the time application was made for the federal injunction.

[42] 350 U.S. 214 (1956).

[43] 365 U.S. 381 (1961).

On the authority of *Stefanelli,* a federal injunction presumably would not issue against a state officer even though the evidence in his possession had originally been obtained by an unlawful seizure by a federal officer. Impossible distinctions such as the foregoing, it can well be understood, were very soon to pay their part in crumbling the entire *Wolf* foundation.

II.

Let us now turn to the facts of the *Mapp* case itself. Miss Mapp lived on the top floor of a two family dwelling in Cleveland, Ohio. Cleveland police officers arrived at her residence on information that a person wanted "for questioning" in connection with a recent bombing was hiding there and that a large amount of "policy paraphenalia" was hidden in the home. Appellant Mapp, after conferring on the telephone with her attorney, refused to admit the officers who then undertook a surveillance of the house. The officers again sought entrance three hours later, and when appellant did not come to the door, forcibly broke down the door at which time appellant's attorney arrived on the scene. The officers refused to allow the attorney to enter the house or to see his client. When the officers broke into the house on the first floor, Miss Mapp was halfway down the stairs. Seeing the officers, she demanded to be shown their search warrant. One of the officers then held up a piece of paper which he said was a warrant. Appellant grabbed the paper and put it in her bosom. A struggle ensued and the officers successfully recovered the paper from appellant's person after which they handcuffed her and took her upstairs to her bedroom where they searched a dresser, a chest of drawers, a closet and some suitcases. They likewise rummaged through appellant's photo album and her private papers and then searched the entire second floor, including a child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found there were likewise searched. During the search, the officers found certain obscene materials for the possession of which Ohio convicted the appellant. The alleged "search warrant" was never produced at the trial, and the Ohio Supreme Court in its opinion conceded that there probably never was one. While holding the search by the officers to be illegal, the Ohio Supreme Court, relying on *Wolf,* nevertheless affirmed, ruling, doubtless correctly in the light of cases like *Irvine,* that the officers' conduct was not of a character shocking to the judicial conscience.

As previously stated,[44] the Ohio judgment was reversed on

[44] See text at note 1 *supra.*

appeal to the United States Supreme Court. Mr. Justice Clark, speaking for the majority, held that the obscene materials were improperly admitted at the state trial. This was because, as *Wolf* had indicated and as *Elkins* had only the term before reaffirmed, the fourth amendment's prohibition against unreasonable searches and seizures was applicable to the states through the due process clause of the fourteenth amendment and because the admission of evidence unreasonably seized by state officers in a state criminal prosecution—at least where objection is seasonably made in accordance with applicable state practice[45]—is likewise a violation of due process of law. This was the holding. But the language of the opinion goes further. As previously indicated,[46] the Court likewise took the opportunity to state that the *Weeks-Elkins* rule adhered to for federal criminal prosecutions was likewise of constitutional origin—in the case of federal prosecutions, both the fourth amendment and the privilege against self incrimination clauses of the fifth. Though spending considerable time with the fifth amendment, the majority was very careful to avoid treading even lightly upon the toes of *Adamson v. California,*[47] and to suggest, contrary to the holding in *Adamson,* that the fifth amendment might likewise be applicable to the states. On the other hand, it is perhaps worthy of note that the contrary was not stated or implied either.

Mr. Justice Black, however, in a concurring opinion,[48] did express the view that the fifth amendment applied to the states, and indeed, that it was the fifth amendment, operating in conjunction with the fourth, which enabled him to concur. In Mr. Justice Black's view, the fourth amendment alone would not justify forcing the exclusionary rule onto the states. The concurring opinion of Mr. Justice Douglas[49] adds little, if anything, to the majority opinion. Mr. Justice Stewart wrote a brief memorandum[50] in which he refused to pass on the *Wolf* case, but concurred in reversal because of his view that the Ohio obscenity statute was unconstitutional. Mr. Justice Harlan wrote the dissenting opinion[51] in which Mr. Justice Frankfurter and Mr. Justice Wittaker joined. The dissent covered the points made by

[45] See text at notes 107-08 *infra.*

[46] See text at note 1 *supra.*

[47] 332 U.S. 46 (1947). See also Cohen v. Hurley, 366 U.S. 117 (1961).

[48] Mapp v. Ohio, 367 U.S. 643 (1961).

[49] *Id.* at 666.

[50] *Id.* at 672.

[51] *Ibid.*

the *Wolf* majority and complained that *Mapp* was an inappropriate case in which to overrule *Wolf* in any event since the *Wolf* point had hardly been touched upon by counsel.

To return now to the majority opinion. It may prove of interest to examine briefly the considerations put forward as requiring *Wolf's* burial. The first was a somewhat tortured argument from precedent. *Boyd v. United States,*[52] not heard from in decades, was cited for the proposition that the admission of evidence obtained by federal officers in violation of the fourth and fifth amendments would be unconstitutional. *Weeks*[53] was found to have said that the federal exclusionary rule was of constitutional origin, and there was likewise language to this effect in *Silverthorne,*[54] *Olmstead,*[55] *McNabb*[56] and *Wolf*[57] itself. The Court acknowledged, but carefully refrained from citing, the many opinions unequivocally stating that the exclusionary rule was merely a rule of evidence alterable at any time by act of Congress.

The Court next proceeded to re-examine "the current validity of the factual grounds upon which *Wolf* was based." All, of course, were found wanting. The first point *Wolf* had made was that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule was "particularly impressive. . . ." and that the Court could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of evidence."[58] This consideration, of course, was basic to *Wolf* which, with the characteristic thoroughness of Mr. Justice Frankfurter, had canvassed nearly all of civilization to see how far it had deteriorated. In any event, the argument was not even as valid in 1961 as it had been in 1949, because by now half the states were following the exclusionary rule whereas in 1949 only a third of them had been doing so. This, it should be noted, however, is something of a half-truth. Many of the states classified by the Court as following the exclusionary rule do so in a very limited way; that is, the scope of many of the state rules is far narrower than the federal exclusionary rule. Missouri, for example, though professing to follow *Weeks,* freely admits evidence

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[52] 116 U.S. 616 (1885).

[53] Weeks v. United States, 232 U.S. 383, 391-93 (1914).

[54] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[55] Olmstead v. United States, 277 U.S. 438, 462 (1928).

[56] McNabb v. United States, 318 U.S. 332, 339-40 (1943).

[57] Wolf v. Colorado, 338 U.S. 25, 28 (1949).

[58] *Id.* at 29-31.

obtained by unreasonable searches so long as it is shown that the officer's unreasonable suspicions were in fact justified in view of what he turned up.[59] Under *Weeks,* of course, the federal courts have never allowed an otherwise unlawful search to be justified simply because it turned out that the officer was luckily correct.[60]

The Court next dealt with the second ground put forward in *Wolf* for refusing to impose the exclusionary rule upon the states. This was the existence of "other means" of protection in the enforcement of the right of privacy guaranteed by the fourth amendment. With rather obvious justification, the Court now found such "other means" to be wholly ineffectual to protect the right of privacy. While the Court referred only to the fact that less than half the states have criminal provisions directly relating to unlawful searches and seizures, and that many of these are woefully inadequate, other circumstances might, of course, have also been mentioned. District attorneys, it is well known, practically never prosecute offending officers; disciplinary action is almost never taken against them by police departments; and the victim's common-law tort action is, in an overwhelming percentage of the cases, more theoretical than real. In addition, police officers are typically uninsured against false imprisonment actions, and are, by and large, themselves impecunious. Local governments generally have common-law immunity, and in a few states[61] punitive damages are not even recoverable. Furthermore, apart from extreme cases, juries are likely to view the equities as being on the side of the offending officer rather than with the victim. In passing, the narrow judicial construction of the criminal law provisions of the Federal Civil Rights Act[62] might also be noted along with the recent Supreme Court decision in *Monroe v. Pape*[63] to the effect that Congress did not intend to impose civil liability upon municipalities for the Federal Civil Rights Act violations of their police officers.

