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Francis A. Allen

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THE EXCLUSIONARY RULE IN THE AMERICAN LAW OF SEARCH AND SEIZURE

FRANCIS A. ALLEN

The author is Professor of Law in the University of Chicago. Formerly a member of the law faculties of Northwestern and Harvard Universities, he served as Law Clerk to Mr. Chief Justice Vinson from 1946 to 1948. A frequent contributor to legal periodicals, as well as a prime mover in the drafting and adoption of the new Illinois Criminal Code, Professor Allen has served for a number of years as an Associate Editor of this *Journal*.—EDITOR.

The American law of search and seizure and the enforcement of constitutional rights of privacy constitute a prime instance of law under stress. If, as we are told, hard cases make bad law, one would expect much bad law in the search and seizure area; for the cases are often hard, indeed. They are hard both because they place in sharp conflict interests of great and of the most obvious importance and because of confusion and inadequacy in the theory of the "right of privacy." In looking into the law of search and seizure our expectations are realized: it is an area in which bad law abounds. Where else does one find quite such enthusiastic efforts on the part of courts, legislatures, and even commentators, to have their cake and eat it, too? Where else do we find such fervent attempts to obtain advantage from the simultaneous acceptance of mutually inconsistent alternatives? One should not expect that all the tough and intractable problems in this area will be resolved by this series of papers. But, one may properly hope and expect that the following discussion gives due recognition to one fundamental proposition. That proposition is this: Any decision with reference to the exclusionary rule in the search and seizure cases involves costs. Any discussion of these issues, if it is to be responsible, must clearly identify these costs. Any proposals for legislative or judicial action, if they are to deserve attention, must be founded on conscientious effort to take these costs into account.

First, what is the exclusionary rule in the search and seizure cases? There are, of course, many rules and doctrines, dealing with particular problems, that result in exclusion of evidence from criminal trials. The rules relating to the inadmissibility of "involuntary" confessions provide one example.¹

¹ The basic confession rule may be supplemented by special statutory rules of exclusion. Thus in Illinois the prosecutor is under obligation to furnish the defendant with a copy of his confession before arraign-

Sometimes a legislature in its wisdom will construct a special rule of exclusion such as the remarkable and little-noticed provision of the Illinois statutes that declares inadmissible any evidence obtained by a private detective in the employ of a governmental official, when the compensation paid the detective is calculated on any basis other than the time spent by him in the investigation.² We are concerned here, however, with the special rule of exclusion recognized in some American jurisdictions relating to evidence illegally seized. The rule in its broadest form can be described rather simply. Upon appropriate motion by the defendant in a criminal prosecution, evidence obtained from the defendant in violation of his constitutional rights to be free from unreasonable searches and seizures will be suppressed by order of court. In some jurisdictions the evidence subject to suppression need not be physical or tangible evidence. Thus, the Illinois case, *People v. Albee*,³ held that the testimony of a prosecution witness, a person discovered by the police in the course of an unlawful search, should have been excluded at the criminal trial.⁴ Moreover, in some circumstances, evidence other than that directly obtained through unreasonable search and seizure may be suppressed. Ever since the decision of the *Silverthorne* case⁵ by the United States Supreme Court it has been understood in the federal courts, and in at least some of the state courts

ment. The provision is mandatory. Failure of the prosecution to comply renders the confession inadmissible. ILL. REV. STAT. c. 38, §729 (1959).

² ILL. REV. STAT. c. 38, §608a (1959).

³ 2 Ill.2d 317, 118 N.E.2d 277 (1954).

⁴ And see *Nueslein v. District of Columbia*, 115 F.2d 690 (D.C. Cir. 1940). The cases on this and related points, however, have not often gone so far. For a recent discussion, see Kamisar, *Illegal Searches and Seizures and Contemporaneous Incriminating Statements*, 1961 U. ILL. L. FORUM 78.

⁵ 251 U.S. 385 (1920). See also *Nardone v. United States*, 308 U.S. 338 (1939).

recognizing the exclusionary rule,⁶ that the so-called "derivative use" of illegally seized evidence may be denied. Thus, evidence obtained legitimately but brought to the prosecutor's attention by clues or leads supplied by illegally seized evidence, may, upon proper showing, also be suppressed.

The exclusionary rule, as just described, is subject to certain implicit limitations. These limitations are important, not only because a statement of them is necessary to the precise definition of the rule, but because some commentators regard these limitations as imperiling the effectiveness of the exclusionary rule as a deterrent to police misconduct.⁷ There are at least four such limitations. First, it has been clearly held in the federal cases that evidence obtained unlawfully from the defendant by a private person is not subject to suppression. The theory here is that the exclusionary rule is designed to enforce constitutional rights of privacy. The Fourth Amendment provides an immunity from official or governmental misconduct, not a protection against private action, however illegal or even criminal it may be.⁸

Second, it is generally understood that one moving to suppress evidence has standing to complain only of illegal searches which violated his own constitutional rights.⁹ Thus, a defendant may not obtain the exclusion of incriminating evidence illegally seized by the police solely in

⁶ E.g., *People v. Martin*, 382 Ill. 192, 46 N.E.2d 997 (1943).

