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flaunted before him, and many of the cases turn on that very point.³⁵

The Tennessee view, in addition to its care lest the private citizen be unreasonably disturbed, is apparently that a court would be ratifying the acts of the officer if it appropriated his evidence wrongfully obtained, and that if officials can violate the law and be forgiven, disrespect for law by individuals would result.³⁶ The attitude of such courts as those of New York is that a criminal should not go free because of a technical blunder on the part of an officer.³⁷ And in light of the attitude of the United States Supreme Court that when a state does admit evidence obtained by unreasonable search it has not denied the accused a fair trial nor sacrificed a fundamental principle of justice,³⁸ it would seem that such practical considerations of law enforcement as the New York court has articulated should govern, particularly in a society confronted with organized crime.

JOHN S. WHITTLESEY.

A Recent Extension by the United States Supreme Court of the Doctrine of Incidental Search

The recent case of *Harris v. United States*¹ appears to have revived the controversy concerning the scope of protection afforded to individuals by the Fourth Amendment of the Federal Constitution.² As proof that the decision aroused interest in other than legal circles, nearly every newspaper had some editorial comment to make on the holding, all forbidding sinister consequences to follow. In both the lay journals and dissenting opinions it was plain that the writers believed that the conduct of the police officers here approved by the majority of the Court harked far back to the days of writs of assistance in the American Colonies and of general warrants in England.³ Whatever the dangers, real or imaginary, lurking behind the new holding, it is certain that the case has added another chapter to the confusing body of law known as "searches and seizures."

³⁵ This was argued by the prosecution in *Cox v. State*, cited *supra* note 6, but was rejected by the court. That case is difficult to distinguish on this point from *Smith v. State*, cited *supra* note 14, where the evidence was held admissible. The element of subterfuge appears to be the paramount element to the Tennessee court in the principal case. *Contra*: *People v. Exum*, cited *supra* note 17, where articles in plain view on an automobile seat were held admissible, the court saying, "A search implies a prying into hidden places for that which is concealed, and it is not a search to observe that which is open to view."

³⁶ See *Hampton v. State*, 148 Tenn. 155, 252 S.W. 1007 (1923).

³⁷ *People v. DeFore*, cited *supra* note 29.

³⁸ *Palko v. Connecticut*, cited *supra* note 25.

¹ U.S., 67 S. Ct. 1098 (1947).

² U.S. Const. Amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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 For reports of Otis' famous argument, see Quincy 471, *et seq.* (Mass. 1761). See also, *Paxton's Case*, *Id.* at pp. 51-57. For the case abrogating the general warrant in England, see *Entick v. Carrington*, 19 Howell's State Trials 1029. Although the objects of both types of warrants were different, they both allowed a general search for any incriminating matter that might be turned up. They were issued on the basis of suspicion only.

The facts were undisputed.⁴ Two valid warrants of arrest were issued for the petitioner Harris. The warrants charged violation of the Mail Fraud Statute and the National Stolen Property Act.⁵ It was alleged, on probable cause, that a forged check had been sent through the mails in connection with a scheme to defraud a certain company in the sum of \$25,000. Five agents of the Federal Bureau of Investigation went to Harris' apartment, found him there alone and arrested him. Without the authority conferred by a search warrant, the officers began a very thorough five hour search of all the rooms of the apartment, for what the testifying agents described as "anything they could find in connection with the violation of the law with which petitioner was charged."⁶ As the search neared its end, one of the agents uncovered a sealed envelope in a bedroom bureau drawer marked personal papers. In it were found some draft cards, the possession and alteration of which constituted a violation of the Selective Training and Service Act of 1940.⁷ These were seized, and subsequently used as the basis of a prosecution of Harris for violation of the draft law. There was a conviction in the District Court and the defendant was sentenced to five years imprisonment. No evidence whatever was uncovered that tended to connect Harris with the offense for which he was originally arrested. Prior to trial the petitioner made proper motion to suppress the evidence thus seized, which was denied. The Circuit Court of Appeals affirmed the conviction, finding that the search was carried on in good faith by the federal agents for the purposes expressed; that it was not a general exploratory search for merely evidentiary materials; and that the search was reasonably incident to Harris' arrest.⁸

Upon appeal to the United States Supreme Court, the conviction was affirmed. The sole question presented was whether the trial court had erred in denying the defendant's motion to suppress. This question involved a consideration of whether the search and seizure was such as is forbidden by the Fourth Amendment, i.e., whether it was, in the language of the Constitution, "unreasonable." If it was, then the judgments below would have to be reversed and the petitioner set free, for it has long been the rule that a conviction in the federal courts based upon evidence so obtained cannot be sustained.⁹ In a five to four decision the Court held that the search had not violated the petitioner's Constitutional rights, and hence, affirmed the conviction.