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59 See, *e.g.,* State v. Cantrell, 310 S.W.2d 866 (Mo. 1958).

60 See, *e.g.,* United States v. Di Re, 332 U.S. 581 (1948): "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officers' knowledge at the time gave him grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *Id.* at 595. See also Henry v. United States, 361 U.S. 98 (1959).

61 See McCORMICK, DAMAGES 278 (1935).

62 Screws v. United States, 325 U.S. 91 (1945). See also United States v. Williams, 341 U.S. 70 (1951).

63 365 U.S. 167 (1961).

Time was also found to have set its face against what *Wolf* had called "the weighty testimony" of the Cardozo opinion in *People v. Defore,*[64] which had observed that "[t]he federal [exclusionary] rule . . . is either too strict or too lax."[65] This was because the Court had since *Defore,* overruled the "silver platter" doctrine, and greatly relaxed the earlier very stiff requirements for standing to assert the unlawfulness of a given search to such an extent that now anyone legitimately on the premises may generally object. In addition, the Court had, in *Rea* formulated "a method to prevent state use of evidence unconstitutionally seized by federal agents . . . ."[66]

But the Court did more than merely tear apart *Wolf's* underpinnings. Additional considerations were advanced for applying the exclusionary rule to the states. Chief among them, of course, was the point that *Wolf* itself had declared that the fourth amendment's prohibition against unreasonable searches and seizures was enforceable against the states and such a ruling "could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused has been forced to give up by reason of the unlawful seizure. To hold otherwise . . . [would be] to grant the right but in reality to withhold its privilege and enployment."[67]

Moreover, there was no restraint similar to the one *Mapp* rejects conditioning the enforcement of any other right protected by due process of law. Why should the fourth amendment alone remain a hollow shell while all other due process violations are judicially redressable with either reversals or grants of outright immunity from prosecution?

> This Court has not hesitated to enforce as strictly against the States as against the Federal government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession . . . without regard to its reliability. . . . And nothing could be more certain than that when a coerced confession is involved, 'the relevant rules of evidence' are overridden without regard to 'the incidence of such conduct by the police,' slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?[68]

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[64] 242 N.Y. 13, 150 N.E. 585 (1926).

[65] *Id.* at 22, 150 N.E. at 588.

[66] Mapp v. Ohio, 367 U.S. 643, 653 (1961).

[67] *Id.* at 656.

[68] *Ibid.*

The above argument—that there must be an effective judicially imposed sanction for the protection of every right protected by due process of law—it should be noted, contains lethal implications for the existing law of criminal procedure far beyond the point to which *Mapp* itself actually decides. Consider, for instance, the following possibility. Would not an unlawful arrest, an "unreasonable seizure" of the person *without more,* be as much a violation of the fourth amendment as an unreasonable search of one's "papers" and "effects"? Indeed, as recently been pointed out,[69] the fourth amendment speaks *first of all* of the right of the people to be secure "in their persons," and on principle one would suppose an unreasonable restraint of the person to be a far greater evil than an unreasonable seizure of one's papers and effects. Certainly this has been forcefully argued many times.[70] While the Court has never conceded this particular point, it has, as recently as *Henry v. United States,*[71] stated that an unlawful arrest by a government officer is, *without more,* a violation of the fourth amendment. Similar language can be found in *Giordenello v. United States*[72] and *Albrecht v. United States.*[73] If, then, an unlawful arrest without more is a violation of the fourth amendment—an amendment which, as *Mapp* holds, is a basic due process right applicable both to the states and to the federal government—and if, as *Mapp* argues, every basic due process right requires an effective judicially imposed sanction, does not this likewise hold true in the case of an unlawful arrest without more? Currently, of course, there is no such effective sanction for an unlawful arrest. Indeed, the Court unanimously held in *Frisbie v. Collins*[74] that a

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69 See an excellent article by Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure,* 1961 ILL. L.F. 78, 91 (1961).

70 See Kamisar, *id.* at 91; see also Barrett, *Personal Rights, Property Rights and the Fourth Amendment,* in 1960 THE SUPREME COURT REVIEW 46, 47 (Kurland ed. 1960).

71 361 U.S. 98, 100-01 (1959).

72 357 U.S. 480, 485-86 (1958).

73 273 U.S. 1, 5 (1927). See generally an article by Mr. Justice Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1 (1960). The Justice, at page 13, expressly states that "arrests on 'suspicion' are unconstitutional at the local, as well as at the federal level."

74 342 U.S. 519 (1952). See also Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 438 (1886); United States v. Sobel, 244 F.2d 520 (2d Cir., *cert. denied,* 355 U.S. 873 (1957). Consult generally Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud,* 37 MINN. L. REV. 91 (1953); Fairman, *Ker v. Illinois Revisited,* 47 AM. J. INT'L LAW 678 (1953); Allen, *Due Process and State Criminal Procedures: Another Look,* 48 NW. U.L. REV. 16, 27-28 (1953).

state court is not even deprived of criminal jurisdiction over a defendant forcefully kidnapped and brought into the jurisdiction from another state. And no case can be found, in the Supreme Court or anywhere else, where a defendant has been given immunity from criminal prosecution simply because he has been unlawfully arrested.[75] The precedents, and there are many, are all the other way.[76] Does the Court in *Mapp* mean to suggest that *Frisbie* and the other precedents just referred to are now to go? Certainly a grant of immunity from criminal prosecution is the only effective way of judicially redressing an unlawful arrest without more, because there is no evidence to exclude, no search having been conducted. There is no middle ground. Immunity from prosecution is the only possible effective sanction.

In the situation where there has been an unlawful arrest, of course, and the arrested party while unlawfully detained makes damaging admissions, an effective redress for the constitutional violation would be the exclusion of the admissions from evidence in the subsequent criminal prosecution. But this, too, would be a marked change from existing practice. Even in the federal courts, assuming no *McNabb-Mallory* rule violation, an admission made after an unlawful arrest without more is, by the great weight of authority, clearly competent.[77] Is this line of cases likewise now to go?

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[75] City of St. Paul v. Webb, 256 Minn. 210, 97 N.W.2d 638 (1959), goes further than any other decided case and then not very far if indeed the Court can be regarded as having moved at all. Here a writ of prohibition was granted annulling a municipal proceeding because the officers had no lawful grounds to arrest the petitioner on a misdemeanor charge. The Court noted, however, that the granting of the writ would not prevent the police from subsequently arresting petitioner on a proper warrant, and that the double jeopardy clause would not bar his trial. *Id.* at 219, 97 N.W.2d at 644.