⁷ This position has been frequently taken. Typical expressions may be found in Grant, *Circumventing the the Fourth Amendment*, 14 So. CALIF. L. REV. 359 (1941); Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L. J. 144 (1948).

⁸ The leading case is *Burdeau v. McDowell*, 256 U.S. 465 (1921). See also *Gindrat v. People*, 138 Ill. 103, 27 N.E. 1085 (1891); *Siebert v. People*, 143 Ill. 571, 32 N.E. 431 (1892); *State v. Owens*, 302 Mo. 348, 377, 259 S.W. 100, 108-09 (1924). *But cf.* Black, *Burdeau v. McDowell; A Judicial Milepost on the Road to Absolutism*, 12 B.U.L. REV. 32 (1932); Chafee, *The Progress of the Law, 1919-1922*, 35 HARV. L. REV. 673, 700-703 (1922).

⁹ *Edwards, Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471 (1952). And see *Cantrell v. United States*, 15 F.2d 955 (5th Cir. 1926); *Walker v. State*, 194 Ind. 402, 142 N.E. 16 (1924); *Tongut v. State*, 197 Ind. 539, 151 N.E. 427 (1926). Corporate officers are usually held to lack standing to complain of an unreasonable search and seizure directed against the corporation: *Guckenheimer and Bros. Co. v. United States*, 3 F.2d 786 (3d Cir. 1925); *Bilodeau v. United States*, 14 F.2d 582 (9th Cir. 1926); *People v. Perry*, 1 Ill.2d 482, 116 N.E.2d 360 (1954). *Cf. Haywood v. United States*, 268 Fed. 795 (7th Cir. 1920) (same result as to officer of an unincorporated association).

violation of a third party's rights of privacy. Nevertheless, the determination of when a petitioner's rights have been sufficiently affected by a search or seizure to give him standing to suppress the evidence so obtained is one of some difficulty. The 1951 decision in *United States v. Jeffers* indicated that the Supreme Court, at least, was disposed toward a rather liberal view of the standing requirements.¹⁰ This impression is strongly confirmed by the recent decision in *Jones v. United States*.¹¹ The opinion recognizes the general formula that one having standing to invoke the exclusionary rule "must have been a victim of a search or seizure, one against whom the search was directed."¹² In *Jones* the defendant was accused of a narcotics offense. The apartment searched and in which the drugs were seized was leased by a friend who had merely given defendant permission to make temporary use of the premises. The Court recognized defendant's substantial dilemma. If his interest in the apartment was not sufficient to support a motion to suppress, standing could only be predicated on his "ownership" of the drugs seized. But the latter allegation would go far to establish defendant's guilt of the offense charged. The Court resolves the dilemma by finding the defendant's "interest" in the premises sufficient. The holding is that "anyone legitimately on the premises where a search occurs may challenge its legality by way of motion to suppress, when its fruits are proposed to be used against him."¹³

A third and much less significant limitation on the exclusionary rule was delineated by the Supreme Court in *Walder v. United States*.¹⁴ In 1950 defendant successfully moved to suppress the use of a narcotic capsule as evidence which had been illegally seized from him by federal officers. Two years later, when defendant was again on trial on a different narcotics charge, defendant testified on direct examination that he had never had narcotics in his possession. The trial judge permitted the government to impeach defendant's

¹⁰ 342 U.S. 48 (1951). Narcotics were unlawfully seized from hotel rooms rented, not by defendant, but by his aunts. The latter had given him free access to the rooms. The Court held that defendant had standing primarily by reason of his "property" interest in the drugs. Although the drugs were "contraband" they were to be treated as defendant's property for purposes of invoking the exclusionary rule.

¹¹ 362 U.S. 257 (1960).

¹² *Id.* at 261. (Emphasis added.)

¹³ *Id.* at 267.

¹⁴ 347 U.S. 62 (1954).

testimony by bringing to the stand one of the officers who had participated in the earlier illegal seizure and allowing him to testify that drugs at that time had been taken from defendant's person. In affirming the conviction, the Court said: "It is one thing to say that the Government cannot make use of evidence unlawfully obtained. It is quite another to say that defendant can turn the illegal method by which the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths."¹⁵