⁴ This is significant because usually there is an issue of whether the accused consented to the search or not. The protection of the Fourth Amendment may be waived. See *Davis v. United States*, 328 U.S. 528 (1945).

⁵ 35 Stat. 1130, 1131 (1909), 18 U.S.C.A. §338 (1925). And, 53 Stat. 1178, 1179 (1913), 18 U.S.C.A. §413 *et seq.* (1926).

⁶ The trial court found that they were looking for stolen property—two stolen checks; one of the dissents points out that, *inter alia*, they seized personal letters, note books, bills, etc. There was no motion to return these objects.

⁷ 54 Stat. 885, 894, 895, 50 U.S.C.A. Appendix, §311 (1940).

⁸ 151 F. (2d) 837 (C.C.A. 10th, 1947) Note (1947) 30 Minn. L. Rev. 207.

⁹ *Weeks v. United States*, 232 U.S. 383 (1914); *Agnello v. United States*, 269 U.S. 20 (1925). This is because of a supposed "interplay" between the Fourth and the immunity against self-incrimination given in the Fifth. The doctrine has its historic origin in *Boyd v. United States*, 116 U.S. 616 (1886) which held that private papers could not be subpoenaed without violating both the Fourth and Fifth Amendments. One writer has pointed out that the rule is not restricted to the area covered by the Fifth Amendment, but extends to corporations as well and disallows the use of derivative evidence from the fruits of a trespass. See Grant, Constitutional Basis of the Rule Forbidding the Use of Illegally Obtained Evidence in a National Prosecution (1944), 15 So. Calif. L. Rev. 60. And compare, Corwin, The Fifth Amendment (1930), 29 Mich. L. Rev. 1.

In order to uphold the conviction the majority resorted to this reasoning. The entry into Harris' apartment was lawful and so was the arrest. It is a well-settled police practice that arresting officers may search the person of the accused and seize anything in his control.¹⁰ As the "fruits and instruments" of the crime with which Harris was charged were stolen checks and other rather small items it was perfectly appropriate for the agents to institute a meticulous hunt through all four rooms. The trial court had determined that the agents had conducted the search in good faith for the objects specified and had not embarked upon a general exploratory search. Because the draft cards were contraband, i.e., things illegally possessed, they were properly subject to seizure as distinguished from merely evidentiary papers which cannot be seized even with the aid of a search warrant.¹¹ To the objection that the objects seized had nothing to do with the crime charged, the Court answered that the illegal possession of the cards constituted a "continuing offense," the existence of which enhanced the powers of the officers to step in and stop its operation. In other words, the presence of the well-secreted draft cards was equivalent to the active perpetuation of a crime which could be stopped at any time under *any* conditions.¹²

The dissents were extremely vigorous. Mr. Justice Frankfurter carefully tabulated the tremendous number of cases decided under the Fourth Amendment to demonstrate that never had the Court sanctioned an incidental search so broad and intensive. In an earlier case he had already exhaustively reviewed the history of Congressional treatment of the subject to show how "warily Congress has walked precisely because of the Fourth Amendment."¹³ While all the dissenters felt that the search was lawless, Justices Frankfurter, Rutledge, and Murphy based their objections on the duration and intensity of the search,¹⁴ and the fact that the officers had been able to exercise greater powers under cover of an arrest warrant than would have been permissible had they obtained a search warrant beforehand with its requirement that the place to be searched and the things to be seized be particularly described therein.¹⁵ The most effective attack upon the majority's position, however, was carried by Mr. Justice Jackson.

¹⁰ For historical background, see opinion of Cardozo, J. in *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923). *Marron v. United States*, 275 U.S. 313 (1927); cf. *Carroll v. United States*, 267 U.S. 132 (1925).