[76] Consult the authorities in note 74 *supra.*

[77] The leading case is Balbo v. People, 80 N.Y. 484 (1880), holding that the illegality of an arrest does not of itself render inadmissible a contemporaneous incriminating statement. The same principle holds true in the case of any such statement made during the course of an unlawful search. See, *e.g.*, Quan v. State, 185 Miss. 513, 188 So. 568 (1939). "And if it be said that the mere fact that an illegal search is being made, regardless of the manner of the conduct thereof, puts the accused under a sort of illegal pressure, or surrounds him with an unlawful oppression, wherefore as a matter of legal policy any statements made by the accused should be excluded, we would have no greater reason in point of legal policy for such exclusion than in cases of such statements or confessions when made while the accused is in custody under an illegal arrest; and nearly all of the authorities are in agreement, so far as we have found, that confessions freely and voluntarily made while in custody under an un-

Then consider the *McNabb*[78]-*Mallory*[79] rule itself. That rule, now followed only in the federal courts and Michigan,[80] compels the exclusion of any confession or admission made during a period of unlawful detention, whether or not the original arrest was lawful.[81] Is not an unreasonable detention following even a lawful arrest as much a violation of the fourth amendment as an original unlawful arrest or unlawful search and seizure? And, if so, does not the *Mapp* argument that every basic due process right must be effectively protected by the courts at the least require the exclusion of any confession or admission made during a period of unlawful dention by the police? Short of an outright grant of immunity from criminal prosecution—a drastic remedy indeed—this is the only effective way of protecting the citizen against unconstitutional detentions by overzealous law enforcement officers. It is also, it might be added, the only way of putting a stop to oppressive police interrogation techniques. If we are indeed serious about doing this, the heavy incidence of reported involuntary confession cases demonstrates conclusively that the only sure preventive is for the Supreme Court to apply *McNabb-Mallory* to the states through the due process clause. It should have been done long ago.

To return now to the arguments of the majority. Still another was the frustration of federal constitutional policy which continued adherence to *Wolf* would have necessarily entailed.

> Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, al-

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lawful arrest, are not excluded on account of the illegality of the arrest." *Id.* at 521, 188 So. at 569-70. *Accord,* Wong Sun v. United States, 288 F.2d 366 (9th Cir. 1961); Dailey v. United States, 261 F.2d 870 (5th Cir. 1958); Smith v. United States, 254 F.2d 751 (D.C. Cir. 1958).

Some authority, however, looks in the opposite direction. See Nueslein v. District of Columbia, 115 F.2d 690 (D.C. Cir. 1940); Takahashi v. United States, 143 F.2d 118 (9th Cir. 1944); People v. Macias, 180 Cal. App. 2d 193, 4 Cal. Rptr. 256 (1960). *Cf.* Somer v. United States, 138 F.2d 790 (2d Cir. 1943). See generally Kamisar, *supra* note 69.

[78] McNabb v. United States, 318 U.S. 332 (1943).

[79] Mallory v. United States, 354 U.S. 449 (1957). See generally Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 GEO. L.J. 1 (1958).

[80] People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960). State cases going the other way are collected in Annot., 19 A.L.R.2d 1331 (1951).

[81] In deciding cases in the *McNabb* area, the Supreme Court has never paid the slightest attention to the question of whether the initial arrest was lawful or unlawful. See, *e.g.,* Anderson v. United States, 318 U.S. 350 (1943). Consult generally Kamisar, *supra* note 69, at 88-90, and authorities therein cited.

> though he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.[82]

Moreover, the Court noted, *Wolf,* operating in conjunction with *Wilson* v. *Schnettler,*[83] where, as we have seen, the Court in the face of *Rea*[84] refused to restrain a federal officer from testifying in a state court as to evidence he had unconstitutionally seized, worked to encourage federal officers to disregard the Constitution, and made for "tainted working arrangements" between federal and state officers. For under *Wolf* and *Wilson,* federal officers in non-exclusionary states "were . . . invited to and did . . . step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment."[85] This language, it will be noted, while not expressly making the point, seems to indicate very strongly that the federal constitution also requires state courts to exclude evidence unconstitutionally seized by federal, as well as by state officers. Any other result, of course, would be absurd. It would be unthinkable after *Mapp* to hold that state courts, while barred from admitting evidence unconstitutionally seized by their own officers, could at the same time freely admit such evidence when seized by federal officers. This is particularly true in light of the ruling in *Elkins,*[86] which held that the federal courts must exclude evidence unconstitutionally seized by state officers. The fourth amendment applies to federal as well as to state officers.

A related point made by the Court as militating against *Wolf* consisted of the previously discussed[87] host of impossible distinctions and unanswered questions raised by the Court's virtually irreconcilable decisions in *Rea* and *Wilson.* While the Court understandably did not go into detail, the difficulties were noted in a general way, and it was strongly implied that *Mapp's* holding would now obviate the necessity of reconciling *Rea* and *Wilson,* each of which, it was observed, "point[ed] up the hazardous uncertainties of our heretofore ambivalent approach."[88]

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[82] Mapp v. Ohio, 367 U.S. 643, 657 (1961).

[83] 365 U.S. 381 (1961).

[84] Rea v. United States, 350 U.S. 214 (1956).

[85] Mapp v. Ohio, 367 U.S. 643, 658 (1961).

[86] Elkins v. United States, 364 U.S. 206 (1960). The case itself is discussed in the text at note 34 and following.

[87] See text at note 41 and following.

[88] Mapp v. Ohio, 367 U.S. 643, 658 (1961).

In closing, the Court noted that the exclusionary rule had not fettered law enforcement in either the federal system or in those states which had adopted it, and that *Mapp* would encourage respect for law by the public in general and by law enforcement officers in particular, and likewise preserve "that judicial integrity so necessary in the true administration of justice."[89]

While the majority opinion indeed makes an impressive case for overruling *Wolf*, two additional objections to that case and to the developments it spawned might also briefly be mentioned. The first is the distinction *Wolf* eventually proved to necessitate between evidence unreasonably seized by state officers, and evidence obtained by them through the use of methods shocking to the Court and revolting to the conscience of civilized man.[90] Not only was the "shock the conscience" test extremely vague and difficult to administer, but it was in fact downright degrading—an insult to the concept of a civilized and responsible system of criminal procedure. Admitting any and all evidence obtained through the use of methods falling just short of barbarism was a reproach to traditions basic to Western civilization, and an endorsement of the very kind of police oppression we as a nation are currently combatting throughout the world. *Mapp* got rid of "shock the conscience" and revolting decisions like *Irvine*,[91] and substituted in their place a rule of reason. With this decision, the Court has forced the states to take a responsible and humanitarian step ahead. It is only to be regretted that the push had to come from Washington, and that more than half of our state courts at the time of *Mapp* had still refused to protect their integrity beyond refusing to admit evidence obtained through shocking methods and having indeed done that much only in obedience to decisions from the Supreme Court.

A second and perhaps more telling objection to *Wolf*, likewise left untouched in *Mapp*, is that it made for non-uniformity among the states in the enforcement of a basic federal right. As *Wolf* first stated, and as *Elkins* emphatically reaffirmed, the fourth amendment's prohibition against unreasonable searches and seizures was implicit in the concept of "ordered liberty" and thus enforceable against the states through the due process clause of the fourteenth amendment. In short, the fourth amendment was a federal right. Yet under *Wolf* the states were entirely free to

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[89] *Id.* at 660.

[90] See text at note 30 and following.