A fourth limitation on the exclusionary rule is the so-called "silver-platter" doctrine. The phrase is that of Mr. Justice Frankfurter¹⁶ and is descriptive of the holdings in many federal cases, prior to *Elkins v. United States*,¹⁷ that evidence illegally seized by state officers may be handed over—on a silver platter—to federal officers and be admitted in a federal trial, so long as there was no federal participation in the illegal activities of the state police.¹⁸ But in the 1960 decision of *Elkins* a majority of the Supreme Court concluded that "this doctrine can no longer be accepted."¹⁹ The result, according to the Court's opinion, was induced by the "logic" of the holding in *Wolf v. Colorado*, decided eleven years earlier.²⁰ The *Wolf* case established the proposition that rights against unreasonable searches and seizures by state officers are included among the protections of the Fourteenth Amendment. Nevertheless, the holding in *Elkins* appears directly predicated, not on a constitutional ground, but on the Court's supervisory powers over federal criminal justice. The test to determine whether evidence illegally seized by state authority is to be suppressed in a federal trial is stated as follows: "... evidence obtained by state officers during a search which, if conducted by federal officers, would have vio-

lated the defendant's immunity from unreasonable searches and seizures under the *Fourth* Amendment is inadmissible over the defendant's timely objection in a federal criminal trial."²¹ The complexities inherent in the *Elkins* rule cannot adequately be canvassed in a single paragraph; but that there are unanswered questions seems apparent. Thus the majority opinion seems tacitly to assume that the rights protected by the *Fourth* Amendment against federal action are in all respects the same as those against unreasonable search and seizure by state officials implicit in the *Fourteenth*. If, as one might have supposed,²² the protections of the *Fourth* Amendment are broader, then the federal courts may be required to exclude evidence from the federal trial which was obtained by state officers without violation of defendant's federal constitutional rights. On the other hand, if the *Fourth* Amendment rights are defined more narrowly than those recognized under state constitutional or statutory provisions, the federal court may be authorized to admit evidence which would have been barred by a state court recognizing the exclusionary rule. Moreover, there is another side to the platter: What about the obligations of state courts with reference to evidence seized unlawfully by federal officials? Given the conclusion in *Wolf* that states are not required to adopt the exclusionary rule, it must surely follow that a state need not suppress evidence illegally seized by federal officials when it is free to admit evidence illegally seized by its own officers. Nevertheless, a number of states prior to *Elkins* had already ruled as a matter of local law, that evidence illegally seized by federal officers should be barred from state proceedings.²³ The *Elkins* ruling may induce other state courts to adopt a similar position. It should also be recalled that in *Rea v. United States* the Court approved an injunction restraining a federal officer from testifying in a state proceeding as to matters discovered in the course of executing an invalid federal search warrant.²⁴ For the purposes at hand it must suffice to say that many problems in this area are yet

¹⁵ *Id.* at 65.

¹⁶ See *Lustig v. United States*, 338 U.S. 74, 78-79 (1949).

¹⁷ 364 U.S. 206 (1960).

¹⁸ The leading case in this series is *Byars v. United States*, 273 U.S. 28 (1927). For a state case dealing with the same problem, see *People v. Touhy*, 361 Ill. 332, 197 N.E. 849 (1935). Consult the interesting and important discussion, Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959). As might be expected, the questions of what constituted federal "participation" and what quantum of evidence is necessary to establish it proved difficult and vexing.

¹⁹ 364 U.S. 206, 208 (1960).

²⁰ 338 U.S. 25 (1949). Consult, Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950).

²¹ 364 U.S. 206, 223-24 (1960). (Emphasis added.)

²² See the dissenting opinion of Mr. Justice Frankfurter in the *Elkins* case, *id.* at 237 *et seq.* Cf. Kamisar, *op. cit. supra* note 18.

²³ The authorities are collected in Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 UCLA L. REV. 1, 28, n. 144 (1961).

²⁴ 350 U.S. 214 (1956). And see *Wilson v. Schnettler*, 365 U.S. 381 (1961).

to be resolved and much remains to be considered in the years ahead.

These, then, are the major limitations on the scope of the exclusionary rule in the search and seizure cases. They do not, however, exhaust the list, for various local doctrines constricting the application of the rule have emerged. Some of these will be noted in connection with the discussion of other matters to which I now must turn.

A word needs to be said about what might be called the procedure of the exclusionary rule. There are variations from one jurisdiction to another in these matters. But the situation in general can be simply stated. In most jurisdictions recognizing the rule, the issue of illegal search must be raised in a pre-trial motion to suppress, unless the facts supporting the motion did not come to the attention of the defendant or could not reasonably have been discovered by him until after commencement of the trial.²⁵ Many cases hold that if the motion to suppress is denied, the issue of unreasonable search can be preserved for appeal only by defense counsel's making appropriate objection at the trial when the contested evidence is offered by the prosecution.²⁶ One further procedural matter deserves attention. In many jurisdictions, if a motion to suppress is granted, there may often be no way for the prosecution to challenge the trial judge's ruling that the evidence was

²⁵ See, e.g., *People v. Anderson*, 337 Ill. 310, 328, 169 N.E. 243 (1929) ("Where it is claimed that evidence against one accused of crime has been obtained by an unlawful search of his house and seizure of his effects, the question of such unlawful search and seizure must be presented to the court before the trial, if possible. If the accused has not raised the question before the trial he cannot avail himself of it when the evidence is offered on the trial."); *State v. Gillam*, 230 Iowa 1287, 300 N.W. 567 (1942); *Robertson v. State*, 94 Fla. 770, 114 So. 534 (1927). And see *FED. R. CRIM. P.* 41(e): "The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion at the trial or hearing." But some courts have ruled to the contrary: *Youman v. Commonwealth*, 189 Ky. 152, 169, 224 S.W. 860 (1920) ("In our practice the proper time, and the only time, in which objection can be made to the introduction of evidence by the mouth of witnesses is when it is offered during the trial. . ."); *Shuck v. State*, 223 Ind. 155, 59 N.E.2d 124 (1945).