¹¹ Search warrants were not generally available to federal law enforcement officers until the First World War. 40 Stat. 217, 223 (1917), 18 U.S.C.A. §612 (1925). The property sought must fall into one of the three categories: a) Stolen or embezzled; b) used as a means of committing a felony; c) used to aid illegally a foreign nation. Purely evidentiary matter may not be sought. *Gouled v. United States*, 255 U. S. 298 (1921). Manifestly draft cards fall within the second category.

¹² *Accord Paper v. United States*, 53 F. (2d) 184, (C.C.A. 4th, 1931); *United States v. Old Dominion Warehouse, Inc.* 10 F. (2d) 736 (C.C.A. 2d, 1926).

¹³ *Davis v. United States*, 328 U.S. 528 (1945).

¹⁴ As per Mr. Justice Murphy: "Thus when a search of this nature degenerates into a general exploratory crusade, probing for anything and everything that might evidence the commission of a crime, the Constitution steps into the picture to protect the individual. If it becomes evident that nothing can be found without a *meticulous* uprooting of a man's home, it is time for the law enforcement officers to secure a warrant."

¹⁵ U.S. Const. Amend. IV. There is also no right of seizure incident to the execution of a search warrant. Only the exact objects specified therein may be taken. "As to what is to be seized, nothing is left to the discretion of the officer executing the warrant of search." *Marron v. United States*, 275 U.S. 132 (1927).

He cogently reasoned that the fair meaning of the Constitutional provision with respect to searches is that the determination of the place to be searched and the objects to be seized is to be left always to a "disinterested magistrate" and never in effect to be delegated to the eager searchers themselves. The once severely confined exception as to the seizure of things on the person of the accused at the time of his arrest should not be used to subvert the plain meaning of the Amendment. If the arresting officer was permitted at his own discretion to pick the place in which to arrest the accused, and was restricted in the subsequent search only by his own zeal, then clearly the Constitutional safeguards were now all for naught.¹⁶

When viewed against the formidable body of doctrine built up around the Fourth Amendment since 1914 the instant case takes on an added significance. In that year the case of *Weeks v. United States* was decided and the so-called Federal rule of excluding unconstitutionally obtained evidence was set upon its devious course.¹⁷ By allowing the victim of an illegal search to suppress before trial the use of evidence so obtained, a remedy which no state court had theretofore allowed and only a minority today observe,¹⁸ the Court hoped to put teeth into the historic mandate of the Fourth Amendment. "If the constable blundered the criminal was to go free." By thus liberally construing the Constitution in favor of the individual the Court built up a tight body of rules to be followed by Federal agents¹⁹ with regard to searches, which rules were transgressed at the peril of having the Government's case upset by any Federal court when properly appealed. Up until the Second World War the right of officers to search the home or office of the accused contemporaneously with his arrest had been severely confined. Only contraband, such as liquor or narcotics, in plain view in the room in which the arrest took place was allowed to be incidentally seized.²⁰ Any prolonged rummaging through the papers and effects of the accused without a previously acquired search

¹⁶ As John Adams said of the writs of assistance: "They put the privacy of the individual at the mercy of any petty officer." 2 C. F. Adams, Works of John Adams, pp. 523-525 (1850-1856).

¹⁷ 232 U.S. 383 (1914). See note 9 *supra*. This case is said to have overruled *Adams v. New York*, 192 U.S. 585 (1904) *sub silencio*, where it was held that the trial court will not stop during the progress of the trial to try a "collateral" issue, i.e. the lawfulness of the means used to obtain the matter offered in evidence. The Court in the *Weeks* case said the demand for return of the unlawfully seized matter had to be made before trial, but later, in *Gould v. United States*, 255 U.S. 298 (1921), it was held that the motion could be made during trial if the defendant had not known of the seizure prior to trial.