[91] Irvine v. California, 347 U.S. 128 (1954), discussed in the text at note 32 *supra*.

enforce it or not as they saw fit. The result was that the citizens of exclusionary states were protected, whereas citizens elsewhere were not. And it goes almost without saying that the way in which a federal constitutional right is to be protected is properly a federal question subject to ultimate determination by the Supreme Court of the United States, and that the very hallmark of a federal constitutional right is that it shall be enjoyed equally and to the same extent by all citizens regardless of their state of residence. The result in *Mapp* finally made this possible. *Wolf* had stood for non-uniformity and had made a state question out of a federal one.[92]

III.

So much then for the question of whether *Mapp* be right or wrong. It is submitted that the majority was entirely correct. It remains, however, to consider certain questions raised but left unanswered by the opinion. To some extent, of course, this has already been done.[93] Other questions, however, remain, the principal one perhaps being whether federal or state standards are to govern the lawfulness of a given arrest and search incident thereto and of a search made independent of an arrest. On principle, of course, since we are dealing with a federal right, it would seem that federal standards would control, and indeed this is the plain implication of much of the language in *Mapp* which speaks of fourth amendment or of federal constitutional violations rather than of "unlawful" searches and seizures. That federal standards will control is likewise the implication from the Court's holding in *Elkins* v. *United States*[94] to the effect that a federal court, in determining for the purpose of a federal prosecution whether there has been an unreasonable search and seizure by a state officer, "must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out." "The test," the Court stated, "is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."[95]

[92] It might also be noted that *Mapp* got rid of non-uniformity in the administration of the exclusionary rule within individual states. For under *Wolf* some jurisdictions followed the practice of excluding unreasonably seized evidence in some counties while admitting it in comparable types of criminal proceedings in other counties. The Court sustained this practice over equal protection objections in Salsburg v. Maryland, 346 U.S. 545 (1954).

[93] See text at note 68 and following, and at note 85 and following.

[94] 364 U.S. 206 (1960).

[95] *Id.* at 224.

The applicability of federal standards would also, of course, be supported by analogy to the handling of all other federal constitional rights. Whether they have been violated is a federal, not a state issue.

The difficulty in the fourth amendment area, however, is two-fold. First of all, the Court's opinion in *Mapp* makes no independent examination of the lawfulness of the officers' search, but appears simply to accept at face value the clear implication of the Ohio Supreme Court opinion that the officers' search was unreasonable, though not of a character to shock one's conscience. This might, of course, simply be explained by the fact that no one in his right mind could conclude that the officers' search in *Mapp* was other than unreasonable and, indeed, this may be the explanation. But, in the light of history, one cannot be sure, and we are thus brought to the second difficulty. In administering the federal exclusionary rule in the years following *Weeks,* the Supreme Court directed the lower federal courts (at least in the absence of a controlling federal arrest statute) to look to the law of the state in which the arrest was made to determine its lawfulness. And the practice was, when no federal arrest statute controlled, to exclude evidence procured incident to the arrest provided the arrest was found to be unlawful by *state* standards. This was the doctrine of *United States* v. *Di Re,*[96] and it has never been questioned by the Court in the case of unlawful arrest by federal officers where there has been an attempt to exclude evidence secured incident to the arrest in a federal criminal prosecution. Of course, as just noted,[97] *Elkins* altered *Di Re* in the case of unreasonable searches by state officers in federal prosecutions, but the doctrine remains as to searches by federal officers in federal criminal prosecutions. The result, then, is that, depending on state law, different standards will sometimes govern the question of the lawfulness of the arrest, and thus of the resulting search in federal criminal prosecutions depending on whether the arrest was made by a state or by a federal officer.[98].

Be this as it may, it would seem wholly impermissible to allow the states—in their own prosecutions—to set arrest and/or search standards more lax than the Constitution demands, and thereby to permit them to effectively by-pass it. Federal constitu-

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[96] 332 U.S. 581 (1948). See also United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied,* 342 U.S. 920, 926 (1952).

[97] See text at note 94 *supra.*

[98] *Cf.* United States v. Copes, 191 F. Supp. 623, 624 (D. Md. 1961).

tional standards must, of necessity, control in state prosecutions even if the federal courts in the case of an arrest by a federal officer would, under *Di Re,* apply a state arrest standard which might turn out to be stricter than the Constitution demands in a federal criminal prosecution. This does not mean, of course, that the states cannot, if they choose, employ arrest and/or search standards stricter than those required by the federal constitution. The fact that the states must accord defendants due process of law has never meant that they are precluded from affording them more than due process demands.

But *Mapp* leaves unanswered much more than the question of substantive federal versus state arrest and search standards. What of the technical requirements of the federal rules of criminal procedure[99] and of other federal statutes[100] for the issuance and service of federal arrest and search warrants? Are these now binding on the states through the due process clause? In other words, do the federal rules and statutes embody constitutional minimums, or do they go beyond them? And what of federal requirements for standing to object to an unlawful search and seizure? Are these rules—now fairly well developed since *Giordenello*[101] and *Jones*[102]—likewise a part of *Mapp's* constitutional package? The answer here, at least, would seem obviously to be affirmative. For to hold otherwise would be to allow state courts to water down the federal constitution.

But what of federal practice with regard to such issues as when the motion to suppress must be made? Does the fourth amendment require the states to adopt the federal practice of permitting—indeed requiring—motions to suppress to be made

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[99] See, *e.g.,* the provisions of Rules 3, 4 and 41 of the Federal Rules of Criminal Procedure. See also Giordenello v. United States, 357 U.S. 480 (1958); Nathanson v. United States, 290 U.S. 41 (1933); United States v. Walters, 193 F. Supp. 788 (W.D. Ark. 1961), and authorities there cited.

[100] See, *e.g.,* 18 U.S.C. § 3109 (1958). "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." (Italics added.) See also Millar v. United States, 357 U.S. 301 (1958); Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961).

[101] Giordenello v. United States, 357 U.S. 480 (1958).

[102] Jones v. United States, 363 U.S. 257 (1960). See also Jeffers v. United States, 342 U.S. 48 (1951); United States v. Pisano, 191 F. Supp. 861 (S.D.N.Y. 1961).

in advance of trial,[103] or can the states fashion their own rules in this regard? Must state courts follow federal practice in having the facts surrounding the arrest and search (as well as the ultimate question of the reasonableness of the search) decided by the judge, or can they submit such questions to a jury as they have been allowed to do in the area of involuntary confessions?[104] And how binding will state factual and mixed legal and factual determinations be in the United States Supreme Court on certioriari or in a federal habeas corpus action?[105] Again, does the Constitution—as in the involuntary confession cases[106]—automatically compel the upsetting of a conviction in part based on evidence obtained by an unconstitutional search, or will the Court employ a prejudice test and allow the states to affirm convictions if reasonably convinced that the jury would have convicted even if such evidence had not been admitted? Finally, to what extent must state requirements regarding the method for raising the issue of an unlawful search and seizure be adhered to as a condition for subsequently raising such issue in a certiorari proceeding in the United States Supreme Court or in a federal habeas corpus action? *Mapp* provides no real answers to any of these questions except the last. In a brief footnote, Mr. Justice Clark observed that "state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."[107] It goes without saying, of course, that the requirements in question must be reasonable.[108] Otherwise the federal question will still be open.

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[103] Rule 41(e) of the Federal Rules of Criminal Procedure provides: "The motion [for return of property and to suppress evidence] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

[104] Stein v. New York, 346 U.S. 156 (1953). See generally Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954).

[105] *Cf.* Brown v. Allen, 344 U.S. 443 (1953).