The burden of proof in the hearing to suppress is ordinarily held to be on the moving party, *Mata v. State*, 203 Ind. 291, 179 N.E. 916 (1932). In one case in which the motion to suppress was made at the trial, the appellate court ruled that the hearing conducted in the presence of the jury did not constitute reversible error but was a matter within the trial judge's discretion. *Italiano v. State*, 141 Fla. 249, 193 So. 48 (1940).

²⁶ *People v. Reid*, 336 Ill. 421, 168 N.E. 344 (1929); *Robertson v. State*, 94 Fla. 770, 114 So. 534 (1927); *Wishmire v. State*, 196 Ind. 104, 147 N.E. 278 (1925).

obtained by or derived from an unconstitutional search and seizure. Quite generally, a ruling on the motion to suppress is not itself appealable because it is not regarded as a "final order" or for some other reason.²⁷ On the other hand, if the motion is granted and the evidence suppressed, the prosecution may have no case, with the result that the charge must be dismissed or the defendant acquitted. If the defendant is acquitted, the prosecution, of course, is barred from access to the appellate court by appeal. The serious consequence of this situation is that, particularly in areas of criminal litigation such as gambling, where motions to suppress are frequently filed and frequently granted,²⁸ the decisions of trial judges are substantially immune from effective appellate supervision. There is reason to believe that the search and seizure law being applied in inferior trial courts sometimes bears only coincidental relation to the principles announced in decisions of the highest court of the jurisdiction.

If the foregoing will suffice as a brief sketch of the nature of the exclusionary rule and its mode of application, we may now direct our attention to other questions. What is the historical and legal basis of the exclusionary rule?

There is a notion—I am almost tempted to call it a myth—that the exclusionary rule in the search and seizure cases is merely the illegitimate progeny of the American prohibition experiment. The rule, according to this version of its history, was conceived in sin, for it represented little more than an elaborate effort at judicial nullification by judges hostile to the enforcement of the Eighteenth Amendment. This explanation of the exclusionary rule is vulnerable on two scores. First, it is probably not true or, at least, it contains only a partial truth. Second, acceptance of any such notion as the sole or primary explanation for the creation and survival of the exclusionary rule requires one to ignore or trivialize persisting and pressing issues in the current administration of criminal justice.

Certainly, in the federal courts, the origins of the exclusionary rule long antedated national prohibition. *Boyd v. United States*²⁹ and *Weeks v. United*

²⁷ *Cogen v. United States*, 278 U.S. 221 (1929). *But cf.* *United States v. Sineiro*, 190 F.2d 397 (3d Cir. 1951).

²⁸ See the instructive data presented in Comment, *Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy*, 47 Nw. U.L. REV. 493 (1952).

²⁹ 116 U.S. 616 (1886).

*States*³⁰ were decided by the Supreme Court of the United States in 1886 and 1914, respectively. Neither involved the enforcement of liquor laws. As late as 1955, long after the Noble Experiment had become only a quaint historical memory, the California court in *People v. Cahan*³¹ overturned its long-established law and adopted the exclusionary rule. To be sure, most of the states that accepted the "Weeks Rule" did so in the period of national prohibition. No doubt, in some cases, the adoption or rejection of the exclusionary rule reflected the attitude of particular judges toward the whole prohibition enterprise. But it should also be noticed that the prohibition laws provided many state courts with their first occasions to give serious consideration to the problem of enforcement of individual rights against unreasonable search and seizure. When national prohibition suddenly burst upon the country the jurisprudence of many states was almost completely innocent of authoritative precedents, not only as to ways and means of enforcement, but as to substance of these rights in the multitude of situations then being presented for the first time to the courts for adjudication.³² The Volstead Act and supporting state legislation represented the first important nation-wide effort to enforce criminal sanctions against conduct which involves no victims or, at least those who may be called willing victims. Such areas of penal regulation present peculiar problems of enforcement; in such areas the likelihood of violations of constitutional rights of privacy is greatest.³³ The prohibition experiment has, by and large, been abandoned. But efforts at law enforcement in other areas, presenting comparable problems, persist and have become more important with the passing of the years. Insofar as the problems we are discussing today are concerned, those associated with the gambling laws and narcotics enforcement are, after all, not so

very different from those of thirty years ago. It will not do, therefore, to brush aside the exclusionary rule in the search and seizure cases as an historical aberration arising out of an effort at penal regulation, fortunately long since abandoned. Whatever one's conclusion as to the propriety of the exclusionary rule, the problems it attempts to confront are clear and present.