¹⁸ For a complete listing of state court holdings both pro and con the rule in the *Weeks* case, see Wigmore, Evidence (3rd ed. 1940) Vol. 7 §2183, p. 11, note 2. Within the decade following the *Weeks* case, of the forty-six state courts that passed on the question, thirty-two courts expressly rejected the rule and only fourteen adopted it. *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

¹⁹ Evidence unlawfully obtained by private persons and state officers and turned over to the Federal authorities is admissible. *Burdeau v. McDowell*, 256 U.S. 465 (1921). But if the Federal Government participates, either by requesting active state co-operation, *Gambino v. United States*, 275 U.S. 310 (1927), or by joining through its officers in the search, *Byars v. United States*, 273 U.S. 310 (1927), the evidence is inadmissible unless it is secured according to the standards set by the Federal Court.

²⁰ *Agnello v. United States*, 269 U.S. 20 (1925); *Marron v. United States*, 275 U.S. 192 (1927). In the latter case the sale of liquor was actually being transacted when the agents entered, which accounts for the fact that the Court allowed the ledgers and bills there seized, in plain sight, to be used.

warrant was soundly condemned.²¹ Nothing discovered during the progress of an unauthorized search could by some notion of inverted trespass *ab initio* save the object seized from judicial anathematization.²²

The furthest the Court had gone in extending the area of search incident to arrest prior to the *Harris* case was in the case of *Davis v. United States* decided by a divided court in 1945.²³ There the defendant was arrested at his place of business, a gas station, and illegally possessed gas coupons were taken from his office without a warrant. The Court upheld the search, saying it was reasonably incident to the arrest for violation of the rationing laws, and that the nature of the objects seized (government documents) removed the bar of the Fifth Amendment against self-incrimination.²⁴ The right of privacy, which is said to be protected by the Fourth Amendment,²⁵ was not invaded because the search was made of a "public place of business during business hours." While the *Davis* case is no authority for the holding in the present case it at least indicates the new trend which the *Harris* case continues.

The difficulty of decision in any particular case is of course increased by the retention of the exclusionary rule. The Court would be much more ready to label certain police practices unconstitutional if the result were not to set the obviously guilty free. Many learned commentators have urged that the Court rectify its "historical blunder" and reinstate the common-law rule of "no-questions-asked," leaving the victim to his action in trespass.²⁶ Others say that without the rule the Amendment would become a mere form of words.²⁷ The Court may desire to keep the rule as an effective weapon against a future piece of police legislation which would trench too freely on individual

²¹ *Go-Bart Co. v. United States*, 282 U.S. 344 (1930); *United States v. Leftkowitz*, 285 U.S. 452 (1932). Per Judge L. Hand in *Kirschenblatt v. United States*, 16 F. (2d) 202, (C.C.A. 2d, 1926): "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis, the power would not exist if the supposed offender were not found on the premises, but it is small comfort to know that one's papers are safe only so long as one is not at home."

²² *Amos v. United States*, 255 U.S. 313 (1920); *Agnello v. United States*, 269 U.S. 20 (1925).

²³ 328 U.S. 528 (1945). Note (1947) 37 J. Crim. L. & Criminology 413.

²⁴ The Coupons were similar to account books which must be kept for the Government under the provisions of some statute. See *Wilson v. United States*, 221 U.S. 361 (1911).

²⁵ "They (the forefathers) conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Brandeis, J. in *Olmstead v. United States*, 277 U.S. 438 (1928) (dissenting).

²⁶ Wigmore, *Evidence* (3rd ed. 1940) Vol. 7 §2183, 2184; Harno, *Evidence Obtained by Illegal Search and Seizure* (1925), 19 Ill. L. Rev. 303; Fraenkel, *Concerning Searches and Seizures* (1921), 34 Harv. L. Rev. 361; Wingren, *A Short Review of the Law on Searches and Seizures* (1946), 18 Rocky Mt. L. Rev. 345.

²⁷ Cornelius, *Search and Seizure* (1926), p. 54; Chafee, *The Progress of the Law* (1922), 35 Harv. L. Rev. 673, 694; Atkinson, *Unreasonable Searches and Seizures* (1925), 25 Col. L. Rev. 11; Comment (1945) 30 Iowa L. Rev. 456; Comment (1944) 17 St. John's L. Rev. 103.

An action based on the violation of the Constitution itself in the federal courts may be possible. See *Bell v. Hood*, . . . U.S. . . ., 66 S. Ct. 773 (1946). Note (1946) 41 Ill. L. Rev. 558.