[106] Spano v. New York, 360 U.S. 315 (1959). See also Rogers v. Richmond, 365 U.S. 534 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960). Compare Stein v. New York, 346 U.S. 156 (1953). For a general discussion, consult Meltzer, *supra* note 104.

[107] Mapp v. Ohio, 367 U.S. 643, 659 n.9 (1961).

[108] Herdon v. Georgia, 295 U.S. 441 (1935), and authorities cited therein. See also Michel v. Louisiana, 350 U.S. 91 (1955); Young v. Ragen, 337 U.S. 235 (1949); Parker v. Illinois, 333 U.S. 571 (1948).

Then there are certain questions with regard to the impact of *Mapp* on persons convicted by the use of evidence obtained by an unreasonable search in the years prior to the decision. *Mapp* of course leaves no doubt that some of these individuals may now secure a new trial through appropriate collateral attack proceedings,[109] and unequivocally equates a conviction on evidence obtained by an unconstitutional search with one obtained on the basis of an involuntary confession. The difficulty lies in determining which groups of prisoners are entitled to relief. As to some, of course, there will be no difficulty. In this category would fall any federal or state prisoner convicted on unconstitutionally seized evidence who, with standing to raise the question, did so from the trial all the way to the United States Supreme Court.[110] Federal prisoners in this category would clearly be entitled to Section 2255[111] relief and state prisoners[112] to federal habeas corpus without further resort to the state courts. The difficulty comes in the case of federal and state prisoners who, with adequate opportunity, but in reliance on *Wolf* and/or on the "silver platter" aspect of *Weeks*, failed seasonably to raise the unconstitutional search question on direct attack and to carry the issue to Washington.[113] Are such individuals now barred from relief? Certainly not, of course, in those jurisdictions whose courts are now willing to hear the claim of unconstitutional search.[114] And, if a state court now actually entertains the claim

[109] As the federal exclusionary rule was not deemed to have a constitutional basis prior to *Mapp*, the federal courts uniformly denied relief in Section 2255 proceedings notwithstanding that the petition alleged a conviction on the basis of evidence secured by an unreasonable search. United States v. Sturm, 180 F.2d 413 (7th Cir. 1950), *cert. denied*, 339 U.S. 986 (1950); Kinney v. United States, 177 F.2d 895 (10th Cir. 1949). See generally United States v. Edwards, 152 F. Supp. 179 (D.D.C. 1957).

[110] *Cf.* Brown v. Allen, 344 U.S. 443 (1953); Darr v. Burford, 339 U.S. 200 (1950).

[111] 28 U.S.C. § 2255 (1958). Section 2255 provides for collateral attack relief for federal prisoners, and a petition under such section is a condition precedent to federal habeas corpus in the case of federal prisoners. The scope of Section 2255 relief is as narrow as federal habeas corpus and coram nobis, reaching only federal constitutional violations. See generally, United States v. Edwards, 152 F. Supp. 179 (D.D.C. 1957), and authorities there cited.

[112] *Cf.* Brown v. Allen, 344 U.S. 443 (1953).

[113] Of course, any prisoner, state or federal, who had no reasonable opportunity to raise the issue of unconstitutional search at his trial or on direct attack would now be entitled to collateral attack relief if able to substantiate his claim. See authorities cited note 107 *supra*.

[114] This has long been the rule. See, *e.g.*, Herndon v. Georgia, 295 U.S. 441 (1935).

and erroneously decides it against the prisoner, federal habeas corpus would certainly be available following a seasonable petition for certiorari in the United States Supreme Court.[115] But what of federal and state prisoners in this category in states whose courts now refuse to listen to an unconstitutional search claim on the ground that it was not seasonably raised before or at the trial or on appeal? Ordinarily, of course, such individuals would be barred.[116] Failure to raise a constitutional issue when one has a reasonable opportunity to do so ordinarily waives such issue.[117] But *Mapp* is a case where the Supreme Court overruled one of its own cases, and where for the first time, contrary to its prior pronouncements, it put the exclusionary rule on a constitutional basis. These would appear to be exceptional circumstances justifying, and indeed in justice requiring, a departure from the ordinary waiver rule. That *Mapp* does justify such a departure seems clearly to be supported by the Court's opinion in *Sunal v. Large,*[118] where it was very strongly implied that the waiver rule should not be applied to bar collateral attack relief "where the law was changed [by the Court] after time for appeal had expired."[119] Finally, to leave the question of relief up to the individual states would be to make for the very nonuniformity in the enforcement of a federal constitutional right which *Mapp* presumably attempts to rectify.

Alexander v. United States,[120] a recent decision of the Fifth Circuit, appears to be one of the few cases thus far even remotely touching upon the above matters. Decided after *Elkins* but before *Mapp,* the case holds that Section 2255 relief is unavailable to a federal prisoner who, at a time prior to *Elkins,* had pleaded guilty to a narcotics charge because his attorney, relying on the "silver platter" doctrine of *Weeks* v. *United States,*[121] had advised

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115 Darr v. Burford, 339 U.S. 200 (1950). Compare Wade v. Mayo, 344 U.S. 672 (1948).

116 Brown v. Allen, 344 U.S. 443 (1953); Michel v. Louisiana, 350 U.S. 91 (1955); Sunal v. Large, 332 U.S. 174 (1947). Compare United States v. Harpole, 263 F.2d 71 (5th Cir. 1959); United States v. Price, 258 F.2d 918 (3d Cir. 1958).

117 *But see* Jordan v. United States, 352 U.S. 904, *reversing* 233 F.2d 362 (D.C. Cir. 1956); Lampe v. United States, 288 F.2d 881 (D.C. Cir. 1961).

118 332 U.S. 174 (1947).

119 *Id.* at 181.

120 290 F.2d 252 (5th Cir. 1961).

121 232 U.S. 383 (1914).

him that evidence unreasonably procured by state officers acting entirely on their own was admissible in a federal criminal prosecution, and that the government had enough of such evidence to convict him. The Court held the attorney's advice to be reasonable in view of *Weeks* and of the possibility of obtaining leniency by a guilty plea and stated that the subsequent overruling of "silver platter" by *Elkins* was not an exceptional circumstance justifying Section 2255 relief. A Section 2255 hearing was ordered on another ground, however, and the Court's ruling about the unavailability of Section 2255 relief on the "silver platter" point was obviously influenced by its view—since proved erroneous by *Mapp*—that *Elkins* had not put the federal exclusionary rule on a constitutional basis. Judge Brown, however, in concurring,[122] did so read *Elkins* and rather clearly implied that petitioner was entitled to Section 2255 relief because of his attorney's ill-founded reliance on "silver platter." It is submitted that the majority, in the light of *Mapp,* would now probably agree with Judge Brown.

Aside from *Alexander,* the only other authority, and that, too, not directly in point, appears to be a federal district court opinion in *United States* v. *Gaitan.*[123] Prior to *Elkins,* defendants had been convicted by a jury on a federal narcotics charge, much of the evidence against them having been obtained by an unconstitutional search by state police officers. Defense counsel duly objected to the admission of such evidence at the trial, on appeal and by a petition for certiorari in the United States Supreme Court which was denied. The trial court and the court of appeals, of course relying on "silver platter," had sustained the admission of such evidence. Then came *Elkins,* whereupon defendants promptly filed a Section 2255 proceeding seeking a new trial. Relief was denied. But the district court's opinion leaves no doubt that this was solely because of its view that *Elkins* had not put the exclusionary rule on a constitutional plane. Indeed, the opinion expressly states that "[i]f the admission of this evidence was in itself a violation of the Constitution, Sec. 2255 would undoubtedly be applicable."[124] *Mapp,* of course, does put the exclusionary rule on a constitutional basis. Accordingly, one can safely assume that the *Gaitan* court would now grant Section 2255 relief to defendants, especially since their counsel

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[122] Alexander v. United States, 290 F.2d 252, 255 (5th Cir. 1961).