So much for the historical background of the exclusionary rule. What can be said of its legal or constitutional basis? It is strange that after the decision of hundreds of cases by state and federal courts in which the exclusionary rule has been applied these questions are still in doubt. From the decision of the first important case, *Boyd v. United States*,³⁴ the privilege against self-incrimination has played some role in efforts to articulate the legal basis of the rule. But its role has been confusing and ill-defined. In *Agnello v. United States* the Supreme Court announced the stark proposition: "It is well settled that when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through a search or seizure made in violation of his rights under the Fourth Amendment."³⁵ But by 1949 and the decision of *Wolf v. Colorado*,³⁶ a case surely requiring the most precise articulation of the constitutional basis for the exclusionary rule, the privilege against self-incrimination is almost totally ignored. Mr. Justice Black describes the rule simply as a rule of evidence applied by the federal courts. Mr. Justice Frankfurter sees it as deriving from the Fourth Amendment by "judicial implication." The dissenting justices treat it as a necessary and inherent part of the Fourth Amendment's protections.

The reliance on the privilege against self-incrimination in these cases, it seems to me, has contributed neither to clarity nor sense. Certainly, the reliance on the privilege has not been consistent. Thus, it is generally held that a corporation may move to suppress evidence illegally seized from it, despite the fact that corporate bodies are said to lack capacity to invoke the privilege against self-incrimination.³⁷ Reliance on the privilege as the rationale of the exclusionary rule is also probably responsible for some egregious decisions

³⁰ 232 U.S. 383 (1914).

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

³² The difficulties associated with the paucity of settled law are graphically illustrated in an article written in this period by a Wisconsin prosecutor, Roberts, *Does the Search and Seizure Clause Hinder the Proper Administration of the Criminal Justice?*, 5 Wis. L. Rev. 195 (1929). At one point he asserts: "It can probably be safely said that the decisions passing squarely upon the search and seizure clause of the Constitutions of the states prior to prohibition would not average one for each state." *Id.* at 200.

³³ See Allen, *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, 32 Soc. SER. REV. 107, 112 (1958).

³⁴ 116 U.S. 616 (1886).

³⁵ 269 U.S. 20, 33-34 (1925).

³⁶ 338 U.S. 26 (1949).

³⁷ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Cf. *Oklahoma Press Publishing Co. v. Wattling*, 327 U.S. 186 (1946).

denying the exclusion of evidence in cases in which the defendant, although the victim of illegal search, disclaims ownership of the property seized.³⁸

It is clear, as opponents of the rule have frequently pointed out, that the exclusionary rule in the search and seizure cases is in opposition to the ordinary assumptions of the Anglo-American law of evidence which generally, though not universally, postulates that competent evidence is not rendered incompetent by virtue of the fact that the evidence was obtained in an improper or illegal fashion. How has this deviation from normal assumptions been justified by courts accepting the exclusionary rule? Apart from reliance on the privilege against self-incrimination, I find two principal grounds being relied on in the cases. First, it is said, the exclusion of unlawfully seized evidence is necessary to deter police misconduct and provides an indispensable device for enforcement of constitutional rights of privacy. Mr. Justice Douglas, in his dissenting opinion in the *Wolf* case, gives succinct expression to this view, when he says: [E]vidence obtained [by unreasonable search and seizure] *must* be excluded . . . , since in the absence of that rule of evidence the Amendment would have no effective sanction."³⁹ The second basis of the exclusionary rule, frequently articulated in state as well as federal opinions, is essentially an ethical ground. A typical expression is that of the Florida court in a case decided almost forty years ago: "To permit an officer of the State to *acquire evidence illegally* and in *violation of sacred constitutional guaranties*, and to use the *illegally acquired* evidence in the prosecution of the person who illegally

³⁸ Compare *People v. Exum*, 382 Ill. 204, 209, 47 N.E.2d 56 (1943) ("Nowhere in his motion is it alleged that any of the property seized is claimed to be the property of the defendant, nor does he claim any interest in it or ask for its return. . . . The property admittedly not belonging to him or being property in which he has an interest or right of possession, we are at a loss to see how he can complain whether of its seizure or its use as being a violation of his constitutional rights. Clearly, if the property is not his and he has no interest in it, and no right to its possession, he is not in the position of giving evidence against himself when it is introduced as exhibits upon the trial.") with *People v. Grod*, 385 Ill. 584, 591-92, 53 N.E.2d 591 (1944) ("If, in order to have them suppressed he must allege that he owned them, then he has in effect been compelled to admit the possession of stolen property recently following a crime, which is sufficient in itself, unless explained, to authorize conviction.") See Note, 96 L. Ed. 66 (1951).

³⁹ 338 U.S. 25, 40 (1949). (Italics in the original.)

acquired the intoxicants strikes at the very foundation of the administration of justice, and where such practices prevail makes law enforcement a mockery."⁴⁰ Needless to say, the critics of the exclusionary rule find neither of these grounds persuasive or sufficient.