[123] 189 F. Supp. 674 (D. Colo. 1960).

[124] *Id* at 676.

had raised and preserved the "silver platter" point all the way to Washington. Indeed, any other result would be unthinkable.[125]

Another interesting dimension of *Mapp* arises from the Court's somewhat enigmatic distinction between the constitutional sources of the exclusionary doctrine in relation to the states as compared to the federal government. This doctrine, it will be remembered,[126] was as to the states rested on the fourth amendment, but for the federal government on the fourth amendment operating in conjunction with the fifth.

> We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy . . . [secured by the Fourth Amendment] do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured[only after years of struggle."[127]

The question, of course, is why the Court thought it necessary or desirable to bring the fifth amendment into the discussion in relation to the federal government.

One possible answer, at least, is bound up with the interesting question of whether the Court will, under *Mapp,* apply the rule of *Gouled v. United States*[128] to the states through the due process clause. That rule, first enunciated for federal criminal prosecutions in 1921, is that objects of "evidentiary value" only can never be seized, either as an incident of a lawful arrest with or without a warrant, or in a case where an otherwise valid search warrant has been issued for the objects and a properly conducted search has taken place. In *Gouled* itself some bills for legal services, an executed contract and an unexecuted contract were seized under a valid search warrant by federal officers while investigating defendant's alleged fraudulent use of the mails. The Supreme Court held that since there was no showing that these documents had been stolen by defendant, or that they were themselves the means by which crime had been committed, they were of "evidentiary value" only, and were accordingly

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125 Contrary to the result suggested in the text, at least one court, in a decision announced after the preparation of this article, has held that *Mapp* has only prospective application and that a state prisoner convicted in pre-*Mapp* days on unconstitutionally seized evidence is not now entitled to collateral attack relief. People v. Figueroa, 30 U.S.L. WEEK 2158 (N.Y. City Ct., Kings County Sept. 30, 1961). See also United States *ex rel.* Gregory v. New York, 195 F. Supp. 527 (N.D. N.Y. 1961).

126 See text at note 5 *supra.*

127 Mapp v. Ohio, 367 U.S. 643, 656 (1961).

128 255 U.S. 298 (1921).

immune from seizure. Their seizure violated the fourth amendment and the use of them in evidence violated the *fifth* amendment. Since its inception *Gouled* has had frequent albeit uncertain and inconsistent, application both in the Supreme Court[129] and in the lower federal courts.[130] Some cases have stretched the doctrine to almost unbelievable lengths, *Morrison* v. *United States*,[131] for example, holding that a handkerchief with which a sodomist wiped himself after having relations with a young child was purely evidentiary and hence immune from seizure. On the other hand, the 1946 Supreme Court decision in *Zap* v. *United States*[132] appears to throw considerable mud on the doctrine. Here a cancelled check used to defraud the government was seized during an inspection of defendant's books by federal officers. According to the majority opinion, the check was the means by which the crime was committed and therefore subject to seizure.[133] The dissenting judges' opinion indicates their belief that the check was merely evidentiary, and thus under *Gouled* immune from seizure.[134] But the dissenting opinion appears to agree with the majority that a valid warrant could have been issued for the check, a statement completely at odds with *Gouled*.[135]

But whatever *Gouled's* contemporary vitality in the federal system, the point is that it rests both on the fourth as well as the fifth amendment, and that it is the fifth rather than the fourth which precludes the admission of the purely evidentiary items. *Mapp's* exclusionary doctrine on the other hand rests solely on the fourth amendment so far as the states are concerned. Thus, if *Gouled* depends both on the fourth and fifth, the doctrine would appear inapplicable to the states. At the same time, of course,

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129 *Compare* Marron v. United States, 275 U.S. 192 (1927), *with* United States v. Lefkowitz, 285 U.S. 452 (1932). See also Abel v. United States, 362 U.S. 217, *rehearing denied*, 362 U.S. 984 (1960).

130 See, *e.g.*, United States v. Rees, 193 F. Supp. 849 (D. Md. 1961); Woo Lai Chun v. United States, 274 F.2d 708 (9th Cir. 1960); Morrison v. United States, 262 F.2d 449 (D.C. Cir. 1958); United States v. Lerner, 100 F. Supp. 765 (N.D. Cal. 1951); *In re* Ginsburg, 147 F.2d 749 (2d Cir. 1945); United States v. Richmond, 57 F. Supp. 903 (S.D.W.Va. 1944). See generally Comment, *Limitations on Seizure of "Evidentiary" Objects: A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319 (1953).

131 262 F.2d 449 (D.C. Cir. 1958).

132 338 U.S. 624 (1946).

133 *Id.* at 629 n.7.

134 *Id.* at 632-33.

135 *Ibid.*

Gouled does declare that the seizure of purely evidentiary items violates the fourth amendment, and much can be said for the view that the privacy considerations at the core of such amendment should be held to preclude the states from seizing at least some types of items—personal letters, photographs and diaries, for example—notwithstanding that an otherwise valid search warrant is procured and a proper search conducted.[136]

But the arsenal of unanswered difficulties raised by *Mapp* is not yet exhausted. Another question the case leaves undecided is whether the "fruits doctrine" of *Silverthorne Lumber*[137] will be applied to the state; whether, in other words, due process requires not only that evidence unreasonably seized be excluded but likewise bans state use of information derivatively acquired by reason of the unreasonable search. A typical situation would be an unreasonable search of defendant's papers, the papers revealing the names of various persons having knowledge of defendant's criminality who are then subpoenaed to testify against defendant.[138] Assuming that the state cannot demonstrate that it learned of such persons' existence and whereabouts in an independently lawful manner—which would under all the authorities make the testimony admissible—can the testimony of such persons constitutionally be used against defendant? The answer, it seems fairly plain, is no. First of all, exclusionary jurisdiction case law in the years prior to *Mapp* almost universally prohibited this.[139] Secondly, the factual situation in *Wolf* was strikingly similar to the hypothetical case posed above, and the *Wolf* opinion impliedly, but nevertheless clearly, conceded that Colorado could not have used evidence derivatively acquired from the unreasonable search there involved had the Court in *Wolf* chosen to apply the exclusionary rule to the states.[140] Again, constitutionally banning state use of information derivatively acquired from an unreasonable search is required on principle. To

136 See Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures*, 33 IOWA L. REV. 472, 488 (1948).

137 Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), discussed at note 16 and following.

138 See People v. Schaumloffel, 53 Cal. 2d 96, 346 P.2d 393 (1959); People v. Mills, 148 Cal. App. 2d 392, 306 P.2d 1005 (1957); People v. Albea, 2 Ill. 2d 317, 118 N.E.2d 277 (1954); People v. Schmoll, 383 Ill. 80, 48 N.E.2d 933 (1943); People v. Martin, 382 Ill. 192, 46 N.E.2d 997 (1942). See also Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958), noted in 69 YALE L.J. 432 (1960). *Cf.* Abbott v. United States, 138 A.2d 485 (D.C. Munic. Ct. App. 1958).

139 See authorities cited note 130 *supra*.

140 See text discussion at note 27 and following.

hold otherwise would be to give state officials an incentive and reward for violating defendant's constitutional rights and undercut much of the ground on which *Mapp* rests.

Still another question is the post-*Mapp* status of *Burdeau* v. *McDowell*,[141] which, it will be recalled, sanctions the admissibility of evidence unlawfully obtained by a thief acting on his own without the knowledge or assistance of federal officials. Several considerations appear relevant. The first is that, inasmuch as *Mapp* puts the exclusionary doctrine on a constitutional basis, there would seem to be little difference between allowing government use of evidence unreasonably seized by its own agents and permitting the government to take advantage of the criminal invasion of defendant's privacy by a private citizen. In using such evidence the government itself becomes a party to the previous wrong, and the use of such evidence in court would, of course, be government action. Secondly, Mr. Justice Brandeis and Mr. Justice Holmes dissented in *Burdeau*, and the civil liberties' dissents of those men have in recent years increasingly been adopted by the Court.[142] The difficulty with overruling *Burdeau*, of course, is that it would presumably accomplish very little. For example, learning of the thief's illegal possession of defendant's effects, the government could presumably obtain and use them through use of a search warrant, at least assuming that the effects are not otherwise immune from seizure under *Gouled*.

In addition to *Burdeau*, one can safely predict that *Mapp* will necessitate the Court's re-examination of a considerable number of other cases and previously well-settled principles. *Breithaupt* v. *Abram*[143] might first be mentioned. That case, decided in the heyday of "shock the conscience," holds that due process is not offended when a state convicts on the basis of a blood sample taken from an unconscious suspect not then under arrest or charged with crime. *Olmstead* v. *United States*,[144] holding, over the vigorous dissent of Mr. Justice Brandeis, that non-trespass type wiretapping does not violate the fourth amendment, will likewise doubtless have to be reconsidered. And on principle it ought to be. Why one's private conversation on a telpehone should not be as much an "effect" within the meaning of the fourth amendment as one's private papers has never been satis-

141 256 U.S. 465 (1921), discussed in text at note 20 *supra*.

142 See, *e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

143 352 U.S. 432 (1957).

144 277 U.S. 438 (1928). See generally Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891 (1960).

factorily explained. Cases such as *Goldman* v. *United States,*[145] involving the use of "detectaphones," will, and should, also reappear for the same reason. The possible effect of *Mapp* on *Frisbie* v. *Collins,*[146] and on the many cases refusing to apply *McNabb-Mallory*[147] to the states has previously been mentioned and need not further be considered here.

One final point. In assessing *Mapp's* litigation potential, it must be realized that despite the many years that *Weeks* has been on the books, federal constitutional search and seizure doctrines are still very unsettled. This is due, in part, to the *Di Re*[148] doctrine, but also to the fact that the Court has not decided a particularly large number of cases in this area. Numerous basic questions remain entirely, or almost entirely, open. Among them might be mentioned the following: Whether something less than "probable cause" justifies a "detention," as compared with an "arrest";[149] the legality of the "frisk";[150] whether the search may constitutionally precede the arrest;[151] possible constitutional dif-

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145 316 U.S. 129 (1942). Compare Silverman v. United States, 365 U.S. 505 (1961).

146 342 U.S. 519 (1952), discussed in text at note 74 *supra.*

147 Discussed in text at note 78 and following.

148 United States v. Di Re, 332 U.S. 581 (1948), discussed in text at note 96 *supra.*

149 The government contended in Rios v. United States, 364 U.S. 253 (1960), that less than probable cause would justify an officer in temporarily stopping and detaining a driver, passenger or pedestrian for the purpose of making inquiry, but the Court in its opinion failed to touch on the question. Federal law is represented by the following cases, among others: Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925); United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom* United States v. Bufalino, 285 F.2d (2d Cir. 1960). Representative state cases are People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955); Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (1908).

For a general discussion of the problem, consult Barrett, *op cit. supra* note 70; 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. 386 (1960); Foote, *Safeguards in the Law of Arrest,* 52 NW. U.L. REV. 16 (1957).

150 Consult Remington, *supra* note 149.

151 The conflicting state and federal authorities are collected in People v. Simon, 45 Cal. 2d 645, 290 P.2d 531 (1955). Compare State v. McDaniel, 111 Ore. 187, 231 Pac. 965 (1925).

ferences involved in "stopping" pedestrians as compared with cars and exactly what constitutes a pedestrian and driver arrest respectively;[152] the constitutionality of roadblocks;[153] consent to search issues such as who may consent;[154] when "implied coercion" will vitiate a consent to search,[155] and whether a consent to search given after an illegal arrest or during a period of unlawful detention is valid;[156] constitutional differences involved in searching private homes as compared with apartment houses and moving and stationary motor vehicles;[157] limitations on the extent of the permissible search in the case of searches incident to an arrest;[158] whether, assuming a lawful arrest, the police are auto-

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[152] Consult the authorities cited in note 149 *supra.*

[153] See City of Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1958). See generally DONIGAN & FISHER, KNOW THE LAW 222-38 (1958); Notes, 45 J. CRIM. L. AND CRIM. 541 (1955); 36 J. CRIM. L. AND CRIM. 134 (1945).

[154] The numerous and sharply conflicting cases are collected in Annot., *Authority to Consent for Another to Search and Seizure,* 31 A.L.R.2d 1078 (1953). The Supreme Court has not even decided such basic questions as whether a wife may validly consent to a search of the home and thus waive her husband's rights. See Amos v. United States, 255 U.S. 313, 317 (1921), where the question was expressly left open. Compare State v. Sobczak, 108 N.W.2d 310 (Minn. 1961). Here officers entered defendant's home at his wife's invitation and arrested him for drunkenness. The court upheld the arrest on the theory that the wife had as much right to invite the officers into the home as the husband did to exclude them. See also the discussion and citation of authorities in Kamisar, *supra* note 69, at 118. And see United States v. Rees, 193 F. Supp. 849, 854 (D. Md. 1961), and authorities there cited.

[155] See Channel v. United States, 285 F.2d 217 (9th Cir. 1960); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951). The question referred to is when a person will be regarded as having unwillingly yielded to the officers' demands to enter. The starting place here is Amos v. United States, 255 U.S. 313 (1921), which, however, unfortunately does not decide much, if anything, beyond indicating that on the facts therein "implied coercion" vitiated the consent to search.

[156] The conflicting authorities are collected in Kamisar, *supra* note 69, at 132 and following. *Cf.* Watson v. United States, 249 F.2d 106 (D.C. Cir. 1957), and authorities there cited.

[157] Compare Chapman v. United States, 365 U.S. 610 (1961); McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1947); Brinegar v. United States, 338 U.S. 160 (1949); and Carroll v. United States, 267 U.S. 132 (1925).

[158] The leading case, which raises far more questions than it answers, is United States v. Rabinowitz, 339 U.S. 56 (1950). Compare People v. Ziegler, 358 Mich. 355, 100 N.W.2d 456 (1960), noted in 6 WAYNE L. REV. 413 (1960) (defendant's valid arrest on running red light charge would not justify an incidental search of his person or car).

matically entitled to search the arrested party's person at the police station preparatory to jailing him;[159] the constitutional status of the so-called "unlawful collateral purpose" doctrine;[160] the much litigated but still unsettled question of the relevance of police opportunity to procure a search warrant;[161] and possible constitutional differences in the area of permissible methods of search depending on the severity and nature of the crime being investigated.[162] One could go on and on. The point is that the federal law of search and seizure is in a highly fluid condition, and that a goodly portion of the Court's time in the next few years will necessarily be spent in drawing the appropriate constitutional lines.