Not all of the American states have adopted the exclusionary rule; indeed, only about half of them have done so.⁴¹ Twenty of the states appear to have adopted the rule without substantial qualification. These include⁴² such populous jurisdictions as California,⁴³ Illinois,⁴⁴ Indiana,⁴⁵ Missouri,⁴⁶ Texas,⁴⁷ and Wisconsin.⁴⁸ In Michigan, although the exclusionary rule was adopted early by the courts,⁴⁹ certain categories of evidence are now placed outside the operation of the rule by constitutional amendment, including narcotics, firearms and other dangerous weapons seized in places other than a dwelling house.⁵⁰ Alabama,⁵¹

⁴⁰ *Atz v. Andrews*, 84 Fla. 43, 52, 94 So. 329, 332 (1922). (Italics in the original.)

⁴¹ Note, 50 A.L.R.2d 533 (1956). See also the appendix to the opinion of the Court in *Elkins v. United States*, 364 U.S. 206, 224-32 (1960).

⁴² The jurisdictions not specifically mentioned in the text include the following: *Delaware* (*Rickards v. State*, 45 Del. 573, 77 A.2d 199 (1950)); *Florida* (*Atz v. Andrews*, 84 Fla. 43, 94 So. 329 (1922)); *Idaho* (*State v. Arregui*, 44 Idaho 43, 254 Pac. 788 (1927)); *Kentucky* (*Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860 (1920)); *Mississippi* (*Tucker v. State*, 128 Miss. 211, 90 So. 845 (1922)); *Montana* (*State ex rel. King v. District Court*, 70 Mont. 191, 224 Pac. 862 (1924)); *North Carolina* (apparently full adoption of the exclusionary rule by statutory amendment, N.C. GEN. STAT. §15-27 (Supp. 1951)); *Oklahoma* (*Gore v. State*, 24 Okla. Crim. 394, 218 Pac. 545 (1923)); *Oregon* (*State v. Laundry*, 103 Or. 443, 204 Pac. 958, 206 Pac. 290 (1922), and see comment in *Kamisar, op. cit. supra* note 18 at 1160, n.259); *Rhode Island* (R. I. GEN. LAWS §§9-19-25 (1956). See *State v. Hillman*, 84 R.I. 396, 125 A.2d 94 (1956)); *Tennessee* (*Hughes v. State*, 145 Tenn. 544, 238 S.W. 588 (1921)); *Washington* (*State v. Gibbons*, 118 Wash. 171, 203 Pac. 390 (1922)); *West Virginia* (*State v. Wills*, 91 W. Va. 659, 114 S.E. 261 (1922)); *Wyoming* (*State v. George*, 32 Wyo. 223, 231 Pac. 683 (1924)).

⁴³ *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955).

⁴⁴ *People v. Castree*, 311 Ill. 392, 143 N.E. 112 (1924).

⁴⁵ *Callender v. State*, 193 Ind. 91, 138 N.E. 817 (1922).

⁴⁶ *State v. Owens*, 302 Mo. 348, 259 S.W. 100 (1924).

⁴⁷ TEX. CODE CRIM. PROC. art. 727a (Vernon, 1941). See *Williamson v. State*, 156 Tex. Crim. 520, 244 S.W.2d 202 (1951).

⁴⁸ *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923).

⁴⁹ *People v. Marxhausen*, 204 Mich. 559, 171 N.W. 557 (1919).

⁵⁰ MICH. CONST. 1908, art. II, §10 (as amended in 1934 and 1952).

⁵¹ Act of September 12, 1951 (ALA. CODE tit. 29, §210 (1940)).

Maryland,⁵² and South Dakota⁵³ have by legislation adopted the rule only as to the situations stipulated in their statutes. Hawaii and Alaska have apparently not spoken to the question since becoming states.⁵⁴ The federal rule of exclusion operates in the District of Columbia.⁵⁵

The division of the American states into exclusion and non-exclusion jurisdictions suggests one final cluster of problems. These problems can hardly be more than noted, for they are extremely complex, involving basic constitutional issues implicit in a system of federalism. The most important question can be put in this fashion: By virtue of the Fourteenth Amendment or other provision of the United States constitution, can federal power be employed to force upon an unwilling state court the exclusion of illegally-seized evidence in a state proceeding? This question could scarcely have been seriously asked as recently as a generation ago. But in 1949 the Supreme Court of the United States decided the case of *Wolf v. Colorado*.⁵⁶ The opinion of the Court, written by Mr. Justice Frankfurter, appears to announce two propositions. First, individual immunities from unreasonable search and seizure by state officials are to be regarded, in the language of the traditional due process formula, as rights "basic to a free society" and, hence, fall within the due process clause of the Fourteenth Amendment. But second, the exclusion of evidence illegally seized is merely one method of enforcement among many, and the states are free to accept or reject the exclusionary rule according to local conceptions of policy. Two years later, the Court, again through Mr. Justice Frankfurter, emphasized its unwillingness to enforce the exclusion of illegally-seized evidence against the states when it denied federal injunctive relief to the defendant in a state proceeding who alleged that evidence against him had been illegally seized by

state officials and that this evidence was to be introduced in the state trial.⁵⁷