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159 *Cf.* People v. Ziegler, 358 Mich. 355, 100 N.W.2d 456 (1960); United States v. Russian, 192 F. Supp. 183, 185 (D. Conn. 1961), and authorities there cited.

160 This is the rule, adhered to in some federal and state cases, that an arrest and search incident thereto are invalid if the officer acts for an invalid reason, notwithstanding the fact that he also has a valid one. For cases applying the doctrine, see Collins v. United States, 289 F.2d 129 (5th Cir. 1960) (though officers could validly have arrested defendant on larceny or contributing to the delinquency of a minor charges, booking him for the non-existent offense of "investigation of loitering" was unlawful and would not support a contemporaneous search of defendant's automobile); United States v. Evans, 194 F. Supp. 90 (D.D.C. 1961) (though officers could validly have seized stolen property they saw in defendant's apartment had they gone there for the legitimate purpose of questioning defendant about his involvement in certain robberies, seizure of such property unlawful where real purpose of visit was to search for stolen property—court left open the question of whether officers could testify that they saw the stolen property in defendant's apartment); United States v. Killough, 193 F. Supp. 905, 910 (D.D.C. 1961) (though police might in fact have had probable cause to arrest defendant on homicide charge, booking him on non-existent charge of "suspicion" rendered invalid a confession obtained from defendant while illegally booked on such non-existent charge); Shirley v. State, 321 P.2d 981 (Okla. Crim. App. 1957); Smith v. State, 182 Tenn. 158, 184 S.W.2d 390 (1945). *Cf.* People v. Craig, 152 Cal. 42, 91 Pac. 997 (1907).

161 *Compare* Chapman v. United States, 365 U.S. 610 (1961, *and* Trupiano v. United States, 334 U.S. 699 (1947), *with* United States v. Rabinowitz, 339 U.S. 56 (1950). See also Clay v. United States, 239 F.2d 196 (2d Cir. 1956).

162 Certainly the late Mr. Justice Jackson, though on none of the occasions speaking for the Court, had the most to say on this particular question. See, *e.g.*, his opinions in McDonald v. United States, 335 U.S. 451, 457-61 (1948); and Brinegar v. United States, 338 U.S. 160, 182-83 (1949). See also the penetrating opinion of Judge Kaufman in United States v. Bonanno, 180 F. Supp. 71 (S.D.N.Y.), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

IV.

Perhaps the reader will forgive one final prediction. It is simply this: Unless the states move far more rapidly than in the past to clean up their procedural houses, *Mapp* will prove, comparatively speaking, to have been only the beginning of federal court intervention in the administration of criminal justice in the states. For, from a civil liberties' standpoint, the states' record is on the whole a sorry one indeed. More than half the states still refused, on the eve of *Mapp,* to apply the exclusionary rule, and many which did did so only very sparingly;[163] practically all states admit wiretap evidence, and this in direct violation of federal court practice and of the Federal Communications Act;[164] only Michigan among the states has adopted *McNabb-Mallory;*[165] only a few states have adopted *Gouled;*[166] no state provides for counsel in the police station, and most deny counsel to indigent defendants on the preliminary hearing regardless of the offense;[167] counsel is also typically denied to such defendants at all stages of misdemeanor prosecutions;[168] in contrast to the elaborate discovery structure typically existing for civil litigants, a state criminal defendant is either not entitled to discovery at all or, if so, only to one of the most limited and unfair type;[169] indigent defendants are jailed simply because they are unable to pay fines;[170] state courts have done almost nothing in contrast to the federal courts in controlling unfair argument

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163 See note 6 *supra* and the text discussion *circa* note 59 *supra.*

164 See Schwartz v. Texas, 344 U.S. 199 (1952); Pugach v. Dollinger, 365 U.S. 458 (1961). *Cf.* Benanti v. United States, 355 U.S. 96 (1957), and cases there cited.

165 See note 80 *supra.*

166 Florida and Wyoming appear to be the only ones. State v. Willard, 54 So. 2d 179 (Fla. 1951); Church v. State, 151 Fla. 24, 9 So. 2d 164 (1942); State v. George, 32 Wyo. 223, 231 Pac. 683 (1924).

167 See, *e.g.,* Roberts v. State, 145 Neb. 658, 17 N.W.2d 666 (1945).

168 Certainly this is true in Nebraska where the statute only calls for appointment of counsel for indigent felony defendants. See NEB. REV. STAT. § 29-1803 (Reissue 1956).

169 See State v. Leland, 190 Ore. 598, 227 P.2d 785, *aff'd sub nom.* Leland v. Oregon, 345 U.S. 690 (1951), and authorities cited therein; People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84, 219 N.Y.S. 892 (1927). For a discussion of the limited or nonexistent scope of defendant's discovery rights in Nebraska, see Note, 34 NEB. L. REV. 647 (1955). Compare Fryer v. United States, 207 F.2d 134 (D.C. Cir. 1953).

170 And this, it might be added, is done squarely in the face of the rationale of Griffin v. Illinois, 351 U.S. 12 (1956).

by government counsel or in protecting the defendant against the consequences of highly unfavorable newspaper publicity;[171] res judicata and double jeopardy doctrines are often restricted to the narrowest possible scope;[172] many state appellate courts freely tolerate the practice of permitting the magistrate on the preliminary hearing to extract a "guilty plea" from a defendant unrepresented by counsel and then allow such "plea" into evidence at the trial;[173] many states refuse to pay the costs of taking depositions for the defense or to advance the costs for subpoenaing out-of-state defense witnesses;[174] defendants against whom there is an abundance of evidence are typically refused lie detector tests; waiver doctrines are often rigidly applied to bar assertion of state and federal constitutional claims,[175] and many state courts are openly hostile to the assertion of such claims and have done nothing to make clear the appropriate collateral attack channels for their assertion.

Unless conditions change markedly and with rapidity, one can only expect, and welcome, further federal intervention in state criminal affairs.

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[171] Compare any representative sampling of state caselaw with such cases as Marshall v. United States, 360 U.S. 310 (1959); Briggs v. United States, 221 F.2d 636 (6th Cir. 1955); and Delaney v. United States, 199 F.2d 107 (1st Cir. 1952).

[172] See, *e.g.*, Bartkus v. Illinois, 359 U.S. 121 (1959); Hoag v. New Jersey, 356 U.S. 464 (1958); Johnson v. Commonwealth, 201 Ky. 314, 256 S.W. 388 (1923); People v. Niles, 300 Ill. 458, 133 N.E. 252, 37 A.L.R. 1284 (1921); Bohanan v. State, 18 Neb. 57, 24 N.W. 390 (1885).

[173] See, *e.g.*, Adams v. State, 138 Neb. 613, 294 N.W. 396 (1940). *But cf.* the contrary federal practice set forth in the late Mr. Justice (then Judge) Rutledge's opinion in Wood v. United States, 128 F.2d 265 (D.D.C. 1942).

[174] This is true, for example, in Nebraska. See Vore v. State, 158 Neb. 222, 62 N.W.2d 141 (1954).

[175] See, *e.g.*, Michel v. Louisiana, 350 U.S. 91 (1955); Brown v. Allen, 344 U.S. 443 (1953); Parker v. Illinois, 333 U.S. 571 (1948).