What has been the practical impact of the *Wolf* case on state criminal procedure? To date it has not been great. True enough, in *Rochin v. California*, the stomach-pump case, a state conviction was reversed; but this result was reached with almost scrupulous avoidance of all talk of search and seizure and of reliance on the authority of the *Wolf* case.⁵⁸ Later, in *Irvine v. California*, the case in which state police planted a microphone in defendant's home, the Court affirmed the conviction on the authority of *Wolf*, although the majority expressed shock and dismay at the police practices involved.⁵⁹ Interestingly enough, Mr. Justice Frankfurter dissented vigorously, insisting that the *Wolf* precedent required no such result. However one may feel about the result contended for in the dissent, it seems fair to suggest, with all gentleness, that Mr. Justice Frankfurter had become entailed in a semantic mesh of his own making. To label a right as one "basic to a free society" is to say about as much as one can say of a constitutional protection. The right of petitioner *Wolf* had been so labelled; and yet, Mr. Justice Frankfurter for the Court had ruled in *Wolf v. Colorado* that the state need not exclude the evidence from the criminal trial. But if in *Irvine*, as Mr. Justice Frankfurter insists, exclusion of the illegally obtained evidence should be enforced by federal power, how is defendant's violated right to be characterized? Is Irvine's right one "very, very" basic to a free society?⁶⁰ The position seems almost to involve a comparison of superlatives, which, whatever may be said for its logic, presents some difficulties of grammar.

The problems of the exclusionary rule in the area of federal-state relations are many. It is not possible in the brief compass of this paper to embark on a full analysis of all of them. For purposes of illustration, however, one further issue may be noted. Assume a case arising from a state that has *accepted* the exclusionary rule but has permitted evidence to be admitted on what defendant claims to be an erroneous interpretation of his constitutional rights of privacy. Under the *Wolf* case, may the Supreme Court intervene and

⁵² MD. LAWS 1929, c. 194. See *Sugarman v. State*, 173 Md. 52, 195 Atl. 324 (1937). See also *Salsburg v. Maryland*, 346 U.S. 545 (1954).

⁵³ S. D. CODE §34.1102 (1935) (evidence seized under color of an invalid search warrant admissible). See *State v. Land*, 76 S.D. 544, 82 N.W.2d 286 (1957).

⁵⁴ Prior to statehood courts of both jurisdictions followed the federal rule. See *United States v. Doumain*, 7 Alaska 31 (1923), and *Territory v. Ho Me*, 26 Hawaii 331 (1922), cited in *Kamisar, op. cit. supra* note 18 at 1160, n. 259.

⁵⁵ *Darnall v. United States*, 33 A.2d 734 (Mun. Ct. App., D.C., 1943).

⁵⁶ 338 U.S. 25 (1949).

⁵⁷ *Stefanelli v. Menard*, 342 U.S. 117 (1951).

⁵⁸ 342 U.S. 165 (1952).

⁵⁹ 347 U.S. 128 (1954).

⁶⁰ These matters have been recently discussed in *Kamisar, op. cit. supra* note 18.

reverse the state conviction? It would certainly seem that such a result might and, in an appropriate case, should follow. Yet one of the Courts of Appeal has reached a contrary decision.⁶¹

This, then, must serve as the background for our discussion of the exclusionary rule in the search and seizure cases. What does forty years of widespread experience with the rule teach us? In previous efforts to evaluate this experience have the right questions been asked? These and many more difficult problems I happily surrender to bolder and more competent hands.

* * *

ADDENDUM

One of the hazards of the legal commentator, especially one who concerns himself with the work of the United States Supreme Court, is that events sometimes outrun publishing schedules. Thus the decision of the Court in *Mapp v. Ohio*,⁶² announced on the last day of the 1960 term, requires fundamental modifications in the description, given above, of the American law as it relates to the exclusionary rule in search and seizure cases. *Mapp* holds that the states are now required, by reason

⁶¹ *Sisk v. Overlade*, 220 F.2d 68 (7th Cir. 1955).

⁶² 81 S.Ct. 1684 (1961), decided on June 19, 1961. City police acting pursuant to information that a person involved in a bombing was hiding in petitioner's apartment and that policy paraphernalia was hidden in the home, requested admission for purposes of search. After calling her lawyer, petitioner refused admission except under the authority of a search warrant. Later the police returned, broke open the outside door, and gained admission to the apartment armed with a document said to be a search warrant. There is reason to believe that no warrant had in fact issued or that the police had adequate grounds for issuance of a valid warrant. Petitioner's request to see the warrant was refused, and when she snatched the paper from the officer's hands, a scuffle ensued and the paper was retrieved. Petitioner was handcuffed and her apartment and the basement of the building was thoroughly searched. Petitioner's counsel, who arrived on the scene when the search was in progress, was denied admission. In the course of the search obscene books and pictures were seized. Petitioner, who explained that the objects seized were owned by a roomer who had vacated the apartment, was convicted of possession of the obscene materials. The conviction was affirmed by the Ohio supreme court. *State v. Mapp*, 170 Ohio St. 427, 166 N.E.2d 387 (1960). Due to a rule limiting the power of the Ohio court to invalidate state legislation, the affirmation occurred despite the fact that a majority of the state supreme court felt that the statute under which petitioner was convicted was unconstitutional. Ohio has refused to adopt the exclusionary rule as a matter of local law; hence the admission of the fruits of the unlawful search did not provide grounds for reversal.

of the due process clause of the Fourteenth Amendment, to exclude from state criminal trials evidence seized in violation of the accused's constitutional rights by state officers. In so doing the Court specifically overruled its 1949 decision in *Wolf v. Colorado*, insofar as that case held the states free to accept or reject the exclusionary rule as a means to enforce rights against unreasonable search.⁶³

That the Court might one day overturn, or at least substantially modify, its holding in *Wolf* was undoubtedly recognized by many who follow the Court's work. There were several straws in the wind, such as the tenor of the opinion of the Court in *Elkins v. United States*,⁶⁴ which suggested that this might occur sooner rather than later. Nevertheless, that the Court should act when it did and that it should employ the *Mapp* case as the vehicle to effect this change in due process doctrine probably came as a surprise to most.⁶⁵

The brief compass of these remarks does not make possible a full evaluation of the Court's action. It must suffice to say that an appraisal of the *Mapp* case involves more than a canvassing of opinions relating to the desirability and effectiveness of the exclusionary rule as a device to enforce constitutional rights against unreasonable search and seizure. It involves questions of the proper exercise of judicial power in a federal system. There will undoubtedly be many who will contend that the Court has invaded areas of discretion and self-determination reserved to the states. The controversies on this and other issues are likely to persist in the years ahead.

It is not possible to anticipate all of the consequences of the *Mapp* decision, but some can be stated with reasonable assurance. The immediate impact of the holding will, of course, be felt most strongly in those states which have consistently rejected the exclusionary rule as a matter of local law.⁶⁶ Rights to suppress illegally seized evidence must now be recognized in these jurisdictions. *Mapp* also presumably sweeps aside provisions of

⁶³ See discussion in the text at note 56, *supra*.

⁶⁴ 364 U. S. 206 (1960). An interesting contrast is provided by comparing the remarks relating to the exclusionary rule in the opinion of the Court in the *Elkins* case with those of Mr. Justice Jackson in *Irvine v. California*, 347 U.S. 128, 135, 136-37 (1954).

⁶⁵ Including, presumably, *Mapp*'s counsel. The decision of *Wolf v. California* is not cited in appellant's brief. See Brief of Appellant on the Merits, No. 236, October Term, 1960.

⁶⁶ See discussion in the text at note 41, *supra*.

state constitutions⁶⁷ and statutes⁶⁸ which give only a partial recognition to the exclusionary rule. The statement of certain procedural requirements relating to the motion to suppress, such as the rule that the motion must be made before trial,⁶⁹ will undoubtedly be left to the law of the states. On the other hand, one may anticipate that issues of standing to object to an illegal search and the right to object to the derivative use of unlawfully obtained evidence will in the main be resolved by federal law.⁷⁰ It seems likely, also, that the Supreme Court will be called upon to review state court decisions relating to the validity of searches and seizures by state officers much more frequently than in the past. The implicit assumption of the *Elkins* case, that the rights against unreasonable search and seizure protected by the Fourteenth Amendment are in all respects the same as those protected by the Fourth, may thereby be put to the test.⁷¹ Both state and federal courts will inevitably be confronted by petitions from state prisoners alleging that their convictions, prior to *Mapp*, are void because based on illegally seized evidence.

⁶⁷ See note 50, *supra*.

⁶⁸ See notes 51-53, *supra*.

⁶⁹ See discussion in the text at note 25, *supra*.

⁷⁰ See discussion in the text at note 9, *supra*.

⁷¹ See discussion in the text at note 22, *supra*.

The ramifications of the *Mapp* decision in other areas of constitutional adjudication are obviously more speculative. It is possible, for example, that the Court may be induced to apply the *Elkins* doctrine to the state courts and require the latter to suppress evidence illegally seized by federal officers when there has been no participation in the illegal behavior by state police.⁷² *Mapp* may also induce reconsideration of the Court's interpretation of Section 605 of the Federal Communications Act,⁷³ insofar as it involves the admission of wiretap evidence in state proceedings. The problem of wiretapping, to be sure, involves a federal statute rather than a constitutional provision and may in other respects differ from the problem of unreasonable searches and seizures. Nevertheless, the holding in *Schwartz v. Texas*⁷⁴ which permitted the states to admit wiretap evidence in state proceedings, was based in significant part on the analogous authority of *Wolf v. Colorado*. That authority has now been overturned.

Perhaps enough has been said to indicate that by its decision in *Mapp v. Ohio* the Court has effected far-reaching modifications in the American law of search and seizure. The reverberations of that decision have only just begun.

⁷² See discussion in the text at note 23, *supra*.

⁷³ 48 Stat. 1064, 1103 (1934), 47 U.S.C. §605 (1958).

⁷⁴ 344 U.S. 199 (1952).